



# ***Decolonising affirmative action in 21st-century Africa: Reparatory alternatives for affirming South Africa<sup>1</sup>***

**Khanya B. Motshabi**

University of the Free State

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## **Abstract**

Decolonisation of knowledge enhances Africa's contribution to the global knowledge commons, augmenting both theory from the global South and its universal value. In this paper, I apply this insight to affirmative action policies. Affirmative action claims to facilitate socio-economic mobility and that this avoids the most extremely perverse inequalities. However, the gross brutalities of conquest, dispossession, racial genocide, slavery, slave trading, colonialism and apartheid demand a decolonial critique of affirmative action. This applies not merely to affirmative action as policy, but perhaps much more significantly, as practice. Indeed, I reject affirmative action for South Africa, if not for the entire globe (the latter position would raise an argument that is beyond immediate focus). This personal 'decolonial turn' from affirmative action foreshadows my advocacy of such concepts as 'wholeness' and 'reparation', which I conceptualise as a return of something to its original condition plus satisfaction for the interim rupture. Wholeness and reparation in this particular setting require replacement, atonement, restoration and restitution to remedy the sense and reality of injury flowing from the gross brutalities listed earlier. I argue that such concepts are the ideal remedy for the South African condition and need detailed in my analysis. This move from affirmative action to reparation affirms the inside-out posture of decoloniality, insistent as it is on African agency, on 'centring' Africa and on 'provincialising' the exogenous.

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<sup>1</sup> 21st-century Africa' references the fact that today most African countries have achieved political independence and, in this sense, constitute 'post-independence' societies. I avoid the term 'post-colonial' because although it allows for the persistence of colonial legacies, it could obscure the fact that the independence of most African nations is more nominal than substantive. Thus, I recognise that the dismemberment of colonial administrations was largely cosmetic and that coloniality remains rampant in the world community. I use '21st century' and 'post-independence' interchangeably throughout this article.

**Keywords:** decolonisation, affirmative action, apartheid, wholeness, reparations.

## Introduction

It is odd but predictable that the renewal of decolonisation discussions should have been delayed so long in South African tertiary education. Coloniality is so ubiquitous that some hardly notice it. To others, it may seem that colonialism stopped at the end of formal colonialism. Still others may (even) assume that coloniality merits no further attention because that condition is inexorable and natural, simply a normal part of an immutable order. Our colonial socialisation, which arguably has limited our intellectual habits, may partly be a cause of this reality (Motshabi 2018), perhaps because colonialism ‘invades and resides in one’s heart, mind and body’ (Ndlovu-Gatsheni 2018: 27). This kind of socialisation is profoundly anti-African for many reasons, among which is that it fortifies negative images about Africa (Asante 1983; Asante 2010; Motshabi 2018). One devaluative premise of colonisation is that ‘the African’ is not ‘a full and complete human being’ (Ramose 2019: 5). A mere half-century ago, Trevor-Roper, Regius Professor of modern history at Oxford University, made an outrageous and extraordinarily impertinent statement denying the very existence of African history. ‘Perhaps in the future’, he said, ‘there will be some African history to teach. But at present there is none: there is only the history of Europeans in Africa. The rest is darkness ... and darkness is not a subject of history’ (Idowu 2008: 173). According to Biakolo, some even believe that for Africans ‘the slightest mental effort involving abstract reasoning, however elementary it may be, is distasteful’ (2003: 11).

Such caricatures of African subjectivity afford an ideological scaffold for colonial and imperial activities, including the erasure and occlusion of Indigenous epistemes. Thus, Said suggests that ‘the enterprise of empire depends on the idea of having an empire ... and all kinds of preparation are made for it within a culture; then imperialism acquires a kind of coherence’ (1993: 11). The mainly northward gaze of the South African academy adds to what decolonial literature has termed epistemicide (cf. Ndlovu-Gatsheni 2018). Therefore, it is imperative to imagine the academe afresh, ‘rethink thinking’ (cf. Ndlovu-Gatsheni 2018: 32) and ‘learn to unlearn in order to re-learn’ (cf. Ndlovu-Gatsheni 2018: 33). Inspired by and working from a decolonial mindset, we should cultivate an attitude that upholds the ‘knowledge and acceptance’ of ‘African heritage’ (Nkoane 2006: 51). I explore

affirmative action within this aspirational paradigm.

I accept fundamentally the rationale and motivation behind affirmative action, which I suggest, rests on the principle of redress. However, I contest its function and application in South Africa. Affirmative action is an inadequate response to a grave and endemic national crisis premised on colonial and apartheid legacies. I conclude that affirmative action is poorly suited to a 21st-century African country. I approach affirmative action from a decolonial perspective that I regard as indispensable for our context. I appraise our preconceptions consciously and critically to access fresh insights (see Melber 2018; Motshabi 2018). By ‘decolonial’ perspective, I am suggesting an insistence on African agency as argued by decolonialists (Asante 1983, 1991/1992, 2009, 2010; Mqgqwashu 2019; Ndlovu-Gatsheni 2018). From this vantage, I adopt an inside-out posture that insists on African agency, centres Africa and provincialises the exogenous (Asante 1983, 1991/1992, 2009, 2010; Ndlovu-Gatsheni 2018; Nkoane 2006).

