The past is unpredictable: race, redress and remembrance in the South African Constitution

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The future is certain. It is the past that is unpredictable. – Evita Bezuidenhout[1]

1. Introduction

Much ink has been spilt about the criteria used by the University of Cape Town to make decisions about the admission of students to its various academic programmes.[2] Several UCT academics, political leaders, opinion-makers and members of the public have objected to this policy, calling it "racist" and a form of "reverse-discrimination". In one instance a commentator, perhaps having been overcome by a momentary amnesia about South Africa's recent past and getting slightly carried away by his own indignation, describing it as similar to the "policy applied to Jews at German universities by an edict signed in 1933 by Adolf Hitler". Opposition to the UCT admissions policy is based on the fact that it divides South African applicants into categories: those judged to have been affected by inequality and disadvantage (the redress categories), and those who have not (the open category). The policy further subdivides the former category into subcategories based on the whether the applicant

* Claude Leon Foundation Chair in Constitutional Governance, Department of Public Law, University of Cape Town. Email: Pierre.devos@uct.ac.za

1 Evita Bezuidenhout is the self-described "most famous white women in Africa" and the alter-ego of comedian Pieter Dirk Uys. These words have also been attributed to an old joke that did the rounds in the former Soviet Union. See Lawrence W. Levine "The Unpredictable Past: Explorations in American Cultural History (1993).

2 See for example Ken Owen "Hitler's policy at UCT" *Business Day*, 24 June 2011, accessed on 3 Septmeber at http://www.businessday.co.za/articles/Content.aspx?id=146718; Amanda Ngwenya "UCT admission policy perpetuates a perverse idea of fairness", *Business Day*, 6 June 2011, accessed on 3 September 2011 at http://www.businessday.co.za/articles/Content.aspx?id=144848; Neville Alexander "We'll pay the price for race cowardice" *Cape Times* 15 June 2010, accessed on 3 September 2011 at http://www.uct.ac.za/downloads/uct.ac.za/news/media/oped/NevilleAlexander06_2010.pdf; Celia W. Dugger "Campus That Apartheid Ruled Faces a Policy Rift" *The New York Times* 22 November 2010, accessed on 3 September 2011 at http://www.uct.ac.za/usr/about/intro/transformation/new_york_times.pdf and many other contributions. See generally http://www.uct.ac.za/print/news/talkingpoints/admissions/archive/; James Myburgh **"**Racial quotas at UCT", *Politicsweb* 12 May 2011, accessed on 3 September at http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=235701&sn=Detail&pid=71616.

is deemed to be "black", "indian", "coloured" or "chinese" and sets different criteria for admitting members of each of these subcategories competing for places in the redress part of the admission's process.[3] Opponents of this admissions policy often invoke the founding values of the South African Constitution, which include "human dignity, the achievement of equality and the advancement of human rights and freedoms" as well as "non-racialism and non-sexism",[4] arguing that it is constitutionally impermissible to rely on race as a criteria for admitting students to university (or as a criteria for any other form of redress). In order to get beyond race and leave our apartheid past behind us, so the argument goes, we need to stop classifying people in racial terms and we need to stop using apartheid era racial classifications to make decisions about the future of individual citizens – even when these racial classifications are relied upon to address the effects of past and ongoing racial discrimination. Although redress might be permissible and even required, using race as a criteria to effect redress is not. In the words of US Chief Justice John Roberts: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race".[5]

In this lecture I contend that the fact that has been lost in the debate about UCT's admissions policy is that in contemporary South Africa, the issue of race continues to permeate every aspect of both public and private life. For example, in debates about the merits of an appointment of a particular candidate as a judge, the race of a person who speaks and the race of the candidate about whom is spoken affects the tenor of the discussion. The implicit (often unexamined and prejudicial) assumptions people –

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[3] For a full version of the policy see University of Cape Town Admissions Policy, 2012, accessed on 8 September 2011 at http://www.uct.ac.za/downloads/uct.ac.za/about/policies/admissions_policy_2012.pdf.

[4] Section 1 of the Constitution of the Republic of South Africa states:
The Republic of South Africa is one, sovereign, democratic state founded on the following values:
(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
(b) Non-racialism and non-sexism.
(c) Supremacy of the constitution and the rule of law.
(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

[5] See Parents involved in *Community Schools v Seattle Shool District.*

both black and white - make about individuals based on their race is also often superimposed on such discussions in the form of different conceptions of "merit" and different assumptions made (by individuals who might well be unaware that they are making such assumptions) about the merit inherently represented by a person's race. Moreover, the race of various players also has an impact on the way in which their statements are perceived and what effect these statements might have on others.

But race also hovers not far from the surface in private or other everyday settings: as an unspoken presence, a (wrongly) perceived absence or as a painful, confusing, liberating or oppressive reality in social, economic or other – more intimate – interactions between individuals or between groups of individuals. In South Africa we cannot escape the fact that – despite the best efforts of many – race insinuates itself into our responses to situations and people. Even when we claim that we have escaped the perceived shackles of race, we are merely confirming its presence by our stated yearning for its absence. When I sit at a restaurant with my companion and the waiter presents me, and not him, with the wine list or the bill, should I not assume that this is done because I am white and he is black? (I hasten to add that this has happened to me on many occasions, regardless of the race of the waiter or, it must be said, regardless of whether my companion is an actuary earning triple my academic salary, or a relatively poor student.) When I see a young man walking a dog through the streets of the posh, overwhelmingly white, and affluent suburb of Bantry Bay (as often happens in the morning when I drive to work), will the story I make up about that man not differ depending on whether he is white or black – even if, after a second or two, I will be startled by the deeply problematic racial assumptions (based on everyday experiences and generalizations) to which I might have fallen prey, and will try to correct myself?

