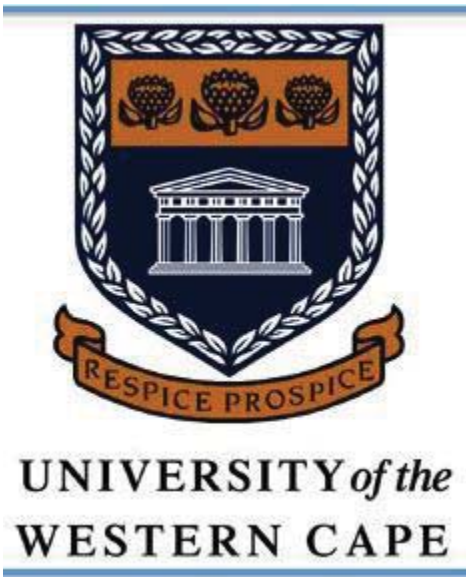

The Illusion of the Rainbow Nation: The Unconstitutionality of Racial Classification?

A Mini-Thesis Proposal submitted in partial fulfilment for the degree LL.M

in the Faculty of Law of the University of the Western Cape

by

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Plagiarism Declaration

I declare that the work presented in *The Illusion of the Rainbow Nation: The Unconstitutionality of Racial Classification* is original and that where other people's work has been mentioned, references have been provided. This work has never been presented to and at other institutions of higher learning, and thus is in this regard, that I present this work as being originally mine. It is hereby presented in partial fulfillment of the requirements for the award of the Master of Laws Degree.

_____ _____

Mbazane Ignatia Nomfundo Diallo **Date**

Acknowledgments and Dedication

I would like to thank Dr Dube and Ms Anthony for their guidance and patience. Thank you for allowing me to pen my ideas at my own pace and time. Thank you for enabling me to write the paper that I had intended to write.

I would also like to thank Professor Ziyad Motala who, through his critique, helped me fine-tune my argument. His constructive criticism is much appreciated.

I dedicate this work to my family. Thank you for your never-ending support and ever-lasting encouragement. Thank you for having confidence in my abilities and believing that I would complete, even when I had all but given up.

To my mother, there are not enough pages in the world for me to say all that I wish to say, therefore I will surmise: I thank God for blessing me with you. In the next life, I pray to be your mother, and you, my daughter, for it is only in that way that I can begin to do for you all that you have done for me. In this life, all that I can do is continue to pray that you live long and ensure that you live well.

To my father, thank you.

To my brother, thank you for paving the way. It must have been challenging for a soft-spoken and gentle soul such as you to lead the fiery and opinionated younger sister that is me. Thank you for being resolute.

To my sisters, education is the fertile soil in which you must throw yourself. Use it to grow and never stop growing. Always remember that we are *The Three Sugar-beans* and as the story goes, a beanstalk grew from the magical kind. Therefore, be magical and become a beanstalk. Find your field of fertile soil and grow. Attain and remain in those new heights.

Contents

Keywords

Race
Classification
Apartheid
Constitutionality
Equality
Opinion
Dignity
Comparative analysis
America
Haiti

List of Abbreviations

CLS – Critical Legal Studies

CRT – Critical Race Theory

BBBEEA – Broad-Based Black Economic Empowerment Act 53 of 2003

EEA – Employment Equity Act 55 of 1998

NSFAS – National Student Financial Aid Scheme

PNURA – Promotion of National Unity and Reconciliation Act 34 of 1995

PRA – Population Registration Act of 1950

TRC – Truth and Reconciliation Commission

ICCPR – International Covenant on Civil and Political Rights

UDHR – Universal Declaration of Human Right

CHAPTER 1 – OVERVIEW OF THE STUDY

1.1. Background

In societies emerging from segregation or division based on the biological factors of race and/ or colour, the centrality (or lack thereof) of race and colour within those legal systems plays a critical role in the progression and transformation of such societies. South Africa is one such society where race was the dividing criterion which saw the population 'be[ing] turned into races through social practices [during] apartheid….'[1]

The post-amble to South Africa's Interim Constitution[2] states that the document was to form a:

> [H]istoric bridge between the past of a deeply divided society…and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour [and] race….

Le Roux asserts that the late Didcott J in *Azapo v The President of the Republic of South Africa*[3] believed that the metaphor of this bridge 'implied an absolute break between the old and the new', a transformation that was meant to be achieved by the Truth and Reconciliation Commission (TRC).[4] Established by section 2 of the Promotion of National Unity and Reconciliation Act[5] (PNURA) the TRC was mandated with 'promot[ing] national unity and reconciliation…which transcends the conflicts and divisions of the past ….'[6] This, as it was envisioned, would facilitate the transition that the Republic was making [from parliamentary sovereignty] into 'democratic constitutionalism'.[7] However, the failing of the TRC in achieving this has not only been seen in scholarly articles to that effect, but also within the argument that the 'new' constitutional dispensation is nothing more than the continuation of the

[1] Marè G 'Race counts in contemporary South Africa: "An illusion of ordinariness"' (2001) 47 *Transformations* 76.
[2] Constitution of the Republic of South Africa Act 200 of 1993.
[3] *Azapo v The President of the Republic of South Africa* 1996 (8) BCLR 1015.
[4] Le Roux W 'Bridges, clearings and labyrinths: the architectural framing of postapartheid constitutionalism' (2004) 19 *SAPR/PL* 631.
[5] Promotion of National Unity and Reconciliation Act 34 of 1995, s2(1) establishes the Truth and Reconciliation Commission.
[6] Promotion of National Unity and Reconciliation Act Chapter 2, s3(1).
[7] Bass O *et al.* 'The possibilities of researching non-racialism: Reflections on racialism in South Africa' (2012) 39(1) *Politikon* 31.

previous regime masked only with a different face.[8] The retention of racial classification gives prima facie credence to this belief.

Adopted into the legal system through the Populations Registration Act of 1950 (PRA), racial classification would thenceforth play a decisive role in the lived experiences of ordinary South Africans.[9] The PRA would 'establish race as a domain of knowledge independent of any particular training or expertise, based on the ordinary experience of racial difference, which ranked whiteness as its apex.'[10] This lack of knowledge associated with racially classifying people has resulted in what has been coined the 'common sense' approach.[11] This approach deems it common sense that one can automatically classify what race another belongs to without having any pre-existing knowledge on how to classify or what the blood lineage of the person being classified was. Initially the categories comprised of 'White', 'Native' and 'Coloured' (with Indians being deemed a subset of the latter)[12] however, with the passage of time the categories now reflect as 'White', 'Black' (or 'African'), and 'Coloured', with 'Indian' now being a separate category.[13] There has also been the inclusion of the category of 'Other'[14] with 'Asian' making intermittent appearances.

With the advent of the new constitutional dispensation which focused on achieving national unity and the reconstruction of society,[15] one would presume that South Africa would opt to distance itself from its racialised[16] and racialising[17] past, yet this

[8] Botha H 'Instituting public freedom or extinguishing constituent power? Reflections on South-Africa's constitution-making experiment' (2010) 26 *SAJHR* 71.
[9] Erwin K 'Race and race thinking: reflections on theory and practice for researchers in South Africa and beyond' (2012) 79 *Transformation* 96.
[10] Posel D 'What's in a name? Racial categorisations under apartheid and their afterlife' (2001) 47 *Transformation* 57.
[11] Posel D 'Race as common sense: Racial classification in Twentieth-Century South Africa'(2001) 44(2) *African Studies Review* 89.
[12] Erasmus Z 'Apartheid race categories: daring to question their continued use' (2012) 79 *Transformation* 1.
[13] Marè G 'The cradle to the grave: Reflections on race thinking' 115(1) *Thesis Eleven* 44.
[14] *Ibid*.
[15] Constitution of the Republic of South Africa, Act 200 of 1993, the post-amble.
[16] Omi M and Winant H 'Racial Formations' in *Racial Formation in the United States: From the 1960s to the 1990s* (2ed) (1994) 5 describe racialisation as 'signify[ing] the extension of racial meaning to a previously racially unclassified relationship, social practice or group.' Consequently, the becoming racialised within the South African context occurred with the enactment of the PRA and the emergence of rigid racial categories.
[17] Bass O *et al.* 'The possibilities of researching non-racialism: Reflections on racialism in South Africa' (2012) 39(1) *Politikon* 31 hold that '[r]acialism is the acceptance of races as either biologically and/or culturally constituted groups, to which individuals can be assigned through perceived heritable/essential characteristics—most obviously, though not exclusively, through visible

would not be the case. The very system that spawned contempt and hatred while dividing and institutionalising a racial hierarchy within the population would be retained to, ironically, serve the complete opposite purpose.[18] With the enactment of the Employment Equity Act[19] (EEA) a few years after the country's first democratic elections and the Broad-Based Black Economic Empowerment Act[20] (BBBEEA) several years later, the continued use of racial classification would be defended as being necessary not only for bureaucratic reasons but also (and especially) for the deployment of programmes aimed at redressing past injustices and inequality.[21] Thus, racial classification became and continues to be an ever-present fixture in the lives of South Africans.

Broadly speaking, race has been a theme garnering much interest within academia and in general society. However in recent years, increasing attention has been given to it as a result of the various social media movements, namely #BlackLivesMatter, #RhodesMustFall and #FeesMustFall. Specifically looking at the latter two movements due to their South African origin, the former movement saw the '…symbolism of Rhodes and all other imperialists and oppressors [being] questioned'[22] whereas the latter questioned the cost of higher education while highlighting the disparity of economic wealth between the races.[23] Neither movement, however, questioned the continued use of racial categories in post-apartheid South Africa, despite the Rhodes movement demanding the interrogation of the continued use of colonial symbols and the Fees movement depicting that the retention of racial classification for redress purposes has failed to improve the economic reality of millions of South Africans.

morphological characteristics', such as skin colour, hair and facial features.' Thus, to racialise would be the assigning of people to these categories based on any of these listed or other factors.

[18] Inaugural Lecture of Pierre de Vos *The Past is Unpredictable: Race, Redress and Remembrance in the South African Constitution* University of Cape Town (2011) 8.

[19] Employment Equity Act 55 of 1998.

[20] Broad-Based Black Economic Empowerment Act 53 of 2003.

[21] Ruggunan S and Marè G 'Race classification at the University of KwaZulu-Natal: Purposes, sites and practices' (2012) 79 *Transformation* 49.

[22] Msila V '#FeesMustFall is just the start of a change' available at http://mg.co.za/article/2016-01-20-fees-are-just-the-start-of-change *Mail and Guardian* 21 January 2016 (accessed on 29 June 2016).

[23] *Ibid*.

The above illustrates how the social construct that is race[24] (which has been held to have been created for political[25] and, during apartheid, socio-legal[26] purposes) is so strongly considered to exist both on a biological[27] and factual level, that it results in racial classification being viewed as a corollary to this existence. Apart from the common sense assertion that racial classification has taken, it has been postulated that this process of self-classification and classifying others has become so ingrained in South Africans that, it has assumed a banal character.[28] From this, one can understand why none of the abovementioned movements even considered questioning racial classification, as it is viewed by the masses to be a normal and inconsequential thing. Despite this, the system is argued to be in conflict with the value of non-racialism,[29] a term that, although is used to reason against race-based policies, continues to be an ambiguous conundrum for its lack of a definition.[30]

The interim Constitution makes further provision that the 'adoption of this Constitution lays the secure foundation for the people of South Africa to *transcend the divisions* and strife of the past.' This can be linked to the ideals of transformative justice (which is an ideal that 'seeks to change [an unequal society] in ways that [make it] more inclusive, less unequal [and] fair[er])[31] and can be seen through the various laws that have been enacted with the aim of improving the access to and exercise of rights by all who previously could not enjoy these rights. Looking at South Africa's history, it is understandable why a particular section of the population is targeted for redress purposes. To clarify, it is not the ideology behind the policy that is disputed, but rather the means that have been elected to achieve those aims.

[24] Smedley A 'The history of the idea of race…and why it matters' (2007) *Race, Human Variation and Disease: Consensus and Frontiers* 2.
[25] Western States Centre *Dismantling Racism: A Resource Book* (2003) Portland 13.
[26] Posel D 'Race as common sense: Racial classification in Twentieth-Century South Africa' (2001) 44(2) *African Studies Review* 88.
[27] Lefko-Everett K 'Beyond race? Exploring indicators of (dis)advantage to achieve South Africa's equity goals' (2012) 79 *Transformation* 73.
[28] Erwin K 'Race and race thinking: reflections in theory and practice for researchers in South Africa and beyond' (2012) 79 *Transformation* 105; see also Ruggunan S and Marè G 'Race classification at the University of KwaZulu-Natal: Purposes, sites and practices' (2012) 79 *Transformation* 55.
[29] Constitution of the Republic of South Africa of 1996, s1(b) provides that one of its foundational values is non-racialism and non-sexism.
[30] Bass O *et al.* 'The possibilities of researching non-racialism: Reflections on racialism in South Africa' (2012) 39(1) *Politikon* 33.
[31] Gready P *et al.* 'Transformative justice – A concept note' in Gready P *The Era of Transitional Justice: The Aftermath of the Truth and Reconciliation* (2010) 1.

1.2. Aims and Objectives

The paper aims at contributing to the discourse within the schools of thought that challenge the alleged neutrality of laws and legal systems, such as the Critical Legal Studies[32] but more specifically the Critical Race Theory.[33] It is hoped that this paper will add to the discussions on race and the law, bringing in a slightly nuanced perspective that can be further developed and/or expounded upon.

The essential objective of the paper is to prove that racial classification is unconstitutional as it violates various provisions of the Constitution. The arguments made will be from the perspective that racial classification not only confines one to a category where stereotypes are attached, but also helps in perpetuating a culture of hatred. The assumption is that racial classification does more harm than good, especially when viewing it from the perspective of how pivotal race was to apartheid, and how the retention of this system is contrary to the value of non-racialism. Originally racial classification was developed to oppress and humiliate the majority of the South African population. However, this paper intends to show that this system negatively affects all South Africans, as opposed to just the majority. Although classifying on the basis of race is not unique to this country, its history warrants a contextualised investigation.

1.3. Significance of the study

This study initiates discussion that would tackle the relevance of this difficult race-related issue within the country's legal system. Currently, racial classification is not a topic of much debate in South Africa despite, as mentioned above, the overall theme of race having broad and current interest. It remains uncontested that it will take time for South Africa to undo all the damage that apartheid and the regimes before it have caused, however, the goal will remain unobtainable if the root of the problem

[32] Johnson D, Pete S and Du Plessis M *Jurisprudence: A South African Perspective* (2001) 246 state that '[t]he members of the CLS movement…believe that society in general is characterised by inequality and oppression, and that the law plays a part in perpetuating this by maintaining and promoting the *status quo.* Their main aim accordingly is to reveal the role that law plays in underpinning injustice and exploitation, and social science is used not simply to inform legal judgment, but rather to develop "a true science of law as a social phenomenon…."'

[33] Modiri JM 'The colour of law, power and knowledge: Introducing Critical Race Theory in (post-) apartheid South Africa' (2012) 28 *SAJHR* 408 provides that the CRT movement was born from the CLS movement, however its ideologies are based upon the view that the 'law's normative vision of social and political life is imbued with racialised power and the existing order is one that operates from a largely white (and male), western perspective and denies black history/ies and black experience(s).'

persists. Economic inequality and other social ills cannot be remedied using a system premised on racial inequality.

Using race as the sole criterion for redress fails to take into consideration the complexity of life under apartheid for the different sections of the population.[34] This study will be significant in adding to the momentum of those advocating for the formulation of new criteria for matters pertaining to redress and interrogating the relevance and centrality that race has in bureaucratic processes.

1.4. Research Question(s)

The prevalence of racial antagonism and a widening economic gap between the races requires a critical analysis of race relations and the transformative framework that is in place within the country. This paper, however, will focus on analysing the basic concepts prevalent in national policies in an attempt to answer the following question:

- Does racial classification in post-apartheid South Africa unjustifiably violate the provisions of the Constitution?

1.5. Literature Review

South Africa is celebrating 22 years of democracy, yet little to no progress has been made where race relations are concerned. Rather, racial tensions are on the increase.[35] The truth and reconciliation process attempted to, but failed at truly unifying the country due to, inter alia, the Commission not being established to target this inherently divisive system that the country both adopted and incorporated into its legal structure. The most prominent arguments on racial classification revolve around the conflict it has with the constitutional value of non-racialism and its centrality to race-based redress.

[34] De Vos P 'Race, corrective measures and the South African Constitutional Court' (2012) 79 *Transformation* 152.

[35] Wicks J 'Twitter erupts after KZN estate agent calls black people "monkeys"' 04 Jan 2016 *Mail and Guardian* available at http://mg.co.za/article/2016-01-04-twitter-erupts-after-kzn-estate-agent-calls-black-people-monkeys (accessed 29 June 2016); see also Dludla S 'SAHRC opens its own complaint against racist guest house owner' 29 June 2016 available at http://www.timeslive.co.za/local/2016/06/29/SAHRC-opens-its-own-complaint-against-racist-guest-house-owner (accessed on 29 June 2016).

South African academic literature touching on racial classification discusses the development of this system within the Republic's history,[36] focusing on its utilisation during apartheid, as well as investigating how students racially identified themselves during the years following the demise of the racist regime.[37] Worthy of particular mention is a special release of the *Transformation* journal that was released pursuant to a conference held at the University of the Witwatersrand following the 2007 University of Cape Town admissions requirements controversy.[38] Therein, several writers critiqued and analysed racial classification and its relevance from a legal,[39] jurisprudential[40] and higher-education[41] perspective. Race-based redress and possible alternatives for the utilisation of race as an identifier formed a considerable part of the edition. It is partially from the questions raised in this edition[42] that have motivated and increased the interest in questioning the constitutional validity of racial classification.

Racial classification is mainly associated with South Africa due to how central the system was for the apartheid regime.[43] Across the pond there has been a discussion on a matter closely resembling racial classification but which instead analyses what the term 'Americanisation' means. Within this analysis, it was found that ethno-racial categorisation and behaving according to what one was classified as being was

[36] Posel D 'What's in a name? Racial categorisations under apartheid and their afterlife' (2001) 47 *Transformation* 51.
[37] Franchi V and Swart TM 'From apartheid to affirmative action: The use of 'racial' markers in past, present and future articulations of identity among South African students' (2003) 27 *International Journal of Intercultural Relations* 209.
[38] Erasmus Z 'Apartheid race categories: daring to question their continued use' (2012) 79 *Transformation* 2.
[39] Stone L and Erasmus Y 'Race thinking and the law in post-1994 South Africa' (2012) 79 *Transformation* 119; see also De Vos P 'Looking backward, looking forward: race, corrective measures and the South African Constitutional Court' (2012) 79 *Transformation* 144.
[40] Soudien C 'The modern seduction of race: Whither social constructionism' (2012) 79 *Transformation* 19.
[41] Ruggunan S and Marè G 'Race classification at the University of KwaZulu-Natal: Purposes, sites and practices' (2012) 79 *Transformation* 48; see also Lefko-Everett K 'Beyond race? Exploring indicators of (dis)advantage to achieve South Africa's equity goals' (2012) 79 *Transformation* 69.
[42] A colloquium was held at the University of the Witswatersrand in response to the University of Cape Town's admissions debacle in 2010 titled 'Revisiting Apartheid's Race Categories'. In organising this event, Zimitri Erasmus formulated questions that served as a framework for the discussion. The questions were a) *How are these categories used in post-1994 South Africa?* b) *What conundrums emerge from the continued use of race classification?* c) *Do we need apartheid race categories for the purposes of redress*? d) *What alternative indicators, analytical strategies and ways of seeing – necessarily informed by both the historical social effects of apartheid governmentality and by racism in the present - might one devise*? (original emphasis). The result of this colloquium was the release of the *Transformation*'s special edition.
[43] Bass O *et al.* 'The possibilities of researching non-racialism: Reflections on racialism in South Africa' (2012) 39(1) *Politikon* 34.

essential for the Americanisation process to both occur and be successful.[44] Hence, one can already see the process of stereotyping associated with racial classification, as (within the context of that discussion) one cannot be deemed American without falling within a specified ethno-racial category, yet one needs to exhibit certain closely held presuppositions about a particular race in order to fall within a specified category.[45]

International discussion around the broad theme of race covers many areas, such as the anthropological discussions questioning the origins of racialisation and its biological component (or lack thereof).[46] With recent developments being located in the spheres of the American #BlackLivesMatter movement, the world-wide refugee crisis, South African student protests and social-media related incidents, there is an abundance of material for academics venturing into the field of race. There has been a substantial amount of writing on race within the sphere of the social sciences, where arguments are centered on proving that race is not a biological but rather a social (man-made) construct.[47]As can be gleaned from the above, racial classification is not a popular independent topic both nationally and internationally. It is usually spoken of within the context of a specific topic, such as, for example, affirmative action or higher education.

Domestically many of the papers that have been written question how 'non-racial' post-apartheid South Africa is, in light of the transformative framework that the country has adopted.[48] These papers take the position that contrary to the purpose of the Constitution, South Africa embraces multi-racialism rather than non-

[44] Richomme O 'The role of "ethno-racial" classification in the Americanization process' (2009) 19 *Cercles* 1.
[45] Omi M and Winant H 'Racial Formations' in *Racial Formation in the United States: From the 1960s to the 1990s* (2ed) (1994) 4.
[46] Marks J 'Black, white other: Racial categories are cultural constructs masquerading as biology' (1994) *Natural History* 174.
[47] Western States Centre *Dismantling Racism: A Resource Book* (2003) Portland 12.
[48] The recognition, promotion and fulfilment of socio-economic rights is one of the best ways to achieve transformation within a society. The Constitution makes provision for these types of rights in terms ss 25 (property), 26 (housing), 27 (health care) and 30 (education). These guarantees are further enhanced and elaborated upon with the enactment of more extensive pieces of legislation dealing with a particular right, for example, the Prevention of Illegal Occupation and Unlawful Occupation of Land Act 19 of 1998 would be read in conjunction with ss 25 and 26 so as to give both these provisions substantive meaning.

racialism.[49] This is a position that I fully agree with, as racial classification is *de facto* taking cognisance of various races, and so is directly opposed to non-racialism.

Building upon, on the one hand, the thinking of Deborah Posel who questions what lies behind and beneath racial categories,[50] this work will attempt to assist in answering her question. On the other hand, Stone and Erasmus were of the opinion that 'while racial discrimination causes such [an] offence [of impairing dignity], [whether it actually does so] is a question that requires further exploration.'[51] This paper also intends to argue that the system does indeed impair one's dignity. Thus, in terms of the angle that has been elected, one would be inclined to say that the argument that racial classification is unconstitutional within the South African context has not been done.

1.6. Methodology

A desktop study will be utilised in carrying out this study. The primary sources that will be referred to will include, case reports, legislation, policies and official documents and various international instruments. Secondary sources will comprise of the writings of authors.

1.7. Chapter Outline

Chapter 1 - Overview of the study

Starting the paper will be a brief introduction highlighting the purpose of this work's intended objectives and giving a holistic outline of how those objectives are to be met. Following from this will be the background, which will trace the history and development of racial classification. As this chapter serves merely to set the foundation for the substance of the work's argument this chapter will not be lengthy.

