

College of Law and Management Studies and School of Law

**The Judicial defense for Affirmative Action Measures:  
A critique of the rationality standard of judicial review**

By

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**A Statement of Originality**

**The project is an original piece of work which is made available for photocopying and for inter-library loan.**

**Signed at Howard College on this the 30<sup>th</sup> of November 2015**

**Signature: \_\_\_\_\_**

**DECLARATION**

I, **Sibusiso Blessing Mbutho**, do hereby declare that unless specifically indicated to the contrary in this text, this thesis is my own original work, and has not been submitted to any other university in full or partial fulfilment of the academic requirements of any other degree or other qualification.

**Signed at Howard College on this the 30<sup>th</sup> of November 2015**

**Signature:** \_\_\_\_\_

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## **Abstract**

The South African Constitution states that in order to promote the achievement of equality, legislative and other measures designed to protect those disadvantaged by unfair discrimination may be taken. One of these measures is affirmative action. For the constitutionality of measures in disputes the Court has opted for the 'rationality' standard of judicial review.

This dissertation aims to critically analyse the rationality standard in the judicial defense of affirmative action measures through an examination of court cases and government legislation. It was found, firstly, that the role of rationality in the Constitution value structure as a whole is superficially confined to the legitimacy of governmental purpose. Its result excludes the full spectrum of competing interests and a determination of their relative weight in terms of an integrative account of the Constitution structure. Secondly, it was found that promoting the achievement of equality has proved to be problematic within the strictures of a rationality standard.

It is concluded that to promote the achievement of equality requires a judicial review during affirmative action disputes to have regard to the impact of measures in their implementation within the ambit of right and value to equality. Legal standards are supposed to provide the basis to choose amongst varying competing ends or relate them in a meaningful way to an integrating normative standard in order to claim democratic justificatory and legitimizing value. The rationality standard needs to be amended to introduce a more substantive normative standard which ensures that the implementation of measures which passes constitutional muster also takes into account how it may affect other constitutional rights and values. The proportionality standard provides the degree of democratic accountability expected of rights-limiting measures by considering the impact which such measures may have on competing rights and the interests of those detrimentally affected by it.

## CHAPTER 1: INTRODUCTION AND CONTEXT OF THE RESEARCH

### 1.1. *The background of the study*

‘The Constitutional Court has contextualised its interpretation of the affirmative action clause of the Constitution in a manner which dogmatically isolated it from the broader normative framework of the equality guarantee and the Constitution as a whole. In the context of equality challenges to affirmative action, the Court opted to extract the constitutional conditions for validity from s 9(2) exclusively, to the exclusion of the fairness and proportionality requirements of ss 9(3) and 36 respectively. This approach, if consistently followed, stands to limit basic constitutional values and could undermine the ability of the Constitution to meaningfully integrate competing interests, in the context of affirmative action disputes, in a comprehensive and fair manner. An element of ambivalence, however, characterises the Court’s jurisprudence in this respect, which might serve to open the way for the development of a more integrated, fairness-based approach.’<sup>1</sup>

The expression of equality and unfair discrimination is a fundamental proxy of the Constitution. Its meaning is profound.<sup>2</sup> The drafters of the Constitution were at pains to communicate the ideal concepts of equality in the South African context and its achievement against the background of the systemic inequality which had taken place in South Africa.<sup>3</sup> It is against this background that affirmative action was incorporated in the Bill of Rights, which is the cornerstone of the Constitution.<sup>4</sup> Affirmative action allows for preferential treatment of formerly disadvantaged groups of people.<sup>5</sup> It requires a member of the disadvantaged group to be preferred for the distribution of a benefit over a person who is not a member of that group.<sup>6</sup> Further, while the basis for affirmative action is usually race or gender, these are not the only determining factors. Efficiency is an inherent element, with the Employment Equity Act<sup>7</sup> (EEA) requiring the appointment of persons that are suitably qualified.<sup>8</sup> Section 9 (2) of the

<sup>1</sup> JL Pretorius “*Fairness in transformation. A critique of the Constitutional Court’s affirmative action jurisprudence*” (2010) 26 SAJHR 536 at 570.

<sup>2</sup> See for example *Minster of Finance v Van Heerden* [2004] BCLR 1125 (CC) (*Van Heerden*) 14 par 22; *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others* 2004 (7) BCLR 687 (CC). Para 74 in *Brink v Kitshoff* NO1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC): “[a]s in other national constitutions, section 8 is the product of our own particular history. Perhaps more than any of the other provisions in chap 3, its interpretation must be based on the specific language of section 8, as well as our own constitutional context. Our history is of particular relevance to the concept of equality.”

<sup>3</sup> *The Constitution of the Republic of South Africa* Act 106 of 1996 section 9(1) (2).

<sup>4</sup> De Waal et al *The Bill of Rights Handbook* 4 ed (Juta and Co, Cape Town 2001) 223 par 3-4: Segregation and apartheid created a political and economic system that favoured some people and unfairly discriminated against others. This system left a legacy of inequality which inhibits the enjoyment and exercise of the constitutional rights of a large number of people of South Africa.

<sup>5</sup> Employment Equity Amendment Act 47 of 2013 (EEAA) s. 2: The purpose of the Act is the implementation of affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational levels in the workforce.

<sup>6</sup> Section 13 of the Employment Equity Act 55 of 1998 (EEA) (1).

<sup>7</sup> Act 55 of 1998.

<sup>8</sup> Section 1 of the EEA (note 6 above); See for example: Section 7 (a) of Act 47 of 2013 EEAA note 5. Affirmative action measures are measures designed to ensure that suitably qualified people from designated

Constitution states that ‘equality includes the full and equal enjoyment of all rights and freedoms’ and that ‘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.’<sup>9</sup> Thus, affirmative action is understood as a means to achieve equality in its substantive or restitutionary sense.<sup>10</sup> To determine the legitimacy of affirmative action measures, the Constitutional Court in *Minister of Finance v Van Heerden*<sup>11</sup> opted for the ‘rationality’ standard of judicial review. The Court stated that the test whether a restitutionary measure falls within the ambit of section 9(2) is threefold. The measure must:

- ‘(a) target a particular class of people who have been susceptible to unfair discrimination;
- (b) be designed to protect or advance those classes of persons; and
- (c) promote the achievement of equality.’<sup>12</sup>

The threefold test is a benchmark determinable in terms of the rationality standard.

### **1.2. Problem statement**

The main challenge facing the Constitutional Court in adjudicating affirmative action disputes is reconciling the compelling need for transformative justice with the core function of the Constitution to integrate, in a fair and proportional manner, the diversity of rights and interests at stake.<sup>13</sup> The constitutional goal is a ‘more equal and fair society that hopefully is non-racial, non-sexist and socially inclusive.’<sup>14</sup> Accordingly, ‘measures that are directed at remedying past discrimination must be formulated with due care not to invade unduly the dignity of all concerned.’<sup>15</sup> Furthermore, measures should not result in the abuse of power or ‘impose such substantial and undue harm on those excluded from its benefits that our long-term constitutional goal would be threatened.’<sup>16</sup>

However, the rationality standard of constitutional review does not enhance the courts’ capacity to integrate and weigh up competing rights and interests entrenched in the Constitution.<sup>17</sup> This

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groups have equal employment opportunities and are equitably represented in all occupational levels in the workforce of a designated employer.

<sup>9</sup> The *Constitution of the Republic of South Africa* Act 106 of 1996 section 9(2).

<sup>10</sup> De Waal et al *The Bill of Rights Handbook* 5 ed (Juta and Co, Cape Town 2005) 264 par 3.

<sup>11</sup> [2004] BCLR 1125 (CC) (*Van Heerden*).

<sup>12</sup> *Ibid* par 37.

<sup>13</sup> JL Pretorius (note 1 above) 569 par 2.

<sup>14</sup> *South African Police Service v Solidarity abo Barnard* 2014 (6) SA 123 (CC) (Barnard) 18 par 30.

<sup>15</sup> *Ibid*.

<sup>16</sup> *Van Heerden* (note 2 above) par. 44.

<sup>17</sup> JL Pretorius “*Deliberative democracy and constitutionalism: the limits of rationality review:*” (2014) 29 *SAPL* 420 par 1.

standard treats affirmative action measures as a means to an end and self-justifying.<sup>18</sup> This implied assumption was revived by the Constitutional Court in the *South African Police Service v Solidarity abo Barnard*<sup>19</sup> case when it affirmed the *Van Heerden* adjudication that, ‘if restitutionary measures, even based on any of the grounds of discrimination listed in section 9(3), pass muster under section 9(2), they cannot be presumed to be unfairly discriminatory,’<sup>20</sup> and ‘to hold otherwise would mean that the scheme of section 9 is internally inconsistent or that the provisions of section 9(2) are a mere interpretative aid or even surplusage.’<sup>21</sup> The court in *Van Heerden* was adamant that it should not be thought that the ‘Constitution at once authorises measures aimed at redress of past inequality and disadvantage but also labels them as presumptively unfair.’<sup>22</sup>

Be that as it may, the third condition for s 9(2) compliance, that is, whether the measure ‘promotes the achievement of equality’, has proved to be problematic within the strictures of a rationality mould.<sup>23</sup> In assessing therefore whether a measure will in the long term promote equality, it is required that the constitutional goal must be kept in mind.<sup>24</sup> Therefore, this dissertation will argue in favor of the view that ‘of all the standards employed by the courts for the purpose of constitutional review (such as rationality, reasonableness, fairness, proportionality), a deferential rationality standard is problematic in this respect.’<sup>25</sup> This is because it can lead to a narrow instrumentalist perspective for the evaluation of governmental objectives, which is incapable of facilitating substantive forms of democratic control, that is, participation, inclusivity, openness, transparency, public justification and accountability.<sup>26</sup>

### **1.3. Research questions**

The following questions will be considered in this dissertation

Given that affirmative action measures are integral to the attainment of equality and that the rationality standard of review is institutionalised as the judicial standard for such measures -

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<sup>18</sup> JL Pretorius (note 17 above) 420 par 1.

<sup>19</sup> 2014 (6) SA 123 (CC) (*Barnard*) (note 14 above).

<sup>20</sup> *Van Heerden* (CC) (note 2 above) 21 par 2.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> JL Pretorius (note 1 above).

<sup>24</sup> *Van Heerden* (note 2 above) par 44.

<sup>25</sup> JL Pretorius (note 17 above) 409-440.

<sup>26</sup> *Ibid.*

1. Does the rationality standard adequately address the need for transformative justice in keeping with the core function of the Constitution to integrate, in a fair and proportional manner, the diversity of rights and interests at stake?
2. Is the rationality standard effective in promoting the realisation of the constitutional goal of a non-racial, non-sexist and socially inclusive, in which each person will be recognised and treated as a human being of equal worth and dignity'?
3. Does the rationality standard adequately facilitate claims of unfair discrimination by those affected by such measures during the adjudication of affirmative action dispute?
4. Of all the substantive standards of constitutional review, which is the most appropriate standard in determining disputes regarding affirmative action measures?

#### **1.4. Literature Review**

Affirmative action is a widely researched topic and cannot be exhaustively covered in this dissertation. This literature review focuses on the views of Pretorius and Klinck,<sup>27</sup> Du Plessis and Corder,<sup>28</sup> De Waal and Currie,<sup>29</sup> Rautenbach<sup>30</sup>, Malan,<sup>31</sup> and Pretorius.<sup>32</sup>

The controversial features of affirmative action measures appear from the literature to be related to a need for a suitable normative standard of judicial review which would have regard to the goals of affirmative action measures and legitimately adjudicate claims of unfair discrimination brought by those impacted by such measures. Pretorius and Klink argue that the fairness standard should form part of the substantive equality which underlies section 9 as a whole.<sup>33</sup> They state that 'unfair or unreasonably disproportional forms of affirmative action would be irreconcilable with realising the long-term ideal of equality based on the affirmation of equal worth and respect.'<sup>34</sup> They also note that underlying constitutional values of non-racialism and non-sexism do not allow section 9(2) to be interpreted in a way 'which says: provided the measure affecting the advantaged persons (whites, men, heterosexuals, English-

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<sup>27</sup>JL Pretorius and ME Klinck *Labour law Employment Equity Law*, <http://www.mylexisnexis.co.za/Index.aspx>  
Last Updated: August 2014 - SI 14.

<sup>28</sup> Du Plessis and Corder "*Understanding South Africa's Transitional Bill of Rights*" (Juta and Co, Cape Town 1994) 144-5.

<sup>29</sup> De Waal (note 4 above) 223-5.

<sup>30</sup> C Rautenbach "*Employment Equity Act (and other myths about the pursuit of equality, equity and dignity in the post-apartheid South Africa)*" 4th edition of 2015 PER eISSN 1727-3781 <http://www.nwu.ac.za/per/index.html> 30 January 2015.

<sup>31</sup> K Malan "*Constitutional perspectives on the judgments of the Labour Appeal Court and the Supreme Court of Appeal in Solidarity (acting on behalf of Barnard) v South African Police Services*". 2014 De Jure 118

<sup>32</sup> JL Pretorius (note 17 above).

<sup>33</sup> JL Pretorius and ME Klinck (note 27 above) 9.3.4 par 1.

<sup>34</sup> Ibid.

speakers) is designed to advance the disadvantaged, the former can be treated in an abusive or oppressive way that offends their dignity and tells them and the world that they are of lesser worth than the disadvantaged<sup>35</sup> Given that affirmative action measure must promote equality,<sup>36</sup> Pretorius and Klink argue that ‘ignoring the fairness of the impact of remedial measures would indeed have rendered meaningless the ideal of achieving equality.’<sup>37</sup> They add that ‘it is a natural consequence of the relational or comparative aspect inherent in all equality analyses that the fairness of the impact of differentiating measures on affected parties be evaluated.’<sup>38</sup> Remedial measures correlate to normative legitimacy or fairness. Despite this, fairness as a practical test is not an established standard for affirmative action measures.

The impact of measures is touched on by Moseneke J in *Van Heerden*, where it was held that they should not constitute the abuse of power and cause undue harm.<sup>39</sup> There are three conditions for section 9 (2) compliance. The first condition is that the measure must target a particular class of people who have been susceptible to unfair discrimination; and the second condition is that the measure should be designed to protect or advance those classes of persons. However, the third condition, to ‘promote the achievement of equality’ in order to pass constitutional muster imports considerations that go beyond rationality testing.<sup>40</sup> This condition requires a judgement to have regard to the impact of measures in their implementation - within the ambit of right and value to equality.<sup>41</sup> It needs to be considered ‘whether the measure serves to advance or retard the equal enjoyment in practice of the rights and freedoms that are promised by the Constitution but have not already been achieved.’<sup>42</sup>

This dissertation affirms that where measures have ‘manifestly overbalanced in ignoring or trampling on the interests of members of the advantaged section of the community, and gratuitously and flagrantly imposes disproportionate burdens on them, the courts have a duty to interfere.’<sup>43</sup> Further, it is argued that some degree of proportionality, based on the particular context and circumstances of each case, should be taken into consideration.<sup>44</sup>

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<sup>35</sup> JL Pretorius (note 1 above).

<sup>36</sup> JL Pretorius and ME Klinck (note 27 above) 9.3.3-4.

<sup>37</sup> Ibid 9.3.4 par 3.

<sup>38</sup> Ibid.

<sup>39</sup> *Van Heerden* (note 2 above) par at 44.

<sup>40</sup> JL Pretorius (note 1 above) 562 par 2.

<sup>41</sup> Van der Westhuizen J (note 14 above) 80 par 75.

<sup>42</sup> Sachs J’s judgment (note 2 above) para 142.

<sup>43</sup> *Van Heerden* (note 2 above) par 44; see for example: JL Pretorius (note 1 above).

<sup>44</sup> JL Pretorius (note 1 above) 546; JL Pretorius and ME Klinck (note 27 above) 9.3.3-4.

Thus, this dissertation will argue that the rationality standard needs to be amended to introduce a more substantive normative standard which ensures that the implementation of measure which ‘passes constitutional muster has also take into account how it may affect other constitutional rights and values.’<sup>45</sup> This dissertation agrees with the sentiments that ‘no legal good is pursued in a space devoid of competing interests and nothing in the Constitution suggests that the validity of affirmative action should be judged in terms of its own objectives only.’<sup>46</sup> Further, it is hardly contestable that the fairness of a measure cannot be established without consideration of the validity and weight of competing factors and interests. However, whether fairness is a suitable standard of review for affirmative action measures will be determined by a critical analysis of the rationality and proportionality standards of review.

The separation of section 9(2) and 9(3) of the equality clause has created a dilemma.<sup>47</sup> Malan questions whether measures for restitutionary equality grounded in section 9(2), which differentiate on one of the listed grounds of section 9(3) read with section 9(5), are to be considered on the same footing as other forms of racial differentiation.<sup>48</sup> This implies that these restitutionary equality measures will be overtly and unfairly discriminatory, unless the author of the measures proves the contrary.<sup>49</sup> He questions further whether restitutionary measures, in pursuance of section 9(2), should be treated differently from other forms of differentiation, and more particularly whether they should not be regarded as *prima facie* discriminatory.<sup>50</sup> In *Barnard*, the Supreme Court of Appeal (SCA) considered measures on the same footing as other forms of racial differentiation and thus unfairly discriminatory. Malan states that the SCA might have been wrong in applying the fairness test but, for the reason that measures cannot be self-justifying, the SCA was not wrong.<sup>51</sup>

However, the SCA decision in *Barnard* was overturned by the Constitutional Court, which upheld the decision of the Labour Appeal Court (LAC), upholding the rationality standard. The decision of the Constitutional Court in *Van Heerden* was the first case to entrench rationality as a judicial standard of the review for affirmative action measures.<sup>52</sup> The establishment of an internal test for section 9 (2) and Moseneke J’s behest to read section 9 provision as a whole

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<sup>45</sup> Van der Westhuizen J (note 14 above) 84 par 83.

