Report on racialised legislation in South Africa

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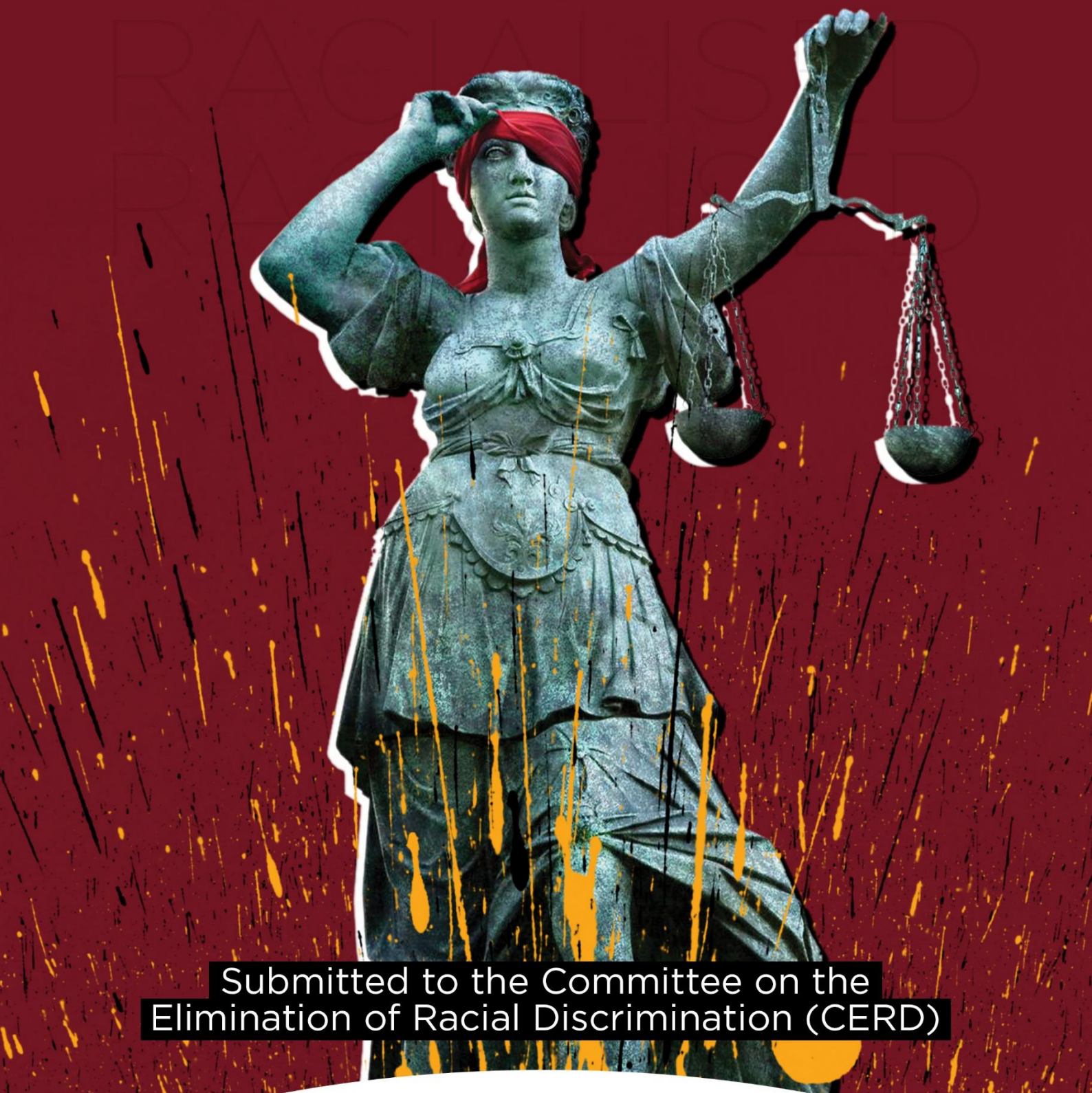

Submitted to the Committee on the Elimination of Racial Discrimination (CERD)

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Contents

Abbreviations and acronyms used in this report

AA	Affirmative action
ANC	African National Congress
B-BBEE	Broad-based Black Economic Empowerment
B-BBEEA	Broad Based Black Economic Empowerment Act 53 of 2003
CERD	Committee on the Elimination of Racial Discrimination
DEL	Department of Employment and Labour
EEA	Employment Equity Act 55 of 1998
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
OECD	Organisation for Economic Cooperation and Development
PPPFA	Preferential Procurement Policy Framework Act 5 of 2000
SAPS	South African Police Service
UDHR	Universal Declaration on Human Rights

Introduction

Racism – past and present – is wrong. This report sheds light on enduring racialised legislation in South Africa despite constitutional emphasis on principles such as non-racialism, equality and the supremacy of the South African Constitution and the rule of law, as outlined in section 1 of the Constitution. These foundational values are meant to ensure that South Africa is not governed by the preferences and prejudices of government officials, politicians and bureaucrats. However, this has since been distorted by the government, which is led by the African National Congress (ANC).