Chapter 2 - The Importation and Retention of Classification within the South African Legal System

[49] Maré G 'Race counts in contemporary South Africa: 'An illusion of ordinariness'' (2001) 47 *Transformation* 83.
[50] Posel D 'Apartheid race categories: daring to question their continued use' (2012) 79 *Transformation* 9.
[51] Stone L and Erasmus Y 'Race thinking and the law in post-1994 South Africa' (2012) 79 *Transformation* 130.

This chapter shall consist of a detailed discussion examining the acceptance of racial classification into the South African legal system. This will be done through looking at the pre-apartheid, apartheid and post-apartheid periods. With particular emphasis placed on the post-apartheid legislation and policies, one intends to scrutinise the reasons for retaining racial classification. It will be argued that as current events have shown[52] the government is failing in the of delivering basic municipal services to the section of the population that are most in need of it and against whom redress laws are mainly aimed at. This failure questions the sincerity of racial classification being used for redress purposes when the group considered to be the most disadvantaged is repeatedly the one that take to violent protest action so as to voice their dissatisfaction with the government. In making this argument specific reference will be made to the case of *Motala v University of Natal.*[53]

Chapter 3 - The Constitutional Invalidity of Racial Classification?

This chapter will form the bulk of the thesis, and it is here that an attempt to prove the stance adopted will be made. This will involve a thorough breakdown and discussion of the specific provisions of the Constitution, that this paper aims to prove are violated by racial classification. A few appear below:

Clause 9 – The right to equality

By utilising the test established in the Harksen case,[54] the Promotion of Equality and the Prevention of Unfair Discrimination Act[55] (PEPUDA) as well as engaging in a section 36 analysis, it will be established that racial classification is sanctioned by laws of general application with the goal of serving various governmental redress programmes.

Section 10 – The right to dignity

[52] Jordaan N 'Ongoing protests in Tshwane disrupt schooling' 22 June 2016 available at http://www.timeslive.co.za/local/2016/06/22/Ongoing-protests-in-Tshwane-disrupt-schooling (accessed on 29 June 2016).

[53] *Motala v University of Natal* (1995) 3 BCLR 374. In casu, an Indian student who had matriculated with five distinctions had been denied admission into medical school, as the school capped the number of Indian students accepted to 40 in order to accept more Black/African students. The Constitutional Court found that this policy was not in conflict with the Constitution.

[54] *Harksen v Lane NO and Others* (CCT9/97) [1997] ZACC 12.

[55] Promotion of Equalty and the Prevention of Unfair Discrimination Act 4 of 2000.

In determining whether this right has been violated, a crucial component of the assessment entails one looking at how its violation has adversely affected the person, noting that one's dignity 'is seen to be impaired if [one] is discriminated against for a reason over which they have limited (or no) control and which cannot easily be changed, such as nationality.'[56] Therefore, under this sub-heading the aim will be to show the extent to which the retention of racial classification adversely affects one based on criteria that are beyond one's control.

Section 14 – The right to religion, belief or opinion

Under this sub-heading arguments will revolve solely on the right to one's opinion. As this is a right that has not given much attention, there will first be a discussion on the meaning and content of this right. Subsequent to this the investigation into how racial classification encroaches upon it will ensue.

Chapter 4 - Comparative Analysis

The two following countries will be looked at -

The Republic of Haiti

In 1805 the Constitution of Saint-Dominique (Haiti's colonial name) was one of the first nations to re-evaluate racial categorisation when it declared that all Haitians (regardless of colour and origin) would be referred to as 'Black'.[57] In looking at Haiti one will investigate the consequences that this declaration had at the time of its issuance as well as if the declaration has successfully combated the racial divisions it was aimed at alleviating.

The United States of America

As the United States is another country where race and colour were used to divide its population, one will analyse how the country has dealt with the issue of racial classification in its governmental policies and laws.

Chapter 5 - Recommendations and Conclusion

[56] Stone L and Erasmus Y 'Race thinking and the law in post-1994 South Africa' (2012) 79 *Transformation* 129.
[57] Garuba H 'Closing reflections on 'Revisiting Apartheid's Race Categories' (2012) 79 *Transformation* 173.

Drawing from the previous chapter, in this brief chapter, a number of recommendations will be made, which will be followed by the conclusion.

CHAPTER 2 – THE IMPORTATION AND RETENTION OF RACIAL CLASSIFICATION WITHIN THE SOUTH AFRICAN LEGAL SYSTEM

2.1 Introduction

Seventeenth century French philosopher, physician and traveller François Bernier,[58] though virtually unknown by most people, can be heralded as the father of an idea that has affected every human being since its inception – racial classification.[59] Although the concept of race was arguably in existence,[60] Bernier's theory would take race-thinking to new heights. His ideas would be developed further [61] and through imperialism, exported to every corner of the world.[62] As a Dutch colony, the introduction of racial classification would play a pivotal role in South Africa's history as well as in its 'new'[63] constitutional dispensation. In this chapter, I will analyse the adoption, development and continued use of racial classification within South Africa.

2.2 Pre-apartheid: 1652 – 1948

By the time Jan van Riebeeck had set up his refreshment station in the Cape,[64] race as a concept may arguably already have been in existence. Although racial segregation could be traced to as far back as 1659, to incidents such as when '[g]overnor van Riebeeck had ordered that a fence be built between [B]lacks and [W]hites in Cape Town…', [65] one can only speculate as to who fell within those categories. This is partly due to the fact that race, at that time, did not have the fixed (yet oddly elusive)[66] meaning that it carries today and that the Cape colony had

[58] Stuurman S 'François Bernier and the invention of racial classification' (2000) 50 *History Workshop Journal* 1.
[59] *Ibid*.
[60] Hudson N 'From "nation to race": The origin of racial classification in eighteenth-century thought' (1996) 29(3) *Eighteenth-Century Studies* 247.
[61] *Ibid* at 251.
[62] Mills B *Exporting the Racial Republic: African Colonization, National Citizenship, and the Transformation of U.S Expansion, 1776 – 1864* (unpublished PhD dissertation, University of Illinois, 2011)10.
[63] To understand the use of the inverted commas, see the discussion under chapter 5.
[64] Raven-Hart R *Cape Good Hope 1652 – 1702: The First Fifty Years of Dutch Colonisation as Seen by Callers Volume One* (1971) 3.
[65] Welsh D *The Rise and Fall of Apartheid* (2010) 146.
[66] Erasmus Y and Ellison GTH 'What can we learn about the meaning of race from the classification of population groups during apartheid?' (2008) 104 *South African Journal of Science* 450.

several different indigenous groups inhabiting it.[67] Thus, whether 'Black' was a collective noun for all these indigenous groups, and 'White' referred only to the settlers is debatable.[68]

With the passage of time, and particularly after the second annexation of the Cape colony by the British in 1806,[69] the laws that were promulgated began distinguishing between persons. However, the distinctions were at times confusing due to a lack of definitional consistency. For example, in 1809 the 'Caledon Code' (which would later be known as the 'Hottentot Code') was passed.[70] This law would apply to Hottentots (a derogatory term that was used to denote the Khoikhoi)[71] ending their nomadic way of life, and confining them 'to a fixed place of abode.'[72] Yet, in 1812 a Black Circuit court was established dealing 'with complaints by servants and slaves against their [W]hite masters.'[73] Upon further investigation one uncovers that, despite its name, the court was established mainly to hear the complaints of Khoikhoi labourers.[74] Nothing is mentioned of other indigenous groups nor is there an explanation of who constitutes a servant and/or slave for the purposes of that particular law. Consequently, any person could be a servant or slave, including those deemed Europeans.

Apart from inconsistently applied definitions, there also existed uncertainty within categories. For example, in the 1870s, the Diamond Diggers' Protection Society in Griqualand attempted to have laws promulgated preventing 'natives' (Coloureds and Blacks) from prospecting for and/or claiming diamonds.[75] The problem encountered is that this British proclamation factually stripped Black people from owning and

[67] Field S, Meyer R and Swanson F *Imagining the City: Memories and Cultures in Cape Town* ed (2007) 4.
[68] See 'Classification Process' in 'America' section of chapter 4.
[69] Field S, Meyer R and Swanson F *Imagining the City: Memories and Cultures in Cape Town* ed (2007) 4.
[70] Dooling W 'The origins and aftermath of the Cape colony's "Hottentot Code" of 1809' (2005) 31 *Kronos* 50.
[71] *Ibid*.
[72] Malherbe VC *The Cape Khoisan in the Eastern Districts of the Colony Before and After Ordinance 1828* (published PhD dissertation, University of Cape Town, 1997) 99.
[73] Unesco *Racism and apartheid in southern Africa: South Africa and Namibia* (1974) *18.*
[74] Erasmus HJ 'Circuit courts in the Cape colony during the nineteenth century: Hazards and achievements' (2013) 19(2) *Fundamina* 269.
[75] Unesco *Racism and apartheid in southern Africa: South Africa and Namibia* (1974 21.

trading in diamonds[76] yet this was in conflict with a previously promulgated law, namely the Vagrancy Act of 1867 (which was the amendment to the Kaffir Pass Act).[77]

In terms of these earlier proclamations 'kaffirs' had already been stripped of the ability to own and trade in minerals[78] thus making the 1870s proclamation seem redundant. However, the confusion can be abated if one interprets the debase term 'kaffir' as initially only referring to the Xhosa population group,[79] instead of understanding it as the racial slur referring to all Blacks.[80] Thus laws directed at 'kaffirs' may have only been applicable against Xhosas instead of the general Black populace, but due to no clarity on the subject matter, the laws are interpreted as having being applied indiscriminately against all Black people.

The Education Act of 1907 established that school was free and compulsory for White children, but not for those deemed Coloured, with the latter group being forbidden from schooling with the former.[81] Curiously, Coloured was a generic term used to denote persons from the Native, Indian and Coloured population groups.[82] When writing on the 'Native question' in 1908, Olive Schreiner classified the groups occupying pre-union South Africa as being:

> The [W]hite race consist[ing] mainly of two varieties…partly divided at the present moment by traditions and the use of two forms of speech, the Taal and the English…. Our vast, dark *native population consists largely* of Bantus, who were already in South Africa when we came here; of a few *expiring yellow varieties of African races*, *and a small but important number of half-castes*, largely the descendants of imported

[76] '1872. Proclamation' available at https://www.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01646/05lv01683.htm (accessed 14 October 2016).
[77] Kaffir Pass Act of 1857.
[78] Unesco *Racism and apartheid in southern Africa: South Africa and Namibia* (1974 24.
[79] As was done '1872.Proclamation' available at https://www.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01646/05lv01683.htm (accessed 14 October 2016).
[80] See *South African Revenue Services v Commission for Conciliation, Mediation and Arbitration and Others* 2017 (1) SA 549 (CC) at paras.3 -15 where the court delves into the history of the word as a slur.
[81] South African History Online 'A history of Indians in South Africa Timeline: 1654 – 2008' available at www.sahistory.org.za/topic/indian-south-africans-timeline1900-1909. (accessed 23 March 2017).
[82] Glücksmann R 'Apartheid legislation in South Africa' (2010) 2 available at http://ra.smixx.de/Apartheid (accessed 20 December 2016) 8.

> slaves whose blood was mingled with that of their masters, as is always the case where slavery exists, and a very small body of Asiatics.[83] (Own emphasis)

Yet and still, in 1913, section 10 of the Natives Land Act[84] defined a 'native' as:

> [A]ny person, male or female, who is a member of an aboriginal race or tribe of Africa; and shall further include any company or other body of persons, corporate or unincorporated, if the persons who have a controlling interest therein are natives.

This evinces that certain categories meant whatever the writer willed them to mean. Coloured and Khoikhoi were described as two separate races by Schreiner, yet other authors as well as the laws of the time deemed the two as interchangeable. Coloured was specific yet general, similar to 'kaffir.' It is discerned that, although inconsistent, vague and at times confusing, racial categories had been affixed to the different peoples occupying the land. Found throughout a vast array of legislation spanning over three-hundred years, these categories were White, Native, Khoikhoi and Coloured, with the latter comprising of Indians, Cape Malays, Griqua and Chinese.[85] These categories would, however, undergo several changes over the ensuing decades as the next section will detail.

2.3 Apartheid: 1948 – 1994

Deborah Posel put it succinctly when she wrote that '[*a*]*partheid* originated as a label for the system of institutionalised racism and racial social engineering inaugurated by the National Party after its election victory in 1948.'[86] Race was a central element to the regime[87] and by way of confirmation, among the early pieces of legislation promulgated was the Populations Registration Act (PRA) of 1950, which would become 'the linchpin of apartheid.'[88]

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[83] South African History Online 'Fourthly, as to the Native Question' http://www.sahistory.org.za/archive/fourthly-native-question available at (12 October 2016).
[84] Natives Land Act 27 of 1913.
[85] Erasmus Y 'Negotiating racial boundaries: Dialectic strategies of Supreme Court judges in appeals against racial (re)classification during apartheid' (2007) *Centre for Critical Research on Race and Identity* 1.
[86] Posel D 'The Apartheid Project, 1948 – 1970' in Mager A and Ross R (eds) *Cambridge History of South Africa* (2011) 319
[87] Erasmus Z 'The Nation, its populations and their re-calibration: South African affirmative action in a neoliberal age' (2014) *Cultural Dynamics* 2.
[88] Welsh D *The Rise and Fall of Apartheid* (2010) 146.

Initially, the Act classified the populace into three core categories, namely, White, Coloured and Native[89] however, in 1959 the second category would be further subdivided[90] to include Cape Malays,[91] Indians and Asians.[92] The Act saw Coloureds as being persons who were neither White nor Native[93] with the latter being deemed to be those who were 'generally accepted as a member of any aboriginal race or tribe of Africa.'[94] The definitions section of the Act concluded by defining Whites as:

> [P]erson[s] who in appearance obviously [are], or who [are] generally accepted as... [W]hite person[s], but does not include a person who, although in appearance obviously a [W]hite person, is generally accepted as a [C]oloured person.[95]

The governmental department that bore the responsibility for pigeon-holing citizens into the above categories was the Department of Home Affairs.[96] Officials relied on external factors (namely appearance, social acceptance and descent)[97] in making determinations. Although a seemingly clear-cut task, racially classifying people was problematic, as those conferring race were neither experts at it, nor were they trained in that regard.[98] Therefore, the entire classification process was a highly subjective one which tended to be supported by closely-held social prejudices.[99]

Apart from the daily 'common sense' approach[100] used to classify people (i.e. looking at skin colour, hair texture, inquiring into social circumstances and ancestry) some methods of investigating would gain infamy as a result of their invasive and degrading content. Methods such as the pencil-in-hair test (a test used to determine

[89] Erasmus Y and Ellison GTH 'What can we learn about the meaning of race from the classification of population groups during apartheid?' (2008) 104 *South African Journal of Science* 450.
[90] *Ibid*.
[91] Wallerstein I 'The construction of peoplehood: Racism, nationalism, ethnicity' (1987) 2(2) *Sociological Forum* 374.
[92] Erasmus Y 'Negotiating racial boundaries: Dialectic strategies of Supreme Court judges in appeals against racial (re)classification during apartheid' (2007) *Centre for Critical Research on Race and Identity* 1.
[93] Section 1 (iii).
[94] Section 1(x).
[95] Section 1 (xv).
[96] 'The History of Apartheid in South Africa' www-cs-students.stanfpord.edu/cale/cs201/apartheid.hist.html (accessed 5 September 2016).
[97] Posel D 'What's in a name? Racial categorisations under apartheid and their afterlife' (2001) 47 *Transformation* 55 and 58.
[98] Breckenridge K 'The book of life: The South African population register and the invention of racial descent, 1950 – 1980' (2014) 40 *Kronos* 227.
[99] Posel D 'Race as common sense: Racial Classification in Twentieth-Century South Africa' (2001) 44(2) *African Studies Review* 96.
[100] Gotanda N 'The "common sense" of race' (2010) 83 *Southern California Law Review* 442.

ones 'proximity to whiteness' through hair-texture)[101] and genitalia-assessments[102] were just two of the many ways in which determinations were also made. Such vulgar means of identification did not emerge during this period, as some had been in use since the early 1900s to identify Chinese labourers.[103] Apartheid simply recycled, 'improved' and added to erstwhile practices.

Despite the various methods employed, problems arose in classifying ambiguous cases, which were found to be particularly predominant among Coloureds.[104] Thus the Race Classification Appeal Board was established to hear appeals from complainants contesting their classifications.[105] Few cases came before the Board,[106] proving just how the racialisation of the country over the centuries had been ingrained and normalised, so much so that being consigned to a race by state officials was met with little resistance.

The first wide-scale classification occurred with the 1951 Population Census.[107] The devastation that the classification caused was not only felt through the subsequent multitudinous pieces of racially discriminatory legislation, but rather, it was felt immediately within families that were torn apart as a result of conflicting classifications.[108] With the Group Areas Act[109] still in force, families were uprooted and relocated; where kin were categorised differently, they were forcefully separated[110] as a result of grand apartheid's scheme of 'separate but equal development.'[111]

[101] Posel D 'What's in a name? Racial categorisations under apartheid and their afterlife' (2001) 47 *Transformation* 59.
[102] *Ibid*.
[103] Harris KL 'Paper trail: Chasing the Chinese in the Cape (1904 – 1933) (2014) 40 *Kronos* explains how they were stripped naked to ascertain any peculiar birthmarks for identification purposes.
[104] Bosch T 'Online coloured identities: A virtual ethnography' in Hadland A et al (eds) *Power,Politics and Identity in South African Media: Selected Seminar Papers* (2008) 187.
[105] Seekings J 'The continuing salience of race: Discrimination and diversity in South Africa' (2008) 26(1) *Journal of Contemporary African Studies* 3.
[106] Erasmus Y and Ellison GTH 'What can we learn about the meaning of race from the classification of population groups during apartheid?' (2008) 104 *South African Journal of Science* 450.
[107] Seekings J 'The continuing salience of race: Discrimination and diversity in South Africa' (2008) 26(1) *Journal of Contemporary African Studies* 3.
[108] Glücksmann R 'Apartheid legislation in South Africa' (2010) 2 available at http://ra.smixx.de/Apartheid (accessed 20 December 2016). 14.
[109] Group Areas Act 41 of 1950 legalised the forced removals of persons to racially segregated communities.
[110] Muyeba S and Seekings J 'Race, attitudes and behaviour in racially-mixed, low-income neighbourhoods in Cape Town, South Africa' (2011) 59(5) *Current Sociology* 656.
[111] Welsh D *The Rise and Fall of Apartheid* (2010) 147; see also the discussion of this concept in the 'Illegalisation of Classification' in the 'America' section of chapter 4.

At a later stage, Indians were granted a separate category, bringing the core categories to four.[112] Roughly at the same time, the term 'Native' was replaced by 'Black' and 'Bantu', with the former, in 1970, being 'further sub-divided into ethnic or linguistic groups (such as Zulu and Xhosa).'[113] It would seem that, it was during this period in South Africa's history, where racial categories became fixed and discernible. However, there were two anomalies that existed, namely, the classification of the Japanese and the ability for one to 'upgrade' to a better racial category.

Up until they were given a separate category, the general rule in apartheid South Africa was that Indians and other Asian ethnic groups were classified as Coloured. The exceptions, however, were the Japanese. April of 1960 saw the apartheid government making a controversial decision by granting the Japanese within South Africa the status of "honorary European/White."[114] Many reasons were proffered by the government in defence of this decision but the most compelling was that this label was extended to them as a result of the economic benefits being received from Japan.[115] The designation of such status gained the individual 'access to… social recognition and economic benefits [that were] usually reserved for [W]hite[s]….'[116]

Although one would assume that being granted this title would bring much satisfaction for the community concerned, that was not the case, for in mainland Japan, one of the major rallying-calls for the various anti-apartheid movements was the rejection of this '"unhonorable" status'[117] which many an activist felt was offensively derogatory to the nation.[118] This label (of which they were not strangers to)[119] brought embarrassment as a result of its history, its use as ammunition for mockery, and the fact that it conflicted with the Japanese culture of being a

[112] Seekings J 'The continuing salience of race: Discrimination and diversity in South Africa' (2008) 26(1) *Journal of Contemporary African Studies* 3.
[113] *Ibid*.
[114] 'AFJ: Newsletter [quarterly] "Africa NOW" No.102' available at www.ajf.gr.jp/lang_en/africa-now/no102.html (accessed on 4 May 2017); see also Adachi N 'Ethnic identity, culture, and race: Japanese and nikkei at home and abroad' (2010) 8(4) *The Asia-Pacific Journal* 2.
[115] Kawasaki S 'The policy of apartheid and the Japanese in the Republic of South Africa' (2001) 5 *Bulletin of Tsukuba Women's University* 69. At that time, Japan was one of the Republic's biggest trade partners.
[116] Young AV 'Research note: Honorary whiteness' (2009) 10(2) *Asian Ethnicity* 178.
[117] Makino K 'The anti-apartheid movement in Japan: An overview' (2014) *Institute of Developing Economies* 2.
[118] *Ibid* at 5.
[119] Stuurman S 'François Bernier and the invention of racial classification' (2000) 50 *History Workshop Journal* 15.

perceptive and considerate people.[120] To date there has been no legal declaration addressing the status of the Japanese within the Republic.

The degree to which the notions of hierarchy and social status have become embedded in race-thinking is to the extent that, the one cannot be divorced from the other. Consequently, apart from categorising one, racial classification performed two additional functions – it placed one somewhere in this hierarchy that society had created, while simultaneously accruing to one the social status considered appropriate for such position.[121] As the general populace were mere spectators, recipients and adherents to this process, they were compelled to take the outcome as being their lot in life. Yet, for those who found themselves at the lower to bottom-end of the hierarchy, there was a possibility to be 'promoted' to a higher-placed category or bestowed honorary status.[122]

Where one could objectively show that they had reached a certain level of civility and pedigree, an application could be made whereupon a racial upgrade could be requested.[123] If the powers that be agreed that such person had indeed somehow advanced beyond the believed (biologically-inherent) intellectual and behavioural incapacity associated with that 'inferior' race, then an upgrade was granted.[124] This practice most likely existed in the Republic until concern rose that such a prospect would motivate Black people (in particular) to strive for upward mobility within the racial hierarchy.

All the above clearly illustrates what has been proven by various academics across many fields of study – race is a social construct. Neither the classification process nor the categories themselves have been consistent, but were rather arbitrary and based on the subjective predispositions of those in power. Thus, an inherently flawed and uncertain system was introduced into the South African legal system. Reasons for its retention and the problems linked to its continued use will be delved into within the next section.

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[120] Kawasaki S 'The policy of apartheid and the Japanese in the Republic of South Africa' (2001) 5 *Bulletin of Tsukuba Women's University* 69.
[121] Marè G 'Race counts in contemporary South Africa: "An illusion of ordinariness"' (2001) 47 *Transformations* 77.
[122] See Braithwaite ER *"Honorary White": A Visit to South Africa* (1975).
[123] *Ibid*.
[124] *Ibid*.

2.4 Post-apartheid: 1994 – Present

During the early 90s the Republic underwent a drastic political metamorphosis when it from went from apartheid to democracy as a result of a:

> [C]onstitutional and political "revolution" [being] enabled and shaped by protracted negotiations between the apartheid government, the former liberation movements and other stakeholders.[125]

From this process the Constitution emerged, proclaiming its supremacy above all other law. Section 229 of the 1993 Constitution provided for the continued application of apartheid-era laws until their repeal by the relevant and competent authority. Section 241 read with Schedule 6 of the 1996 Constitution would dictate the same thing adding that amendments and inconsistencies with the Constitution would nullify the particular legislation in question.

