

RACE DISCRIMINATION IN SOUTH AFRICA: AN OVERVIEW

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ABSTRACT

In hierdie oorsigartikel word die vernaamste verskyningsvorme van rasbepaalde diskriminasie (apartheid) bondig teen die raamwerk van die gelykheidsbeginsel bespreek. Dié beginsel (soms ook bekend as die diskriminasieverbod) is in Suid-Afrika van besondere belang gesien die historiese en huidige beklemtoning van ras as primêre ordeningskriterium in die Suid-Afrikaanse reg.

Die werkwyse wat gevolg word, is om na 'n uiteensetting van die gelykheidsbeginsel in 'n aantal internasionale verdrae, die Gereformeerde Ekumeniese Sinode se Testimony on human rights en die voorgestelde menseregteakte van die Suid-Afrikaanse Regskommissie, 'n bondige oorsig van 'n aantal verskyningsvorme van statutêre apartheid te gee. Ten slotte word gekonkludeer dat 'n behoorlike en diepgaande proses om dié wetgewing en verbandhoudende administratiewe praktyk te herroep, 'n *conditio sine qua non* vir die erkenning en afdwinging van die gelykheidsbeginsel is.

1. INTRODUCTION

In this article the phenomenon of discrimination based on race is discussed against the background of the proposed Bill of Rights of the South African Law Commission as well as the relevant provisions of a number of international and European treaties. The main provisions of the most important race-related legislation will be discussed.

The most outstanding characteristic of South African law is the predominance of race as primary ordering criterion for participation in the totality of the legal sphere. Matters as diverse as participation in the central and local political
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processes, citizenship, residential rights, access to public amenities and the various kinds of rights pertaining to immovable property are all - in principle and in actual practice - based on race. In this sense South African law can justly be described as a legal pluralistic system. Legal pluralism in its widest sense is the coexistence of various categories of legal norms within a particular territory (Olivier, 1988:60). One of the most obvious species in the South African context is race-based legal pluralism. For the purposes of this article the following forms can be distinguished:

1. Race classification
2. Old style discriminatory legislation
3. Constitutional discrimination
4. Implied discriminatory measures
5. Land control systems.

A distinction can be drawn between so-called old style apartheid (legislative measures prior to the commencement of the Republic of South Africa Constitution Act 110 of 1983) and new style post 1983-apartheid. Both these forms depend primarily on race classification in terms of the Population Registration Act 30 of 1950.

2. EQUALITY AS FUNDAMENTAL FREEDOM

It is today generally accepted that discrimination on account of age, sex, descent, origin and race is not allowed. In the aftermath of the Holocaust and in reaction to views of racial superiority prevailing before and during the Second World War equality has become one of the cornerstones of international law as well as of national legal systems. In the field of differentiation on account of race this has taken the form of a prohibition on discrimination, or, put positively, a right to non-discrimination.

In the Charter of the United Nations (1945) the purpose of the United Nations is *inter alia* defined as follows:

To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting

and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

In 1948 the Universal Declaration on Human Rights was adopted by the General Assembly of the United Nations (South Africa and eight other states abstaining). This document contains an enumeration of the basic human rights or fundamental freedoms (individual and procedural rights). Although no provision is made for the enforcement of these rights, it does have strong persuasive power. Articles 1-2 accept equality as the basic point of departure:

1. All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.
2. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, or political or other opinion, national or social origin, property, birth or other status.

The International Covenant on Economic, Social and Cultural Rights of 1966 (a United Nations treaty) was adopted in 1966. South Africa, was, however, not a signatory. In terms of its provisions member states undertake to guarantee the rights contained therein without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. South Africa has also declined to sign the International Covenant on Civil and Political Rights of 1966.

South Africa voted against the adoption of two treaties dealing with the elimination of discrimination, the International Convention on the Elimination of all Forms of Racial Discrimination (1965) and the International Convention on the Suppression and Punishment of the Crime of Apartheid (1973), has not become a signatory thereto, and has not ratified them.

In its thought-provoking Testimony on human rights the Reformed Ecumenical Synod declared in 1984 that human rights do have a Scriptural foundation. Equality is deemed to be one of the 12 manifestations of human rights that all Christians (and governments) should respect and uphold (1984:152):

10. the right to freedom of all forms of discrimination -- challenging us to advocate human rights for all, without distinctions based on race, color, ethnic origin, religion, sex, language, social status, political conviction, wealth, or property.

