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The (mis)appropriation of human rights, norm-spoiling, and white supremacist backlash in South African minority rights litigation

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> [C]ourts should however always be astute to distinguish between genuine attempts to promote and protect equality on the one hand and actions calculated to protect pockets of privilege at a price which amounts to the perpetuation of inequality and disadvantage to others on the other.[1]
>
> This is a racial project and ought to be discussed, analyzed, and criticized as such.[2]

The utility of human rights to help redress and repair the ongoing harms of colonialism and apartheid in South Africa has been heavily criticised.[3] Writing from a decolonial perspective, scholars have highlighted the limits of rights to redress inequality and deliver substantive justice for the black dispossessed; those who constitute the majority of South Africa's 'underclass'.[4] In this scholarship, the core argument has been the

1 *Pretoria City Council v Walker* [1998] ZACC 1 para 48.

2 D Simson 'Most favored racial hierarchy: The ever-evolving ways of the supreme court's superordination of whiteness' (2022) 120 *Michigan Law Review* 1629 at 1634.

3 See JM Modiri 'Law's poverty' (2015) 18 *Potchefstroom Electronic Law Journal* 224; JM Modiri 'Conquest and constitutionalism: First thoughts on an alternative jurisprudence' (2018) 34 *South African Journal on Human Rights* 300; S Sibanda '"Not yet uhuru" – The usurpation of the liberation aspirations of South Africa's masses by a commitment to liberal constitutional democracy' (PhD thesis, University of the Witwatersrand, 2018); T Madlingozi 'Social justice in a time of neo-apartheid constitutionalism: Critiquing the anti-black economy of recognition, incorporation and distribution' (2017) 28 *Stellenbosch Law Review* 123.

4 While the meaning of underclass is subject to much debate, here I simply mean those who live in persisting, structural poverty that is difficult, if not impossible, to escape without structural intervention. See eg J Seekings & N Nattrass *Class, race, and inequality in South Africa* (2005) 298. To follow the general debate about

idea that the 'Western', 'Eurocentric' and colonial liberal rights paradigm is incapable of delivering substantive justice for over 300 years of colonial conquest and pillaging and that it entrenches existing patterns of dispossession.

The premise of this chapter deviates from the critique that rights are inherently incapable of delivering substantive justice. My point of departure is that rights are a possible vehicle for emancipatory impact, but they may also be used for entrenching and preserving existing inequality. Rights can have an emancipatory impact if they are interpreted and applied in a manner that contributes to dismantling existing systems of domination and unequal power relations – a process involving the legislature, executive and judiciary. In this sense, I see rights as 'non-reformist reforms' – measures which are likely incapable of achieving revolutionary change, but which are at least able to undermine or shrink existing oppressive systems.[5] In the South African context, there have been many impediments to the realisation of the full potential of rights as non-reformist reforms, chief among these being the government's implementation failures and rampant maladministration and corruption. My focus in this chapter is on another mechanism that has the potential to thwart the emancipatory potential of rights – the (mis)appropriation and norm-spoiling of rights by powerful actors who seek to preserve and entrench white privilege and power. (Mis)appropriation refers to the observed phenomena where states and private actors deploy a 'range of strategies and arguments … advanced in the language of protecting "human rights", but generally seeking to reverse or undo previous human

whether there is an 'underclass' (in the social and economic hierarchy) and distinct from other classes, see eg RB Mincy, IV Sawhill & DA Wolf 'The underclass: Definition and measurement' (1990) 248 *Science* 450; F Robinson & N Gregson 'The "underclass": A class apart?' (1992) 12 *Critical Social Policy* 38.

5 The idea of non-reformist reforms has been used in different contexts, most recently in the context of prison abolition see, AA Akbar 'Non-reformist reforms and struggles over life, death, and democracy' (2023) 132 *Yale Law Journal* 2497; M Stahly-Butts & AA Akbar 'Reforms for radicals? An abolitionist framework' (2022) 68 *UCLA Law Review* 1544; NF Stump '"Non-reformist reforms" in radical social change: A critical legal research exploration' (2021) 101 *Boston University Law Review Online* 6. For an analysis of the earlier discussions of non-reformist reform as a path for socialist development following the failures of early socialist regimes, see A Gorz 'Reform and revolution' in R Miliband & J Saville (eds) *The Socialist register* (1968); A Gorz *Strategy for labour: A radical proposal* (1967).

rights developments and commitments'.[6] Relatedly, 'norm-spoiling' describes the process through which actors directly challenge existing norms with the aim of weakening their influence.[7]

In recent years, South Africa has seen an emerging pattern of strategic litigation, specifically in the context of the right to equality and language and cultural rights, aimed not at furthering the ends of equality but at entrenching existing patterns of inequality. This has been led by several well-resourced and organised political actors, including the Afrikaner-Nationalist trade union Solidarity, a self-styled civil rights organisation, and AfriForum.[8] A core strategy for (mis)appropriation and norm-spoiling has been the attempt to get courts to ignore the social, cultural, historical and political context in their interpretation of rights, and steer their focus towards rights as individual entitlements enjoyed by equally situated citizens. In doing so, they have sought to dilute judicial engagement with the lingering impact of past and ongoing oppression and the impact of power on the conceptualisation of rights.[9]

While these actors are not always successful in their claims, the chapter will demonstrate how they nevertheless undermine and erode existing norms and influence the development of the content of rights, to the detriment of disadvantaged groups and in favour of reinforcing existing inequality. The chapter will show how these actors have shifted the 'Overton window', opening political space for a regressive and harmful conception of these rights.[10] I believe that this litigation is a racialised

6 G de Burca & KG Young 'The (mis)appropriation of human rights by the new global right: An introduction to the symposium' (2023) 21 *International Journal of Constitutional* Law 205 at 207.

7 R Sanders 'Norm spoiling: Undermining the international women's rights agenda' (2018) 94 *International Affairs* 271 at 272; R Sanders & LD Jenkins 'Control, alt, delete: Patriarchal populist attacks on international women's rights' (2022) 11 *Global Constitutionalism* 401 at 402.

8 These parties have been involved in all the major affirmative action cases: see eg *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23 (*Barnard*); *Solidarity v Department of Correctional Services* [2016] ZACC 18 (*Correctional Services*); *Minister of Constitutional Development v South African Restructuring and Insolvency Practitioners Association* [2018] ZACC 20 (*SARIPA CC*); *Solidariteit Helpende Hand NPC v Minister of Basic Education* [2017] ZAGPPHC 1220; *AfriForum NPC v Minister of Tourism; Solidarity Trade Union v Minister of Small Business Development* [2021] ZASCA 121.

9 I owe the clarity in these few sentences to my friend and mentor, Professor Pierre de Vos.

10 The 'Overton window' is a theory (mostly credited to the conservative think-tank called the Mackinac Centre for Public Policy) which suggests that there is a range

project and a part of 'white backlash' – legal and political strategies by which groups with relative socioeconomic power perceive themselves as victims of equality and anti-discrimination laws and fight to preserve their interests and privileged status.[11] Accordingly, these cases should be examined and treated as such, if not by the courts, then by the academics and practitioners who litigate and write about these cases – raising the alarm and calling for a social, political and judicial response to curtail this project.

A common theme in the strategic litigation against affirmative action is the framing of affirmative action as a threat to the rights to equality, dignity, and the individual liberty of non-beneficiaries of affirmative action – shifting the focus away from the rights of disadvantaged groups, and from the need to remedy the injustices wrought by colonialism and apartheid. The arguments made posit the non-beneficiaries of affirmative action or those adversely affected by these measures as 'innocent' minority groups unfairly disadvantaged by the state's mission to redistribute resources and eradicate inequality.[12] The Afrikaans language cases are a response to South African universities' decisions to move towards more inclusiveness and accommodate the increase of non-Afrikaans speaking students on their campuses – the majority of whom are black.[13] A core

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of policies that are politically acceptable to the mainstream population at a given time. A policy which falls outside of this window will not be accepted by the public. However, the theory suggests that a policy which falls outside the window could be cast or promoted in a manner that shifts the Overton window in a different direction, making the policy more acceptable. For a discussion of this idea, see M Astor 'How the politically unthinkable can become mainstream' *New York Times* (26 February 2019). I thank Dr Khomotso Moshikaro, a friend and colleague, for pointing out how this idea maps onto the argument that the litigation explored in this chapter has, even when the cases have failed, shifted the Overton window in the areas of equality, language, and cultural rights – imperceptible as this shift may at times appear.

11 For an analysis of this concept, see JM Modiri 'Towards a "(post-)apartheid" critical race jurisprudence: "Divining our racial themes"' (2012) 27 *Southern African Public Law* 231 at 253-255. See also JM Modiri 'The colour of law, power and knowledge: Introducing critical race theory in (post-)apartheid South Africa' (2012) 28 *South African Journal on Human Rights* 405; A Mbembe 'Passages to freedom: The politics of racial reconciliation in South Africa' (2008) 20 *Public Culture* 5.

12 This is a trite argument in the affirmative action literature, best exemplified in the South African context by D Benatar 'Justice, diversity and racial preference: A critique of affirmative action' (2008) 125 *South African Law Journal* 274.

13 *Chairperson of the Council of UNISA v AfriForum NPC* [2021] ZACC 32 (*UNISA*); *Gelyke Kanse v Chairperson of the Senate of the University of Stellenbosch*

theme in the language cases is the use of claims of equality and minority language and cultural rights to weave a story in which Afrikaans-speaking persons are the victims of oppression by a regime that seeks to elevate non-Afrikaans-speaking persons.

Given that this contribution is part of a *Festschrift* honouring Justice Edwin Cameron, it explores judgments in which he had some influence, whether as a dissenter, the scribe of a majority judgment or in influencing (through his previous judgments) arguments in the cases.[14] From a methodology perspective, I was not looking to target the work of an individual judge. Rather, the cases with which I am concerned happened to map onto litigation in which Cameron J had a hand. In extra-curial writing, Justice Cameron has suggested that there was division in the Constitutional Court and an 'acrid racial tension' when some of these cases were decided.[15] I cannot speak to these tensions or how they ultimately shaped the outcome of the judgments. Instead, this chapter will show how even judges committed to using the law to eradicate inequality and transform society[16] may either struggle to see these claims for what they are – attempts at (mis)appropriation or norm-spoiling – or, in cases where they do see this, may respond in ways that fail to diffuse or curtail the attempts at (mis)appropriation and norm-spoiling.

In his academic writing, Cameron J's position on minority rights is rooted in his commitment to protecting those on the margins of society.[17] His work shows concern for the ways in which minorities can become objects of majoritarian power, the coercive force of assimilation, and the

[2019] ZACC 38 (*Stellenbosch*); *AfriForum v University of the Free State* [2017] ZACC 48 (*UFS*).

14 Justice Cameron was on the bench in all but one of the cases, the last of the language cases (i.e. *UNISA*).

15 E Cameron & others 'Rainbows and realities: Justice Johan Froneman in the explosive terrain of linguistic and cultural rights' (2022) 12 *Constitutional Court Review* 261 at 287.

16 By this, I mean a commitment to 'transformative adjudication'; that is, the commitment to interpreting the law in a manner that seeks to transform society and achieve the Constitution's commitment to equality. See, in general, D Moseneke 'Transformative adjudication' (2002) 18 *South African Journal on Human Rights* 309; K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146.

17 See Cameron & others 'Rainbows and realities' (n 15); E Cameron 'Nepal's new constitution and fundamental rights of minorities – lessons of the South African experience' (2007) 23 *South African Journal on Human Rights* 195; E Cameron 'Sexual orientation and the Constitution: A test case for human rights' in N Bamforth (ed) *Sexual orientation and rights* (2014).

annihilation of difference. Writing in the context of the protection of gays and lesbians, he notes how '[o]ur common future depends on the capacity of majoritarian politics to accommodate minorities'.[18] In this, he captures the importance of pursuing the protection of those whose differences may make them illegible to the majority – risking their marginalisation, exclusion, and oppression. However, the commitment to ensuring that all, especially the 'constitutional outcasts',[19] are seen may make it difficult for a judge to differentiate between claims that genuinely seek to further equality and those that have more nefarious purposes. This is especially so in cases involving language, culture, race and reparations, issues Justice Cameron has aptly described as 'emotionally charged and politically fraught'.[20]

The chapter is divided into five substantive parts. In the first part, I provide an analysis of minority rights – what they are and why it is important to protect them. I will also differentiate between minority rights claims that seek to further and expand inclusion and difference in society, and the claims made by otherwise dominant minorities to preserve their dominance, power, and privilege, which I believe is the case in the litigation discussed in this chapter. In the second part, I explore the literature on the (mis)appropriation of human rights and norm-spoiling and provide an analysis of what I mean by white supremacist backlash and how this relates to minority rights discourse. While (mis) appropriation and norm-spoiling can happen in other settings, such as the tabling of legislation or resistance to legislative change,[21] in this chapter I focus on (mis)appropriation and norm-spoiling in the courts.