Under both the interim Constitution[126] and the final Constitution[127] the Republic's legislative authority is vested in Parliament with the National Assembly bearing the duty to, inter alia, 'represent the people and ensure government by the people….'[128] In fulfilling this duty, the National Assembly has been conferred, under section 55(1), with the power to 'consider, pass, amend or reject any legislation before the Assembly.…'A significant body of laws were repealed by Schedule 7 of the interim Constitution with Parliament adding to the list when confronted with offensive legislation or requested to do so by the courts.

Despite being officially repealed in 1991[129] the tenets of the PRA would be retained as a result of section 8(3) of the interim Constitution. The predecessor to section 9(2) of the final Constitution, section 8(3) enabled for redress measures aimed at previously disadvantaged persons to be utilised in order for substantive equality[130] to be achieved. Resembling elements of what is known as 'restitutionary equality'[131]

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[125] Botha H 'Instituting public freedom or extinguishing constituent power? Reflections on South Africa's Constitution-making experiment.' (2010) 26 *SAJHR* 67.
[126] Section 37.
[127] Sections 43 and 44.
[128] Constitution of the Republic of South Africa 1996, s42(3).
[129] Population Registration Act Repeal Act 114 of 1991.
[130] See chapter 3 for a discussion on the content of substantive equality.
[131] The court in *National Coalition for Gay and Lesbian Equality v Minister of Justice* remarked at paragraphs 60–1 that '[i]t is insufficient for the Constitution merely to ensure, through its Bill of Rights,

section 8(3) aims to 'transcend the divisions and strife of the past…'[132] by '[i]mprov[ing] the quality of life of all citizens and free[ing] the potential of each person….'[133]

Naturally, Parliament and proponents for the continued use of racial categories argue that the retention of racial categories is needed in order for this transformation to be effected.[134] Thus, race has become the defining characteristic used to assess where redress was and is most needed and to whom it ought to be given to. The use of race as a criterion requires the continuation of the racial classification process, which in and of itself is an irony – to address injustices created as a result of apartheid race-thinking, those very same ideas are used to try resolving the very problems it has created.[135]

Jonathan Marks contends that 'a longstanding problem in our use of racial categories – [is] namely, a confusion between biological and cultural hereditary.'[136] The former is simple to understand, as that refers to biological make-up, whereas the latter 'label refers to little or nothing in the natural attributes of its members… [t]he groupings are constructions of human social history.'[137]

As already outlined apartheid made use of three criteria for classifying race – appearance, descent and social acceptance. The latter method had the effect that, during race classification appeals, the one being compartmentalised into a specific domain had to 'provide evidence of acceptance by other members of the racial group concerned.'[138] However, this is the general reality of classification even in the new

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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 substantial time and even indefinitely. Like justice, equality delayed is equality denied…One could refer to such equality as remedial or restitutionary equality.'

[132] Postamble of the interim Constitution.

[133] Preamble of the final Constitution.

[134] Moodley J 'She broke my identity into invisible pieces: Transformation and black students in higher education' available at www.psychology.uct.ac.za/site/default/files/image_tools/images/117/Joy.Moodley.pdf (accessed 15 August 2016) 4.

[135] De Vos P 'Constitutionally speaking: A rethink on race' 2 March 2011 available at https://constitutionallyspeaking.co.za/a-rethink-on-race/ (accessed on 18 December 2016).

[136] Marks J 'Black, white, other: Racial categories are cultural constructs masquerading as biology' (1994) *Natural History* 173.

[137] *Ibid*.

[138] Erasmus Y and Ellison GTH 'What can we learn about the meaning of race from the classification of population groups during apartheid?' (2008) 104 *South African Journal of Science* 451.

dispensation, as previously most people were more influenced by society than by any scientific reasoning, in defining themselves.[139]

There have been numerous cases of misclassification, whether intentional[140] or accidental, the outcomes of which have had grave social (and legal) repercussions on those so classed.[141] Racial classification naturally disregards the opinion of the individual concerned, as acceptance is the determinative factor. Essentially this means that what society deems one as is eventually what one becomes. In official documentation, where self-categorisation leaves an official dumbfounded, resort can always be had to the picture within one's identity document, home language and/or residential address, as these are all tools that can be used to 'correctly' categorise one.[142] Thus, not only have the key features of apartheid-era classification lingered, but also the classification process itself remains unperturbed.

2.4.1 Race-based redress

In amassing wealth for the minority, the apartheid government 'systematically and purposefully' restricted the majority's ability to participate in the economy.[143] The reversal of these consequences requires the inclusion of those previously excluded as well as the creation of a framework enabling access to resources that would make participation in the economy easier.[144] As apartheid's policies on education and labour 'produced a strong racial gradient in unemployment, employment and wage rates'[145] it logically follows that legal reform targeting both these aspects was necessary, as access to quality education results in more opportunities that allow for more meaningful[146] participation in the economy. Race became the method used through which this change would be effected.[147] Efforts to change the status quo

[139] *Ibid*.
[140] See the discussion under 'Right to Freedom of Opinion' in chapter 3.
[141] The stories of Rita Hoefling and Beatrice Baby Smale available at sthp.saha.org.za/docs/Classroom/RaceClassificationBoard/STHP_LP_Race_old.pdf (accessed 16 July 2016) show how misclassification led to being ostracised and loss of employment.
[142] Identification Act 68 of 1997, section 9.
[143] Department of Trade and Industry *South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment* (2003) 4.
[144] Durrheim K and Dixon J 'Racial contact and change in South Africa' (2010) 66(2) *Journal of Social Issues* 274.
[145] Roberts B, Weir-Smith G and Reddy V 'Minding the gap: Attitudes toward affirmative action in South Africa' (2011) *Transformation* 6.
[146] Department of Trade and Industry *South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment* (2003) 4.
[147] Posel D 'The ANC youth league and the politicization of race' (2013) 115(1) *Thesis Eleven* 59.

have been noted as having begun in the late 1970s.[148] However, it was only post 1994 that Parliament truly began effecting race-based redress across the board, making its implementation mandatory.

Prior to the promulgation of the key pieces of legislation that would form the structure to the Republic's transformative framework, courts were already being faced with cases pertaining to racial redress. Of note was the case of *Motala and Another v University of Natal.*[149] This case would tackle the concept of restitutionary equality and race. *In casu*, an academically-outstanding Indian matriculant girl had applied and had been refused admission at the medical faculty at the University cited. When reasons for the refusal were eventually given, the applicants were told that the policy of the faculty dictated that more persons from the Black and Coloured racial categories were to be admitted. Thus the admission of Indian students was restricted to forty.

The central contention by the applicants was that the admissions-restriction on Indian students amounted to racial discrimination and consequently was in conflict with the interim Constitution. Pronouncing on the matter Judge Hurt held that:

> While there is no doubt whatsoever that the Indian group was decidedly disadvantaged by the apartheid system, the evidence before me establishes clearly that the degree of disadvantage to which African pupils were subjected under the "four tier" system of education was significantly greater than that suffered by their Indian counterparts. I do not consider that a selection system which compensates for this discrepancy runs counter to the provisions of sections 8(1) and 8(2).[150]

Consequently, no racial discrimination was found by the court. Marie McGregor correctly states that the judgment of this case 'established the notion of degrees of disadvantage'[151] and although she agrees with De Waal, Currie and Erasmus that taking degrees of disadvantage into consideration when devolving redress is the most effective way in attaining transformation, she disagrees with the outcome of the case. McGregor (citing the above authors) is of the opinion that Hurt J failed to

[148] Leonard A *Communicating Affirmative Action During Transformational Change: A South African Case Study Perspective* (unpublished Master's Thesis, University of Pretoria, 2005) 66.
[149] *Motala and Another v University of Natal* 1995 (3) BCLR 374 (D).
[150] *Ibid* at page 383 at C – E.
[151] McGregor M 'Chapter 4 – The application of affirmative action in South Africa' in McGregor M *The Application of Affirmative Action in Employment Law with Specific Reference to the Beneficiaries: A Comparative Study* (published LL.D dissertation, University of South Africa, 2009) 142.

scrutinise the reasonableness of the university's policy of favouring one previously disadvantaged group over another (because of their respective degrees of disadvantage)[152] and this misstep by the court calls into question the policy's conformity with the notion of substantive equality.

Moreover, judgments such as this, although attempting to rectify past injustices, are problematic as they cause friction between previously disadvantaged groups. What occurs in this situation is that in acknowledging the 'degrees of disadvantage' the court inadvertently creates a hierarchy of disadvantage, making those who experienced lesser degrees of disadvantage and who are placed higher on the racial hierarchy pay for not having being victimised to the extent that Black people were. Black people are the highest in this hierarchy of disadvantage as they suffered the most degree of disadvantage and remain the lowest on the racial hierarchy.

Hurt J's judgment does not grapple with the reality that similar to how Black people could not determine their own treatment at the hands of the apartheid government, this too was the case with other racial groups. New-born tension and long-held animosity then festers between previously disadvantaged groups as a result hereof, which runs contrary to the espoused vision of PNURA[153] as well as the Constitution.

2.4.2 Affirmative action and Black Economic Empowerment

In combatting the pervasive economic disparity that exists, the government adopted comprehensive programmes[154] that would assist in eradicating the legacy of apartheid. Several pieces of legislation were promulgated for these purposes, with two of the earlier and most notable being PEPUDA[155] and the EEA. The latter (within its chapter 3) would give flesh to the American concept of affirmative action[156] which had been introduced into the Republic through s8(2) of the interim Constitution. Affirmative action sought preferential treatment for previously disadvantaged groups so as to 'create a diverse workforce and encourage upward mobility for [the majority]

[152] *Ibid* at fn 50.
[153] Act 34 of 1995 ;see also Yosso TJ 'Who's culture has capital? A critical race theory discussion of community cultural wealth' (2005) 8(1) *Race, Ethnicity and Education* 72.
[154] Department of Trade and Industry *South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment* (2003) 8.
[155] Act 4 of 2000.
[156] Brody Jr., CE 'A historical review of affirmative action and the interpretation of its legislative intent by the Supreme Court'(1996) 29 *Akron Law Review* 292.

and women.'[157] Persons living with disabilities would also be included as beneficiaries of affirmative action policies and programmes.[158]

South African history paints the sordid picture of a violently oppressive country steeped in a patriarchal mind-set seen through its erstwhile sexist laws.[159] Keeping in mind the envisioned fundamental goal of transformation, the means to achieve this aim had to cater to the reality that discrimination did not only manifest in relation to skin colour but affected various groups. Hence, upon attaining democracy, the constitutional values of equality, non-sexism and non-racialism would be at the forefront to informing all redress measures.[160] In spite of the positive intention, affirmative action policies have been met with much resistance and remain a controversial topic.[161]However instead of public opinion encompassing the gamut of the debate, it is rather court pronouncements on affirmative action where the controversy lays.

Barely a decade into democracy and the retention and use of racial categories as a means to mete out and measure[162] transformation had already resulted in an undesirable outcome – certain categories of the previously disadvantaged, although deserving of redress, were restricted in the reception of benefits because, simply put, they were not Black. This point can be seen in the way all key pieces of legislation aimed at redress make use of 'Black people' as the generic term[163] for whom redress is aimed at, thus creating and perpetuating the belief that being Black within the new constitutional dispensation is beneficial, as advantages are seen to accrue to all falling within this demographic.[164]

[157] Gault R, Humber J and Mhone G 'Affirmative action: Is South Africa heading down a route which many African Americans are rethinking?' (1998) 10 *CDE Debates* 1.
[158] Section 1 'Definitions – "designated groups."'
[159] Pradhan M 'Memorandum – Exclusion of women from the legal profession in the United States of America, the United Kingdom, and South Africa' (2012) *Avon Global Center for Women and Justice* 8.
[160] Badat S 'Redressing the colonial/apartheid legacy: Social equity, redress and higher education admissions in democratic South Africa' (2008) Paper presented at the conference in affirmative action in higher education in India, the United States and South Africa, New Delhi, India, 19 – 21 March 125.
[161] Schmermund A, Sellers R, Mueller B and Crosby F 'Attitudes toward affirmative action as a function of racial identity among African American college students' (2001) 22(4) *Political Psychology* 759–60.
[162] Marè G 'Race counts in contemporary South Africa: "An illusion of ordinariness"' (2001) 47 *Transformations* 86.
[163] See definitions sections of EEA and BBBEE Act.
[164] Nel EL *The Justifications and Limits of Affirmative Action: A Jurisprudential and Legal Critique* (published LLD thesis, Stellenbosch University, 2011) 28.

In determining whether an affirmative action clause is constitutional, the court in *Minister of Finance v Van Heerden*[165] requires one to ask whether the impugned clause targets persons (or groups thereof) that have been disadvantaged by unfair discrimination; whether the measure seeks to advance such persons and lastly, whether equality is promoted by it. Only once all three questions are affirmed can the clause or measure be held to be constitutional. Theoretically, the application of these criteria would ensure that redress measures reach their intended beneficiaries. Yet, in reality, affirmative action policies and the like are over-inclusive while simultaneously being under-inclusive.[166] Three reasons for this will be briefly dealt with in turn.

2.4.3 Inclusion

In spite of the existence of the *Van Heerden* criteria, the transformative process is plagued by the inconsistent application of affirmative action legislation both by the courts[167] and employers.[168] From the jurisprudence two problematic things are observed, namely, the inclusion of a previously advantaged group and an alluded to increase of '"intra-racial" inequality…within designated groups.'[169]

With regards to the former, one turns to the *Barnard* cases. Originating in the Labour Court,[170] a finding in favour of Barnard claimed that the failure of the National Police Commissioner to promote her (the best candidate) to the position of superintendent constituted unfair discrimination based on race. On appeal the decision was reversed as the court was of the opinion that White people were over-represented in the position applied for.[171] Furthermore, it held that Barnard had no claim to the position 'because the N[ational] C[ommissioner] was not obliged to fill the advertised

[165] *Minister of Finance v van Heerden* [2004] 12 BLLR 1181 (CC).
[166] Nel EL *The Justifications and Limits of Affirmative Action: A Jurisprudential and Legal Critique* (published LLD thesis, Stellenbosch University, 2011) 29.
[167] Timothy O 'Affirmative action: The uncertainty continues…' available at www.hrpulse.co.za/downloads/affirmativeaction_uncertainty continues.pdf (accessed on 12 May 2017) 5.
[168] See the discussion of the 'Naidoo case' below.
[169] Timothy O 'Affirmative action: The uncertainty continues…' available at www.hrpulse.co.za/downloads/affirmativeaction_uncertainty continues.pdf (accessed on 12 May 2017) 8.
[170] *Solidarity obo Barnard v SA Police Services* [2010] 5 BLLR 561 (LC).
[171] *SA Police Services v Solidarity obo Barnard* [2013] 1 BLLR 1 (LAC).

post.'[172]The Supreme Court of Appeal did not agree with this finding and instead, found that unfair discrimination was present.[173]

At the Constitutional Court, the reasoning behind the inclusion of White women in redress measures was explained. It was readily accepted that the apartheid government discriminated against women, however, highlighted that White women have occupied a particular privileged stratum. Despite their being discriminated against because of their sex, they were still advantaged by virtue of their race.[174] Domestically, White women were neither the recipients of inferior-quality education[175] nor limited to unskilled to semi-skilled labour.[176]

It was then held that due to their peculiar circumstances White women 'may require more promotion in some contexts and less in others'[177] but this was not elaborated on. This reasoning by the court is counterintuitive because rather than it aiming to get women of colour on the same ground that White women inhabit,[178] it is increasing the divide. Only in cases where all applicants are equally skilled should White women be eligible for promotion, however, generally, redress benefits should not be extended to them. The main thrust for this is linked to the argument that follows.

In analysing jurisprudence one refers to the cases of *Naidoo v Minister of Safety and Security*[179] and *Solidarity v Department of Correctional Services* (*February* case).[180] Within the *Naidoo* case an Indian woman that had applied for a senior position in the police services, was denied the position, despite being the second-best candidate.[181] The Black man who placed first was given another position and the impugned

[172] Malan K '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)*' (2004) *De Jure* 121.
[173] *Solidarity obo Barnard v South African Police Service* 2014 (2) SA 1 (SCA) at paragraph 81.
[174] Erasmus Z 'The Nation, its populations and their re-calibration: South African affirmative action in a neoliberal age' (2014) *Cultural Dynamics* 7.
[175] Badat S 'Redressing the colonial/apartheid legacy: Social equity, redress and higher education admissions in democratic South Africa' (2008) Paper presented at the conference in affirmative action in higher education in India, the United States and South Africa, New Delhi, India, 19 – 21 March 124.
[176] Seekings J and Nattrass N *Class, Race and Inequality in South Africa* (2005) 6.
[177] *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23 at paragraph 153.
[178] Gutto SBO '*Equality and Non-discrimination in South Africa: The Political Economy of Law and Law Making* (2001) 159.
[179] *Naidoo v Minister of Safety and Security and Another* 2013 (3) SA 486 (LC)
[180] *Solidarity and Others v Department of Correctional Services and Others* 2015 (4) SA 277 (LAC).
[181] *Naidoo* case at paragraph 4.

vacancy was filled by a Black man that had placed fourth, instead of the applicant. Ultimately, the court found in the applicant's favour and the appropriate redress of promotion was issued.

The discrepancy in adhering to affirmative action plans by potential employers is stark. In *Barnard* only one position was advertised, yet, there was a willingness by the police services to leave the position vacant. Yet, in *Naidoo* there were five positions available[182] of which none were offered to the applicant. It is rather suspect why the same employer would leave an advertised *senior* vacancy open[183] in the former case but not do so in the latter, particularly when both women in both cases were recommended for the particular post. It is easier to overlook the qualifications of a woman of colour than a White woman – this is the message conveyed by South African Police Services' actions.

Intra-racial inequality within designated groups is the direct result of degrees of disadvantage and this is perfectly illustrated by the *February* case. In casu, an interviewing panel were determined to appoint a Black person to because according to them the national demographics determined 'that [C]oloured males were over-represented'[184] in the particular position. The court found this argument untenable as it was of the opinion that:

> [W]hen the Department refused to appoint the Coloured and female individual applicants on the basis that they belonged to groups that were already overrepresented within the occupational levels to which they wanted to be appointed, the overrepresentation of those groups had been determined on a wrong [national] benchmark.[185]

Olivia Timothy correctly states that the EEA 'does not provide for unequal treatment of members from a designated group on the basis of degrees of disadvantaged

[182] *Ibid* at paragraph 2.
[183] Similar sentiments were stated in *Solidarity obo Barnard v South African Police Service* 2014 (2) SA 1 (SCA) at paragraph 73.
[184] Timothy O 'Affirmative action: The uncertainty continues…' available at www.hrpulse.co.za/downloads/affirmativeaction_uncertainty_continues.pdf (accessed on 12 May 2017) 9.
[185] *February* case at paragraph 80.

suffered in the past within and between designated groups.'[186] This interpretation of redress policies is worrisome.

If interpreted correctly, then the degrees of disadvantage dictate that redress benefits should only accrue to one depending on how disadvantaged one's group was during apartheid, but by this very logic, White women should be barred completely from redress measures. Yet, as *Barnard* illustrates, this is not the case. Similarly, candidates who are women of colour should be preferred over their male counter-parts, however, as the facts of *Naidoo* show, this too is not the reality. Thus, from the pool of the included, those who seem to benefit are mainly Black men[187] and White women as education and skills bar Black women,[188] whereas Coloureds and Indians have to overcome the degrees of disadvantage-hurdle.

2.4.4 Exclusion

Whether intentional or not, Parliament legally proscribed the beneficiaries of redress measures when expressing that, inter alia, 'Black people' referred only to Indians and Coloureds, thus ignoring an extremely marginalised community – the South African Chinese. The exclusion of South African Chinese from redress in spite of their having suffered (since the early 1900s) at the hands of previous governments[189] supports the argument that, rather than reverse racism[190] these policies are a new form of continued discrimination against communities that have been ignored in the grand narrative of South Africa's history.

South African Chinese who have been seen as a submissive group that acquiesced with White oppression due to their 'abid[ing] by Confucian edicts to be good citizens and not confront the state…'[191] have had to disprove these allegations and prove,

[186] Timothy O 'Affirmative action: The uncertainty continues…' available at www.hrpulse.co.za/downloads/affirmativeaction_uncertainty_continues.pdf (accessed on 12 May 2017) 9.
[187] *Naidoo* case at paragraphs 183 – 207.
[188] Archibong U and Adejumo O 'Affirmative action in South Africa: Are we creating new casualties?' (2013) 3(1) *Journal of Psychological Issues in Organizational Culture* 15.
[189] See Harris KL 'Paper trail: Chasing the Chinese in the Cape (1904 – 1933)' (2014) 40 *Kronos.*
[190] Hanson AR *Employment Discrimination and Affirmative Action: Are Affirmative Action Plans Helpful or Hurtful?* (unpublished thesis for the Degree of Master of Arts in Liberal Studies, Wake Forest University, 2009) 16 explains how lawsuits alleging this in relation to affirmative action were called '"reverse discrimination" claims.'
[191] Accone D 'The race game' (2008) *The China Monitor* 7.

not only their resistance to the previous regime,[192] but also the oppression they underwent[193] so as to benefit from current redress policies. The latter act of defiance was the outcome in the case of *Chinese Association of South and Others v Minister of Labour and Others*[194] where it was determined that for all intents and purposes Chinese people are 'Black' under both the EEA and the BBBEEA. This proves the painful reality that due to the 'black-white paradigm that conceives South Africa's population as consisting of only two consistent groups (African and European) through which other racial identities and groups are understood[195], '[the]…Chinese… barely feature in the dominant historiography or the country's national memory during and after apartheid.'[196]

Important to highlight from the case is that even though South African Chinese were subsumed under the generic term 'Black people' it was only as a subset of Coloured. Curiously, the judgment ensured to expressly limit this benefit to Chinese people who had attained citizenship by 1994. In doing this, the court has actively contributed to the notion that the inclusion of the Chinese in redress policies would further restrict an already limited resource-pool.[197]

It goes without saying that redress should only be accessed by citizens, and the fact that Blacks have not had a similar curtailment placed on the group, despite the influx of immigrants from neighbouring countries and especially since the case occurred after the 2008 xenophobic attacks, calls into question why the court thought it necessary to state the obvious in relation to South African Chinese. The failure to willingly and ungrudgingly accept this community as being entitled to redress benefits greatly diminishes the number of beneficiaries intending to claim access to such measures.

2.4.5 The majority

[192] Chen AY 'Reclaiming a right to belong' (2008) *The China Monitor* 10.
[193] *Ibid*.
[194] *Chinese Association of South Africa and Others v Minister of Labour and Others* (59251/2007) [2008] ZAGPHC 174 (18 June 2008).
[195] See chapter 3 for this discussion.
[196] Huynh TT 'Indentured Chinese labor in South Africa's black-white binary, 1903-1910' (2011) Paper prepared for the Critical Studies Seminar 6; see also Harris KL 'Paper trail: Chasing the Chinese in the Cape (1904 – 1933) (2014) 40 *Kronos* 133.
[197] Chen AY 'Reclaiming a right to belong' (2008) *The China Monitor* 10.