Historically, South Africa has adopted 313 pieces of racial legislation since 1910, of which at least 116 came into effect after the advent of democracy in South Africa in 1994.[1] The South African government stated in its Periodic Report to the Committee on the Elimination of Racial Discrimination (CERD) that "dismantling the edifice of apartheid involves much more than the repeal of apartheid legislation and its replacement with legislation based on equality and the rule of law."[2] The post-1994 government of South Africa has thus created approximately 37% of South Africa's racialised laws under the guise of non-racialism and equality.

This report reflects on the existing body of racialised laws and reveals that the South African government has failed to align itself within the scope of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). The report reveals the extent to which institutionalised racial preference still persists in South African law, despite the focus on non-racialism and equality in the Constitution.

Equality in South African law

Most constitutions have a blanket guarantee of equality and a complete prohibition of discrimination based on race. For example, article 10 of the Namibian Constitution reads:

> (1) All persons shall be equal before the law.
> (2) No person may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.

Section 15 of the Constitution of Botswana reads:

> … no law shall make any provision that is discriminatory either of itself or in its effect … attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour, creed or sex.

Article 251 of the Constitution of Mozambique reads:

> Access to public office shall not be obstructed on the grounds of colour, race, sex, religion, ethnic or social origin …

International treaties, for example the United Nations Universal Declaration of Human Rights (UDHR), dictate that all persons are equal before the law, and it prohibits discrimination. Article 7 of the UDHR stipulates: "All are equal before the law and are entitled without any discrimination to equal protection of the law." Some constitutions, like South Africa's (in section 9), guarantee equality by prohibiting discrimination based on race but allow discriminatory laws if they offset or alleviate the effects of past racial discrimination. Also, see section 56 of the Zimbabwean Constitution that states:

> (3) Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe …

But sub-section (6) reads:

> The State must take reasonable legislative and other measures to promote the achievement of equality and to protect or advance people or classes of people who have been disadvantaged by unfair discrimination.

Section 15 of the Indian Constitution has a similar formulation whereby it guarantees non-discrimination but does not prohibit discrimination in the advancement of "socially or educationally backward classes."

The South African Constitution prohibits discrimination on various grounds, including race. Section 9 of the constitution reads:

> […]
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). […]
> (5) Discrimination on one or more grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

It goes further to say that any discrimination based on race is automatically unfair unless the state justifies it. Laws that aim to protect and advance persons disadvantaged by past unfair discrimination are permitted. Section 9(2) of the South African Constitution reads:

> 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.

In terms of section 14 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, a law that unfairly discriminates against a group will be justifiable only if it alleviates past discrimination suffered by members of disadvantaged groups.

What is racialised legislation?

Racialised legislation means that the law incorporates the concept of race in its provisions. Some laws, such as affirmative action (AA), are expressly racial given their nature. Some laws are not overtly racial, but race plays some role, sometimes more and sometimes to a lesser extent.

This report groups South Africa's racial laws into three categories. The first group is laws that prohibit overt racial discrimination. An example is the Rental Housing Act, which in article 4(1) prohibits a person from refusing to lease rental premises based on the race of the potential occupant. Other examples include:

- section 18(1)(k) of the Employment of Educators Act 76 of 1998 (school boards are not allowed to discriminate based on race when appointing educators)
- section 8(4) of the Competition Act 89 of 1998 (dominant firms are not allowed to impose higher prices or different trading conditions for historically disadvantaged persons or firms)
- section 21 of the Petroleum Pipelines Act 60 of 2003 (the prohibition of discrimination based on race in respect of tariffs charged by licensees)
- section 2(g) of the Electronic Communications Act 36 of 2005 (the prohibition on discriminatory practices in broadcasting services)

These types of legislative provisions are uncontroversial because they affirm the prevailing and accepted notion that discrimination based on race is morally unacceptable. This is exemplified in article 7 of the United Nations UDHR and the United Kingdom's Equality Act. This report will not address the first category further than the brief remarks above. Modern societies generally accept that discriminating against a person based on race is unacceptable.

The second category is laws that are part of the state's legislative enterprise that aims to correct past discrimination through AA. These laws include the Broad-Based Black Economic Empowerment Act 53 of 2003 (the B-BBEEA) and the Employment Equity Act 55 of 1998 (the EEA). These laws are expressly racial. This second category relies on the proviso to the equality

provision because the state created these laws to undo or address the effects of past discrimination. This grouping of laws is called the "equity laws".

