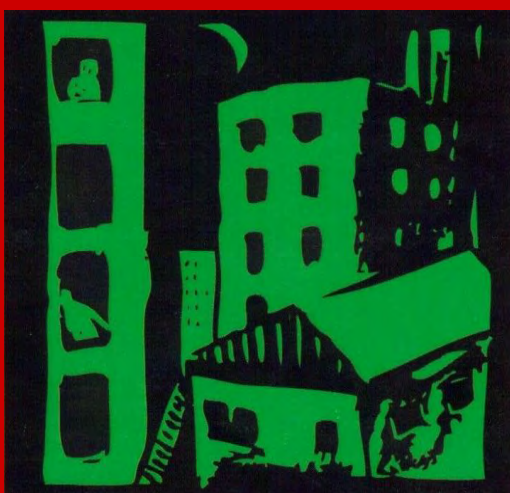
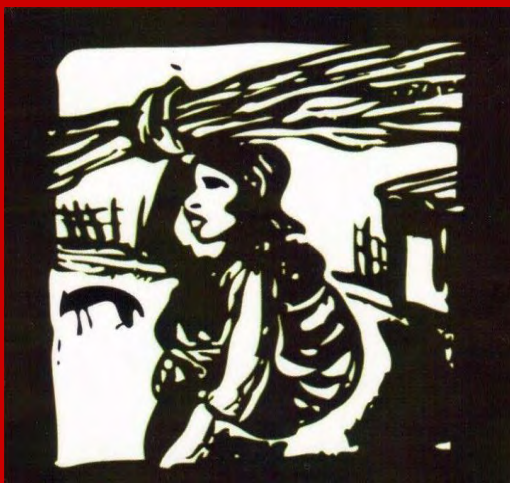


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**Eliminating racial  
discrimination of  
employees: An  
assessment of the  
Employment Equity  
Act 55 of 1998, as  
amended**

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**ABSTRACT**

The Employment Equity Act 55 of 1998, as amended, was enacted *inter alia* to “achieve equity in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination”. In terms of the Act, no person may discriminate against an employee unfairly, but research shows that racial discrimination of black employees persists, despite the promulgation of the Act. The objective of this article is to determine whether the Employment Equity Act 55 of 1998, as amended is the appropriate vehicle to eliminate racial discrimination of black employees. This is undertaken through the lens of critical race theory, which analyses the ways in

which ignoring the importance of race perpetuates oppression. Although critical race theory was developed in the United States, it is relevant to South Africa given that black employees are still subjected to racial discrimination even many years after the end of apartheid. The tenets of critical race theory include structural determinism; the critique of liberalism; social science insights, historical analysis and multidisciplinary thinking; intersectionality; storytelling, narrative, and naming one's reality; and anti-essentialism. This article examines each tenet and shows how they relate to the Act. The contention is that the Employment Equity Act 55 of 1998, as amended is not the most appropriate vehicle for eliminating racial discrimination of black employees in South Africa.

**Keywords:** affirmative action, apartheid, black employees, critical race theory, Employment Equity Act 55 of 1998, equality, racial discrimination.

## 1 INTRODUCTION

During apartheid, laws existed that legalised racial discrimination of black people with the aim of promoting white supremacy.<sup>1</sup> For example, the Native Building Workers Act 27 of 1951 that existed during apartheid made it an offence for Africans to perform skilled work in the homes of white people.<sup>2</sup> After the demise of apartheid, these laws were abolished and new ones were enacted to promote equality in South Africa. Section 9(4) of the Constitution provides that “no person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3)”.<sup>3</sup> The provision goes on to state that ‘national legislation must be enacted to prevent or prohibit unfair discrimination’.<sup>4</sup> The Employment Equity Act 55 of 1998, as amended (EEA) is one of the statutes enacted by Parliament to give effect to the constitutional right to equality.<sup>5</sup> It was enacted since part of the government’s agenda after the elections in 1994 was to transform places of employment so as to ensure that workforces become broadly representative of South Africa.<sup>6</sup> The EEA was promulgated because the government was aware that some employers would not employ black people voluntarily and there was thus a need to enforce transformation.<sup>7</sup>

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<sup>1</sup> Black (Native) Laws Amendment Act 46 of 1937; Group Areas Act 41 of 1950; Bantu Education Act 47 of 1953.

<sup>2</sup> Native Building Workers Act 27 of 1951 (Bantu Building Workers Act 27 of 1951).

<sup>3</sup> Section 9(4) Constitution of the Republic of South Africa, 1996. The grounds contained in section 9(3) of the Constitution include the ground of race.

<sup>4</sup> Section 9(4) Constitution of the Republic of South Africa, 1996.

<sup>5</sup> The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 as amended is an additional statute that was enacted to give effect to section 9(4) of the Constitution and applies to persons to whom the EEA does not apply.

<sup>6</sup> Oosthuizen RM & Naidoo V “Attitudes towards and experience of employment equity” (2010) 36(1) *SA Journal of Industrial Psychology* at 836.

<sup>7</sup> See Oosthuizen & Naidoo (2010) at 836.