Decoloniality raises many important theoretical questions of general interest that we could here explore extensively. However, I am more pointedly interested in three of its main implications and these have immediate pressing salience for theorists anchored in Africa and the global South. First, is the need to abandon our preoccupation with the affirmative action problems of the west. Second, is the need to embrace actively our position as legal educators located in 21st-century Africa though it, like much of the world, is still defined by coloniality (Motshabi 2018). Third, is the need to direct detailed attention to the specific requirements for affirmation of the values, identities and realities of our own society. Among my specific aims is to curate a decolonial conceptual schema to undergird the critique advanced in this paper. The primary claim of the paper is this: just as Germany’s shameful dalliance with Nazism has led to reparations payments to Israel, the proper remedy for South Africa’s stained history is reparations.

## **South African framework for affirmative action**

In my considered view, affirmative action can be regarded as adopting two forms. The narrow form comprises the removal of employment barriers and the achievement of the workforce diversity and demographic integrity required by the Employment Equity Act (1998). The second form consists of a broader set of implements that attempt to undo our iniquitous past. These are the Reconstruction and Development

Programme, Broad Based Black Economic Empowerment (BEE) and affirmative government contracting in terms of the Preferential Procurement Framework Act (2000). These two forms of affirmative action, which pursue redress, coalesce and gain both support and legitimacy from the affirmative provision of services such as roads, transport, housing, sanitation, energy, water, safety and security, healthcare and free tertiary education. I do not comment on these directly except as broad indices of human development.

The specific transformative vision of the Reconstruction and Development Programme is expansive. However, its insistence on the need to 'deracialise business ownership and control' through 'black economic empowerment', is timid especially as it does not demand that the economy should serve the majority (The Reconstruction and Development Programme: A Policy Framework, paragraph 4.4.6.3). My own attempt to frame BEE as a broadly transformative policy intervention misses the mark (Motshabi 2002) for BEE does little more than cultivate the black business and middle classes (Motshabi 2000/2001). The genius of BEE may lie more in 'strategic accommodation or cooptation' than anything else (Motshabi 2002). In this respect, BEE serves mainly the purpose of '[deracialising] exploitation', as has been detailed using the wine industry (Alexander 2007; Du Toit et al. 2008; Motshabi 2002; Ratuva 2013). To explicate this claim, one can refer to the wine industry, which uses BEE to 'contain transformation', 'avoid radical change' and mask 'material exclusion' through 'symbolic inclusion' that allows brutal 'working conditions' (Du Toit et al. 2008: 26). Furthermore,

*In practice, this form of 'empowerment' means that these BEE groups or individuals source wine from other cellars, appoint a wine maker to blend according to their specifications, and outsource the bottling, but own the brand. These black-owned brands can rely on highly exploitative forms of labour, yet present themselves as more 'legitimate' because they are black owned ... They control a small but lucrative part of the value chain, and yet they do little to effect any improvements for farm workers. (Du Toit et al. 2008: 26)*

I maintain that the affirmative provisioning detailed above could easily be more assertive. Naturally, transformation indicators have not moved substantially since 1994. If one considers the 2018 statistics, one observes that the average BEE ownership in the economy stands at 27%, BEE management control is below

50% and BEE players hold 58% of board positions (Broad Based Black Economic Empowerment Commission 2019: 7).<sup>2</sup> If we continue with this schema, following the racial classification of the Employment Equity Act, top management representation sits at 66,5% white in 2019 from 71.1% in 2018, 15.1% African in 2019 from 10.9% in 2018, 5.3% coloured in 2019 from 4.9% in 2018 and 9.7% Indian in 2019 from 9.6% in 2018 (Commission for Employment Equity 2017–2018: 19; 2018–2019: 38).

The most recently available general household statistics disclose the following: 81.1% of all households are in informal settlements, improved sanitation has peaked at approximately 80% of households, 84.7% of households have electricity, 46.3% of households have access to piped water in dwellings, 83% of households have adequate sanitation, refuse removal is available to 64.7% of households and 11.3% of the population is vulnerable to hunger (Statistics South Africa 2018: 32–53). Despite her notoriously tactless pro-colonial rants, Helen Zille rightly reminds us that unemployment and inequality are accelerating (Zille 2019; *News 24* 2019). The indicators confirm that, despite notable improvements, life remains grim for many South Africans. Like India, South Africa may not have an adequate plan for social transformation (Bajpai 2010).

Compounding these challenges significantly are certain troubling insights gleaned from South African public dialogues. According to the statistics, the individual tax base is thin at 5.8 million and 18 million South Africans live on social grants. Calculated on a conservative technical basis, the dependency ratio is in the relatively modest range of 7 to 12. However, this narrow arithmetic conceals a much higher extent of dependency, and one whose actual dimensions constitute a pandemic. Perhaps predictably, this is part of the reason for the persistence of severe social problems.

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<sup>2</sup> The 2020 report, covering 2019, has become available more recently. The timing of its availability did not allow for sufficient analysis at the time of publication. Thus, I have neither used the 2019 data nor cited the 2020 report in which it is contained. This fact is not material to the basic thrust of this paper and is neutral to the fundamental trends under discussion and to the basic structure and direction of our argument.

