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Constructing a FUTURE based on RACE

'RACIAL REPRESENTIVITY'

THROUGH AFFIRMATIVE ACTION AND BROAD-BASED BLACK ECONOMIC EMPOWERMENT IN **SOUTH AFRICA**

Solidariteit Beweging

September 2015

Response to the Fourth to Eighth Periodic Reports of the Republic of South Africa to the Committee on the Elimination of all Forms of Racial Discrimination under article 9 of the Convention on the Elimination of Race Discrimination

Prepared by: Solidarity Trade Union's Centre for Fair Labour Practices

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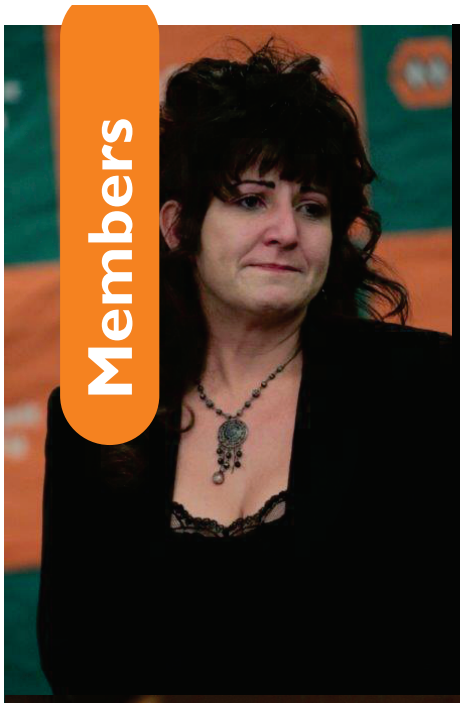

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PROCESS THAT PRECEDED THE SUBMISSION OF THE REPORT

In the run-up to the drafting of this shadow report, Solidarity pursued all avenues as part of a comprehensive process. A total of 35 different lawsuits over race quotas were brought against the South African government. Some have been decided while others are still pending. Despite judgments in favour of Solidarity, which are dealt with in detail in the report, government simply carried on with its policy of racial representation in line with the national demographics. Solidarity has already taken one case to the Constitutional Court, while another will be heard by this court on 3 November 2015. On two occasions, Solidarity submitted proposed amendments to Parliament, and on two separate occasions requested special parliamentary debates. We have, among others, requested that this particular report be debated in Parliament. In drafting the report, ordinary South Africans were asked to give their input. Inputs were also obtained from various South African opinion formers. Input was received from a wide range of people from the various race groups in South Africa. Among the opinion formers count Martin Brassey SC; Herman Mashaba of the Free Market Foundation; well-known businessman Zandile Zungu; Theuns Eloff, Chairman of the F.W. De Klerk Foundation; Temba Nolutshungu, Director of the Free Market Foundation; and Tony Leon, former diplomat and leader of the Democratic Alliance, René Govender of the trade union confederation Consawu, Danny Titus (in his personal capacity) Commissioner of the South African Human Rights Commission, and advocate Paul Hoffman SC of the Institute of Accountability in Southern Africa (IFAISA). A total of 506 000 South Africans from across the spectrum support a petition in support of the report. The shadow report has also been submitted to the Department of International Relations and Cooperation and the South African Human Rights Commission.

INTRODUCTION

After a delay of eight years, the South African government has now reported to the Committee on the Elimination of all Forms of Racial Discrimination. The elimination of race discrimination is of particular importance in this country – a country that has been plagued by race-based decision-making, and where racism and racial discrimination has been the defining features of much of its history. The 1994 elections in South Africa represented a break from the past. Through its Constitution, the country committed itself to the creation of a new nation premised on shared humanity, and the rectification of past injustice. At the same time, South Africa declined to support the perpetuation of race-based decision-making.

The Constitution requires equality before the law, bars discrimination on racial grounds and requires those who discriminate on the basis of race to prove the fairness of their conduct – in line with the fact that 'non-racialism'[1] is explicitly identified as a core value of post-apartheid South Africa. It is no surprise that non-racialism should be a core value of the South African transformation project: the legitimate pain of those who suffered from race discrimination in the past cannot be cured by imposing yet more race-based benefits, and the perpetuation of race consciousness is to the detriment of all. Significant progress has been made over the past 21 years, but formidable challenges remain, not least because South Africa struggles to unshackle itself from its race-conscious past.

[1] As opposed to neo-racialism

In this shadow report, Solidarity's Centre for Fair Labour Practices seeks to bring to the attention of the Committee facts and submissions relevant to the critical evaluation of the South African government's report. This report was prepared by Solidarity's Centre for Fair Labour Practices, and finalised after receipt of commentary invited from a variety of interest groups.

