

The Formulation of Equality Clause in the South African Constitution: a Juristic question, or a Political Point of Departure

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The formulation of equality clause in the South African Constitution (1996)<sup>1</sup> is potentially controversial particularly in relation to the kinds of interpretations that the clause lends itself to. The wording of the clause is typical of modern constitutional framework in the sense that it is too vague and therefore open for contrasting interpretations. This becomes evident when one attempts to assess the clause's attitude toward affirmative action legislations. The clause shows no concrete attitude towards affirmative action legislations: It states generally that affirmative action legislations "may" be entrenched. The wording of the clause, as we explore in this paper, reopens political debates surrounding affirmative action legislations.

Section 9(1) of the Final Constitution of South Africa, referred to as equality clause, states:

"Everyone is equal before the law and has the right to equal protection and benefit of the law".

Then section 9(2) states:

"Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination *may* be taken" [emphasis is mine].

Section 9 (1) promotes equality on a "difference blind" basis while section 9(2) purports to take differences into consideration. In other words, section 9(2) states measures through which section 9(1) can be realized in South Africa: certainly affirmative action measures.

This paper is concerned with the meaning of section 9(2)—read together with section 9(1)—and how this section communicates to the laws of affirmative action. Note that the meaning of equality clause, both subsections 9 (1) and (2), is not given once and for all.

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<sup>1</sup> Act 108 of 1996: Constitution of Republic of South Africa, 1996. The Constitution is commonly referred to as the "Final Constitution" since it precedes the Interim Constitution, Act 200 of 1993: Constitution of

The meaning of this section is deduced on an ad hoc basis, per individual cases. Thus, as to what extent the clause protects the law of affirmative action is an exercise to be carried out by the Constitutional Court, per individual cases<sup>2</sup>.

Moreover, the right to equality is not an absolute right; it is capable of restriction under the provision known as the limitation clause entrenched in the same constitution (1996). Therefore, the role of the Constitutional Court is to assess, given the facts of a particular case, as to whether subsection 9(2) should be construed to mean that affirmative action legislation is enforceable. The Court has the sole discretion to interpret equality clause in the light of cases at hand. The issue is that there is no mechanism in place to prevent judges from invoking their political convictions in interpreting equality clause, or the constitution for that matter.

This is because the Constitutional Court in South Africa has no standard criterion that is being followed in interpreting the Constitution. What is called the standard criteria, i.e. “the grand narrative”<sup>3</sup>, is as ‘meaningful’ as equality clause itself. That being stated, there is no guarantee that the political preferences adopted by justices when interpreting equality clause will bring about ‘desirable’ results (judgments) in the light of historical conditions peculiar to South Africa. The question then is what interpretation is desirable given the historical conditions of South Africa, and how should such interpretation be grounded, both legally and politically?

What factors should the Constitutional Court in South Africa take into consideration when confronted with disputes over affirmative action? Suppose a person (or a group of persons) files a legal complain that his or her right to equality has been abrogated upon by a specific law that purports to be a law of affirmative action. The argument would be

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the Republic of South Africa, 1993.

<sup>2</sup> See Ronald Dworkin *Taking Rights Seriously* (Cambridge Mass.: Harvard University Press, 1977) p. 142. The case of *Marbury v. Madison* has a far reaching precedent: that there is no fixed meaning or understanding of rights hence the notion of judicial review, which gives the court the power to strike down certain construal of rights on the basis of absurdity or non compliance with other rights.

<sup>3</sup> See Pierre De Vos “A Bridge Too Far? History as Context in the Interpretation of the South African Constitution” in *South African Journal on Human Rights* (Republic of South Africa.:Juta Law, 2001, vol.12, part 1)

that the legislation in question is in violation to the provision that “Everyone is equal before the law and has the right to equal protection...” How should the Court handle such a case? Is the court supposed to carry out a *purely political* enquiry into the subject, or should the Court confine itself to a *purely legalistic* enquiry? And, what would it mean to say that the court is pursuing a ‘purely political’ enquiry or a ‘purely legalistic’ enquiry? This paper aims to address these questions.