<sup>46</sup> JL Pretorius and ME Klinck (note 27 above) 9.3.4 par 3.

<sup>47</sup> *Ibid* par 4.

<sup>48</sup> Malan (note 31 above) 138 par 1 and 2.

<sup>49</sup> *Ibid* at 138 par 2.

<sup>50</sup> *Ibid* par 3.

<sup>51</sup> *Ibid* 138 par 4-5. ‘Measures have to be scrutinised in order to establish, with reference to the relevant evidence, whether they are in fact truly measures that promote equality for all.’

<sup>52</sup> JL Pretorius (note 1 above) 544.

are irreconcilable for many judges and academics who try to understand the exposition of the rationality standard and its correlation to the ‘intra-textual’ reading of the equality right.<sup>53</sup> The court opted not to align its approach to section 9(2) of the equality clause with its standard unfair discrimination jurisprudence.<sup>54</sup>

Du Plessis and Corder focus on the underlying bases that underpin Moseneke J’s adjudication in *Van Heerden*. They note that section 8(2) (hereafter section 9(3)) prohibits unfair discrimination on the listed grounds.<sup>55</sup> They state that by so doing section 8(2) strengthens the entrenchment of equality before the law and equal protection of the law in section (8).<sup>56</sup> Section 8(3) includes ‘measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.’<sup>57</sup> Section 8(3) is read in the context of section 8 of the equality clause as a whole.<sup>58</sup> Du Plessis and Corder state that section 8(3) (a) limits section 8(2) ‘by authorising distinctions, for the purpose of affirmative action, which can otherwise be regarded as unfair discrimination proscribed by section 8(2).’<sup>59</sup> This dissertation argues against the approach held by Moseneke J, that section 9(2) limits section 9 (3). It argues that the effect of such interpretation and the endorsement of the rationality standard has denied accountability of government with regards to the implementation of such measures.

Pretorius and Klink argue that ‘the *Harksen* test for unfair discrimination does not necessarily imply strict scrutiny of section 9(2) remedial or restitutionary measures.’<sup>60</sup> They argue that this test certainly ‘does not imply a single rigid standard in terms of which the fairness or justifiability of a breach of the non-discrimination principle is measured in all circumstances.’<sup>61</sup> They add that ‘the standard depends on the interplay of the relevant factors in particular

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<sup>53</sup> C Rautenbach (note 30 above) 4 -5 par 1.

<sup>54</sup> JL Pretorius (note 1 above) 536-570 1.

<sup>55</sup> Constitution of the Republic of South Africa Act 200 of 1993 s 8(2), see for example section 9(3) (note 9 above).

<sup>56</sup> Du Plessis and Corder (note 28 above) 126.

<sup>57</sup> Section 8(3) of the Constitution (note 54 above).

<sup>58</sup> Du Plessis and Corder (note 28 above) 129 par 4; section 8(3) (note 54 above).

<sup>59</sup> *Ibid*; JL Pretorius (note 1 above) 538. at 1 With respect to the relationship between affirmative action and the right against unfair discrimination in particular, O’Regan J appears to have expressed the obiter opinion, without elaborating, that a differentiating measure which falls within the ambit of s 8(3) (a) of the interim Constitution is not susceptible to an unfair discrimination challenge under s 8(2).11.

<sup>60</sup> JL Pretorius and ME Klink (note 27 above) 9.3.4 par 7.

<sup>61</sup> *Ibid*.

circumstances that are taken into account when the fairness or justifiability of a discriminatory measure is appraised.’<sup>62</sup>

The rationality standard facilitates ‘the measure of deference paid towards state actors involved in drafting and implementing affirmative measures and such is out of line with the more general standard of review set by the drafters of the Constitution,’ and as contained in section 36 of the Bill of Rights.<sup>63</sup> It will be argued that the rationality standard is incapable of adjudicating fairness of measures in the terrain of competing factors and interests, and thus is inefficient as a standard of review.<sup>64</sup>

This study will further analyse the rationality standard as a proxy of constitutional review against conceptual coherence of constitutional democracy.<sup>65</sup> Democracy and constitutionalism are two distinct models constituent of constitutional democracy. These models emerge from two dialectal angles. Thus, firstly they are famous for their internal disconnection when interpreted against a background of a dialectical understanding of the historical forces that gave birth to the Constitution.<sup>66</sup> Secondly, with regard to the legitimacy of democracy, justification (public justification) is an essential element of democracy, amongst other values of participation, inclusivity, openness, and transparency.<sup>67</sup> It is through public justification within deliberative democracy that the reconciliation of democracy and constitutionalism could be facilitated.

This dissertation evaluates the rationality principle as being ‘conceptualized and applied as a standard of constitutional review of legislation and in illustration, other governmental action will be discussed, with the emphasis on that standard’s potential in facilitating democratic legitimation in particular contexts.’<sup>68</sup> It will argue for a standard that would adequately address the need for transformative justice with the core function of the Constitution to integrate, in a

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<sup>62</sup> JL Pretorius and ME Klinck (note 27 above) 9.3.4 par 7.

<sup>63</sup> Rautenbach (note 30 above) 4; Pretorius, J L “*Accountability, contextualisation and the standard of judicial review of affirmative action: Solidarity obo Barnard v South African Police Services*” (2013) 130 SA Law Journal 38

<sup>64</sup> See for example: JL Pretorius (note 1 above) 553 par 3 circumstances.101 “Instrumentalist deference typically absolutises specific socio-political goals and disconnects them from their historically contingent and contextually relative settings. Such an approach flies in the face of the fact that in reality no social good is pursued in a space devoid of competing interests and to treat them as such would be tantamount to judging the constitutionality of measures designed to promote such goods in terms of their own stated objectives only. This would of course result in no meaningful constitutional scrutiny at all, since such measures would in effect be constitutionally self-justifying.”

<sup>65</sup> JL Pretorius (note 17 above).

<sup>66</sup> Ibid 410 par 1.

<sup>67</sup> Ibid 417 par 2.

<sup>68</sup> Ibid 419 par 1.

fair and proportional manner, the diversity of rights and interests at stake in the review of affirmative action measures. Thus, the study will argue in favor of the proportionality standard.<sup>69</sup> Support for the proportionality standard is premised on the section 36 limitation clause, which requires courts to be the custodians of an open and democratic society based on human dignity, equality and freedom and to subject rights limiting measures to conform to these principles regarding both their purpose and effect.<sup>70</sup>

Unsurprisingly, the jurisprudence of affirmative action is a reflective of disjunctions and opposing judgments since the entrenchment of rationality as a judicial standard of the review.

### ***1.5. Chapter outline***

Chapter 1 provides the context for the research by considering the interpretation of affirmative action measures in the context of the Constitution as whole, which is entrenched by the normative rationality standard as a standard of constitutional review.

Chapter 2 examines the social and historical context, that is, the political and sociological background to affirmative action arising out of South Africa's history of colonialism, slavery, patriarchy and apartheid.

Chapter 3 examines the constitutional framework for the legal development of affirmative action. This examination is carried out against the background of the concept of equality and the understanding that, in a broader sense, equality goes beyond mere formal equality and non-discrimination or identical treatment.

Chapter 4 comprises the core of this dissertation and it critically evaluates the rationality standard of constitutional review for affirmative action measures against the background of unfair discrimination and the effect of the interpretation on the normative unity of the Constitution as a whole. This chapter set out the limits of the rationality standard and argues that it is ill suited as a standard of review for affirmative action measures.

Chapter 5 provides an argument in favor of the proportionality standard using the matter of *South African Police Service v Solidarity abo Barnard 2014 (6) SA 123 (CC)* as an illustration. This critical analysis justifies the necessity of an amendment of the rationality standard to an

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<sup>69</sup> JL Pretorius (note 1 above) 553 par 3. "If, as is claimed, the fairness investigation is devoted to the complainant's perspective, then the justification inquiry under s 36 would still remain to perform the 'counter-balancing' role of adjusting the scales in favour of assigning the remedial objective its constitutionally endorsed due weight."

<sup>70</sup> JL Pretorius (note 1 above) 556 par 1.

integrative judicial standard of review that results in an interpretation that facilitates the normative unity of the Constitution as a whole.

Chapter 6 contrasts normative fairness, the proportionality standard and the rationality standard against the background of searching for a ‘normative unity of the Constitution to optimise the realisation-potential of all competing constitutionally recognised goods.’<sup>71</sup>

Chapter 7 provides the findings and recommendations of this study.

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<sup>71</sup> JL Pretorius (note 1 above) 555.

## CHAPTER 2: THE POLITICAL AND SOCIOLOGICAL BACKGROUND TO AFFIRMATIVE ACTION

### 2.1. Outline

This chapter focuses on the social and historical context, that is, the political and sociological background to affirmative action arising out of South Africa's history of 'colonialism, slavery, patriarchy and apartheid.'<sup>72</sup> Based on this context, the South African Constitution embraces the concept of equality that affirms remedial or restitutionary measures in order to promote the achievement of equality.<sup>73</sup> The Constitutional Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*<sup>74</sup> noted that

'South Africa is a country in transition. It is a transition from a society based on inequality to a one based on equality. This transition was introduced by the interim Constitution, which was designed to create a new order based on equality in which there is equality between men and women and people of all races so that all citizens should be able to enjoy and exercise their fundamental rights and freedoms. This commitment to the transformation of our society was affirmed and reinforced in 1997, when the Constitution came into force.'<sup>75</sup>

The Constitution states that in order to promote the achievement of equality, legislative and other measures must be taken.<sup>76</sup> These legislative measures are crafted to promote the achievement of equality by protecting and advancing persons or categories of persons who were previously disadvantaged by unfair discrimination.<sup>77</sup> The EEA<sup>78</sup> makes provision for affirmative action measures.<sup>79</sup> Affirmative action measures are defined in the EEA as 'measures designed to ensure that suitably qualified people from designated groups have equal opportunities and are equitably represented across all occupational levels in the workforce of a designated employer.'<sup>80</sup>

The sociological and political history, which 'reveals a history of colonization, slavery, patriarchy and apartheid in South Africa prompted the legal development of affirmative

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<sup>72</sup> M. McGregor 'A Legal Historical Perspective on Affirmative Action in South Africa' (2006) 12 (1) *Fundamina: Journal of Legal History* 87.

<sup>73</sup> *Van Heerden* (note 2 above) 20 par 30.

<sup>74</sup> 2004 (7) BCLR 687 (CC) (12 March 2004).

<sup>75</sup> *Bato Star Fishing* (note 2 above) par 73.

<sup>76</sup> Section 9(2) of the Constitution (note 9 above).

<sup>77</sup> *Ibid.*

<sup>78</sup> 55 of 1998 (note 7 above).

<sup>79</sup> See example *Barnard* (2014) (note 14 above) para 40 'The mission of the Act is diverse. For now, its important objects are to give effect to the constitutional guarantees of equality; to eliminate unfair discrimination at the workplace; and to ensure implementation of employment equity to redress the effects of past discrimination in order to achieve a diverse workforce representative of our people.'

<sup>80</sup> Section 15 (1) of the Employment Equity Act (note 4 above).

action.<sup>81</sup> Systematic racism and sexism against the black majority and women, through legislation, resulted in systemic and structural discrimination against a black majority, other non-white minorities and woman in South Africa.<sup>82</sup> Subsequent to independence from the British, a series of segregation laws were introduced.<sup>83</sup> These laws, such as ‘civilised labour policy’ sought to distinguish “civilized’ white and ‘uncivilized’ black labour with the intention of protecting poor, white labour.<sup>84</sup>

### ***2.1.2. Equality gains support***

In July 1977, the Government of South Africa established a commission,<sup>85</sup> chaired by Professor NE Wiehahn, which introduced the first major changes in the South African workplace towards attaining equality.<sup>86</sup> The Wiehahn Commission was formed solely to address the ‘changing needs of the times’<sup>87</sup> and as a result, it investigated the labour dispensation. The reason for this focus was expressed as follows:

‘It took as points of departure the use of the labour field in South Africa as the conflict area for the acquisition of social, political and other rights for the workers of the country and the fact that changes in labours laws would have a ripple effect on other spheres of society. It viewed change over a broader front in society as essential’<sup>88</sup>

Promotions and the granting of more favourable terms and conditions of employment premised on preferences of immutable attributes of race, colour and sex were prevalent.<sup>89</sup> Industrial courts thus, to counteract all discriminating practices, introduced the concept of unfair labour practice encompassing unfair discrimination.<sup>90</sup>

## ***2.2. The International Framework***

During this time South Africa was in the global spotlight for its repressive policies due to the apartheid dispensation and as such faced the threat of sanctions from the International Labour

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<sup>81</sup> M. McGregor (note 72 above) 87.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid at 90 see; The Industrial Conciliation Act 94 of 1979 and the Mines and Works Act 27 of 1956 excluded blacks from the benefits of collective bargaining and a separate Act was passed for black people, namely the Native Labour Regulation Act 15 of 1911. The Mines and Works Act “provided for job reservation for Whites” And the Wage Act “allowed for differentiation in wage determinations based on race and sex.” The Group Areas Act 77 of 1957 restricted the mobility of Black and, female work seekers and the Unemployment Insurance Act 30 of 1966 provided for “unequal benefits for men and women in the public service.

<sup>84</sup> M. McGregor note 72 at 90.

<sup>85</sup> NE Wiehahn “*Commission of Enquiry into Labour Legislation: The Complete Wiehahn Report*” Parts 1-6.

<sup>86</sup> M. McGregor (note 72 above) 93.

<sup>87</sup> Ibid.

<sup>88</sup> Ibid 93 par 3.

<sup>89</sup> Ibid 74, 95.

<sup>90</sup> Ibid 96.

Organisations (ILO) and United Nations (UN).<sup>91</sup> A Special Report of the ILO by the Director General considered action to be taken against South Africa,<sup>92</sup> noting specific concerns over widespread unrest, fundamental instability, worsening economic prospects, in particular for the Black population of South Africa, and absence of progress towards the peaceful ending of apartheid in South Africa.<sup>93</sup>

The United Nations instituted a programme of action against apartheid in South Africa, barring South Africa from trade in relation to importing and exporting goods and further subjecting it to economic sanctions.<sup>94</sup>

### ***2.3. South African Law Commission***

In response to these measures the South African government instructed the South African Law Commission<sup>95</sup> ‘to investigate the definition and the protection of group rights and the possible extension of the (then) existing protection of individual rights.’<sup>96</sup> This exercise was to be executed in the context of the South African dispensation and the commission was required to ascertain the role that could be played by the courts towards the definition and protection of group rights.<sup>97</sup>

The Commission recommended that “all rights should be protected in the Bills of Rights and ought to, among other things, ‘contain the right to equality before the law (non-discrimination).’<sup>98</sup> In response the South African government announced that it would follow these recommendations and thus accepted the protection of individual rights in the form of a Bill of Rights.<sup>99</sup>

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<sup>91</sup> M. McGregor (note 72 above) 96.

<sup>92</sup> International Labour Conference 73rd Session 1987 “*Special Report of the Director-General on the Application of the Declaration concerning Action against Apartheid in South Africa*” (1987) (*Special Report*) at 509.

<sup>93</sup> Special Report (note 92 above).

<sup>94</sup> Ibid 510.

<sup>95</sup> South African Law Commission “*Group and Human Rights: Interim Report*” (1991) 2 (interim report) the introduction of the Interim Report reveals that South African Law Commission was established by the South African Law Commission Act 19 of 197.

<sup>96</sup> South African Law Commission “*Group and Human Rights: Working Paper*” 25 Project 58 (1989) (hereafter Working Paper).

<sup>97</sup> South African Law Commission “*Final Report on Group and Human Rights*” (1994) (Final Report)

<sup>98</sup> Working Paper (note 96 above) 409.

<sup>99</sup> Interim Report (note 95 above) 97.

The South African Law Commission in its Interim Report <sup>100</sup> included a draft of a Bill of Rights and a clause on non-discrimination and affirmative action, affirming the rationale of both formal and substantive equality.<sup>101</sup> The Interim Report provided a clause as follows that:

‘(b) To this end the highest legislative body may by legislation of general force and effects introduce such programmes of affirmative action and vote such funds therefore as may reasonably be necessary to ensure that through education and training, financing programmes and employment, all citizens have equal opportunities for developing and realising their natural talents and potential to the full.’ <sup>102</sup>

The South African Law Commission’s Final Report echoed the view that the Bill of Rights ought to contain an equality clause<sup>103</sup> with provision for non-discrimination<sup>104</sup> and affirmative action.<sup>105</sup> The non-discrimination clause and affirmative action clause was included in section 8 in the Interim Constitution<sup>106</sup> which prevailed in the final Constitution as section 9, the equality clause. The Final Report noted that the issue of affirmative action remained controversial and subject to debate.<sup>107</sup> The Commission’s Final Report acknowledged that the Constitution and the Bill of Rights emanated from and functioned in a society overwhelmed with enormous imbalances, deep-rooted differences and a legacy of serious injustice and social unrest. <sup>108</sup> Furthermore the Final report acknowledges that South African society had never had a justifiable Bill of Rights <sup>109</sup> and that the courts had never had a substantive testing of rights. Thus, the laws of the legislature will be reviewed and annulled on the objective basis of general, moral and ethical norms or rights of the individual rights. <sup>110</sup>

#### ***2.4. Summation of findings***

This chapter has looked at the political and sociological background to affirmative action that has demonstrated the profound inequality arising from South Africa’s history of colonialism, slavery, patriarchy and apartheid.