In the third and fifth parts, I explore the affirmative action and language rights litigation to illustrate the ways in which minority rights discourse is being used to entrench inequality and preserve white privilege. In the context of the affirmative action cases, I will show how the attempts at (mis)appropriation and norm-spoiling have: (i) opened the door for a more exacting level of judicial scrutiny of affirmative action

18 Cameron 'Nepal's new constitution' (n 17) 202.
19 See *City of Tshwane Metropolitan Municipality v AfriForum* [2016] ZACC 19 para 134 where Cameron J and Froneman J ask whether persons who bring claims for cultural rights rooted in a 'history tainted by bloodshed' should be treated as 'constitutional outcasts' not able to rely on cultural rights.
20 Cameron & others 'Rainbows and realities' (n 15) 263.
21 Sanders & Jenkins (n 7) 402.

measures under the Employment Equity Act (EEA);[22] and (ii) created fertile ground for limiting the types of permissible affirmative action measures under section 9(2) of the Constitution[23] by gesturing towards the prohibition of the use of quotas. In the trilogy of language cases, I will map how the actors have made gains in shaping a high burden of justification for changes to universities' language policies. This level of scrutiny is inappropriate for measures that seek to promote inclusion and access to higher education, especially considering that the language in question has historically enjoyed a dominant and prominent role in these institutions and South African society.

In the fourth part, I segue out of the context of the affirmative action and language cases to examine another case that evokes questions of race, belonging and remedy for historic injustice: the renaming of streets in the City of Tshwane.[24] This judgment is notable for reflecting racial divisions within the Court, with the only two white male judges (Cameron J and Froneman J) writing a dissent, preparing the ground for the first case in the language trilogy. The judgment is also a good example of the phenomena at the core of this chapter, the (mis)appropriation and spoiling of rights to reinforce white Afrikaner privilege.

1 On minority rights discourse

The aim of this chapter is to illustrate how organisations such as Solidarity and AfriForum use a discourse of equality and minority language and cultural rights to advance and reinforce white supremacist ends. To lay a foundation for this argument, I examine the meaning of 'minority rights discourse', starting with a general analysis of what minority rights are and what their purpose is. Before moving to this analysis, it is important to state that there is nothing inherently wrong with the protection of minority rights. The issue is the way in which these rights, as will be shown in the discussion, are being used by otherwise dominant minorities to entrench existing inequality and further white supremacist ends.[25]

22 Act 55 of 1998.
23 Constitution of the Republic of South Africa, 1996.
24 *City of Tshwane* (n 19).
25 While this chapter focuses on the rights to equality and language and cultural rights, the (mis)appropriation and spoiling of rights can happen with any other right.

1.1 National and ethnic minorities

According to Will Kymlicka, there are two types of minority status: national and ethnic. National minorities refer to minority status that is rooted in the incorporation of previously self-governing, territorially concentrated cultures into a larger state.[26] National minorities seek to maintain themselves as a distinct society alongside the 'majority' culture. They do so by demanding some level of autonomy or self-government. On the other hand, ethnic minorities are individual or familial immigrants who seek recognition of their ethnic identity,[27] not to become separate or self-governing, but to 'modify the institutions and laws of the mainstream society to make them more accommodating of cultural differences'.[28] South Africa's minority groups map an intersection of these: we are a nation formed by national and ethnic minorities.

In most liberal democracies, minority groups ask for the protection of their political, cultural, educational, religious, and linguistic interests.[29] Recognising these needs involves two considerations. The first is a commitment to the protection of minority groups because 'religious, cultural, and linguistic affiliations are essential features of what it means to be a human being'.[30] The second has to do with the prevention of conflict rooted in the failure to create space for difference or the

26 The incorporation of these groups, national minorities, into one state has historically been coerced and rooted in colonial conquest. For example, Puerto Ricans were incorporated into the United States as part of colonial conquest (Spain ceded Puerto Rico to the US after the Spanish-American War). Another example is Canada, where colonial historical development incorporated the English, French, and Aboriginal people into a single state. See W Kymlicka *Multicultural citizenship: A liberal theory of minority rights* (1996) 10-12, 27-30.

27 Kymlicka (n 26) 2.

28 Kymlicka (n 26) 11.

29 For purposes of this chapter, I will assume agreement that South Africa is a 'liberal democracy', noting the ongoing debate of this classification; see eg the conversation between Sanele Sibanda and Frank Michelman in S Sibanda 'Not purpose-made! Transformative constitutionalism, post-independence constitutionalism and the struggle to eradicate poverty' (2011) 22 *Stellenbosch Law Review* 482; F Michelman 'Liberal constitutionalism, property rights, and the assault on poverty' (2011) 22 *Stellenbosch Law Review* 706; S Sibanda 'Not quite a rejoinder: Some thoughts and reflections on Michelman's "Liberal constitutionalism, property rights and the assault on poverty"' (2013) 24 *Stellenbosch Law Review* 329.

30 P Macklem 'Minority rights in international law' (2008) 6 *International Journal of Constitutional Law* 531. See also C Taylor 'The politics of recognition' in A Gutmann (ed) *Multiculturalism: Examining the politics of recognition* (1992).

compulsion to assimilate to the 'dominant culture'. As will be seen in the section that follows, both these considerations underlie the recognition and protection of minority rights in South Africa.

From a historical perspective, minority rights protection in South Africa is enmeshed with white supremacist segregationist policies. We have a living memory of the 'homelands system', where numerical racial majorities were made minorities when they found themselves in areas demarcated for 'whites only', and where the state segregated communities based on ethnic differences, thus creating national minorities.[31] During the negotiation and drafting of the Constitution, the National Party (NP) is said to have wanted the interests of the white minority to be secured, through, *inter alia*, the recognition of minority rights.[32] Writing in 1991, Fanie Cloete notes that the NP regarded the protection of minority rights 'as the most important constitutional safeguard for future white security'.[33] The NP was particularly interested in ensuring the 'continued existence of state-funded schools with a distinctive linguistic, cultural or religious character (or all three)'.[34] According to Stu Woolman, '[t]he ANC viewed this formulation as a neo-Verwoerdian attempt to entrench educational apartheid'.[35] More conservative than the NP, other Afrikaner Nationalists were interested in the creation of a separate territory in which to exercise their right to self-determination.[36] There was also a demand for autonomy by the 'traditionalist' Zulu nation.[37] In essence,

31 The homeland system was one in which the National Party government, in furtherance of racial segregation, passed laws by which black South Africans lost citizenship in South Africa and became citizens in the homelands based on their 'ethnic backgrounds'. See J Dugard 'South Africa's "independent" homelands: An exercise in denationalization' (1980) 10 *Denver Journal of International Law and Development* 11.

32 F Cloete 'Minority rights and interest groups' (1991) 6 *SA Public Law* 31.

33 Cloete (n 32) 31.

34 S Woolman 'Community rights: language, culture & religion' in S Woolman & M Bishop (eds) *Constitutional law of South Africa* (2018) 23.

35 Woolman (n 34) 23.

36 HA Strydom 'Minority rights issues in post-apartheid South Africa' (1997) 19 *Loyola of Los Angeles International and Comparative Law Journal* 873 at 896-897. This possibility was protected by the formation of the Volkstaat Council, whose purpose was to 'gather, process and make available information with regard to possible boundaries, powers and functions … of such a Volkstaat'. See Chapter 11A of the Interim Constitution Act 200 of 1993 (inserted by the Constitution of the Republic of South Africa Amendment Act 2 of 1994); and s 20(5)(a) of Schedule 6 of the Constitution, 1996.

37 Strydom (n 36) 884.

South Africa's history of domination and oppression of the majority under white minority rule should make clear that the term 'minority' in the South African context will sometimes refer to a group that is a numerical minority but is socially and economically dominant.

1.2 Numerical and dominant minorities

According to Francesco Capotorti, 'minority' refers to:

> A group numerically inferior to the rest of the population of a state, in a non-dominant position, whose members – being nationals of the state – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.[38]

Capotorti's definition suggests that minority status has two dimensions. The first dimension looks at a group's numerical position relative to the majority group. The second dimension is about power: a group must be in a non-dominant position in society. Accordingly, minority status carries both a quantitative meaning and a political connotation.[39] Sachs J endorsed this conception of minority status in the *Gauteng School Education Bill* case.[40]

The definition above implies that for minority rights protection, a group must show more than just that they are a numerical minority; they must be a minority in relation to their relative social and economic power. This approach has been subject to critique. According to Hennie Strydom, for example, the numerical, political, economic, or cultural dominance of a group should be irrelevant to the protection of all rights, including minority rights.[41] Instead, he argues that the only question should be 'whether a group has a right or interest which inherently

38 F Capotorti 'Study on the rights of persons belonging to ethnic, religious and linguistic minorities' *United Nations Human Rights Study Series No. 5* (1991) 96.

39 See the discussion in MS Mothata & EM Lemmer 'The provision of education for minorities in South Africa' (2002) 22 *South African Journal of Education* 106.

40 *Gauteng Provincial Legislature In Re: Gauteng School Education Bill of 1995* [1996] ZACC 4 para 87. According to Sachs J: '[T]he central theme that runs through the development of international human rights law in relation to the protection of minorities, is that of preventing discrimination against disadvantaged and marginalized groups, guaranteeing them full and factual equality and providing for remedial action to deal with past discrimination ... The weight of international law ... should be in favour of the dominated and not the dominating minorities.'

41 Strydom (n 36) 892.

qualifies for protection'.[42] In other words, the approach to rights, including minority rights, should not make 'constitutional outcasts' of any group. I agree with this critique. The differentiation between dominant and numerical minorities does not mean that dominant minorities have no claim to minority rights; they do. However, the power relations between dominant and non-dominant minorities must be taken into account in the examination of the scope and content of these rights or whether a limitation of these rights would be justifiable. It cannot be simply ignored. Ignoring the dominant position of a numerical minority and the histories in which this dominance is rooted (colonialism and apartheid, for example) could help entrench the dominance of these groups – something which a court committed to using the law to transform society ought to be concerned with.

As I will illustrate in this chapter, the arguments made by AfriForum and Solidarity invoke minority rights without accounting for the social, economic, and cultural dominance of the white minority in South Africa. While the Constitutional Court has been resistant to these narratives, this tactic has still led to an erosion of important norms in South Africa's equality and minority language and cultural rights jurisprudence. Having provided some idea of what I mean by minority rights discourse, I turn to look at how minority rights are protected.

1.3 The protection of minority rights

Minority rights are necessary for maintaining democratic stability and nation-building. The reality of civil conflict across the globe makes plain that the failure to protect minority rights could cause and exacerbate ethnic and cultural tensions and lead to the splintering of political communities.[43] Moreover, the markers of minority status (race, language, religion, culture) are integral to people's identity.[44] Therefore, any nation that values dignity and autonomy should take the demands of minority groups seriously. However, minority protection can induce political discord by hardening differences into rights. These rights can

42 Strydom (n 36) 892. See also HA Strydom 'Minority rights protection: Implementing international standards' (1998) 14 *South African Journal on Human Rights* 373 at 381.
43 Macklem (n 30) 541.
44 See in general Taylor (n 30); Kymlicka (n 26).

enable 'political actors to capitalize on national, ethnic, religious, and linguistic differences to gain political power' and have the capacity to 'divide people into different communities, create insiders and outsiders, pit ethnicity against ethnicity'.[45] As this chapter shows, they can also be used to reify the power, position, and privilege held by some minority groups.

There are two dominant mechanisms through which minorities are protected. The first is through the prohibition of unfair discrimination against specific groups, which includes a requirement that those in the majority accommodate this difference. The second is through individual protection of specific rights and protections of minority groups.[46] Under international law, minority rights are recognised in the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.[47] The Declaration protects the rights of minorities to 'enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination', to participate in decisions at a regional and national level, and to 'establish and maintain their own associations'.[48]

South Africa's constitutional protection of minority rights is in a range of rights that mirror international law protection. This includes the right to receive an education in the language of one's choice in public

45 Macklem (n 30) 532, 541.

46 An example of minority group protection is the use of special representation rights. For a general discussion of these rights, see Kymlicka (n 26) ch 7.

47 UN General Assembly 'Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities' A/RES/47/135 (3 February 1992).

48 Articles 2(1), (3) and (4) of the Declaration (n 47). See also Article 1, which imposes a two-fold obligation to 'protect' and to 'encourage' conditions for the promotion of minority identities. The UN Human Rights Committee has also made it clear that the recognition of minority rights includes 'positive measures by States ... to protect the identity of a minority and the rights or its members to enjoy and develop their culture and language and to practice their religion' (CCPR General Comment No. 23: Article 27 (Rights of minorities), UN Human Rights Committee (8 April 2014) UN Doc CCPR/C/21/Rev.1/Add.5 (2014) para 6.2). It is important to note, however, that Article 27 of the International Covenant on Civil and Political Rights, 1966 (ICCPR) protects individual rights exercised through community or groups, not the collective rights of a minority population to a measure of autonomy from the broader society in which it is situated.

education institutions;[49] the right to use the language and participate in the cultural life of their choice;[50] the right of persons belonging to a cultural, religious, or linguistic community to enjoy their culture, practice their religion, and use their language, as well as form, join, and maintain cultural, religious, and linguistic associations;[51] and the prohibition of unfair discrimination on a range of grounds including race, ethnic or social origin, religion, conscience, belief, and culture.[52] These rights are at the centre of the litigation discussed in this chapter.