Much like affirmative action, black economic empowerment is a redress measure that aims to be:

> [A]n integrated and coherent socio-economic process that directly contributes to the economic transformation of South Africa and brings about significant increases in the number of black people who manage, own and control the country's economy, [while]… decreas[ing]… income inequalities.[198]

Even with these commendable objectives, both affirmative action and black economic empowerment have faced similar criticisms in that, despite being aimed at assisting the majority of South Africans, the measures have mostly benefitted the middle to upper classes.[199] Racial categories were fervently argued for so that through the regular census, transformation could be monitored.[200]Yet, it is through this very same census and racial-based statistics that the widening economic disparity and increase in poverty has been noted.[201]

Due to redress measures being delivered through group and not individual rights, this results in over-inclusivity whereupon privileged persons within the targeted bracket also benefit.[202] Particularly where resources are limited, this further diminishes the chances of the masses in accessing the very measures aimed at them. Foreign jurisdictions suffering from extreme societal inequalities have to grapple with this conundrum of how to level the playing field, without benefiting the privileged among the intended beneficiaries. The Indian Supreme Court has proffered interesting judgments in trying to overcome this hurdle, which will be expounded upon under chapter 5.

2.5 Conclusion

[198]Department of Trade and Industry *Marketing, Advertising and Communication Sector Code* (2016) 68.
[199] Muyeba S and Seekings J 'Race, attitudes and behaviour in racially-mixed, low-income neighbourhoods in Cape Town, South Africa' (2011) 59(5) *Current Sociology* 654-656.
[200] Marè G 'Race counts in contemporary South Africa: "An illusion of ordinariness"' (2001) 47 *Transformations* 86.
[201] See Erasmus Z 'The Nation, its populations and their re-calibration: South African affirmative action in a neoliberal age' (2014) *Cultural Dynamics.*
[202] Nel EL *The Justifications and Limits of Affirmative Action: A Jurisprudential and Legal Critique* (published LLD thesis, Stellenbosch University, 2011) 29.

From this chapter what has been shown is that race and its classification process was introduced into this country for the initial purposes of segregating. Only from 1806 can it unambiguously be discerned that categorisation existed with the nefarious aim of discriminating by uplifting the minority while completely crippling and de-humanising a majority. This aim was concretised and systematically applied for decades until the attainment of democracy, whereupon racial categorisation was retained in order to rectify these injustices.

Intended to chart progress, the retention of racial categories has instead shown a perplexing outcome – where previously the racial hierarchy was a triangle with Whites at the apex and Blacks at the base, the triangle has now been inverted, but instead of benefits trickling down and racial redress reaching the wide bottom-base most in need of it, the benefits are haphazardly only reaching and concentrating in the top-layer of that bottom-base. With the general exclusion of the poor, restriction of other previously disadvantaged groups and inclusion of White women in redress measures and programmes, racial categorisation and the classification process is relegated to redundancy.

CHAPTER 3 – THE CONSTITUTIONAL INVALIDITY OF RACIAL CLASSIFICATION?

3.1 Human dignity

The fabric of democratic societies is said to be woven from the threads of human dignity, equality and freedom, with human dignity taking the 'pride of place.'[203] Accordingly, Nazeem Goolam is of the view that:

> It is not insignificant that the value of human dignity does not appear either after the values of equality and freedom or between the value of equality and freedom. On the contrary, it is highly significant that human dignity appears before both equality and freedom because essentially, human rights law must serve the purpose of effectively protecting the human dignity of the members of any society.[204]

It is accepted that 'human dignity is generally recognized as the foundation on which human rights are based'[205] and this is as a result of it being fundamental to international human rights instruments.[206] The court in *S v Makwanyane,*[207] held that one should always note 'the relationship between the rights of life and dignity, and the importance of these rights taken together…[t]hese twin rights are the essential content of all rights under the Constitution. Take them away, and all other rights cease.'[208] Thus, human dignity is one-half of a set of fundamental rights which form the foundation for all other rights to exist. Without dignity, the enjoyment of life would be impossible, and thus States are obligated to protect and respect this right.

Despite its centrality, human dignity lacks a universal definition[209] which could be why it is opined that, the meaning of human dignity is not universal, but rather 'context-specific, varying from jurisdiction to jurisdiction and (often) over time within particular jurisdictions.'[210] A basic understanding of what the concept human dignity

[203] Goolam NMI 'Human dignity - Our supreme Constitutional value' (2001) 4(1) *PER/PELJ* 43.
[204] *Ibid* at 44.
[205] Andorno R 'Human dignity and human rights as a common ground for a global bioethics' (2009) *Journal of Medicine and Philosophy* 5; see also Kateb G 'The idea of human dignity' in Kateb G *Human Dignity* (2011) 1.
[206] *Ibid* at 4.
[207] *S v Makwanyane and Another* 1995 (3) SA 391 (CC).
[208] Ibid at paragraph 84.
[209] Rapatsa M 'Human dignity as a foundational norm in the understanding of human rights' (2015) 12(2) *Bangladesh e-Journal of Sociology* 41.
[210] McCrudden C 'Human dignity and judicial interpretation of human rights (2008) 19(4) *The European Journal of International Law* 655.

entails is however, still needed. Although not a self-standing right within both the Universal Declaration of Human Rights (UDHR) and the International Convention on Civil and Political Rights (ICCPR), human dignity is a value that is enshrined in the preambles of both instruments. The Constitution explicitly guarantees it under section 10 (as a substantive right), wherein it is noted that the right contains the predicate 'human' followed by the noun 'dignity' which means that 'the kind of dignity in question [i]s the human kind.'[211]

Similar to section 10's formulation, the Helsinki Final Act of 1975[212] speaks of dignity that is inherent to humans, which translates to meaning 'that dignity is inseparable from the human condition.'[213] As there are several concepts of dignity[214] human dignity should not be confused as being an attribute or thing dependent upon external factors but is instead the 'dignity of [the actual] person or personal dignity.'[215] Cicero[216] referred to *dignitas* 'as having a certain worth by virtue of being human' because 'man is contrasted with animals…[he is] "vastly superior [in relation to] cattle and other animals; ….Man's mind… is developed by study and reflection…."'[217]

Human dignity demands that everyone's right be respected which,[218] narrowly speaking, is achieved by giving people the recognition that they deserve.[219] Broadly speaking though, respect is 'recogni[sing] the person as having a certain parity of status with oneself as an agent with interests that ought to count for something both for herself and for others with whom she engages.'[220] With its content understood, it is now set to be determined how racial classification fares against this value[221] and

[211] Lebech M 'What is human dignity?' (2004) *Maynooth Philosophical Papers* 59.
[212] This Act was an instrument promulgated after the conference on security and co-operation that was held in Helsinki in 1975.
[213] Andorno R 'Human dignity and human rights as a common ground for a global bioethics' (2009).*Journal of Medicine and Philosophy*.6
[214] UNESCO, 2011. *Casebook on Human Dignity and Human Rights*, Bioethics Core Curriculum Casebook Series, No.1 ix.
[215] Lee P and George RP 'The nature and basis of human dignity' (2008) 21(2) *Ratio Juris* 174.
[216] Cicero was a Roman philosopher and lawyer.
[217] McCrudden C 'Human dignity and judicial interpretation of human rights (2008) 19(4) *The European Journal of International Law* 657; see also Rachels J 'Kantian theory: The idea of human dignity' in Rachels J *The Elements of Moral Philosophy* (1986) 114.
[218] Amnesty International *Human rights for human dignity: A primer on economic, social and cultural rights* (2005) 6.
[219] Beitz CR 'Human dignity in the theory of human rights: Nothing but a phrase' (2013) 41(3) *Philosophy and Public Affairs* 278.
[220] *Ibid* at 279.
[221] Human dignity forms a foundational value of the Republic as dictated in section 1(a).

right.

3.1.1 Racial classification versus section 10

Language is a tool that is used to maintain White patriarchal and heterosexual hegemony.[222] Words are known to be 'powerful things [that] can deeply hurt and offend others.'[223]

In explaining *deconstruction* Jacques Derrida has stated that 'one of the gestures of deconstruction is not naturalising what is not natural, to not assume that what is conditioned by history, institutions or society is natural.'[224] Thus, by using this technique, one can aim 'to expose the internal contradictions of apparently coherent systems of thought'[225] particularly where one ultimately rejects the idea that 'categorical, abstract theories derived through reason and assumptions about human nature can serve as the foundation of knowledge.'[226]

Racial categories are no different. Race is a social construct that has, through institutions and society, become naturalised to such an extent that one is unable to identify oneself without it.[227] Thus, during the naturalisation of this unnatural phenomenon, the emergence and subsistence of racial categories became a matter of course. These categories were not created to benefit all of those demarcated within them, but instead were created to protect and reflect the dominance of one racial grouping over the others. Racial categories, in and of themselves violate the inherent dignity of those classified thereunder, including persons within the favoured group. What follows is the exposition of how this is achieved.

If you're white you're alright.

[222] Smith P 'Introduction' in Smith P (ed) *Feminist Jurisprudence* (1993) 6.
[223] Pierre De Vos 'Constitutionally speaking: On "kaffirs", "queers" "moffies" and other "hurtful terms"' available at http://constituionallyspeaking.co.za/on kaffirs, queers, moffies and other hurtful terms (accessed on 30 March 2017); see also *Afri-Forum and Another v Malema and Others* (20968/2010) [2011] ZAEQC 2 where at paragraph 94 it was stated that '[w]ords are powerful weapons which if they are allowed to be used indiscriminately can lead to extreme and unacceptable action.'
[224] 'Derrida – Defining Deconstruction' https://www.youtube.com/watch?v=vgwOjjoYtco (accessed on 11 March 2014).
[225] Smith P 'Introduction' in Smith P (ed) *Feminist Jurisprudence* (1993) 6.
[226] *Ibid*.
[227] Bradbury J and Ndlovu S 'Dangerous liasons: A dialogue about ties that bind and lines that divide' (2011) 42 *PINS* 4.

If you're yellow you're mellow.
If you're brown, stick around.
If you're black, get back. [228]

The power of words stems from the fact that certain words, expressions and terms are wrought with connotations.[229] Unlike with denotations (literal meanings), connotations have a 'wide array of positive and negative associations' that are based on 'emotional and imaginative associations.'[230] Most words have connotations attached to them,[231] but it is '[c]olour adjectives [that] are an example of a lexical field which is very rich in connotations. Many colour connotations may be culture-and language-specific, whereas others are universal or near universal.'[232] The above poem, which found its way into the 1947 song 'Black, Brown and White' by Big Bill Broonzy, is but a preface to the actual degrading potency of racial categories. To illustrate the full impact of this degradation, each category will be dealt with in turn.

3.1.2 Asian and Indian

Alongside the category 'Other', this category is probably the most 'compelling evidence that apartheid's racial categories were explicitly *social* constructs…'[233] as the overriding criteria was acceptance rather than appearance and/or descent.[234] This is most evidenced by the situation of Chinese South Africans and the unsettled issue surrounding those of Japanese descent.

In chapter 2 it was canvassed how people of Japanese descent were classified as 'honorary Whites.' If this still remains the case, then this state of affairs may result in an anomaly occurring during census-taking and during the release of subsequent demographic statistics, as the Japanese who remain legally White, may be

[228] Poem and the idea to use it were taken from the thesis by Nkwadi P (2015) retrieved from http://wiredspace.wits.ac.za/jspui/bitstream/10539/19694/4/4%20Final%20report%20chapt%201-5%20.pdf (accessed on 18 April 2017).
[229] Rabab'ah K and Al-Saidat E '.Conceptual and connotative meanings of black and white colours: Examples from Jordanian Arabic' (2014) 6(2) *Asian Culture and History* 255.
[230] 'Connotations and denotations' available at https://www.csun.edu/~bashforth/098PDF/06Sep15Connotation Denotation.pdf (accessed on 18 April 2017).
[231] *Ibid*.
[232] Rabab'ah K and Al-Saidat E '.Conceptual and connotative meanings of black and white colours: Examples from Jordanian Arabic' (2014) 6(2) *Asian Culture and History* 255.
[233] Erasmus Y and Ellison GTH 'What can we learn about the meaning of race from the classification of population groups during apartheid?' (2008) 104 *South African Journal of Science* 451.
[234] *Ibid*.

'miscategorised' as Asian. Furthermore, the fissure between other Asian ethnic[235] groups, especially the Chinese, would deepen. Highlighting this point was Senator de Klerk, who, in Parliament on 1 May 1962 remarked:

> Then they continuously emphasize the discrimination in favour of the Japanese, in an attempt to make all other non-Whites feel hurt, particularly the Chinese, with the object of destroying good relations….[236]

Additionally one has to ponder what consequences this has with regards to restitutionary measures. As a result of their unwanted but nonetheless privileged status, are people of Japanese descent denied from the benefits of affirmative action? Or similar to White women, are they also included in policies such as affirmative action?

All of this reveals a dichotomy at play within the Asian racial category. On the one hand, there exists a large previously disadvantaged group that has a history of (over) a century in the Republic[237] whose dignity has rightly been restored after their inclusion to access restorative measures.[238] On the other hand there is 'the model minority.'[239] Even with the acknowledgement of having suffered oppression that inclusion brings, there remains a bitter aftertaste in that the Chinese have had to become adversarial to gain, and can only access these benefits, not as a separate category falling within the 'Black' umbrella term, but as (once again) a subset of Coloured.[240] Contrast this with the Japanese who were 'honorary White' for simply being Japanese and may possibly be able to benefit from affirmative action. Historical resentments and animosities between these two ethnicities are resurfaced.

[235] Yang PQ 'Theories of ethnicity' (2000)' in Yang PQ *Ethnic Studies: Issues and Approaches* 40 where it is broadly stated that 'ethnicity refers to the affiliation or identification with …a social group based on ancestry [ethnic group].'
[236] Kawasaki S 'The policy of apartheid and the Japanese in the Republic of South Africa' (2001) 5 *Bulletin of Tsukuba Women's University* 62.
[237] Classic FM 'China Update Interview – 3rd July 2008 with Dr. Martyn Davies, Executive Director, Centre for Chinese Studies' (2008) *The China Monitor* 12.
[238] *Ibid*.
[239] Suzuki BH 'Revisiting the model minority stereotype: Implications for student affairs practice and higher education' (2002) 97 *New Directions for Student Services* 22; see also Young AV 'Research note: Honorary whiteness' (2009) 10(2) *Asian Ethnicity* 179.
[240] See 'The Excluded' discussion in chapter 2; *Erasmus* Y 'Facts, "distortions of the facts", and fiction: Brief comments on the CASA judgment and its implications' (2008) *The China Monitor* 4.

If the Japanese remain White and the Chinese are legally Black where does this leave smaller Asian communities whose presence in the Republic have been noted since 1962[241] but who, even then, were blatantly ignored? The extent of their suffering has been deleted from the grand narrative.[242] Daryl Accone muses that 'worse than being oppressed is being ignored.'[243] 'Asian' has rarely applied to Japanese and Chinese as a result of the former's privilege and the latter's being boomeranged between 'Coloured' and 'Black.'[244] The category Asian should apply to all who are Asiatic in appearance (with the exclusion of Indians), but the matter is convoluted, confusing and far from being resolved.

As pertains to Indians, it is well known that India is geographically located in the south of Asia,[245] thus, South Africans descending from this heritage are, technically speaking, Asian. Yet, a separate category is bestowed upon them. The decisive break from the umbrella category occurred during the period of the Group Areas Act[246] for in the early part of the twentieth century, laws pertaining to Asians also applied to Indians.[247] During apartheid the Indian population garnered so much contempt due to their 'distinctiveness, social aloofness … endogamous marriage practices… [and] promiscu[ity] with [C]oloured and African women'[248] that the state was endorsed to 'deliberately break down Indian cohesiveness by classifying the mixed offspring as Indian and not as [C]oloured or African, as was typically the case.'[249]

This attempt at destroying Indian solidarity illustrates that racial classification and the categories therein are superfluous, having no real purpose but to ostracise, embarrass and anger. Whereas initially, 'South African Indian' denoted a colonial

[241] Kawasaki S 'The policy of apartheid and the Japanese in the Republic of South Africa' (2001) 5 *Bulletin of Tsukuba Women's University* 62.
[242] De Vos P 'A bridge too far? History as context in the interpretation of the South African Constitution' (2001) 17 *South African Journal on Human Rights* 1.
[243] Accone D 'The race game' (2008) *The China Monitor* 7.
[244] See discussions under 'Pre-apartheid' and 'Apartheid' in chapter 2.
[245] Thapar R *The Penguin History of Early India: From the Origins to AD 1300* (2002) xviii.
[246] Soske J '*Wash Me Black Again': African Nationalism, Indian Diaspora and Kwa-Zulu Natal, 1944 – 1960* (published PhD thesis, University of Toronto, 2009) 72; One of the first laws referring to Indians as a separate category was the Asiatic Land Tenure and Indian Representation Act 28 of 1946.
[247] *Dadoo v Krugersdorp Municipal Council* 1920 AD 530.
[248] James W 'The meaning of race in modern South Africa' (2012) 67 *Focus* 31.
[249] *Ibid*.

then an apartheid-era racial category rather than a cultural identity[250], it has been retained and has become affixed to the group to the point where divorce is not possible. Within this group are persons who are technically Coloured, but because this classification did not suit the politics of the day, they were classed in similar terms as their fathers and forced to bear the grudges and disgust of their communities.[251] The terms Asian and Indian are not offensive in themselves, but rather it is the history of their use that was degrading.

3.1.3 Black/African and White

'When the first Europeans "discovered" Africa and Africans, they were quick to label Africans "black" because this term maximized the perceived differences between African and European.'[252] These labels transcended their superficial purpose of distinguishing and came to establish that Caucasian skin equated with civility whereas dark-skin with savagery and barbarism.[253] Inherent in the terms Black and White are connotations so powerful they predate the Middle Ages[254] and are cross-cultural.[255]

As colours, black and white occupy polar opposites of a spectrum whereby even their denotations are converse reflections of each other. Black signifies impurity,[256] mediocrity,[257] evil and/or ill-omen,[258] just to name a few. Conversely, white denotes purity,[259] innocence,[260] peace[261] and excellence.[262] Shrouded in negativity, the

[250] Soske J '*Wash Me Black Again': African Nationalism, Indian Diaspora and Kwa-Zulu Natal, 1944 – 1960* (published PhD thesis, University of Toronto, 2009) 72.
[251] Everatt D 'Non-racialism in South Africa: Status and prospects' (2012) 39(1) *Politikon* 14–5.
[252] Fairchild HH 'Black, negro of Afro-American? The differences are crucial!' (1985) 16(1) *Journal of Black Studies* 47.
[253] Stocking, Jr. GW 'The dark skinned savage: The image of primitive man in evolutionary anthropology' in Stocking, Jr. GW *Race, Culture and Evolution*: *Essays in the History of Anthropology* (1968) 131.
[254] Bridges H 'Understanding prejudice and its causes' (2012) available at https://catalogue.pearsoned.co.uk/assets/hip/gb/hip_gb_pearsonhighered/samplechapter/0132824892.pdf (accessed on 2017).
[255] See Bonnet A 'Who was white? The disappearance of non-European white identities and the formation of European racial whiteness' (1998) 21(6) *Ethnic and Racial Studies.*
[256] Sherman GD and Clore GL 'The color of sin: White and black are perceptual symbols of moral purity and pollution' (2009) 20(8) *Association for Psychological Science* 1019.
[257] Bell DA 'Who's afraid of critical race theory?' (1995) 4 *University of Illinois Law Review* 897. (893-910)
[258] Al-Adaileh BA 'The connotations of Arabic colour terms' (2012) *Linguistica* 3.
[259] Sherman GD and Clore GL 'The color of sin: White and black are perceptual symbols of moral purity and pollution' (2009) 20(8) *Association for Psychological Science* 1019.

colour black is perceived as ominous whereas white is understood to be something 'that can be stained easily and that must remain unblemished to stay pure.'[263] In other words, white is seen as being positive.[264]

The English language has a long history of negative and positive connotations attaching to black and white, respectively.[265] It has become known that at the genesis of Western civilisation, before the slave trade, 'attitudes toward African skin suggests that there was less significance placed on skin color'[266] which could be why, race and concomitantly, racial categories, did not exist.[267] Thus, the [a]ssumptions of African inferiority, extended from the Atlantic slave trade necessitated race as the most salient vehicle of human categorization.'[268] Consequently, one can deduce that it was during this period whereby racial categorisation emerged, and that, although 'black' was used as a means to distinguish between Africans and Europeans, the 'use of the term …was a deliberate attempt to demean, subjugate, and dedignify Africans in that it capitalized on a large set of negative connotations within the English language.'[269]

Ever present and pervasive, the dichotomy between black and white has evolved over the centuries to such an extent that it is has become ingrained in both the interactions and perceptions of those classified within either category. Known as the Black/White syndrome, 'a consistently negative pattern for references to black affected British perceptions of Africans and the negative connotations for blackness

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[260] Dilloway L 'An exploration into colour symbolism as used by different cultures and religions' (2006) *NCCA* 47.
[261] *Ibid*.
[262] Robus D and Macleod C '"White excellence and black failure": The reproduction of racialised higher education in everyday talk' (2006) 36(3) *South African Journal of Psychology* 464.
[263] Sherman GD and Clore GL 'The color of sin: White and black are perceptual symbols of moral purity and pollution' (2009) 20(8) *Association for Psychological Science* 1019.
[264] Rabab'ah K and Al-Saidat E '.Conceptual and connotative meanings of black and white colours: Examples from Jordanian Arabic' (2014) 6(2) *Asian Culture and History* 255.
[265] Fairchild HH 'Black, negro of Afro-American? The differences are crucial!' (1985) 16(1) *Journal of Black Studies* 47.
[266] Hall RE 'From psychology of race to issue of skin color: Western trivialization and peoples of African descent' (2005) 5(2) *International Journal of Psychology and Psychological Therapy* 122.
[267] Fairchild HH 'Black, negro of Afro-American? The differences are crucial!' (1985) 16(1) *Journal of Black Studies* 47.
[268] Hall RE 'From psychology of race to issue of skin color: Western trivialization and peoples of African descent' (2005) 5(2) *International Journal of Psychology and Psychological Therapy* 123.
[269] Fairchild HH 'Black, negro of Afro-American? The differences are crucial!' (1985) 16(1) *Journal of Black Studies* 52.

were readily applied to all dark-skinned people they encountered'[270] whereas '"white"…follow[ed] a consistently positive pattern….'[271] Arguments have been made that these connotations influence the 'evaluative favorability/ unfavorability' of those falling within the purview of the respective racial category.[272] This directly impacts on the person's self-esteem,[273] as one perceives him or herself as a conduit embodying all the stereotypes and connotations attached to his or her racial classification.