The third category is laws that do not have a racial purpose but incorporate race on the periphery. These laws usually serve a different purpose but contain racialised components. This category includes most of South Africa's racialised laws because most laws do not have a racial purpose, but race still features in these laws. They are the most problematic laws, because they do not rely on the exemption to justify racial discrimination. These laws usually relate to a phenomenon called *representivity*.

The rest of this report will focus on categories two and three: the equity laws and the representivity provisions, as these laws have controversial consequences.

Representivity

You will find representivity provisions in numerous laws regulating a diverse (and largely mundane) range of topics, from the architectural councils, anti-doping laws, world heritage site laws and even the law establishing the South African National Library.[3] The references to this note mentioned only 57 of these laws. It follows that the statement is justified that these types of provisions are commonplace.

These provisions involve a duty when appointing the board members and staff of statutory bodies or when granting licences; the resulting staff complement or licence holders must represent the national demography proportionally.[4] See, for example:

- section 3(3)(a) of the South African Institute for Drug-Free Sport Act 14 of 1997
- section 8(1) of the Legal Deposit Act 54 of 1997
- section 5(1)(c) of the National Arts Council Act 56 of 1997
- section 7(1)(c) of the National Film and Video Foundation Act 73 of 1997
- section 8(2)(c) of the Higher Education Act 101 of 1997
- sections 7(2) and 34(2) of the Marine Living Resources Act 18 of 1998
- section 6(3)(a) of the Local Government: Municipal Demarcation Act 27 of 1998
- section 8 of the National Prosecuting Authority Act 32 of 1998
- sections 2 and 81(10)(e) of the National Water Act 36 of 1998
- section 6(1)(b) of the Employment of Educators Act 76 of 1998
- section 14(4) of the State Information Technology Agency Act 88 of 1998
- section 6(1)(a) of the South African Library for the Blind Act 91 of 1998
- section 6(1)(a) of the National Library of South Africa Act 92 of 1998

- section 4(2) of the Housing Consumers Protection Measures Act 95 of 1998
- section 11(4)(a) of the Skills Development Act 97 of 1998
- section 6(1)(b) of the National Empowerment Fund Act 105 of 1998
- section 13A of the National Sport and Recreation Act 110 of 1998
- section 96(3)(c) of the Correctional Services Act 111 of 1998
- section 3(2) of the South African Geographical Names Council Act 118 of 1998
- section 5(3) of the Cultural Institutions Act 119 of 1998
- section 13(4)(c) of the Broadcasting Act 4 of 1999
- section 5(2) of the National Heritage Council Act 11 of 1999
- section 14(2) of the National Heritage Resources Act 25 of 1999
- section 14(4) of the World Heritage Convention Act 49 of 1999
- section 5(2)(c) of the National Student Financial Aid Scheme Act 56 of 1999
- section 5(2)(b)(i) of the Independent Communications Authority of South Africa Act 13 of 2000
- section 6(1) of the South African Council for Educators Act 31 of 2000
- section 7 of the National Health Laboratory Service Act 37 of 2000
- section 6(3) of the Construction Industry Development Board Act 38 of 2000
- section 5(2) of the Council for the Built Environment Act 43 of 2000
- section 3(1) of the Architectural Profession Act 44 of 2000
- section 3(1) of the Landscape Architectural Profession Act 45 of 2000
- section 3(1) of the Engineering Profession Act 46 of 2000
- section 3(1) of the Property Valuers Profession Act 47 of 2000
- section 3 of the Project and Construction Management Professions Act 48 of 2000
- section 3(1) of the Quantity Surveying Profession Act 49 of 2000
- section 129(2) of the Firearms Control Act 60 of 2000
- section 5(2) of the Advisory Board on Social Development Act 3 of 2001
- section 8(2) of the National Council of Library and Information Services Act 6 of 2001
- section 5(3)(c) of the South African Weather Service Act 8 of 2001
- section 9 of the South African Boxing Act 11 of 2001
- section 6(3)(c) of the General and Further Education and Training Quality Assurance Act 58 of 2001
- section 4(4)(b)(i) of the Media Development and Diversity Agency Act 14 of 2002
- section 8(6)(a) of the Land and Agricultural Development Bank Act 15 of 2002
- section 6(3)(a) of the Electronic Communications and Transactions Act 25 of 2002
- section 59(1) of the Mineral and Petroleum Resources Development Act 28 of 2002

- section 4(4) of the Planning Profession Act 36 of 2002
- section 62C(3)(a) of the Defence Act 42 of 2002
- section 3(1)(a)(iv) of the Natural Scientific Professions Act 27 of 2003
- sections 22(3)(d) and 58(2) of the Local Government: Municipal Property Rates Act 6 of 2004
- section 6 of the National Energy Regulator Act 40 of 2004
- section 11(3)(a) of the Auditing Profession Act 26 of 2005
- section 28(1)(a) of the National Credit Act 34 of 2005
- section 10(7)(a) of the Continuing Education and Training Act 16 of 2006
- section 10(2)(a) of the Measurement Units and Measurement Standards Act 18 of 2006
- section 8(2)(a) of the Accreditation for Conformity Assessment, Calibration and Good Laboratory Practice Act 19 of 2006
- section 58(3)(a) of the Co-operative Banks Act 40 of 2007
- section 6(3)(a) of the Standards Act 8 of 2008
- section 7(5) of the South African Judicial Education Institute Act 14 of 2008
- section 12(3) of the Housing Development Agency Act 23 of 2008

Naturally, this results in the majority racial group in South Africa, the black African population, being legally required to constitute the majority of the boards and staff of statutory bodies and licence holders.