Anti-discrimination laws are enacted to protect the victim of unfair discrimination; however, such laws are drafted not from the perspective of the victim, but from the perspective of the perpetrator, with the laws viewing racial discrimination as the misguided actions of a specific person as opposed to a social phenomenon.<sup>8</sup> The EEA applies to workplace discrimination, and its objective is to achieve “equity in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination”.<sup>9</sup> It also seeks to implement affirmative action for the purpose of redressing the disadvantages which are experienced by people from designated groups in the workplace to ensure that they are equitably represented in all occupational levels within the workplace.<sup>10</sup>

Sections 5 and 6 of the EEA apply to all employers and all employees.<sup>11</sup> In terms of section 5 of the EEA every employer is required to “take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice”.<sup>12</sup> Section 6 of the EEA states that no person may discriminate against an employee unfairly, either directly or indirectly, in any employment policy or practice, on one or more grounds, including that of race.<sup>13</sup> However, research shows that some black employees are racially discriminated against by their employers<sup>14</sup> despite the provisions in the EEA that expressly prohibit such unfair discrimination. This shows that the provisions in the EEA that aim, inter alia, to eliminate unfair discrimination in the workplace may not be a sufficient deterrent in this regard.

To determine whether this is indeed the case, it is necessary to examine the relevant provisions contained in the EEA through an alternative theoretical framework. The purpose of this article is to determine if the EEA is the most appropriate vehicle to eliminate racial discrimination in the workplace. To this end, the article draws on the perspectives of critical race theory which is a theoretical framework through which the attempts to address racial discrimination will be examined.<sup>15</sup> A critical engagement with race and law is necessary in South Africa given that currently racial discrimination

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<sup>8</sup> Freeman A “Legitimizing racial discrimination through anti-discrimination law: A critical review of Supreme Court doctrine” in Crenshaw K *Critical race theory: The key Writings that formed the movement* New York: The New Press (1995) at 30.

<sup>9</sup> Section 2(a) of the EEA.

<sup>10</sup> Section 2(b) of the EEA.

<sup>11</sup> Section 4(1) of the EEA.

<sup>12</sup> Section 5 of the EEA.

<sup>13</sup> Section 6(1) of the EEA.

<sup>14</sup> Department of Labour *22nd Commission for Employment Equity Annual Report 2021 – 2022* 9; Department of Labour *23rd Commission for Employment Equity Annual Report 2022 – 2023* 22.

<sup>15</sup> Critical race theory has been used in studies by other authors such as Allen ME “The Relevance of critical race theory: Impact on students of color” (2017) 4 (2) *Urban Education Research & Policy Annuals* 33; Zulu NT “The struggles and triumphs of South African black women professors” (2021) 35(6) *South African Journal of Higher Education* 239; Makoelle TM “Race and inclusion in South African education: Analysis of black-African learners’ perceptions in previously advantaged white schools” (2014) *Mediterranean Journal of Social Sciences* 5(14) 283.

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against black people<sup>16</sup> co-exists with white privilege.

This article begins with a brief overview of the historical background of critical race theory. This is followed by a discussion of some of the tenets of critical race theory and their applicability to the EEA, which, as noted seeks inter alia to eliminate racial discrimination against black employees in South Africa.

## 2 HISTORICAL BACKGROUND OF CRITICAL RACE THEORY

The movement known as Critical Legal Studies (CLS) holds that the law is not neutral and that the law reflects power relationships.<sup>17</sup> Critical race theory was developed in response to the shortcomings of CLS<sup>18</sup> in acknowledging how race is a central component of the very legal systems being challenged<sup>19</sup> and in addressing the legal system's perpetuation of racial discrimination.<sup>20</sup> Critical race theory evolved in the 1970s<sup>21</sup> as a result of the work of legal scholars<sup>22</sup> who were re-examining the continuation of racial discrimination in the United States and the absence of racial reform in legislation.<sup>23</sup> These legal scholars were engaged in transforming and studying the relationship between power, race and racism.<sup>24</sup> Critical race theory “was the offspring of a post-civil rights institutional activism that was generated and informed by an oppositionalist orientation toward racial power”.<sup>25</sup> Critical race scholars aim to determine how white supremacy and the oppression of people of colour is perpetuated, a task they undertake by “putting race and racial discrimination at the centre of the scholarship and analysis”.<sup>26</sup>

## 3 CRITICAL RACE THEORY

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<sup>16</sup> See Zulu (2021) at 243.

<sup>17</sup> Subotnik D “What’s wrong with critical race theory: reopening the case for middle class values” (1998) 7(3) *Cornell Journal of Law and Public Policy* 681 at 684.

<sup>18</sup> Martinez AY “Critical race theory: its origins, history and importance to the discourses and rhetorics of race” (2014) 27(2) *Frame* 9 at 17.

<sup>19</sup> See Martinez AY (2014) at 17.

<sup>20</sup> Bergerson AA “Critical race theory and white racism: is there room for white scholars in fighting racism in education?” (2003) 16(1) *International Journal of Qualitative Studies in Education* 51 at 52.

<sup>21</sup> Delgado R & Stefancic J *Critical Race Theory: An Introduction* New York: New York University Press 4<sup>th</sup> ed (2023) at 4.

<sup>22</sup> Scholars such as Richard Delgado, Allan Freeman, Kimberlé Crenshaw, Patricia Williams and Derrick A Bell.

<sup>23</sup> See Allen (2017) at 34.

<sup>24</sup> Delgado R & Stefancic J *Critical Race Theory: An introduction* New York: New York University Press 3<sup>rd</sup> ed (2017) at 3.

<sup>25</sup> Crenshaw K “Twenty years of critical race theory: looking back to Move Forward Commentary: Critical race Theory: A Commemoration: Lead Article” (2011) 43(5) *Connecticut Law Review* 1253 at 1260.

<sup>26</sup> See Allen (2017) at 34.