## Affirmative action in the world

The affirmative action policy positions are well known and I need not analyse them in any depth. The limited purpose of this section of the paper is to demonstrate how and why affirmative action policy, and its discourse(s) and practice, are a cul-de-sac for South Africa. I show that affirmative action is unsuitable for our problems and that its practical operation delivers poor results at an excessive societal cost. I demonstrate that our circumstances require better alternatives.

I embrace the following propositions implicitly. Historic and contemporary suppression of individual talent is real, artificial obstacles to success are real; social uses of the 'merit' principle largely amount to a 'meretricious' sham; connections often matter more than competence and talent deserves no reward because its incidence is fortuitous (Deshpande 2008; Henkin 1989; Kumar 1992). Hence, 'we needn't be great social scientists to realize that we're not likely to find a Kennedy on the unemployment line or a poor black from Harlem in a Harvard classroom' (Henkin 1989). Kumar (1992: 300) maintains that

*The 'meritorious' do not deserve to be doctors, professors, or senior bureaucrats because they did not deserve their education or other advantages which gave them 'merit'.*

Thus, I fundamentally support the principle behind affirmative action, which as I have argued, is the ethic of redress. However, I take issue with the ways in which these objectives have been pursued. Affirmative action permits enough mobility to avoid some of the most extremely perverse inequalities. The mechanism affords those who are precluded from a substantive and substantial socio-economic voice a measure of social, professional, financial and economic status.

On the other hand, inequality 'is usually the product of ... sometimes centuries ... of economic, social, and political discrimination' (Brown & Langer 2015; Laxmi-Narasimha-Rao 2008). As argued by Du Pisani (1993), affirmative action does not generate deep socio-political and economic change and it does not redress the most corrosive inequities of the colonial system. Policies that ignore the 'root causes of poverty among underrepresented' groups have low prospects of success (Wydick 2008: 169). I maintain that affirmative action creates stigma about its beneficiaries, stimulating discourses of 'inferiority' and 'incompetence', while the labour market

responds by shifting the financial cost of the policy to the very same beneficiaries (Wydick 2008). The 'creamy layer' effect observed in many jurisdictions does not help.<sup>3</sup> This compounds the difficulties and is counterproductive (cf. Alexander 2007, 2019; Brown & Langer 2015; Wydick 2008). Sowell (1989) reminds us that often preferential benefits are within reach only for the fortunate few who have already advanced well beyond most other members of the preferred group, a position that is corroborated by the scholarship of Wydick (2008) and Ratuva (2013). Preferential benefits help absorption of 'privileged sections of the lower castes' into the ruling elite (Laxmi-Narasimha-Rao 2008: 490). 'Political elites and special interests have consistently exploited affirmative action' programmes 'for their own gain' (Brown 2015; Ratuva 2013: 218; Guan 2005). Affirmative action enables the most 'fortunate' of the disadvantaged to traffic in patronage, clientelism and corruption (Guan 2005; Ratuva 2013). This is noteworthy given the claim of Ratuva (2013) that distributive share-allocation to Malaysian Bumiputera stimulate corrupt patronage networks. Such schemes divert capital from productive investments into financial speculation. The schemes cause 'distortions and anomalies in the capital market, especially in ... diversion of Bumiputera savings away from competitive investment through cross-subsidisation from other public resources' (Ratuva 2013: 215).

The analysis presented above showcases the tendentious character of debates that recycle worn and sterile arguments with little relevance for South Africa (Alexander 2007; Maphai 1989). The debate often resembles positional bargaining, which is defined by fixed and predictable stances. These discursive practices and socio-economic strategies do not suit South African conditions, as detailed by Alexander (2007). The discourse ascribes blame (Mohanty 2007). Facile terminology, like discrimination and disadvantage, parodies our history (Pretorius et al. 2001). Affirmative action styles itself as an antidote for what it terms the contemporary effects of past discrimination, while trivialising the experiences of victims by calling them excluded groups (Pretorius et al. 2001). Affirmative action seeks to be a solely prospective way to compensate for historical disadvantage.<sup>4</sup> Affirmative action looks at the past in order to fix the future but ends up obsessed with that past. This is

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3 The creamy layer effect refers to the phenomenon by which the most privileged in subaltern communities receive the bulk of any affirmative action benefit.

4 *Canadian National Railways Company v Canada* (Canadian Human Rights Commission) (1987); 1 SCR 1114, Local 28, *Sheet Metal Workers' International Association v EEOC* 478 US 421 (1986) and the dissent of Justice Stevens in *Adarand Constructors v Peña* 515 US 200.

acutely perturbing given its *de facto* permanence (Alexander 2007; Brown & Langer 2015; Sowell 1989).