In addition the chapter has considered the international framework of the development of affirmative action. South Africa yielded to the sanctions imposed by international organisations

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<sup>100</sup> Interim Report (note 95 above) 41.

<sup>101</sup> Ibid: The Bill proposed by the South African Law Commission, in its article 3.

<sup>102</sup> Ibid.

<sup>103</sup> Final Report (note 97 above) 16.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid 137.

<sup>106</sup> Ibid 16.

<sup>107</sup> Ibid 119.

<sup>108</sup> Ibid 5 par 2.2.

<sup>109</sup> Ibid.

<sup>110</sup> Ibid 6 par 2, 3.

against its repression policies and violation of human rights and as a result the South African Commission was established. This Commission was responsible for the Reports that resulted in the inclusion of a draft Bill of Rights which included an equality clause affirming a provision for non-discrimination and the concept of affirmative action. Affirmative action is regarded as an effective way of promoting the principle of equality of opportunities in societies where inequality is evident.<sup>111</sup> It serves to favour individuals so as to dispense with historical disparities, but may however, amount to reverse discrimination if certain conditions are not adhered to or complied with.<sup>112</sup> It is for this particular reason that courts are bestowed with testing powers to interrogate whether the measure is a legitimate restitutionary measure to promote the achievement of equality.<sup>113</sup> The following chapter will explore the constitutional framework for the legal development of affirmative action.

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<sup>111</sup> Final Report (note 97 above) 129.

<sup>112</sup> *Ibid.*

<sup>113</sup> *Barnard* (note 14 above) para 37.

## CHAPTER 3: THE CONCEPT OF EQUALITY

### 3.1. Chapter outline

This chapter focuses on the constitutional framework for the legal development of affirmative action against the background of the concept of equality and the understanding that, in a broader sense, equality goes beyond mere formal equality and non-discrimination or identical treatment.

It should be noted that the Constitution of South Africa is the supreme law of the land.<sup>114</sup> In its preamble, it recognises the injustice of the past and strives to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; improve equality of life of all citizens and the free potential of each person.<sup>115</sup>

This Constitution is constituent of the founding provisions which state that South Africa is a sovereign, democratic state founded on the following values: Human dignity, the achievement of equality and the advancement of human rights and freedoms.<sup>116</sup>

### 3.2. Equality

#### 3.2.1. The right to equality

The right to equality forms an inherent part of the Bill of Rights and it is contained in sections 9 (1), (2), (3), (4) and (5). The Bill of Rights 'is a cornerstone of democracy in South Africa and enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.'<sup>117</sup> The state is required to respect, protect, promote and fulfil the rights in the Bill of Rights. Nonetheless the 'rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.'<sup>118</sup>

Section 9 (1) provides that everyone is equal before the law and has the right to equal protection and benefits of the law.<sup>119</sup> However, due to the social and historical context against which equality is founded, section 9 (1) provides few answers to remedy the inequality that exists in South African society. Section 9 (2) expands the guarantee of equality, and states that equality includes the full and equal enjoyment of all rights and freedoms. Therefore, 'to promote the

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<sup>114</sup> Section 2 of the Constitution (note 9, above) 3.

<sup>115</sup> Preamble of the Constitution (note 9 above).

<sup>116</sup> Section 1(a) (note 9 above).

<sup>117</sup> Ibid Section 7(1).

<sup>118</sup> Ibid Section 7(3).

<sup>119</sup> Ibid Section 9(1).

achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.’<sup>120</sup>

This chapter focuses on the provisions of section 9(1) and (2) of the Bill of Rights in the Constitution. The remaining subsections will be dealt with in the next chapter.

### 3.2.2. *The concept of equality*

In *Van Heerden* the Court (Judge Moseneke) noted that the achievement of equality goes to the bedrock of constitutional architecture.<sup>121</sup> The court noted that the preamble of the Constitution depicts the commitment of the Constitution and illustrates that the Constitution took effect when South African society was deeply unequal and uncaring of human worth.<sup>122</sup> Stark social and economic disparities will persist for a long time to come.<sup>123</sup> The Constitution does not only herald equal protection of the law and non –discrimination, but also the start of a credible and mandatory process of reparation for past exclusion, dispossession, and indignity.<sup>124</sup>

Moseneke J alluded to the fact that the jurisprudence of the Constitutional Court assertively states that the proper reach of equality is determined by making reference to the history of South African society and the underlying values of the Constitution.<sup>125</sup> He articulated that the object of the Constitution is the ‘creation of a non-racial and non-sexist egalitarian society underpinned by human dignity, the rule of law, a democratic ethos and human rights, [and] goes beyond formal equality and mere non-discrimination which requires identical treatment’<sup>126</sup>

Moseneke J made reference to the case of *Bato Star Fishing*, in which Ngcobo J stated that:

‘The achievement of equality is one of the fundamental goals that we have fashioned for ourselves in the Constitution. Our constitutional order is committed to the transformation of our society from a grossly unequal society to one “in which there is equality between men and women and people of all races in this fundamental way, our Constitution differs from other constitutions which assume that all are equal and in so doing simply entrench existing inequalities. Our Constitution recognises that decades of systematic racial discrimination entrenched by the apartheid legal order cannot be eliminated without positive action being taken to achieve that

<sup>120</sup> Section 9(2) of the Constitution (note 9 above).

<sup>121</sup> *Van Heerden* (note 22 above) 14 par 22.

<sup>122</sup> *Ibid* 14 par 23.

<sup>123</sup> *Ibid* 15.

<sup>124</sup> *Ibid* 15 par 25

<sup>125</sup> *Ibid* par 26 at 16; *Brink v Kitshoff* (note 2 above) para 40.

<sup>126</sup> *Van Heerden* (note 2 above) 16 par 26; See also Gutto “*Equality and Non- Discrimination in South Africa: The Political Economy of Law and Law Making* (New Africa Books, Cape Town 2001)128.

result. We are required to do more than that. The effects of discrimination may continue indefinitely unless there is a commitment to end it.’<sup>127</sup>

The foregoing quotation elucidates the Constitution’s commitment to transformation in section 9 (2) of the Bill of Rights.

### 3.2.3. *Restitutionary measures*

In *Van Heerden*, Moseneke J emphasised the need for a comprehensive understanding of the concept of equality and stated that a harmonious reading of the provisions of Section 9 is required.<sup>128</sup> The court referred to section 9 (1), and subsection (3) and stated that the latter provision proscribes unfair discrimination by the state against anyone on the listed grounds and that section 9 (5) states that discrimination on the listed grounds is unfair unless fairness is established.<sup>129</sup>

The court emphatically stated that in essence section 9 (2) ‘provides for the achievement of full and equal enjoyment of all rights and freedom’ and sanctioned legislation and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination.<sup>130</sup>

In the context of section 9 (2) the Constitutional Court understood that restitutionary measures, sometimes referred to as affirmative action, may be taken to promote the achievement of equality.<sup>131</sup> Moseneke J made reference to *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Another*<sup>132</sup> in order to explore the constitutional understanding of equality.

In *National Coalition*, Ackerman J underscored measures to be “remedial or restitutionary equality.”<sup>133</sup> Moseneke J elucidated that ‘such measures are not in themselves a deviation or invasive of the right to equality guaranteed by the constitution’<sup>134</sup> nor are they “reverse discrimination” or “positive discrimination”.<sup>135</sup> Instead he held that such measures are an integral part of attaining equality. He stated further that the provisions of section 9 (1) and section 9 (2) are complementary; both contribute to the constitutional goal of achieving equality

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<sup>127</sup> *Bata Star Fishing* (note 2 above) para 74.

<sup>128</sup> *Van Heerden* (note 2 above) para 28 at 17.

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid* par 28 at 18; see for example JL Pretorius, ME Klinck note 27 (2001, service issue 2009) at 9-8.

<sup>131</sup> *Van Heerden* (note 2 above) para 28 at 18.

<sup>132</sup> 1998 (12) BCLR 1517 (CC) (*National Coalition*).

<sup>133</sup> *National Coalition* (note 132 above) at para 61.

<sup>134</sup> *Van Heerden* (note 2 above) para 30 at 19.

<sup>135</sup> *Ibid.*

to ensure ‘full and equal enjoyment of all rights’. He cautioned against a ‘disjunctive or oppositional reading of the two subsections,<sup>136</sup> that, ‘would frustrate the foundational equality objective of the Constitution and its broader social justice imperatives.’<sup>137</sup>

Moseneke J stated that the Constitution especially ‘section 9, read as a whole, embraces for good reason a substantive conception of equality inclusive of measures to redress existing inequality.’ He showed that, absent ‘a positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege, the constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow.’<sup>138</sup> This affirms that the Constitution espouses the substantive conception of equality.

#### **3.2.4. Formal equality**

Formal equality means sameness of treatment, that is, the law must treat individuals in the same circumstances alike.<sup>139</sup> The concept provides that attributes such as race, colour, and gender do not warrant treating people differently.<sup>140</sup> Accordingly, it requires that all persons are equal bearers of rights. Accordingly, ‘inequality is an aberration that can be eliminated by extending the same rights and entitlements to all in accordance with the same ‘neutral’ norm or standard of measurement.’<sup>141</sup>

Formal equality does not take cognisance of actual social and economic disparities between groups and individuals.<sup>142</sup> The failure of formal equality to take into consideration profound divisions in a society, vast inequality and the disregarding of human worth will certainly leave these social and economic disparities unchanged. Formal equality only heralds negative action which is equal protection and non-discrimination, for the preservation of equality.<sup>143</sup> The incapability of formal equality to acknowledge the circumstances of the individual and the failure to provide for the positive duty of reparation means that formal equality falls short of addressing equity issues.<sup>144</sup>

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<sup>136</sup> *Van Heerden* (note 2 above) para 30 at 19.

<sup>137</sup> *Ibid* para 30 at 20.

<sup>138</sup> *Ibid* para 31.

<sup>139</sup> I Currie & J de Wall (note 10 above) 232.

<sup>140</sup> V Mhlungu, “*Is continuation of affirmative action in South Africa still desirable?*” (unpublished LLM thesis, University of KwaZulu-Natal, 2013) 11.

<sup>141</sup> I Currie & J de Wall (note 10 above) 233 par 1.

<sup>142</sup> *Ibid*.

<sup>143</sup> V Mhlungu (note 140 above) 11 par 1.

<sup>144</sup> *Ibid*.

### 3.2.5. *Substantive equality*

Substantive equality is designed to eradicate socio-economic inequalities and the structures that bring them about.<sup>145</sup> Social inequality is defined as a situation where a person is excluded because of his or her social identity.<sup>146</sup> Economic inequality is defined as ‘[the unequal access to, and distribution of basic needs, opportunities and material resources.’<sup>147</sup> It is depicted in the employment law by underrepresentation in the workplace that signifies that there is an unequal distribution of resources.

Substantive equality was developed to address the failings of formal equality.<sup>148</sup> It ‘requires the law to ensure equality of outcome and is prepared to tolerate disparity of treatment to achieve this goal.’<sup>149</sup> It takes into account actual social and economic disparities of groups and individuals in order to determine whether its constitutional commitment to equality is being upheld.<sup>150</sup> In *Bata Star Fishing* Ngcobo J stated that transformation is a process.<sup>151</sup> As a result, he then noted that ‘there are profound difficulties that will be confronted in giving effect to the constitutional commitment of achieving equality.’<sup>152</sup> He cautioned against underestimating these difficulties and noted that ‘measures that bring about transformation will inevitably affect some members of the society adversely, particularly those coming from the previously advantaged communities.’<sup>153</sup> Moreover, he added that ‘it may well be that other considerations may have to yield in favour of achieving the goal we fashioned for ourselves in the Constitution. What is required, though, is that the process of transformation must be carried out in accordance with the Constitution.’<sup>154</sup>

The Constitutional Court in *President of South Africa v Hugo*<sup>155</sup> emphasised the importance of a good understanding of the notion of unfair discrimination aligned to the concept of non-identical treatment to achieve equality.

The concept of unfair discrimination will be discussed in detail in the next chapter. The notion of substantive equality adheres to the equality of the outcomes. This approach strives towards

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<sup>145</sup> V Mhlungu (note 140 above) 11 par 1.

<sup>146</sup> Ibid.

<sup>147</sup> Ibid.

<sup>148</sup> Ibid 11 par 2.

<sup>149</sup> I Currie & J de Waal (note 10 above) para 1 at 233.

<sup>150</sup> Ibid 233 par 2.

<sup>151</sup> *Bato Star Fishing* (note 2 above) see: I Currie & de Waal (note 10 above) 234 par 3.

<sup>152</sup> Ibid par 76; Currie & de Wall (note 10 above) 234 par 3.

<sup>153</sup> Ibid.

<sup>154</sup> Ibid; I Currie & de Waal (note 10 above) 234 par 3.

<sup>155</sup> 1997 (4) SA 1 (CC) (*Hugo*).

equality and was crafted as the result of an understanding that identical treatment does not amount to an equal position.<sup>156</sup>

### ***3.2.6. Affirmative action measures and unfair discrimination***

The court in *Brink v Kitshoff NO*<sup>157</sup> held that its endorsement of substantive equality implied that affirmative action cannot be perceived as an exception to equality.<sup>158</sup>

When the doctrine of equality was adopted in section 8 of the Bill of Rights in the Interim Constitution, it was against the consideration that discrimination against people who are members of disfavoured groups can lead to patterns of group disadvantage and harm.<sup>159</sup> Accordingly, it was made clear that such discrimination is unfair in that it facilitates and entrenches inequality amongst different groups in society.<sup>160</sup>

The new constitutional order commits to the creation of a society which affords each human being equal treatment on the basis of equal worth and freedom.<sup>161</sup> In *Hugo Goldstone J* emphasized the importance of a concept of unfair discrimination which recognizes that, whereas the ultimate goal is the creation of a society which affords each human being equal treatment on the basis of equal worth and freedom, ‘such a society cannot be achieved through the insistence upon identical treatment in all circumstances.’<sup>162</sup> The court implicitly set out that each case, therefore, requires ‘a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.’<sup>163</sup>

Ackermann J in *National Coalition* reflected on such concepts of equality and how affirmative action measures envisaged in section 8(3) (a) of the interim Constitution and 9(2) of the Constitution relate to the notion of equality. He ‘pointed out that past unfair discrimination frequently leads to ongoing negative consequences which cannot be adequately addressed by

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<sup>156</sup> V Mhlungu, (note 140 above) 11.

<sup>157</sup> 1996 6 BCLR 752 (CC) par 42.

<sup>158</sup> JL Pretorius, ME Klinck (note 23 above) 9-8: The Constitutional Court expressed itself fairly early, in general terms, on the relationship between affirmative action, as defined in section 8(3)(a) of the interim Constitution<sup>23</sup> and equality.

<sup>159</sup> *Brink v Kitshoff NO* (note 2 above) par 42.

<sup>160</sup> *Ibid.*

<sup>161</sup> See for example JL Pretorius, ME Klinck (note 27 above) 9-8.

<sup>162</sup> *Ibid.*

<sup>163</sup> JL Pretorius, ME Klinck (note 27 above) 9-8.

a mere prospective prohibition of discrimination.<sup>164</sup> Thus it is evident that both Constitutions have recognised the need for restitutionary or remedial measures.

### ***3.3. The legislation***

The EEA aims at providing employment equity, and was enacted to give effect to the promotion of the constitutional right of equality and the exercise of true democracy.<sup>165</sup> It is further evident from the purpose of the EEA that, amongst other things, it seeks to ensure the implementation of affirmative action.<sup>166</sup> Section 6 (2) provides that affirmative action is a defence against claims of discrimination.

### ***3.4. Summation of findings***

This chapter has dealt with the concept of equality and the understanding that in a broader sense equality goes beyond mere formal equality and non-discrimination or identical treatment. This chapter reveals that the status quo of ‘social and economic disparities’ that are prevalent in SA will continue unabated in the absence of restitutionary measures. It is for that reason that “remedial or restitutorial measures” in the form of affirmative action are introduced to protect and advance persons or categories of persons disadvantaged by unfair discrimination.

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<sup>164</sup> JL Pretorius, ME Klinck (note 27 above) 9-8.

<sup>165</sup> Preamble to the EEA note 6.

<sup>166</sup> Section 2(b) note 6.

## CHAPTER 4: THE RATIONALITY STANDARD AND COMPETING INTEREST AND VALUES IN THE CONSTITUTION

‘No members of a racial group should be made to feel that they are not deserving of equal ‘concern, respect and consideration’ and that the law is likely to be used against them more harshly than others who belong to other race groups.’<sup>167</sup>

### **4.1. Outline**

This chapter critically evaluates the rationality standard as a standard of constitutional review for affirmative action measures - against the background of unfair discrimination and the effect of the interpretation on the normative unity of the Constitution as a whole. This chapter sets out the limits of the rationality standard and argues that it is ill suited as a standard of review for affirmative action measures.

#### **4.1.1. The tenets of statutory prohibition of unfair discrimination**

The previous chapter dealt with the constitutional framework to the legal development of affirmative action, as well as section 9(1) and (2) of the equality clause. This chapter examines the remaining subsections of section 9, being section 9(3), (4) and (5) of the Constitution. Moseneke J in *Van Heerden* argued that a ‘comprehensive understanding of the Constitution’s conception of equality requires a harmonious reading of the provisions of section 9.’<sup>168</sup> However, Rautenbach notes that inconsistency has been evidenced in the application of the provisions of section 9 when dealing with the compliance of affirmative action measures. He states ‘that the exposition of the rationality standard of review based on section 9(2)’s internal test for compliance of an affirmative action measure would appear to follow a different approach.’<sup>169</sup> Rautenbach states that the clear text of the equality rights embraces a fairness test and the rejection of its role in *Van Heerden* appears questionable.