Even though critical race theory was developed in the United States, it is relevant to this study given that racial discrimination takes place in South African workplaces.<sup>27</sup> Critical race theory is based on the fact that race is central to the discussion of racial discrimination.<sup>28</sup> Race being brought to the centre of the discussion means that no explanation is required to explain that racial discrimination persists.<sup>29</sup> It assesses the role that law plays in constructing and maintaining “social domination and insubordination”.<sup>30</sup>

Scholars of critical race theory argue that by ignoring racial difference the “status quo with all its deeply institutionalised injustices to racial minorities”<sup>31</sup> is perpetuated; they maintain that “dismissing the importance of race is a way to guarantee that institutionalised and systematic racism continues and even prospers”.<sup>32</sup> White privilege as well as the concepts of colour blindness, race neutrality, equal opportunity, objectivity and meritocracy, are challenged by critical race theory.<sup>33</sup> The latter regards the idea that the law can and should treat all persons equally irrespective of their race as being a vehicle for privilege, power and self-interest.<sup>34</sup> “Whiteness” refers to a “racial discourse, while the category of ‘white people’ represents a socially constructed identity, usually based on skin colour”.<sup>35</sup> Critical race theory views “whiteness”<sup>36</sup> as a set of beliefs, practices and assumptions that place the perspectives, needs and interests of white people at the centre of what is considered normal.<sup>37</sup> “Whiteness” has been viewed as a valuable asset in that there are benefits associated with being white – benefits that white people seek to protect.<sup>38</sup>

Although critical race theory does not consist of a single set of rules and perspectives, its scholarship is marked by certain key themes that recur throughout the literature. This article discusses the following selection of them: (1) structural determinism; (2) the critique of liberalism; (3) social science insights, historical analysis and multidisciplinary thinking; (4) intersectionality; (5) storytelling, narrative and naming one's reality; and (6) anti-essentialism.<sup>39</sup> These themes, or tenets, will be

<sup>27</sup> Department of Labour (2022) at 9; Department of Labour (2023) at 22.

<sup>28</sup> See Bergerson (2003) at 52.

<sup>29</sup> Bergerson (2003) at 52. Billings L stated that racism is a permanent fixture.

<sup>30</sup> Crenshaw et al. (1995) at 1.

<sup>31</sup> See Martinez (2014) at 17. This argument applies equally well to the South African context, where black people are the majority of the population.

<sup>32</sup> See Martinez (2014) at 17.

<sup>33</sup> See Allen (2017) at 35.

<sup>34</sup> Barlow B “Racism, justified: A critical look at critical race theory” (2016) *The Harvard Law Record* 1.

<sup>35</sup> Gillborn D “Intersectionality, critical race theory, and the primacy of racism: Race, class, gender and disability in education” (2015) 21 (3) *Qualitative Inquiry* 277 at 278.

<sup>36</sup> See Gillborn (2015) at 278.

<sup>37</sup> See Gillborn (2015) at 278.

<sup>38</sup> Harris CI “Whiteness as property” (1993) 106 *Harvard Law Review* 1707.

<sup>39</sup> Delgado R & Stefancic J “Critical race theory: an annotated bibliography” (1993) 79(2) *Virginia Law Review* 461 at 463.

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discussed individually to illustrate what critical race theory entails and how it is relevant to the racial discrimination that black employees experience in South Africa.

### 3.1 Structural determinism

Critical race theory emphasises that legal culture and legal thought influence and determine the content of the law and therefore also whose interests it reflects and who benefits from it.<sup>40</sup> Klare describes South African legal culture as “conservative”, a term which refers not to a political ideology, but to “cautious traditions of analysis common to South African lawyers of all political outlooks”.<sup>41</sup> Modiri submits that part of the reason why South African legal culture is conservative is that interpretive legitimacy and dominance are accorded to Roman-Dutch law (common law).<sup>42</sup>

The common law is “saturated in a white, male, western and colonial perspective”, but the view still prevails that it can provide access to a neutral meaning when it comes to adjudication and interpretation.<sup>43</sup> This is inaccurate. The maintenance of this view “has had the implication that the legal system is structurally determined to reflect and privilege a contingent and contested view of law while falsely portraying it as neutral, normal and fair”.<sup>44</sup>

As a case in point, the EEA does not provide access to a neutral meaning. Delgado argues that affirmative action measures were “designed by others to promote their purposes, not ours”.<sup>45</sup> The EEA provisions governing affirmative action only apply to designated employers and to people from designated groups.<sup>46</sup> A “designated employer” is defined by the EEA as:

- a. an employer who employs 50 or more employees;
- b. ...  
[“designated employer” paragraph (b) deleted by section
- c. a municipality, as referred to in Chapter 7 of the Constitution;
- d. an organ of state as defined in section 239 of the Constitution, but excluding the National Defence Force, the National Intelligence Agency and the South African Secret Service; and

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<sup>40</sup> Modiri JM “The colour of the law, power and knowledge: Introducing critical race theory in (post-) apartheid South Africa” (2012) 28 *South African Journal on Human Rights* 405 at 419.

<sup>41</sup> Klare KE “Legal culture and transformative constitutionalism” (1998) 14(1) *South African Journal on Human Rights* 146 at 168.

<sup>42</sup> See Modiri (2012) at 419.

<sup>43</sup> See Modiri (2012) at 419.

<sup>44</sup> See Modiri (2012) at 419.

<sup>45</sup> Delgado R “Affirmative action as a majoritarian device: Or, do you really want to be a role model?” (1991) 89(5) *Michigan Law Review* 1222 at 1226.