This is the paradox: while South Africa has emerged from a period in its history in which the race of every individual played a decisive role in determining their life

chances, allocating social status and economic benefits on the basis of race in terms of a rigid hierarchical system according to which every person was classified by the apartheid state as either "white", "Indian", "coloured" or "black"[6] and allocated a social status and economic and political benefits in accordance with that person's race, in the post apartheid era the potency of race as a factor in the allocation of social status and economic benefit has not fundamentally been diminished in our daily lives – despite a professed commitment to non-racialism contained in the South African Constitution, the founding document of our democracy. Problematic racial categories such as "black", "coloured", "indian" and "white" has also remained inscribed in our law and in official policies – including the admission policy at UCT – in an attempt by the law to deal with the effects of past and ongoing racial discrimination and racism.

Opponents of the use of these racial categories object to their use in legal rules, policies and regulations. This is why. Because the legal rules and policies are instruments of power and because power is – in the Foucauldian sense – productive, legal rules, policies and regulations contribute to the production of our lived reality. The law thus helps to construct the individual subject, his or her identity, the knowledge that it is possible to have about the individual, and the limits of our understanding of the place of the individual in society.[7] Foucaldian scholars may contend that because legal rules, policies and regulations act increasingly as a disciplining force, it contributes to the way in which we understand ourselves and the world we live in, and the way we conceptualise ourselves, others and our relationships with others and the world around us.[8] If this is true, so the argument goes, the way in which laws and policies deal with race becomes important for any emancipatory project aimed at decentering race as a defining organizing principle of society (which

[6] See Population Registration Act no 30 of 1950.

[7] See Michelle Foucault Discipline and Punish: The Birth of the Prison Transl by Alan Sheridan (1977) 194.

[8] See Pierre de Vos "The Constitution made us queer: the sexual orientation clause in the South African Constitution and the emergence of gay and lesbian identity" in Carl Stychin and Didi Herman (eds.) Sexuality in the legal arena (2000) 195 at 1999.

is required to overcome the subjugating and oppressive effects of race). It is trite to state that race is inextricable linked to power, racism and subordination. The question becomes how does the law deal with racism and its effects?

In this lecture I contend that it cannot do so merely by assuming that race and racism is about biological determinants or that the consequences of race – including racism – can be addressed by attending to the material conditions of inequality.[9] Something else is needed. Questioning the positions and discourses of privilege and dominance that stem from an ideology of white superiority and hegemony is a starting point. But when legal rules, policies and regulations are deployed to address the effects of past unfair discrimination and the ongoing dominance of an ideology of white superiority, how can this be done without merely perpetuating the very categories and the positions of privilege and hierarchical dominance of whiteness implied by them?

The problem is complex. On the one hand, the danger is that the deployment of racial categories in legal rules, policies and regulations can have the effect of perpetuating and legitimizing racial categories (and the assumed dominance of whiteness inherent in the deployment of such categories). By recognizing these categories and by dealing with them as if they are a given – normal, essentialist, unchanging and unchangeable – and by failing to challenge the hierarchical assumptions underlying the deployment of these categories, we can do immense harm – even in the name of wanting to do good. Instead of helping us to move away from a hierarchically racialised society in which racial categories continue to exhort a powerful pull on the way in which we perceive and understand the way in which the world is organized and how we perceive and understand ourselves and our relationships with those around us, the deployment of racial categories in law can contribute to the perpetuation of the very race-based hierarchy that is the cause of

[9] Meredith J. Green, Christopher C. Sonn and Jabulane Matsebula "Reviewing whiteness: Theory, research, and possibilities" South African Journal of Psychology, 37(3), 2007, pp. 389. See generally Sefa-Dei, G. J. (1996) "Critical perspectives in antiracism: An introduction" *The Canadian Review of Sociology and Anthropology*, 33(3), 247–268.

the "problem of race" in our society.

On the other hand, if racial categories are not deployed in legal rules, policies and regulations aimed at addressing the effects of past racial discrimination and the continued dominance of an ideology of white dominance, the law may well fail to address the effects of past racial discrimination and the ongoing problem of racism and racial oppression. This is so, I contend, because "disadvantage" flows not only from an individual person's material conditions, but also from a person's social status associated with his or her race, something determined (to some degree at least) by the effects of past and ongoing racism and racial discrimination. If we insist that race is (or should be) absolutely irrelevant and superfluous, and that racial categories should therefore not be relied upon – even when the legal rules, policies and regulations are aimed at addressing the effects of past and ongoing racial discrimination and racism to achieve a society that truly moves beyond race – a society that treats individuals as *individual* human beings of equal moral worth regardless of any constructed differences – how can the powerful effects of past and ongoing racial discrimination and racism be addressed? Would it not be true that if we insisted that race was irrelevant and superfluous, we would be endorsing and perpetuating the fiction that the characteristics, cultural beliefs and (often unexamined and silent) norms of an often dominant white group (dominant culturally and economically) are universal and neutral? Would such a "race-blindness" in the legal rules, policies and regulations not impose white dominance by erasing awareness of racial identity or cultural distinctiveness, given the fact that many white South Africans still experience whiteness and white cultural practices as normative, natural, and universal, and therefore close to invisible or at least as irrelevant.[10] Would this not negate any understanding of racial domination in terms of cultural or symbolic practices? And if one insisted on this fiction that race as a lived reality did not exist in South Africa or

[10] Frankenberg, R. (2001) "The mirage of an unmarked whiteness" in B. Bander Rasmussen, E. Klinenberg, I. J. Nexica, & M. Wray (Eds.) *The making and unmaking of whiteness* (pp. 72–96); Nakayama, T. K., & Krizek, R. L. (1999) "Whiteness as a strategic rhetoric" in T. K. Nakayama & J. N. Martin (Eds.) *Whiteness: The communication of social identity* (pp. 87–106).

that it did not matter (on the basis that we do not want it to matter or that it is not in the interest of the still dominant racial minority group that it should matter), would one not be denying the powerful effects of a pervasive racial ideology that continues – to different degrees – to oppress and marginalize black South Africans regardless of their economic status? Does this stance not require one to ignore the lived reality of a majority of South Africans who experience race as real and, often, as oppressive? Because the dominant norm according to which decisions about inclusion and exclusion – and the awarding of social status and goods and opportunities – are made is so part of the world view of the dominant white group, a legal system that pretends to remain neutral and eschews any reference to race may ignore the exclusionary effect race might have on those who happen not to share the dominant world view.[11] Is it not the case that, by virtue of this very pretense to neutrality, the system would re-enforce the ideology of racial superiority upon which it was founded in the first place? Is the claim to neutrality, then, not the zero point of ideology, the point at which ideology encounters its purest expression?