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<sup>167</sup> *National Coalition* (note 132 above) par 60 and *Pretoria City Council v Walker* [1998] ZACC 1; 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC) 81.

<sup>168</sup> *Van Heerden* note 2; see for example: C Rautenbach (note 30 above) 5 par 1: “Moseneke J in *Van Heerden* specifically emphasised that the respective sub-sections of section 9 should be read together<sup>168</sup> (an ‘intra-textual’ reading of the equality right).”

<sup>169</sup> C Rautenbach (note 30 above) par 1; see for example: Malan, K (note 31 above) 139.

Further, this chapter critically evaluates the ability of a rationality standard of review to wrestle with complex competing interests, rights and values, which are at the heart of the constitutional democracy, and the constitutional goal which is at stake.<sup>170</sup>

## ***4.2. The correlation between differentiation and discrimination***

### ***4.2.1. Mere differentiation***

It is important for an understanding of unfair discrimination to examine two important concepts - that of differentiation and discrimination. The Constitution affirms the notion of formal and substantive equality and hence does not prevent the government from making classifications and from treating some people differently to others. Accordingly, a complementary reading of subsections 9(1) and (2) of the Bill of Rights does not require everyone to be treated the same.<sup>171</sup> The government may as a result classify persons and treat those persons differently to others for a variety of legitimate reasons.<sup>172</sup> In terms of the EEA a “designated employer must, in order to achieve employment equity, implement affirmative action measures for people from designated groups.”<sup>173</sup> A classical interpretation of differentiation is articulated as follows:

‘It is impossible to regulate the affairs of the inhabitants of a country without differentiation and without classification that treat people differently and that impact on people differently. Not very differentiation can therefore amount to unequal treatment. If it did, the courts could be called on to review almost the entire legislative programme. Accordingly, it is necessary to identify the criteria that separate legitimate differentiation from constitutionally impermissible differentiation.’<sup>174</sup>

The Constitution is the supreme law of the Republic and any law or conduct inconsistent with it is invalid. Its paramount feature is that the obligations it imposes must be fulfilled.<sup>175</sup> The Constitution differentiates between a legitimate and impermissible differentiation by setting out the criteria in section 9(3), read with subsections 9(4), and 9(5) of the Constitution.<sup>176</sup> At

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<sup>170</sup> *Barnard* 2014 (note 14 above) 87-88 par 89: Van der Westhuizen J states that at its heart a limitation analysis is an acknowledgment that constitutional democracies are faced – and must wrestle – with complex competing interests, rights and values.

<sup>171</sup> I Currie & J de Waal (note 10 above) 239 par 1.

<sup>172</sup> *Ibid*, see for example Section 1 of the EEA (note 6 above): designated groups' means black people, women and people with disabilities who-

(a) are citizens of the Republic of South Africa by birth or descent; or

(b) became citizens of the Republic of South Africa by naturalisation-

(i) before 27 April 1994; or

(ii) after 26 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date but who were precluded by apartheid policies;

[Definition of 'designated groups' substituted by s. 1 (b) of Act 47 of 2013 (note 5 above).]

<sup>173</sup> Section 13(1).

<sup>174</sup> I Currie & J de Waal (note 10 above) 239 par 1.

<sup>175</sup> Section 2 (note 9 above) 3.

<sup>176</sup> I Currie & J de Waal (note 10 above) 239 par 1.

its core, section 9(3) sets out the listed grounds upon which differentiation is impermissible and constitutes unfair discrimination.<sup>177</sup> In addition to the listed grounds there are also analogous grounds for discrimination.<sup>178</sup> However, the difference between listed and analogous grounds is in the discharge of the evidentiary burden which applies. Differentiation is permissible if it does not amount to unfair discrimination.<sup>179</sup>

#### 4.2.2. *Rule of law*

With regard to the concept of permissible differentiation, in *Prinsloo v Van der Linde*<sup>180</sup> the court stated that this differentiation for descriptive purposes must be referred to as ‘mere differentiation.’ In this regard the constitutional state is urged to act in a rational manner<sup>181</sup> and is called upon to correlate its action to a defensible vision of the public good and to serve to enhance the cohesiveness and the integrity of the legislation<sup>182</sup> Before it can be alleged that mere differentiation infringes section 9, the first step is to ascertain that there is no rational connection between the differentiation in question<sup>183</sup> and the governmental purpose which is intended by it.<sup>184</sup> If there is no rational connection the differentiation would infringe section 9, that is, the right to equality.<sup>185</sup> In having met the requirements, differentiation may still amount to unfair discrimination.<sup>186</sup> It is apparent from the concept of section 9 (1) that rationality is limited to differentiation.<sup>187</sup> Accordingly, this limitation has prompted the Constitutional Court to develop the general rationality requirement, derived from the rule of law in section 1 of the Constitution.<sup>188</sup>

With regard to the general rationality requirement, in *Pharmaceutical Manufacturers Association of SA, In ex parte President of the Republic of South Africa The Constitutional Court*,<sup>189</sup> the court held that in terms of the rule of law that all exercise of public power by the executive and other spheres must not be arbitrary.<sup>190</sup> ‘Decisions must be rationally related to

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<sup>177</sup> I Currie & J de Waal (note 10 above) 239 par 1.

<sup>178</sup> Ibid 244 par 1.

<sup>179</sup> Ibid 239 par 1.

<sup>180</sup> 1997 (3) SA 1012 (CC) (*Prinsloo*).

<sup>181</sup> *Prinsloo* par 25.

<sup>182</sup> *Harksen v Lane NO* 1998 (1) SA 300 (CC) (*Harksen*) para 43.

<sup>183</sup> *Prinsloo* (note 180 above) par 25.

<sup>184</sup> Ibid para 26.

<sup>185</sup> Ibid.

<sup>186</sup> Ibid.

<sup>187</sup> See example. I Currie & J de Wall (note 10 above) 243 par 4.

<sup>188</sup> I Currie & J de Wall (note 10 above) 243 par 2.

<sup>189</sup> 2000 (2) SA 674.

<sup>190</sup> *Pharmaceutical Manufacturers Association of SA, In ex parte President of the Republic of South Africa* (note 189 above) (*Pharmaceutical Manufacturers Association*) par 85.

the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement.<sup>191</sup> This approach forbids arbitrariness in general and is not limited to arbitrary differentiation.<sup>192</sup> The remarkable feature of this jurisprudence is its articulation that once law or conduct has been found to be rational or irrational for the purpose of the general rationality requirement, it becomes unnecessary to have regard to whether there is a violation of section 9 (1) of the Constitution.

This jurisprudence is adopted by courts in scrutinising compliance of affirmative action measures, and gives legitimacy to the crafting of affirmative action measures in the new constitutional order, where the government's purpose is to protect and advance persons, or categories of persons, disadvantaged by unfair discrimination. According to the rationality standard of review, the implementation of affirmative action measures must be rationally correlated to the purpose which they were designed to achieve.<sup>193</sup> However, it ought to be noted that 'constitutionally, the 'vision of the public good' cannot be limited to a particular public purpose and the 'coherence' or 'integrity' of particular governmental aims is evidently not determinable by means of self-reference only.'<sup>194</sup>

The critique of this standard reveals that it involves a simple analytical exercise and such cannot be counted.<sup>195</sup> This is because there is indeterminacy about the kind and degree of reflective evaluation this standard allows regarding the ends of governmental action, if any.<sup>196</sup> This standard evaluation does not avoid treating government purposes as ends to themselves and essentially self-legitimising.<sup>197</sup>

Further, with regard to the evaluation of government ends in relation to other competing ends, the standard has no normative orientation to provide for weighting and reconciling competing ends.<sup>198</sup> It treats government purposes as given and ends in themselves, and thus in practice the whole principle of inquiry is limited to the question of the utility of the means.<sup>199</sup> In recapitulating the utility of the means it is focused in the narrow context of a self-standing governmental purpose. In consideration of the rationality principle, courts are unable to

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<sup>191</sup> *Pharmaceutical Manufacturers Association* (note 189 above) par 85.

<sup>192</sup> I Currie & J de Waal (note 10 above) 234 par 4.

<sup>193</sup> *Barnard* 2014 (note 14 above) par 39.

<sup>194</sup> JL Pretorius (note 21 above) 422 par 1.

<sup>195</sup> *Ibid.*

<sup>196</sup> *Ibid.*

<sup>197</sup> JL Pretorius (note 21 above) 420 par 1.

<sup>198</sup> *Ibid.*

<sup>199</sup> *Ibid.*

interfere with the decision of a public power if it considers such was exercised inappropriately.<sup>200</sup> Accordingly, this approach undermines the fundamental constitutional principle.<sup>201</sup>

In addition, the constitutional jurisprudence shows that, based on this principle, courts avoid their function and role. Rautenbach notes that the ‘[courts] must not primarily pursue policies deemed to advance or secure an economic, political or social situation for the benefit of all. That is the distinctive terrain of the legislature and the executive.’<sup>202</sup> Rautenbach makes the point that the ‘rationality standard of review as articulated by Moseneke J in *Van Heerden* pays an inappropriate measure of deference in respect of the formulation of affirmative policies and measures.’<sup>203</sup> It ‘is not directed at testing whether legislation or executive action is fair, reasonable or appropriate.’<sup>204</sup> Accordingly, ‘the rationality standard implies deference or restraint on the part of courts towards the legislature and the executive, which is grounded in the principle of separation of powers.’<sup>205</sup>

#### ***4.3. The implications of a rationality standard of review***

The rationality standard of review indicates the courts’ reluctance to presume that provisions on the Constitution operate in tension. As a result, courts have overlooked the impact of one right on other in specific situations and have interpreted rights narrowly at the outset to avoid possible tension.<sup>206</sup> Van der Westhuizen J in *Barnard*, which is the leading Constitutional Court case in terms of affirmative action measures, notes that constitutional provisions inclusive of protecting rights ought to be construed in the context of the Constitution as a whole.<sup>207</sup> Accordingly, ‘construing constitutional provisions in the light of the Constitution as a whole is a necessary corollary of the contextual and purposive approach to constitutional interpretation.’<sup>208</sup> It is also fundamental, ‘amongst other things, to avert the danger of distorting

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<sup>200</sup> *Pharmaceutical Manufacturers Association of SA*, (note 189 above) par 86.

<sup>201</sup> *Ibid.*

<sup>202</sup> C Rautenbach (note 30 above) 38 par 3.

<sup>203</sup> *Ibid.*; Pretorius (note 17 above) 420 par 1.

<sup>204</sup> *Ibid.* 419 par 2.

<sup>205</sup> *Ibid.*

<sup>206</sup> *Barnard* (note 14 above) 86 -88.

<sup>207</sup> *Ibid.*: JL Pretorius note 1 at 558 par 1 ‘The Court’s approach of restricting its interpretation to s 9(2) in isolation seems curious in light of its general sensitivity to the danger of reading specific constitutional provisions in isolation.’

<sup>208</sup> JL Pretorius (note 1 above) 558: ‘Konrad Hesse hinted at the larger social function of the interpretative principle of preserving the normative unity of the Constitution . . . . It is not just about maintaining the Constitution’s conceptual or logical coherence. It is ultimately premised on the larger socio-political integrative role of the Constitution. It is intended to prevent the Constitution from falling prey to narrow ideological hijacking through the privileging of specific constitutional goals or values at the expense of others.’

the normative unity or the ‘internal value coherence’ of the Constitution.<sup>209</sup> Thus neither provision must be construed in isolation nor rights protected and enforced without regard to other rights. Van der Westhuizen J certainly stated that the exercise of the one constitutional right may have to be balanced against the other.<sup>210</sup>

Van der Westhuizen J correctly states that the inherent question, whether the implementation of affirmative action measures passes constitutional muster, needs to take into account the promotion of equality and how the implementation may affect other constitutional rights and values.<sup>211</sup> He proposes a separate inquiry, one which does not use only equality as a barometer, but which will also test the impact of the implementation.<sup>212</sup> He states that the proportionality analysis, while not only the appropriate standard, is often well-placed for navigating the contested terrain of competing rights and values.<sup>213</sup> It is a good step in a right direction to look for a barometer that is case sensitive and forms a concrete assessment of the competing rights.<sup>214</sup> This is because a right should not be compromised more than necessary, taking into account the constitutional values of dignity, equality and freedom which the government has positive duties to promote and uphold.<sup>215</sup>

It is imperative for courts to scrutinise the implementation of measures which may impact on any number of rights and interests, both of the individual right concerned and of the public. Each case would have to be determined on its own facts. With regard to dignity as one of the founding values, Van der Westhuizen J states that affirmative action measures legitimately emphasise the relative importance of a particular characteristic of a candidate over other elements: ‘their implementation has the potential to affect the right to human dignity of people, individually or as members of a group.’<sup>216</sup> He makes reference to the EEA that promotes equal dignity and respect of all people. In *Van Heerden*, Moseneke J concedes that the imposition of substantial and undue harm on those excluded from measures benefits will threaten the long constitutional goal and this is objectionable.<sup>217</sup>

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<sup>209</sup> JL Pretorius (note 1 above) 558.

<sup>210</sup> *Barnard* (note 14 above) 86 para 88; JL Pretorius (note 1 above) 559.

<sup>211</sup> *Ibid* 84 para 83.

<sup>212</sup> *Ibid*.

<sup>213</sup> *Ibid* 89 para 92, See, for example, *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions and Others* [2006] BCLR 167 (CC) par 125-6.

<sup>214</sup> *Ibid* at 89 para 93, see for example *Independent Newspapers Holdings Ltd and Others v Suliman* [2004] 3 All SA 137 (SCA) para 44.

<sup>215</sup> *Ibid*, *Carmichele v Minister of Safety and Security* 2001 (10) BCLR 995 (CC) par 43.

<sup>216</sup> *Barnard* (note 14 above) 90 para 95.

<sup>217</sup> *Ibid* par 24.

However, dignity will not always be affected by the implementation of measures. Courts ought to remain aware that rights to and values of equality and dignity are interdependent and complementary. Be that as it may, ‘but they may sometimes compete, as far as the scope of their implementation or enforcement is concerned.’<sup>218</sup> As a result, while ‘aspects of one persons’ dignity may sometimes have to yield to the importance of promoting the full equality our Constitution envisages’,<sup>219</sup> at other times, ‘the impact of equality-driven measures with laudable aims may not be justifiable in view of severe damage to human dignity.’<sup>220</sup>

There are two factors that should be considered in order to assess the reasonableness and justifiability of the impact of such measures, namely, whether an aggrieved person was treated as a means to achieve an end and whether the decision reduces the aggrieved person to a member of an underclass to the extent that this person’s place in society and in the Constitution is denigrated. Van der Westhuizen J eloquently states that ‘the perception of this may threaten the pursuit of our constitutional goal of a society in which everyone, regardless of their differences, is equally valued and at home.’<sup>221</sup>

The second factor pertains to the question of whether the measure’s implementation amounts to an absolute barrier to the person’s advancement, and Van der Westhuizen J states in this regard that ‘if a measure is used to obliterate a person’s chances at progressing in her chosen career, it would not pass constitutional muster.’<sup>222</sup> He states that it would constitute an impermissible barrier to an individual’s ability to “develop humanity, and ‘humanness’ to the full extent of its potential.”<sup>223</sup>

#### **4.4. Fairness Standard: Grounds for Discrimination**

##### **4.4.1. Impermissible discrimination**

Currie and de Wall state that discrimination ‘without departing from the meaning differentiation’ is a particular form of differentiation.<sup>224</sup> Discrimination has been divided into

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<sup>218</sup> *Barnard* (note 14 above) 91 par 96.

<sup>219</sup> *Ibid.*

<sup>220</sup> *Ibid.*

<sup>221</sup> *Barnard* (note 14 above) 98 par 107.

<sup>222</sup> *Ibid.*; See also *Du Preez v Minister of Justice and Constitutional Development and Others* 2006 (5) SA 592 (E) para 30, which finds unfair discrimination where an affirmative action policy was so inflexible that it effectively prevented all white men from appointment.

<sup>223</sup> *Barnard* (note 14 above) 98 par 107.

<sup>224</sup> I Currie & J de Waal (note 10 above) 243par 4.

two categories.<sup>225</sup> The first is differentiation on listed grounds; this differentiation is found in section 9 (3) of the Constitution, which states the following:

‘The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth’<sup>226</sup>

When the differentiation takes place on listed grounds, discrimination will be established.<sup>227</sup> If the differentiation amounts to discrimination, it is logical to ask whether it amounts to unfair discrimination.<sup>228</sup> The unfair discrimination will be presumed if discrimination is on listed grounds. The onus of proof will shift to the alleged perpetrator to justify the unfair discrimination and, if the alleged discrimination took place in the workplace by the employer, the employer could raise the inherent requirement of the job as a defence or justification.<sup>229</sup> This presumption is evident from section 9(5) of the Constitution, which stipulates that ‘discrimination on one more of the grounds listed in subsection 9 (3) is unfair unless it is established that the discrimination is fair’<sup>230</sup>

Rautenbach refers to the foregoing analysis as the clear text of equality right, and the standard of review to be fairness.<sup>231</sup> On the contrary, Moseneke J in *Van Heerden* states that ‘if restitutionary measures, even based on any of the grounds of discrimination listed in section 9(3), pass muster under section 9(2), they cannot be presumed to be unfairly discriminatory,’<sup>232</sup> Nothing can be further from the truth that ‘assessing governmental purposes on their own terms has the result that the testing of their legitimacy by definition does not involve an evaluation that takes into account the full spectrum of competing interests and a determination of their relative weight in terms of an integrative account of the Constitution’s value structure.’<sup>233</sup> It is again correct that ‘the constitutional validity of the way in which a particular governmental purpose is realized’<sup>234</sup> should however, ‘be decided with reference to how its realisation gives effect to the Constitution’s values and how it impacts on other constitutionally recognised goods and interests, if the risk of distorting the constitutional value structure by elevating a

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<sup>225</sup> *Harksen* (note 182 above) par 46.