<sup>46</sup> Section 4(2) of the EEA.

- e. an employer bound by a collective agreement in terms of section 23 or 31 of the Labour Relations Act, which appoints it as a designated employer in terms of [the EEA], to the extent provided for in the agreement..<sup>47</sup>

If it is assumed that affirmative action benefits people from designated groups (which include black employees), it benefits only those who are employed by employers who fall within the meaning of “designated employers”. This means that not all black employees will receive the benefits which affirmative action promises to provide. Here, it is noteworthy that the Employment Equity Amendment Act 4 of 2022 removes one of the categories of employers that initially formed part of the meaning of a “designated employer”. The employers that the Employment Equity Amendment Act 4 of 2022 excluded from the meaning of “designated employer” are those who “employ fewer than 50 employees but has a total annual turnover that is equal to or above the applicable annual turnover of a small business in terms of Schedule 4 to [the EEA]”. The effect of this is to reduce the number of employers who are required to implement affirmative action measures. The question that may be raised in this regard is: Who are the parties likely to benefit from this exclusion?<sup>48</sup>

Affirmative action exists to ensure that suitably qualified people from designated groups are equitably represented in all occupational levels within a designated employer’s workplace and have equal opportunities.<sup>49</sup> Designated employers are required to identify and remove employment barriers that adversely affect people from designated groups, barriers that include unfair discrimination.<sup>50</sup> An employment barrier exists where a practice or policy which includes “procedures, guidelines or rules , or an aspect of it that limits the opportunities of employees”.<sup>51</sup> An employment barrier may include the criteria that should be met by applicants to obtain employment; it may also include criteria which should be met by employees to become eligible for promotions.

For instance, in certain circumstances, black people who seek employment, or wish to apply for promotions to more senior positions, are required to meet unreasonable criteria such as a number of years of experience that is unreasonably lengthy. In circumstances where a few black persons, or even only a single one, meet the criteria, this results in some employers believing that the unreasonable requirements which the black people were required to comply with were reasonable. This means that where a black person can overcome an “obstacle” in the workplace, the assumption is

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<sup>47</sup> Section 1 of the EEA.

<sup>48</sup> Department of Labour (2023) at 17 states that the reason for this exclusion is to “reduce the regulatory burden on small employers i.e., those employing between 0 – 49 employees”. A number of the places of employment who fall in this category (having an annual turnover equal to or above the applicable turnover of a small business in terms of Schedule 4 of the EEA) are white-owned businesses.

<sup>49</sup> Section 15(1) of the EEA.

<sup>50</sup> Section 15(2)(a) of the EEA.

<sup>51</sup> Item 5.2.5 Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices Notice 1358 of 2005.

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that such a barrier or inequality “is simply an excuse, a failing to make good on an opportunity that is now provably there”.<sup>52</sup> This is because “the rose that grows in the cracks confirms that the concrete is fertile after all; the slave who manages to escape proves that those who remain in captivity do so out of choice”.<sup>53</sup>

Systemic impediments and barriers have made it difficult for black people to succeed. As far as black exceptionalism is concerned, where a black person succeeds despite barriers, such barriers are thought not to exist. As an example of black exceptionalism, Spencer records that a black participant in a study stated that:

[his] colleagues made discriminatory statements because Obama’s presidency purports a particular image of black masculinity that categorises him as the racial exception...[the colleagues of the black participant] compare him with former president Obama because they both represent neoliberal visions of success that are centered and shaped by the social construction of whiteness.<sup>54</sup>

The affirmative action measures that designated employers are required to implement also include “measures designed to further diversity in the workplace based on equal dignity and respect of all people”.<sup>55</sup> When considering the meaning of “diversity”, some believe that this relates solely to people of different cultures; however, diversity encompasses more than this. It includes other differences that exist among people, such as the way people differ in terms of race, age, health, gender, education, and so forth. Crenshaw states that “the subsequent embrace of diversity in the context of affirmative action symbolise[s] a broader concession about how to understand racial disparity on a wider societal level”.<sup>56</sup> She states, furthermore, that::

in the same way that diversity erased the particular dimensions of racial subordination in education, especially its institutional and structural synergies, the widespread articulation of diversity as a stand-in for race reform helped to marginalise racial injustice as a contemporary phenomenon.<sup>57</sup>

As regards affirmative action, it has been argued that if white people invented something that made them feel virtuous and made black people grateful they must be happy with themselves and if that programme was placed in the hands of the very people who caused the problematic situation, society would be satisfied.<sup>58</sup> As a result,

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<sup>52</sup> See Crenshaw K (2011) at 1333.

<sup>53</sup> See Crenshaw K (2011) at 1332.

<sup>54</sup> Spencer BM “The psychological costs of experiencing racial discrimination in the ivory tower: The untold stories of black men enrolled in science, technology, engineering and mathematics (STEM) Doctoral programs” (2021) 36(3) *Sociological Forum* 776 at 784.

<sup>55</sup> Section 15(2)(b) EEA.

<sup>56</sup> See Crenshaw K (2011) at 1341.

<sup>57</sup> See Crenshaw K (2011) at 1342.

<sup>58</sup> See Delgado R (1991) at 1225; Delgado R & Stefanic J *Critical Race Theory: the cutting edge* Philadelphia, Pennsylvania: Philadelphia Temple University Press (2000) at 398.