At the start of this report, it established that one must accept that non-racialism and equality are declared to be the foundation of the South African legal order. It also showed that one could only justify discriminatory laws if they alleviate past discrimination. Considering the legal framework established, these laws make no effort to justify themselves in this context. These "representivity" provisions are never linked to a duty to prove that the African candidate must be preferred above any other candidate because that candidate experienced past discrimination. No, it is interpreted that African candidates must be preferred solely because they constitute the majority population in South Africa. If a law that promotes differentiation between citizens based on race does not aim to address past discrimination, that law offends the equality provision in section 9 of South Africa's Constitution.

You may wonder whether this outcome is not logical, given that the majority population in South Africa would naturally be included in most state institutions. The issue is not that it might occur naturally that the majority population group represents most employees or board members. The problem is that these laws create a legalised racial order of preference without referencing past racial discrimination based on racial demographics.

These laws are unconstitutional if they do not prove to alleviate past racial discrimination. Representivity states that when appointing a person to either a board or as an employee of the state you must prefer the African candidate more than any other, only because he is of the majority population group. It does not require of the appointer to consider whether the appointee suffered previous discrimination.

Others have pointed out that the South African courts have equated equality with representivity; namely where we have representivity, we have equality.[5] The core issue with representivity is that it only serves as a token or representation for achieving equality and does not deal with systemic issues on an individual level. Representivity might appear virtuous, but it does not look at actual instances of past discrimination and remedies those proven instances of past discrimination. No, it relies on the assumption that the appointment of a person from a specific racial group compensates for the past discrimination of other persons of the same racial group.

For representivity, whether the individual appointee experienced past racial discrimination, is irrelevant. Representivity laws assume that because a person forms part of a racial group that suffered past discrimination, the law attributes the collective experience of past discrimination of the group to that person. The logic of representivity laws is that because of that person's appointment from a marginalised group, his appointment will assist in alleviating the past discrimination suffered by the group. But the appointment criteria never consider if the person being considered for appointment suffered past prejudice or if the appointment does something to counteract past racial discrimination suffered by others.

One may think or argue that the effects of past injustices are felt in generational waves and will not be alleviated quickly, primarily because current barriers towards proper education and services still exist. That said, we must leave room to account for modern and much more pressing destabilising factors, for example high crime levels, corruption, political instability, failing service delivery and weak economic indicators due to poor governance. The assumptions we make, namely that the current rates of poverty and inequality are still largely remnants of past injustices, are weaker than in 1993. Years of economic growth that could have pulled many persons out of poverty are being stifled by current ills in our society that are not directly due to past discrimination but to contemporary poor governance, corruption and mismanagement.

Furthermore, to have representivity in the elite sectors of society, such as boards of mining companies, management of universities, boards of banks and government institutions, does not assist the poor class of any race. Representivity, which applies in the councils of auditors,

geologists, medical practitioners, legal practitioners, architects, accountants, et cetera does nothing to solve the economic crises experienced by the disadvantaged people in a society.

The question is simple: How could appointing a single person to a high-paying executive position, who has already passed other barriers of entry such as professional qualifications or experience, alleviate the disadvantage of the larger group?

We cannot disregard the existence of inequalities in various forms, such as income disparities or educational opportunities, along racial lines. These phenomena exist. What we must debate is whether representivity will remedy these disparities. The evidence that representivity does not alleviate the disadvantage of larger groups is that poverty and disparity still exist in our society – despite more than 57 laws applying it.

The case of *South African Police Service* v *Solidarity o.b.o. Barnard* is an excellent example of both the illogical effect of representivity and the devastating impact on members of minority races.[6] The facts of the case are that Mrs Barnard, a white female, was a captain in the South African Police Service (SAPS). A vacancy as a superintendent opened and she applied for the position. Capt. Barnard scored the highest marks during the selection process and the committee recommended her for the position. The National Commissioner of Police declined to appoint Mrs Barnard because she did not promote representivity in the police service. The SAPS repeatedly advertised the position; she reapplied and scored the highest, and the committee recommended her for the appointment. Again, the National Commissioner declined to appoint her as white females are overrepresented in the SAPS. The position was left vacant at the end.