In the Introduction to the proposed Bill of Rights the general premise of the South African Law Commission is formulated as follows (1989:471):

The rights set forth in this Part are fundamental rights to which every person in the Republic of South Africa shall be entitled and, save as provided in this Bill, no legislation or executive or administrative act of any nature whatever shall infringe those rights.

Article 2 of the Bill of Rights contains the following provision prohibiting discrimination (1989:471):

The right to human dignity and equality before the law, which means that there shall be no discrimination on the ground of race, colour, language, sex, religion, ethnic origin, social class, birth, political or other views or any disability or other natural characteristic: Provided that such legislation or executive or administrative acts as may reasonably be necessary for the improvement, on a temporary basis, of a position in which, for historical reasons, persons or groups find themselves to be disadvantaged, shall be permissible.

It is clear that the existence of discriminatory legislation as well as of discriminatory executive and administrative practice is at variance with the recommendations of the South African Law Commission. This entails the repeal and/or invalidation of all such measures; the introduction of a Bill of Rights would not be worth one iota if the race-based system were to remain intact. The Law Commission foresees that existing legislation must either be repealed or be declared invalid in cases where the courts are required to pronounce on the reconcilability with the right to non-discrimination (1989:313):

Naturally the prerequisite for the introduction of a bill of rights is that the statute book should be purged of measures in force at present which will conflict with the essence of the bill of rights. The legislature itself

will probably be scrupulous enough in ensuring that any new laws passed do not conflict with the bill of rights.

This point of view also raises another question, namely the applicability of affirmative action as a method to redress past injustices. The arguments in favour of the introduction of enabling legislation in this regard far outweigh the arguments against this "reverse discrimination" (1989:437-440). The Law Commission, however, is of the opinion that the legislature can only be empowered (and not be forced) to act to grant certain advantages to a group previously discriminated against with a view to achieving equality (1989:440).

3. RACE CLASSIFICATION

In terms of the Population Registration Act 30 of 1950 (previously known as the Race Classification Act) all South Africans are at birth categorised as either White or Black, and if a particular person does not fall within one of these definitions, he is deemed to be a member of the Coloured group. The Minister of Home Affairs is empowered to subdivide this (amorphous) negatively defined group into various subgroups. At present he has provided for seven subgroups, of which the last category (other Coloureds) serves as catch-all for all individuals that cannot fit into one of the other groups. The Act also enables individuals to apply for reclassification: in fact nearly all applications have been for reclassification as a member of a so-called lighter group. An interesting phenomenon is the successful applications of a number of White females to be reclassified as Chinese (one of the seven subgroups of the Coloured group) in order to contract valid marriages (until 1985 marriages across the so-called colour bar were prohibited in terms of the then valid Prohibition of Mixed Marriages Act 55 of 1949) and to cohabit lawfully with their spouses (Girvin, 1988:8).

This system of race classification forms the basis of the South African legal system. Participation in the public law field as well as the acquisition of various private law rights are dependent on the individual's classification.

4. OLD STYLE DISCRIMINATORY LEGISLATION

Although it is a truism that discrimination existed in various guises (legislation, administrative practice as well as on an informal level) in South Africa before 1948, the advent of the National Party heralded the era of a detailed programme of enforced separation based on race. Davenport (1987:361-381) characterises the period 1948-1972 as one of social engineering. A large number of legislative measures were enacted with the object of achieving a racially segregated South Africa. One of the cornerstones of this policy was that Black people were deemed to be only temporary sojourners in South Africa outside the so-called homelands (previously known as Bantustans), and that they were to be repatriated to their (deemed) area of origin as soon as they were no longer economically active. In this sense South Africa outside the homelands was often described as White South Africa. Measures pertaining to the control of migration and the forced relocation of Blacks were strengthened and extended. In the period 1971-1985 17 million Blacks were arrested on charges of contravening influx control. Influx control was abolished only in 1986 by the Abolition of Influx Control Act 68 of 1986.

According to some sources nearly 3 million Blacks were (often forcibly) removed from land to which they had valid title to areas in the homelands or areas destined to eventual incorporation in such homelands. The aim of this policy was to eliminate the so-called Black spots (later euphemistically known as badly situated areas; at present South African Development Trust land) on the map of White South Africa. Due to international pressure forced removals were suspended in 1984, and in 1986 the relevant empowering legislation was repealed. However, physical removals have been substituted by the incorporation of such areas in near-by homelands.