The language of discrimination against innocents disregards the systemic nature of oppression. Some affirmative action discourses stigmatise the benefits and accomplishments of the policy's beneficiaries. This approach insists that the individual beneficiary would amount to nothing in the absence of handouts, so called. This wrongly promotes the view that beneficiaries of the policy become dependent on public largesse. North American courts rightly state a reality that affirmative action supporters seem anxious to stress, perhaps as a confidence-building measure, which is the reality that affirmative action does not compensate past victims.<sup>5</sup> It is at best a well-meant palliative that cannot make identified victims whole.<sup>6</sup>

The aggregation of individuals and their experiences is worrisome on several levels. Aggregation might be apt if racial policies targeted individuals in their individual capacity. Yet because affirmative action is hardly possible to administer without racial categories, whether explicit or implicit, the policy sanctions racial or racist attitudes in national governance. This endorses racial divisiveness and fosters the notion that 'designated groups' are 'permanently disabled' and need 'handouts' (Thomas 1986: 403). It also 'delays the day when skin color and gender' are 'truly the least important things about a person in the employment context' (Thomas 1986). Comparative analyses highlight that affirmative action fossilises racial and other divisions, possibly spawning division, anger, rancour and alienation. This could also excuse self-justifying racism where resentment of designated beneficiaries takes root and matures into active hatred, whether reciprocated or not (Alexander 2007; Brown et al. 2015).

Despite this, political leaders persist with affirmative action policies owing to its comparatively easy administration. Often, it is a convenient way of appeasing interest groups. Affirmative action allows 'large promises about the future to be made by politicians at small immediate cost to the government. Such policies reward vocal leaders of the preferred group by creating benefits focused on their class' (Sowell 1989: 51).

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5 Canadian Railways Company v Canada (Canadian Human Rights Commission) [1987] 1 SCR 1114 at 1143.

6 The dissent of Justice Brennan in *Local 28, Sheet Metal Workers' International Association v EEOC* 478 US 421 (1986).



Sowell (1989: 54) warns:

*Even in the extreme case of South Africa, where massive transfers of the resources were focused on a small minority of its people, in addition to preferential policies pursued in utter disregard of the losses and even tragedies suffered by others as a result, it was decades before the Afrikaner 'poor whites' became middle-class. Only in terms of political appearances are preferential policies a 'quick fix.'*

Ironically, or perhaps, understandably,

*the empirical consequences of preferential policies have received much less attention than the rationales and goals of such policies. Too often these rationales and goals have been sufficient unto themselves, both in the political arena and in courts of law. Without even an attempt at empirical assessment of costs versus benefits, with no attempt to pinpoint either losers or gainers, discussions of preferential policies are often exercises in assertion, counter-assertion, and accusation. Illusions flourish in such an atmosphere. So do the disappointments and bitterness to which illusions lead. (Sowell 1989: 3)*

Rubinfeld's (1997) assertion that he would 'probably vote to scrap the entire patchwork of affirmative action measures in favor of a massive capital injection into inner-city day care and educational facilities', seems practical and valid even though it is shocking viscerally.

## **Affirmative action in South Africa**

Having treated the international debates on affirmative action, I now proceed to consider the application of the policy in our jurisdiction. Affirmative action has achieved some gains that can be classified as the humanisation of some people. It has resulted in a measure of upward mobility, provided positive role modelling and symbolism and supported a broad process of socio-political change among certain demographics. However, blind, uncaring or cynical implementation of the policy – or some combination of these and other factors – invites critical challenge.

Misapplied South African affirmative action policies reduce job creation and

weaken the operational capability of our public and private sectors. Whatever may be the proper objectives of affirmative action, broadly conceived, the available information demonstrates that the programme cannot reverse South Africa's history of conquest and dispossession. In this framework, one must concede the problematic potential to deploy affirmative action and BEE cynically in an attempt to "sell" the incremental progress that has been made as serious transformation' (Alexander 2007: 97). Nonetheless, we require profound change and its scale is beyond the capabilities and goals of affirmative action. In agreeing with Mohanty (2007), I maintain that affirmative action without commensurate structural transformation does not accord substantial justice. Numeric goals and timetables, so embedded in the South African employment equity architecture, are an indifferent tool. Thus, the pertinence of Thomas's (1986) observation that the affirmative action techniques used are a numerical smokescreen for past or present violations that externalise the cost of remediation.

Affirmative action seems to embed a racially essentialist, oppositional and binary approach founded on scarcity-thinking. This diminishes shared subjectivity, common identification and effective nation building. These tensions, that are derived from the implications of affirmative action policies, have preoccupied the judicial mind considerably. Justice O' Regan had to explain carefully that affirmative action is not an exception to the principle of equality (*Brink v Kitshoff* NO 1996 6 BCLR 752 (CC) para 42) while Justice Ackermann spoke of a 'remedial' or 'restitutionary' equality (*National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517). In the same vein, Justice Moseneke sought to distinguish affirmative action and deviations from the right to equality. He was anxious about the perception that it creates reverse or positive discrimination (*Minister of Finance and Another v van Heerden* 2004 7 BCLR 687 (CC)). Thanks to affirmative action, adjudicators struggle with such concepts as 'perverse racial rivalry' and 'hierarchies of disadvantage'.<sup>7</sup> It took nothing less than judicial intervention to the appointment of a Euro-South African to head a university's science faculty (University of Cape Town v

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<sup>7</sup> *Motala v University of Natal* (1995) 3 BCLR 374 (D); *Munsamy v Minister of Safety and Security* (2004) 25 ILJ 1716; *Fourie v Provincial Commissioner of the SA Police Service (North West Province)* (2004) 25 ILJ 1716 (LC); *Naidoo v Minister of Safety and Security and Another* [2013] 5 BLLR 490 (LC); *Durban Metropolitan Council (Parks Department)* (1998) 7 ARB6.9.5.; *South African Police Service v Solidarity obo Barnard (Police and Prisons Civil Rights Union as amicus curiae)* [2014] 11 BLLR 1025 (CC); Pretorius et al. 2012.