The court made lengthy remarks on how Capt. Barnard belonged to a group of persons who are advantaged (white persons), but also to a group that has been historically disadvantaged (women). It also remarked on the shared history of disadvantages suffered by the African population and steps to remedy the collective harm done to a group of persons. In the end, Capt. Barnard lost the case, and the court upheld the Nasional Commissioner's decision not to appoint her.

The net effect of the judgment is that the post remained vacant, although two African candidates scored lower than Capt. Barnard and the committee also recommended them for the position. Here, the court did not ask whether the apparent racial discrimination against Capt. Barnard alleviated past racial discrimination, but whether the racial discrimination was justified under the principle of representivity. The court justified that appointing no one rather than a white person was better, because that promotes equality. How does that improve equality?

Studies show that since 1994 the wealth inequality in South Africa shifted from an inter-racial inequality (between various racial groups) to an intra-racial wealth disparity (income inequality

within racial groups). In 1996, the wealthiest 10th of the African population earned 250 times more than their lower-class counterparts.[7] The same 10th of the most affluent African population made a 6th of the national income (across all races). Adv. Thembeka Ngcukaitobi SC remarks on this issue in his contribution to Currie and De Waal's book *The Bill of Rights.* He acknowledges that as time progressed, the inequalities in our society shifted to an intra-racial inequality, where each racial group has an elite, middle and lower class.

Using representivity to compel a particular race's appointment to the board of the South African Weather Service or the South African National Library does nothing to put food on the table and a roof over the head of the poorest sectors of society. It only creates a race-based preference in society's middle and elite sectors where the footing is more or less on par. It also only benefits a few individuals appointed to these limited roles, assuming that their appointments compensate for the hardships suffered by the poor sectors of that racial group.

Therefore, representivity makes no effort to justify itself regarding alleviating actual past discrimination and disadvantage. Given that representivity will never achieve any tangible redress for the adverse effects of past racial discrimination in our society, it merely results in a legalised system of racial preference that offends the equality provisions of the South African Constitution.

Employment equity/affirmative action

Now we consider those laws that are expressly racial in scope. The EEA and the B-BBEEA are the most prominent laws in this category.

The EEA applies to any employer with more than 50 employees, the state or an employer with fewer than 50 persons but whose turnover is above a sector-specific threshold. Where representivity creates a preference for race based on their percentage of South Africa's racial demographics, employment equity applies only to black persons, women and people with disabilities.

The EEA serves a dual purpose. First, it prohibits unfair discrimination based on race. But it simultaneously provides that AA measures will not constitute unfair racial discrimination. The practical effect of this provision is to say that discrimination against the designated group is illegal, but discrimination in their favour is acceptable.[8]

The AA measures in the act state that policies must be in place to ensure equal opportunity and equitable representation of the designated groups. Such equity policies may include representation targets but must not establish a quota. The act requires the employer to adopt an

employment equity plan showing how it will reach its numerical equity targets. The employer must file that plan with the South African Department of Employment Labour (DEL).

The two controversial aspects of this law are the enforcement provisions and its impact on state procurement.

The Director-General of the DEL may consider the extent to which an employer employs designated persons following the demographic profile of South Africa. The South African parliament recently amended the act to allow the Minister of Employment and Labour to impose private-sector employment-equity targets on various industries. The DEL is also empowered to conduct reviews. After an assessment, the inspector can recommend that the employer is not meeting these equity targets. If non-compliance persists, the labour inspector can refer the recommendation to the Labour Court and impose a fine of between R1,5 million and R2,7 million or 10% of the employer's annual turnover, whichever is greater.

The Minister of Employment and Labour published the proposed sectoral equity targets in *Government Gazette 48589* of 2 May 2023. One of the shocking elements of these targets is the complete exclusion of the coloured population from most economic sectors in the Limpopo Province. This means no person designated as coloured can be appointed to manage companies in most of the sector categories in Limpopo. If companies with more than 50 employees do not meet these targets, they risk paying the penalties described above. It is also essential to recognise that the proposed mandatory equity targets entrench the representivity principle as the law will compel the demographical representation under threat of the penalty from the state.

The DEL also issues compliance certificates, specifically that the employer has met the equity targets imposed by the Minister of Employment and Labour. Without this certificate, a person cannot do business with the state in terms of section 53 of the EEA.

The other equity law in South Africa is the B-BBEEA. This Act states that its purpose is to change the racial composition of business ownership in South Africa by promoting and economically including black, coloured and Indian individuals in the South African economy. The Minister of Employment and Labour can issue codes of good practice describing various transformation initiatives and percentage ownership that the state recognises.

The regulations promulgated in terms of the B-BBEEA establish a legal framework that creates levels of broad-based black economic empowerment (B-BBEE) compliance. Private companies are assigned level designations depending on their ownership structures' racial composition and size. In simple terms, a level 1 firm would be a firm that has 100% black ownership; a level 2 firm would

have 51% black ownership, and so forth. The South African government uses these level designations in its procurement practices, as will be discussed under the next heading.