It is easy to understand how the category 'Black' impacts on the dignity of those classified as such, the difficulty comes in understanding how the same reasoning applies to White people. Sally Matthews mused that the demise of apartheid 'caused something of an identity crisis for [W]hite South Africans'[274] and inasmuch as this may be the case where Afrikaners and their nationalism is concerned,[275] one cannot fully agree with Matthews' assertion. That is simply because there was never 'racial' identity attached to the category 'Whites' to begin with.[276]

One is used to hearing the phrase 'Black culture' and 'Black identity'. Yet, the same cannot be said of 'White culture' and 'White identity' because only in recent years has the study of 'Whiteness' drawn academic interest[277] adequate enough to begin the expedition on ascertaining its content. White identity is anomalous because, although generally, the different 'races are not all homogenous',[278] the racial category 'White' denotes a monolith where homogeneity and a disregarding of

[270] Bridges H 'Understanding prejudice and its causes' (2012) available at https://catalogue.pearsoned.co.uk/assets/hip/gb/hip_gb_pearsonhighered/samplechapter/0132824892.pdf (accessed on 2017).
[271] *Ibid* at 28.
[272] Fairchild HH 'Black, negro of Afro-American? The differences are crucial!' (1985) 16(1) *Journal of Black Studies* 47.
[273] Coard SI, Breland AM and Raskin P 'Perceptions of and preferences for skin color, black racial identity, and self-esteem among African Americans' (2001) 31(11) *Journal of Applied Social Psychology* 2257.
[274] Matthews S 'Shifting white identities in South Africa: White Africanness and the struggle for racial justice' (2015) 16(2) *Phronimon* 112.
[275] Verwey C and Quayle M 'Whiteness, racism and Afrikaner identity in post-apartheid South Africa' (2012) 111(445) *African Affairs* 551.
[276] Bonnet A 'Anti-racism and the critique of white identities' (1996) 22(1) *New Community* 98 states that "whiteness" is 'a static, ahistorical, aspatial "thing": something set outside social change, something set outside social change, something central and permanent, something that defines the "other" but is itself not subject to others' definitions.'
[277] Chun EW 'The Construction of white, black and Korean American identities through African American vernacular English' (2001) 11(1) *Journal of Linguistic Anthropology* 52.
[278] Marks J 'Black, white, other: Racial categories are cultural constructs masquerading as biology' (1994) *Natural History* 174.

ethnicities[279] are the rule. This is, however, not true.[280] The category fails to relay that there exists no single European race.[281] White denotes 'perfection', and as a result of history it has become the universal benchmark for all spheres of life.[282] Consequently, it is associated with oppression, power and privilege.[283] Thus, anyone classified as such is automatically viewed as oppressive, powerful and privileged – hence no further identity is needed, as this becomes their definition.

The fatal flaw in choosing a racial label that projects perfection is that it requires a certain standard to be maintained by its beneficiaries (as it is perpetually in a state of crisis).[284] Failing hereof results in an automatic ejection – which has been the case several times in the course of history.[285] This brings to fore the question of whether South African Whites, are indeed White, for it must be borne in mind that:

> [T]he process of gaining recognition as a [W]hite European was based on a "tenuously balanced assessment of who was judged to act with reason, affective appropriateness, and a sense of morality". It is clear that the privileges of colonial whiteness were not based on color alone. Construction and protection of "white prestige" was a nuanced enactment of colonial logic that rewarded Western psychology, and behaviors, and subservience to political and economic structures with increased social visibility and citizenship. Thus, in a colonial context, both Europeans and "natives" pursued power by cultivating qualities of their Western self.[286]

[279] Roediger D 'Whiteness and ethnicity in the history of "white ethnics" in the United States' in *Towards the Abolition of Whiteness: Essays on Race, Politics and Working Class History* (1994) 184–8.
[280] Green MJ, Sonn CC and Matsebula J 'Reviewing whiteness: Theory, research and possibilities' (2007) 37(3) *South African Journal of Psychology* 393.
[281] Marks J 'Black, white, other: Racial categories are cultural constructs masquerading as biology' (1994) *Natural History* 174.
[282] Bonnet A 'Anti-racism and the critique of white identities' (1996) 22(1) *New Community* 98.
[283] Green MJ, Sonn CC and Matsebula J 'Reviewing whiteness: Theory, research and possibilities' (2007) 37(3) *South African Journal of Psychology* 390.
[284] Bonnet A 'From the crises of whiteness to western supremacism' (2005) 1 *Australian Critical Race and Whiteness Studies Association* 9 – 14
[285] Green MJ, Sonn CC and Matsebula J 'Reviewing whiteness: Theory, research and possibilities' (2007) 37(3) *South African Journal of Psychology* 394; see also Bonnet A 'From white to western: "Racial decline" and the idea of the west in Britain, 1890 – 1930' (2003) 16(3) *Journal of Historical Sociology* and Bonnet A 'How the British working class became white: The symbolic (re)formation of racialised capitalism' (1998) 11(3) *Journal of Historical Sociology* where even among Britons, White-status was limited.
[286] Young AV 'Research note: Honorary whiteness' (2009) 10(2) *Asian Ethnicity* 180.

These beliefs still persist, and can explain why 'traitorous'[287] eastern European Whites are deemed inferior[288] to western European Whites,[289] whereas American and Australian Whites have never had their whiteness called into question. As White has become synonymous with oppression, power and privilege, it could be that by losing political power,[290] the whiteness of South African Whites' began losing its lustre, and this has been interpreted as a loss of cultural identity. For the descendants of colonisers (who have merely benefitted from past injustices), being viewed in this light is both humiliating and frustrating.

3.1.4 Coloured

Joel Modiri has held that colour is of utility within race, as one's race amounts to a social position that is external to one.[291] In other words, due to one's skin colour, one is imposed with a social standing that affects how others identify one as, regardless of the self-identification that that person is aligned to.[292] When apartheid's first Home Affairs Minister, Eben Dönges wanted to limit South African citizenship on the basis of skin colour, he tasked the job to the Director of Census, Jan Raats.[293] Raats, using the criteria of appearance and social recognition subsequently defined these races within the PRA whereupon a racial hierarchy was firmly established: Europeans (Whites), Asians, Coloureds and Natives (Blacks).[294]

As a result of the mixed heritage that the Coloured population have, they were afforded a higher ranking in comparison to Blacks.[295] Historically and currently,

[287] Bonnet A 'From white to western: "Racial decline" and the idea of the west in Britain, 1890 – 1930' (2003) 16(3) *Journal of Historical Sociology* 325.
[288] Bonnet A 'Whiteness in crisis' (2000) *History Today* 39.
[289] Bonnet A 'From the crises of whiteness to western supremacism' (2005) 1 *Australian Critical Race and Whiteness Studies Association* 9.
[290] Steyn M and Foster D 'Repertoires for talking white: Resistant whiteness in post-apartheid South Africa' (2008) 31(1) *Ethnic and Racial Studies* 26.
[291] Guest lecture by Modiri J *Jurisprudence - Critical Race Theory* University of the Western Cape on (2016).
[292] *Ibid*.
[293] James W 'The meaning of race in modern South Africa' (2012) 67 *Focus* 29.
[294] *Ibid*.
[295] Erasmus Z 'Recognition through pleasure, recognition through violence: Gendered Coloured subjectivities in South Africa' (2000) 48(3) *Current Sociology* 71; see also Coard SI, Breland AM and Raskin P 'Perceptions of and preferences for skin color, black racial identity, and self-esteem among African Americans' (2001) 31(11) *Journal of Applied Social Psychology* 2256 where it is remarked that mixed slaves were given preferential treatment.

however, this racial group is faced with a dilemma of identification[296] – on the one hand, one cannot be considered White if one parent is a person of colour[297] and on the other hand, identifying as Black is detested due to the 'lowering in status' that is presumed to occur.[298] Thus, Coloured people have, rather unfortunately, claimed this category as their own.

Initially, there was resistance to the term 'Coloured',[299] however, it gradually came to be accepted. Seemingly inoffensive, the term is potent with connotations. Simply put, the term, apart from alluding to being tainted and sullied, has referred to racial degeneracy.[300] Not nearly as pejorative as 'Black', the term comes in at a close second. When analysing its denotation, the word coloured refers to anything that has or produces colour.[301]

Contextually, South Africa is the only country in the world where Coloured refers to a legal racial group,[302] for universally, this term is a derogatory way in which to refer to a Black person.[303] The first recording of the term being used to denote skin colour was during the 1600s 'and was adopted in the United States by emancipated slaves as a term of racial pride after the end of the American civil war.'[304] As 'Coloured' was only formally established with the PRA as a category,[305] one wonders whether this term was not purposefully chosen to indirectly strengthen Coloured people's link to Black people and thus concretise their 'impurity.' One can only speculate.

[296] Erasmus Z 'Recognition through pleasure, recognition through violence: Gendered Coloured subjectivities in South Africa' (2000) 48(3) *Current Sociology* 71.
[297] 'The history of apartheid' available at academic.evergreen.edu/projects/wallpainting/New curriculum/8-12 All/8-12 Social Studies/8-12 The History of Apartheid.PDF (accessed on 5 August 2016).
[298] Guest lecture by Modiri J *Jurisprudence - Critical Race Theory* University of the Western Cape on (2016).
[299] Wallerstein I 'The construction of peoplehood: Racism, nationalism and ethnicity' (1987) 2(2) *Sociological Forum* 374 – 6.
[300] Erasmus Z 'Creolization, colonial citizenship(s) and degeneracy: A critique of selected histories of Sierra Leone and South Africa' (2011) *Current Sociology* 4.
[301] 'Meaning of "coloured" in the English dictionary' available at dictionary. Cambridge.org/dictionary/English/coloured (accessed 26 April 2017).
[302] Farquharson K 'Racial categories in three nations: Australia, South Africa and the United States' Paper presented at the Australian Sociology Association Conference, December 4-7 (2009) 4.
[303] 'Definition of coloured in English' available at https: //en.oxforddictionaries.com/definition/coloured (accessed 26 April 2017).
[304] *Ibid*.
[305] Erasmus Z 'Creolization, colonial citizenship(s) and degeneracy: A critique of selected histories of Sierra Leone and South Africa' (2011) *Current Sociology* 4 states that the term has been in use by relevant communities since the 1800s.

Coloured people are products of mixed race or interracial relations and it is known that the first interracial relationships were between slave owners and their slaves.[306] Due to slaves being deemed property,[307] the children born from these affairs were also seen in the same light.[308] In many instances, these child-producing dealings were done without consent, 'under conditions of captivity, dispossession and racism.'[309] A dire consequence of this history is that Coloured people are stigmatised as the products of colonial rape. Regardless of appearance, this negative connotation is automatically affiliated with the category and this on its own, debases the Coloured community in its entirety.

3.1.5 Other

Simone de Beauvoir argued that 'otherness is a fundamental category of human thought.'[310] To existentialists, the Other is a negative status as it is used to objectify, determine and marginalise.[311] Clarifying this (albeit from a gendered perspective), it has been postulated that:

> Women are defined and differentiated with reference to man and not he with reference to her; she is incidental, the inessential as opposed to the essential. He is the subject, he is the Absolute; she is the "Other."[312]

This racial category brings into sharp focus this sentiment, as all the above racial categories are the references,[313] with White holding the title of being the essential and "Absolute Subject". This translates as meaning that Asian, Black, Coloured and Indian are the inessential "Others" with the 'Other' category being the other of the "Others". It is a very demeaning racial category as one is 'othered' twice.

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[306] Guest lecture by Modiri J *Jurisprudence - Critical Race Theory* University of the Western Cape on (2016).
[307] *State of Missouri v Celia* (1855).
[308] Guest lecture by Modiri J *Jurisprudence - Critical Race Theory* University of the Western Cape on (2016).
[309] *Ibid*.
[310] De Beauvoir S *The Second Sex* (1953) 16.
[311] Smith P 'Introduction' in Smith P (ed) *Feminist Jurisprudence* (1993) 6.
[312] Appelrouth S and Edles LD 'Feminist and gender theories' in *Sociological Theory in the Contemporary Era* (2011) 317.
[313] To say that if one is not White, s/he would then fall within another obvious category, failing of which would result in confinement under the 'Other' category.

Racial categorisation (in conjunction with one's sex) places one on a rung on society's ladder however this is dependent on one being classifiable. Unclassifiable people bring confusion and frustration, as it becomes difficult to allot them into the predetermined life chances that their race affords them. For example, consider '[s]ome [Indian] populations that are darkly pigmented (or "black"), have Europeanlike ("Caucasoid") facial features, but inhabit the continent of Asia (which would make them "Asian").[314] In South Africa, these people would be forced to align with the 'Other' category, as they do not accord with the general characteristics and features associated with the main racial categories.

Acknowledging the biological distinctiveness of unclassifiable people would lead to a 'proliferation of categories'[315] and thus, 'Other' acts as a catch-all phrase for those who do not neatly adhere to the main groupings. However, this category is offensive as it declares that the person so categorised is an oddity[316] so irregular that the category itself deems them strange. Rather than using something positive like, 'various', 'special' or 'unique', the label 'Other' may just as well have said 'peculiar' instead. 'The racial categories with which we have become so familiar are the result of our imposing arbitrary cultural boundaries in order to partition gradual biological variation.'[317] As racial categories 'have long been associated with the development and maintenance of racial attitudes'[318] people who are unclassifiable are viewed as a conundrum, and this may result in hostilities against them (especially when it is ascertained that they fall within the demographic against whom there exists xenophobic sentiment). By assimilating all uncertain cases under this category, they become open to a barrage of invasive questioning and offensive retorts.

3.1.6 Conclusion

[314] Marks J 'Black, white, other: Racial categories are cultural constructs masquerading as biology' (1994) *Natural History* 175.
[315] *Ibid*.
[316] Bonnet A and Carrington B 'Fitting into categories or falling between them? Rethinking ethnic classification' (2000) 21(4) *British Journal of Sociology of Education* 489.
[317] Marks J 'Black, white, other: Racial categories are cultural constructs masquerading as biology' (1994) *Natural History* 174.
[318] Fairchild HH 'Black, negro of Afro-American? The differences are crucial!' (1985) 16(1) *Journal of Black Studies* 47.

When one refers to oneself as or acquiesces with being called that which they have been categorised as, one accepts all of the sentiments about that category as being true. The connotations become part of one's identity. These classifications target the intrinsic worth of the individual, strip him or her of it, and only in the case of Whites, rebuilds and (attempts) to boost that worth. However, in the process of rebuilding this value, identity and individuality is lost – in effect, the very essence of being a human being.[319] Thus, in effect, all share the same fate of having their dignity perpetually diminished for the entirety that they are assigned to, and abide by a racial category.

3.2 The right to equality

Equality is comprised of two very different concepts – the first being the actual right to equality with the second being a non-discrimination clause.[320] These two concepts are often discussed as if they are synonyms of each other[321] and this conflation impairs the potential to address social inequities.[322] Equality and non-discrimination are said to occupy the two ends of a spectrum, with the former being positive and the latter, negative.[323] Thus they cannot be equated as equality imposes a positive duty (an action) on the relevant duty-bearer whereas non-discrimination calls for a negative duty (inaction or a refraining from interference).[324] As the South African Constitution embraces both these concepts[325] it is imperative to flesh out both their contents.

3.2.1 Equality

Guaranteed under section 9(1), the general right to equality is probably the most substantive yet difficult right to achieve. Denuding it reveals that the right originally called for '[e]very man to count for one and no one to count for more than one….'[326]

[319] *MEC for Education Kwa-Zulu Natal and Others v Pillay* 2008 (1) SA 474 (CC) at paragraphs 53–4.
[320] MacNaughton 'Untangling equality and non-discrimination to promote the right to health care for all' (2009) 11(2) *Health and Human Rights* 47.
[321] *Ibid*.
[322]. MacNaughton 'Untangling equality and non-discrimination to promote the right to health care for all' (2009) 11(2) *Health and Human Rights* 47.
[323] *Ibid*.
[324] Weiwei L 'Equality and non-discrimination under international human rights law' (2004) *Research Notes* 7.
[325] Section 9(1) is the equality guarantee whereas 9(3) provides for non-discrimination.
[326] Berlin I 'Equality' in Berlin I *Concepts and Categories: Philosophical Essays* (1999) 81.

Known as formal equality[327] it argues that similarly placed persons should be treated alike. The idea of formal equality requires those in similar positions to be treated the same and 'judged [using] a universal standard',[328] which is principally because, equality 'often takes the form of a demand for fairness.'[329] The inherent flaw with this understanding of equality is that it indirectly accepts that, where differences are present, the need for similar treatment is no longer activated and thus inequality may occur.[330]

Through extrapolation, it is clear why this application of equality (and understanding of fairness) would be troublesome within a country such as South Africa, where it is mandated that the bill of rights be contextually interpreted.[331] In light of the Republic's shameful history, if this standard approach to equality is applied, rather than eradicating inequality, it would instead grossly perpetuate it. Consequently, South Africa's equality jurisprudence, which is universally applauded as being exemplary,[332] reflects the Republic as having adopted the more contextualised form of equality, namely, substantive equality.[333]

Chaskalson P *in Brink v Kitshoff NO* states that:

> Section 8 was adopted…in the recognition that discrimination against people who are members of disfavoured groups can lead to patterns of group disadvantage and harm. Such discrimination is unfair: it builds and entrenches inequality amongst different groups in our society. The drafters [of the Constitution] realised that it was necessary both to proscribe such forms of discrimination and to permit positive steps to redress the effects of such discrimination. The need to prohibit such patterns of discrimination and to remedy their results is the primary purposes of section 8….[334]

[327] Stanton GH 'Three concepts of equality: Compensatory discrimination in Indian and American Constitutional Law' (1981) XXVII(1) *IJPA* 4.
[328] *Ibid*.
[329] Berlin I 'Equality' in Berlin I *Concepts and Categories: Philosophical Essays* (1999) 96; the judgment of *Jaga v Dönges 1950* (4) SA 653 (A) has frequently been cited as the authority for establishing the contextual (or purposive) approach to interpretation.
[330] Berlin I 'Equality' in Berlin I *Concepts and Categories: Philosophical Essays* (1999) 92.
[331] Ngcukaitobi T 'Equality' (updated version) in Currie I and De Waal J *The Bill of Rights Handbook* 6ed (2013) 211.
[332] Albertyn C and Goldblatt B 'Section 9 – The right to equality' Presentation paper at the Constitutional Law of South Africa Conference (2006) 1.
[333] See fn.67 in chapter 2.
[334] *Brink v Kitshoff NO* (CCT15/95) [1996] ZACC 9 at paragraph 42.

In protecting the right to equality the Constitution guarantees equality 'before the law' as well as 'equal protection and benefit of the law.' Save for the United States,[335] many jurisdictions such as Trinidad and Tobago have clauses couched in similar terms.[336] Much debate and discussion have been on what the exact meaning of these phrases is.[337] Simply put, equality before the law is being treated as equally as others and equal benefit of the law refers 'to the equal disposal of benefits in terms of the law.'[338]

Taken as a whole, the right to equality both domestically and internationally focuses primarily on improving the situations of blocs[339] rather than one-to-one inequities.[340] As the plethora of case-law and section 9(2) indicate, the primary focus of the right is to rectify past (bloc) injustices while preventing further wrongs from occurring. De Waal and Currie caution however, that, although the constitutional commitment to equality is wary of the inequality between blocs (specifically racial groups in South Africa), note must be had to the increasing inequality among individuals within these blocs (intra-racially).[341] Thus, at some venture, one-to-one equality will have to be duly considered and enforced.

3.2.2 Non-discrimination

Prior to the Second World War, non-discrimination clauses, although limited in scope, were only found in treaties pertaining to minorities.[342] After the war, the establishment of the United Nations with its concomitant Charter resulted in a universal non-discrimination clause[343] coming into effect.[344] The international bill of

[335] The Fourteenth Amendment only confers protection of the law to American citizens.
[336] UPR *Report on Trinidad and Tobago 12th Session of the Universal Periodic Review* (October 2011).
[337] MacNaughton 'Untangling equality and non-discrimination to promote the right to health care for all' (2009) 11(2) *Health and Human Rights* 50.
[338] Rautenbach IM *Rautenbach-Malherbe Constitutional Law* 6ed (2012) 321 at 3.1.1.
[339] A bloc can loosely be defined as a group of people or states that pursue similar interests.
[340] MacNaughton 'Untangling equality and non-discrimination to promote the right to health care for all' (2009) 11(2) *Health and Human Rights* 49.
[341] Ngcukaitobi T 'Equality' (updated version) in Currie I and De Waal J *The Bill of Rights Handbook* 6ed (2013) 212. See 'Post-apartheid' discussion in chapter 2.
[342] Weiwei L 'Equality and non-discrimination under international human rights law' (2004) *Research Notes* 5; see also Office of the High Commissioner for Human Rights 'The right to equality and the non-discrimination in the administration of justice' in *Human Rights in the Administration of Justice: A Manuel on Human Rights for Judges, Prosecutors and Lawyers* (2003) 634 at 1.3 where it is held that Japan had attempted to have a provision for racial equality (protecting minorities) inserted into the Covenant of the League of Nations during the 1919 Paris Conference.
[343] Article 1(3) of the Charter of the United Nations states that, '[t]he [p]urposes of the United Nations are…(c) [t]o achieve international cooperation in solving international problems of an economic,

rights[345] made both non-discrimination and equality clauses a global standard. State parties are to treat all persons equally, differentiating only for purposes of redressing injustice.

Section 9(4) acknowledges that discrimination may be either direct or indirect, and that it can stem from both state parties and private persons. As a result thereof, the Republic is obligated to enact laws barring this from happening, which has been done with the enactment of PEPUDA. Acts of discrimination are recognised as arising from both commissions and omissions.[346]

3.2.3 Arguing the violation of the right to equality

The case of *Harksen v Lane NO*[347] established the two-stage enquiry used to determine whether indeed a violation of equality has occurred. The prequel requires one to determine whether the law or conduct in question makes distinctions between persons or categories of people.[348] Only where differentiation is concluded as being present can one move on to the first stage of the enquiry, for a lack of differentiation puts an immediate end to the investigation.[349] The first stage entails ascertaining whether or not section 9(1) has been infringed by looking at whether a rational basis for the impugned law or conduct exists. In the case of *Prinsloo v Van der Linde*[350] the court said that where there is a rational nexus between the method and the objective, then there is no need to prove that the objective could have been achieved using other methods.[351] Where no rational basis exists, it is immediately concluded that an outright violation of section 9(1) has transpired. If, on the other hand, it is found that a rational basis does indeed exist, then the second-stage of the enquiry is activated, as it may be discovered that the differentiation is unfair.

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social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all *without distinction* as to race, sex, language, or religion;…' (Emphasis added)

[344] Weiwei L 'Equality and non-discrimination under international human rights law' (2004) *Research Notes* 5.

[345] Arat ZFK 'Forging a global culture of human rights: Origins and prospects of the International Bill of Rights' (2006) 28(2) *Human Rights Quarterly* 418.

[346] Albertyn C and Goldblatt B 'Section 9 – The right to equality' Presentation paper at the Constitutional Law of South Africa Conference (2006) 6.

[347] *Harksen v Lane NO* 1998 (1) SA 300 (CC).

[348] Ngcukaitobi T 'Equality' (updated version) in Currie I and De Waal J *The Bill of Rights Handbook* 6ed (2013) 216 calls this the 'threshold test.'

[349] *Ibid* at 216.

[350] *Prinsloo v Van der Linde* 1997 (6)BCLR 759.

[351] *Ibid* at paragraph 36.