EC Reynhardt [2000] 8 BLLR 877 (LC)). We have so debased our national public affairs discourse. We should learn from ‘Nazi Germany’ and ‘Rwanda’ that unchecked, ‘racialised identities’ have ‘genocidal potential’ (Alexander 2007: 92). ‘Arguments for and against “affirmative action” ... have provoked controversy – even bloodshed – ... in the most disparate societies, scattered around the world. India, Nigeria, Australia, Guyana, Malaysia, Sri Lanka, Pakistan, and Indonesia are just some of the countries’ (Sowell 1989: 1–2) on whose experience we can draw.

There is sound historical motivation behind the Employment Equity Act’s continued use of apartheid era-racial categories, principally that to be effective. Supposedly, human rehabilitation and equalisation after deliberate racial inferiorisation demands racially defined strategies. However, the practice remains disconcerting. This claim has further purchase given the reality that designated and non-designated groups both contain non-Africans. The then-Minister of Defence, Mosiua Lekota, asked the sincere but loaded question, ‘when will we cease to be Africans, coloureds, Indians and so forth ... at some point we need to ... say there are no Indians here, Indians live in India?’ (Alexander 2007: 103). This sentiment echoes Alexander’s (2007: 94) condemnation of the

*irresponsible practice of ... role models ... referring unproblematically to “Blacks”, “Coloureds”, “Indians”, and “Whites” in their normal public discourse, well knowing that by doing so they are perpetuating the racial categories of Apartheid South Africa and ... entrenching racial prejudice.*

## **Affirmative action for South (Africa)?**

I contest the function and application of affirmative action in post-independence South Africa, not simply because its lexicon and social theory are troubling. Affirmative action is doubly inadequate to our colonial, apartheid and grossly inhuman histories.<sup>8</sup> Its social diagnosis is concomitantly shallow and superficial. Our history breeds compounded injury to its victim (Madonsela 2019) and the cumulative trauma is exponential as premier Zille was forced to recognise (Zille 2019). Zille may

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<sup>8</sup> Brink v Kitshoff 1996 6 BCLR 752 (CC); Harksen v Lane 19997 (11) BCLR 1489 (CC); National Coalition for Gay and Lesbian Equality v Minister of Justice 1998 12 BCLR 1517 (CC); Walker v City Council of Pretoria 1998 (3) BCLR 257 (CC); Hugo v President of the Republic of South Africa 1997 6 BCLR 752 (CC); Dugard 1978.

not yet accept that the injury has multigenerational effects – as other thinkers suggest (cf. Craemer 2018; Madonsela 2019). Speaking comparatively, the cruelties practised on West Indies sugar plantations seem to have instigated incredible damage. This includes congenital sugar diabetes that has made the region the amputation capital of the world. Domestically, the wine industry's ugly method of barter payment of workers, the tot or dop system, seems responsible for intergenerational alcoholism.

The amelioration of these harms cannot be framed through the lens of trivial, pretend-remedies. The harms transcend disadvantage feebly imagined as a random series of accidental, statistical hardships. The historic design and structure of oppression caused nothing less than loss of identity, humanity, dignity, country, nationhood, citizenship, family and life itself. Slavery, slave trading, colonisation, imperialism and genocidal policies impoverished Africa and enriched the conqueror. 'Extractive colonial economics continue to delay African advance while serving the West, and more recently and as ominously, the East. Colonialism itself followed detectible African progress. European development and modernity are, consistent with design, abetted by colonialism and coloniality' (Motshabi 2018: 107). The Smithsonian Institute duly records in the United States context that

*Slavery was deeply woven into the fabric of the United States and challenged the meaning of democracy. Enslaved people's work formed an economic engine producing half of all U.S. exports and providing much of the financial capital and raw materials to spark industrialization.* (Smithsonian Institute 2016)

Affirmative action should serve different purposes in post-independence African societies. For western societies, the object seems to be the assimilation, integration and improved representation of marginal minority outgroups (Human 1991; Maphai 1989; Rubinfeld 1997). But affirmative action does not remedy the conquest of north America and the genocide of its natives. Nor does it cure the enslavement, transportation and dislocation of the African. That argument aside, the transplant of affirmative action from United States civil rights struggles is unsuitable because African-South Africans constitute most of the South African population. The majority has the 'power to insist on new ways of sharing' state revenue (Alexander 2007: 104). American society can accommodate or co-opt its minorities without major threat to the interests of the majority (Maphai 1989). The need, and the opportunity, for true liberation and restoration may be larger in our part of the

world, at least conceptually and politically. Political self-determination may permit accurate diagnosis and treatment of our problems. It may even allow true recognition of the immense consequences of dispossession. As already indicated, we lost identity, humanity, dignity, territory, self-determination, nationhood, nationality, family and life itself (Dugard, 1986; Motshabi 1987). This reality, a consequence of colonial imposition and rule, does not seem to have changed much.