In this lecture, I explore the ways in which the South African Constitutional Court deals with this problem in the context of programmes aimed at addressing the effects of past racial discrimination, programmes such as the UCT admissions policy. I point out that the Court has embraced a view that the South African Constitution is historically self-conscious in order to assist it with its interpretation of the various provisions of the Constitution and to signal the contingent nature of its interpretation. I explore the manner in which the Constitutional Court has dealt with racially-based corrective measures against the background of the Court's understanding of the South African apartheid past and the lingering effects and consequences of this apartheid past on the post-apartheid society. I argue that

[11] Henk Botha argues that it is one of the "great paradoxes" of the South African reality that the Constitution commits us to a non-racial society and yet recognises that we can eradicate discrimination and redress disadvantage caused by racial discrimination only "if we remain conscious of the deep racial…. fault lines characterising our society." See Henk Botha "Equality, Plurality and Structural Power" vol. 25 (2009) *SAJHR* 1 at 1.

although the Court has not always demonstrated a sufficient degree of care when deploying racial categories and, hence, that its jurisprudence could be read as endorsing a rather essentialist view of race, its jurisprudence of historical self-conscientiousness also gestures at the need for a contingent and critical approach to race when engaging with the issue of race-based corrective measures and its limits. I argue that what is needed is a more nuanced understanding of our past. As Evita Bezuidenhout pointed out during the Truth and Reconciliation Commission process when she commented on the apparent amnesia of many white South Africans about the apartheid past: "The future is certain. It is the past that is unpredictable. Who we are and what position we speak from will influence our conception of the past. An awareness of our different conceptions of the past and a move towards a more nuanced and complex engagement with our past might therefore help our courts to deal with the paradox of race and redress set out above.

2. Race, redress and the South African Constitution

Section 9(1) of the South African Constitution states that "[e]veryone is equal before the law and has the right to equal protection and benefit of the law". Section 9(3) prohibits unfair discrimination – whether direct or indirect – 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. But section 9(2) of the Constitution also states that legislative and other measures may be taken (by the state and private institutions) to protect or advance categories of persons disadvantaged by unfair discrimination.[12] Legislation subsequently adopted in the light of this injunction to address the effects of past discrimination in order to *achieve* the realization of equality[13] pointedly mentions race as one of the categories to be relied upon when dealing with, and

[12] Section 9(2) states:
"Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons disadvantaged by past discrimination may be taken."

[13] See Employment Equity Act 55 of 1998.

correcting the effects of, past unfair discrimination and this is sanctioned by the Constitution itself.[14] The Constitutional Court has also explicitly acknowledged that people who have been unfairly discriminated against in the past – and hence would qualify as the potential beneficiaries of corrective measures – include those who have been discriminated against on the basis of their race.[15] It is true that in the case of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* the Constitutional Court, (per O'Regan J) held that the broad goals of transformation of society (and hence, by implication, the goal of addressing the effects of past racial discrimination) could be achieved in a myriad of ways: there was not one simple formula for transformation.[16] However, this does not mean that the Constitution prohibits institutions like UCT from relying on racial categories when addressing the effects of past unfair discrimination or when addressing the lingering effects of racial discrimination and racism. The achievement of equality is one of the fundamental goals that we have fashioned for ourselves in the Constitution and this means the 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. As Ngcobo J (as he then was) stated in the *Bato Star* judgment:

> 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*

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[14] See definition section 13 of the Employment Equity Act which states that all designated employers must, in order to achieve employment equity, implement affirmative action measures for designated people, which includes "black people" – defined as "a generic term which means Africans, Coloureds and Indians".

[15] In *Brink v Kitshoff NO* 1996 (6) BCLR 752 (CC) at par 40 the Constitutional Court remarked that:

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

See also *Minister of Finance v Van Heerden* 2004 (11) BCLR 1125 (CC) par 74.

[16] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (7) BCLR 687 (CC) par 35.

> *discrimination* entrenched by the apartheid legal order cannot be eliminated without positive action being taken to achieve that result. We are required to do more than that. The effects of discrimination may continue indefinitely unless there is a commitment to end it.[17]

Ngcobo J admitted that there are profound difficulties that will be confronted in giving effect to the constitutional commitment of achieving equality. The measures that bring about transformation will inevitably affect some members of the society adversely, particularly those coming from the white community whose members benefited directly or indirectly from the system of apartheid. What is required, though, is that the process of transformation must be carried out in accordance with the Constitution.[18] The question to be answered is what exactly is required by the Constitution. It is to this question that I now turn.

3.1 Substantive equality and the need for (race based) corrective measures

The Constitutional Court has declined to interpret the equality clause in a formalistic manner. Given its insistence on interpreting the Constitution contextually, most notably with reference to the South African apartheid history,[19] and given the text of section 9 of the Constitution it has rather interpreted section 9 as endorsing a substantive notion of equality. It thus rejected the notion that equality could be premised on the assumption that all South Africans were born free and equal and that all South Africans could therefore demand to be treated in exactly the same manner –

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[17] Ibid par 74 (my italics). Ngcobo further stated that:

> "It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied."

[18] Ibid par 76. See also *Bel Porto School Governing Body and Others v Premier of the Province, Western Cape, and Another* 2002 (9) BCLR 891 (CC) at par 7 where the Constitutional Court held:

> "The difficulties confronting us as a nation in giving effect to these commitments are profound and must not be underestimated. The process of transformation must be carried out in accordance with the provisions of the Constitution and its Bill of Rights. Yet, in order to achieve the goals set in the Constitution, what has to be done in the process of transformation will at times inevitably weigh more heavily on some members of the community than others."