<sup>226</sup> Section 9(3) (note 9 above) 7, I Currie & J de Waal (note 10 above) 243 par 4.

<sup>227</sup> *Harksen* 182 par 15.

<sup>228</sup> *Harksen* (note 182 above) par 50; I Currie & J de Waal (note 10 above) 235-6 par 1.

<sup>229</sup> *Ibid.*

<sup>230</sup> Section 9 (5) (note 9 above).

<sup>231</sup> C Rautenbach (note 30 above) 5 par 1.

<sup>232</sup> *Van Heerden* (note 2 above) 21 par 2; Pretorius (note 21 above): Rationality standard is at a risk of degenerating into a pure instrumental mental rationality: is often limited, for the purpose of establishing constitutional compliance, to an investigation of the utility of the means to serve particular ends.

<sup>233</sup> Pretorius (note 17 above) 420.

<sup>234</sup> *Ibid* 421.

particular governmental objective as an end in itself is to be avoided.<sup>235</sup> The rationality standard of review premised on section 9 (2)'s internal test for compliance of affirmative action measures emerges to follow a different approach. Rautenbach notes that this exposition disregards the inherent content of the significant part of this sub-section, in particular its first sentence, which states that equality includes the full and equal enjoyment of all rights and freedoms, which failure undermines the 'inter-textual' approach.<sup>236</sup>

According to the inter-textual approach, 'a proper reading of the first sentence of section 9(2) would seem to demand the consideration, in reviewing any affirmative measure which purports to comply with section 9(2), of the full and equal enjoyment of all rights and freedoms. That is, it demands consideration of the impact of any such measure on those disadvantaged by it.'<sup>237</sup>

#### **4.5. Fair discrimination**

The first of the leading cases to determine the concept of fair discrimination in the constitutional ethos was *Hugo*. In this case the alleged discrimination was on listed grounds, that is, discrimination on the ground of sex and on the analogous grounds of the parenthood of children under the age of 12.<sup>238</sup> The complainant was a sentenced father and had a small child of 12 years old.<sup>239</sup> The former President of South Africa, Doctor Nelson Mandela, had granted remission of sentence to all mothers with small children.<sup>240</sup> The granting of remission was to serve the interest of their children.<sup>241</sup> To support this objective it was submitted in court that, generally speaking mothers are primarily responsible for the care of small children in our society.<sup>242</sup>

This general submission was affirmed in court, but the court held that it did not answer the question whether discrimination was fair. However, the court held that it will be inevitably unfair for discrimination to have regard to that particular generalisation when refusing benefits.<sup>243</sup> In that context, the court stated that this generalisation of women's responsibilities

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<sup>235</sup> Pretorius (note 17 above) 421.

<sup>236</sup> C Rautenbach (note 30 above) 5 par 1.

<sup>237</sup> Ibid par 3.

<sup>238</sup> Ibid.

<sup>238</sup> *Hugo* (note 155 above) par 33.

<sup>239</sup> Ibid par 3.

<sup>240</sup> Ibid par 37.

<sup>241</sup> Ibid par 36 - 37.

<sup>242</sup> Ibid

<sup>243</sup> *Hugo* (note 155 above) par 39.

in housekeeping and child rearing historically had been prejudicial and was detrimental to women in that it has barred women from making progress.<sup>244</sup> The court stated the following:

To use the generalization that women bear a greater proportion of the burdens of child rearing for justifying treatment that deprives women of benefits or advantages or imposes disadvantages upon them would clearly, therefore, be unfair.

However, Goldstone J stated that what the President had done in this case was unique, in that the President had granted benefits to mothers with small children which were not afforded to fathers. The discrimination was against the group of individuals, namely, fathers, who had not historically been subjected to disadvantage.<sup>245</sup> The discrimination was thus not an unfair one.<sup>246</sup> The President's act was unequivocally equated to a worthy and vital societal goal.<sup>247</sup> The Constitutional Court in adjudicating this matter had regard to the determination of an unfair impact of the discrimination. It held that when determining an unfair impact the inquiry should not be confined only to a person or group who has been disadvantaged but also extends to 'the nature of power in which the discrimination was effected, and also the nature of interests which have been affected by discrimination.'<sup>248</sup> Most importantly it is a consideration of the purpose which was sought to be achieved by that nature of power.<sup>249</sup>

In this case, the Interim Constitution had granted the President power to determine when, in his view, the public welfare could be better served by the granting of a remission of sentence or other form of pardon.<sup>250</sup> The determination exercise in regard to the unfair impact of discrimination is credibly set out in *Harksen*. The court stated that, to determine whether the contravening act has impacted on the aggrieved party unfairly, the following factors must be taken into account:

- (1) The position of the complainants in society and whether they have been victims of past patterns of discrimination. Differential treatment that burdens people in a disadvantaged position is more likely to be unfair than burdens placed on those who are relatively well off.
- (2) The nature of the discriminating law or action and the purpose sought to be achieved by it. An important consideration would be whether the primary purpose of the law or action is to achieve a worthy and important societal goal.
- (3) The extent to which the rights of the complainant have been impaired and whether there has been an impairment of his or her fundamental dignity.<sup>251</sup>

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<sup>244</sup> *Hugo* (note 155 above) par 39.

<sup>245</sup> I Currie & J de Waal (note 10 above) 246 par 1, *Hugo* (note 154 above) par 39.

<sup>246</sup> *Ibid*.

<sup>247</sup> *Ibid*.

<sup>248</sup> *Hugo* (note 155 above) par 43.

<sup>249</sup> *Ibid* par 45.

<sup>250</sup> *Ibid* par 44.

<sup>251</sup> *Harksen* (note 182 above) para 51.

These factors are well set out, in that their objective and cumulative assessment give ‘precision and elaboration’ to the constitutional test of unfairness. These factors are not a closed list and hence are accommodative of other factors that would emerge as the quality of jurisprudence continues to develop.<sup>252</sup> While the President’s act constituted a disadvantage to fathers with small children under the age of 12, this act did not circumscribe their rights or obligations as fathers.<sup>253</sup> The court stated that it could not have held that the discriminatory act by the President denied or circumscribed their freedom in that their freedom had been curtailed as the result of their conviction, and not by the act of the President.<sup>254</sup>

The court held further that the President’s act denied rights to fathers with small children to which they had no legal entitlement.<sup>255</sup> The President had led evidence by way of an affidavit stating that fathers with small children had been welcomed to apply in the ordinary way for remission of their sentences on the basis of their individual circumstances.<sup>256</sup> While the act denied the fathers the opportunity it offered to mothers, the court stated that it did not fundamentally impair their right to dignity or sense of equal worth.<sup>257</sup>

The refusal to grant remission of sentence to male prisoners on the same terms and conditions as mothers was justified because the release of fathers would have had a negative impact and could not amount to the better serving of public welfare as was required by the President.<sup>258</sup> The release of fathers would have meant that a large number of male prisoners would have gained their release.<sup>259</sup> It was undeniable that the role played by fathers in children’s rearing is a secondary role in comparison to that of mothers.<sup>260</sup> At the time of the remission of sentence, crime was considered to have reached a shocking level, and releasing male prisoners would have certainly prompted a public outcry.<sup>261</sup> When objectively balancing all the crucial factors in determining whether the discrimination had an unfair impact, it cannot be stated that the President’s action was unfair.<sup>262</sup>

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<sup>252</sup> Ibid para 53; I Currie & J de Waal (note 10 above) 244 -45 par 1.

<sup>253</sup> *Hugo* (note 155 above) par 47.

<sup>254</sup> Ibid.

<sup>255</sup> Ibid.

<sup>256</sup> Ibid.

<sup>257</sup> Ibid: De Waal (note 10 above) 245 par 3.

<sup>258</sup> *Hugo* (note 155 above) para 46.

<sup>259</sup> Ibid.

<sup>260</sup> Ibid.

<sup>261</sup> *Hugo* (note 155 above) par 46.

<sup>262</sup> *Harksen* (note 182 above) par 51.

The next chapter will critically analyse the fairness and proportionality standard in contrast to rationality standard to search after a ‘normative unity of the Constitution to optimise the realisation-potential of all competing constitutionally recognised goods: all must be set limits in order that all may acquire optimal efficacy.’<sup>263</sup> The search after a standard that will bring related constitutional provisions into the equation and facilitates the consideration of the effect of its interpretation on the normative unity of the Constitution as a whole.<sup>264</sup>

#### ***4.7. Summation of findings***

This chapter has evaluated the concept of unfair discrimination for purposes of affirmative action. It is not differentiation that is prohibited but instead unfair discrimination. The governmental act must correlate with a defensible vision of the public good and serve to enhance the cohesiveness and the integrity of the legislation under the rule of law and the state ought to act in a rational manner in this regard. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. This latter principle goes beyond differentiation, once the decision is found to be rationally related to the purpose for which the power was given it is unnecessary to ask whether there was violation of the equality right. This principle underlies the concept of review for decisions taken under the concepts of affirmative action measures. This is the rationality standard and is the minimum standard and it is not necessary to complete the enquiry.

The biggest failure of the rationality standard is to facilitate the assessment of governmental purposes on their own terms which results in the testing of their legitimacy by definition and does not involve an evaluation that takes into account the full spectrum of competing interests and a determination of their relative weight in terms of an integrative account of the Constitution’s value structure. This denies a clear test of discrimination in the listed ground in section 9 (3), and denies the presumption of unfair discrimination in section 9(5). To recapitulate the rationality standard is essentially self-legitimizing in that it rests on the critique that treats government purposes as given and ends in themselves.

It is self-explanatory that the Constitutional Court has contextualised its interpretation of the affirmative action clause of the Constitution in a manner which principally isolated it from the broader normative framework of the equality guarantee and the Constitution as a whole.

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<sup>263</sup> JL Pretorius (note 1 above) 555.

<sup>264</sup> Ibid 549 par 2.

Accordingly, in the context of equality challenges to affirmative action, the Court opted to extract the constitutional conditions for validity from s 9(2) exclusively, to the exclusion of the fairness and proportionality requirements of section 9(3) and 36 respectively.

## CHAPTER 5: THE IMPLEMENTATION OF AFFIRMATIVE ACTION MEASURES:

### THE *BARNARD* DECISION

#### 5.1. Outline

This chapter undertakes a critical analysis of the leading Constitutional Court judgment on the concept of affirmative action measures and their standard of review, being *South African Police Service v Solidarity abo Barnard* <sup>265</sup>

#### 5.2. Judicial standard for the implementation of legitimate affirmative action measures

The critical evaluation of the judicial standard comes about as a result of a series of disjunctive and opposing judgments from the Labour Court, as well as from the Labour Appeal Court and the Supreme Court of Appeal. These judgments were anticipated to bring insight and direction on the determination of the appropriate and applicable judicial standard for the implementation of affirmative action measures. However, these judgements did not provide the relief sought by the litigants, due to uncertainty on the ongoing question of the appropriate and applicable judicial standard for the implementation of affirmative action measures. As a result the litigants resorted to bringing their case to the Constitutional Court.

Ms Barnard applied for a position which had been advertised on two different occasions and she was the first choice of the interviewing panel both times. She was not promoted because her appointment would not address representivity at her salary level, but neither would it affect the racial representivity of the division as she was already a part of the division.<sup>266</sup> Her claim was that of unfair discrimination based on the ground of race in terms of section 6(1) the EEA.<sup>267</sup> The employer, the South African Police Service (SAPS), replied that the National Commissioner, who had the discretion to appoint or not, acted lawfully in pursuit of a legitimate employment equity plan and thus it was a legitimate and justifiable differentiation because it was based on legitimate grounds and a defensible Employment Policy and Plan.<sup>268</sup> However, the fundamental question in this case pertains to the appropriate and applicable judicial standard in determining Barnard's complaints, which fall within the parameters of affirmative action measures.

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<sup>265</sup> 2014 (6) SA 123 (CC).

<sup>266</sup> *Barnard* 2014 (note 14 above) 8 par 12.

<sup>267</sup> Section 6 (1) (note 6 above): 1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex....

<sup>268</sup> *Barnard* (note 14 above) 12 par 20.

The Constitutional Court's determination on this uncertain legal issue was eagerly awaited, not only by the parties or litigants, but by the whole community of South Africa. This is because the concept of affirmative action is embraced as an equality-driven concept by the Constitution of South Africa<sup>269</sup> and raises important questions regarding the appropriate and applicable judicial standard for the implementation of such measures.

The Constitutional Court in *Barnard* confirmed the established legal principle laid down in *Van Heerden* about the appropriate and applicable judicial standard for the implementation of measures. However, it should be noted from the Constitutional Court in *Barnard* that, as much as the judges arrived at the same conclusion, there were different opinions expressed in reaching their conclusions. Moseneke DCJ in the majority judgment wrote that the judicial standard for review is the rationality standard and, while it is the bare minimum requirement, it suffices and there is no need to define the standard finally. The correctness of this statement will be assessed.

### ***5.3. The commentary on the Van Heerden judgements***

It is necessary to look into the ratio of this case, having noted that its legal principle was confirmed in the *Barnard* case. Briefly, this judgment has been criticised for failing to incorporate fairness into its standard.<sup>270</sup> Rautenbach expresses the view that the approach taken pays deference towards the state actors involved in drafting and implementing affirmative action measures and that this approach is out of line with the general standard of review set out by the drafters of the Constitution, in terms of section 36 of the Constitution.<sup>271</sup>

In a well-worded statement, Malan points out that the 'rationality standard may also implicate a separation of power when one considers the role of the courts in respect of constitutional adjudication (and their discrete oversight over the conduct of the executive)<sup>272</sup> On the other hand, Pretorious, Klinck and Ngwena have underscored the fact that Moseneke DCJ in this case, notwithstanding his adamant choice of the rationality standard, in fact applied a form of fairness review.<sup>273</sup>

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<sup>269</sup> *Stoman v Minister of Safety & Security & others* 2002 (3) SA 468 (T).

<sup>270</sup> McGregor '*Affirmative Action on Trial — Determining the Legitimacy and Fair Application of Remedial Measures*' (2013) 4 TSAR 650 - 655.

<sup>271</sup> C Rautenbach (note 30 above) 5 par 1.

<sup>272</sup> K Malan, (note 31 above) 134-135.

<sup>273</sup> C Rautenbach (note 30 above) 7 see for example Pretorious, Klink (note 27 above) 9-28.

Pretorius et al's commentary reveals the issues that concern the applicable and appropriate judicial standard for the implementation of affirmative action measures. The opinions raised in Pretorius et al are enough to invite opposing judgments in the abovementioned courts.

#### ***5.4. The nature and the extent of protection provided in section 9(2) of the Constitution***

The submission of Moseneke DCJ that 'our state must direct reasonable public resources to achieve substantive equality for full and equal enjoyment of all rights and freedoms'<sup>274</sup> is well intended. Contrary to Moseneke DCJ's view that affirmative active measures cannot be presumed to be unfair in their impact on members of the non-designated groups,<sup>275</sup> such position can be counterproductive. McGregor notes that 'any denial that legitimate restitutionary measures can be unfair in its application would be facetious'.<sup>276</sup> Legitimate restitutionary measures can be unfair in their application, yet Moseneke DCJ holds that such application must be lawful.<sup>277</sup>

##### ***5.4.1. The rationality standard***

Moseneke DCJ stated that affirmative action measures and their implementation are not immune from judicial scrutiny.<sup>278</sup> Thus, he is correct in saying that measures that are directed at remedying the past discrimination must be formulated with due regard not to impact unfairly the dignity of all concerned.<sup>279</sup> It is right to be vigilant that remedial measures under the Constitution do not become an end in themselves, as they are not meant to be punitive and retaliatory.<sup>280</sup>

Erasmus J in the case of *Du Preez v Minister of Justice & Constitutional Development & others*<sup>281</sup> affirmed that Parliament in compliance with the dictates of section 9 (4) of the Constitution enacted the national legislation in the form of two measures: firstly, the EEA<sup>282</sup> and, secondly, the Equality Act.<sup>283</sup> These acts flowed from and continue to give effect to section 9(3) of the equality clause in the Constitution.<sup>284</sup>

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<sup>274</sup> *Barnard* (note 14 above) 18 par 33.

<sup>275</sup> *Ibid* 19 par 37.

<sup>276</sup> C Rautenbach (note 30 above) 35 par 2; see for example McGregor, M "Blowing the whistle? The Future of Affirmative Action in South Africa" (Part 1) 26, 2014, *Mercantile Law Journal* 60-92 at 88

<sup>277</sup> *Barnard* (note 14 above) 19 par 38.

<sup>278</sup> *Ibid* 79 par 69.

<sup>279</sup> *Ibid* 18 par 30.

<sup>280</sup> *Ibid* 19 par 30.

<sup>281</sup> (2006) 27 ILJ 1811 (SE).

<sup>282</sup> 55 of 1998.

<sup>283</sup> 4 of 2000.