Affirmative action is clearly inadequate as a coordinated national response to grave and endemic social crises. If the primary task of post-1994 public policy is reconstruction, the trouble with affirmative action is acute. Failure to recognise this is hazardous in that we may continue to borrow the retrogressive techniques of countries with a markedly different legacy, demographic and political agenda. Chief Justice Dickson and Justice Brennan's respective dicta that affirmative action does not compensate victims or make them whole may be apposite for North America (*Canadian Railway Company v Canada (Canadian Human Rights Commission)* [1987] 1 SCR 1114 at 1143); and *Local 28, Sheet Metal Workers' International Association v EEOC* 478 US 421 [1986]). The dicta make for a powerful rhetorical sleight of hand, possibly sheer sophistry in the hands of a clever advocate of affirmative action. Imagine statements like: 'Do not worry, we can leave the past intact and focus on "prospective" remedies for past wrongs'. The two judicial pronouncements are accurate in an ironic sense. If we pretend away the history of conquest, genocide and dislocation, we might accept this approach for Canada and the United States, if only grudgingly (Asante 1991/1992; Coates 2014). The geographic contrast with north America has the acute merit of sharpening insight into our own situation.

### **Affirmation, not affirmative action**

Considering contemporary evidence, I definitively abandon my previous faith in affirmative action as an effective way of addressing the ills of our terrible past. Post-1994 South Africa's political agenda is or should be profoundly dissimilar from that of most western societies. National reconstruction seems to capture the core of the domestic agenda to address the legacy and cost of South Africa's history properly. Thematically, national reconstruction sharpens interest in the precise qualities that north American judges reject for affirmative action: the making of a whole South African society. The distance between that woolly and ambiguous term, 'wholeness', to Dickson CJ's chosen word, 'compensation', is undoubtedly short. Even shorter is

the excursion to words like return, replacement, satisfaction, atonement, restoration, restitution and reparation and the associations of this vocabulary is a material aid to our discernment. The double claim here is that affirmative action is inadequate and reparation is essential if we are to make South Africans whole. Wholeness requires concrete material and spiritual action to repair the injury flowing from the gross brutalities of our history. This insight necessarily compels methods of affirmation and wholeness-making that are vastly superior to affirmative action.

### Reparations in the world

Comparative experience deepens our insight into reparations. Contemplate the conflicts we commonly call the First World War and the Second World War. Reflect on the Nazi genocide of 11 to 12 million Jews, Gypsies, Jehovah's witnesses and same-sex men. Turkey's mass annihilation of Armenian persons is also telling.<sup>9</sup> So, too, is the US internment of Japanese Americans during World War II. The Japanese mass rape and enslavement of Asian women is also notable for this analysis.<sup>10</sup> Imagine the Holocaust of the Herero and Nama of Namibia.<sup>11</sup> Our collective attention should also not lose sight of Italy's crimes in Libya and its atrocities in 1930s Ethiopia, just as it should not overlook the Rwanda genocide, and those in Cambodia and the USSR (Woolford & Wolejszo 2006). The genocide of 12 to 15 million Africans in Belgian King Leopold's personal colony, the Congo, could be the world's worst instance if we dared, and were sufficiently callous, to compare (Holdschild 1998). This setting makes the 27 September 1951 statement of by German Chancellor Konrad Adenauer profoundly telling. Dr Adenauer's statement acknowledged that 'unspeakable acts were perpetrated in the name of the German people, which impose upon them the obligation to make moral and material amends' (Rosensaft & Rosensaft 2001: 26).

The case for reparations is compelling logically, though it faces a residual difficulty. The First World War (so-called) settlement illustrates that the right to reparations traditionally functioned as a form of the spoils of war. This is to say

9 Alexander 2007; Coates 2014; Cooper 2006; Craemer, 2015; Holdschild 1999; Lewis 2017; Rosensaft & Rosensaft 2001; Weitz 2008; Woolford & Wolejszo 2006.

10 Alexander 2007; Coates 2014; Cooper 2006; Craemer, 2015; Holdschild 1999; Lewis 2017; Rosensaft & Rosensaft 2001; Sarkin & Fowler 2008; Weitz 2008; Woolford & Wolejszo 2006.

11 Alexander 2007; Coates 2014; Cooper 2006; Craemer, 2015; Holdschild 1999; Lewis 2017; Rosensaft & Rosensaft 2001; Sarkin & Fowler 2008; Weitz 2008; Woolford & Wolejszo 2006.

that the privilege of being paid reparations belonged only to the military victor. The precedent set by Haiti's independence debt, with Haiti paying 150 million Francs to indemnify former French slave owners and heirs for the loss of property, illustrates the older form of 'reparation' (Craemer 2015). England's payment of £20 million for loss of slave property, along with Glasgow University's £20 million reparation for benefitting from slave trading, more than qualifies the conclusion that military victory is a precondition to receipt of reparations payments (Carrel 2019; Craemer 2018). State and non-state practice since the Second World War (so-called) discloses a profound change in convention. Thus, it must be correct to claim today that 'not only the conqueror ... is invariably entitled to reparations' (Ramose 2003: 568).