[19] See *Brink v Kitshoff NO* 1996 (6) BCLR 752 (CC) at para 40; *Hugo* above n 26 at para 41; *Prinsloo v Van der Linde and Others* 1997 (6) BCLR 759 (CC) at para 31; *Pretoria City Council v Walker* 1998 (3) BCLR 257 (CC) at para 26; S*atchwell v President of the Republic of South Africa and Another* [2002] ZACC 18; 2002 (6) SA 1 (CC); 2002 (9) BCLR 986 (CC) at para 17. See also *Minister of Finance v Van Heerden* par 26 where Moseneke stated that: "The jurisprudence of this Court makes plain that the proper reach of the equality right must be determined by reference to our history and the underlying values of the Constitution."

regardless of race. A formal conception of equality would not address the effects of past racial discrimination and would fail to take account of the structural inequality produced by past (and ongoing) racial discrimination and racism. It would freeze the status quo and would not take account of the existing (largely) racially determined social and economic imbalances and the differences in power between white and black South Africans – which is the result of the ideology of race. Instead the Constitutional Court has emphasised that equality is something that does not yet exist in South Africa and hence that the Constitution permits – or even requires – that measures to be taken to help address the effects of past discrimination in order progressively to realise the achievement of equality. Because our society is deeply divided at the time when the Constitution was adopted, and remains vastly unequal and uncaring of the human worth of some and because many of these stark social and economic disparities will persist for a long time to come, corrective measures were mandated by section 9 itself.[20] In the words of Deputy Chief Justice Moseneke:

> Of course, democratic values and fundamental human rights espoused by our Constitution are foundational. But just as crucial is the commitment to strive for a society based on social justice. In this way, our Constitution heralds not only equal protection of the law and non-discrimination but also the start of a credible and abiding process of reparation for past exclusion, dispossession, and indignity within the discipline of our constitutional framework.[21]

This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage. It is therefore incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution. In the assessment of fairness or otherwise a flexible but "situation-sensitive" approach is indispensable because of

[20] *Van Heerden* par 23.
[21] Ibid par 25.

shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society. The unfair discrimination enquiry requires several stages.[22]

The effect of this commitment to redress is that restitutionary measures are mandated by the Constitution itself. Unlike the US anti-discrimination approach – rather unhelpfully referred to in that contex as "affirmative action" – which views corrective measures as an exception to the general requirement that people should be treated similarly regardless of their race, the South African equality jurisprudence does not view such measures as a deviation from, or invasive of, the right to equality guaranteed by the Constitution. They are not "reverse discrimination" or "positive discrimination".[23] Instead, corrective or restitutionary measures are integral to the reach of our equality protection. In other words, the provisions of section 9(1) and section 9(2) are complementary; both contribute to the constitutional goal of achieving equality to ensure "full and equal enjoyment of all rights". A disjunctive or oppositional reading of the two subsections would frustrate the foundational equality objective of the Constitution and its broader social justice imperatives.[24] Because the Constitutional Court interprets section 9 in the context of South Africa's particular history, it views the provision of section 9(1), which guarantees equality before the law, and section 9(2), which insists that measures to promote equality are required to achieve equality in the long term as "both necessary and mutually reinforcing". 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.[25]

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[22] Ibid par 27.

[23] See debate on the nature of these measures in De Waal et al *The Bill of Rights Handbook* 4 ed (Juta and Co, Cape Town 2001) at 223-5; Gutto *Equality and Non-Discrimination in South Africa: The Political Economy of Law and Law Making* (New Africa Books, Cape Town 2001) at 204-5. See also Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* (Juta and Co, Cape Town 1994) at 144-5; Kentridge "Equality" in Chaskalson et al *Constitutional Law of South Africa* (Juta and Co, Cape Town 1999) at para 14-59-60; Cachalia et al *Fundamental Rights in the New Constitution* (Juta and Co, Cape Town 1994) at 31; Rycroft "Obstacles to employment equity?: The Role of Judges and Arbitrators in the Interpretation and Implementation of Affirmative Action Policies" (1999) 20 *Industrial Law Journa*l 1411; Pretorius "Constitutional Standards for Affirmative Action in South Africa: A Comparative Overview" *Heidelberg Journal of International Law* Vol 61 (2001) 403; Van Reenen "Equality, discrimination and affirmative action: an analysis of section 9 of the Constitution of the Republic of South Africa" (1997) 12 *SA Publiekreg/Public Law* 151.

[24] *Van Heerden* at par 30.

[25] Ibid. par 31.

3.2 The limits of corrective measures

The fact that the Constitutional Court has embraced a substantive notion of equality and has emphasised that corrective measures were both constitutionally permissable and sometimes mandated in order to achieve this substantive equality, does not mean that the Constitution places no limits on the measures that may be taken, either by the state or by other institutions, to achieve equality in the long run. According to the Constitutional Court, any programme or policy aimed at addressing the effects of past (and continuing) racial discrimination has to meet at least three requirements before it would be considered to be constitutionally permissable. All three requirements have to be met but, as we shall see, these requirements cast the net rather wide which means that at present it would be difficult – but not impossible – to convince a court that a programme aimed at redressing past unfair discrimination did not comply with the requirements of the Constitution. It is to these requirements that I now turn.