2 (Mis)appropriation and white supremacist backlash

A core argument of this chapter is that much of the affirmative action and Afrikaans language litigation ought to be seen as a continuation of the incomplete white supremacist project of the 1990s through the mechanisms of (mis)appropriating minority rights and norm-spoiling.

The (mis)appropriation of rights refers to the use of various strategies and arguments by persons or groups who claim to protect human rights, while, in reality, they aim to undo or reverse the progress made in the field of human rights to further their own, limited or regressive conception of these rights.[53] There are a range of strategies used in the (mis)appropriation of rights. However, a core feature is the attempt to reverse or distort existing protections and understandings of human rights towards illiberal ends.[54] This can be a slow and, at times, imperceptible process, making it very difficult to identify.[55] In order to uncover (mis)appropriations, Gráinne de Búrca and Katherine Young

49 Section 29(2) of the Constitution.
50 Section 30 of the Constitution.
51 Section 31(1) of the Constitution.
52 Section 9(3) of the Constitution. Other rights that are essential to the protection of minority groups include freedom of association (s 18), freedom of expression (s 16), freedom of movement and residence (s 21), and the political rights in s 19 of the Constitution. These enable members of national and ethnic minorities to form and maintain groups and associations which constitute civil society and to promote their views and interests in the larger community.
53 De Búrca & Young (n 6) 207.
54 Other mechanisms may be used, such as excluding certain persons and groups from the embrace of human rights law, and giving clear priority to a cluster of specific rights over other rights (eg the rights of the family, religious rights, the right to life of the foetus, property rights): see de Búrca & Young (n 6) 210.
55 Referring to (mis)appropriations by governments, Farrah Ahmed notes that '[s]trategies of subterfuge require careful attention as they are typically deceptive, diversionary, and polyvocal': see F Ahmed 'Constitutional parasitism, camouflage,

suggest we ask a few questions, including whether the particular human rights interpretation or claim being made has an 'exclusionary, repressive or anti-pluralist aim or effect, as opposed to widening inclusion or recognition'; whether there is 'evidence of clear falsehood, subterfuge, "camouflage", intentional distortion or deliberate polarization'; and the extent to which a specific interpretation or claim represents 'a departure from the existing body and sources of international human rights law'.[56] While de Búrca and Young raise other questions, the listed three, for reasons that will be clear below, are the most relevant for this chapter.[57]

A closely related concept to (mis)appropriation is the idea of 'norm-spoiling'. As mentioned earlier, according to Rebecca Sanders, norm-spoiling is when actors directly challenge existing norms with the aim of weakening their influence.[58] Norm-spoiling has the impact of diluting and limiting the development of a norm. In doing so, it creates 'political space' for competing norms.[59] In this chapter, the competing norms are those that narrow and limit the uses of rights to equality and minority language and cultural rights in the disruption of inequality – rights as non-reformist reforms. The actors are working to shift the 'Overton window' in favour of a conception of these rights that would entrench the status quo of inequality. The focus of norm-spoilers is not to resist the dominant norms; rather, it is to erode them and reshape them in a specific direction. In the field of international women's rights, Sanders argues that norm-spoilers advance interpretations of extant human-rights norms, such as the protection of the right to life of the unborn against abortion rights.[60] The actors in this case, Solidarity and AfriForum, embrace the language of human rights but actively seek to reshape the

and pretense: Shaping citizenship through subterfuge' (2023) 21 *International Journal of Constitutional Law* 285 at 286.

56 De Búrca & Young (n 6) 213.

57 The other questions include an analysis of whether there is an attempt to create a hierarchy of rights; whether there is an intent to scapegoat a certain group; and whether there is an attempt to impose restrictions on civil rights groups, see De Búrca & Young (n 6) 213.

58 Sanders (n 7) 272; Sanders & Jenkins (n 7) 402.

59 Sanders (n 7) 272.

60 Sanders (n 7) 273. These are not the only spoiling strategies – others include 'appointing spoilers to key policy positions, excluding feminists from decision-making, leveraging financial resources, lobbying politicians and diplomats, advertising and propaganda, and mass electoral and protest mobilization.' See Sanders & Jenkins (n 7) 406.

array of recognised rights in 'highly conservative and often significantly illiberal directions'.[61]

The trade union Solidarity has represented employees and acted in the public interest in the affirmative action litigation. While it tried to intervene in one of the language cases, the court held that it did not have standing.[62] Solidarity has used the courts, as well as institutions such as the International Labour Organisation (ILO), to challenge South Africa's affirmative action regime.[63] At the core of this strategy is an ideology that considers affirmative action measures to be violative of the rights of white South Africans. AfriForum is a civil rights organisation that focuses on the interests of Afrikaners to 'ensure that the basic prerequisites for the continued existence of Afrikaners are met ... while working simultaneously to establish sustainable structures through which Afrikaners are able to ensure their own future independently'.[64] Two of its core focuses, as explained in its Civil Rights Charter, are to ensure that 'minority communities' are not subject to 'unequal treatment under the guise of equality' and to protect the right to self-determination.[65] AfriForum and Solidarity are a part of the Solidarity Movement, a conservative movement dedicated to furthering the interests of 'Afrikaners'.[66] Another actor in this type of litigation is the Democratic Alliance (DA), the official opposition party in South Africa.[67] While this chapter will not explore the DA's litigation, it bears mentioning that they are using similar lines of argument to those of AfriForum and

61 De Búrca & Young (n 6) 207. See also, K Stoeckl 'Traditional values, family, homeschooling: The role of Russia and the Russian Orthodox Church in transnational moral conservative networks and their efforts at reshaping human rights' (2023) 21 *International Journal of Constitutional Law* 224.

62 *UFS* (n 13) paras 23-29.

63 In 2015, Solidarity lodged a dispute with the ILO, arguing that South Africa's employment affirmative action legislation (the EEA) and its amendments were discriminatory and in contravention of the ILO's Discrimination (Employment and Occupation) Convention, 1958. See Solidarity's press statement 'Reuse deurbraak in die stryd teen ras malheid' *Solidarity* (2022).

64 See AfriForum's 'About us' page on the organisation's website.

65 AfriForum 'Civil Rights Charter' (2019).

66 See M van Staden '"Selfdoen": The Solidarity movement and AfriForum are conservatism done right' *Free Market Foundation* (6 October 2023).

67 See eg *Democratic Alliance v President of the Republic of South Africa* [2020] ZAGPPHC 237. For a critical analysis of this case, see C Albertyn 'Section 9 in a time of Covid: Substantive equality, economic inclusion and positive duties' (2021) 37 *South African Journal on Human Rights* 205.

Solidarity.[68] At the core of the DA's approach to socioeconomic policy is that it eschews the use of race in affirmative action measures and has opted for a policy of 'non-racialism', which commits to prohibiting the use of race in government policy.[69]

Overall, the (mis)appropriation of rights and the spoiling of norms is a manifestation of 'white backlash politics'.[70] While the cases discussed here first appear to be about protecting and affirming the rights of minority groups, what is really at stake is white supremacy. By white supremacy, I mean 'a political system, a particular power structure of formal or informal rule, socioeconomic privilege, and norms for the differential distribution of material wealth and opportunities, benefits and burdens, rights and duties'.[71] The strategic litigation explored in this chapter is an example of the 'radical revision of South Africa's white supremacist ideology'.[72] Rather than a focus on the 'natural inferiority' of black people, it seeks to disrupt the use of rights to eradicate inequality and aims to preserve the status quo.

3 Affirmative action litigation: From substantive to formal equality

In this part, I turn to the affirmative action litigation. To provide context for this litigation, I begin with an analysis of South Africa's affirmative

68 In an effort to further the campaign to eliminate race-based affirmative action, or at least limit the size and scope of application, the Democratic Alliance announced a challenge to amendments to the EEA, arguing that these are a violation of the right to equality. See the statement by the leader of the Democratic Alliance, J Steenhuisen 'DA to launch High Court challenge against ANC race quotas' *Democratic Alliance* (6 June 2023).

69 See the statement by the DA's Shadow Minister for Public Service and Administration, L Basson 'Why the DA chose non-racialism over multiracialism' *Democratic Alliance* (10 September 2020). For a more nuanced analysis of the meaning of non-racialism, see K Minofu 'Non-racial constitutionalism: Transcendent utopia or color-blind fiction?' (2021) 11 *Constitutional Court Review* 301.

70 JM Modiri 'Towards a "(post-)apartheid" critical race jurisprudence' (n 11) 253.

71 See C Mills *The racial contract* (1997) 3. See also FL Ansley 'Stirring the ashes: Race class and the future of civil rights scholarship' (1989) 74 *Cornell Law Review* 993 at 1024 fn 129, who defines white supremacy as 'a political, economic and cultural system in which whites overwhelmingly control power and material resources, conscious and unconscious ideas of white superiority and entitlement are widespread, and relations of white dominance and non-white subordination are daily reenacted across a broad array of institutions and social settings.'

72 Mbembe (n 11) 10.

action regime and how the Constitutional Court has treated affirmative action and its relationship with the right to equality. This analysis will set the scene for how the litigation by AfriForum and Solidarity has sought to reshape the Court's approach, weaken its normative understanding of the nature of the right to equality and its demands – favouring a formal rather than substantive conception of the right – with the aim to reverse and undo the gains made in the Court's earlier jurisprudence.

Section 9(2) of the Constitution provides that the state can take legislative or other measures to advance or protect groups or persons adversely affected by unfair discrimination. This has been understood as permitting remedial and restitutionary measures, including affirmative action.[73] For purposes of this chapter, 'affirmative action'

> refers to laws, policies and other measures which seek to realise the right to equality for disadvantaged groups by, amongst other measures, giving them preference or benefits over other groups or to the exclusion of other groups in the context of the allocation of resources such as employment, education or other valued resources.[74]

Giving effect to section 9(2) in the employment context, the EEA obliges certain employers to take affirmative action measures, including the use of numerical targets to further the achievement of equality.[75] The EEA draws distinctions based on race, gender, and disabilities, in order to benefit black persons, women, and persons with disabilities.[76] Another important feature of the EEA is that it expressly prohibits the use of quotas.[77] No similar prohibition exists under section 9(2) of the Constitution.

In contrast with jurisdictions such as the United States of America, affirmative action has long been accepted as both permissible and necessary to achieve the goal of equality in democratic South Africa. In the landmark *Van Heerden* case, the Court affirmed a substantive rather than a formal conception of the right to equality in section 9 of

73 *Minister of Finance v Van Heerden* [2004] ZACC 3 paras 28, 30; *Barnard* (n 8) para 37.

74 See N Ramalekana 'What's so wrong with quotas? An argument for the permissibility of quotas under s 9(2) of the South African Constitution' (2020) 10 *Constitutional Court Review* 251 at 253 fn 6; R Kennedy *For discrimination: Race, affirmative action, and the law* (2013) 19-21.

75 Chapter 3 of the EEA.

76 See s 1, especially the definition of 'designated groups'.

77 Section 15(3).

the Constitution.[78] The Court's approach to affirmative action in that case – viewing it as an integral part of the achievement of the right to equality rather than a deviation or departure from the right – has, from a doctrinal perspective, led to the application of a deferent standard of judicial review for affirmative action measures.[79] As captured by Sachs J in *Van Heerden*:

> [M]easures taken to destroy the caste-like character of our society and to enable people historically held back by patterns of subordination to break through into hitherto excluded terrain, clearly promote equality … and are not unfair … Courts must be reluctant to interfere with such measures, and exercise due restraint when tempted to interpose themselves as arbiters as to whether the measure could have been proceeded with in a better or less onerous way.[80]

The *Van Heerden* test requires the courts to ask three questions: whether the measure targets disadvantaged persons or groups, whether it is designed to advance or protect such disadvantaged persons or groups, and whether it promotes equality in the long run.[81] This is understood to be a relatively deferent standard, especially when compared to the standard applicable to section 9(3) unfair discrimination claims. In addition to the deference applied to the review of affirmative action measures, the Court's approach to affirmative action has made it clear that while the interests of those adversely affected by such measures will be considered, they are not the focus of the inquiry. Instead, the focus is on the disadvantaged groups whom the affirmative action measure seeks to advance. In the words of Mokgoro J in *Van Heerden*, section 9(2) is 'forward looking' and

> measures enacted in terms of it ought to be assessed from the perspective of the goal intended to be advanced … This is not to say that the interests of those not advanced by the measure must necessarily be disregarded. However, the main

78 *Van Heerden* (n 73) para 31.
79 For a sustained critique of the Constitutional Court's deferent standard of judicial review in affirmative action cases, see JL Pretorius '*R v Kapp*: A model for South African affirmative action jurisprudence?' (2009) 126 *South African Law Journal* 398; JL Pretorius 'Fairness in transformation: A critique of the Constitutional Court's affirmative action jurisprudence' (2010) 26 *South African Journal on Human Rights* 536; JL Pretorius 'Accountability, contextualisation and the standard of judicial review of affirmative action: *Solidarity obo Barnard v South African Police Services*' (2013) 130 *South African Law Journal* 31.
80 *Van Heerden* (n 73) para 152.
81 *Van Heerden* (n 73) para 37.