Delgado believes that affirmative action should not be supported by black people.<sup>59</sup> While some commentators regard the principle known as interest convergence,<sup>60</sup> as an individual tenet of critical race theory, it is discussed here for the purposes of relevance. According to the principle of interest convergence, white people are interested in furthering the rights and interests of black people only when such rights and interests converge with their own interests, ideologies, and needs.<sup>61</sup> Milner provides an example of interest convergence by describing the situation in a school where the school is willing to provide resources to non-English students to learn English because the majority of white students would benefit from the linguistic, racial, ethnic and cultural backgrounds of the non-English students.<sup>62</sup>

In instances of interest convergence, the convergence is more important when it comes to relief than the extent of harm that is suffered by marginalised groups.<sup>63</sup> As Milner notes, “Change is often purposefully and skilfully slow and at the will and design of those in power.”<sup>64</sup> In this regard, the EEA does not contain any incentives for employers to comply with its provisions (to eliminate racial discrimination and to implement affirmative action), other than avoiding legal action and fines. The absence of incentives is confirmed by the fact that the legislature allows the duration of employment equity plans to be for a maximum period of five years,<sup>65</sup> thus providing employers with a lengthy period within which to achieve employment equity.

For the aforementioned reasons, it is submitted that the Employment Equity Act 55 of 1998, as amended, is not the most appropriate vehicle for eliminating racial discrimination against black employees.

### 3.2 Critique of Liberalism

Liberalism involves “an enthusiasm for freedom, toleration, individualism and reason on

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<sup>59</sup> See Delgado & Stefanic (2000) at 399.

<sup>60</sup> Discussed in Derrick Bell’s work on the case of *Brown v Board of Education* 347 U.S. (1954) 483. In this case the Supreme Court struck down segregation in schools. While this case was a victory for African-Americans in the United States, Bell states that foreign policy concerns were most likely the reason for the decision. See Martinez (2014) at 21; Bell D *Silent Covenants Brown v. Board of Education and the unfulfilled hopes for racial reform* United States of America: Oxford University Press (2004); Bell D “Brown v board of education and the interest-convergence dilemma” (1980) 93(3) *Harvard Law Review* 518 at 523.

<sup>61</sup> Milner HR “Critical race theory and interest convergence as analytic tools in teacher education policies and practices” (2008) 59(4) *Journal of Teacher Education* 332 at 333; Daftary A, Ortega D & Hylton M “Protecting White Interests: A case example of interest convergence in policymaking” (2021) 22(1) *Critical Social Work* 41 at 55.

<sup>62</sup> Milner (2008) at 333.

<sup>63</sup> Daftary, Ortega & Hylton (2021) at 55.

<sup>64</sup> Milner (2008) at 334.

<sup>65</sup> Section 20(2)(e) of the EEA.

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the one hand, and a disapproval of power, authority and tradition on the other”.<sup>66</sup> The individual and individual rights are at the centre of liberalism.<sup>67</sup> Critical race theory rejects liberalism's approach to transformation, which emphasises rights-based approaches to resolving issues relating to racial discrimination.<sup>68</sup> A system may provide for equality of opportunity, but resist implementing programmes that assure equality of results.<sup>69</sup>

In South Africa, the EEA makes provision for equal opportunity,<sup>70</sup> but does not assure equality of results. The liberal approach views racial discrimination from the perpetrator's perspective where racial discrimination is viewed as an “irrational, aberrational act committed by a conscious wrongdoer often deviating from fair and impartial ways of treating fellow humans, distributing jobs, power, prestige and wealth”.<sup>71</sup> A liberal interpretation of unfair discrimination in South Africa is problematic and a communitarian interpretation should be used instead. The communitarian approach is based on the fact that the rights and duties of an individual should be determined according to the community of which the individual forms part.<sup>72</sup>

The reason why a liberal interpretation of unfair discrimination (racial discrimination) is problematic is because emphasis is placed on individual rights as opposed to collective objectives. The collective objectives of South Africa, as entrenched in the Constitution, are, inter alia, to “heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights” and to “build a united and democratic South Africa”.<sup>73</sup> A liberal interpretation of racial discrimination negatively affects the achievement of these collective objectives and may negatively affect the achievement of equality.<sup>74</sup>

Liberals believe in colour blindness and neutral principles of law. Critical race theory is sceptical of neutrality, merit and colour blindness.<sup>75</sup> The premise that the law occupies a rational and “neutral position in relation to social power negates the fact that

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<sup>66</sup> Alexander J “The major ideologies of Liberalism, Socialism and Conservatism” (2014) *Political Studies* 980 at 983.

<sup>67</sup> Costagno AE “Commonsense understandings of equality and social change: a critical race theory analysis of liberalism at Spruce Middle School” (2009) 22 (6) *International Journal of Qualitative Studies in Education* 755 at 756.

<sup>68</sup> Delgado & Stefancic (2023) at 29; See Modiri (2012) at 415.

<sup>69</sup> Delgado & Stefancic (2023) at 29.

<sup>70</sup> Section 2(a) and section 15(1) of the EEA.

<sup>71</sup> Modiri (2012) at 415.

<sup>72</sup> Saaremael- Stoilov K “Liberal communitarian interpretation of social and equality rights: A balanced approach” (2006) XI *Juridica International* 85 at 87.

<sup>73</sup> Preamble of the Constitution.

<sup>74</sup> Section 9(4) of the Constitution promotes the attainment of equality.