The first question is whether the programme of redress is designed to protect and advance a disadvantaged group. The measures of redress chosen must favour a group or category of people designated in section 9(2). The beneficiaries must be shown to belong to a group which has been disadvantaged by unfair discrimination in the past. Because of the fact that the court interprets this section in the light of South Africa's apartheid past, it assumes that any programme aimed at addressing the effects of past racial discrimination may potentially comply with this first requirement.[26] The Court acknowledges the fact that it would be difficult, impractical or undesirable always to devise a legislative scheme or programme with "pure" differentiation demarcating precisely the affected classes. "Within each class, favoured or otherwise, there may indeed be exceptional or 'hard cases' or windfall beneficiaries".[27] The Court thus acknowledges that not all the members of a class targeted to benefit from

[26] Ibid par 38.
[27] Ibid par 39.

restitutionary measures might themselves have suffered from unfair discrimination or might have been disadvantaged because of the effects of past discrimination.[28] In the context of a section 9(2) measure, the legal efficacy of the remedial scheme should be judged by whether an overwhelming majority of members of the favoured class (for the purposes of this lecture, members who are "black") are persons designated as disadvantaged by unfair exclusion.[29] Thus, where a programme is aimed at addressing the effects of past racial discrimination and it can be shown that some of the beneficiaries of that programme no longer suffer from the effects of past discrimination, this will not torpedo the programme – as long as the overwhelming majority of beneficiaries can be shown to suffer from the effects of past discrimination.

Two preliminary observations may be made about the way in which the Constitutional Court has interpreted this first requirement for a constitutionally valid restitutory programme. First, if one assumes (as I do) that the positions and discourses of privilege and dominance that stem from an ideology of white superiority and hegemony is still pervasive in the South African society and hence that racism affects all black South Africans (to some degree or another) regardless of their economic status and social and political power and material success, it would be difficult, for the time being, to conceive of any restitutory programme that targets black South Africans (including "africans", "indians" and "coloureds") that would not meet this first requirement. Because corrective measures are aimed not only at addressing economic disadvantage but also the ongoing effects of racism and racial discrimination, any restitutionary programme that overwhelmingly benefits black South Africans would meet this first requirement. Second, because the Constitutional Court has endorsed all programmes that overwhelmingly target a designated group,

[28] In the Indian context, where corrective measures were first instituted shortly after that country gained its independence but continue today, this is often referred to as the problem of the "creamy layer". Where those individuals who belong to a previously disadvantaged group no longer suffer from the effects of past discrimination, the question is then posed in India whether these members of the so called creamy layer can also benefit from restitutionary measures.

[29] *Van Heerden* par 40.

constitutionally valid restitutionary programmes may well be devised which do not take race as its starting point and which may also benefit individuals who have not suffered from past discrimination. The programme in the *Van Heerden* case illustrates this point well. This programme made a distinction between individuals who were members of Parliament before 1994 and continued to be members of Parliament after 1994 on the one hand, and individuals who only became members of Parliament after 1994. For the period from 1994 to 1999 the latter group received a larger pensions contribution than the former group to address the effects of apartheid discrimination which precluded black African citizens from becoming members of Parliament. Of course, some white citizens (Joe Slovo, Ronnie Kasrils, for example) only became members of Parliament after 1994 but also benefited from the restitutionary scheme. The mere fact that white members also benefited from the scheme did not mean that the scheme did not comply with the requirements of section 9(2). On the one hand this means that restitutionary programmes may validly be designed to redress the effects of past racial discrimination without mentioning race. On the other, a failure to implement racially targeted programmes may run the risk of failing to deal with the effects of the ideology of white superiority and hegemony and may mask the effects of ongoing racism and racial discrimination and domination.

The second requirement for a valid restitutionary programme is that the measure must be "designed to protect or advance" those disadvantaged by unfair discrimination. In essence, the remedial measures are directed at an envisaged future outcome. As the Constitutional Court rather whimsically stated: "The future is hard to predict". What is required, however, is that the measures "must be reasonably capable of attaining the desired outcome" of addressing the effects of past and ongoing racial discrimination and racism. If the remedial measures are arbitrary, capricious or display naked preference they could hardly be said to be designed to

achieve the constitutionally permissible goal.[30] If it is clear that they are not reasonably likely to achieve the end of advancing or benefiting the interests of those who have been disadvantaged by unfair discrimination, they would not constitute measures contemplated by section 9(2). It is not necessary to show that the remedial measures were a "necessity" or that it was necessary to disfavour one class in order to uplift another.[31] Given the historical self-consciousness of the Constitutional Court's interpretation, a valid purpose of a remedial programme would be to address the effects of past racial discrimination. I would contend that given the lingering effects of racism and racial discrimination, it would also be valid for a programme to be aimed at addressing continuing racial discrimination and the effects of continued racism and the racial hierarchy embedded in our society. But where measures are completely arbitrary or where they are a mere smokescreen for the advancement of the interests of a specific person or group, say by benefiting the members of a well-connected political family or by benefiting individuals who had paid a bribe to the official or body who had devised the programme in order to benefit from such a programme, the remedial measures would not be found to meet this second requirement of the test.

The third requirement for a valid remedial programme is probably the most difficult and complex. It would require a value judgment, which would have to be made in the light of all the circumstances, including the apartheid history of the country. According to the court, remedial measures can only be constitutionally valid if, thirdly, such a measure "promotes the achievement of equality". This is a rather difficult concept, so it may be useful to quote the Constitutional Court extensively in this regard:

> Determining whether a measure will in the long run promote the achievement of equality requires an appreciation of the effect of the measure in the context

[30] Ibid par 41. See also *Prinsloo v Van der Linde* above n 33 at paras 24-6 and 36; *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) BCLR 139 (CC) at para 16.
[31] Ibid par 43.