I argue in this paper that the court should avoid these two approaches at their extreme take, for a rather reflective synthetic approach. This comes out of the realization that it is undesirable to pursue purely legalistic argumentations when interpreting the constitution, while at the same time it is absurd to overly subject constitutional interpretation to pressures arising out of day-to-day political bargaining. The central aim of this paper is to explore the constitutional interpretation mechanism that takes into consideration both legalistic and political arguments while rejecting their extreme take. This exercise is conducted in the light of equality clause in the South African constitution and more importantly how the country’s historical conditions should bear upon constitutional interpretation.

The paper starts by an analysis of the political background of the South African Constitution with the aim to elucidate the link between constitutional format, therefore interpretations, and the process of transformation in South Africa. It attempts to provide the legal background of the country and how the court considers its role to be. The paper then moves on to show the problematic of the two extremes (viz. ‘purely legalistic’ interpretations, and ‘purely political’ interpretations). In conclusion, the paper argues for a synthesis of the latter extremes. This synthesis, as developed by Ackerman (1991), informs that constitutional administration can be handled in a way that the exercise fairly adheres to legalistic demands while at the same time being responsive to political opinions. Ackerman terms this strategy a “switch in time” mechanism. The point here is to illustrate how this “switch in time” mechanism would operate in the case of South Africa.

### **Political Background of the South African Constitution**

The drafting of the constitution in South Africa has been part and parcel of the entire process of negotiations for a democratic settlement. This directly affects the Interim Constitution (1993), which was to lay foundation for the drafting of the Final Constitution. The Interim Constitution was drafted amid political violence in the country and that had a direct impact on the *language* that was to be used by that constitution. The Interim Constitution is in a sense characteristic of the volatile political atmosphere existing in the eve of a political settlement in South Africa. As a result, the Interim Constitution had a strong wording towards affirmative action legislations. However, underneath the Interim Constitution lies the successful maneuver to distance what was to be the Final Constitution from the volatile language of the Interim Constitution. This section of the paper unpacks the historical conditions of constitutional formation in South Africa, and also explores the political implications of the shift—in terms of the wording<sup>4</sup>—from the Interim Constitution to the Final Constitution.

During the drafting of the Interim Constitution South Africa was on the brink of a civil war. As Spitz correctly states, “The drafting of the Interim Constitution in South Africa was no exception to the patterns of constitution-making against a backdrop of internal unrest” (Spitz 2000, 64). What this means is that negotiators were under pressure to “reach a settlement, and to do so quickly” (ibid). Widespread violence in townships and Natal Midlands informed that delays in reaching settlement could mean further loss of lives. Let us see how this picture connects to the idea that the Interim Constitution reflects a radical departure from the past injustices indicated by, among other factors, a strong and forthcoming equality clause, as opposed to a loosely worded clause in the Final Constitution<sup>5</sup>.

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<sup>4</sup> The impression is than the wording of equality clause in the Interim Constitution is stronger and clearer that it is the case in the Final Constitution. The equivalent of sec 9(2) in the Interim Constitution (sec 83(a)) reads as follows: “This section [referring to the general “difference blind” protection of equal treatment] *shall not* preclude measures designed to achieve the adequate protection and advancement of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of rights and freedoms”. The wording of this section is indicative of political pressure to reach a compromise. I find this section quite compelling in the sense that it states clearly that equality, on a general basis, shall not stand on the way of entrenching affirmative action legislations, which are perceived as means through which equality would in the first place be tangible in South Africa.

<sup>5</sup> ibid

The aim here is not to turn a full attention to the provision of equality in the Interim Constitution, but to highlight how transition from apartheid regime to democracy in South Africa bear on the subject of constitutional development. This gives us a political background against which constitutional interpretation in South Africa can be comprehended. Therefore, a proper analysis of the political background of the Final Constitution would start with an analysis of the political background of the drafting of the Interim Constitution.