Still, the reparations proposal is fraught with challenges and induces fear for many reasons. Reparation incorporates the risk of countless claims and unlimited liability. The implied admission of liability raises concerns about unforeseeable plaintiffs and other risks, whether in political, legal, reputational or other realms (Neuborne 2001). Reparations for slave trading alone would trigger a European payment of nearly US \$7 trillion to what the Africa Reparations Movement calls 'South Africa and interior' alone (Craemer 2018). Reparations to the whole world would cost Europe alone an estimated US \$44 trillion (Craemer 2018). These numbers explain the reluctance of western states, including Germany and Belgium, to consider payment of reparations. The German Federal Republic's different responses to the respective claims for the Herero and Jewish Holocausts is puzzling, as is the Belgian response to the Congolese genocide by both country and King. Belgium, a country that benefited immensely from the economic profits of its King's Congolese fiefdom, has never been interested in acknowledging its part in the dehumanisation of an entire people. Germany, which has either issued or committed to issuing an apology, has consistently repudiated Namibia's imputation of liability (Alexander 2007; Cooper 2006; Sarkin & Fowler 2008). A recent visit to Namibia of the Minister of State of the German Foreign Ministry did nothing to change this stance (*News 24* 2018). The minister stated only that Germany wants 'to help heal the wounds from the atrocities committed by Germans at the time' and that Germany has 'a lot of catching up to do in coming to terms with our colonial heritage' (*News 24* 2018).

In contrast to this position, Germany initiated early discussions with Israel that resulted in a commitment to pay reparations from 1952 (Anon 1952; Rosensaft & Rosensaft 2001). The country has also agreed reparation payments to other nations (Weitz 2008: 362). The total paid reparations exceed 100 billion Deutsch

Marks and instalments continue (Weitz 2008). As recently as 1999, Germany set up a compensation fund for victims of slave and forced labour under German rule (Rosensaft & Rosensaft 2001). Switzerland and Austria have paid US \$1,25 billion and \$40 million respectively for the plunder of Jewish property during that Holocaust. Moreover, in early 2001, a lawsuit against German corporations and financial institutions settled with the creation of a foundation funded jointly by German industry and government in order to compensate victims of the German holocaust (Neuborne 2001). Germany's basis for resisting liability for the Namibian Holocaust, namely that colonial genocide was lawful under contemporaneous international law, is erroneous (Anderson 2005; Cooper 2006).

Despite common scholarly perception, the Nuremberg Tribunal was not simply a retrospective form of criminal justice facilitated only by the Allied military victory. The prohibition of genocide, slavery, crimes against humanity, crimes against peace and war crimes was already part of the international law of the late 1800s (Anderson 2005; Cooper 2007; Lewis 2017; Sarkin & Fowler 2008). The view that Nuremberg did not create new law but purely instituted sanctions for atrocities and gross criminal violations is not peculiar (Neuborne 2001). The Israeli and Namibian claims are similar and we hope the Herero belief that racism explains their disparate treatment is grossly misplaced (Cooper 2007). The paradox is that the 'Namibian Holocaust' of the so-named First World War led to a 'climate, ideology and environment that contributed in great part to the genocide of the Jews during World War II', so-called (Lewis 2017: 134). The Herero and Nama may still be litigating the matter in U.S. federal courts (*News 24* 2018). For its own part, the government of South Africa has balked at full compliance with the recommendation to compensate victims of the gross apartheid human rights violations (Bell 2008; Gumede 2019; Meintjies 2013; Smith et al. 2014). Most related recommendations of the Truth and Reconciliation Commission apparently still gather dust in the Presidency. This explanation seems to lie in fear of the threatened economic retaliation of powerful states (Ramosé 2003). I am thus not sanguine about the prospects of reparation though forecasting is not the purpose of my argument.

## **Reparations for South Africa**

Temporarily disregarding African exposure to colonialism, slavery, slave trading and racial genocide, the 1979 and 1994 political settlement of the respective Zimbabwean



and South African conflicts is a good starting point. Ramose (2003) rightly contends that the settlements achieved democracy but not decolonisation, a view founded on their failure to confront issues of territorial title and sovereignty. If our premise is that territorial title and sovereignty should return to the indigenes, the conclusion that the people of Zimbabwe and South Africa remain unrestored is unavoidable. For Ramose (2003), restoration requires of the conqueror three actions: return of territorial title, renunciation of sovereignty and restitution and reparation. This paper attends only to the reparations component of Ramose's argument, while commending his focused clarity on all three mentioned conditions. He proclaims,

*the restoration of title to territory to the indigenous conquered people and the necessity for the reversion to unencumbered and unmodified sovereignty to the same quantum and degree as at conquest. Only in this way can restitution and reparation as exigencies of historical justice be realized in Zimbabwe. The implications for the rest of Africa speak for themselves.* (Ramosé 2003: 555)

Moreover, 'justice demands the restoration of title to territory [and renunciation of sovereignty over territory] to the indigenous conquered peoples as well as restitution to them' (Ramosé 2003: 543). Two potential sources of reparation payments seem obvious in this schema. The first puts the onus on the colonists, which puts places the Netherlands and the United Kingdom directly into the equation. The second is the South African state itself. Of course, it would be a great benefit if both squared the moral debt. For the moment, let us leave the Netherlands and United Kingdom out of analytical account.