> of our broader society. It must be accepted that the achievement of this goal may often come at a price for those who were previously advantaged. Action needs to be taken to advance the position of those who have suffered unfair discrimination in the past. [....] However, it is also clear that the long-term goal of our society is a non-racial, non-sexist society in which each person will be recognised and treated as a human being of equal worth and dignity. Central to this vision is the recognition that ours is a diverse society, comprised of people of different races, different language groups, different religions and both sexes. This diversity, and our equality as citizens within it, is something our Constitution celebrates and protects. … In particular, a measure should not constitute an abuse of power or impose such substantial and undue harm on those excluded from its benefits that our long-term constitutional goal would be threatened.[32]

One must therefore look at the effect that the the remedial measures will have on the group or groups that might be negatively affected by the measures. It would not invalidate such measures merely if it can be shown that the excluded group have been negatively affected in some way or another. For example, a programme aimed at addressing the effects of past racial discrimination may negatively affect white South Africans. The admissions policy of a university which reserves certain places for black South Africans or does not require black applicants to meet exactly the same requirements as white applicants may affect some white applicants who may be denied a place to study at the University because of the remedial programme. This in itself will not invalidate the programme. But where the measures taken are so extreme that it sends a signal that the equal dignity of white applicants are not respected, the programme may be invalidated. Thus, where an admissions policy takes race into account and the effect of that policy is to exclude the vast majority (or all) of the white applicants, the programme would probably not pass constitutional muster. In effect this is a value judgment which the court will exercise with reference to the

[32] Ibid at par 44.

apartheid history of the country, the extent to which the effects of past or continuing racial discrimination lingers on in society and other factors which might impact on the full enjoyment of all rights and priviledges for all South Africans.

At this point it is important to reiterate that this jurisprudence stems from the courts understanding that section 9 had to be interpreted in the context of South Africa's specific history of racial exclusion, marginalisation and oppression. But the court leaves the door open for a re-evalution of its present permissive view on racially-based corrective measures. As I pointed out in the discussion above about the Court's endorsement of a substantive notion of equality, the Court recognises, first, that – apart from race – there are other levels and forms of social differentiation and systematic under-privilege, which still persist in our society and that the Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage. Sexism, homophobia, prejudice based on disability or HIV status and other aspects or characteristics of a person's personality which invoke opprobrium may also be targeted. Second, while the Constitutional Court recognises that at present section 9(2) must be interpreted with specific reference to the apartheid past and while it has to take into account the effects of past and continued unfair racial discrimination and racism, when it evalutes the constitutionality of corrective measures, it also recognises that this context and the actual situation may change. If power shifts decidedly in our society and if the dominance of whiteness as the norm subsides, the Court might therefore evaluate remedial measures differently from the way it does so at present.

4. Race, redress and remembrance

Because the Constitutional Court has stated that in order to judge the permissabilty of race based redress measures one must have regard to South Africa's past, it is my contention that the paradox highlighted at the start of this lecture can be – if not solved, then be managed – by exploring ways of engaging in a more nuanced and

complex manner with our history. Neither attempting to sweep the past racism and racial discrimination and its ongoing manifestations and effects, which continue to haunt our country, under the carpet, nor reducing or simplifying the story of our past to one in which human beings only existed as markers for their racial identities, such an engagement might allow for a jurisprudence that takes the effects of past and ongoing racism and discrimination seriously without treating all South Africans as no more than representatives of their race and hence as not being fully human. What is required is to question, what I have elsewhere called,[33] the "grand narratives" about our past, without falling into a kind of racial amnesia.

It was the French philosopher and literary theorist Jean Francois Lyotard who first suggested back in 1979 that one way to understand the world around us is to identify the often invisible or unquestioned "grand narratives" which are produced by specific cultures or societies to make sense of the world. In a modernist world, Lyotard argued, such narratives operate as great structuring stories that are supposed to give meaning and make us understand all other events and interpretations around us.[34] These "grand narratives" are grand, large-scale theories and philosophies of the world, such as the progress of history, the knowability of everything by science, and the possibility of absolute freedom. Lyotard – writing from a late twentieth century Western perspective — argued that in the so called postmodern Western world people have ceased to believe that narratives of this kind are adequate to represent and contain us all. They have become alert to difference, diversity, the incompatibility of our aspirations, beliefs and desires, and for that reason postmodernity is characterised by an abundance of micro-narratives.

South Africa, however, is decidedly not a postmodern country and "grand narratives"

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33 See "A Bridge too far?: history as context in the interpretation of the South African Constitution" *SAJHR* vol. 17 (2001) 1.

34 See generally J.F. Lyotard *The Post-Modern Condition* (1984) xxiv, 34-37. See also Keith Jenkins Re-thinking history (1991) 60. What I refer to as a grand narrative is an attempt to apply Lyotard's work to a micro level.

still have a decisive hold on our imaginations – albeit that different South Africans are wedded to different grand narratives and fit their understanding of events into such narratives. This is understandable. Because it is impossible to make sense of all the available information we are exposed to by focusing on each event and each piece of information afresh, we tend to deal with this information overload by discarding some facts and ideas and by fitting other facts and ideas into existing grand narratives. Although many of us might not even be aware of the existence of these grand narratives, we are slaves to them, because these narratives help shape our understanding of the world and the people and events in it. One can argue about the mechanisms through which such grand narratives are produced. One may also quibble about whether such grand narratives are actually necessary tools to help us understand the world or rather a handy mechanism through which the powerful and dominant groups in society maintain their hegemonic position and achieve the subjugation of other cultures and societies. But it seems to me that much of the disagreements in South Africa – disagreements about race and redress, about corruption, about the origins of injustice and the ways to deal with it, about the ways in which we make sense of living in this strange place – stem from an adherence to different grand narratives by those, on the one hand, who punt Western, liberal, race-blind, free market values and those, on the other hand, who punt a kind of race-based nationalism and the importance of redress and/or revenge. In South Africa there are therefore two particularly dominant but fundamentally clashing grand narratives that vie for overall dominance. On the one hand, there is the narrative influenced by a long history of colonial domination of Africa, a narrative of "darkest Africa" and "venal natives" who "cannot be trusted", a narrative informed by the deeply ingrained fears which have been instilled at mothers knee with dark whispers of the Mau Mau and Dingaan, a narrative that has been informed by the insecurity experienced by the once dominant colonial minority. This is a narrative that suggests that Africa is a basket case and that most Africans are corrupt, untrustworthy and lazy. When Julius Malema is reported by City Press to have taken bribes to secure

tenders, this information can easily be slotted into this grand narrative. The news merely affirms what we are all supposed to know already — even if those who embrace this narrative are now often politically too savvy actually to speak of their beliefs in such a crude manner. Instead, sophisticated adherents to this grand narrative now often speak about their fears and prejudices in code — by bemoaning "dropping standards", by wailing about "rampant crime", or by complaining about how race-based redress measures are turning us into Nazi Germany.