The second stage focuses on establishing whether the differentiation complained of amounts to discrimination, which is done by identifying the grounds upon which the differentiation is based on. Where differentiation is based on a listed ground in terms of section 9(3), discrimination will be established and as such an automatic presumption of unfairness, in terms of section 9(5), will apply. However, where the differentiation is based on analogous grounds the complainant will bear the onus of establishing unfair discrimination.[352] In the event that the differentiation complained of is neither on a listed nor analogous ground, then such conduct or law amounts only to mere differentiation.[353]

In proving unfairness, the focal point of the complainant's argument should be on the impact that the discrimination has had on them.[354] The cumulative effect of the following three factors should be taken into consideration – the complainant's position in society; the nature of the discrimination as well as the objective that the discrimination aims to achieve and the degree to which the complainant's rights have been diminished. Where the differentiation is found to be fair, no violation has occurred, but in the event that unfairness is proven, then section 9(3) or (4) has been violated. The next step would be a section 36 (limitations clause) analysis.[355]

3.2.4 Racial classification versus section 9

Embedded in the idea of racial classification is a racial hierarchy. That was the case during apartheid, and it still remains the case today. Section 7(2) of the Constitution obliges the state to promote, fulfil and protect the rights within the bill of rights. However, its continued use of racial classification goes against the right and value of equality, as the 'divisions of the past'[356] are left to widen while this process indirectly discriminates against millions of South Africans by making those of the unfavoured racial groupings feel inadequate and inferior.

In applying the *Harksen* test, one ascertains that there is no single overarching law that is applicable, but instead there are several distinct pieces of legislation, such as the EEA and the BBBEEA which can be scrutinised. To be determined first is

[352] *Harksen* case at paragraph 53.
[353] De Vos P *South African Constitutional Law in Context* (2014) 430.
[354] *Ibid* at 421.
[355] *Rautenbach-Malherbe Constitutional Law* 6ed (2012) 332.
[356] As formulated in the preamble to the 1996 Constitution.

whether there is a rational connection between the various laws and their objectives, to which one finds that there are rational connections.

As the two stage enquiry is activated, the determination made in the first stage (the threshold test) is that the several pieces of legislation that utilise racial classification do differentiate between groups of people. These laws make distinctions between previously advantaged and disadvantaged groups,[357] with the former being Whites and the latter falling into the umbrella term 'Black.' This distinction (as established by stage two of the enquiry) is based on a listed ground, namely race. Consequently, the enquiry ends here, as the presumption of unfairness under section 9(5) automatically becomes applicable. Accordingly, a prima facie infringement of section 9 has been established. All that is left to prove is that such infringement is tantamount to a violation in terms of section 36 (dealt with below).

3.3 The right to freedom of opinion

The right to freedom of opinion can be said to be one of the most neglected guarantees within the body of human rights, as little to nothing has been written on it both domestically and abroad. The lack of discursive interest begs the question of why this right is even included in any human rights instruments at all. Insofar as racial classification is concerned, the right to freedom of opinion plays a crucial role.

Article 19 of the ICCPR provides that '[e]veryone shall have the right to hold opinions without interference' whereas 19(2) protects freedom of expression. Globally, the inclination has been that freedom of opinion is grouped alongside or within the umbrella that is freedom of expression.[358] However, South Africa completely deviated from this international trend and elected to grant it protection in terms of section 15(1) of the Constitution – the right to freedom of religion. This odd placement of opinion has an impact on its interpretation and consequently, its curtailment. As section 15 protects several other concepts namely conscience, belief and thought, one's initial presumption would be that the guarantee is broad enough

[357] See the preambles and section 1 of the EEA and BBBEEA, respectively.
[358] See Article 10 of the European Convention of Human Rights and Fundamental Freedoms ETS 5; 213 UNTS 221 see also Chapter One, Article IV of the American Declaration of the Rights and Duties of Man of 1948; Article 9 of the African Charter of Human and Peoples Rights of 1981.

to encompass opinion, however upon further investigation one finds that that is not the case.

Holistically, the limitation (whether internal or external) that qualifies the exercise of one's expression would automatically apply verbatim to the exercise of one's opinion as well. The internal qualification found in Article 19(3) expressly states that it is applicable to both guarantees and it dictates that these provisions may 'be subject to certain restrictions, [of which] shall only be such as are provided by law.' Apart from this, Article 20[359] has also been held to be a further extension to the rights within Article 19,[360] so much so that Article 20 has been referred to as the unofficial Article 19(4).[361] Hence, the norm is that the manner in which expression is limited, so too must opinion follow suit.

Domestically, the above is not the case, as section 15 lacks an internal qualification, and can thus only be limited via conditions found in terms of the general limitations clause. Furthermore, the freedom of expression which is assured under section 16 does contain a qualification couched in similar terms as that of Article 20, and due to opinion not falling within the purview of this section, one is left to wonder as to whether or not an opinion can amount to propaganda or incitement for war.

The restriction of rights is a natural matter of course, as one cannot expect a right to be unlimited in its application,[362] however in order for a restriction to be placed, one needs to first know what exactly it is that is being limited. Whereas there exists a multitudinous library of what the rights to expression and religion entail, one is wont for the lack of a simple definition of what constitutes an opinion. In the very little that has been written about it, it has been stated that 'freedom of opinion is of a different character because it is a private matter.'[363] No further elaboration is offered. In shedding some light to this matter, the Human Rights Committee (the Committee) in

[359] Article 20 provides that, '(1) Any propaganda for war shall be prohibited by law (2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.
[360] Human Rights Committee 'General Comment No.34 - Article 19: Freedoms of opinion and expression' CCPR/C/GC/34 (2011) at paragraphs 50–1.
[361] UNHCR *Expert Meeting on the Links between Articles 19 and 20 of the ICCPR: Freedom of Expression and Advocacy of Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence* October 2 – 3 (2008) 9.
[362] *Rautenbach-Malherbe Constitutional Law* 6ed (2012 301.
[363] Human Rights in New Zealand '9 Freedom of opinion and expression' in *Section Two – Civil and Political Rights* (2010) 124.

General Comment 34 states, inter alia, that expression and opinion 'are closely related with freedom of expression providing the vehicle for the exchange and development of opinions.'[364] Extrapolating from this one can deduce that the one right cannot exist without the other, as one needs to outwardly manifest (express) an opinion in order to be said to have one, and expression is impossible where one is void of such opinion.

As the Committee continues to claim that '[t]he freedoms of opinion and expression form a basis for the full enjoyment of a wide range of other human rights'[365] the conclusion that is reached is that freedom of opinion can never be derogated from[366] and that its exercise is protected regardless of what form such opinion may take.[367] Thus, in layman's terms, freedom of opinion would refer to the holding of a particular view on various topics. These views need not be based upon facts or logic, and can be changed at will.[368] Globally, one is now able to ascertain, to a certain extent, what the freedom to an opinion entails and what restricting it relays. However, the same cannot be said on the domestic level, as expounding on this right using the Republic's domestic law requires its own exercise altogether.

The canon *noscitur a sociis*[369] is a rule of statutory interpretation that is 'concerned with relations between the words of a statute'[370] and it dictates that the contextual, rather than a strict literal meaning of a word should be followed.[371] Thus the problem that is encountered is that, taken in context, due to section 15 being religious in tone, the freedom of opinion should be read in a religious light. Yet this is not feasible, as religious opinion is already protected by the concepts of *belief* and *thought*.[372] This has the undesirable consequence of bringing redundancy to one of the three terms.

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[364] Human Rights Committee 'General Comment No.34 - Article 19: Freedoms of opinion and expression' CCPR/C/GC/34 (2011) at paragraphs 2.
[365] *Ibid* at 4.
[366] Human Rights Committee 'General Comment No.34 - Article 19: Freedoms of opinion and expression' CCPR/C/GC/34 (2011) at paragraphs 5.
[367] *Ibid* at 9.
[368] *Ibid*.
[369] Translated this means that a word can become known from accompanying words.
[370] Johnstone Q 'An evaluation of the rules of statutory interpretation' (1954) 1(1) *Kansas Law Review* 2.
[371] The Supreme Court of Appeal in the *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) rejected reliance on the grammatical meaning of words, as the court held that before reading the wording of a provision, it must first be placed in its context.
[372] Sachs J in *Christian Education of South Africa v The Minister of Justice* 1999 (2) SA 83 (CC) states at paragraph 19 that there is a difficulty in separating religious thought from religious belief with the latter being what one believes in.

Where there is uncertainty regarding the interpretation of a constitutional provision, recourse would be had to Constitutional Court decisions so as to elucidate the matter. Unfortunately, within all major cases concerning section 15, no discussion has been had explaining the differences between *thought*, *belief* and *opinion*. Furthermore, one cannot look abroad for guidance because, as already mentioned, the Republic departed from the general trend and elected to insert opinion under religion and not alongside expression.

Lourens du Plessis opines that because the Constitution is expansively formulated to cater for an array of exigencies as well as it being extremely value-laden, there is a difficulty in expressing these provisions and values clearly and unambiguously[373] therefore the above is a matter that the courts will have to clarify. For purposes of this paper, however, one will rely on sections 233[374] and 39(1)(b) of the Constitution, as well as the interpretative presumption that statute law does not violate international law to guide the discussion on opinion. Another useful source of authority is the assertion by Sachs J in *S v Lawrence*[375] as well as the presumption preferring the least arduous interpretation.[376] As international law elucidates the freedom to an opinion more, and does so in rather flexible and general terms (as opposed to South Africa), that is the interpretation that will be followed.

3.3.1 Racial classification versus section 15

Unlike an opinion on general matters, one is forbidden from altering their perception as to what racial classification (s)he falls under. This would be met with great resistance especially in the case of a lower-end category on the hierarchy trying to infiltrate a higher category, and not vice-versa.[377] To date, no post-apartheid cases rectifying past misclassifications have been heard. This brings one to the conclusion that those who are misclassified have long accepted the blighting of their opinions, as it would require the exertion of too much energy in arguing and proving their

[373] Du Plessis *Re-inter*pretation of *Statutes* (2002) 145.
[374] In terms of section 233, '[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'; see also Du Plessis *Re-inter*pretation of *Statutes* (2002) 173 the presumption that 'international standards for the protection of fundamental rights and freedoms are upheld by the state.
[375] *S v Lawrence* 1997 (4) SA 1176 (6 October 1997).In paragraph 145 the Justice states that ' [f]reedom of opinion and freedom of expression go hand in hand.'
[376] Du Plessis *Re-inter*pretation of *Statutes* (2002) 161.
[377] *Ibid*.

arguments. Generally, this in effect is racial classification – it dictates to all where they belong regardless of what they believe to be true, because self-classification is 'a form of acculturation into the rationality of government.'[378]

3.4 The limitations (clause) analysis

All of the arguments above build the case of prima facie unconstitutionality. What is left to determine is whether or not these infringements can be justified. In terms of section 36,[379] one encounters a hurdle in that only a law of general application may limit rights within the bill of rights. An ambiguity surfaces in that upon the repeal of the PRA in 1991,[380] no other piece of legislation mandated for the racial classification of the population, yet in the vast majority of administrative and official documentation, it is a compulsory requirement that cannot be foregone.

Relying on the cases of *Hugo*[381] and *Hoffman*[382] where there was no law of general application the court continued with its limitations analysis due to the 'greater interests of society requiring [that] the inherent dignity of everyone…' be recognised.[383] In a similar vein, the greater interests of society would deem it beneficial to ascertain whether this practice of racially categorising is justifiable in an open and democratic society.

Looking at the nature of the rights, dignity and equality are fundamental rights, whereas opinion forms part of expression, which is essential to a democracy. The importance of the limitation is that these rights are limited for purposes of effecting transformative justice, because it is only through race (as it is alleged) that restorative measures can reach previously disadvantaged groups. The nature and extent of the limitation is that one's dignity is diminished and can only be restored (then fully enjoyed) once classification ceases to exist, whereas the right to equality

[378] Bonnet A and Carrington B 'Fitting into categories or falling between them? Rethinking ethnic classification' (2000) 21(4) *British Journal of Sociology of Education* 489.
[379] Section 36 provides that, (1) 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…' (Emphasis added).
[380] De Vos P 'A rethink on race?' (2011) available at constitutionallyspeaking.co.za/a-rethink-on-race (accessed 09 May 2017).
[381] *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC); see also Rautenbach IM *Rautenbach-Malherbe Constitutional Law* 6ed (2012) 304 at (e).
[382] *Hoffman v South African Airways* 2000 (11) BCLR 1211 (CC).
[383] Albertyn C and Goldblatt B 'Section 9 – The right to equality' Presentation paper at the Constitutional Law of South Africa Conference (2006) 15.

has been wholly affected. Racial classification is the key cause of the current inequality due to its usefulness delineating to whom favour, advantages and benefits accrued. It is impossible for this system to support an idea of equality when it was conceived for the complete opposite reason. Freedom of opinion is limited insofar as one is compelled to a category in conflict with one's perceptions – essentially being told what to think and why.

There does seem to be a nexus between the limitations and their purpose, as race is an easy criteria for devolving redress. Therefore, as race is the method used, naturally the classification process must continue, however in looking at the whether there are less restrictive means in achieving this purpose, it has been postulated by several academics that social economic stance,[384] and access to tertiary education[385] may be viable alternative criteria for conferring redress. As there are unexplored avenues in which to affect redress, and the rights violated are integral to the person, one can only hold that racial classification is indeed unjustifiably unconstitutional.

[384] Erasmus Z 'Apartheid race categories: daring to question their continued use' (2012) 79 *Transformation* 2.
[385] *Ibid* at 10.

CHAPTER 4 – COMPARATIVE ANALYSIS: THE REPUBLIC OF HAITI AND THE UNITED STATES OF AMERICA

4.1. The Republic of Haiti

4.1.1 Introduction

According to Scott Koslow '[m]odernity is characterized by a [W]hite supremacist synecdoche that selects the [W]hite portion of a population to stand in for the whole population ….'[386]The year 1804 not only saw the close to history's most 'effective slave rebellion ever to have occurred in the Americas'[387] but also bore witness to the reversal of this synecdoche, whereupon a [B]lack population was selected 'as representative of the whole.'[388] Within the first part of this comparative analysis, one will investigate Haiti and the consequences that this reversal had on the racial classification of the population.

4.1.2 Brief history

In 1791 insurgency broke out in the French colony of Saint-Domingue (present day Haiti)[389] located on the western shore of the island of Hispaniola.[390] The revolt was precipitated by France's 1789 Universal Declaration of the Rights of Man[391] whereby slavery was expected to be abolished due to the declaration conferring 'universal' rights upon subjects.[392] However, when this expectation failed to materialise in the colony, the somewhat five-hundred thousand strong slave-labour force[393] along with the *anciens libre*[394] and *petit blancs*[395] took up arms.

[386] Koslow S *Writing Race in Haiti's Constitutions: Synecdoche and Negritude in Post-Revolutionary Haiti* (published MBA thesis, Baylor University, (2015) 8.
[387] Smith A 'A critical analysis of the processes of racialization in the Dominican Republic and Haiti' (2014*) CERS Working Paper* 2.
[388] Koslow S *Writing Race in Haiti's Constitutions: Synecdoche and Negritude in Post-Revolutionary Haiti* (published MBA thesis, Baylor University, (2015) 12.
[389] Taber RD 'Navigating Haiti's: Saint-Domingue and the Haitian Revolution' (2015) 13(5) *History Compass* 235.
[390] Saba LP *Dominant Racial and Cultural Ideologies in Dominican Elementary Education* (published thesis for M.A. Degree, McGill University 2009) 18.
[391] Grüner E 'Haiti: A (forgotten) philosophical revolution' (2008) 4 *Sociedad (B. Aires)* 3.
[392] Ibid at fn 2.
[393] Murray G *Dominican-Haitian Racial and Ethnic Perceptions and Sentiments: Mutual Adaptations, Mutual Tensions, Mutual Anxieties* (2010) 6.
[394] Geggus A 'The Haitian Revolution in comparative perspective' a paper presented at *Creating Freedom in the Americas: 1776 – 1826* 19 November, (2010) 5 translates this as referring to free born Blacks.

Under the leadership of Touissant L'Overture,[396] the relentlessness and determination of the insurgents would result in France being compelled to abolish slavery in 1794,[397] yet the bitter and bloody fighting would only come to a decade later.[398]With L'Overture having being betrayed and left to die in a French prison,[399] independence would be attained by his infamous successor, Jean-Jacques Dessalines, who made the historic pronouncement several weeks after massacring most of Saint-Domingue's White population.[400] Recorded in the annals of history as having a deep-seated hatred for Whites,[401] Dessalines (who was a slave until the revolution broke out)[402] would rename the colony to Haiti, in honour of the island's original native inhabitants.[403] Thereupon, within the Republic's second Constitution, Dessalines would do the unimagined – declare all Haitians as Black.[404]

Printed in the New York Evening Post on July 15, 1805,[405] Article 14 of the Haitian Constitution declared:

> All exception (sic) of colour among the children of one and the same family, of whom the chief magistrate is the father, being necessarily to cease, the *Haytians shall hence forward be known only by the generic appellation of Blacks*. (Own emphasis)

On the one hand, it has been postulated that Dessalines had this inserted into the Constitution as a means to achieving cohesion,[406] which rings similar to how South Africa espoused certain values and strategies within both its interim and final Constitutions in order to achieve national unity. However, much like the current

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[395] Connor J *Children of Guinea. Voodoo, the 1793 Haitian Revolution and After* (2003) 5 translates this term as referring to the middle-men beneath the plantation owners.
[396] Popkin JD *A Concise History of the Haitian Revolution* (2012) 90.
[397] Nesbitt N 'The idea of 1804' (2005) 107 *Yale French Studies* 18.
[398] Bogues A 'The dual Haitian revolution as an archive of freedom' (2010) 3(2) *BIM* 218.
[399] *Ibid*.
[400] Geggus A 'The Haitian Revolution in comparative perspective' a paper presented at *Creating Freedom in the Americas: 1776 – 1826* 19 November, (2010) 5.
[401] Girard PR 'Jean-Jacques Dessalines and the Atlantic system: A reappraisal' (2012) *The William and Mary Quarterly* 552.
[402] Popkin JD *A Concise History of the Haitian Revolution* (2012) 125.
[403] Geggus D 'Print culture and the Haitian revolution: The written and the spoken word' (2007) *American Antiquarian Society* 315.
[404] Koslow S *Writing Race in Haiti's Constitutions: Synecdoche and Negritude in Post-Revolutionary Haiti* (published MBA thesis, Baylor University, (2015) 39.
[405] 'Haiti: 1805 Constitution - Webster University' available at faculty.webster.edu/corbetre/Haiti/history/earlyhaiti/1805-const.htm (accessed 17 May 2017).
[406] 'Haiti – 1804-1805 – Independent Haiti' available at www.globalsecurity.org/military/world/haiti/history-5.htm (accessed 16 August 2017).

situation within South Africa, Dessalines' attempts could not eradicate underlying (ethnic) tensions.[407] On the other hand, the popular sentiment has been that the insertion of such a bold declaration was Dessalines' way of showing further impudence to Western idealism and beliefs.[408] Regardless of his motives, the fact remains that, thenceforth, Haiti came to be known as the 'Black Republic.'[409]

Despite the historical impression that Haiti no longer had a diverse populace, several authors demonstrate that Dessalines did not annihilate Haiti's White population in totality[410] but spared those in meaningful occupations. In addition, although marginal, Haiti also had interracial inhabitants[411] as intermixing between slaves and colonisers was an open secret in many former colonies. Despite this (and most probably as a result of its history) 'Haitian' became universally synonymous with 'Black.'[412]

4.1.3 Present day

From being the world's richest colony,[413] today, Haiti is one of the poorest countries in the world plagued by inter alia, poverty and the inability to cope with natural disasters. Viewed poorly by some Western circles, the Republic, during its bicentennial, had an article in the Washington *National Review* written about it, wherein it was stated that the Republic had '"celebrated" two hundred years of fail[ing] to build a democratic… society.'[414] In spite of the changing tides, one thing has remained constant – Black has remained the standard against which all inhabitants are classified. Essentially, Haiti has a dichotomised racial classificatory

[407] *Ibid*.
[408] Grüner E 'Haiti: A (forgotten) philosophical revolution' (2008) 4 *Sociedad (B. Aires)* 8.
[409] Fuller R 'From slavery to exclusion: Perceptions of African identity in the Dominican Republic and Brazil' (2009) available at http://www.wofford.edu/uploadedfiles/community-scholars/new_cos_page/fuller_spread.pdf (accessed on 9 August 2017) 2; see also Sawyer MQ and Paschel TS '"We didn't cross the color line, the color line crossed us": Blackness and immigration in the Dominican Republic, Puerto Rico and the United States' (2007) *Du Bois Review* 306.
[410] Dubois L *Avengers of the New World: The Story of the Haitian Revolution* (2004) 112.
[411] Jenson D 'Dessaline's American proclamations of the Haitian independence' (2009) 15(1) *The Journal of Haitian Studies* 82.
[412] Meszaros J 'The Dominican second generation: Creation of a subaltern identity' (2010) conference paper from *Looking at Ourselves: Multiculturalism, Conflict and Belonging* 1.
[413] Mocombe PC 'Why Haiti is maligned in the western world: The contemporary significance of Bois Caiman and the Haitian Revolution' (2010) 16 *Encuentros* 32.
[414] Shilliam R 'What the Haitian revolution might tellus about development, security and the politics of race' (2008) *Comparative Studies in Society and History* 780.

process[415] which results in one being categorised as either Black (us) or non-Black (them).[416]

Racial categories, as known by common Haitians, consist of either *po nwa* (black skin) or *po wouj* (red skin).[417] People are then classed accordingly, with those traditionally deemed Black falling into the former category, while Black people of lighter shades coupled with persons of other races, fall into the latter category.[418] Although colourism exists, one would argue with some difficulty the assertion that, Haiti's racial classifications are indicative of an entrenched racial hierarchy. Despite the phenotypical-influence, Haiti's racial categories focus more on skin tone, with regular to dark brown being the standard gradient, whereby every other skin tone is measured against. It is as a result of this that the curious situation of Whites and Blacks occupying the same racial category can occur.[419] This racial binary enables all people within the borders of Haiti to fall into one of the two categories, regardless of their 'universal' race.

Although South Africa has always had a minimum of three known racial categories at any given time during its history, similar to Haiti, a Black/White binary has always taken precedence. However, unlike the island nation, South Africa's binary imitated Koslow's modern-synedoche wherein the White populace was the measuring-tape used for all inhabitants. South Africa followed the Western classification standard of White and non-White. Currently, there is much debate as to whether this remains the case, as academics are attempting to determine who's will is represented by '[w]e the people' in the country's final Constitution.[420]For Haiti, the matter is rather simple, the 1805 Constitution and its successors, represented (to the exclusion of all others) the will of former slaves.

[415] Smith A 'A critical analysis of the processes of racialization in the Dominican Republic and Haiti' (2014*) CERS Working Paper* 12.
[416] Smith A 'A critical analysis of the processes of racialization in the Dominican Republic and Haiti' (2014*) CERS Working Paper* 12.
[417] *Ibid*.
[418] *Ibid*.
[419] *Ibid*.
[420] See Botha H 'Instituting public freedom or extinguishing constituent power? Reflections on South-Africa's constitution-making experiment' (2010) 26 *SAJHR* 66 – 84.

Being viewed as a Black Republic has had grave consequences for the country, both on a symbolic as well as realistic level. As discussed under chapter 3, the connotations that are attached to the adjective 'Black' are predominantly negative and this is clearly seen in relation to Haiti. The large corpus of writing on the Haitian revolution paint the affair as being nothing more than a violent rebellion by slaves who were first under the leadership of (mulatto) L'Overture[421] and later by the notorious (dark-skinned) Dessalines[422] who yielded an unquenchable lust for White blood.