As far as the so-called grand apartheid is concerned, the policy until 1986 was to regulate the movement of Blacks to areas outside the traditional areas and to endeavour to bring about a racially segregated South Africa, the legality of Blacks present in the remainder of South Africa being dependent on a system of permits.

Local and regional government in the traditional areas was strengthened. In 1970 the National States Citizenship Act 26 of 1970 was enacted with a view on the compulsory conferment on Blacks of citizenship of one of the homelands. In 1971 the National States Constitution Act 21 of 1971 provided for the granting

of vast legislative powers to the assemblies of the national states. The object of this Act has been and still is the eventual attainment of independence. Since 1976 four national states have opted for independence. This resulted *inter alia* in the involuntary loss of South African nationality of all such persons who were deemed to be citizens of such an independent state (even if they were third generation urban Blacks). This was only partially rectified by the introduction of the Restoration of South African Citizenship Act 73 of 1986 - only those Blacks that were resident outside the particular national state on the date of its independence may on application regain South African nationality.

As far as the other two major population groups (the Coloureds and the Indians) are concerned, residential and social segregation has been the policy since 1948. In this regard the Group Areas Act 41 of 1950 was enacted, and a consolidating measure, the Group Areas Act 36 of 1966 came into force in 1966. In terms of this legislation the racial characteristic of land as it was in 1952 has been fixed, and in principle no member of another racial group may obtain land in these controlled areas. This Act also provides for the proclamation of controlled areas as group areas for the exclusive occupation and acquisition of rights by members of a specific race group. Many Coloureds and Indians were expropriated at very low rates, and were removed to areas that were in many cases underdeveloped. On 1987-02-18 the following group areas have been proclaimed for the various population groups (Hansard 1987-02-19):

Whites: 455 (479 886 hectares)
Coloureds: 361 (97 423 hectares)
Indians: 127 (50 673 hectares).

The prohibition on Blacks living in residential areas set aside for other race groups was primarily based on the mandatory provision of the Blacks (Urban Areas) Consolidation Act of 1945 that lawful presence in so-called proclaimed areas (urban Black townships) was dependent on the acquisition of the necessary permits. This has now been substituted by the provision of the Black Communities Development Act 4 of 1984 that all the prescribed areas are deemed to be development areas set aside for exclusive occupation by Blacks.

A large number of so-called small apartheid measures still remain on the statute book. The most notorious of these measures is the Reservation of Separate Amenities Act 49 of 1953 which empowers provincial and local authorities to proclaim public amenities to be for the exclusive use and enjoyment of the members of a particular race group. Since its commencement many amenities have been declared as such; it goes without saying that the vast majority of these have been earmarked for the white population group. Amenities as divergent as beaches, lakes and parks have been segregated; the presence of members of other groups is a punishable offence, enforced by the South African Police.

5. CONSTITUTIONAL DISCRIMINATION

The Constitution of the Republic of South Africa Act 110 of 1983 is based on the system of race classification. The tricameral Parliament consists of three Houses: the Assembly (Whites), the House of Representatives (Coloureds) and the House of Delegates (Indians). Blacks are totally excluded from the Parliamentary system; their indirect representation were removed in the 1950's. A second form of racial discrimination has been created by the Constitution: the distinction between general and own affairs. Own affairs are all affairs enumerated in Schedule 1 to the Constitution. In terms of this various public amenities have been set aside for the exclusive use and enjoyment of a particular racial group. In this regard a large number of libraries and hospitals (e.g. the JG Strydom Hospital in Johannesburg) have been proclaimed as White own affairs. Different Housing Acts have also been passed by the three Houses of Parliament.

Universities are also categorised as own affairs; the University of South Africa (with nearly half of its students not classified as Whites) is a White own affair.

Section 15 of the Republic of South Africa Constitution Act 110 of 1983 provides for all matters that are not defined in Schedule 1 as own affairs, are deemed to be general affairs. Legislation pertaining to Blacks is thus a general affair. However, Blacks do not have any say in their own affairs (nor in general affairs); the White, Coloured and Indian parliamentary representatives pass legislation which affects Blacks in every fact of their daily life. Matters that have recently been attended to by Parliament, are amendments to the

consequences of marriages contracted by Blacks (the Marriage and Matrimonial Property Amendment Act 3 of 1988) and the passing of the Black Local Authorities Amendment Act 95 of 1988.

Education at the primary and secondary level is also regulated according to racial lines. Each population group has its own education department. The same applies to health matters.