<sup>284</sup> *Du Preez v Minister of Justice & Constitutional Development & others (Du Preez)* (note 281 above) par 13

In as far as the EEA is concerned, section 6(2) states that it is not unfair to take affirmative action measures consistent with the purpose of EEA, which is as follows:

- ‘The purpose of this Act is to achieve equity in the workplace by -
- (a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and
  - (b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational levels in the workforce.’<sup>285</sup>

It is worth noting that, in the interpretation of section 6 (2) of the EEA, although affirmative action measures do not necessarily disadvantage any other persons, inevitably some measures will have that effect.<sup>286</sup> This is possible when one person is preferred over another on the basis of race or gender in the appointment to a position for which both had applied.<sup>287</sup>

The minority judgment reasoned that since Barnard’s claim of unfair discrimination was sourced from the contravention of the EEA, such imposes an additional standard to rationality.<sup>288</sup> Further, constitutional values can be in tension when implementing affirmative action measures, thus courts are required to examine implementation with a more exacting level of scrutiny.<sup>289</sup> An additional standard to a rationality standard is necessary. The minority judgment makes a special call for fairness and this call is a step in the right direction.

In *Barnard* an inquiry into section 13 of the EEA was made pertaining to its compliance whether there was a plan or not, the legitimacy of that plan. In section 15 a similar enquiry was done towards preferential treatment, numeral goals and exclusion of quotas. These provisions were looked at in conjunction with section 2 and 6(2) of the EEA. It emerged from this inquiry that Ms Barnard did not challenge the plan or the racial and gender targets it embodied.<sup>290</sup> Thus, in the absence of a proper challenge and argument, the Court could not undermine the decision-maker’s stated reasons on this point.<sup>291</sup> Ms Barnard made no challenge to the fairness, validity and legitimacy of the formulation and implementation of measures, and they were in accordance with section 13 obligations and section 15 read with section 2 of the EEA.

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<sup>285</sup> Section 2 (a) (b) of the EEA (note 8 above).

<sup>286</sup> *Du Preez* (note 281 above) par 18.

<sup>287</sup> *Ibid* par 18.

<sup>288</sup> *Barnard* (note 14 above) 40 par 1, 2-3.

<sup>289</sup> *Ibid*.

<sup>290</sup> *Ibid* 68 par 51.

<sup>291</sup> *Ibid*.

The minority finding concluded that the facts in *Barnard* showed that the National Commissioner's decision passes the fairness standard.<sup>292</sup> The minority judgement stated that what was determinative to them was the pronounced over-representation of white women at the salary level to which Ms Barnard was applying.<sup>293</sup>

Moseneke DCJ in *Barnard* heeded the appeal by Ngcobo J that the transformation must be carried out in accordance with the context of the Constitution.<sup>294</sup> Thus, it is trite that for measures to escape constitutional invalidity they must comply with the protection test standard provided in section 9(2).<sup>295</sup> Once the measure passes the foregoing test, Moseneke DCJ notes, it is neither unfair nor presumed to be unfair.<sup>296</sup> He makes the assertion that this statement is given expression by the Constitution. This interpretation which Moseneke DCJ read into section 9 (2) finds expression in section 6(2) of EEA, and not section 9 (2) of the Constitution. His assertion puts measures beyond the purview of the EEA, irrespective of their content and effect on others.<sup>297</sup> Erasmus J raises a valid question about the nature and extent of protection. He stated that 'if the provisions of subsection (2) of s 9 were to be interpreted as constituting an exception to the unfair discrimination proscribed by subsection (3), then persons disadvantaged by affirmative action measures would have no protection under the equality rights guaranteed by the Constitution.'<sup>298</sup>

In considering whether affirmative action measures are an exception or not, Van der Westhuizen J writes that, in keeping with a holistic reading of section 9, the measures provided for in section 9(2) are not exceptions to the right to equality; they form part of it.<sup>299</sup> He notes that the appropriate assumption under our constitutional framework is that restitutionary or affirmative measures should be welcomed rather than viewed with suspicion.<sup>300</sup>

### ***5.5. The interpretation of section 9(2) of the Constitution in the Barnard case (CC)***

It is necessary to look at the ambit and tenets of the interpretation of statutes and, because the Constitution is the Supreme law of the Republic, it is correct that it is the starting point in the

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<sup>292</sup> *Barnard* (note 14 above) 69 par 52.

<sup>293</sup> *Ibid.*

<sup>294</sup> *Ibid* 18 par 30; *Bato Star Fishing* (note 2 above) par 76.

<sup>295</sup> *Barnard* (note 14 above) 20 par 36.

<sup>296</sup> *Ibid*; see also *Van Heerden* (note 2 above) par 33.

<sup>297</sup> *Du Preez* (note 281 above) par 16.

<sup>298</sup> *Ibid* par 18.

<sup>299</sup> *Barnard* (note 14 above) 77 par 65.

<sup>300</sup> *Ibid.*

interpretation of the legislation.<sup>301</sup> According to section 39, the courts must promote the spirit, purport and object of the Bill of Rights when interpreting any legislation. Ngcobo J states that implicit in this prescript are two prepositions: ‘first, the interpretation that is placed upon a statute must, where possible, be one that would advance at least an identifiable value enshrined in the Bill of Rights; and, second, the statute must be reasonably capable of such interpretation.’<sup>302</sup>

Ngcobo J states that this interpretation is attributed to the fact that the Bill of Rights is the cornerstone of our constitutional democracy. It affirms the democratic values of human dignity, equality and freedom.<sup>303</sup> Thus, when interpreting any provision, promotion must be given to the values of this constitutional democracy.<sup>304</sup>

The interpretation that measures cannot be presumed to be unfair is quite far out of the target of subsection 2 of section 9 of the Constitution.<sup>305</sup> This interpretation is foreign in an intra-textual approach in reading the equality rights.<sup>306</sup> This interpretation would not pass either of the implied twofold test by Ngcobo J; firstly the interpretation which does not advance at least identifiable value enshrined in the Bill of Rights, will be bound to fail; secondly, this interpretation is not reasonably capable of being sourced from the reading of the equality right.

There is a valid point for concern here. By implying that measures cannot be presumed unfair, this interpretation does not regard the impact of the measures on the members of non-designated groups. Even if it were to be accepted that this interpretation will advance at least an identifiable value enshrined in the Bill of Rights, the interpretation that measures cannot be presumed to be unfair cannot be acceptable in this case, because this interpretation is not reasonably capable of being sourced from the reading of the equality right of the Constitution.

The EEA arguably gives effect to subsection 3 of section 9 of the Constitution. However, it is trite that, when applying the Bill of Rights, courts must promote all the values that are fundamentally enshrined in the Bill of Rights. As a result, courts should not readily accept the exclusion or diminution of a fundamental right even by another constitutional right, and certainly not by any other statute.<sup>307</sup> It is true that the Constitution is not subject to the

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<sup>301</sup> *Bato Star Fishing* (note 2 above) par 70.

<sup>302</sup> *Ibid* 72 par 72.

<sup>303</sup> *Ibid*.

<sup>304</sup> *Ibid*.

<sup>305</sup> *Barnard* (note 14 above) 21 par 37.

<sup>306</sup> C Rautenbach (note 30 above) 5 par 1.

<sup>307</sup> *Du Preez* (note 281 above) par 18.

constructions that govern the interpretation of the ordinary law. Thus, it is persuasive to call for an approach that is ‘acutely sensitive to all constitutional values and objectives.’<sup>308</sup> In that context, ‘an interpretation of s 9(2) of the Constitution that sees its implicit approval of affirmative action measures as excluding or negating the right to equality, will therefore offend constitutional principle.’<sup>309</sup>

### ***5.6. The question of the appropriateness of the rationality standard***

When Moseneke DCJ evaluated the question about the manner in which properly adopted affirmative action measures were to be implemented and whether they can be challenged,<sup>310</sup> his finding was in the affirmative. He concluded that there is no valid reason ‘why courts are precluded from deciding whether a valid employment equity plan has been put into practice lawfully’.<sup>311</sup> He eloquently stated that a validly adopted employment equity plan must be put to use lawfully.<sup>312</sup> This statement disagrees with his controversial statement that measures cannot be presumed unfair. Rautenbach put it differently, stating that ‘the only logical implication is that the determination of the lawfulness of the implementation of affirmative action measures otherwise rational measure must be its fairness and or the impact of such implementation on the right of those disadvantaged by it’<sup>313</sup> He says Moseneke DCJ in the *Barnard* case himself exposed the inappropriateness of the rationality standard of review when he chose a bare minimum standard, and said that, as far as the principle of legality is concerned, the ‘implementation of measures would require to be rationally related to the terms and objects of the measure.’<sup>314</sup> Measures must advance their legitimate purpose and nothing else in their application. He says ordinarily, irrational conduct in implementing a lawful project attracts unlawfulness. Moreover, Moseneke DCJ reiterated that the implementation of corrective measures must be rational, and as much as this rationality standard is the bare minimum requirements, it is not necessary to define the standard finally.<sup>315</sup>

It seems that this emphatic statement on the lawfulness implementation would suggest that a perfectly rational measure can be abused.<sup>316</sup> Rautenbach raises a good point that, if the

<sup>308</sup> *Du Preez* (note 281 above) par 18.

<sup>309</sup> *Ibid* par 18.

<sup>310</sup> *Barnard* (note 14 above) 21 par 38.

<sup>311</sup> *Ibid*.

<sup>312</sup> *Ibid*.

<sup>313</sup> C Rautenbach (note 30 above) 5 par 1.

<sup>314</sup> *Barnard* (note 14 above) 21 par 39.

<sup>315</sup> *Ibid*.

<sup>316</sup> C Rautenbach (note 30 above) 6.

rationality standard ‘in terms of *Van Heerden*’s interpretation of the internal test for compliance as found in section 9 (2) is truly sufficient to mark such measure as constitutionally compliant, then this consideration regarding the implementation of measures must be surely irrelevant.’<sup>317</sup>

The appropriateness of the rational standard is indeed questionable, and without doubt this judicial standard is not sufficient, despite the fact that the judges in *Barnard* showed deference in the Moseneke DCJ’s main judgment. Three judges implied that they were willing to reject this judicial standard.<sup>318</sup> Cameron J, Froneman J and Majiedt AJ were bold in their approach to determining Ms. Barnard’s case; they said in adjudicating this matter that it required them to apply a less deferential standard than mere rationality.<sup>319</sup> This approach surely underscores the inappropriateness of the rationality standard. In *Van Heerden* Moseneke DCJ stated that ‘a measure should not constitute an abuse of power or impose such substantial and undue harm on those excluded from its benefits that our long-term constitutional goal would be threatened.’<sup>320</sup>

Rautenbach appears to be right when she says a ‘reference to the substantial harm to those excluded from benefits simply cannot refer merely to the lawfulness of implementation of a measure being measured with reference to rationality; it must require interrogation of the fairness of such implementation.’<sup>321</sup>

### ***5.7. Constitutional adjudication***

Pretorius writes that the ‘Constitution commits itself to a standard of review which requires all rights limiting action to be reasonable and justifiable in an open democratic society based on human equality, dignity and freedom.’<sup>322</sup> Pretorius makes a valid point that the Constitution prescribes this standard for assessing whether limits imposed on the realisation of a rights in a particular context is justified.<sup>323</sup>

In a separate minority judgment, Van der Westhuizen J noted that a ‘measure might be legitimate in form, but its application may be unlawful.’<sup>324</sup> Moseneke DCJ in the majority judgment recognised this and stated that, ‘a validly adopted Employment Equity Plan must be

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<sup>317</sup> C Rautenbach (note 30 above) 6.

<sup>318</sup> Ibid 10.

<sup>319</sup> Ibid; see *Barnard* (note 14 above) par 95.

<sup>320</sup> *Van Heerden* (note 2 above) par 44.

<sup>321</sup> C Rautenbach (note 26 above) 7.

<sup>322</sup> Pretorius, J L (note 1 above) 31-44.

<sup>323</sup> Ibid.

<sup>324</sup> *Barnard* (note 14 above) 81 par 74.

put to use lawfully.<sup>325</sup> Van der Westhuizen J says that ‘courts are generally reluctant to presume that provisions in the Constitution operate in tension and so try to construe them harmoniously’<sup>326</sup>

Van der Westhuizen J states that constitutional provisions – including those protecting rights – have to be interpreted within the context of the Constitution as a whole.<sup>327</sup> It is an undeniable fact that no provision may be interpreted in isolation and no right protected and enforced without regard to other rights.<sup>328</sup> In particular, the exercise of one constitutional right may often have to be balanced against another. It seems that this is what our courts lack in their adjudication of the right to equality. In particular the jurisprudence of the *Van Heerden* and *Barnard* judgment are both exemplary as they could not construe harmoniously constitutional provisions that operate in tensions. This is evident from their determination of the appropriate standard applicable in the implementation of affirmative action measures. Woolman and Botha acknowledge this concern, and suggest that, when a court is presented with hard choices, it ‘must not view the choice of one good over another good in hard cases as arbitrary. Instead, it must be candid about the reasons for its choices and hope that its candour about the reasons for its choices ultimately reflects the exercise of good judgment.’<sup>329</sup>

Van der Westhuizen J makes a call directed to section 7 (3) and 36 of the Constitution,<sup>330</sup> which states that rights are subject to limitations contained in the Bill of Rights or in other provisions of the Constitution and this call is well-intended. He says that as much as this formula is applicable to the law of general application but it could be very effective in measuring the impact of the enforcement of one right on another,<sup>331</sup> and this is a good step to a right direction.

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<sup>325</sup> *Barnard* (note 14 above) 81 par 74.

<sup>326</sup> *Ibid* 86 par 88.

<sup>327</sup> *Ibid* 88 par 90.

<sup>328</sup> *Ibid*.

<sup>329</sup> Woolman and Botha “*Limitations*” in Woolman et al (eds) *Constitutional Law of South Africa Service 3* (2011) vol 2(2) 34–99.

<sup>330</sup> Section 7(3) of the Constitution (note 9 above) provides that “[t]he rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill”, while section 36(2) sets out that “[e]xcept as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.” Subsection (1) states:

“The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.”

<sup>331</sup> *Barnard* (note 14 above) 90 par 93.

The best thing about this formula is that a limitation analysis is an acknowledgment that constitutional democracies are faced with complex competing interests, rights and values.

### ***5.8. Summation of findings***

It is evident that the rationality standard of review is not capable of balancing the competing interests, rights and values enshrined in the Constitution. Moseneke DCJ in *Barnard* exposed the inappropriateness of the rationality standard of review. Moseneke DCJ made an emphatic statement on the lawful implementation of measures and this inevitably suggests that a perfectly rational measure can be abused. Noting that measures might be legitimate in form and unlawful in their application, it is not appropriate to say that measures cannot be presumed to be unfair. Thus, it is not unreasonable to call for a fairness test as a judicial standard of review. However, it should be noted that Moseneke DCJ in *Van Heerden* and *Barnard*, along with Van der Westhuizen J, cries foul that measures are understood as equality-driven mechanisms in their own right, rather than carve-outs from what is discriminatory.

The appropriate assumption under our constitutional framework is that restitutionary or affirmative measures should be welcomed rather than viewed with suspicion. It is submitted that the section 36 limitation clause is the best judicial standard of review, in a limitation analysis is acknowledgment that constitutional democracies are faced — and must wrestle — with complex competing interests, rights and values. With regard to the ongoing legal issue about the appropriate judicial standard for the implementation of legitimate affirmative action measures, the formula in terms of section 36 provides good step to the right direction for constitutional transformation.

## CHAPTER 6: SUBSTANTIVE STANDARD OF CONSTITUTIONAL REVIEW

### 6.1. *Outline*

This chapter is preceded by the critical evaluation of the rationality standard against the background of unfair discrimination, as illustrated by the Constitutional Court cases that have formed the frame of reference in the jurisprudence of normative standard of rationality. An evaluative and critical analyses of an appropriate standard of review begun when rationality as a standard of review for affirmative action measures was assessed in the context of its efficacy and productivity in the new constitutional order. This chapter will in addition contrast the tests of fairness and proportionality against the rationality standard.

### 6.2. *The coherence of constitutional democracy*

South Africa is founded on a constitutional democracy. The need for a normative standard emanates from a democratic necessity to have a properly conceived standard of constitutional review of legislation and other governmental action.<sup>332</sup> Thus, the coherence of constitutional democracy through constitutional review will be articulated by showing the interrelatedness of the substantive normative standard of constitutional review with core democratic values.<sup>333</sup> The importance of such standard serves to institutionalise democratic values in and through adjudicative process by determining both intensity and normative substance of the duty of public justification which is the essential element of a deliberative democracy.<sup>334</sup>

An intrinsic standard will be determined by assessing the key components of a deliberative democracy which will be a normative benchmark for evaluating the democratic credentials of the substantive standard of constitutional review.<sup>335</sup> Thus it is important to ask first ‘how the substantive standards of constitutional review can enhance or diminish public accountability through deliberative participation in the context of the process of constitutional review.’<sup>336</sup> Secondly, the question goes to ‘the scope that substantive standards of constitutional review allow for facilitating the kind of normative discourse that a deliberative understanding of democracy ideally envisages.’<sup>337</sup> Thirdly, it could be said that the rationality test is endowed with tools to keep the coherence of constitutional democracy. Accordingly, the analysis will be conducted with reference to the way the Constitutional Court has conceptualised and applied

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<sup>332</sup> JL Pretorius (note 17 above) 411 par 1.

<sup>333</sup> Ibid.

<sup>334</sup> Ibid.

<sup>335</sup> Ibid 441 par 2.

<sup>336</sup> JL Pretorius (note 17 above) 414 par 2.