Two aspects of equity laws in South Africa are worth mentioning.

First, when looking at equity laws in other countries, they usually aim to protect minority population groups. For example, in the United States and the United Kingdom, the minority groups that receive protection under equity laws are the black population. Therefore, in those countries, equity laws prohibit discrimination against minorities and aim to promote the inclusion of minorities in the majority economic activity.[9]

Contrary to the above examples, the South African equity laws prohibit discrimination based on race but create a legal framework within which the majority population benefits from preferential treatment.[10] Put differently, it legalises discrimination against the minority and effectively excludes the minority population from public economic activity. The report explores the economic exclusion of minorities as far as it relates to public procurement below.

The minority population's economic exclusion can already be seen from the provision of the EEA that allows the imposition of fines on private companies for not having a majority black staff complement. It actively discourages the employment of minorities and excludes them from economic activity in favour of the majority population group.

It brings us to the second unique feature of South Africa's equity laws, the fact that they have penal consequences. Most equity laws first prohibit discrimination against minority population groups and second encourage or incentivise the inclusion of minority groups in economic activity. The equity laws in other countries have penal sections. However, they are usually sanctions when someone racially discriminates against another person. South Africa's equity laws are different because they impose penalties for not having the required number of people of a certain race in your company that the state prescribes that you must have. The minimum fine is R1,5 million and will financially ruin any non-compliant private company.

The claim that these laws result in the complete exclusion of the white minority population is not exaggerated because it has already manifested itself. In September 2022, Dis-Chem, a publicly-listed South African pharmaceutical retailer, circulated an internal memorandum that informed its employees that it imposed a complete moratorium on the promotion of white individuals.[11]

What is striking about this example is that it was the first instance where the penal consequences of the South African government's aggressive racial equity laws resulted in overt racial

discrimination against a minority group. The letter references that, given that it is a listed company on the Johannesburg Stock Exchange, it cannot afford to run the risk of a potential fine of 10% of its annual turnover.

Beyond the overt discrimination prohibiting the appointment or promotion of white individuals, the letter also said that Dis-Chem's management promised bonuses for meeting equity targets. Racial discrimination against a racial minority in a democratic society was encouraged by the threat of fines by the government and incentivised internally with financial rewards.

Dis-Chem's letter was met with widespread backlash. However, despite issuing a statement that it regretted the letter's tone, it reaffirmed its commitment to implementing its transformation plan.

The risk of the aggressive equity laws the South African government is implementing is entrenching a legal system of racial discrimination against a minority group. It also forces private companies to be complicit, enabling racial discrimination to comply with the law.

We must measure the effect of South Africa's equity laws against the constitutional measures described above. It is crucial to remember that racial discrimination is permitted only if it alleviates past racial discrimination. South Africa's equity laws that sanction racial discrimination against the white minority group are justified by the Constitution only if it remedies past racial discrimination.

Public procurement and race

Under the Preferential Procurement Policy Framework Act (PPPFA) 5 of 2000, the South African government can set standards for who is eligible to obtain government contracts. Based on the provisions of the B-BBEE Act, this has taken the form that the South African government requires levels 1 or 2 B-BBEE contributors to do business with the state.

In 2017 the South African government amended the regulations of the PPPFA to make it a pre-qualification criterion that a tender must be a level 1 B-BBEE contributor to be eligible for government contracts. In other words, only private companies wholly owned by black individuals can receive government contracts. A civil society organisation successfully challenged these regulations. The Constitutional Court struck the regulations, although not because the principle of a racial preference in public procurement offends the Constitution. It only ruled that the Minister of Finance, who amended the regulations, was not the correct official to do so.[12] The court did not doubt the principle that was applied by the Minister of Finance.

The current regulations allow racial preferences to be considered; the regulations limit this to only 10 points (of 100). The remaining criteria remain affordability, price, skills and the service provider's ability to render the services.

The South African government has committed to promulgating new regulations allowing state departments to vary these scoring matrices per their transformation objectives. Only time will tell to what extent the new regulations will entrench overt racial preferences in government procurement.[13]

Are affirmative action and the laws mentioned above justifiable?

The inclination of AA to refer to the past is open to criticism. Let us take non-discrimination and non-racialism as both the starting point and the goal of South Africa's societal structure. We must ask how to achieve this.

There are two arguments that the racial laws in South Africa, as described above, do not achieve the desired result.

The first argument is that despite the existence of these laws, the inequalities they seek to redress still exist. This can be because of two explanations: either the state does not implement the laws correctly or the laws are ineffective.