This exclusion of Blacks has been one of the reasons for the incidence of unrest in South Africa since the inception of the tricameral Parliament in 1984. The reaction of the Government was to proclaim a partial state of emergency in 1984 and successive general states of emergencies from 1985 onwards (Du Plessis & Olivier, 1989). The 1989 state of emergency was proclaimed on 9 June 1989.

6. IMPLIED DISCRIMINATION

A large number of legislation that prima facie appears innocuous has the effect (and very often the object) of discriminating against people of colour. For the purposes of this article a distinction can be drawn between

1. Legislation that discriminates per se on account of socio-economic (and often politico-historical) factors. In this context the legislative measures that control the immigration and settlement of especially Black and Coloured people contain far-reaching provisions that severely limit and occasionally exclude normal procedural and private law rights; in some instances the jurisdiction of the courts has been ousted, and such people are often subjected to administrative actions without recourse to law. The most important legislative measures are the Prevention of Illegal Squatting Act 52 of 1951, the Slums Act 76 of 1979 and the Trespass Act 6 of 1959.
2. Legislation that empowers the minister concerned (or one of his officials) to promulgate regulations in which he may differentiate between various groups as defined by him. This inevitably results in unequal treatment. Two such measures are the Social Pensions Act 37 of 1973 (which allows for different pensions to be paid to Whites, Coloureds, Indians and Blacks) and the Mental Health Act 18 of 1973 (which allows that different amounts and amenities be made available to different groups).

7. LAND LAW

Perhaps the most striking (and deeply imbedded) species of race-related discrimination is on the one hand the existence of differentiating land control legislation (the form and content thereof based on the racial characteristic of the land in question) and on the other hand the unequal distribution of land.

Reference has already been made to the Group Areas Act 36 of 1966 and its effect on residential patterns. As far as Blacks are concerned, they may (apart from the urban areas) only reside and obtain rights in the so-called scheduled areas (in terms of the Black Land Act 27 of 1913) and the released areas (in terms of the Development Trust and Land Act 18 of 1936). These areas comprise 13 % of South Africa as it was in 1961 and form at present the following territorial entities:

1. the TBVC states;
2. the six national states, and
3. land controlled by the South African Development Trust (previously known as black spots or badly situated areas).

The land control measures pertaining to these areas differ substantially on the one hand from each other and on the other hand from measures regarding land occupied by members of other groups. The same applies to town planning and development measures.

In the case of urban Blacks the relevant legislation is the Black Communities Development Act 4 of 1984 in terms of which fundamental differences from measures governing land available to other groups exist as regards:

1. town planning and development measures, and
2. forms of land control. In addition to leasehold and ownership (which was introduced only in 1986) the subordinate legislation (Government Notice R1036 of 1968-06-14) provides for the following system of permits:
 - a. certificates of occupation;
 - b. site permits;
 - c. lodger's permits;
 - d. lease permits, and

e. hostel permits.

The reason why leasehold has taken a number of years to get off the ground, is that generally speaking Black residential areas have not been surveyed (the Survey Act 9 of 1929 having been specifically excluded). This also explains the low incidence of ownership. An additional important factor is the refusal to make available timeously sufficient land for the expansion of existing urban areas and the proclamation of new areas. This attitude is to a large extent due to the hold that the authorities and the White community has on land adjacent to the urban areas and to their unwillingness to transfer such land to Black local authorities.

8. CONCLUSION

The brief overview has shown clearly that in post 1983 South Africa many apartheid measures still exist. Even outside the ambit of the tricameral Parliament (with its exclusion of Blacks) and the new style apartheid of own and general affairs, many legislative measures dating from older times are still intact and are being enforced.

Although it is true that a number of discriminatory measures were repealed in 1986 and that a few other measures are not strictly enforced, it can be stated that the vast majority of the direct and indirect measures form part and parcel of the South African legal system.

When this *status quo* is measured against the principle of equality and non-discrimination as enunciated in the international treaties, the RES Testimony on human rights and the proposed South African Bill of Rights discussed above, the conclusion is inescapable that

1. the successful implementation of an all-encompassing programme to dismantle the existing legislation and the concomitant administrative practice;
2. the drafting of a new constitution that will provide for the participation of all South Africans, and

3. the implementation of measures that will ensure that disadvantages ensuing from past injustices be rectified

are a *conditio sine qua non* for the recognition and enforcement of equality in the South African context.

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