The elements of colourism in these narratives prove how Dessalines became the archetype of Black racial stereotypes. To the West, he was a bogey-man and as a result thereof, the land he was a leader of could never be viewed and treated in a positive light[423] – hence Black Republic. This name achieved two things – it 'reversed the colonial hierarchical status of human beings'[424] and (most importantly) espoused the contempt and fear[425] that the West had for the former colony. A possible and logical reason for this may stem from the manner in which independence was attained. Haiti forcefully took its independence without settling for anything less than what it wanted and by doing this, Haitians may have unintentionally corroborated the racist beliefs attached to Black people. With the country being deemed a failed state[426], the name 'Black Republic' achieves an additional thing – it has fulfilled an implied colour-coded prophesy.[427]

> [R]acial enculturation is a process by which we come to understand and internalize racial definitions and concepts. All of these ideas are reinforced throughout society, especially in families, schools, religious institutions and among peers.[428]

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[421] See fn 99 below for the definition.
[422] Girard PR 'Jean-Jacques Dessalines and the Atlantic system: A reappraisal' (2012) *The William and Mary Quarterly* 554.
[423] See Alexander L '"The Black republic: The influence of the Haitian revolution on black political consciousness, 1817 – 1861" in Jackson M and Bacon J (eds) *African Americans and the Haitian Revolution: Selected Essay and Historical Documents* (2009).
[424] Bogues A 'The dual Haitian revolution as an archive of freedom' (2010) 3(2) *BIM* 230.
[425] Koslow S *Writing Race in Haiti's Constitutions: Synecdoche and Negritude in Post-Revolutionary Haiti* (published MBA thesis, Baylor University, (2015) 3.
[426] Shilliam R 'What the Haitian revolution might tellus about development, security and the politics or race' (2008) *Comparative Studies in Society and History* 779.
[427] As mentioned in chapter 3 'black' also connotes failure.
[428] Simmons KE 'Racial enculturation and lived experience: Reflections on race at home and abroad' (2006) *Anthropology News* 2.

Nowhere is this better illustrated than in the interactions between Haitians and their neighbour, the Dominican Republic. Occupying the eastern-side of Hispaniola[429] the former Spanish colony of Santo Domingo, now the Dominican Republic, was under Haitian control from 1822, attaining independence in1844.[430] During that period, the two nations clashed to the extent that deeply-entrenched negative sentiments are still held today.[431] So despised is the idea of being associated with Haiti that since 1844 the Dominican Republic has fervently worked at purging itself of its African history and heritage.[432]

The dissociation not only manifests in the culture, languages and history celebrated by the country, but is most evident in the racial categories elected to represent the Dominican population. Unlike Haiti where a binary exists, the Dominican Republic has three dominant racial categories, namely *blanco*, *indio,* and *negro* (the preferred synonyms for the latter being *moreno* or *prieto*).[433] The first category refers to the White population group, however, when addressing such person directly, the synonym *rubio* is used instead, as it is socially viewed to be more polite and acceptable.[434]

Much like South Africa, the racially mixed Dominican populace are conferred with a separate category – *indio*. Directly translated as meaning 'Indian',[435] this category makes reference to the history of miscegenation that occurred between the native women and the Spaniards in the early history of Hispaniola.[436] Consequently, the indigenous phenotype remains discernible among some Dominicans. In bleaching all traces of negritude from the country, President Trujillo in 1944 posited the novel

[429] Saba LP *Dominant Racial and Cultural Ideologies in Dominican Elementary Education* (published thesis for M.A. Degree, McGill University 2009) 50.
[430] Torres-Saillant S 'The tribulations of blackness: Stages in Dominican racial identity' (1998) 25(3) *Latin American Perspectives* 1.
[431] Mazzaglia NL and Marcelino PF 'Migratory policy as an exclusionary tool: The case of Haitians in the Dominican Republic' (2014) *Laws* 164.
[432] Bailey B 'The language of multiple identities among Dominican Americans' (2001) 10(2) *Journal of Linguistic Anthropology* 190; see also Howard D *Colouring the Nation: Race and Ethnicity in the Dominican Republic* (unpublished PhD dissertation, University of Oxford, 1997) 1 – 2.
[433] Murray G *Dominican-Haitian Racial and Ethnic Perceptions and Sentiments: Mutual Adaptations, Mutual Tensions, Mutual Anxieties* (2010) 9.
[434] Ibid.
[435] Duany J 'Reconstructing racial identity: Ethnicity, color, and class among Dominicans in the United States and Puerto Rico' (1998) *Latin American Perspectives* 147.
[436] Murray G *Dominican-Haitian Racial and Ethnic Perceptions and Sentiments: Mutual Adaptations, Mutual Tensions, Mutual Anxieties* (2010) 5.

category *indio* on the population, electing to recognise the minute trace of native blood in the populace rather than continue to acknowledge any African (and concomitantly Haitian) link.[437] Thus, *indio* is an umbrella category that incorporates brown-skinned individuals of both the lighter and darker shades.[438]

Being the only country in the world in which the majority of the population is mulatto,[439] the bulk of Dominicans classify themselves as *indio* regardless of whether there exists any actual admixture.[440] It as a result hereof that many academics hotly contest and bemoan Dominicans as rejecting their African heritage because Dominicans of unambiguous African descent would be classified as *indio* rather than *moreno*.[441]

South Africa and the Dominican Republic both contrast Haiti in that, their various racial categories were conceived with the intent of establishing a firm hierarchy.[442] With colourism rearing its head once again, this hierarchy is mostly felt by darker-skinned Dominicans and (especially) Haitians.[443] Canvassed above (in that order) are the upper tiers of this hierarchy. *Moreno* or *prieto* is the final (and lowest) category which refers to Black people, as traditionally known. Social practice dictates that the use of 'the term *negro* has denigrating social implications and will not be used in polite company'[444] and because of the degree of offensiveness that this term is deemed to have, *moreno* is the preferred synonym.[445] Even with this general rule, however, certain areas in the Dominican Republic have reserved the term *negro* and *moreno* as synonyms for Haitian (rather than make use of the standard reference

[437] Simmons KE 'Racial enculturation and lived experience: Reflections on race at home and abroad' (2006) *Anthropology News* 4.
[438] Murray G *Dominican-Haitian Racial and Ethnic Perceptions and Sentiments: Mutual Adaptations, Mutual Tensions, Mutual Anxieties* (2010) 9.
[439] *Ibid* at 5.
[440] Sawyer MQ and Paschel TS '"We didn't cross the color line, the color line crossed us": Blackness and immigration in the Dominican Republic, Puerto Rico and the United States' (2007) *Du Bois Review* 306.
[441] See Smith A 'A critical analysis of the processes of racialization in the Dominican Republic and Haiti' (2014*) CERS Working Paper.*
[442] *Ibid*.
[443] *Ibid* at 2.
[444] Murray G *Dominican-Haitian Racial and Ethnic Perceptions and Sentiments: Mutual Adaptations, Mutual Tensions, Mutual Anxieties* (2010) 9.
[445] *Ibid*.

term *haitiano*).[446] This points to how, irrespective of shade, Haitians are automatically given the lowest social standing in the form of an insult.[447]

4.1.4 Conclusion

South Africa and Haiti both have populations were the majority is Black. Knowing that a pejorative meaning was attached to this label, Haiti attempted to reclaim and redefine the word. To a certain extent, it has worked within the borders of the nation. Looking at Haiti and its neighbourly-relations illustrates that racial classification is contextual and certain categories can be created solely for territorial application. Ultimately, the remarkable declaration made in 1805 has now become a stain that will forever taint the (once rebellious and brave) island nation.

[446] *Ibid*.
[447] Smith A 'A critical analysis of the processes of racialization in the Dominican Republic and Haiti' (2014*) CERS Working Paper* 2.

4.2. The United States of America

4.2.1 Introduction

Many an American, for over 'two hundred years… [has] had to cope with the social labyrinth of [the] … deceptively straightforward one-drop racial rule.'[448] Unlike in South Africa, racial classification in North America was especially dependant on ancestry.[449] Convoluted yet simple, confusing yet comprehendible – this encompasses the United States' racial classificatory process. In the second part of this comparative analysis, one will investigate the country where social assimilation (Americanisation) continues to hinge on racial classification. [450]

4.2.2 The classification process

Racial classification in America is determined by blood.[451] Known as the 'one-drop rule', this principle asserts 'the idea that anyone with any African "blood" is legally [B]lack.'[452] The consequence of this social rule is that one either is, or is not Black.[453]Similar to South Africa, America viewed and continues to view race from a predominantly bifurcated lens – the typical White/Black binary.[454] Enabling this outlook to persist requires the definitions of both these categories to either be entrenched or continuously updated. In the course of its history, America has partaken in the latter exercise.

Tracing the history of the one-drop rule revealed that it had its origins in the 1662 Virginian prescript of *partus sequitur ventrem,* which stated that the status of all children born within the country would be determined by the 'condition of the mother.'[455] Thus, if the mother was a slave, so too would be her offspring, regardless

[448] Jordan WD 'Historical origins of the one-drop rule in the United States' (2014) 1(1) *Journal of Critical Mixed Race Studies* 117.
[449] Brubaker R *Trans: Gender and Race in an Age of Unsettled Identities* (2016) 6.
[450] See chapter 1.
[451] Sharfstein DJ 'The secret history of race in the United States' (2003) 112 *The Yale Law Journal* 1479.
[452] Sharfstein DJ 'Crossing the color line: Racial migration and the one-drop rule, 1600 – 1860.' (2007) 91 *Minnesota Law Review* 593.
[453] Jordan WD 'Historical origins of the one-drop rule in the United States' (2014) 1(1) *Journal of Critical Mixed Race Studies* 99.
[454] Yosso TJ 'Who's culture has capital? A critical race theory discussion of community cultural wealth' (2005) 8(1) *Race, Ethnicity and Education* 72.
[455] Sharfstein DJ 'Crossing the color line: Racial migration and the one-drop rule, 1600 – 1860.' (2007) 91 *Minnesota Law Review* 605.

of their paternity.[456] This rule was a deviation from an English common law custom whereby the child's paternity determined its status.[457] Subsequently, this Virginian principle enabled slave owners to profit from the sexual exploitation of female slaves.[458]

Naturally, the flaw with dictating that maternity bestows status on children was the reality that many interracial relationships in America – both currently and historically – occurred between Black men and White women.[459] Children born from such (illegal)[460] unions were thus theoretically born free.[461] However, to combat this state of affairs the concepts of hyper and hypo-descent were introduced. Although the one-drop rule was originally intended to apply to persons of mixed European and African descent,[462] where various racial admixtures led to confusion, the formula would be as follows – one would trace their lineage as far back as possible to ensure the non-existence of a Black ancestor,[463] but in the event that one such ancestor is found, the classification of the inferior (Black) race would be assumed (hypo-descent).[464] Where no Black intermixture is found, the classification of the superior of the two races (normally White) is then taken (hyper-descent).[465]

The hyper and hypo-descent concepts contain a snag in that, due to America operating from a racial dichotomy, mainly two races existed – White and Black/Coloured.[466] The native Indian population, as well as various Asian sub-groups were not given racial categories, per se, but were intermittently subsumed under the

[456] *Ibid* at fn 39.
[457] Sharfstein DJ 'Crossing the color line: Racial migration and the one-drop rule, 1600 – 1860.' (2007) 91 *Minnesota Law Review* 605.
[458] Roberts DE '*Loving v Virginia* as a civil rights decision' (2014/5) 59 *New York Law School Law Review* 180.
[459] Wilkinson AB *Blurring the Lines of Race and Freedom: Mulattoes in English Colonial North America and the Early United States Republic* (published dissertation for a PhD in History, University of California, Berkeley, 2013) v.
[460] *Ibid* at 18.
[461] *Ibid* at v.
[462] Jordan WD 'Historical origins of the one-drop rule in the United States' (2014) 1(1) *Journal of Critical Mixed Race Studies* 101.
[463] Post DW 'Cultural inversion and the one-drop rule: An essay on biology, racial classification, and the rhetoric of racial transcendence'(2009) 72 *Albany Law Review* 922.
[464] Gullickson A and Morning A 'Choosing race: Multi-racial ancestry and identification' (2011) 40 *Social Science Research* 499.
[465] *Ibid*.
[466] Smith TW 'Changing racial labels from "colored" to "negro" to "black" to "African American"' (1992) 56 496 explains that'"Colored" was the dominant term in the mid- to late nineteenth century.'

'[C]olored groups' banner.[467] Separately, Asians were generally identified through their nationalities[468] whereas the categorisation of native Indians depended on purity of blood.[469] Thus, until a firm racial hierarchy was established in 1924,[470] attempting to categorise one mixed with everything save Black and White, was a fruitless exercise.

Children born of interracial unions occupied a distinct place in society, as, (much like South African Coloureds), they were envied by Blacks for their proximity (in appearance) to Europeans[471] but loathed by various Whites who viewed them as half-breeds[472] threatening racial purity.[473]America's obsession with the polarisation of its population resulted in the labelling of mixed-race persons according to the degrees of admixture in their blood. Mulattoes,[474] quadroons[475] and octoroons[476] were but three of the many labels. The latter two fell into disuse, arguably around the early 1900s, however, mulatto was not only a category in the U.S census from 1850 – 1900 and 1910 – 1930,[477] but it is a term that still remains pervasive.[478] Regardless of whether it was an official racial category or not, mulattoes (like South African

[467] Browning JR 'Anti-miscegenation laws in the U.S.' (1951) *Duke Bar Journal* 33.
[468] Hochschild JL and Powell BM 'Racial reorganization and the United States census 1850 – 1930: Mulattoes, half-breeds, mixed parentage, hindoos and the Mexican race' (2008) 22 *Studies in American Political Development* 60.
[469] *Ibid*.
[470] Pascoe P 'Miscegenation law, court cases, and ideologies of "race" in twentieth-century America' (1996) 83(1) *The Journal of American History* 59.
[471] Nascimento GXC 'The dangers of white blacks: Mulatto culture, class, and eugenic beauty in the post-emancipation (USA, 1900-1920)' (2015)35(69) *Revista Brasileira de História* 6.
[472] Wright L 'One drop of blood' (1992) *The New Yorker* 134.
[473] Pascoe P 'Miscegenation law, court cases, and ideologies of "race" in twentieth-century America' (1996) 83(1) *The Journal of American History* 59.
[474] DeBoise H 'Life on the fence: The hidden power of the "Tragic Mulatto"' (2014) available at fortworks.fortlewis.edu/625 (accessed on 3 March 2017) 3 states that the term originates from the Iberian word for 'mule.' Popular belief was that '…like the mule the product of reproduction between an inferior and superior race would lead to infertility three to four generations down the line from the first offspring.'
[475] Voltz N *Black Female Agency and Sexual Exploitation: Quadroon Balls and Plaçage Relationships* (unpublished Senior Honors thesis, Ohio State University, 2008) 1 explains that the term applied to one '…who is one-quarter black and three-quarters white '
[476] Mafe DA *Mixed Bodies, Separate Races: The Trope the "(Tragic) Mulatto" in Twentieth Century African Literature* (published PhD dissertation, McMaster University, 2007) 27 defines an "octoroon" as one who is 'one-eighth [B]lack and seven-eights [W]hite.'
[477] Nascimento GXC 'The dangers of white blacks: Mulatto culture, class, and eugenic beauty in the post-emancipation (USA, 1900-1920)' (2015)35(69) *Revista Brasileira de História* 7.
[478] Mafe DA *Mixed Bodies, Separate Races: The Trope the "(Tragic) Mulatto" in Twentieth Century African Literature* (published PhD dissertation, McMaster University, 2007) 3.

Coloureds) received privileges and faced better treatment than their dark-skinned counterparts.[479]

Racial classification not only reinvigorated slavery but also qualified American citizenship. Gaining citizenship afforded many protections and privileges such as voting but for slaves, none compared to the receiving of liberation. The Constitution of the United States[480] only applied to citizens. Within its preamble, all men were declared as equals therefore the natural conclusion was that citizenship led to freedom.[481] This highly desired status was only open to persons deemed White.[482]

Unsurprisingly, both in America and most countries, the word 'white' refers to a racial category.[483] Yet, when Congress, in 1790, decided to qualify the citizenship to this group, the lack of definitional precision was problematic for courts.[484] Consequently, those of Anglo-Saxon or Teutonic descent where deemed as being the aforesaid W*hite* and thus eligible for citizenship.[485] The qualification – being Caucasian[486] – did not apply to the Irish, Jews and Italians who were seen as 'Europeans of inferior stock.'[487] Like slaves, free Blacks, Asians and indigenous Americans, they were ineligible for citizenship. Eventually, this group of Europeans would become eligible for citizenship, but only after decades of proving their Whiteness.[488]

The allure of Whiteness saw the birth of an odd occurrence termed 'passing.' Derrick A. Bell wrote:

[479] DeBoise H 'Life on the fence: The hidden power of the "Tragic Mulatto"' (2014) available at fortworks.fortlewis.edu/625 (accessed on 3 March 2017) 6.
[480] Constitution of the United States of 1789.
[481] Fredrickson GM *The Historical Construction of Race and Citizenship in the United* States (2003), Identities, Conflict and Cohesion, programme paper Number One 1.
[482] Roediger D 'Whiteness and ethnicity in the history of "white ethnics" in the United States' in *Towards the Abolition of Whiteness: Essays on Race, Politics and Working Class History* (1994) London: Verso 1.
[483] Tehranian J 'Performing whiteness: Naturalization litigation and the construction of racial identity in America' (2000) 109(4) *The Yale Law Journal* 818.
[484] Richomme O 'The role of "ethno-racial" classification in the Americanization process' (2009) 19 *Cercles* 2.
[485] Fredrickson GM *The Historical Construction of Race and Citizenship in the United* States (2003), Identities, Conflict and Cohesion, programme paper Number One 5.
[486] Tehranian J 'Performing whiteness: Naturalization litigation and the construction of racial identity in America' (2000) 109(4) *The Yale Law Journal* 822.
[487] Glenn EN *Unequal Freedom: How Race and Gender Shaped American Citizenship and Labor* (2002) 19.
[488] Jackson RO 'Black immigrants and the rhetoric of social distancing' (2010) 4(3) *Sociology Compass* 194.

> [P]assing is not an obsolete phenomenon that has slipped into history. …Becoming [W]hite meant gaining access to a whole set of public and private privileges that materially and permanently guaranteed basic needs and, therefore, survival.[489]

The practice of passing was not exclusive to America, as even within South Africa, some Black women underwent intensive hair straightening regimes, in addition to applying skin-lightening crèmes so as to pass off as Coloured. However, whereas Americans would generally not dare to question the racial authenticity of one presumed to be passing as a White person, in fear of offending an actual White person,[490] this was not the case in the Republic. Black and Coloured South African women were always open to invasive questioning. Additionally, with race being socially-determined, few Black South African women could successfully pass for Coloured if they resided or associated with a predominantly Black community.

Racial classification and the development of categories in America was firmly entrenched and developed by laws regulating sex and marriage.[491] The anti-miscegenation laws that had existed from the 1660s[492] right until the 1960s,[493] required the establishing of racial categories in order to determine what marriages where legally prohibited.[494] By the 1900s, Whites were barred from marrying African-, Indian-, Asian-Americans as well as Malays.[495] Centuries of protesting these laws would, in 1967, culminate in the Supreme Court pronouncing anti-miscegenation laws as unconstitutional.[496]

Despite the many commonalities shared between South African and America, there is one stark difference between the two countries – governmental use of racial classification is by default, illegal in America.[497] The following section will delve into

[489] Bell DA 'Who's afraid of critical race theory?' (1995) 4 *University of Illinois Law Review* 906.
[490] Jordan WD 'Historical origins of the one-drop rule in the United States' (2014) 1(1) *Journal of Critical Mixed Race Studies* 113.
[491] Roberts DE '*Loving v Virginia* as a civil rights decision' (2014/5) 59 *New York Law School Law Review* 179.
[492] Thompson D Nation and Miscegenation: Comparing Anti-miscegenation Regulations in North America (2008) Department of Political Science, University of Toronto 7.
[493] *Ibid* at 2.
[494] Roberts DE '*Loving v Virginia* as a civil rights decision' (2014/5) 59 *New York Law School Law Review* 181 and 198.
[495] Pascoe P 'Miscegenation law, court cases, and ideologies of "race" in twentieth-century America' (1996) 83(1) *The Journal of American History* 49.
[496] *Loving v Virginia* 388 U.S. 1.
[497] Jung D and Wadia C 'Affirmative action and the courts' (1996) *Public Law Research Institute* 653.

how and why this has come to be. Thereafter, the final section will look at the consequences that illegalisation has had on present-day America.

4.2.3 Illegalisation of classification and its consequences

Roughly since the 1940s,[498] governmental policies that racially categorise the population have been held to be 'presumptively impermissible'[499] and thus illegal. In the cases of *City of Richmond v J.A Croson Company*[500] and *Adarand Constructors, Inc v Pena*[501] the Supreme Court held that the constitutional law standard of 'strict scrutiny must be applied to all racial classifications regardless of whether the policies subordinate minorities, remedy past discrimination, or promote the inclusion of minorities in civic life.'[502]

Essentially, these judgements dictate that the highest level of judicial review be used in cases concerning 'remedial affirmative action' rather than 'diversity-based affirmative action.'[503] Strict scrutiny requires that, where racial classification is used, the impugned law or policy be 'narrowly tailored to further a compelling state interest.'[504] Failing thereof would result in the law or policy being found as unconstitutional. The rationale behind these judgments stems from the perspective that allowing race-based rules would result in the impairment in the exercise of third parties' rights to the Equal Protection Clause.[505]

Strict scrutiny is known as being a test that invalidates laws[506] because the rigorous examination of "suspect classifications"[507] makes it difficult to prove the validity of the challenged classifications.[508] In analysing the court's precedent on Equal Protection, Professor Gerald Gunther remarked that this review-standard was 'a "scrutiny that

[498] *Korematsu v. United States* 323 U.S. 214 (1944).
[499] Volokh E 'Racial and ethnic classifications in American law' in Thernstrom A and Thernstrom S (eds) *Beyond the Color Line: New Perspectives on Race and Ethnicity in America* (2002) 309.
[500] 1989 U.S 579.
[501] 515 U.S 200 (1995).
[502] Ancheta AN 'Contextual strict scrutiny and race-conscious policy making' (2004) 36 *Loyola University Chicago Law Journal* 102.
[503] Gertsmann E and Shortell C 'The many faces of strict scrutiny: How the Supreme Court changes the rules in race cases' (2010) 72(1) *University of Pittsburgh Law Review* 4.
[504] Spece RG and Yokum D 'Scrutinizing strict scrutiny' (2015) 40 *Vermont Law Review* 295.
[505] Krstić I 'Affirmative action in the United States and the European Union: Comparison and analysis' (2003) 1(7) *Law and Politics* 832.
[506] Lapidus LM, Martin EJ and Luthra N *The Rights of Women: The Authoritative ACLU Guide to Women's Rights* 4ed (2009) 1.
[507] *Ibid*.
[508] *Ibid* at 2.

was 'strict' in theory and fatal in fact.'[509] In reaffirming the contrary, Justice Ginsburg in the case of *Grutter v Bollinger*[510] held 'that strict scrutiny was not necessarily fatal.'[511] However, this has done little to lessen the qualms on this issue.