The first possible explanation is not convincing for three reasons. First, we have the sheer number of racialised laws that have been adopted since 1996. This alone suggests the South African government pursues its transformation and representivity agenda. Second, as recently as April 2023, the South African government has tightened its equity laws to impose the penal consequences of non-compliance dealt with above. In this regard, the Employment Equity Amendment Bill of 2020 was signed into law by President Ramaphosa on 12 April 2023. Third, the president and other politicians continuously affirm their commitment to the ANC's commitment to transformation.[14]

The second reason is more plausible than the government not implementing equity laws. The second reason for the persistence of inequality and poverty is that AA and equity provisions do not have the desired outcome. Here we must be clear about what we mean by inefficiency. Section 9(2) of the Constitution permits racial discrimination only if it alleviates the effect of past racial discrimination. Therefore, AA must address inter-racial inequalities stemming from positive discrimination against the black population. Although the Constitution guarantees equality, it does not mean that racial discrimination may alleviate poverty and inequality in a general sense.

This distinction is essential. The Constitution limits the minority's right to equality if the measures alleviate past racial discrimination. If racialised laws do not achieve this goal, the justification falls away and they are unconstitutional. The Constitution does not permit overt racial discrimination against the racial minority in South Africa for as long as society remains unequal. It could not be the case, because no society in history was perfectly equal and societies will never be perfectly equal. AA's justification is tied to addressing past racial discrimination, nothing more.

What does the evidence show? According to the Organisation for Economic Cooperation and Development (OECD),[15] South Africa's statistics show these trends. The inter-racial inequalities in South Africa declined since 1996, meaning that although there are inter-racial inequalities, they have narrowed. But the study found that intra-racial inequalities have hampered the decline of inter-racial inequalities. In other words, the difference between the poor, middle class and elite under the black population has increased. The relative income difference between the white and black populations is slow to remedy because there is little improvement in the impoverished sectors of the black community. The income difference is widening between a black person who is poor and a rich person.[16] In contrast, the income gap among the classes within the white population remains relatively constant.

We can conclude from these statistics: First, in the presence of all the equity laws described above, a small grouping of the black population is getting richer, and the gap between them and the poor of the black population is widening. Therefore, AA laws are not assisting the impoverished majority but benefit a few wealthy persons within the majority population group. Second, AA functions on the assumption that the racial preferences favouring the black population would reduce poverty and tighten income inequality both between the black and white population groups and within each group. Yet the evidence shows an increase of inequality within particular groups and the inter-racial inequalities are not closing. AA laws are neither creating wealth for poor and middle-income black households nor placing the black population on equal footing with other racial groups.

This leads us to conclude that either South Africa's racialised laws do not achieve the desired result or other factors influence the persistence of poverty in South Africa. Most likely, both of these reasons are true. Either of these conclusions must cast long shadows of doubt as to whether we can justify such a large, growing body of racialised laws in our lawbooks.

The moral argument against AA is that it does not account for individual experiences and ignores the individual's dignity. We are not holding the actual perpetrators of past racial discrimination to account. We are disadvantaging other persons of the same race. It generalises all white

individuals as past offenders and all black individuals as past victims of racial discrimination. It attributes generalised assumptions to a racial group.

Defenders of AA answer this criticism, usually with one of these three arguments:[17]

The first argument we will explore states that all members of the disadvantaged group suffered the adverse effects of discrimination, and all members of the offending group, to some extent, benefited from the past system of racial oppression. The issue with this argument is that it is morally questionable if one looks at specific examples and it is only effective at a general level. Consider a scenario where a black candidate and a white candidate come from the same middle-class educational background. If both candidates are from an affluent background, the racial preference of one over the other cannot be justified by calling on the prejudice suffered by members of the same race and ignoring the lack of disadvantage in our example.

The second counterargument is that AA does not aim to compensate individuals but groups. Therefore, the unique background of individual candidates is not relevant, but the experiences and past discrimination against the entire group. The difficulty with this argument is that it defeats AA's main claim to justification, namely addressing past wrongs. If implementing AA does not try to do away with actual past wrongs suffered by a group, it loses its rationale. For example, it cannot be justified that a child from an affluent black family be given preference over a white person from a low-income family based on the assumption that the black person's race makes them disadvantaged. You must look at the facts.

Also, the promotion of a single person who has already passed other barriers to entry to a profession does not negate the suffering of the poorer sectors of the same racial group. In these cases, AA is over-inclusive because it benefits some individuals who are not necessarily disadvantaged.

This argument gives rise to another defence of AA: it would be too impractical to create such a detailed programme to implement it individually. However, depriving an individual of a minority race group of the right to equality despite a constitutional guarantee of a society that is committed to non-racialism and equality, cannot be justified by impracticality alone.

Some have suggested not to justify AA by looking at the past, but in a forward-looking perspective. Instead, we should look towards a non-racial society where there is no over-representation or under-representation of any specific group in any sector of society. Thus, until such a society exists, AA is justified.[18] Unfortunately, the forward-looking justification for affirmative does not seem to fit the evidence that the inequality in our society is not declining.