<sup>75</sup> Bergerson (2003) at 53.

politics embed the doctrinal categories and normative assumptions with which law organises and represents social reality and responds to social ills".<sup>76</sup> Critical race theory challenges the argument that the law is colour-blind and neutral.<sup>77</sup> As indicated in the positions in countries where racial discrimination is a problem such as the United States, scholars of critical race theory argue that racial discrimination is "systemic and ingrained in the social culture and reinforced through the reproduction of political power and legal reasoning".<sup>78</sup>

In the case of South Africa, it is believed that since 1994 black and white people are equal and that the law no longer plays as dominant a role in the oppression of black people.<sup>79</sup> This is affirmed by the Constitution, which states that "everyone is equal before the law and has the right to equal protection and benefit of the law"<sup>80</sup> and, furthermore, that "equality includes the full and equal enjoyment of all rights and freedoms".<sup>81</sup> In South Africa, the dignity-based approach to equality which is endorsed by the Constitution,<sup>82</sup> and thus the EEA, has resulted from the inability to understand "issues of racial discrimination in terms of systemic disadvantage and structural power".<sup>83</sup> Many liberals believe that all persons should be treated equally without regard to a person's past experiences of unfair discrimination.<sup>84</sup> Critical race scholars are of the view that colour blindness of the latter nature can redress only extreme acts of racial discrimination.<sup>85</sup> The idea of colour blindness allows racial discrimination to persist, but in subtler ways than before.<sup>86</sup> The view that the law is neutral is problematic, because white people consider whiteness to be the norm and therefore neutrality is perceived as being equivalent to being white.<sup>87</sup> Bergerson states that a white person can walk in a white area and no one asks any questions concerning that person being there, which illustrates the idea that, "because we are not aware of our own whiteness, we may think we are colourblind".<sup>88</sup>

Critical race theorists argue that racial discrimination continues due to policies and structures built not only on the notion of colour blindness but on that of individual merit, a construct that perpetuates the dominance of white people.<sup>89</sup> Merit is defined as individual worthiness. Within the employment context, the individual worthiness of an

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<sup>76</sup> Modiri (2012) at 415.

<sup>77</sup> Bergerson (2003) at 53; See Martinez (2014) at 20.

<sup>78</sup> Modiri (2012) at 415.

<sup>79</sup> Modiri (2012) at 406.

<sup>80</sup> Section 9(1) of the Constitution.

<sup>81</sup> Section 9(2) of the Constitution.

<sup>82</sup> Modiri (2012) at 415.

<sup>83</sup> Modiri (2012) at 416.

<sup>84</sup> This is known as formal equality. See Delgado & Stefancic (2023) at 27.

<sup>85</sup> See Delgado & Stefancic (2023) at 27.

<sup>86</sup> Bergerson (2003) at 53.

<sup>87</sup> Bergerson (2003) at 53.

<sup>88</sup> Bergerson (2003) at 53.

<sup>89</sup> Bergerson (2003) at 53.

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employee may be based on qualities which an employee possesses, such as relevant experience and qualifications. Taking South Africa's history into consideration, one in which restrictions were placed on the education that black people could access<sup>90</sup> and the positions they could occupy at places of employment,<sup>91</sup> appointing or promoting employees on the basis of these qualities may be questionable. The issue that arises is whether the fact that fewer employees from designated groups are employed in top management and senior management positions in South Africa than people from non-designated groups is the product only of unfair discrimination or also the uneven distribution of qualifications.<sup>92</sup>

While it is acknowledged that the meaning of "a suitably qualified person" also includes additional qualities such as prior learning<sup>93</sup> and the capacity to acquire the ability to do the job within a reasonable period,<sup>94</sup> this meaning of a "suitably qualified person" only applies within the context of affirmative action. The provisions contained in the Employment Equity Act 55 of 1998, as amended, governing affirmative action only apply to designated employers.<sup>95</sup> This means that where a black employee is not employed by a designated employer, the employee's capacity to acquire the ability to do the job within a reasonable period is not a factor which is necessarily considered by an employer.

Critical race scholars question the view that people may be ranked by merit. Delgado argues that "merit sounds like white people's affirmative action... a way of keeping their own deficiencies neatly hidden while assuring that only people like them get it".<sup>96</sup> According to Barlow "The myth of meritocracy is merely a tool to perpetuate the existing power structures that are based on white supremacy<sup>97</sup> and white privilege and therefore this myth of meritocracy marginalises [black people]."<sup>98</sup> Since the law views racial discrimination as the misguided behaviour of specific persons, it follows that the world is one where, but for this misguided behaviour of certain persons, the system of equality of opportunity would work to provide a distribution of good things in

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<sup>90</sup> Bantu Education Act 47 of 1953; Extension of University Education Act 45 of 1959.

<sup>91</sup> Bantu (Native) Building Workers Act 27 of 1951; Pruitt LR "No black names on the letterhead? Efficient discrimination and the South African legal profession" (2002) 23 *Michigan Journal of International Law* 547 at 557.

<sup>92</sup> See Crenshaw (2011) at 1330.

<sup>93</sup> Section 20(3)(b) of the EEA.

<sup>94</sup> Section 20(3)(d) of the EEA.

<sup>95</sup> Section 4(2) of the EEA.

<sup>96</sup> See Delgado (1991) at 1223.

<sup>97</sup> In critical race theory "white supremacy" refers to the 'operation of much more subtle and extensive forces that saturate the everyday mundane actions and policies that shape the world in the interests of white people' - see Gillborn (2015) at 278.