> focus in section 9(2) is on the group advanced and the mechanism used to advance it.[82]

In the same case, Moseneke J made it clear that it must be accepted that the achievement of equality may 'come at a price for those who were previously advantaged'.[83] This is a price we are willing to pay so long as the affirmative action measure does not 'constitute an abuse of power or impose such substantial and undue harm on those excluded from its benefits that our long-term constitutional goal would be threatened'.[84] What this means is that, in contrast with the approach in the United States, for example, our courts have rejected a race-neutral approach to equality. Appeals to 'white innocence' and individual merit, while relevant to the assessment of the constitutionality of affirmative action, do not tilt the scale far in favour of declaring these measures unconstitutional.[85]

The analysis in the last few paragraphs should clearly demonstrate that the Court's approach to affirmative action, drawing on a substantive rather than a formal conception of equality, has been largely positive. As I will illustrate below, 'white backlash' strategic litigation has not sought to challenge the permissibility of affirmative action altogether. Instead, the actors have employed tactics akin to (mis)appropriation and norm-spoiling to restrict what qualifies as an acceptable affirmative action measure. Their approach involves targeting and representing sympathetic claimants while presenting technical arguments against the design or implementation of specific affirmative action measures. At first glance, these claims may seem genuine in their intent to safeguard the claimant's right to equality. However, a closer examination reveals a mission to overturn or distort existing safeguards and our understanding of the right to equality and its relationship with affirmative action.

82 *Van Heerden* (n 73) para 78.
83 *Van Heerden* (n 73) para 44.
84 *Van Heerden* (n 73) para 44.
85 For a discussion of how these arguments against affirmative action, particularly affirmative action based on race, have shaped the United States Supreme Court's fourteenth amendment jurisprudence, see Simson (n 2); S David 'Whiteness as innocence' (2019) 96 *Denver Law Review* 635; RB Siegel 'Equality divided' (2013) 127 *Harvard Law Review* 1; CJ Hunt 'The color of perspective: Affirmative action and the constitutional rhetoric of white innocence' (2006) 11 *Michigan Journal of Race and Law* 477.

3.1 The choice of claimants

The first tactic used in this litigation is the strategic choice of claimants. In all the cases that the trade union Solidarity has litigated up to the Constitutional Court, the majority of the claimants have not been white men. In one case, *Barnard* – perhaps the most famous of Solidarity's cases to date – Solidarity acted on behalf of a white woman who had twice applied for a promotion within the South African Police Services (SAPS). In both instances, Ms Barnard was not promoted despite being the interviewing panel's recommended candidate.[86] She argued, *inter alia,* that the failure to appoint her was a form of unfair discrimination in terms of section 6(1) of the EEA and that it had an adverse impact on service delivery.[87] The SAPS argued that the decision was not unfair discrimination; it was a valid implementation of an affirmative action measure.[88]

In another case, *Correctional Services*, the claimants were predominantly coloured persons adversely affected by the manner in which the numerical targets of an affirmative action measure were determined.[89] The numerical targets were based on national racial demographics as opposed to both national and regional racial demographics.[90] Though they make up a small percentage of the national population, coloured people make up a larger portion of the regional racial demographics in the province.[91] In using the national demographics to set the numerical targets, the benchmark targets for coloured persons were therefore lower than they would be if regional demographics had been taken into account. Solidarity represented the ten claimants in the case – one white male and nine coloured men and women.[92] They had applied for positions and, save for one person, they were all recommended for appointment by the interviewing panel but were not appointed. Solidarity brought a claim

86 *Barnard* (n 8) paras 8-14.
87 Similar to s 9(3) of the Constitution, s 6(1) of the EEA prohibits unfair discrimination on various grounds including race, gender, disability and sexual orientation.
88 *Barnard* (n 8) para 20.
89 *Correctional Services* (n 8) para 2.
90 *Correctional Services* (n 8) para 5.
91 According to the 2022 census, coloured persons make up 42% of the population in the Western Cape and only 8.2% of the national population: see Statistics South Africa 'Census 2022: Statistical release P0301.4' (10 October 2023) 7.
92 *Correctional Services* (n 8) para 2.

on various grounds. First, it argued that the employment equity plan (which contained the affirmative action numerical targets) breached the provisions of the EEA because it did not use the regional and provincial demographics to set the numerical targets.[93] Second, it argued that the implementation of the plan amounted to unfair discrimination on the grounds of race, sex, and/or gender in its individual application to the claimants.[94]

In both cases, the selection of claimants is a tactic to make the challenge politically more palatable, creating the illusion that the challenge is not aimed at reinforcing Solidarity's interests: preserving white privilege. In the *Barnard* case, the claimant was a white woman, sympathetic for her many years of service in the SAPS. In *Correctional Services*, nine of the ten claimants belonged to a marginalised racial group in South Africa. This strategy pits these individuals against 'black African' beneficiaries of affirmative action, reminiscent of the divide and conquer tactics employed by colonial and apartheid governments. It is important to clarify that I do not dispute the legitimacy of the claims presented by the individuals in these cases. My aim is to highlight that the selection of these claimants was deliberate and intended to obscure Solidarity's underlying agenda in *their* strategic litigation. Their ultimate objective is to gradually restrict and eventually eliminate affirmative action, particularly when it is based on race. This overarching goal becomes evident through their second tactic: the nature of the arguments they put forth.

3.2 The nature of the arguments

Revealing that the cases are not about the impact of affirmative action measures on the claimants, the actual arguments presented in Solidarity's papers contradict the interests of the individual claimants in the cases. For instance, in *Barnard,* they argued that the use of numerical targets in affirmative action measures is a form of 'race and gender norming', and 'naked race discrimination'; they also call these measures 'racialist and sexist'.[95] From this, it appears that Solidarity, at the very least, wishes to do away with the use of race and gender in employment decisions.

93 *Correctional Services* (n 8) para 18.
94 *Correctional Services* (n 8) para 18.
95 Answering affidavit by Solidarity, on behalf of Ms Barnard, in *Barnard* (13 January 2014) paras 28-29.

The problem with this, in respect of the person whom they claimed to represent, is that a gender-neutral approach to appointment, in the context of a historically male-dominated field, would likely have meant her continued marginalisation and exclusion. Similarly, in the *Correctional Services* case, the trade union simultaneously argued that the method used to calculate numerical targets was impermissible, while launching a comprehensive attack on the use of numerical targets in this case (suggesting that they were impermissible quotas).[96] Again, in the context of the historical preference of white and male persons in the public service, such an approach would likely have disadvantaged all or most of the nine (non-white) claimants in the case.

Although not explicitly stated in the cases, Solidarity's litigation seeks to narrow, undermine, and distort the Court's affirmative action jurisprudence and steer it towards a more formal approach to equality. If we narrowly focus on the outcome of the cases, these parties have not been successful. However, a closer look reveals some success in steering towards a narrower ideal of what is permissible affirmative action. I turn to this below.

3.3 The impact of the cases

3.3.1 Confusion regarding the standard of judicial review

The *Barnard* case has had a significant impact by triggering a debate over the suitable standard of review for affirmative action measures implemented under the EEA. As mentioned earlier, in the initial case addressing this issue, *Van Heerden*, the Constitutional Court established a three-step standard of review that intentionally granted the state leeway to devise measures aimed at promoting and safeguarding the rights of those negatively affected by unfair discrimination. However, in *Barnard,* a disagreement arose among the judges regarding the appropriate standard of review to be applied under the EEA. A lot has been written about what the Court should have done to suit the *Van Heerden* test to the context of the EEA.[97] For purposes of this chapter,

96 Heads of argument by Solidarity and others in *Correctional Services* (n 8) (28 April 2015) paras 74-77.

97 Ramalekana (n 74); C McConnachie 'Affirmative action and intensity of review: *South African Police Service v Solidarity Obo Barnard*' (2015) 7 *Constitutional*

I focus on the approach to the standard of judicial review in the joint concurrence by Cameron J, Froneman J, and Majiedt AJ and how it was influenced by appeals to 'innocence' and 'individual merit' that shift the focus of affirmative action away from the intended beneficiaries to those adversely affected by the implementation of affirmative action – exactly what the Court in *Van Heerden* sought to avoid. As the question of the appropriate standard remains open, I see the disagreements in this judgment, and especially the opinion co-authored by Cameron J, as having opened political space for applying a higher level of judicial scrutiny to these measures.

In his majority opinion, Moseneke ACJ affirmed the application of the *Van Heerden* test for reviewing the content of affirmative action measures under the EEA.[98] However, he introduced an additional analysis, stating that decisions made pursuant to an otherwise constitutionally compliant affirmative action measure had to be *implemented* in a lawful manner.[99] While not fully determining a standard for the review of the implementation of affirmative action measures (he dismissed the case on technical grounds), he stated that the bare minimum requirement would be rationality: 'a legitimate restitution measure must be rationally related to the terms and objects of the measure. It must be applied to advance its legitimate purpose and nothing else'.[100] This standard of judicial review is relatively deferent. Its application would let most implementations of affirmative action pass judicial scrutiny.[101]

In their minority concurrence, Cameron J and his co-authors concurred with Moseneke ACJ's distinction between the standard applicable to the review of affirmative action measures and their implementation.[102] However, in contrast with Moseneke ACJ, the

Court Review 163; C Albertyn 'Adjudicating affirmative action within a normative framework of substantive equality and the Employment Equity Act – An opportunity missed?' (2015) 132 *South African Law Journal* 711.

98 *Barnard* (n 8) paras 36-37.

99 *Barnard* (n 8) para 38.

100 *Barnard* (n 8) para 39.

101 Interestingly, it has been argued that the *Van Heerden* test is merely a rationality test: see Pretorius 'Accountability' (n 79). For a different reading of the *Van Heerden* test as a standard more stringent than rationality but less stringent than the fairness standard under s 9(3) of the Constitution (with which I agree), see McConnachie (n 97); Albertyn (n 97) 729-730.

102 The judges characterise their inquiry as including an analysis of 'the appropriate standard that should apply when a litigant challenges the *implementation* of

judges rejected the rationality standard. Instead, they advocated for a less deferent approach than rationality review, and one that allowed for 'heightened scrutiny': namely, a standard of 'fairness'.[103] They began their joint opinion by suggesting that there exists a tension between 'redressing the realities of the past' and 'establishing a society that is non-racial, non-sexist and socially inclusive'.[104] The judges then align themselves with the majority's approach to affirmative action as a part of the Constitution's transformative mission, which 'permits government to take remedial measures to redress the lingering and pernicious effects of apartheid'.[105] Having aligned with the majority on the permissibility and necessity of affirmative action measures, Cameron J, Froneman J, and Majiedt AJ then warn against the use of race as a decisive factor in employment equity decisions, noting that 'this may suggest the invidious and usually false inference that the person who gets the job has done so not because of merit but only because of race' and thus causing them harm.[106] These statements highlight an unease with the type of affirmative action measure at the core of this case – that which requires reliance on numerical targets.[107] The judges' apprehensive approach to the use of race in employment decisions could be explained by the poor reasoning provided by the National Commissioner of Police for why Ms Barnard should not be appointed.[108] It may also be explained by having been influenced by Solidarity's appeals to innocence and the importance of giving due weight to individual merit in employment equity decisions.[109] The union had chosen the perfect claimant for this purpose.

In deciding on the appropriate standard of review for the implementation of affirmative action measures under the EEA, Cameron J and his co-authors held that rationality was the bare minimum, but that the EEA contemplated something more than rationality.[110] According

a constitutionally compliant restitutionary measure in a particular case' (my emphasis): see *Barnard* (n 8) para 75.

103 *Barnard* (n 8) paras 95-98.

104 *Barnard* (n 8) para 77.

105 *Barnard* (n 8) para 78.

106 *Barnard* (n 8) para 80.

107 Throughout their opinion, Cameron J, Froneman J, and Majiedt AJ note the risk of an overly rigid implementation of numerical targets, which would amount to impermissible quotas: see *Barnard* (n 8) paras 87, 89, 91, 119.

108 *Barnard* (n 8) paras 102-107.

109 *Barnard* (n 8) para 58.