These laws do not close the inter-racial inequalities or uplift the black majority from poverty. The evidence has already shown that inter-racial inequalities declined as apartheid declined. Therefore, it appears logical that as discrimination laws reduced, inter-racial disparity corrected itself from the 1970s to 1996, as racial discrimination became less institutionalised.[19] Thus, if general economic conditions improve, it will also improve the conditions of the most impoverished and aid the decline in the inter-racial disparity. Complete equality among all citizens will always be elusive, as absolute equality among citizens has not existed in any society in history. The other social ills South Africa suffers, for example crime, corruption, weak economic forecasting and incompetent governance, are making the poor of all races poorer, while AA is making the black elite richer.

The correlation between affirmative action in public procurement and corruption

Many have suggested that South Africa's preferential procurement framework is susceptible to corruption and nepotism, where politically connected individuals exploit the legislative framework to enrich themselves.[20]

The argument is that because the government's procurement framework allows for discretion to prefer one supplier to another based on factors other than price, sustainability and functionality (namely, can the work be done), but choose other factors such as race, it gives government bureaucrats too much discretion that can lead to corruption and nepotism.

The suspicions regarding the link between racial preferences in public procurement and corruption were confirmed in the reports of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, chaired by (the now) Chief Justice Raymond Zondo. The term *state capture* is an umbrella term adopted in South Africa to explain the shocking prevalence of corruption in the ANC government's procurement practices. State capture expresses the view that specific individuals exclusively "captured" the state's resources and appropriated those resources to themselves. In the first volume of the report, Chief Justice Zondo says the following (footnotes omitted):[21]

> Procurement has a legitimate transformation role to play in South Africa. State institutions are permitted to use procurement as a policy tool to advance the interest of various designated groups. However, evidence shows that the ideals of empowerment were grossly manipulated and abused to advance the interests of a few individuals.

Discretion is the breeding ground for corruption. Where a government official has the discretion to decide, the potential for corruption exists. The problem with South Africa's preferential

procurement legislation is that it gives corrupt bureaucrats a ground of justification for corrupt activities.

When an official prefers a more expensive company because of racial factors, the bureaucrat can justify the decision grounded on empowerment. During state capture legitimate companies had to work with "empowerment companies" to reach the appropriate level of black ownership or benefit to obtain government contracts. Those empowerment companies would then channel the funds back to the official granting the government contract.

The racial factor in public procurement is the enabler of corruption in these structures. Suppose the legitimate company was not required to factor in racial demographics in its service offering to the government. In that case, there is no potential justification for the corrupt activities. It can easily be exposed if the legitimate company outright bribes the government official. But bringing empowerment and race are prescribed elements of the process, it complicates the transaction enough that the corruption is harder to detect.

Concluding remarks

In the context of South Africa's commitment to non-racialism and equality – as enshrined in its Constitution – AfriForum seeks to alert CERD that there is growing concern about the prevalence of racial laws in South Africa. Although one might expect these laws to diminish over time, especially when they favour the majority population at the expense of the minority, the reality is that, under the post-1994 ANC-led government, the number and intensity of these laws have in fact increased.

Certain laws ensure the majority's dominance in employment and legal organisations. On the other hand, equity laws grant preferential treatment to the majority in employment and government contracts – while excluding the minority. This trend risks entrenching a racially divisive system where benefits accrue primarily to a privileged few within the majority, leaving the impoverished majority without relief from poverty. Moreover, this cycle fuels the introduction of even more extreme racial legislation.

Racial discrimination against minority groups is becoming more acceptable. This was especially exemplified by the introduction of race-based criteria for relief funds during the Covid-19 pandemic.[22] Despite claims that these measures aimed to assist previously disadvantaged groups, it overlooked the fact that businesses employ people from diverse racial backgrounds. Such arbitrary discriminatory practices cause harm to the very groups they profess to help.

Although the Constitution does allow for such laws, it is imperative to demand justifications for their existence. Presently, these laws disproportionately benefit a select few and do little to alleviate the persistent poverty in society. After 27 years of affirmative legislation, the assertion that these laws are essential in reducing poverty is increasingly questionable.

It is necessary to comprehensively assess the impact of these racialised laws to determine their effectiveness. The continued addition of such laws – despite a constitutional guarantee of equality – raises concerns about their impact on the equality rights of minority groups. It is imperative to question their effectiveness according to evidence and reality, which would currently indicate that these laws fall short of their intended goals.

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[9] In the United States of America: The Civil Rights Act of 1964 and Executive Order 11246 of President L. Johnson. Date: 24 September 1965. In the United Kingdom: The Equality Act. Of course, it is true that one cannot simply compare two jurisdictions because of the different contexts and histories from which their laws arise. The point made here is that if South Africa commits itself to non-racialism and the same standards imposed on other sovereign nations, the comparability of these systems is important to discuss here.

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