<sup>337</sup> Ibid.

the standard of rationality in the course of constitutional review of legislation and other governmental action in particular contexts.<sup>338</sup> This dissertation argues for the amendment of the normative rationality standard for affirmative action measures.<sup>339</sup>

A reference to deliberative democracy requires that, for its legitimacy under permanent moral diversity, the deliberative conception of democracy would have to be organised around an ideal of political justification - in that such requires the finding of publicly acceptable reasons for collectively binding reasons.<sup>340</sup> Democratic legitimacy is based on such that it is intimately 'linked to the ability and opportunity to participate in an effective deliberation on the part of those subject to collective decisions, which 'requires justification in terms that, on reflection, [people] are capable of accepting.'<sup>341</sup> A 'deliberative understandings of democracy therefore represent an attempt to acknowledge and accommodate moral diversity from a standpoint of discursive inclusion based on equal concern and respect.'<sup>342</sup> The crucial point of a deliberative democracy process requires an account of how decisions equates when evaluated in terms of dialectical understanding of the constitutive values of democratic legitimacy.<sup>343</sup> Public justification is an indispensable figure of democratic legitimacy through deliberative engagement and this will capacitate the exponents of deliberative democracy to credible reconcile democracy and constitutionalism.

### **6.3. Constitutionalism**

Constitutionalism is an ideal that government ought to derive its powers from a written constitution and that its powers ought to be limited to those set out in the constitution.<sup>344</sup> Thus, it is commendable that for an effective limitation on state power, three associated principles of law, that is to say constitutional supremacy, justiciability and entrenchment provide a normative benchmark.<sup>345</sup> Constitutionalism, incidentally, has been principally postulated as a necessary constraint on democratic decision-making from the vantage point ideally

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<sup>338</sup> JL Pretorius (note 17 above) 414 par 2.

<sup>339</sup> See for example *Barnard* (note 14 above) 49-50 par 73.

<sup>340</sup> JL Pretorius (note 21 above) 414 par 2; see also Cohen "Procedure and substance in deliberative democracy" in Bohman & Rehg (eds) *Deliberative democracy: Essays on reason and politics* (1997) 412

<sup>341</sup> JL Pretorius (note 17 above) 441 par 2; Dryzek *Deliberative 17 democracy and beyond: Liberals, critics, contestations* (2000) 1. For a brief overview of deliberative democracy theory, see Roux "Democracy" in Woolman *et al* (eds) *Constitutional law of South Africa* 2 ed (2006) 10-15-10-18.

<sup>342</sup> JL Pretorius (note 17 above) 414 par 3.

<sup>343</sup> *Ibid* 417 par 2.

<sup>344</sup> De Waal (note 10 above) 8 par 2.

<sup>345</sup> *Ibid*.

disconnected from the notion of democracy itself.<sup>346</sup> As a result, a critique of courts and judges is that, notwithstanding that the latter are unelected, they have power to strike down the decisions of a democratic legislature and a democratic representative government. Constitutionalism provides that democracy is not simply ‘the rule of the people but always the rule of people within certain predetermined channels, according to certain procedures.’<sup>347</sup> In this context, ‘the pre-commitment to certain procedural and substantive constraints on the power of the majority that are inherent in the constitutionalism make democracy stronger not weaker.’<sup>348</sup> In addition, a perspective of deliberative understanding of democracy, ‘lays a more plausible foundation for the constitutive function of constitutionally protected values and rights as necessary conditions for the legitimacy of democratic will-formation.’<sup>349</sup> In this context ‘democratic legitimation through public justification depends on the extent to which a constitution is designed to, and succeeds in, safeguarding the deliberative legitimacy conditions of democratically established law.’<sup>350</sup>

Pretorius asserts that justification through deliberative engagement is dependent ‘on both procedural (participatory) and substantive (public reason) conditions’<sup>351</sup> Accordingly, he states that ‘constitutionalism authoritatively defines and safeguards a democracy’s legitimating basis by entrenching a deliberative structure, which is defined by both inclusive participation and accountability in terms of a particular normative framework.’<sup>352</sup>

#### **6.4. Constitutional review**

Constitutional review is closely linked to scrutinizing quality and propriety of reasons justifying government actions, amongst other aspects.<sup>353</sup> Contrary to the vantage point which present constitutionalism to be disconnected from the notion of democracy itself, constitutionalism’s function is wide-ranging indicating the extent and forms of democratic

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<sup>346</sup> JL Pretorius (note 17 above) 417 par 3; see for example: De Waal (note 10 above) 9 par 2, *S v Makwanyane* 1995 (3) SA 391 (CC) (*Makwanyane*); see also Ramatlhodi “*The big read: ANC’s fatal concessions*” *The Times* (2011-09-01) available at <http://www.timeslive.co.za/opinion/commentary/2011/09/01/the-big-read-anc-s-fatal-concessions> (accessed 2013-11-12).

<sup>347</sup> De Waal (note 10 above) 9-10 par 4; S Holmes “*Precommitment and Paradox of Democracy*” in J Elster & R Slagstad (eds) *Constitutionalism and Democracy* (1998) 231.

<sup>348</sup> De Waal (note 10 above) 10 par 1.

<sup>349</sup> JL Pretorius (note 17 above) 417 par 3.

<sup>350</sup> *Ibid.*

<sup>351</sup> *Ibid* 418 par 1; De Waal (note 10 above) 10 par 1.

<sup>352</sup> *Ibid.*

<sup>353</sup> CF Zurn *Deliberative democracy and the institutions of judicial review* (2009) 242-3.

participation, and it has ‘but also – however provisionally and imperfectly – the normative orientation of a democracy’s justificatory discourse.’<sup>354</sup>

The role of the latter element, says Pretorius, is to ensure that justificatory reasoning is firmly situated in the evaluative space of a Constitution in a properly functioning deliberative democracy.<sup>355</sup> In this context, Zurn says the tasks of Constitutional review are manifold:

“keeping open the channels of political change, guaranteeing that individuals’ civil, membership, legal, political, and social rights are respected, scrutinizing the constitutional quality and propriety of the reasons justifying governmental action, and ensuring that the channels of influence from independent civil society public spheres to the strong public sphere remain unobstructed and undistorted by administrative, economic, and social powers.”<sup>356</sup>

It is manifestly evident from the foregoing quotation that the constitutional review is unmatched, and regarding the indeterminacy of much of the constitutional essentials, this institution ‘must in order to reflect the interdependence of democracy and constitutionalism display a deliberative character.’<sup>357</sup> Further, the ‘interpretation and application of the Constitution must be equally situated in a fully inclusive deliberative space.’<sup>358</sup> From this perspective the ‘process of constitutional review itself must be reflective of, and conducive to, the substantive democratic values of participation, inclusivity, openness, transparency, and public justification.’<sup>359</sup>

Thus, the notion of institutionalising public justification in government settings is correlated to the need for public accountability.<sup>360</sup> Pretorius states that public accountability needs to be realised on at least two path. The first which will not be considered here concerns the complex issue of constitutional design of constitutional review which, concerns main issues like procedures, powers, and composition of the designated body for exercising this function its place in the architecture of democratically constituted governmental institutions. The second path has regard to ‘how the substantive standards of constitutional review serve to institutionalise the core ethos of deliberative democracy, that is, public justification through deliberative engagement.’<sup>361</sup> The latter path will be considered further here, as ‘it is about the

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<sup>354</sup> JL Pretorius (note 17 above) 418 par 1.

<sup>355</sup> Ibid.

<sup>356</sup> C F, Zurn (note 353 above) 242-3.

<sup>357</sup> JL Pretorius (note 17 above) 418 par 3.

<sup>358</sup> Ibid.

<sup>359</sup> Ibid.

<sup>360</sup> Ibid.

<sup>361</sup> Ibid 419 par 1.

potential of these standards to realise core deliberative democratic values, namely transparency, inclusivity and accountability in terms of the Constitution's 'public reason.'<sup>362</sup>

#### **6.4.1. The 'minimum threshold' rationality standard**

The rationality standard was analysed in chapter 3.<sup>363</sup> It is hardly contestable that this standard is a minimum requirement prescribing the lowest possible threshold for the validity of the exercise of public power.

It should be clear that the potential of the rationality standard to effect public justification is arguably sufficient. Accordingly, this standard's capacity to realise the deliberative democratic objective of public accountability will be analysed.<sup>364</sup>

#### **6.4.2. Rationality, and deliberative democracy and constitutionalism**

The rationality standard has the following two issues: firstly it is about its conceptualisation by the Constitutional Court, and in this context the methodology of the rationality analysis. Secondly, the issue is about 'the overextension of the scope of application of the rationality standard to Bill of Rights disputes in contexts where it is unsuited to bring about the constitutionally required degree and kind of justification of limitations of fundamental rights.'<sup>365</sup>

#### **6.4.3. Instrumental rationality**

It evident in *Van Heerden* that rationality analysis is limited, for the purpose of establishing constitutional compliance, to an investigation of the utility of the means to serve particular ends. Be that as it may, the rationality standard requires courts to inquire into the legitimacy of governmental purpose. However, such process is superficial in that it is assessed within a non-relational, free standing frame of reference. Given that in terms of the rule of law public power should not be arbitrary, such denies the need to show the legitimacy of the assailed governmental end against substantive constitutional values or any conception of common good.<sup>366</sup>

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<sup>362</sup> JL Pretorius (note 17 above) 419 par 1.

<sup>363</sup> *Law Society of South Africa v Minister for Transport* 2011 2 BCLR 150 (CC) (LSSA) para 29

<sup>364</sup> JL Pretorius (note 17 above) 420 par 2.

<sup>365</sup> *Ibid.*

<sup>366</sup> Du Plessis & Scott "The variable standard of rationality review: Suggestions for improved legality jurisprudence" 2013 (130) *SALJ* 597, 616: "one of the problems with the current application of the [rationality] test is that a deferential approach has often been applied to an already deferential standard."

The rationality standard brings about the assessment of government purposes on their own terms, which result is exclusive of ‘the full spectrum of competing interests and a determination of their relative weight in terms of an integrative account of the Constitution structure.’<sup>367</sup> The role of rationality in the Constitution value structure as a whole is superficially confined to the legitimacy of governmental purpose. Therefore, a normative benchmark for ‘the constitutional validity of the way in which a particular governmental purpose is realised’<sup>368</sup> should be determined with reference to the way its realisation gives effects to the constitutional values.<sup>369</sup> As a result, regard ought to be given on ‘impacts on other constitutionally recognised goods and interests.’<sup>370</sup> From this perspective, this will ensure that there is no ‘risk of distorting the constitutional value structure by elevating a particular government purpose as an end in itself.’<sup>371</sup>

It is clear that ‘the instrumental rationality is ill-suited to serve as a normative constitutional standard to justify and legitimise the exercise of public power in order to resolve conflict and effect socio-political integration’<sup>372</sup> Legal standards are supposed to provide the bases to choose amongst various competing ends or relate them in a meaningful way to an integrating normative standard in order to claim any democratic justificatory and legitimising value, and it is self-explanatory that instrumentality standard has no such bases.<sup>373</sup> Given that rationality standard is a constitutional norm with the thrust of resolving conflict and realising socio-political integration, among other things therefore, this standard offers minimal ‘form of framework for reasoning that can prevent the danger of social exclusion and normative distortion.’<sup>374</sup>

#### ***6.4.4. Proportionality and overextension of the rationality standard in Bill of Rights disputes***

It is trite that the rationality standard cannot facilitate the degree of justification required of government action which severely impacts of on fundamental rights.<sup>375</sup> Section 36 of the Constitution “commits itself to a standard of review which requires all rights-limiting measures

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<sup>367</sup> JL Pretorius (note 17 above) 421 par 2.

<sup>368</sup> Ibid.

<sup>369</sup> *Barnard* 2014 (note 14 above) 84 par 83.

<sup>370</sup> JL Pretorius (note 17 above) 421 par 2.

<sup>371</sup> Ibid.

<sup>372</sup> Ibid.

<sup>373</sup> Ibid.

<sup>374</sup> Ibid.

<sup>375</sup> *LSSA* (note 363 above) para 36.

to be ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.’<sup>376</sup> The courts’ perspective of section 36 emphasizes that such provides a reasonableness standard involving a proportionality requirement.<sup>377</sup> As far as section 36 is concerned, it requires that the rights-limiting measures be justified by an essential public interest and to be less restrictive means to achieve the purpose.<sup>378</sup>

The proportionality standard provides the degree of democratic accountability expected of rights-limiting measures which the rationality inquiry is not able to do. Given that the rationality standard seeks only minimal ‘measure of justification in respects of legitimacy of the purposes pursued and means of coherence, it relieves the state of the duty to justify actions into two significant respects.’<sup>379</sup> Firstly, it is patent that the rationality standard affords the state much latitude regarding the extent to which rights may be limited to achieve governmental ends then proportionality standard does.<sup>380</sup> The rationality standard, when compared with the proportionality standard, does not herald the same responsiveness to situations where the infringements of rights are more intrusive.<sup>381</sup> In essence, rights limiting measure under rationality review will prevail even if disproportional or unfair in that the rationality standard of justification does not provide for explanation for the disproportional or invasion of rights.<sup>382</sup>

Secondly, it cannot be denied that the rationality standard exempts the state of the intrinsic ‘justificatory exercise of demonstrating, by means of reason assessment of the competing considerations at stake, that a right is outweighed by public good in the particular circumstances of the case.’<sup>383</sup> However, on the other hand, the proportionality standard makes it a prerequisite for the state to account for the prioritisation of public good over a fundamental right in each and every circumstances in a legitimate order, that is to say an ‘assessment of the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society’.<sup>384</sup> The factors postulated in terms of section 36 of the Constitution correspond exactly to the factors identified.<sup>385</sup>

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<sup>376</sup> JL Pretorius (note 21 above) 427 par 1; C Rautenbach (note 30 above) 4 par 1.

<sup>377</sup> *Barnard* 2014 (note 14 above) 88 par 90.

<sup>378</sup> *Makwanyane* (note 346 above) para 104.

<sup>379</sup> JL Pretorius (note 17 above) 421 par 2; see for example Pretorius (note 62 above) 37–42.

<sup>380</sup> *Ibid* 428 par 1.

<sup>381</sup> *Makwanyane* (note 346 above) para 104.

<sup>382</sup> JL Pretorius (note 17 above) 428 par 2; *Prinsloo* (note 180 above) para 36.

<sup>383</sup> *Ibid* 421 par 2.

<sup>384</sup> *Makwanyane* (note 346 above) par 104.

<sup>385</sup> De Waal (note 10 above) 177 par 3.

In the essence of section 36, proportionality is endowed with an analytical structure to reveal the state exposition of constitutional justice which inform its decision making.<sup>386</sup> Therefore, this standard matches the ‘service of the democratic values of openness, transparency and reason responsiveness.’<sup>387</sup> Furthermore, the ‘superior democratic credentials of the principle of proportionality recommends it as the appropriate standard in terms of which account must be given for rights-limiting measures.’<sup>388</sup> It is not difficult to find that proportionality standard gives to a wide-ranging contextual frame of reference for solving rights disputes then would have been the case when compared with the rationality standard.<sup>389</sup>

In light of the interrelatedness of democracy and constitutionalism, ‘the democratic system of government as expressed in the Constitution should determine the power to review administrative action and the extent thereof.’<sup>390</sup> Accordingly, ‘the standards of constitutional review ought to be dictated in terms of what is required to give effect to the foundational values of accountability, responsiveness and openness’.<sup>391</sup> A normative proportionality as the constitutional standard of review is preferable in that it facilitates a more deliberatively inclusive process of constitutional review that allows more voices to be heard and more perspectives to be represented. This is plausibly done in two ways: firstly, given that this standard ascribe to the balancing of competing claims, it allows ‘discursive avenues for a wider spectrum of relevant concerns to influence judicial deliberation;’<sup>392</sup> secondly, it is evident in section 36 that rights limitations are required to be justifiable in an open and democratic society based on human dignity, equality and freedom, and that this section ‘in principle opens up reference to any and all the values characteristic of such a society in opposition to, or in defence, of the limitation.’<sup>393</sup> It is evident with regard to the rationality standard that its use ‘structure[s] deliberation in such a way that the perspectives cannot be raised because they are categorically deemed irrelevant, irrespective of how closely they reflect fundamental constitutional values.’<sup>394</sup>

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<sup>386</sup> JL Pretorius (note 17 above) 428 par 2.

<sup>387</sup> De Waal (note 10 above) 16 par 3: “Reference to the principle of democracy in the Constitution are... followed by references to the ideas of openness, responsiveness and accountability.”

<sup>388</sup> JL Pretorius (note 17 above) 428 par 2.

<sup>389</sup> Ibid 428-9 par 2.

<sup>390</sup> *Bel Porto School Governing Body v Premier of the Province, Western Cape* 2002 9 BCLR 89169 (CC) (*Bel Porto school*) para 163.

<sup>391</sup> *Bel Porto School* (note 390 above) para 163.

<sup>392</sup> Pretorius (note 63 above) 42.

<sup>393</sup> JL Pretorius (note 17 above) 429 par 1.

<sup>394</sup> Ibid.

### 6.5. Fairness standard

In *Barnard*, the minority judgment discussed the tension that arises in the formulation and implementation of measures crafted to give effects to the transformative demands of the Constitution.<sup>395</sup> As a result they indicated a preference for the fairness standard as an appropriate and well orientated normative designed to amicably balance competing interests.<sup>396</sup>

Goldstone J in *Harksen* tabulated the stages of an inquiry which become necessary when there is an alleged violation of the equality clause:

- (a) Does the challenged law or conduct differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of s 9 (1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.
- (b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:
  - (i) Firstly, does the differentiation amount to discrimination. If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
  - (ii) Secondly, if the differentiation amounts to ‘discrimination’, does it amount to ‘unfair discrimination’? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.  
 If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of s 9 (3) and (4).
- (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitation clause.<sup>397</sup>

The foregoing quotation has regard to equality clause violation. Moreover, section 9 of the Constitution identifies three ways in which ‘law or conduct might differentiate surely between people or categories of people, “mere differentiation” forms part of the first stage of inquiry. While it does treat some people differently to others, it does not amount to discrimination.<sup>398</sup> When differentiation amounts to discrimination, and either unfair discrimination is presumed

<sup>395</sup> *Barnard* 2014 (note 14 above) 40 par 1.