110 *Barnard* (n 8) para 94.

to the judges, a 'rigorous' standard 'to avoid over-rigid implementation, to balance the interests of the various designated groups, and to respect the dignity of rejected applicants' was required.[111] Underlying this 'heightened'[112] and 'rigorous'[113] approach was a concern for the dignity of those adversely affected by these affirmative action measures – a dignity tied to ensuring that their individual merit is not ignored.[114] There is nothing wrong with considering the dignity harm that may arise in affirmative action cases.[115] The *Van Heerden* test already requires that we consider the impact that a measure will have on those adversely affected, including the impact to their dignity.[116] Thus, it is not clear why the need to consider dignity harm warrants a higher standard of judicial review for the *implementation* of otherwise constitutional affirmative action measures than the standard suggested by the majority.

One argument could be that the nature of the interests at stake in affirmative action measures require adequate balancing, something that rationality review would not allow. Why not then suggest the application of the same test to implementation as that applicable for the analysis of the constitutionality of the affirmative action measure? In a footnote, the judges contemplate such an approach but still opt for their new standard of fairness:

> We have had the benefit of reading the concurring judgment of Van der Westhuizen J and consider invaluable his detailed treatment of dignity and proportionality ... As far as his suggestion of proportionality as the exclusive standard is concerned, we think that proportionality can be accommodated within the broader standard

111 *Barnard* (n 8) para 97.
112 *Barnard* (n 8) para 96.
113 *Barnard* (n 8) para 97.
114 *Barnard* (n 8) para 89.
115 The analysis of whether individual dignity is harmed has always been central to the South African court's equality jurisprudence: see L Ackermann *Human dignity: Lodestar for equality in South Africa* (2012). For a critical reading of some of the problems that have arisen due to the Court's centering of dignity, see C Albertyn & B Goldblatt 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *South African Journal on Human Rights* 248; C Albertyn & S Fredman 'Equality beyond dignity: Multi-dimensional equality and Justice Langa's judgments' (2015) *Acta Juridica* 430; C McConnachie 'Human dignity, unfair discrimination and guidance' (2014) 34 *Oxford Journal of Legal Studies* 609; H Botha 'Equality, dignity, and the politics of interpretation' (2004) 19 *SA Public Law* 724.
116 *Van Heerden* (n 73) paras 44, 54.

> of fairness. The added advantage of fairness is it may also cater for situations where proportionality is not necessarily at the heart of alleged unfair implementation.[117]

This statement seems to suggest that their fairness standard sets a more exacting threshold than proportionality review. To the judges' credit, the language of fairness is, as they note, quite common in the context of employment law. Section 2(a) of the EEA states that one of the purposes of the EEA is to promote employment equity and 'fair treatment in employment through the elimination of unfair discrimination'. Similarly, using the fairness threshold, section 185 of the Labour Relations Act[118] prohibits unfair dismissals and unfair labour practices. That said, it is not clear how these concepts mandate a fairness threshold for the implementation of affirmative action measures under the EEA.

The problem with the joint opinion's fairness standard is that it suggests some equivalence to the claims made by beneficiaries of affirmative action and those adversely affected by these measures – something the Court, as early as in *Bato Star*,[119] has pushed against. In that case, Ngcobo J held that we have to accept that the measures under section 9(2) will have an adverse impact on privileged members of society, but, so long as these measures do not impose an undue burden, the adverse impact would have 'to yield in favour of achieving the goal we fashioned for ourselves in the Constitution'.[120] Additionally, Cameron J and his co-author's approach contradicts Moseneke J's majority judgment in *Van Heerden*, where he held that affirmative action measures should not be subject to the heightened level of judicial scrutiny applied to unfair discrimination claims.[121] While the judges mention that their proposed fairness standard is not the same as that applicable in the context of unfair discrimination claims, they do not actually articulate how it differs. The judges merely state that the unfair discrimination analysis applies to the general formulation of the measure while their fairness standard applies to the implementation.[122] This does not really help us. The lack of clarity on how the fairness standard differs from the unfair

117 *Barnard* (n 8) para 98 fn 107.
118 Act 66 of 1995.
119 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15.
120 *Van Heerden* (n 73) para 80.
121 *Van Heerden* (n 73) paras 78-81.
122 *Barnard* (n 8) para 101.

discrimination test matters because, as explained earlier, the Court in *Van Heerden* was deliberate and clear in its finding that remedial and restitutionary measures, including affirmative action, ought to be subject to a more deferent standard of judicial review than that which applies in unfair discrimination claims.[123] Ultimately, the more rigorous standard of judicial review advanced in Cameron J's joint opinion seems to require courts to put more weight on the impact that the affirmative action measure has on the disadvantaged claimant in the case, shifting the gaze from the important purpose served by these measures and their intended beneficiaries.

In contrast with the other judgments, Van der Westhuizen J was the only judge to apply the *Van Heerden* test to both the constitutionality of an affirmative action measure under the EEA and its implementation. He held that the Court had to determine whether the policy and its implementation meet the standard set in *Van Heerden* including, whether they promote equality.[124] He did not end there: his approach also required the reviewing court to determine whether the implementation impacts on any other constitutional rights, in particular, the right to human dignity.[125] As noted earlier, if the reason for a more exacting level of scrutiny was indeed the need to balance the conflicting factors that arise in affirmative action cases, why not opt for Van der Westhuizen J's approach?

Ultimately, Solidarity lost the case, including on the more exacting standard of fairness by Cameron J and others. However, Solidarity did make some gains from this judgment – gains that are rooted in Cameron J, Froneman J, and Majiedt AJ's orientation towards the innocent, meritorious individual claimant in this case. Where once there was clarity that the standard of judicial review for affirmative action had to be deferent, now there is the possibility, following their approach, for a 'heightened' and 'rigorous' level of judicial scrutiny of affirmative action measures under the EEA, or at least to their implementation. At the time of writing, the Court has not had another opportunity to consider the appropriate standard of judicial review for the implementation of affirmative action measures under the EEA. If the route in Cameron

123 *Van Heerden* (n 73) paras 32-35.
124 *Barnard* (n 8) para 133.
125 *Barnard* (n 8) para 133.

J's joint opinion is followed, it could become more challenging for affirmative action measures under the EEA to withstand judicial scrutiny. This potential shift would signify a regression in the protection of affirmative action measures in South Africa – a change in the direction of the jurisprudence on affirmative action in South Africa. Solidarity was able to achieve this without even winning the case for Ms Barnard. In the language of the scholarship on (mis)appropriation, the minority judgment's receptiveness to Solidarity's arguments has opened political space for Solidarity's approach to affirmative action and made room for its arguments in favour of limiting the nature, scope, and content of the right to equality.

3.3.2 The prohibition of quotas under section 9(2) of the Constitution

Another significant area of impact is in regard to whether affirmative action measures taken under section 9(2) of the Constitution can include the use of quotas. Section 9(2) does not expressly prohibit the use of quotas. By contrast, the EEA permits numerical targets but prohibits quotas.[126] Unfortunately, it does not define what they are. In *Barnard*, Solidarity argued that the strict implementation of numerical targets was not permissible because it effectively amounted to quotas.[127] According to Solidarity, the rigid implementation of numerical targets was unlawful because numerical targets were not concerned with redressing past discrimination. Instead, they amounted to a form of 'naked race and gender norming' in a 'social engineering' process that sought to 'reshape the future'.[128] Accepting the argument on rigidity, the majority judgment in *Barnard* suggested that the distinction between a quota and a permissible numerical target lies in the flexibility of the latter and the rigidity of the former.[129] According to Moseneke ACJ, quotas were impermissible 'job reservations', and numerical targets 'serve as a flexible employment guideline'.[130] For Cameron J and his co-authors, 'over-rigidity' in the implementation of numerical targets posed two

126 Section 15(3) of the EEA.
127 Answering affidavit by Solidarity (n 95) para 30.
128 Answering affidavit by Solidarity (n 95) para 29.
129 *Barnard* (n 8) para 54.
130 *Barnard* (n 8) para 54.

problems. First, it risked disadvantaging both those who benefit from the affirmative action measures and those who do not. For the beneficiaries, as we saw, an overly rigid focus on race 'may suggest the invidious and usually false inference that the person who gets the job has done so not because of merit but only because of race'.[131] In relation to those who do not benefit, over-rigid implementation of numerical targets would fail to give a 'full appreciation of the individual'.[132] This reasoning, while in the context of the EEA, influenced the broader affirmative action jurisprudence in the context of section 9(2) of the Constitution.

A year after the *Barnard* judgment, the Western Cape High Court, drawing on the reasoning of the majority and minority judgments in *Barnard*, held that section 9(2) of the Constitution also prohibits the use of quotas.[133] Yes, Solidarity was one of the claimants in the High Court case. The case concerned the constitutionality of a policy by the Minister of Justice and Constitutional Development. The policy sought to grapple with an apparent unequal distribution of work in favour of white insolvency practitioners in South Africa. The policy created a ratio system which the Master of the High Court had to follow when selecting practitioners to work on an estate. In accordance with the ratio, the Master would have to make appointments of suitable candidates drawn from a list and through the lens of race, gender, and citizenship: he would have to appoint four black women who became citizens before 27 April 1994 first, three black men who became citizens before 1994 second, two white women who became citizens before 1994 third, and, from the final pool, the Master had to appoint one practitioner from amongst all other candidates, which included white males.[134] The policy allowed the Master to deviate from the ratio under limited circumstances, where the complexity of the matter and the suitability of the insolvency practitioner next in line required the joint appointment of a senior

131 *Barnard* (n 8) para 80. For a critique of this argument, see N Ramalekana 'A critique of the stigma argument against affirmative action in South Africa' (2022) 4 *University of Oxford Human Rights Hub Journal* 1.

132 *Barnard* (n 8) para 118.

133 *South African Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development; In Re: Concerned Insolvency Practitioners Association NPC v Minister of Justice and Constitutional Development* [2015] ZAWCHC 1 (*SARIPA HC*) paras 203-208.

134 *SARIPA CC* (n 8) paras 19-23.

insolvency practitioner and the next junior or senior practitioner from the list.[135]

The High Court held that the policy was rigid and amounted to an impermissible quota under section 9(2) of the Constitution. Under the heading 'Are quotas generally prohibited?', the High Court cited Moseneke ACJ's remarks that numerical targets had to be flexible, and Cameron J's joint opinion's reasoning that 'over-rigidity' causes harm to beneficiaries and non-beneficiaries of affirmative action, and held that 'a rigid formulation cannot be sufficiently sensitive to the achievement of substantive equality whether it is strictly within the employment context or in a broader setting'.[136] The Supreme Court of Appeal agreed and held that the policy was unconstitutional on the basis that it was rigid, arbitrary, and capricious.[137] On appeal to the Constitutional Court, the question whether section 9(2) of the Constitution prohibits the use of quotas was left open. Instead, the majority held that the policy fell afoul of section 9(2) of the Constitution because it was not evident that it would bring about the transformation of the insolvency industry.[138] Additionally, the Court held that the policy perpetuated the disadvantage it aimed to mitigate due to its under-inclusiveness with regard to the date of citizenship.[139] Following this case, the question whether section 9(2) prohibits quotas remains open. However, the case has paved the path for a possible finding that section 9(2) of the Constitution prohibits the use of quotas, narrowing the types of affirmative action measures that can be taken under section 9(2). Here we see a weakening of affirmative action measures and a widening of political space for Solidarity and AfriForum's fight against affirmative action.

It is hoped that, instead of following the arguments made in the High Court, the courts will opt in favour of Madlanga J's dissenting judgment. According to Madlanga J, there will be cases where an instrument as rigid as a quota is required to pursue the goals of achieving equality; there can never be a 'one-size-fits-all'.[140] Unfortunately, if the idea set out in

135 *SARIPA CC* (n 8) para 25.
136 *SARIPA HC* (n 133) para 208.
137 *Minister of Justice and Constitutional Development v South African Restructuring and Insolvency Practitioners Association* [2016] ZASCA 196 para 34.
138 *SARIPA CC* (n 8) para 40. Cameron J concurred in the majority judgment authored by Jafta J.
139 *SARIPA CC* (n 8) para 42.
140 *SARIPA CC* (n 8) para 80.

Barnard, by both the majority and minority in that case, is followed, the rigid application of numerical targets will be perceived as amounting to an impermissible quota and thus unlawful. Where once there was the possibility of using quotas under section 9(2) of the Constitution, this is now likely to be considered impermissible. While it is beyond the scope of this chapter to defend the necessity of rigidity and the use of quotas,[141] the point here is that, through this litigation, Solidarity has been able to lay the foundation for an outright prohibition of quotas – perhaps one similar to that found in the US Supreme Court's affirmative action jurisprudence.[142]

The discussion above has illustrated how Solidarity has used the right to equality to create space for the reconfiguration and redirection of early affirmative action jurisprudence in a way that is less tolerant of such affirmative action measures – leaving room for a higher level of judicial scrutiny and limiting the possibility of the use of quotas under section 9(2) of the Constitution. The same (mis)appropriation and norm-spoiling in the affirmative action cases can be seen in the language cases. However, before turning to these, it is important to first look at a case that set the arena for that litigation – splitting the Constitutional Court along racial lines on contentious issues of belonging, nation-building, and how to grapple with the complex and contested histories in which rights are embedded.