GENERAL SUBMISSIONS

Throughout its report to the Committee, the South African government proclaims its commitment to the development of a society that is non-racial and non-sexist. It says that:

> 'The elimination of all forms of racial discrimination remains high on the agenda of the Government. South Africa's history brings into particular prominence the importance of eliminating all forms of racial discrimination. The Government continues to dedicate considerable financial, organisational and human resources to the fight against racial discrimination.'

Summarizing its position, it states that the 'Government is dedicated to the development of … a non-racial society.'

By means of such pronouncements the South African Government hopes to bring itself within the legitimate scope of the Convention on the Elimination of Race Discrimination, which includes race-based discrimination among its prohibitions. Whether the South African Government appreciates it or not, however, the stance being adopted is false. In fact, the South African Government pursues policies that are overtly race-based in order to produce a society that is 'demographically representative'. In short, its policies are not non-racial; at

best they are neo-racial and at worst nakedly racialist: society is structured in silos based on race and gender, with baneful effects (*see box*).[2] The system is not concerned with remedial affirmative action, but with race.

The problem permeates every facet of the regulatory framework of South Africa. No statute governing the distribution of societal benefits or privileges is without a structure designed to give preferment to black people, and the executive branch of government uniformly grants licences and permits on the same basis. This is nothing less than institutionalised racism. In the face of entrenched rights to equality in the Constitution, these policies are pursued with impunity since the courts, whose powers have repeatedly been invoked, are either unable or unwilling to take a stand that would give proper effect to the rhetoric of non-racialism they simultaneously employ.

Of the statutes, the most profoundly racialistic is the Broad Based Black Economic Empowerment Act (BEE). It creates a structure that makes government procurement depend upon the extent to which a prospective supplier is, in racial terms, 'transformed'.[3] Points are awarded for black equity and asset ownership, black representation within the managerial and staff hierarchy, and the awarding of contracts on preferential terms to black contractors. In her comprehensive and compelling book *BEE: Helping or Hurting* (2014) chapter 10, renowned political commentator Dr Anthea Jeffery considers the woeful consequences of this policy on liberty and race relations; on integrity, efficiency, investment, and small business; and on the poor, who arguably suffer most from its effect. In the course of describing the

[2] Demographic statistics constitute a movable target, and the ideology is divorced from the reality of available skills. The attention is on demographic outcomes, rather than empowerment through education and training.
[3] For the government, 'transformed' means that the employees of every firm reflect the national racial demographics at every level.

social costs of BEE, she recites[4] an impassioned plea from a 2014 article by Jonathan Jansen, a so-called coloured person who heads up the University of the Free State:

> 'I hope that race-obsessed policies can come to an end as we continue on the critical path of nation-building in the long shadows of apartheid …. The hated race categories conjured up by apartheid [that is, White, Coloured, Indian and Black] cannot be instruments for transforming a new country …. In our obsession with demographic correctness, we privilege crude numbers over transformed minds; we re-inscribe offensive apartheid categories on post-apartheid mentalities; and we risk social cohesion by generating alienation, division and bitterness.'

The quote describes every bit as aptly the consequences of the State's policies in the workplace, where race norming and race-preferencing are pursued. In supposed pursuit of the Employment Equity Act, enacted to give effect to the constitutional imperative of substantive equality, plans are devised by government departments that universally determine matters of employment and promotion by reference to race. Applicants for employment or promotion are placed into one of the racial categories devised by the apartheid State (to repeat: White, Coloured, Indian and African) and then distributed by gender. The current distribution of staff in each of the resulting eight categories per grade is then assessed against demographic statistics, typically national, that are regarded as apposite to determine degrees of so-called under- and over-representivity. Candidates who are over-represented in the category to which they have been assigned by reason of their race and gender are treated as ineligible for appointment or promotion unless the Department's operational requirements emphatically dictate otherwise. Given the nature of the system, therefore, white males (a category no one would characterise as disadvantaged by past discrimination) receive preferment whenever this subset is under-represented within the given grade. Manifestly this is not a system of affirmative action; rather it is a system of neo-racialism (overlain by gender considerations)

[4] At 367.

that has been allowed to run rampant. Providing redress for disadvantage is completely ignored in this mathematical system.

The consequences of this policy are starkly illustrated by the undisputed facts in *Solidarity & 10 others v Department of Correctional Services*,[5] one of the many cases in which the trade union Solidarity has gone to court on behalf of members belonging to various 'race groups' to stem the tide of race norming within the public service. Applications for promotion by ten members of the prison staff, recommended on merit by a non-racial selection committee, were rejected by the head of the department on the basis that the race and gender groupings into which they fell were over-represented at the levels in question.