A second grand narrative, which South Africa's Constitutional Court has embraced and which I have often written about and relied upon — at least partially — is the one informed by a specific understanding of our apartheid past. This narrative focuses on the injustice of the apartheid past and the dehumanising effects of the system of racial oppression, which denied black South Africans access to opportunities and robbed them of their dignity. According to this grand narrative we can understand much of what is happening in South Africa with reference to race and racism. It's a narrative informed by the stories — at first whispered to avoid persecution by the apartheid state, now loudly proclaimed by even those who had no part in the struggle — of a heroic and noble anti-apartheid struggle led by the ANC against an evil apartheid regime. This is the narrative that focuses on the past and turns away from the future. It is nurtured by a keen awareness of the past and ongoing injustice in our country. In its more extreme forms this narrative is fed by a (legitimate) grievance and the memory of past and ongoing racial prejudice and discrimination and evidence that there are pockets of fantastic wealth in the white community as well as evidence of the ease with which most white people seem to inhabit their skins and embrace their assumed privilege and superiority.

Those of us in South Africa (black and white) who think of ourselves as progressive — who believe in social justice and redress, in individual rights, in democracy, in freedom and equality, in trying to live ethical lives no matter how impossible that may

seem given the vast and immoral inequalities around us — are perhaps trying to live as postmodern citizens in a modernist world. We want to punt many small micro-narratives that recognize the individuality of each person and the fact that none of us can be reduced merely to our racial identities. We wish to get people to listen to and embrace the variety of stories about ourselves and our lives. We want to embrace complexity and nuance in a world that thrives on simplistic generalisations. Like Jacob Dlamini did in his book *Native Nostalgia*, we want to tell stories that humanise our lives and particularise our experiences without airbrushing away the past and without denying the lingering effects of ongoing racial injustice around us. We believe that every individual has his or her own unique story to tell and that we can learn something from listening to and hearing – really hearing - the story told by others about their lives. We also believe that every individual must be judged as an individual and not as a symbol or as a representative of a racial or language group, but we know that we are all also still to some extent prisoners of our racialised past which we cannot escape – no matter how much we insist that apartheid is past us and that there should be no place in our society for race based thinking. We believe that individuals have moral agency independent of their race or their other identity commitments. For those who believe that they fall into this category I wish to pose the following question: Does a respect for the human dignity of all and the possibility of moral agency (and the responsibility this entails) for every South African not require that we begin to question, expose and resist these master narratives whose proponents are leading us down a path of absolutes which rejects complexity and nuance in favour of easy but wrong answers?

In Jacob Dlamini's book he tells many stories about growing up during the apartheid years in Katlehong, a township located 35 km east of Johannesburg and south of Germiston, not far from Alberton where I had the dubious honour of completing my primary school education. Of course, when I was a primary school child during the height of apartheid, it would have been unthinkable for me to spend time in

Katlehong and to get to know Dlamini, his mother or his friends. It would also have been legally impossible for Dlamini to attend the same relatively good school as I did and unthinkable that he would spend time with me in my family home in Alberton as a friend to get to know me, my mother or my friends. One of the stories Dlamini tells about his childhood in Katlehong is about how the people living in his street listened to the radio broadcast of the world heavyweight boxing title fight in which Gerrie Coetzee (who hailed from nearby Boksburg and was hence known as the Boksburg Bomber) took on a black American, and how they all cheered on the homeboy, who, after all, grew up not too far from Katlehong. I too listened to that fight broadcast over the radio, albeit to the Afrikaans and ridiculously biased commentary of Gerhard Viviers – all from the relative privilege of our whites only suburb of Brackenhurst. And I too cheered on the Boksburg Bomber, albeit with my shouting father who was already slurring his words after one brandy too many. We were worlds apart: one slightly bewildered white boy, living in the privileged comfort afforded to white middle class South Africans by the system of apartheid, one black boy subjected to the humiliation wrought by the system from which I was to benefit so handsomely. Yet to tell the full and nuanced story of our respective childhoods, it would be a mistake not to acknowledge our shared experience to remind us that – apart from belonging to the apartheid era race categories imposed on us – our life experiences intersected and overlapped in sometime surprising and other times shocking ways and that our lives were influenced by many factors apart from our respective races.

This engagement with our history would be incomplete if it did not note that in terms of the Population Registration Act[35] the state ensured that we had very different life experiences, that we were deemed to be different in every way. As a middle class white boy I was accorded a certain status which allowed me (unthinkingly, I must add) to enjoy the privileges that were associated with being a member of the economic, social and political dominant racial minority. Later, of course, I discovered

35 Act 30 of 1950.

that one might also belong to other identity categories, that one's sexual orientation or HIV status could change one's status somewhat, from being an absolute insider to a person faced with the challenges associated with these other aspects of one's identity, aspects which many in our society still insist belongs on the margins. I also discovered that other aspects of one's identity – one's whiteness, one's economic and social privilege, one's academic status – could mitigate against the deeply dehumanizing effects of the prejudices associated with other aspects of one's identity. The point I wish to make is that when we reflect on race-based redress measures at institutions like UCT (an institution created by whites for whites) and when the Constitutional Court engages with the question of whether a specific race-based redress measure is constitutionally compliant, the full complexity of our past and the history of each individual who still carries this past with them – no matter how some of us might protest that the past is behind us and that we have suddenly become race-blind and stripped of the social and economic privileges our white skins might still be affording us – must not be lost sight of.