Academics highlight a multitude of inconsistencies and hypocrisies in the application of the standard but the one area that is of crucial importance is how all of this relates to affirmative action. The origins of the ideology trace back to the Freedmen Bureau's Bills of 1864–65 whereby race was acknowledged as entitling freed men (in particular) receipt to program benefits[512] assisting them in becoming self-sufficient, as a means to atone for the discrimination they, as former slaves, were subjected to.[513] The Fourteenth Amendment (1868) along with the Civil Rights Act (1866) were added to the arsenal of race-conscious protections.[514]

The court in *Plessy v Ferguson*[515] would hinder any progress made, by finding, as constitutional, the notion of 'separate but equal' development.[516] Apartheid South Africa would decades later siphon ideas such as the segregation of the population and the devolution of inferior-quality facilities to Black communities[517] from America's post-*Plessy* conduct. The cumulative effect of these and Jim Crow laws would be the stagnation and regression into dire poverty of the Black population. Thus, in the 1960s, under Presidents John F. Kennedy and Lyndon B. Johnson affirmative action was instituted and reiterated.[518]

Despite the great legal strides that affirmative action had made in several dozen cases, the controversial judgments of recent cases would bring great uncertainty to

[509] Ancheta AN 'Contextual strict scrutiny and race-conscious policy making' (2004) 36 *Loyola University Chicago Law Journal* 101.
[510] 539 U.S. 306.
[511] Gertsmann E and Shortell C 'The many faces of strict scrutiny: How the Supreme Court changes the rules in race cases' (2010) 72(1) *University of Pittsburgh Law Review* 5.
[512] Brody Jr., CE 'A historical review of affirmative action and the interpretation of its legislative intent by the Supreme Court'(1996) 29 *Akron Law Review* 292.
[513] *Ibid* at 2.
[514] *Ibid* at 3.
[515] 163 U.S 537 (1896).
[516] Margo RA 'The impact of separate-but-equal' in Margo RA *Race and Schooling in the South, 1880 – 1950: An Economic History* (1990) 69.
[517] Hudson N 'From "nation to race": The origin of racial classification in eighteenth-century thought' (1996) 29(3) *Eighteenth-Century Studies* 1.
[518] Krstić I 'Affirmative action in the United States and the European Union: Comparison and analysis' (2003) 1(7) *Law and Politics* 827.

the withstanding ability of this policy. Affirmative action plans that have been adopted for the purposes of rectifying past discrimination have conjured a negative response from the Supreme Court.[519] As a result of *Adarand* and *Croson* the government has had to revise its equal opportunity[520] policies[521] so as to conform to the strict scrutiny requirements.

America's affirmative action jurisprudence is, at best, confounding. The Supreme Court has forbade race from being a central factor in admissions,[522] racial representation within schools and private 'transformational' policies[523] yet race can be considered as a criteria when diversifying universities or workforces and following a general colour-blind approach.[524] Interestingly, strict scrutiny is usually only applicable against government agencies, as private enterprises have no obligation to incorporate affirmative action ideologies within their mandates.[525]

Additionally, in the *Bollinger* case, Justice O'Connor, in writing for the majority, held that affirmative action would not be needed in twenty-five years.[526] The non-permanence of equal-opportunity policies has been reiterated by Justice Ginsburg,[527] however, the dictum by the court opens it to extensive criticism.[528] Kevin Johnson notes that the benefit of a sunset clause is that it 'ensures periodic review of a race-conscious program and that it is maintained only if needed or, if

[519] Edelman P 'Courts and the making of public policy: Affirmative action' (2007) *The Foundation for Law, Justice and Society* 5; see also Greenblatt JL 'Putting the government to the (heightened, intermediate, or strict) scrutiny test: Disparate application shows not all rights and powers are created equal' (2009) 10 *Florida Coastal Law Review* fn144.
[520] Lipson DN 'Where's the justice? Affirmative action's severed civil rights roots in the age of diversity' (2008) 6(4) *Perspectives on Politics* 691 maintains this as one of two synonyms for affirmative action.
[521] Edelman P 'Courts and the making of public policy: Affirmative action' (2007) *The Foundation for Law, Justice and Society* 6.
[522] *Gratz v. Bollinger* 539 U.S. 244 (2003) see also Krstić I 'Affirmative action in the United States and the European Union: Comparison and analysis' (2003) 1(7) *Law and Politics* 835.
[523] *Wygant v. Jackson Board of Education* 476 U.S. 267*; Ricci v DeStefano* 557 U.S. 557.
[524] See *Regents v Bakke* 438 U.S. 265; Johnson KR 'The last twenty five years of affirmative action?' (2004) 21(171) *Constitutional Commentary* 176.
[525] Brody Jr., CE 'A historical review of affirmative action and the interpretation of its legislative intent by the Supreme Court'(1996) 29 *Akron Law Review* 4.
[526] *Ibid* at 10.
[527] Anker DE '*Grutter v. Bollinger*: Justice Ruth Bader Ginsburg's legitimization of the role of comparative and international law in U.S. jurisprudence' (2013) 127 *Harvard Law Review* 31; see also the finding by the court in *United Steelworkers v Weber* 443 U.SS 193.
[528] Johnson KR 'The last twenty five years of affirmative action?' (2004) 21(171) *Constitutional Commentary* 172.

warranted, modified to better achieve its goals.'[529] Thus, sunset clauses are dependent on goals achieved, and according to the late Justice Thurgood Marshall, the recent spate of judgments have taken America 'a giant step backwards.'[530]

The decennial census plays the crucial role of shaping the image of what the American nation is and ethno-racial categories are instrumental to this.[531] With the legal use of racial classification being generally unconstitutional for over sixty years, one is inclined to wonder why much ado was made about the inclusion of 'multi-racial' as a category in the 2000-nation-wide census,[532] as its inclusion serves little purpose. National statistics and the scientific field seem to be the only beneficiaries to the continued use of race categories.

4.2.4 Conclusion

In referring to their country as a 'melting pot',[533] Americans intended to convey that within their borders resides a multi-cultural people of various races, ethnicities and religious beliefs, but instead, this phrase alludes to forced assimilation.[534] 'Americanisation' is merely code for the assimilation into the White Republic.[535] Thus, for immigrants to acculturate and eventually assimilate, it is expected for them to both internalise American racial attitudes while socially distancing themselves from Black Americans.[536] Racial classification as a process still exists, as can be seen in the census, however its use for redress purposes raises contentions. As

[529] Johnson KR 'The last twenty five years of affirmative action?' (2004) 21(171) *Constitutional Commentary* 172.
[530] Krstić I 'Affirmative action in the United States and the European Union: Comparison and analysis' (2003) 1(7) *Law and Politics* 836.
[531] Richomme O 'The role of "ethno-racial" classification in the Americanization process' (2009) 19 *Cercles* 7.
[532] Fairlie RW 'Can the "one-drop" tell us anything about racial discrimination? New evidence from the multiple race question on the 2000 census.' (2009) 16 *Labour Economics*; see also Gullickson A and Morning A 'Choosing race: Multi-racial ancestry and identification' (2011) 40 *Social Science Research* and Chen JM and Hamilton DL 'Natural ambiguities: Racial categorization of multiracial individuals' (2012) 48 *Journal of Experimental Social Psychology.*
[533] Bisin A and Verdier T '"Beyond the melthing pot": Cultural transmission, marriage, and the evolution of ethnic and religious traits' (2000) *Quarterly Journal of Economics* 955.
[534] See Richomme O 'The role of "ethno-racial" classification in the Americanization process' (2009) 19 *Cercles* 1.
[535] Tehranian J 'Performing whiteness: Naturalization litigation and the construction of racial identity in America' (2000) 109(4) *The Yale Law Journal* 842.
[536] Post DW 'Cultural inversion and the one-drop rule: An essay on biology, racial classification, and the rhetoric of racial transcendence'(2009) 72 *Albany Law Review* 922.

several dozen commonalities exist between South Africa and America, one will chart the outcomes of this comparative analysis within the recommendations.[537]

[537] See chapter 5.

CHAPTER 5 - RECOMMENDATIONS

5.1. Summary of foregoing chapters

The main aim of this thesis was to establish that the system of racial classification is unconstitutional as it violates several rights and values. In recollecting each of the substantive chapters, one will briefly outline the central idea and pivotal arguments made therein. This will be followed by general and specific recommendations gleaned from the comparative analysis.

Before any discussion could be had on racial classification, it was paramount to chart the history of this system within the Republic.[538] This contextual background guided one in understanding that racial classification, as a legally mandated system, only came into being in 1950, with the promulgation of the PRA. Prior to this, laws discriminating between races were firmly in place (since 1806), however, the categories were flimsy and inconsistent. Thus, the PRA both entrenched and defined the categories that would eventually become the four main categories that currently exist.[539]

With the advent of the 'new' constitutional dispensation, a system that was introduced to oppress and humiliate a majority was retained for the purposes of reversing past injustices. Despite the lack of a law obligating South Africans to classify themselves according to predetermined categories, this is a process that occurs automatically and is expected on all official documentation. Indicating one's race, as it was argued, assists in devolving and thus monitoring the effects of racial redress measures.[540] Yet, this has instead assisted with the contrary – it has shown decreasing inter-racial but increasing intra-racial economic disparity.[541]

Despite the good intentions, programmes such as affirmative action have seen a very limited group accessing its benefits whereas the majority for whom it was

[538] See chapter 2.2.
[539] See chapter 2.3.
[540] See chapter 2.4.
[541] Van der Berg S and Louw M 'Changing patterns of South African income distribution: Towards time series estimates of distribution and poverty' (2003) 2 *Stellenbosch Economic Working Papers* 4.

created continue to trudge on amidst dire poverty.[542] Thus, the main thrust for the retention of racial classification is failing to be realised. This inherent flaw is not unique to South Africa and a possible solution will be dealt with below.

Upon highlighting the redundancy of the retention of racial classification, the subsequent chapter looked at the core component of the entire system i.e. the categories. Here, one analysed the constitutionality of the racialisation process from the angle of three rights, namely, human dignity, equality and freedom of opinion. The investigation into human dignity[543] required an analysis of the intention and meanings behind each of the racial categories and how these connotations affected the individual so classed. In the end, it was found that human dignity was violated.

The enquiry into equality saw the utilisation of the *Harksen* test in ascertaining if any infringement occurred.[544] Delving into the test established that, racial classification differentiates between persons based upon a listed ground, and as a result of the presumption under section 9(5), this racial differentiation is deemed to be unfair. Therefore, the only thing that fell to be determined was whether this differentiation could be justified.

Finally, with the freedom of opinion, the content of the right needed to first be determined due to so little being written on it.[545] Determining what constitutes this right (as it pertains to this work) was imperative in order to establish whether a violation had occurred or not. It was only through adopting the international interpretation of this right that one could produce a result that was not absurd, as interpreting opinion within its section 15 context would produce a religious reading of the right. Ultimately, it was found that racial classification, superimposes the ideology of a racialised society on one. One is viewed in certain racial terms and is forced to accept it. Self-classification is completely disregarded where it conflicts with (the social) external classification.

[542] 'Poverty trends in South Africa: An examination of absolute poverty between 2006 and 2015' 22 August 2017 available at www.statssa.gov.za/?p=10341 (accessed on 16 September 2017).
[543] See chapter 3.1.
[544] See chapter 3.2.
[545] See chapter 3.3.

In conducting the limitations-analysis, it was found that racial classification unjustifiably violates the rights of South Africans.[546] However, despite this being the outcome, the words of the court in *S v Makwanyane*[547] are heeded, where it was held that one needs to weigh between the infringement and the objective sought to be achieved.[548] Achieving proportionality between the infringement and the objective is impossible; however, the alleviation of poverty and improvement of life-standards for the majority of South Africans is of such significance, that enduring a degrading and dehumanising racialisation process would be worth it. Racial classification should only continue if the outcome results in a positive objective result. Thus, to assist this system in yielding fruits, the following recommendations are made.

5.2. Recommendations

5.2.1. General recommendations

5.2.1.1 Alternatives to race-based redress

In chapter 1 it was mentioned that academics have proffered several alternatives to race-based redress such as level of education as well as class.[549] The latter could be a viable substitute, seeing as how race and class are inextricably linked. It is opined, however, that both level of education and class should be considered jointly because at its basis, it is the uneducated as well as those with a basic education that live and remain in dire poverty. Due to objective circumstances, the upward mobility of such persons is curtailed resulting in them remaining in the unskilled to semi-skilled workforce domain.

A large portion of South Africans live below the bread-line and this very population comprises of previously disadvantaged persons. In this manner, class taken in conjunction with one's history of education could be further expanded in such a fashion that the genuine stakeholders are cropped out and afforded opportunities so as to enable them to grow. As it is mainly the impoverished and uneducated that still

[546] See chapter 3.4.
[547] *S v Makwanyane and Another* 1995 (3) SA 392 (CC).
[548] *S v Makwanyane* at paragraphs 104 and 105.
[549] Nel EL *The Justifications and Limits of Affirmative Action: A Jurisprudential and Legal Critique* (published LLD thesis, Stellenbosch University, 2011) 113–42.

hold onto the belief that redress measures work, the least that can be done is prevent the embers of hope from needlessly burning out.

5.2.1.2 Racial categories

As race is the criteria used to address the inequality within the Republic, it is imperative that the racial categories themselves be re-analysed, particularly the Asian category. Clarity needs to be given with regards to the status of persons of Japanese descent: are they White or not? Are they included within the bracket of beneficiaries entitled to access redress measures? If excluded/included, on what grounds? With the exclusion of Indians and the South African Chinese, these last two questions are also relevant in relation to other Asian sub-groups.

Furthermore, a law prescribing racial classification needs to be promulgated. Currently, there is no legal obligation on any South African to declare their race on any documentation. It is merely done out of habit – albeit a bad one. Through an enactment, the means of classifying can be discussed (i.e. whether the 'common sense' approach is still the dominant one) in addition to whether the categories and their names will remain the same.

5.2.1.3 Creamy Layer

Within chapter 2 it was mentioned that India has an interesting way of dealing with the distribution of redress benefits. As India suffers from extreme economic disparity among its citizens due to class or caste-driven discrimination[550] and in trying to rectify this the Indian government devised a strategy of 'providing for reservation to Other Backward Classes in the services and posts under the Government of India.'[551] The seminal case of *Indra Sawhney*[552] resulted in Article 16(4) of the Indian Constitution being amended to explicitly cater for the reservation in promotion of certain scheduled castes and tribes.[553]

In the realisation of this process the court determined that:

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[550] Rao J 'The caste system: Effects on poverty in India, Nepal and Sri Lanka' (2010) 2(1) *Global Majority E-Journal* 100–1.

[551] Mehrishi *S Clarification About the Caste/Creamy Layer Certificates of OBC Candidates – Regarding* (2015) 2.

[552] *Indra Sawney and Others v Union of India* AIR 1993 SC 477.

[553] 'Reservation in promotion for members of scheduled castes' available at ncsc.nic.in/files/Reservation in Promotion.pdf (accessed on 25 May 2017) 1.

> If forward classes are mechanically included in the list of backward classes or if the creamy layer among backward classes is not excluded, then the benefits of reservation will not reach the really backward among the backward classes. Most of the benefits will then be knocked away by the forward castes and the creamy layer. That will leave the truly backward, backward forever.[554]

Thus, the creamy layer concept refers to the exclusion of the developed and/or advanced persons within a heterogeneous caste in order for that caste to be considered a class.[555] By excluding the privileged within a caste, an active attempt is made to ensure that redress is accessed by those beneficiaries who are truly most in need of it. This has advantaged many Indians that ordinarily would not have had access to the (in particular) educational and public employment opportunities, had this system not existed.[556]

The denouement of chapter 2 highlighted that the biggest complaint concerning redress measures in the Republic is that they are not being accessed by those most in need of them. Usually persons with qualifications and a tertiary education gain access to these benefits as they are more aware of the existence of such opportunities. A public-sector reservation system (similar to India) may be a viable option, however, the push-back could be the financial burden that specific training (and so forth) may incur. Thus, instead, one recommends the exclusion of the 'creamy layer' from redress benefits.

This too will incur costs as a commission will have to be organised so as to determine the categories of persons that fall within the Republic's 'creamy layer', however, reference can be had to the National Student Financial Aid Scheme (NSFAS) policy. NSFAS has both minimum and maximum standards as to who qualifies for (and is similarly disqualified from) the bursary, thus, these basics can be extended and developed in relation to particular fields of work. To ensure that only those in need receive assistance and benefits, the floor and ceiling should be clearly delineated. It is the people falling within this pocket that government should

[554] *Indra Sawney* at paragraph 10.
[555] Choudhary SK and Rath SK *The Myth Called Creamy Layer: The Intension of Judiciary vs Intervention of Politics* (2015) 2.
[556] Nel EL *The Justifications and Limits of Affirmative Action: A Jurisprudential and Legal Critique* (published LLD thesis, Stellenbosch University, 2011) 171.

maximise its efforts in educating in order to not only enable them to access redress measures, but also enable them to excel and be promoted.

5.2.2. Specific recommendations

5.2.2.1 Lessons from America

America's affirmative action jurisprudence indicated that the system was branched into two types, namely, remedial and diversity-orientated. Depending on which one is being adjudicated upon, the courts engage in various levels of scrutiny in testing the constitutionality of the impugned policy. Remedial affirmative action unlocks the strict scrutiny test, which is the most stringent form of American constitutional review. Recently, the use of this test has resulted in a regression in the positive accomplishments already achieved in the promotion of minority rights.

Saleem Badat states that two kinds of injustices prevail in South Africa – one related to the discrimination against the 'other' and the second 'is deeply woven into the social and economic structures and relations of South African society… [it is] reproduced through human action and agency.'[557] Due to this and the fact that 'all societies are shaped by their historical contexts….'[558] South Africa's affirmative action policies are solely remedial.

Rather than applying any standards of review, when investigating the constitutionality of an affirmative action policy, the courts rely on the criteria established in the *Van Heerden* case. The courts need to apply this guideline consistently because the failure thereof begets interpretative conflict. Similar to how the American judiciary is facing backlash due to its inconsistency in the application of its review standards, South Africa is already following suit, as several judgments do not harmonise.

It is of utmost importance that the South African judiciary does away with the 'degrees of disadvantage' notion. This is a major stumbling-block for many (non-Black) previously disadvantaged beneficiaries, as prospective employers use this

[557] Badat S 'Redressing the colonial/apartheid legacy: Social equity, redress and higher education admissions in democratic South Africa' (2008) Paper presented at the conference in affirmative action in higher education in India, the United States and South Africa, New Delhi, India, 19 – 21 March 131.
[558] Smith A 'A critical analysis of the process of racialization in the Dominican Republic and Haiti' (2014) *CERS Working Paper* 2.

idea as ammunition to not hire certain candidates. Affirmative action is still a very fragmented concept whose implementation needs to be continually developed. In reality, both Black women and persons living with disabilities remain invisible both in society and the economic world. This is an issue that the courts need to address because these are the two most disadvantaged groups within society.

The retention of racial classification supplements the argument that the new constitutional dispensation is merely the continuation of the old order just with a new face.[559] With this view being as complex and multi-faceted as it is, an idea that can be incorporated to address this is a sunset-clause. As proponents of this argument assert that the new order greatly resembles that of the apartheid-era (with few exceptions),[560] a system of continuous review is needed in order to dispel naysayers. By adding sunset-clauses to redress measures (particularly affirmative action) this enables regular re-evaluation of the programmes, and allows for improvements to be made where weaknesses are discovered. Additionally, the success of these programmes can be better documented, thus resuscitating efforts to continue to strive for equal representation and access to opportunities.

5.2.2.2 Lessons from Haiti

A lesson that can be learned from the Republic of Haiti is that South Africa needs to elect a stance and stick to it, in relation to the debate concerning non- and multi-racialism. As illustrated in chapter 4, Haiti is mono-racial and has stood by this since 1805 (despite the negative impact it has had on the country). South Africa, on the other hand, is indecisive.

Although section 1(b) of the Constitution espouses non-racialism as a foundational value the problem relates to how (since its inception) non-racialism has remained undefined.[561] Unlike with freedom of opinion where one could attempt to define the content of the right with reference to the international community, this process is not

[559] See Botha H 'Instituting public freedom or extinguishing constituent power? Reflections on South-Africa's constitution-making experiment' (2010) 26 *SAJHR*.
[560] *Ibid*.
[561] Everatt D 'Nationalism, class and non-racialism in the 1950s and beyond: the search for convergence' paper presented at the *Yusuf Dadoo Centenary Conference: Marxism, Non-racialism and the Shaping of South Africa's Liberation Struggle*, University of Johannesburg, September (2009) 1.

possible where non-racialism is concerned as the South African concept[562] was popularised during the anti-apartheid struggle.[563] Thus other countries look to the Republic for its definition.[564]

This lack of definition has led to a series of concomitant problems, namely, what is required of this value. The want for content has inevitably resulted in uncertainty regarding whether the value requires active-engagement or whether it advocates for a more passive stance to be taken.[565] Apart from the issue of implementation, there is also the schism between non-racialism and multi-racialism. On the one hand, non-racialism (in its ordinary meaning) would denote a lack of racialising, whereas on the other hand, multi-racialism signifies an acknowledgment (and celebration) of various racial groups. There is clear dissonance between these two concepts, as they occupy separate ends of a spectrum.

Due to racial classification embracing the concept of multi-racialism and this stance appearing to be the approach adopted and more frequently practiced,[566] it is believed that this should be the path that South Africa temporarily follows. Multi-racialism adopts the idea of recognising the different racial groups[567] and this goes hand-in-glove with the essence of racial classification – racially boxing people exhibiting similar physical attributes within demarcated racial categories. The adoption of this approach would piggy-back that of implementing a sunset-clause for race-based redress. In the hopes that the Republic becomes a more egalitarian society, this would mean that less reliance would be had on racial classification, thus making it possible to subscribe to the ideal of non-racialism. It is only at such time that courts can truly begin to engage with the definition of the concept, because as it stands, the understanding of what non-racialism means is varied.

[562] Everatt D 'Non-racialism in South Africa: status and prospects' (2012) 39(1) *Politikon* 10.
[563] Whitehead KA 'Racial categories as resources and constraints in everyday interactions: Implications for racialism and non-racialism in post-apartheid South Africa' (2012) 35(7) *Ethnic and Racial Studies* 1249.
[564] Kientz, L (2011) 'My attempt to define Non-racialism in a South African context for an American audience' available at southafrica.as.uky.edu/Files/Nonracialism.*pdf* (accessed on 16 March 2017).
[565] See Everatt D 'Non-racialism in South Africa: status and prospects' (2012) 39(1) *Politikon* where an investigation into what non-racialism requires is held.
[566] See discussion under 'Literature Review' in chapter 1.
[567] Maré G 'Race counts in contemporary South Africa: 'An illusion of ordinariness'' (2001) 47 *Transformation* 89.

5.3. Conclusion

By temporarily ceasing the questioning of non-racialism's relevance as an interpretive aid[568] until such time where society is more equal, will assist the Republic in transcending the strife of the past. Racial classification is unconstitutional, but between it and the continuance of hundreds of South Africans dying in desperate poverty and under inhumane conditions, it is the lesser evil. All things come to an end including racial classification, but, before its demise, this evil should be used *effectively* in spurring the nation onward in its bridge-crossing mission.

[568] Everatt D 'Non-racialism in South Africa: status and prospects' (2012) 39(1) *Politikon* 10.

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