Back to the Interim Constitution, the relatively strong wording of equality clause in the Interim Constitution, in Hannah Arendt's words, is "revolutionary" (Elster 1988, 142). This is so because there was then the need or the realization among negotiators (predominantly the African National Congress and the National Party) to deliver a revolutionary charged constitution in order to save the nation from further atrocities. Alas, that was to be a temporary promise because the Interim Constitution was to be substituted by the Final Constitution.

There are two ways in which constitutional format can be seen: Firstly, a constitution can be "revolutionary", and secondly, it can be "counterrevolutionary" (Elster 1988, 158). It is often difficult to identify if the constitution is of the latter format, i.e. counterrevolutionary. Let us look at this delineation in the light of the South African case.

Revolutionary constitutions are *authored* by past experiences in a way that such constitutions present themselves as radical departures from past experiences (ibid). Revolutionary constitutions do not seek revenge from the past experiences; neither do they romanticize the past. Such constitutions rather strive to build societies that transcend past experiences. This is accomplished by alluding to past experiences in order to seek the way for the future. In the case of South Africa, a revolutionary constitution would strive to avoid the continuation of inequalities incurred during the apartheid regime. Revolutionary constitutions are normally not drafted during the moments of political tranquility. They are drafted amid or immediately after massive political unrests hence

their less compromising language (as it seems to be case with the language of equality clause in the Interim Constitution).

The language of revolutionary constitutions is something that evolves directly out of reigning political atmosphere rather than being an imposition by drafters.

Counterrevolutionary constitutions are not easy to identify since they might be deceitful in their wording. The point is that, unlike revolutionary constitutions, counterrevolutionary constitutions are drafted during the moment of political tranquility. Counterrevolutionary constitutions are products of peaceful negotiations or negotiated revolutions. Such constitutions are not shaped by historical conditions; they reflect the influence of the negotiators or drafters. More applicable to the Final Constitution in South Africa, counterrevolutionary<sup>6</sup> constitutions are indicative of attempts to reach consensus hence their vague wording.

Transition to democracy in South Africa had both moments of “revolution” and political tranquility, resulting in both counterrevolutionary and revolutionary constitutions. The Interim Constitution is a product of a revolutionary moment since it was drafted amid political violence and massive politically motivated killings in the country (Spits 2000). The opposite can be said about the Final Constitution, which is too less revolutionary since it was drafted during the moment of political tranquility and came out of lengthy negotiations and political consensus, the moment which the drafting of the Interim Constitution did not enjoy.

It is arguable that during the lengthy process of drafting the Final Constitution there have been tensions among contributors surrounding, among other things, the wording of equality clause. However unlike during the drafting of the Interim Constitution, there was

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<sup>6</sup> The statement that the Final Constitution is counterrevolutionary should not be understood to mean that the constitution is totally regressive. What this statement means is that the constitution is less revolutionary if compared to the Interim constitution. However, we should note that conditions and guidelines for the drafting of the Final Constitution are entrenched in the very Interim Constitution under the heading “Constitutional Schedules”. Therefore, if the Interim Constitution, through its constitutional schedules, could protect the drafting of a vague equality clause as it is the case in the Final Constitution, then this also means that the Interim Constitution is not deeply revolutionary. Thus, it is revolutionary in a self contained way. The point of the matter is that the picture is blurred.

sufficient time for contributors to provide argumentations for their preferences and for drafters to even the differences, resulting in consensus<sup>7</sup>. However, when one looks at the constitution, particularly, the wording of equality clause, one notices that there have only been general agreements (consensus) and that left concrete questions to the discretion of the court.

Generally speaking, there is an agreement that the constitution should be interpreted along the understanding that it is a “bridge between the future and the past” (Mureinik 1994). But it is not clear what that exactly means. Also, the historical background of the South African constitution is too contested to help us in dealing with this question. As I attempted to outline, the historical background of the South African constitution is complex and perhaps deceitful.