I propose that the starting point for such a nuanced approach should be to recognise that the various identity categories – including race, including sexual orientation, including gender, including HIV status – are the product of a specific history and that they cannot be used to predict how individuals who are said to slot into these categories will behave, what their attitudes will be, and who they are as individuals. When we use these categories for purposes of redress we should do so ironically and in a contingent manner. In other words, we should never use such categories as if they are "real", in the sense of really saying something profound or true about any human being, all while acknowledging that the categories feel real to most people and that being assumed to be a member of one of the race categories will often have very real consequences. (That is why I place inverted commas around the terms when I use them: I wish to signal that I believe these terms – while very real for all of us – are no more than crude and obnoxious descriptors which can never capture the full

essence of each individual person supposedly described by them.)

Second, a more nuanced deployment of such categories in legislation, policies and regulations is required. Apart from the category of race (which for the moment we have no choice but to rely on to help address the effects of past and ongoing racism and discrimination) we may want to add other considerations – along with the race of an individual – when we decide whether an individual should be the beneficiary of a specific programme of corrective measures. The social and economic status of the individual and his or her parents; whether an individual is part of a first, second or third generation who has obtained secondary or tertiary education and the nature of that tertiary education (if any) received by his or her parents or grandparents; whether an individual grew up in a rural area or in the city; whether the individual is monolingual or speaks several South African languages; whether an individual attended a mud school in the Eastern Cape or a posh private school in Rondebosch; whether the individual is required to study in his or her home language or in a second or third language – these factors, along with many others, could all be considered as relevant (along with the race of an individual) when decisions about redress measures are made.

There must also other ways to deal with issues of redress. Who knows? What I do know is that we need to continue having a conversation about what will work best and that when we do so we ignore a critical but serious engagement with the past at our peril. When I talk about a conversation I do not mean a shouting match in which individuals retreat into the laager of their own apartheid era racial identities and shout abuse at others who they perceive to belong to a different apartheid race category, clinging to rigid and simplistic master narratives which the ghost of our apartheid past have fixed so firmly in many of our imaginations (even if many deny this). In having this conversation it would be helpful if we could agree that it is important to take race and the need for racially-based redress seriously while also acknowledging that in

doing so there is a danger that the use of apartheid era race categories will imprison us all in an apartheid of the mind. What is needed — to use the dreadful cliche — is "out of the box" thinking. This we can only do if we have a real and open discussion about what race did to all of us in the past (and continues to do to us today) and how we can address the effects of race in the future; if we do not take part in the discussion as perpetual victims (of racism or of so called reverse-racism), but as equal, respectful human beings with agency and a unique take on life who believe and act like people who have the pride in themselves and the power to chart a new destiny that is fair and just for all — not just for those who belong to the same racial group we happen to believe that we belong to.

5 Conclusion

From the above it must be clear that the South African Constitutional Court endorses the notion of racially based corrective measures to address the effects of past and continuing racial discrimination and racism. Indeed, the court argues that such programmes might sometimes be required to achieve the vision of an equal and just society. In the light of the the complex problem regarding the legal deployment of race, highlighted in the introduction of this lecture, the question must be asked whether the Constitutional Court is sufficiently attuned to the dangers of legally mandated and endorsed race-based remedial programmes. If it is indeed correct that there is a danger that the deployment of racial categories in laws, policies and regulations can have the effect of perpetuating and legitimizing racial categories (and the assumed dominance of whiteness inherent in the deployment of such categories), is the Constitutional Court not endorsing a legalized perpetuation of a particular racial hierarchy? In recognizing and dealing with racial categories, is the Court sufficiently attuned to the fact that racial categories themselves are the product of a particular history and the effects of the power relations in society? Or does the Court deal with racial categories as if they are a given – normal, essentialist, unchanging and unchangeable? Is the court failing to challenge the hierarchical assumptions

underlying the deployment of these racial categories, and in doing so is the Court not endorsing a particular harmful racial hegemony?

I would argue that the Constitutional Court's jurisprudence dealing with the constitutionality of remedial measures aimed at addressing the effects of past and ongoing racial discrimination and racism, is far less formalistic than its critics believe and that the court has not explicitly endorsed the notion of race as something essential and fixed. Neither has it endorsed the notion that race-based remedial measures will remain permissible or required indefinitely. It can, of course, be argued that the Court has a rather simplistic view of South Africa's history and that many of its assumption about race in South Africa remain unexamined and unstated. It is not clear whether the court views race as the product of an ideological system of racial domination and oppression, thus whether it views race as something that is contingent and constructed, or whether it sees race in essentialist terms as something that is given and that can easily be determined with reference biological factors such as skin colour. The Court's jurisprudence hardly touches on the issue, merely assuming that given our history of racial oppression, race based remedial measures are not only constitutionally permissible but also – sometimes required. Neither is it clear that the court is alive to the complex and contingent nature of history itself, better to infuse its jurisprudence with nuance and complexity.

However, the jurisprudence of the Court is also perhaps more complex than many would admit. First, it recognizes that constitutionally valid remedial measures aimed at addressing the effects of past racial discrimination need not always focus on the category of race. Where other factors could be used (and where these factors would be effective to address the past and ongoing effects of racial discrimination and racism) this would be constitutionally permissible because the group targeted need not be drawn with absolute precision. As long as the overwhelming majority of beneficiaries targeted by a remedial programme have been disadvantaged by unfair

discrimination, the remedial programme would meet the constitutional requirement that the programme must be aimed at addressing past discrimination. This leaves the door open for the fashioning of innovative programmes which manages to address the effects of past racial discrimination - taking into account the lingering effects of racism – without explicitly relying on the difficult categories of race. Second, because the court has signaled that the context in which a programme is evaluated is all important and that the context may change as society changes, the jurisprudence also gestures at the contingent nature of present racial categories and power relations. Although the Court has not said so explicitly, the jurisprudence leaves the door open for future contestation regarding race-based remedial measures if it becomes apparent that the deployment of racial categories in the law had the effect of perpetuating and legitimizing racial categories (and the assumed dominance of whiteness inherent in the deployment of such categories) by recognizing these categories and by dealing with them as if they are a given – normal, essentialist, unchanging and unchangeable – and by failing to challenge the hierarchical assumptions underlying the deployment of these categories.