4 The street names case: A thin line between belonging and cultural dominance

The first case in the language trilogy, *UFS*, came on the heels of one of the Court's most racially divisive judgments, *City of Tshwane*.[143] The case was an appeal of an interim interdict that had been granted against the City of Tshwane's Municipal Council and in favour of AfriForum. In September 2007, the Council passed a resolution to change 25 street names in the City of Tshwane, the administrative capital of South

141 For such a defence, see Ramalekana (n 74).
142 See *Grutter v Bollinger* 539 US 306 (2003); *Fisher v University of Texas at Austin* 570 US 297 (2013).
143 *City of Tshwane* (n 19). This judgment was handed down on 21 July 2016, and *UFS* (n 13) was handed down on 29 December 2017.

Africa.[144] According to the Council, the decision was made to reflect the shared heritage of all South Africans, achieve inclusivity and diversity, and honour heroes of the anti-apartheid struggle. It was ultimately intended to 'shed [the city] of its colonial and apartheid legacy and to introduce those names that symbolise the pursuit of justice, peace, unity, reconciliation, fundamental human rights and freedoms'.[145] Having made several requests that the Council not change the street names, AfriForum brought an application to restrain the Council from implementing the decision.[146] At the hearing in the High Court before Tuchten J, the Council agreed not to implement the decision for a period of six months. In this time, AfriForum stated that it would bring an application to review the Council's decision on the basis that there had been a failure to ensure adequate participation in the decision-making process.[147] Thus, instead of changing the street names, the Council decided to display the new street names on top of the old ones and cross out the old names.[148] However, AfriForum did not immediately launch its review application, and after the expiry of the six-month self-restraint and six years after its initial decision, the Council decided and announced its intention to implement its decision and remove the old street names permanently.[149] Following the Council's announcement, AfriForum approached the High Court for a second time seeking an urgent interim interdict that would prevent the Council from removing the old, crossed out names.[150] After AfriForum launched its application, but before it was heard, the City removed the old, crossed-out signs.[151] Following the hearing, the High Court granted a temporary interdict to prevent the Council from changing the street names (the prohibitory interdict) and required it to revert to the old (crossed-out) street names until the review application was decided (the mandatory interdict).[152] After several failed appeals

144 *City of Tshwane* (n 19) para 21.
145 *City of Tshwane* (n 19) para 22.
146 *AfriForum v City of Tshwane Metropolitan Municipality* [2012] ZAGPPHC 71. The core of AfriForum's argument was that the Council had failed to comply with its own policy, which required consultations with all the wards affected before making the decision.
147 *City of Tshwane* (n 19) para 23.
148 *City of Tshwane* (n 19) para 86.
149 *City of Tshwane* (n 19) para 86.
150 *City of Tshwane* (n 19) para 86.
151 *City of Tshwane* (n 19) para 87.
152 *City of Tshwane* (n 19) para 88.

to the High Court and the Supreme Court of Appeal,[153] the Council appealed to the Constitutional Court.

As discussed in the majority judgment, many of the street names in the City of Tshwane and other parts of South Africa commemorate key figures of the colonial and apartheid regimes.[154] In this case, AfriForum objected to the removal of street names of persons who are seen to be a part of Afrikaner heritage.[155] The Court in the case split 9:2 along racial lines, with the majority written by Chief Justice Mogoeng Mogoeng, supported by eight black judges. The minority dissent was penned by Froneman J and Cameron J. Jafta J, also a black judge, wrote separately, though he concurred with the majority judgment. As Joel Modiri wrote soon after the judgment, the divergence in opinion between Mogoeng CJ and the black judges who supported his majority decision, on the one hand, and Froneman J and Cameron J, on the other, 'is a metaphor for the persistence of race as a critical fault-line in society and a reflection of the still "unsettled" character of South Africa'.[156]

The judgments principally disagreed on two issues: whether to grant leave to appeal and whether the High Court was correct in issuing the interim interdict. The latter point is of particular relevance for this chapter. While seemingly procedural in nature, at the core of this issue was an important question, namely whether

> the Constitution's professed vision of a non-racial, democratic, and united society accommodates, protects, *and affirms* both the historical memory and experience of the historically oppressed Black community as well as the political worldview and cultural history of the white minority population.[157]

To understand the disagreement between the majority and minority judges, a brief analysis of the legal principles applicable to granting interim orders will be helpful. In order for an interim interdict to succeed, a claimant must show that there is a *prima facie* right that might be open to doubt, a reasonable apprehension of irreparable and imminent harm to the right if the interdict is not granted, and that the balance of

153 *City of Tshwane* (n 19) para 88.
154 *City of Tshwane* (n 19) paras 12-13.
155 *City of Tshwane* (n 19) para 27.
156 JM Modiri 'Race, history, irresolution: Reflections on *City of Tshwane Metropolitan Municipality v AfriForum* and the limits of "post"-apartheid constitutionalism' (2019) 52 *De Jure* 27 at 41.
157 Modiri 'Race, history, irresolution' (n 156) 30 (emphasis in original).

convenience favours granting the remedy.[158] AfriForum based its claim on, amongst others, sections 24 and 31 of the Constitution, arguing that the rights at stake were the rights to cultural life and the right to an environment, the latter defined as including cultural artefacts.[159] The Council, on the other hand, argued that AfriForum had not satisfied the requirements of an interim order as it had not shown that there would be irreparable harm if the interdict were not granted or that the balance of convenience was in their favour.

In his majority judgment, Mogoeng CJ expressed scepticism about the existence of a *prima facie* right, though he assumed this in AfriForum's favour.[160] He then characterised AfriForum's claim to harm as being that they would experience a 'gradual loss of place or sense of belonging and association with the direct environment (living space) which is known to be of emotional value to people.'[161] Rejecting the argument of irreparable harm, the majority held that the lost sense of belonging contended for by AfriForum was insensitive to 'the sense of belonging' of other racial groups and was 'divisive' and 'selfish'.[162] Ultimately, he found that AfriForum had not shown that there would be irreparable harm to their rights, and on a balance of convenience, no interdict should have been given.[163]

In their dissent, Froneman J and Cameron J argued that the majority had foreclosed the possibility of white South Africans, particularly white Afrikaner people, from being able to rely 'on a cultural tradition founded in history' because that history is 'inevitably rooted in oppression'.[164] On the one hand, the judges critiqued AfriForum's denial of white privilege and the reality of racial historical injustice.[165] Froneman J and Cameron J acknowledged the persisting racial privilege that has accrued to white people and emphasised that the Constitution 'protects culture, yes, but not racism'.[166] On the other hand, the judges held that the commitment to a shared vision for the future entitled AfriForum's members to a sense

158 *City of Tshwane* (n 19) para 49.
159 Respondent's heads of argument in *City of Tshwane* (16 November 2015) para 7.
160 *City of Tshwane* (n 19) para 50.
161 *City of Tshwane* (n 19) para 57.
162 *City of Tshwane* (n 19) para 58.
163 *City of Tshwane* (n 19) paras 55-61.
164 *City of Tshwane* (n 19) paras 81, 117.
165 *City of Tshwane* (n 19) paras 120-123.
166 *City of Tshwane* (n 19) para 122.

of belonging, place, and loss.[167] This was because 'the Constitution creates scope for recognising an interest or right based on a sense of belonging to the place where one lives, rooted in its particular history, and to be involved in decisions affecting that sense of place and belonging'.[168] This interest had to be protected because, in claiming a right to a sense of belonging and place, they had done 'no wrong' and 'committed no crime'.[169] For the judges, the protection of cultural rights helped 'ensure that minorities, including cultural, linguistic or ethnic minorities, feel included and protected'.[170]

In his critique of the dissent, Jafta J argued that sections 30 and 31 cannot be understood as protecting cultural rights rooted in a racist past, as such an approach would be inimical to the ideal of the Constitution being transformative.[171] He further argued that there is no justification for recognising cultural traditions or interests '"based on a sense of belonging to the place where one lives" if those interests are rooted in the shameful racist past'.[172] This was because these rights had to be exercised in a manner that was not violative of the rights of others.[173] For Jafta J, the Constitution

> commits our nation to reject all disgraceful and shameful practices and traditions of the apartheid era and embrace an equalitarian ethos in pursuit of transformation of our society into a caring one in which everyone enjoys equal rights and opportunities to realise fully their individual potential as members of society.[174]

This could not be achieved via the protection of cultural practices that are rooted in racism.

Ultimately, in a case that raised 'questions of memory, race, power, and how to respond to the almost four-centuries history of trauma, terror and tragedy that define colonial-apartheid in South Africa',[175] the minority judgment appeared to narrowly focus on the ideal of protecting the interests of the minority rights claimants in the case. As I argued in

167 *City of Tshwane* (n 19) para 123.
168 *City of Tshwane* (n 19) para 124.
169 *City of Tshwane* (n 19) para 126.
170 *City of Tshwane* (n 19) para 126.
171 *City of Tshwane* (n 19) para 165.
172 *City of Tshwane* (n 19) para 169.
173 *City of Tshwane* (n 19) para 174.
174 *City of Tshwane* (n 19) para 176.
175 Modiri 'Race, history, irresolution' (n 156) 28.

part 1, and contrary to Capotorti's approach to minority rights,[176] it is correct to recognise cultural, language and other minority rights even if they adhere to dominant minorities. However, this does not mean these rights should be interpreted and implemented without enquiring into the context and history in which a particular rights claim is embedded. The language in the majority and concurring judgments shows awareness of the fact that, while cloaked in the language of cultural and minority rights, what was and continues to be at stake is the preservation of white privilege. In a sense, the case was an assertion of the right for a dominant minority's history and cultural heritage to remain intact, while insulating it from being confronted by the violent histories related to this heritage, to the exclusion of the history and cultural heritage of others. It was understandably difficult for the majority and Jafta J's concurring opinion to ignore this larger context – leading to what the dissenting judges cast as a 'passionately' written judgment by the majority.[177] Rather than merely impassioned, the majority judgment should be understood as a 'refusal to entertain discourses of white victimhood and reverse racism' upon which AfriForum's claim was based.[178] It is perhaps an example of how courts can respond to attempts at (mis)appropriation and norm-spoiling by excavating the rights claims from the realm of the neutral and rooting them in context and history.

5 The Afrikaans language litigation: The pitfalls of having to prove racial disharmony

A core feature of colonial and apartheid oppression in South Africa was the deliberate exclusion of the majority of the black population from accessing quality education. In the higher education context, Afrikaans served as the medium of instruction in several universities, including the University of Stellenbosch, the University of the Free State, Northwest University, Rand Afrikaans University (now the University of Johannesburg), and the University of Pretoria. These universities were 'exceedingly well-resourced for the exclusive or primary benefit of white Afrikaner students'.[179] Their mission was closely intertwined with the

176 Capotorti (n 38).
177 *City of Tshwane* (n 19) para 79.
178 Modiri 'Race, history, irresolution' (n 156) 40.
179 *UFS* (n 13) para 2.

development and promotion of the Afrikaans language, which played a defining role in their identity and purpose.[180] Against the weight of this history, the formerly Afrikaans-speaking universities have been making efforts, as required by legislation and policy, to enable better access to education by diversifying language instruction beyond Afrikaans. In this part, I explore challenges brought against three universities' language policies: the University of the Free State,[181] the University of Stellenbosch,[182] and the University of South Africa (UNISA).[183] In these cases, AfriForum emerges as a central player in the litigation, representing the claimants in two of the three cases.[184] While the motives of the claimants in the *Stellenbosch* case may not have been aligned with those of AfriForum and Solidarity, the arguments made are a continuation of the same type of litigation.[185]

On the face of it, the key disagreement in the cases relates to the contested history and proper place for Afrikaans in South African higher education. However, the cases are also about preserving a particular identity and culture, a place for the cultural heritage of a dominant minority. Thus, it is not surprising that, similar to what we saw in *City of Tshwane*, the tensions surrounding history, belonging, and place track the racial division in the first case in the language trilogy. In *UFS*, Mogoeng CJ wrote the majority, with Nkabinde ADCJ, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, and Zondo J concurring on the one side, and Froneman J dissenting, with Cameron J and Pretorius AJ concurring with him. Perhaps capturing the complexity of the history of Afrikaans, by the time we get to the second and third cases, we have a unanimous court and an affirmation, including by Mogoeng CJ, of the African roots of the language and that it is a part of South Africa's 'historic pride' that ought to be treasured by all citizens.[186] Against this

180 *UFS* (n 13) para 2.
181 *UFS* (n 13).
182 *Stellenbosch* (n 13).
183 *UNISA* (n 13).
184 *UFS* (n 13); *UNISA* (n 13). The case not involving AfriForum is *Stellenbosch* (n 13).
185 The applicants in the case were Gelyke Kanse, 'a voluntary association committed to equal chances for Afrikaans and all indigenous languages' as well as six 'brown' (persons classified as coloured) and white students of the University of Stellenbosch who wished to receive tuition in Afrikaans: see *Stellenbosch* (n 13) para 1.
186 *Stellenbosch* (n 13) para 61.

backdrop, I examine the language trilogy and illustrate how this litigation is another example of (mis)appropriation and norm-spoiling to entrench existing patterns of inequality and white privilege.