## **Reparations scenario for South Africa<sup>12</sup>**

Assume for the sake of simplicity that President Ramaphosa's Cabinet approves the principle of paying reparations to South Africans who were victim to years of

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<sup>12</sup> This scenario predates the severe tightening of fiscal space caused by the COVID-19 pandemic, which sadly builds on the consistent and pronounced recent trend of shrinking economic performance and public finances. Thus, the scenario is more hypothesis and rhetoric than a presently realistic claim on public policy. Of course, the intrinsic logic of the scenario transcends current economic conditions. Its cogency is more telling under a healthy economy and the ultimate value of the scenario is in illustrating an important policy alternative.

apartheid, slavery and colonial imposition. In line with this thought experiment, add the following simplistic and mainly economic assumptions. Macroeconomic fundamentals and public finances are sound, and the economic outlook is positive. The stimulus effects of the programme would more than offset a negative outlook. The National Treasury carefully designs a prudent combination of policy and execution plans. These impose exacting and easily enforced requirements for effective governance, assurance, financial probity and the pre-emption of cronyism and programme capture. The National Treasury and other government departments have formulated a set of high-quality financial and economic models, all eminently practical and actionable. The programme focuses only on the victims, being the conquered. Make the arithmetic easy. Pretend the population of Afro-South Africans has risen to 50 million.

The reparations budget is not high in the rough theoretical order of R 10 to R 25 billion.<sup>13</sup> Pretend the programme pays individual victims a modest consequential per capita R 500 000.00. About fifty percent or more of this figure pays out as a lump sum. The acceptance conditions require the investment of fixed portions towards debt retirement, fixed property, education, savings and retirement provisioning. This is to avoid or limit the need for people to approach the state again, cap in hand to double dip. The balance releases periodically over several years. The interesting aside is whether the scheme could afford something of a consumption-led economic stimulus, a feat that domestic savings and domestic and international investment seem especially unable to achieve in the short-term and in the context of public finances that reflect heightened stress.

Reparation could collapse the argument for special preferences and enable the repeal of the current programme of putative affirmation, specifically the constitutional and legislative provisions on affirmative action, BEE and preferential procurement. There are so many potential advantages apart from avoidance of the difficulties canvassed earlier. We could end the unproductive and parasitic micro-economy of affirmative preference (Motshabi 2002). We could dispense with the required raft of

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<sup>13</sup> These sums are not large and money is easily spent in South Africa. For instance, Mogoeng CJ found for a unanimous Constitutional Court that R250 million was spent on president Zuma's home in KwaZulu-Natal (*Economic Freedom Fighters and Others v Speaker of the National Assembly and Others* [2016] ZACC 11). Even at a R 100 billion, the arithmetic would not be prohibitive with disciplined budgeting and financial planning. In any event, the figures serve only to illustrate and do not go to the principle.

laws, institutions, business processes, information systems, organisational expenses and so forth. No doubt, many ready and worthy alternative applications of the total organisational cost savings exist, including the payment of reparations by the National Treasury. The residual claim to public resource assistance would be limited mainly to that reportedly provided in progressive social democracies. This would do little more than provide the minimum welfare net of resources necessary for a dignified existence (this framework fulfils the ambitions of the Constitution of the Republic of South Africa: ss 1, 2, 3, 7, 8, 9, 10, 11, 24, 25, 26, 27, 28, 29, 30 & 31, all read together).

Payment of reparations by South Africa does not remove the responsibility of former colonisers. South Africa should open negotiations with the Netherlands and the United Kingdom in the sincere hope that good sense will prevail. South Africa might consider legal proceedings too, if necessity should indicate such a measure. I recognise the important implications for political, diplomatic, economic and trade relations, but the government of the day is charged with managing the conflicting demands of public policy and interest.

## **Concluding comments**

Stimulating questions arising from teaching activities inspired this enquiry into affirmative action. I now find myself condemning the policy of affirmative action, but I am grateful to have engaged in an infinitely more productive conversation. Affirmative preference serves South African society very badly, at best. A quarter century of unconscionably poor results and high financial and moral costs makes an unanswerable case for the abolition of affirmative action. This requires amendment of the Constitution, raising potentially difficult political questions. However, the issue justifies sincere attention, as attempted in this analysis. South Africans need a reconstitution of their wholeness and reparation is a significant tool of this lofty objective. The government should consider the claim to pay reparations through the National Treasury. This does not suggest that the government is liable – merely that interests of the country support this enormously important approach to what can be conceptualised as an essential form of human affirmation. The interests of the country likewise support the lodgement of a reparations claim with the Netherlands and the United Kingdom. I expressly commend the ten-point reparations prototype developed by the the nations of the Caribbean (Anon 2019).

## About the Author

**Khanya B Motshabi** | Department of Public Law, University of the Free State, South Africa  
ORCID (<http://orcid.org.0000-0002-8310-7828>) |

**Khanya B Motshabi** is a constitutional and international lawyer currently teaching constitutional equality and constitutional property.

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