I now wish to illustrate how historical conditions in South Africa can be alluded upon in order to justify undesirable interpretation of equality clause. By ‘undesirable interpretations’<sup>8</sup>, I am referring here to the situation whereby equality clause is interpreted in a way that it is too difficult for the government to pass affirmative action legislations. I will return to this point later. The point to be made at this moment is that

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<sup>7</sup>As part of their submission to the Constitutional Assembly on the working draft of the constitution, the National Association of Democratic Lawyers indicated that they favor the retention of the wording of equality clause in the Interim Constitution. Thus, they wished that equality clause in the Final Constitution should maintain the same strong wording. On the other hand, Center for Applied Legal Studies at the University of the Witwatersrand had a slightly different viewpoint regarding the matter. The Center submitted that the formulation we have in the Final Constitution is rather stronger and positive than the one in the Interim Constitution. It was argued that equality clause in the Interim Constitution is negatively formulated in a way it renders this affirmative action an exception to general equality rather than being seen as an extension of equality. For these submissions and other submissions by various bodies see the following (html) web page: <http://constitution.uct.za/cgi-bin/catdoc.sh/cama/data/data/multi/subs/>

<sup>8</sup>The point I am trying to make here is that the historical conditions of the South African constitution is paradoxical. Thus, it is arguable through deduction from the historical conditions that equality clause should be interpreted in a way that it demands strict requirements before affirmative action legislations are passed. This can be justified by arguing that the current government, unlike the apartheid government, should uphold the “spirit of justification”, as Etienne Mureinik holds. This is because, as Mureinik argues, the apartheid government did not uphold the culture of justification. On the other hand, one might allude to the historical conditions and argue that the court should interpret equality clause in a way that the government is not required to go through too strict hurdles before applying the laws of affirmative action. This is, arguably, because of the ‘fact’ that since South Africa experienced apartheid regime—which was a government sponsored discrimination—that should be understood to mean that there should be no question or strict requirements regarding the implementation of affirmative action. This is paradoxical, and the only way to clear this is to ask what is ‘desirable’.



historical conditions in South Africa cater for diverse, and sometimes contrasting, opinions. The country's legal background, and the role played by the courts, is difficult to distinguish from the normal "conservative" legal background.

Mureinik alludes to the legal background, as part of the historical background, in order to deduct how equality clause should be interpreted. I believe that the "legal background" on its own is not reducible to the "historical background". I turn to this point in the next section of the paper, whose central aim is to warn against narrow deductions from history. I argue against Mureinik's point (Mureinik 1994) that equality clause should be interpreted in a way that it requires the government to satisfy strict requirement in terms of justification. I find this point too narrow and undesirable given what I argue to be a rather reflective deduction from the historical conditions in South Africa. Let us explore this contention.

#### **'Narrow' political and legalistic deductions from history**

This section aims to explore the shortfalls of both purely legalistic and purely political interpretations of equality clause. The section points out that the argumentations (or interpretations) that claim to be purely confined to either political reasoning or legal reasoning are merely narrow historical deductions. Such argumentations can give rise to rational but undesirable constitutional interpretations. It is also the argument of this paper, therefore, that Constitutional Court judges should be reflective when interpreting the clause. Constitutional interpretation is simultaneously a legal and a political exercise. The nature of societies that we live in requires this kind of understanding.

It is clear that the wording of equality clause in the South African constitution is not only vague but shows no single objective of the clause (De Vos 1994, 2). The phrase that "To promote the achievement of equality legislative and other measures *may* be taken" gives the court full discretion to decide whether affirmative action legislation should be protected in a given case. The question is what type of questions, or line of enquiry, should the court follow when confronted with such questions. One of the guidelines for the interpretation of the clause has been brought forth by Mureinik (1994). In his seminal

article, Mureinik argues that the constitution (equality clause in particular) should be interpreted in a way that it is a “bridge from the culture of authority”<sup>9</sup> to the culture of justification (Mureinik 1994, 32). Before looking at the implications of this argument, let us firstly observe how this “grand narrative” is worked out.