<sup>98</sup> Barlow (2016) at 1.

life without racial disparities and a world in which deprivations that did correlate with race would be deserved by those deprived on grounds of insufficient “merit”.<sup>99</sup>

The status quo in South Africa, however, paints a different picture. This is evident from the number of unfair discrimination cases that are instituted.<sup>100</sup> This is also evident from the representation of black people in top<sup>101</sup> and senior management levels<sup>102</sup> of workplaces in comparison to the representation of white people in top<sup>103</sup> and senior management levels.<sup>104</sup>

### 3.3 Social science insights, historical analysis and multidisciplinary thinking

Critical race theory is based on multidisciplinary research<sup>105</sup> that seeks to obtain “knowledge about the processes that produce race, as a social construct”.<sup>106</sup> In this approach, the law per se is seen as insufficient and unable to formulate solutions to racial discrimination on its own.<sup>107</sup> Critical race theory emphasises the need to understand racial discrimination within its economic, social and historical context.<sup>108</sup> It encourages research into how race acquires meaning through everyday practices.<sup>109</sup>

It is uncertain whether in South Africa there is an understanding that, in addition to the law, other solutions to racial discrimination should be formulated. While the Employment and Occupational Equity Green Paper indicates that, before the promulgation of the EEA, the Affirmative Action Policy Development Forum was established by the Minister of Labour who brought together organised labour, organised business, the youth, women, government officials, representatives of persons with disabilities and researchers to debate important aspects of employment equity in an informal manner,<sup>110</sup> it is unclear what the debates entailed and to what extent interdisciplinary research was conducted.

### 3.4 Intersectionality

The concept of intersectionality presupposes that black people do not only experience oppression as a result of race but also as a result of the other identities which they possess, such as, gender, religion, sexual orientation and class.<sup>111</sup> Intersectionality

<sup>99</sup> Freeman (1995) at 30.

<sup>100</sup> Department of Labour (2022) at 9.

<sup>101</sup> Department of Labour (2022) at 24.

<sup>102</sup> Department of Labour (2022) at 27.

<sup>103</sup> Department of Labour (2022) at 24.

<sup>104</sup> Department of Labour (2022) at 27.

<sup>105</sup> See Martinez (2014) at 21.

<sup>106</sup> Conradie MS “Critical race theory and the question of safety in dialogues on race” (2016) 36 (1) *Acta Theologica* 5 at 12.

<sup>107</sup> Wing AK “Is there a future for critical race theory?” (2016) 66(1) *Journal of Legal Education* 44 at 48.

<sup>108</sup> Martinez (2014) at 21.

<sup>109</sup> See Conradie at 11.

<sup>110</sup> Minister of Labour *Green Paper on Employment and Occupational Equity* (GN 804 of 1996) at 1.2.2

<sup>111</sup> Allen (2017) at 36.

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recognises the fact that perceived group membership may allow people to be subjected to bias, yet as a result of such persons also being members of other groups simultaneously, the complex identities of those subjected to the bias shapes the way in which the bias is experienced by each person.<sup>112</sup> Since critical race theory recognises that a person is defined not only skin colour, but by characteristics such as gender<sup>113</sup> it is important to illustrate the meaning of intersectionality by way of an example. For example, women and men can experience racial discrimination differently. A coloured female can experience racial discrimination differently to a coloured male. In the same way women who form part of different races can experience sexism differently.<sup>114</sup>

An understanding and awareness of intersectionality is important in identifying different types of unfair discrimination, assessing its individual impact, and understanding the remedies that can respond to the unfair discrimination.<sup>115</sup> When an employee has been unfairly discriminated against, the type of unfair discrimination and its individual impact should be taken into consideration in circumstances where a remedy, such as the payment of compensation by the employer to the employee, is awarded.<sup>116</sup> While the EEA is flawed in respect of some of the other tenets discussed, it should be acknowledged that the EEA does use the words “one or more grounds”,<sup>117</sup> therefore making provision for instances where (for example) a black disabled female can contend a different experience of gender, disability and race to a white disabled female, or a black abled female or a black disabled male.

### 3.5 Storytelling and narrative

Storytelling is a central feature of critical race theory.<sup>118</sup> Delgado argues that the use of stories by outgroups is transformative in part since it invades the consciousness of the oppressors and attacks their complacency.<sup>119</sup> Initially, the stories were aimed at restructuring legal scholarship and were “intended to illuminate, by contrast, the majoritarian story represented by the law”.<sup>120</sup> The use of stories is based on a social constructivist paradigm which, in turn, is based on the premise that reality is constructed by individuals.<sup>121</sup> It is important to know the experiences of marginalised groups. Engaging stories assist in persons understanding what life is like for others and

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<sup>112</sup> Gillborn (2015) at 278.

<sup>113</sup> Allen (2017) at 36.

<sup>114</sup> Gillborn (2015) at 278.

<sup>115</sup> Modiri (2012) at 418.

<sup>116</sup> Section 50(2) of the EEA.

<sup>117</sup> Section 6(1) of the EEA.

<sup>118</sup> Subotnik (1998) at 687.

<sup>119</sup> Delgado R “Storytelling for Oppositionists and Others: A Plea for Narrative” (1989) 87(8) *Michigan Law Review* 2411 at 2438.

<sup>120</sup> Allen (2017) at 36.

<sup>121</sup> Bergerson (2003) at 54.

invites them into an unfamiliar world.<sup>122</sup> Critical race theory draws on the lived experiences of people from marginalised groups by using different kinds of storytelling, among them biographies, narratives and family histories.<sup>123</sup> Stories by black people in South Africa not only illuminate salient issues related to racial discrimination and its consequences, but also help other people understand the experiences of black people.