<sup>396</sup> *Ibid* 40 par 2 - 3.

<sup>397</sup> *Harksen* (note 182 above) 235-6 par 1.

<sup>398</sup> I Currie & J de Waal (note 10 above) 244 -45 par 1.

or established, but the impugned act or conduct is found to be fair, there will be no violation of quality clause.<sup>399</sup>

It was determined in *Harksen* that in order to determine whether the discriminatory measure has an unfair impact on the aggrieved person, it becomes necessary to have regard to the “nature of the provision and the purpose sought to be achieved by it”.<sup>400</sup> Goldstone J specifically used the example of a remedial or restitutionary measure to explain the relevance of this factor:

‘If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question’.<sup>401</sup>

It is generally accepted that the underlying reason for the incorporation of affirmative action in the Constitution was to institutionalise its protection from stringent standards of review. Such scrutiny facilitated the demise of such measures in United State of America.<sup>402</sup> It should be born in mind that Moseneke J in *Van Heerden* explicitly cast the fairness standard as not befitting section 9 substantive equality approaches.<sup>403</sup> He stated that the American equality jurisprudence regards ‘affirmative action measures as a suspect category which must pass strict scrutiny.’<sup>404</sup> This approach is the main basis upon which fairness standard is rejected as the standard of judicial review for affirmative action measures.

On the contrary, Pretorius argues that the fairness test, which had its inception in *Harksen*, does not necessarily open doors for American-style strict scrutiny.<sup>405</sup> He says the fairness test generously accommodates affirmative action measures in that, if the purpose of a measure is aimed at the ‘furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question.’<sup>406</sup> From this perspective, Pretorius says that, considering the contextual factor of the nature of the differential measures and their importance in the fairness inquiry, ‘courts are, in the process of weighing them against conflicting or competing interests, bound to take judicial notice of the constitutional endorsement of the necessity of such measures and accord their remedial purpose the importance intended by the

<sup>399</sup> J de Waal (note 10 above) 244 par 1.

<sup>400</sup> *Harksen* (note 181 above) 50.

<sup>401</sup> *Ibid.*

<sup>402</sup> JL Pretorius (note 1 above) 550; *Van Heerden* (note 2 above) par 147.

<sup>403</sup> *Van Heerden* (note 2 above) par 29.

<sup>404</sup> *Ibid.*

<sup>405</sup> JL Pretorius (note 1 above) 550.

<sup>406</sup> *Harksen* (note 181 above) 41; JL Pretorius (note 1 above) 551.

Constitution.<sup>407</sup> He plausibly says such measures will not reflexively be subject to strict judiciary scrutiny merely because they differentiate on the prohibited ground.<sup>408</sup> Be that as it may, he notes that fairness and proportionality of a differential measure cannot rest on a means to an end focus, but ought to ultimately have to be determined with reference to the accumulative effect of all relevant factors.<sup>409</sup> He does not lose the sight over the impact which such measures may have on competing rights and interest on those detrimentally affected by it.

This indicates that the remedial or restitutionary nature and purpose of the measures are not placed beyond the reach and need for a fairness scrutiny as such, but must be treated as weighty considerations in favour of a finding of fairness.

### ***6.6. Summation of findings***

In the perspective of affirming the constitutional democracy, the contrast on overall standards reveals that the rationality standard does not affirm the coherence of constitutional democracy. This because this standard falls short of the important figure of constitutional review, which is reflective of, and conducive to, the substantive democratic values of participation, inclusivity, openness, transparency, and public justification. The methodology of the rationality analysis risks encouraging a narrow instrumental version of rationality,

The rationality standard brings about the assessment of government purposes on their own terms, which results in the testing of their legitimacy, exclusive of ‘the full spectrum of competing interests and a determination of their relative weight in terms of an integrative account of the Constitution structure.’<sup>410</sup> Therefore, a normative benchmark for ‘the constitutional validity of the way in which a particular governmental purpose is realised’<sup>411</sup> should be determined with reference to the way its realisation gives effects to the constitutional values.<sup>412</sup>

Legal standards are supposed to provide the basis to choose amongst varying competing ends or to relate them in a meaningful way to an integrating normative standard in order to claim any democratic justificatory and legitimising value. It is self-explanatory that the

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<sup>407</sup> JL Pretorius (note 1 above) 551.

<sup>408</sup> Ibid.

<sup>409</sup> Ibid.

<sup>410</sup> JL Pretorius (note 17 above) 421 par 2.

<sup>411</sup> Ibid.

<sup>412</sup> *Barnard* 2014 (note 14 above) 84 par 83.

instrumentality standard has no such basis.<sup>413</sup> The proportionality standard provides the degree of democratic accountability expected of rights-limiting measures, whereas the rationality inquiry is not able to realise such. Standards of constitutional review ought to be dictated in terms of what is required to give effect to the foundational values of accountability, responsiveness and openness.<sup>414</sup> A normative proportionality standard of review is more appropriate in that it facilitates a more inclusive process of constitutional review that allows more voices to be heard and more perspectives to be represented.

It is true that the fairness test generously accommodates affirmative action measures in that, if the purpose of a measure is aimed at the 'furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question.'<sup>415</sup> From this perspective courts are, in the process of weighing measures against conflicting or competing interests, bound to take judicial notice of the constitutional endorsement of the necessity of such measures and accord their remedial purpose the importance intended by the Constitution.

The fairness and proportionality of a differential measure cannot rest on a means to an end focus, but ought to ultimately have a determination with reference to the accumulative effect of all relevant factors.<sup>416</sup> Accordingly, consideration ought to be given to the impact which such measures may have on competing rights and interest on those detrimentally affected by it.

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<sup>413</sup>JL Pretorius (note 17 above) 423 par 1.

<sup>414</sup>*Bel Porto School* (note 390 above) par 163.

<sup>415</sup>*Harksen* (note 182 above) 41; JL Pretorius (note 1 above) 551.

<sup>416</sup>JL Pretorius (note 1 above) 551.

## CHAPTER 7: CONCLUSION AND RECOMMENDATIONS

### 7.1. Conclusion

This study focuses on the challenges facing the Constitutional Court in adjudicating affirmative action disputes, being the reconciliation of the compelling need for transformative justice with the core function of the Constitution to integrate, in a fair and proportional manner, the diversity of rights and interests at stake. The challenge is facilitated by the rationality standard which, it is argued, fails to enhance the court's capacity and role to integrate and weigh up competing rights and interests entrenched in the Constitution.

The Constitutional Court in *Barnard* instead opted to extract the constitutional conditions for validity of affirmative action measures from section 9 (2) exclusively. Thus, there is no regard given to the fairness and proportionality requirements of section 9 (3) and 36 respectively, which serves to imply that affirmative action is a means to end, and self-justifying. This critique is borne out in the majority judgement in *Barnard* where Moseneke CDJ reaffirmed that, if restitutionary measures, even based on any of the prohibitory grounds of discrimination in section 9 (3), pass muster under section 9 (2), they cannot be presumed to be unfairly discriminatory.<sup>417</sup> However, Moseneke CDJ concedes that, irrational conduct in implementing a lawful project attracts unlawfulness. Moseneke DCJ notes that the rationality standard bears the minimum requirements, and it is not necessary to define the standard finally.<sup>418</sup> It is a cause for concern that these measures could be constituent in the abuse of power or impose substantial and undue harm on those excluded from its benefits or that they should be unfair in their applications.<sup>419</sup> Be that as it may, he states that an affirmative action measure 'must be applied to advance its purpose and nothing else.'<sup>420</sup>

It is of concern that the third inquiry in *Van Heerden* imports considerations that go beyond rationality testing.<sup>421</sup> This inquiry must take into account whether the measure undermines the goal of section 9 to promote the long-term vision of a society based on non-racialism and non-sexism and must be alive to shifting circumstances and the distribution of privilege and under-privilege in society.<sup>422</sup>

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<sup>417</sup> *Van Heerden* (CC) (note 2 above) 21 par 2.

<sup>418</sup> *Barnard* 2014 (note 14 above) 21-2 par 37-39.

<sup>419</sup> *Ibid* par 44.

<sup>420</sup> *Barnard* 2014 (note 14 above) 21 par 39.

<sup>421</sup> JL Pretorius (note 1 above) 562 par 2.

<sup>422</sup> *Barnard* 2014 (note 14 above) 80 par 75

This research acknowledges that affirmative action measures are based on the vision of the public good and that the government's purpose is to protect and advance persons or categories of persons disadvantaged by unfair discrimination. However, it is important to safeguard against unfair or unreasonably disproportional forms of affirmative action that would be irreconcilable with realising the long term ideal of equality based on the affirmation of equal worth and respect.

In chapter 4 it was noted that 'constitutionally, the vision of public good cannot be limited to a particular public purpose and the coherence or integrity of a particular governmental aims is evidently not determinable by means of self-reference only.'<sup>423</sup> The use of self-reference only, 'flies in the face of the fact that in reality no social good is pursued in a space devoid of competing interests and to treat them as such would be tantamount to judging the constitutionality of measures designed to promote such goods in terms of their own stated objectives only.'<sup>424</sup> The Constitutional Court's contextualization, in its interpretation of the affirmative action clause of the Constitution, has principally isolated this clause from the broader normative framework of the equality guarantee and the Constitution as a whole. As a result this approach limits basic constitutional values and undermines the ability of the Constitution to meaningfully integrate competing interests, in the context of affirmative action disputes, in a comprehensive and fair manner.

This dissertation has found that the inappropriateness of the rationality standard of review reveals that a perfectly rational measure can be abused - hence the implementation of measures must be lawful (see chapter 5). The fairness standard, given that it substantially overlaps with the proportionality standard and that its presence in section 9 of the equality clause is compelling in the adjudication of claims of discrimination, does not surpass the credentials of the proportionality standard. It is because, in keeping with a holistic reading of section 9, the measures provided for in section 9(2) are not exceptions to the right to equality; they form part of it.<sup>425</sup> The appropriate assumption under the constitutional framework is that restitutionary or affirmative action measures should be welcomed rather than viewed with suspicion.<sup>426</sup>

In chapter 6 this study considered overall standards and found that the rationality standard does not affirm the coherence of constitutional democracy. This because this standard falls short of

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<sup>423</sup> JL Pretorius (note 17 above) 422 par 1.

<sup>424</sup> JL Pretorius (note 1 above) 553 par 3.

<sup>425</sup> *Barnard* (note 14 above) 77 par 65.

<sup>426</sup> *Ibid.*

the important principle of constitutional review which is reflective of, and conducive to, the substantive democratic values of participation, inclusivity, openness, transparency, and public justification. The methodology of the rationality analysis risks encouraging a narrow instrumental version of rationality,

The rationality standard brings about the assessment of government purposes on their own terms, which results in the testing of their legitimacy, exclusive of ‘the full spectrum of competing interests and a determination of their relative weight in terms of an integrative account of the Constitution structure.’<sup>427</sup> Therefore, a normative benchmark for ‘the constitutional validity of the way in which a particular governmental purpose is realised’<sup>428</sup> should be determined with reference to the way its realisation gives effects to the constitutional values.<sup>429</sup>

Legal standards are supposed to provide the basis to choose amongst varying competing ends or to relate them in a meaningful way to an integrative normative standard in order to claim any democratic justificatory and legitimising value. It is self-explanatory that the instrumentality standard has no such basis.<sup>430</sup> It is worth noting that the ‘standards of constitutional review ought to be dictated in terms of what is required to give effect to the foundational values of accountability, responsiveness and openness’.<sup>431</sup>

This research has dealt with important questions concerning reliance upon rationality as the judicial standard of review for affirmative action measures. It is evident from the discussion in chapter 4 that the rationality standard fails to adequately address the need for transformative justice in keeping with the core function of the Constitution to integrate, in a fair and proportional manner, the diversity of rights and interests at stake. This standard falls short and is not effective in promoting the realisation of the constitutional goal of a non-racial, non-sexist and socially inclusive society, in which each person will be recognised and treated as a human being of equal worth and dignity’. That the rationality standard is certainly incapable of adequately facilitating claims of unfair discrimination by those affected by such measures during the adjudication of affirmative action disputes is demonstrated in the disjunctive and opposing judgements in *Barnard* decision. The contrast of tests of fairness and proportionality against the rationality standard has showed that, of all the substantive standards of

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<sup>427</sup> JL Pretorius (note 17 above) 421 par 2.

<sup>428</sup> Ibid.

<sup>429</sup> *Barnard* 2014 (note 14 above) 84 par 83.

<sup>430</sup> JL Pretorius (note 17 above) 423 par 1.

<sup>431</sup> *Bel Porto School* (note 389 above) para 163.

constitutional review, the rationality standard is not the most appropriate standard in determining disputes regarding affirmative action measures.

The analysis in this dissertation has built on the research literature to date in order to present a new point of view with regard to the jurisprudence of affirmative action measures, evaluating the disjunctive and opposing judgments with regard to the rationality standard as a standard of judicial review for the claims of unfair discrimination in affirmative action disputes. The analysis has suggested a more coherent approach to the rights and values enshrined in the Constitution, striking the balance between the beneficiaries of the affirmative action measures and those disfavored by it. The analysis has also assessed divergent scholarly debates about a standard of judicial review for affirmative action, and has argued against the unsatisfactory status quo adopted in the jurisprudence of affirmative action against claims of unfair discrimination in South Africa.

## **7.2. Recommendations**

Accordingly, it is recommended that the standard of rationality be amended to introduce a more substantive normative standard which ensures that the implementation of measures which passes constitutional muster also take into account how it may affect other constitutional rights and values.<sup>432</sup>

A normative proportionality standard of review is more appropriate as it facilitates a more inclusive process of constitutional review that allows more voices to be heard and more perspectives to be represented. It considers the impact which such measures may have on competing rights and interest on those detrimentally affected by it.

Thus, whether the implementation of affirmative action measures passes constitutional muster or not, one needs to take into account the promotion of equality and how the implementation may affect other constitutional rights and values. This is a separate inquiry, one which does not use only equality as a barometer, but which will also test the impact of the implementation. Accordingly, the third *Van Heerden* criterion, – which requires the measure to promote the achievement of equality – needs to include an appreciation of the effect and impact of the measure. The impact of a measure is ascertained by looking at how it is implemented. The ‘enquiry should go beyond mere abuse of power and undue harm.’<sup>433</sup> It requires a judgment –

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<sup>432</sup> Van der Westhuizen (note 14 above) 84 par 83

<sup>433</sup> *Barnard* 2014 (note 14 above) 80 par 75.

within the ambit of the right to and value of equality – of whether the measure ‘serves to advance or retard the equal enjoyment in practice of the rights and freedoms that are promised by the Constitution but have not already been achieved’.<sup>434</sup>

Overall, then this research supports the proportionality standard, in that this standard facilitates the degree of justification required of government action which severely impacts on fundamental rights.<sup>435</sup> Section 36 of the Constitution ‘commits itself to a standard of review which requires all rights-limiting measures to be ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.’<sup>436</sup> The courts’ perspective of section 36 emphasizes that such provides a reasonableness standard involving a proportionality requirement.<sup>437</sup> The proportionality standard requires that the rights-limiting measures be justified by an essential public interest and to be less restrictive means to achieve the purpose.<sup>438</sup>

The proportionality standard provides the degree of democratic accountability expected of rights-limiting measures, whereas the rationality inquiry is not able to realise this. Given that the rationality standard seeks only minimal measure of justification in respects of legitimacy of the purposes pursued and means of coherence, it relieves the state of the duty to justify its actions<sup>439</sup> by contrast, the proportionality standard makes it a prerequisite for the state to account for the prioritisation of public good over a fundamental right in each and every circumstances in a legitimate order, that is to say an ‘assessment of the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society’.<sup>440</sup>

Section 36 provides in essence that proportionality is endowed with an analytical structure to reveal the state exposition of constitutional justice which inform its decision making.<sup>441</sup> Therefore, this standard matches the ‘service of the democratic values of openness, transparency and reason responsiveness.’<sup>442</sup> Furthermore, the ‘superior democratic credentials

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<sup>434</sup> *Barnard* 2014 (note 14 above) 80 par 75.

<sup>435</sup> *LSSA* (note 363 above) para 36.

<sup>436</sup> *JL Pretorius* (note 17 above) 427 par 1.

<sup>437</sup> *Barnard* 2014 (note 14 above) 88 par 90.

<sup>438</sup> *Makwanyane* (note 346 above) para 104.

<sup>439</sup> *JL Pretorius* (note 17 above) 421 par 2.

<sup>440</sup> *Makwanyane* (note 346 above) para 104.

<sup>441</sup> *JL Pretorius* (note 17 above) 428 par 2.

<sup>442</sup> *De Waal* (note 10 above) 16 par 3.

of the principle of proportionality recommends it as the appropriate standard in terms of which account must be given for rights-limiting measures.<sup>443</sup> It is clear that the proportionality standard provides a wide-ranging contextual frame of reference for solving rights disputes, as opposed to than the rationality standard.<sup>444</sup>

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<sup>443</sup> JL Pretorius (note 21 above) 428 par 2.

<sup>444</sup> Ibid 428-9 par 2.

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