5.1 The choice of claimants

The first notable aspect in these cases is the strategic selection of represented claimants. In *Stellenbosch*, the inclusion of non-white Afrikaans speakers, specifically coloured litigants, played a central role in obscuring the true nature of the case.[187] As I will argue, the language cases were fundamentally about preserving white privilege and power, particularly white Afrikaner privilege and power. By choosing litigants from different racial backgrounds, the litigators sought to obscure this. As with the affirmative action cases, my argument is that the strategic selection of claimants sought to pit the black African students against coloured students; rather than being a case about the desire to entrench white privilege, the case could be seen from the lens of one disadvantaged minority group (coloured Afrikaans speaking students) and another, the mostly English speaking (though as a third or second language) black African students. This tactic diverted attention from the underlying agenda of entrenching the exclusionary practices against *all* non-white students.

To be clear, the claims by non-white Afrikaans speakers and many white Afrikaans speakers are legitimate. As highlighted by the Court's analysis in *UNISA*, Afrikaans is a language that is not the sole preserve of white people.[188] Apart from the educational benefits of mother-tongue instruction, Afrikaans has a diverse history that goes beyond white hegemony and racial oppression, leaving room for a range of reasons to want instruction and tuition in Afrikaans.[189] Further, in a country with eleven official languages, real efforts have to be made to promote the use of all of these official languages in public higher education.[190] However,

187 Founding affidavit by the applicants in *Stellenbosch* (29 November 2017) para 3, where it is noted that the applicants included six students, 'including some brown students'.

188 *UNISA* (n 13) paras 1-23.

189 *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* [2009] ZACC 32 para 49; *UNISA* (n 13) para 21.

190 This is the purpose behind the government's language policy framework: see Department of Higher Education 'Language Policy Framework for Public Higher

in the context of the cases under discussion, AfriForum's primary concern was the preservation of white presence and dominance in state-funded public higher education institutions. Similar to the affirmative action cases, the rights claimed, and the identity of the litigants chosen served to obscure and camouflage this purpose – a spoiling and (mis) appropriation of the rights to equality and the protection of indigenous languages.

5.2 The nature of the arguments

Section 29(2) of the Constitution protects the right to receive education 'in the official language or languages of their choice in public educational institutions where that education is reasonably practicable'. It also requires the state to ensure effective access to and implementation of this right. When implementing this right, the state must consider all reasonable educational alternatives, including single-medium institutions, taking into account equity, practicability, and the need to redress past racially discriminatory laws and practices.[191]

The language cases centre on the meaning of 'reasonably practicable' in the context of the negative obligations that arise from section 29(2). In one of its early judgments on this section, *Ermelo,* the Court held that section 29(2)(a) imposed a 'context-sensitive understanding of each claim for education in a language of choice'.[192] In relation to the negative duty, 'when a learner already enjoys the benefit of being taught in an official language of choice, the state bears the negative duty not to take away or diminish the right without appropriate justification'.[193] As will become clear, there are different visions of what the 'appropriate justification' standard requires.

The first case in the trilogy is *UFS*. In 2003, the university introduced a policy for multilingualism, providing separate classes in English and Afrikaans. However, two years after the policy's implementation, the university observed that the policy had led to the racial segregation of its classrooms and racial tensions and division in the student body.[194]

Education Institutions' GN 1160 in *GG* 43860 (30 October 2020).

191 Section 29(2) of the Constitution. See also *Ermelo* (n 189) paras 42, 53.

192 *Ermelo* (n 189) para 52.

193 *Ermelo* (n 189) para 52.

194 *UFS* (n 13) paras 15-16.

More importantly, after consultation with relevant stakeholders, the university found that the language policy had led to unequal access to knowledge between the two different language groups.[195] Accordingly, the university decided to introduce a new language policy. The new policy sought to establish English as the primary language of instruction while encouraging the use of other indigenous languages, including Afrikaans.[196] The core issue in the case was whether 'the university acted inconsistently with its obligations in terms of section 29(2) of the Constitution in adopting a policy that phases out Afrikaans as a co-equal medium of instruction with English'.[197]

AfriForum and Solidarity argued that, in making the decision to change its language policy, the university had focused too narrowly on racial segregation and no other considerations.[198] In their founding affidavit, they argued that

> [a]gainst the backdrop of the constitutional injunction to promote diversity (including linguistic diversity) and the enshrined right to instruction in a language of choice, the UFS Council ought not to have treated redress in the form of classroom integration as the 'overarching consideration' in its determination.[199]

They also argued that section 29(2) should be read disjunctively, with the implication that the right to education in one's preferred language should be subject to the practicability test, but not to the factors (including the need for redress) in the second part of section 29(2).[200] AfriForum and Solidarity's reading of section 29(2) would mean that the need to redress past exclusion could not be a factor in the analysis of whether it was practicable to provide language in one's language of preference. For this, it drew on the argument that the Constitution, apparently, 'turns its face against race-based assessments and sets as founding provision non-racialism'.[201] Of course, this is a thin conception of non-racialism, one similar to that used in the affirmative action cases, a notion stripped of

195 *UFS* (n 13) paras 17-18.
196 *UFS* (n 13) para 19.
197 *UFS* (n 13) para 22.
198 Founding affidavit by AfriForum and Solidarity in *UFS* (20 April 2017) para 48 (emphasis in original).
199 Founding affidavit by AfriForum and Solidarity (n 198) para 50.2.
200 Founding affidavit by AfriForum and Solidarity (n 198) para 56.
201 Founding affidavit by AfriForum and Solidarity (n 198) para 56.2.

the requirement to redress historic injustice.[202] If successful, the argument for a disjunctive reading of section 29(2) would lead to a reshaping and repurposing of this right into an instrument for the preservation of the status quo, a distortion of section 29(2) and its purpose in favour of the interests of a dominant minority. As will be shown, however, AfriForum and Solidarity failed in this argument.

In the second case in the trilogy, *Stellenbosch*, the facts revolved around the adoption of a new language policy. Prior to 2014, Stellenbosch's language policy emphasised single-medium Afrikaans tuition. The 2014 policy introduced a shift towards bilingual instruction, offering tuition in English and Afrikaans, with interpretation from Afrikaans to English.[203] However, in 2016, following the Fees Must Fall student protests, the University adopted a new language policy, under which students had the option to receive all their tuition in English.[204] Thus, while undergraduate classes were generally offered in Afrikaans, Afrikaans had lost its primacy.[205] In its application, Gelyke Kanse and the other claimants sought the reinstatement of the 2014 policy and argued that the 2016 policy amounted to direct discrimination against Afrikaans-speaking students, among other arguments, including reliance on section 29(2) of the Constitution.[206]

In *UNISA*, the central issue was whether UNISA's decision to adopt a new language policy, *inter alia*, complied with section 29(2) of the Constitution. From its inception in 1959, UNISA offered tuition in both English and Afrikaans; this changed in 2010 when the University committed to a policy that would retain English and Afrikaans as languages of tuition while also promoting multilingualism in the other indigenous languages. In 2016, UNISA approved a policy that ended the use of Afrikaans as a language of tuition.[207] According to the university, the core objective of the new policy was to promote

202 For an analysis of the contested meaning(s) of non-racialism see Minofu (n 69); R Suttner 'Understanding non-racialism as an emancipatory concept in South Africa' (2012) 59 *Theoria* 22; D Everatt *The origins of non-racialism: White opposition to apartheid in the 1950s* (2009).
203 *Stellenbosch* (n 13) para 3.
204 *Stellenbosch* (n 13) paras 4-5.
205 *Stellenbosch* (n 13) para 7.
206 *Stellenbosch* (n 13) para 13.
207 UNISA 'Language Policy' (22 September 2016).

indigenous languages while phasing out the prominence of Afrikaans.[208] An important difference between the context of the *UNISA* case and the other cases is that UNISA is a correspondence university. Thus, some of the issues which arise in residential universities, like the possibility of racial segregation in class caused by the impact of language policy, may not arise. Additionally, UNISA's policy sought to completely phase out Afrikaans, making English the only language of tuition and learning.[209] Similar to the other cases, AfriForum argued that the policy did not comply with section 29(2) of the Constitution as it did not accommodate Afrikaans students' right to be taught in the language of their choice, even though it was reasonably practicable to do so.[210]

While the facts and context of the cases differed, the arguments made in these cases, similar to the affirmative action cases and the street names case, use the language of equality and of minority cultural and linguistic rights to obscure an underlying claim – that things should stay the same, that the existing privilege and power of a dominant minority ought to be protected. Through these arguments, the litigants sought to weaken the influence of measures that seek to genuinely achieve equality and inclusion in higher education. Though almost imperceptible, they have made some gains in this regard. I turn to this below.

5.3 The impact of the cases

The central impact of this litigation has been to require a high level of judicial scrutiny in cases where there is an alleged breach of the negative obligation that arises from section 29(2). The Court seems to require, as part of its objective assessment of whether there is appropriate justification for the language policy, proof that the policy had, in fact, had a discriminatory impact or that it caused racial disharmony through marginalisation, stigmatisation, or racial segregation. This is a problem because it is very difficult to prove that a policy has an unfairly discriminatory impact or that it has caused racial disharmony. Outside of statistical evidence of segregated class enrolments or an analysis of the subjective feelings of students because of the segregated classes,

208 Founding Affidavit by UNISA (20 July 2020) para 10.b.
209 *UNISA* (n 13) para 29.
210 *UNISA* (n 13) para 30.

universities and other institutions will struggle to meet this threshold. To require proof of discriminatory impact, when neither section 29(2) nor the Higher Education Act[211] requires such proof, tilts the scale in favour of retaining the status quo. It should be the other way around. The importance of the commitment to redress past patterns of inequality ought to make it difficult to find measures which attempt to do so unconstitutional.

Of course, courts should always be searching in cases dealing with a breach of negative obligations, especially when these may amount to retrogressive measures.[212] However, the level of scrutiny cannot be so high as to require proof of unfairly discriminatory impact. Nevertheless, this higher threshold, which was developed in Froneman J's dissent in *UFS* and Cameron J's majority in the *Stellenbosch* case, played a pivotal role in favour of AfriForum in the *UNISA* case – a case they won. To understand what I mean by a rigorous or high level of scrutiny, we must closely examine the primary issue in all of the court decisions, namely the 'reasonable practicability' and 'appropriate justification' standard in section 29(2) of the Constitution.

In the first case, *UFS,* Mogoeng CJ refused leave to appeal on the basis that AfriForum's case was 'so devoid of merit that the grant of leave to appeal would be an injudicious deployment of the scarce and already over-stretched judicial resources'.[213] However, he did make some observations about section 29(2). For Mogoeng CJ, the reasonable practicability standard has two dimensions. The first aspect considers constitutional norms, such as equity, redress, desegregation, and non-racialism. The second aspect looks at the practicability of implementing a particular language policy, including resource constraints and feasibility.[214] A language policy, according to Mogoeng CJ, could be practical because there are no resource constraints to its implementation, but it may still be

211 Act 101 of 1997.

212 For an analysis of the need for rigorous judicial scrutiny in cases involving retrogressive measures to breaches of socioeconomic rights, see in general S Liebenberg 'Austerity in the midst of a pandemic: Pursuing accountability through the socio-economic rights doctrine of non-retrogression' (2021) 37 *South African Journal on Human Rights* 181; S Samtani 'International law, access to courts and non-retrogression: *Law Society v President of the Republic of South Africa*' (2020) 10 *Constitutional Court Review* 197.

213 *UFS* (n 13) para 39.

214 *UFS* (n 13) paras 44-54.

unreasonable because it offends constitutional norms.[215] This reading of section 29(2) embodies a rejection of AfriForum's proposed disjunctive reading of this right, thus pushing against possible (mis)appropriation and norm-spoiling by AfriForum.

Additionally, though Mogoeng CJ refused leave to appeal in this case, he nevertheless held that it would be 'unreasonable to slavishly hold on to a language policy that has proved to be the practical antithesis of fairness, feasibility, inclusivity and the remedial action necessary to shake racism and its tendencies out of their comfort zone'.[216] For Mogoeng CJ, the link between racially segregated lectures and racial tensions on the university campus, as UFS had argued, had not been rebutted. Thus, even if it were practicable (for example, if resources were readily accessible) to provide dual instruction in English and Afrikaans, he held that the retention of the dual language instruction could not be said to be 'reasonably practicable' due to its impact on race relations.[217] In essence, for Mogoeng CJ, in cases where single or dual language instruction *could* lead to indirect discrimination, this would be 'appropriate justification' for 'taking away or diminishing the already existing enjoyment of the right to be taught in one's mother tongue'.[218] This is a relatively deferent approach to what 'appropriate justification' requires, as it allows the university's objective assessment of the impact of the language policy on its campus to stand as a part of the justification for breaches of the negative obligation arising from section 29(2).