### 3.6 Anti-essentialism

In terms of anti-essentialism, an identity category, such as, a “black” or “male”, is not fixed,<sup>124</sup> but relational. Critical race theory scholars criticise the attempts to define one black community.<sup>125</sup> Anti-essentialism is relevant to the EEA since this statute is premised on representativity. The EEA describes the meaning of “people from designated groups” as it does that of “black people”.<sup>126</sup> Modiri notes how “people from designated groups” is described in the EEA and states that the separation of race and gender assumes that “gender can be separated from how one is racialised, and how one in turn identifies with *racialised* difference”.<sup>127</sup> The idea that race and gender can be separated has been criticised on the ground that the EEA fails to recognise “the unstable and relational nature of identity”.<sup>128</sup> The EEA defines the meaning of “black people”: black people consist of Africans, Coloureds, Chinese people<sup>129</sup> and Indians.<sup>130</sup> This description seems to posit a singular black experience in which the particularities, differences and experiences of Africans, Coloureds, Indians and the Chinese are not considered.<sup>131</sup> The fact that the EEA fails to consider the unstable nature of identity results in the EEA being flawed in this regard.

## 4 CONCLUSION

Critical race theory is based on the premise that race is central to the discussion on racial discrimination. As far as structural determinism is concerned, the system by reason of its structure and legal thought determine the law’s content as well as who benefits from the law and whose interests are reflected and protected. As regards the principle of interest convergence, the interests of black people are advanced only when it coincides with the interests of white people.<sup>132</sup> At times people in power support equity-orientated policies that do not unfairly discriminate against others in theory, but

<sup>122</sup> Delgado R & Stefancic J *Critical Race Theory: An introduction* 2<sup>nd</sup> edition New York and London: New York University Press (2012) at 48.

<sup>123</sup> Allen (2017) at 36.

<sup>124</sup> Carbado DW & Harris CI “Intersectionality at 30: Mapping the margins of anti-essentialism, intersectionality and dominance theory” (2019) 132 *Harvard Law Review* 2193 at 2204.

<sup>125</sup> Delgado & Stefancic (1993) at 463.

<sup>126</sup> “Black people” refers to Africans, Coloureds, Indians and Chinese people.

<sup>127</sup> Modiri (2012) at 417.

<sup>128</sup> Modiri (2012) at 417.

<sup>129</sup> *Chinese Association of South Africa & others v Minister of Labour* 59251/2007 (2008) ZAGPHC at 174.

<sup>130</sup> Section 1 of the EEA.

<sup>131</sup> Carbado & Harris (2019) at 2204; see Modiri (2012) at 417.

<sup>132</sup> Delgado & Stefancic (2023) at 22.

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they do so only if they are not required to change their own status, systems, and privileges.<sup>133</sup> Moreover, critical race scholars are dissatisfied with liberalism use as a framework to eradicate racial discrimination since liberals believe in neutral principles and colour blindness.<sup>134</sup> The idea of colour blindness entails that all persons should be treated equally irrespective of their past experiences of racial discrimination, but it is only able to address extreme acts of racial discrimination; indeed, it allows racial discrimination to persist in subtle ways.

In circumstances where black employees are subjected to racial discrimination, the EEA aims to assist in providing the employees in question with relief, which in certain situations may only be obtained by way of the employee taking legal action against the employer. Where employees are successful with their legal action, the employer would be held to have unfairly discriminated against the employee. This system thus merely confirms that the employers' actions should not have taken place, an outcome which suggests that it (the system) begins with an assumption that such a ruling is made for the purpose of achieving a desired end-state in which the conditions associated with the unlawful act will not be apparent any longer.<sup>135</sup> If racial discrimination is merely confirmed to have taken place and construed as deviations from the norm, this implies that the norm "must include within it a vision of a society where there would not be such deviations".<sup>136</sup> It can thus be asked "whether this is really the case?".

Critical race theory is also based on a multidisciplinary approach that draws on other disciplines such as political science, philosophy, historical and cultural studies. In this approach the law is regarded as being unable to formulate solutions to racial discrimination on its own. This means the law alone, and, as a consequence, the EEA, is unable to eliminate racial discrimination against black employees. As far as intersectionality is concerned, it is important to assess how various characteristics such as race, sexual orientation, religion and gender produce multiple forms of unfair discrimination. The EEA recognises that claims of unfair discrimination may be instituted on one or more grounds contained in the EEA. In terms of anti-essentialism, an identity category cannot be fixed. The EEA's description of black people is flawed because it fails to recognise the unstable nature of identity. Storytelling is a central feature of critical race theory. The experiences of black people in South Africa who have been subjected to racial inequalities are relevant, because emphasis should be placed on the stories of people. Critical race theory draws on the lived experiences of people. It is

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<sup>133</sup> Milner (2008) at 334.

<sup>134</sup> Delgado & Stefancic (2023) at 26.

<sup>135</sup> Freeman (1995) at 34.

<sup>136</sup> Freeman (1995) at 34 states that "it would then be possible to test current conditions against the desired end-state to decide whether progress is being made".



doubtful whether this was considered in the drafting of the EEA's provisions.

In South Africa, the law is meant to exist to achieve transformation. However, if this were possible, the racial discrimination that black employees experience in South Africa would have been resolved by now. It may thus be concluded that when evaluating the relevant provisions contained in the EEA through the lens of critical race theory, the EEA is not the most appropriate vehicle to eliminate racial discrimination against black employees. The question thus arises whether it would be possible for any statute in South Africa to accomplish this seemingly unattainable objective.

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