Mureinik correctly points out that “*Legally*, the apartheid order [from which the constitution is charged to deliver the nation] rested on the doctrine of parliamentary sovereignty” (ibid). He continues that “Universally that doctrine teaches that what Parliament says is law, without the need to offer justification to the courts” (ibid). Therefore, the constitution should be interpreted in a way that it counters the government power. The implication of this argument on the interpretation of equality clause is that the government has to offer the highest level of justification so as to satisfy the court why the clause should, given the facts of the case, be interpreted to mean that affirmative action law is enforceable. While it is clear that the clause offers no ‘blanket’ protection to affirmative action legislations, it is also clear, following Mureinik’s argument, that the clause leaves the government with an onus to prove the desirability of affirmative action legislation each an every time there is a dispute over that.

I want to explore Mureinik’s argument by separating it into two points. First, that he provides a ‘purely legal deduction’ from history and holds that as *a* historical deduction. Second, that he therefore focuses on a single aspect of history in a way that it obscures what could further be deducted from history. I think both elements of his arguments are undesirable. That Mureinik’s deduction from the historical past is ‘narrow’ ties to the point that it is fetish to insulate law from politics. It is also arguable that this legalistic guideline for the interpretation of the clause serves a particular political end i.e. continuation of the enjoyment of unfairly accumulated advantages.

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<sup>9</sup> Note that the metaphor of the “bridge” is used in South Africa to understand the aim of the constitution. This is used to depict the kind of the future strived for through the constitution. The constitution is clearly charged with the task to deliver the nation into the future while taking into consideration the impacts of the past. As I stated somewhere else, it not clear as to how this task is to be accomplished hence this paper, which attempts to explore the question further.

That the apartheid government did not uphold the spirit of justification is indisputable. However, alluding to that as a general reflection of the future ignores not only the political foundations of the current democratic government in South Africa, but also raises questions as to whether the implications<sup>10</sup> of that deduction are morally justifiable given the urgency of affirmative action legislation in the country. This high standard of justification requirement is indicative of modern constitutionalism. This tradition, as stated, attempts to arrive at a 'clean' separation between law and politics.

Attempts to separate law from politics find a true expression in the South African legal system, where "most of the judges, lawyers and legal academics adhere to the traditional liberal school of adjudication" (De Vos 2001, 4). What this tradition aims to achieve, as we observe with Mureinik argument, is to arrive at 'objective' legal adjudication. This tradition ignores the point that what is important is a desirable and reflective adjudication and not objective adjudication. In fact the court follows a purely legalistic interpretative method in order to obscure its own political agency.

It is arguable that Mureinik's deduction from the legal history as an 'objective' guideline for assessing the laws of affirmative action has something to do with the deep suspicion of affirmative action<sup>11</sup>. There is no reason why Mureinik 'only' opted to emphasize the importance of the "spirit of justification" without at least footnoting the urgency of affirmative action measures since the history of the country equally informs us of the fact that the enjoyment of equality is unreachable for majority of the population due to the continuing legacy of apartheid order. This would certainly mean that the court should not overburden the government to prove the enforceability of affirmative action.

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<sup>10</sup> The high standard of justification required of the government for affirmative action laws.

<sup>11</sup> As a matter of fact, Prof Mureinik was among consultants who advised the drafting of the *Democratic Party Proposal: Securing Fundamental Rights*. The document submits that "It [The Party's proposal] demands of government rational, honest justifications for policy decisions...Rationality or reasonableness are therefore the standard of justification provided for in this Bill". This corresponds very well with the standard of judgment argued for by Mureinik in his seminal paper (1994). The Democratic Party, as a white liberal party in South Africa, has deep resentments for affirmative. The party represents a white middle class population, who mostly benefited from apartheid order. For the Democratic Party's submission on this matter see the following html web page: <http://constitution.uct.ac.za/cgi-bin/catdoc.sh/cama/data/data/multi/subs/3700>. The other point to note here is that it is possible to refer to the same past experience and yet come out with different reasoning.