Froneman J, with Cameron J and Pretorius AJ concurring, dissented. First, they argued that an effort should be made to separate the issue of racial power from language. The judges, quite correctly, berated AfriForum for the manner in which they conducted their litigation, noting their ignorance of context, the complexity of language rights, 'the unequal treatment of oppressed people of other races in the past' and the 'continued existence of historic privilege'.[219] But, while recognising the responsibility of white Afrikaans speakers to prevent their desire to preserve their language from disadvantaging others, Froneman J emphasised that it was crucial not to unfairly burden future generations

215 *UFS* (n 13) paras 53-54.
216 *UFS* (n 13) para 46.
217 *UFS* (n 13) para 62.
218 *UFS* (n 13) para 50.
219 *UFS* (n 13) para 134.

of white Afrikaans speakers with the 'undeniable injustices' committed by their predecessors in the past.[220]

In addition to appealing to white innocence, Froneman J critiqued what he considers to be an overemphasis on the 'use of Afrikaans as an instrument of oppression by a racist and nationalist government'.[221] Instead, he points to the fact that there is a constitutional obligation to advance other official languages.[222] By doing so, Froneman J likened AfriForum's claim to that of other indigenous official languages that have been subjugated in favour of English.[223] It bears emphasis that there is an obligation to advance these other official languages, but this alone does not mean that the special status of some languages ought to be preserved, especially if the preservation will have the impact of entrenching patterns of inequality and exclusion. There is a marked difference between furthering isiZulu in order to expand access to higher education and furthering Afrikaans. This difference does not come out in Froneman J's judgment.

Froneman J framed his inquiry as involving an analysis of whether 'the mere exercise of a constitutionally protected language right can amount to unfair racial discrimination that would necessarily justify taking away that right'.[224] In this regard, he held that the majority was too deferent in accepting the 'correctness of the University's own assessment that the continuation of the existing policy amounted to racial discrimination'.[225] According to Froneman J, the Court had to independently assess whether the exercise of one's constitutional right to choice of a language in tertiary education results in discrimination prohibited by the Constitution.[226] In this case, the judges seemed to be asking the university to show that a new language policy was appropriately justified because the previous policy had an unfairly discriminatory impact. It is not at all clear why this high threshold had to be met: nothing in the requirement for 'appropriate justification' demands this. In essence, the suggestion that, absent proof of an unfairly discriminatory impact, a university could not rely on the

220 *UFS* (n 13) paras 87-88.
221 *UFS* (n 13) para 91.
222 *UFS* (n 13) para 91.
223 *UFS* (n 13) para 93.
224 *UFS* (n 13) para 96.
225 *UFS* (n 13) para 110.
226 *UFS* (n 13) para 112.

risk of perpetuating racial disharmony and segregation as 'appropriate justification' is a perversion of the protection of the right to equality and would make it difficult for universities to take proactive steps to make higher education more inclusive.

The *UFS* dissent should perhaps be read against the context where there had not been an oral argument in the case and could be seen as merely a tentative, impassioned analysis made in response to Mogoeng CJ's depiction of the history of the Afrikaans language.[227] This explains, perhaps, the judge's desire to set the record straight about the complex history of Afrikaans and for a higher level of justification from universities when there has been a breach of section 29(2)'s negative obligations.[228] Unfortunately, though, this would not be the end of this form of reasoning. Traces of the need to prove discriminatory impact or some other form of racial disharmony caused by the language policy have lingered in the subsequent cases in the language trilogy.

In *Stellenbosch*, the second of the trilogy, the presence of evidence that the language policy would, in fact, lead to racial segregation and have a harmful impact on black students was integral to the assessment of whether section 29(2) had been breached. Before moving to show how this is the case, it is important to explain one of AfriForum's arguments and Cameron J's response thereto. AfriForum tried to argue that once a right has been provided for (that is, tuition in Afrikaans), the 'appropriate justification' required to support what would otherwise be a negative duty not to diminish already existing right was a higher, more exacting standard than whether the measure was reasonably practicable. Cameron J rightly rejected this argument, affirming that the appropriate justification required for breaches of the negative duty in section 29(2) was not a separate, higher standard of justification.[229]

Nevertheless, despite Cameron J's finding that section 29(2) does not create a higher standard of scrutiny when there is a breach of the negative obligation, his reasons for why section 29(2) had not been breached in this case aligns with Froneman J's reasoning in *UFS*. That is, he promotes the idea that in order to pass constitutional scrutiny, these policies must

227 This is a point made by an anonymous reviewer of this chapter.
228 See Cameron & others 'Rainbows and realities' (n 15) 276-279, including a description of Froneman J's dissent as 'redolent of a sense of near-disbelief'.
229 *Stellenbosch* (n 13) para 24.

be taken under conditions where it is, on the evidence, clear that existing policies lead to either racial discrimination or that they have created an environment in which some students (in this case, black African students) felt marginalised, excluded, and stigmatised.[230] In his judgment, Cameron J affirmed the constitutionality of the new policy because of the cost implications and because there was established evidence that the previous policy had led to unequal access to higher education and caused harm to non-Afrikaans-speaking students.[231] Analysing the University's evidence, he noted:

> The evidence the University presented showed that elements of the 2014 Language Policy when applied, left a sting. Separate classes in English and Afrikaans, or single classes conducted in Afrikaans, with interpreting from Afrikaans into English, made black students not conversant in Afrikaans feel marginalised, excluded and stigmatised. They were not proficient in Afrikaans, could not understand the lectures presented in Afrikaans or, where the balanced use of Afrikaans and English was offered, they felt stigmatised by real-time interpretation (which was almost solely used for translating lectures they could not understand). Also, less directly pertinent to the "right to receive education", they felt excluded from other aspects of campus life, including residence meetings and official University events held in Afrikaans, without interpretation.[232]

At the core of Cameron J's finding in favour of the university was the argument that 'dual medium classes with interpreting from Afrikaans to English peripheralise and stigmatise black students not conversant in Afrikaans'.[233] Moreover, Cameron J distinguished this case from *UFS,* arguing that the impugned policy, in this case, did not completely do away with Afrikaans and that some of the students who sought tuition in Afrikaans were 'brown' students; thus, the racial segregation at issue in *UFS* was not in issue in *Stellenbosch*.[234] At first blush, this judgment reads to be real progress from the approach taken in the *UFS* dissent (especially since the claimants lost this case). However, a closer look shows that this judgment entrenched the idea that for universities to meet the section 29(2) threshold, there needs to be some evidence of harm in retaining the old language policies: the harm of stigma, marginalisation, and racial segregation. While Cameron J does not opine on whether the racial

230 *Stellenbosch* (n 13) para 28.
231 *Stellenbosch* (n 13) para 40.
232 *Stellenbosch* (n 13) para 28.
233 *Stellenbosch* (n 13) para 40.
234 *Stellenbosch* (n 13) para 40.

discrimination required in the *UFS* dissent (in which he concurred) should be proven, the discourse in this judgment suggests that he considers, on the facts in this case, that the discrimination was, in fact, proven – that is, the stigma, harm and marginalisation. As I have noted earlier, it will not always be possible to provide evidence of this harm; to require this proof in the face of measures which seek to expand access to higher education *and* in the context of Afrikaans, given its history, seems an undue burden on universities.

My reading of these cases is that by the time we reach the third case in the trilogy, *UNISA*, the need to show some form of harm or discriminatory impact had solidified to being an actual requirement in the assessment of appropriate justification that the university had to meet before they could roll back Afrikaans language instruction. In *UNISA,* the impugned policy sought to discontinue Afrikaans language instruction completely.[235] The policy failed constitutional scrutiny for several reasons, including the erroneous position taken by the university that it did not have to comply with section 29(2). In this regard, the Court rightly clarified that UNISA had an obligation to comply with that section in determining its language policy.[236] On an 'objective consideration *ex post facto*' of whether there was appropriate justification for the change in policy, the Court moved to reject all of UNISA's justifications for the policy.[237] The Court held that, unlike in *UFS* and *Stellenbosch*, the policy posed no risk of racial segregation or harm. According to Majiedt J:

> In [the *Stellenbosch* case], the previous language policy created an exclusionary hurdle, specifically for black students studying at the University of Stellenbosch. … This Court identified that the previous language policy in that case created a barrier along racial lines to full access to the university's learning and other opportunities. In the present instance, however, there is no suggestion that Afrikaans tuition will stigmatise students or prevent students who study in English from full access to UNISA's learning and other opportunities. Again, there is no spectre of possible marginalisation, stigmatisation or exclusion, since there is no teaching that occurs in lecture rooms.[238]

235 *UNISA* (n 13) para 3.
236 *UNISA* (n 13) para 54.
237 *UNISA* (n 13) para 62.
238 *UNISA* (n 13) para 63.

In essence, the fact that all teaching was remote (as UNISA is a distance learning institution) and could thus not lead to racial segregation and discrimination, tilted the weight in favour of a finding that there was no appropriate justification for the policy.[239] Other reasons advanced against UNISA included that the institution had not shown that providing tuition in Afrikaans had prevented the development of African languages as languages of higher education, that tuition was too costly, or that the demand for Afrikaans language instruction was dwindling.[240] It may be that, taken together, all these factors would inevitably lead to the conclusion that there was no appropriate justification for UNISA's language policy. My point is that the need to show proof that the language policy would lead to racial disharmony, including through racial segregation or racial discrimination, should not have been part of the assessment of appropriate justification at all. It is too high a threshold for the types of measures under constitutional scrutiny in these cases.

Describing the distortions created by the language stream of cases has been hard. At the very least, I hope to have shown that the approach taken to the appropriate justification threshold has evolved from the dissent in *UFS* to the majority in *UNISA* as requiring some proof that Afrikaans language tuition creates racial disharmony, segregation, or amounted to unfair discrimination in order for a shift in language policy to be upheld. While not the rigorous 'appropriate justification' sought by AfriForum, the need to show the existence of harm and discriminatory impact could curtail *pre-emptive* policies that seek to avoid these very consequences.

6 Conclusion

I have tried to illustrate the different ways that minority rights discourse has been used to further white privilege in South Africa. Focusing on the litigation by key actors, including the trade union Solidarity and the civil rights organisation AfriForum, I have shown how rights have been (mis)appropriated and how norms have been spoiled in the context of affirmative action and minority language and cultural rights. This move has created fertile ground for other actors to pursue a similar agenda. An example is the efforts being undertaken by the official opposition party,

239 *UNISA* (n 13) para 63.
240 *UNISA* (n 13) paras 66, 68-72.

the Democratic Alliance, which has led the charge against the use of race, age, and gender in the criteria to allocate resources to curb the impact of Covid-19.[241] Their next act in the courts, especially the planned challenge to the EEA, will likely reinforce the patterns identified here.[242]

Weaving the impact of these cases was difficult. This is because sometimes the changes, shifts, and distortions were imperceptible. But they are present. The actors have used the constellation of minority rights discussed in this chapter in ways that distort their impact and lend themselves to a project that is exclusionary and repressive. They have used falsehoods and camouflage, for example, in the selection of litigants to front their litigation while making arguments against their claimant's interests, as we saw in the affirmative action cases. They have made arguments that would lead to a departure from established norms, arguments aligned with formal equality, and asking for a disjunctive reading of rights that would lead to the entrenchment of an unequal distribution of resources. While they have, on the face of it, been unsuccessful in the final outcomes of the cases, they have made some gains: they have opened political space for arguments that are arguably misaligned with the commitment to using the Constitution to transform society; they are slowly shifting and expanding the Overton window. Following this litigation, it may be that section 9(2) prohibits the use of quotas; it may be that language policy changes, including those seeking to achieve inclusion in higher education, have to meet a high level of justification. This is no small victory.

This chapter will appear to be a strange contribution to this *Festschrift*. However, it is a tribute in that it explores important issues related to race, belonging, and remedy – issues that Cameron J has always taken seriously and has sought to contribute to in a manner that aids in the struggle to create a more just, more inclusive society. In the cases, Cameron J showed some awareness of the underlying politics, perhaps even the motives I suggest in this chapter. This awareness can be seen, for example, when he and Froneman J cautioned AfriForum for their insistence on ignoring South Africa's history of racial subordination and prevailing white privilege. However, he has also struggled to navigate a safe path in this unusually fraught context. It may be that some of the

241 *Democratic Alliance* (n 67).
242 See Steenhuisen (n 68).

judgments he wrote, and those in which he concurred, have opened the political space for carving away at some of the gains made in the early Court's approach to these rights.