Historical conditions provide different outlooks and reasoning despite general agreement about what the past is all about.

In concrete terms, the idea of the spirit of justification means that in case of a dispute regarding affirmative action law, the court might require the government to substantiate substantively that the purported law should really be protected under section 9(2) of the constitution (1996). The onus is on the government to demonstrate that such law would *really* benefit those who suffered, or continue to suffer, unfair discrimination. This is a difficult requirement to satisfy. It is difficult to know exactly, let alone justify, that a particular law indeed addresses the legacy of the past injustices. And, prolonged legal wrangling that exists when dealing with this question would certainly mean continued harm to those who already suffered unfair discrimination.

So, a purely legalistic enquiry—with emphasis on substantive interrogations of the purported law of affirmative action—is undesirable and too demanding given the urgency of affirmative action, deducible from historical conditions. Alternatively the court can enquire into the procedural adoption of the purported law. The court can enquire as to whether the purported law of affirmative action has been procedurally passes. This is to ask whether parliament attained required majority to pass the legislation. This line of enquiry is not as narrow as it appeared to be, it has far reaching impacts.

By enquiring whether parliament had a sufficient majority to pass affirmative action law is to ask whether the law has attained sufficient interrogation and parliamentary verification. This is to ask if the law has been subjected to necessary political debates. This line of enquiry saves the court from making political ruling on the pretext that it is pursuing a legal argumentation. Through this enquiry, the court can avoid controversial underpinnings of the traditional liberal school of legal adjudication (also known as constitutionalism)<sup>12</sup>. While it is absurd to overly separate law from politics, it is equally odd to subject higher law (constitutions) to pressures of day-to-day political opinions. What is important is to find a balanced approach.

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<sup>12</sup> See De Vos 2001, p2.

South Africa also shows that sometimes the court is correct in its endeavor to distance its rulings from the influence of existing political opinions; however that should not be overdone. In the next paragraphs I look at the shortfalls of direct influence of day-to-day political opinion on constitutional interpretations. This is to highlight how complex this question is.

The argument that the court should be directly responsive to public opinion when interpreting the constitution fails to realize the depth of the instability of political opinions. This argument challenges the idea that “there are certain areas of life which should be placed outside the control of transient majority”<sup>13</sup>. The argument holds that the court is justified in constraining the wishes of the majority. The counterargument is that it is sometimes unclear as to what the wishes of the people are. What appears to be the wish of the people today might change tomorrow. Therefore, higher law (constitutions) should not be directly subjected to this necessarily unstable feature of democracy. Subjecting constitutional interpretations to this instability would render constitutions unstable. This was nearly the case in South Africa. Let us observe this problem.

In *S v Makwanyana*<sup>14</sup> the court ruled against death penalty despite demonstrated popular support for death penalty. What this means is that the court practically ignored public opinion and provided a completely legal argumentation. This case raised temporary resentment against the Constitutional Court, questioning the validity of the decision by judges who are not even democratically elected. In this case, the court charged itself with the protection of “humanity” against what can be termed “unsolicited public opinion”. Despite the controversy of the case by then, the passing of time proved that the people did not really support death penalty. Therefore, it seems that the court has in this case correctly exercised its monopoly of discretion.

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<sup>13</sup> See Denis Davis “Democracy—Its Influence upon the Process of Constitutional Interpretation” in *South African Journal on Human Rights* (Republic of South Africa.: Juta Law, 1994, vol.10) p.107

<sup>14</sup> 1995 (3) SA 391 (CC)

As an indication that public opinion has considerable degree of instability, later after the *Makwanyana* decision there emerged a popular outcry against death penalty in South Africa. The outcry against death penalty was shown after a South African citizen was sentenced to death in Botswana. So, it is difficult to say whether the public opinion in South Africa shows support or rejection for death penalty. This instability inherent in public opinion makes it difficult for one to extract what is public opinion. Therefore the same, although to a limited degree, can be said with regard to support for affirmative action. This is a multi-layered argument and calls for a cautious outlook.

Generally, there is no dispute that affirmative action is necessary for the full realization of equality in South Africa. However, there is no objective proof that there is a popular support for affirmative action. Also, that there is a popular support for affirmative action does not necessarily mean that the court will accept that to be a justifiable or a reflective support for affirmative action. Like it was the case in *Makwanyana*, the court has the discretion to override alleged support for affirmative action by adopting purely legalistic argumentations, strictly requiring the government to prove its case for affirmative action.

The heart of that matter is that the court has the sole discretion to interpret the clause. So, for desirable interpretation of the clause, one can only hope that the court would follow a reflective method of interpreting the constitution. The court has to allude, reflectively, to unique historical conditions of the country with the knowledge that “no version of history, no matter how generally accepted, can escape controversy” (De Vos 2001, 22). Therefore the court has to deliberate within the confines of South Africa’s own historical conditions. Resorting to foreign legal precedence might result in rulings that are undesirable since they conform to historical conditions of their origin. We can imagine of judgments that are backed by arguments like ‘original intent’, they might not suffice in South Africa.

It is difficult in the case of South Africa to find out what drafters of the constitution intended with such an open ended clause. The constitution is relatively new and most of drafters are still alive but yet it is impossible to find out what their intentions were. So, it

would further obscure the question for the generation to come, say, after fifty years to employ the ‘original intent’ approach. How is it possible for the future generation to understand ‘our’ intentions while we cannot even comprehend those ourselves? This approach would be absurd in the South African case.

Foreign judgments should be alluded to with great caution, or perhaps they should be adjusted to fit the South African situation. That foreign judgments are sometimes unclear is evident in *Regent of the University of California v. Bakke*<sup>15</sup>. In this case Justice Powell argued that affirmative action program has to be subjected to “strict scrutiny” with the aim to assess whether the program really promote social goals. This clearly shows lack of standard criterion for dealing with this question. That affirmative action programs should only be scrutinized individually without any reference to the general understanding of affirmative action is too restrictive. This also means that the court can easily strike down affirmative action program on the grounds of poor justification.

This kind of minimalism would be undesirable for the case of South Africa. I attempted to identify the problems of narrow deduction from historical conditions and how this further complicates constitutional interpretation. I then move on to conclude that what is required, particularly for the case of South Africa, is Ackerman’s “switch in time” model. This model, as we observe below, has internal deliberations and it is more reflective rather being overly conservative.

### **Conclusion**

Ackerman provides a synthesis of the political and legalistic extreme. This synthesis, argues Ackerman, flows from dualist democracy. Thus, in the event of the expression of the feeling by the people that constitution should be interpreted in a particular direction, the dualist court does not immediately act upon that. For a dualist democracy would initially dismiss this wave or popular opinion, sending its protagonist back to the society

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<sup>15</sup> See Cass Sunstein *One case at a time* (Cambridge Mass: Harvard University Press, 1999) p.122

to build gain and sustain more support. What is actually done is to give the people time to think about what they believe they want.

Once it is clear that a particular opinion is deep and enjoys sustainable support, the court then executes a “switch in time” move, thus, gives a ruling that implicitly indicates response to popular pressure. It is not easy to see when exactly the court executes this shift since the court often obscures its reason for shifting, neither does it normally acknowledge a shift in the first place. This model incorporates some reasonable degree of conservatism while embracing some degree of elasticity.

This method is similar to what Dworkin (1977, 137) terms a “fresh moral insight”. Dworkin argues that the court should find or establish a fresh moral insight as a way to establish what people need. So, the court gauges the depth of public opinion. Judges may impose their opinions on societies on the pretext that they reflect moral insights. This cannot be permanently avoided. However, a careful and reflective interpretation is unlikely to reflect unsolicited and undesirable personal opinion. Therefore, there should be some reflective deliberations within the court in interpreting equality clause. The absence of a standard criterion of enquiry should not be a ‘floodgate’ for undesirable ruling. The court alludes to “fresh moral insight”, historical conditions, coupled with legal reasoning.



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