In an interlocutory application concerning the position of Mr Christo February, the State argued that he should have to move away from the Western Cape to some other part of the country if he wanted to pursue his career ambitions, since so-called 'Coloureds' were 'over-represented' in that province.[6]

In the ensuing main litigation, the Labour Court judge declared that the refusal to promote the nine applicants who are 'Coloured' (and so 'previously disadvantaged') was unfair on the grounds that the demographic grid utilised by the Department was based exclusively on national demographics and so took absolutely no account of the preponderance of Coloured

[5] (2014) 35 ILJ 504 (LC).

[6] The argument was reminiscent of the views of Mr Jimmy Manyi, former Director-General of Labour: 'This overconcentration of coloureds in the Western Cape is not working for them. They should spread in the rest of the country. There is a requirement of coloureds in Limpopo and all over the country. They should stop this overconcentration. Because they are in oversupply where they are. So you must look into the country and see where you can meet the supply'.

people in the region[7], the Western Cape, in which they lived and, naturally, wished to work. However, the court declined to endorse the *principle* that a system based on race norming is objectionable: Solidarity's arguments based on the unlawfulness of race and gender based quotas in SA's constitutional dispensation were brushed aside as facile.[8] That judgment has been upheld on appeal to the Labour Appeal Court, and is due to be considered by the Constitutional Court on 3 November 2015.

Modest though the court's conclusions were, they taught the Department nothing. In the face of the order, whose enforceability has been decreed despite the noting of an appeal, the Department of Correctional Services proceeds as before. Its obduracy is, no doubt, encouraged by the fact that staffing by race and gender is the norm within every branch of the public service. In the South African Police Service (SAPS), for instance, a comparable race-norming plan[9] was, by common consent, used to deny promotion to an Indian woman who was recommended by the selection panel as best suited for the post in question, Cluster Commander. Her fate was determined by the application of a demographic grid that showed that the number of posts at this senior level are so few that Indians, who comprise less than three per cent of the country's population, can *never* meet the threshold for appointment. The SAPS witness explained that the 'ideal' number of Indian females to be appointed at this particular level was zero. The evidence led by SAPS reads as follows:

> *19 positions on level 14 are multiplied by the national demographic figure for a specific race group, e.g. 19 positions x 79% Africans = 15 of 19 posts must be filled by Africans, then 15 x 70% = 11 positions to be filled by African males minus the current status of seven, meaning there is a shortage of four African males. For*

[7] Coloured individuals constitute 51% of the economically active population of the Western Cape; however, in terms of the Department's Employment Equity Plan, they may only constitute 8.8% of the workforce within the province.

[8] The case is currently on appeal.

[9] The SAPS Employment Equity Plan 2010-2014 states that:
"[d]uring promotion all the available posts will be distributed in terms of the national demographics amongst all race groups. This will ensure that no absolute barrier is placed with regard to the advancement of any group with the SAPS"

> *Indian females the calculation is 19 x 2, 5% = 0,5 positions to be filled by Indians, then 0, 5 x 30% = 0, 1 Indian females and that is rounded off to zero. Of the five available positions 0,125 could go to Indians x 30% gender allocation means 0,037 could be allocated to Indian females and that is rounded to zero'.*

The judge roundly condemned the plan as unfair[10] but the SAPS, unrepentant, continued to apply its policy of race norming. The Labour Appeal Court has upheld the decision not to appoint Ms Naidoo.

The SAPS attitude is partly a product of the uncertainties and ambiguities of the governing law. When, twenty years ago, South Africa became a democratic state, the framers of the new constitutional order were confronted with a country beset by the divisions caused by patriarchy, colonialism and apartheid. In deciding how best to resolve the deep-seated problems caused by these hegemonic systems, they rejected a solution in which race and gender would cease to play a structural role in the governance of the State and transformation would be realized through welfare and other race-neutral measures. The pursuit of formal equality, they concluded, would undermine the achievement of substantive equality, which could be attained only by the countervailing use of precisely the criteria that had served to create the discrimination in the first place.

Likewise rejected was a neo-racial model in which the groupings would be separately conceived, developed and regulated in an effort to create parity between them. Resistance to this model was scarcely surprising: it was nothing but an expression of the 'separate but equal' doctrine and so was a variant of the very policy - separate development – that the drafters were rightly determined to overturn. What they eventually chose, perhaps unsurprisingly, was the *via media* of a non-racial dispensation in which provision was made for redress

[10] *Naidoo v SAPS* (2013) 34 ILJ 2279 (LC).

through affirmative action. In the process, however, they employed language that, while apparently clear on its face, provided scope for the process of social engineering through race norming that has become endemic in the country.

Section 9 of the Constitution begins with the important principle that 'everyone is equal before the law and has the right to equal protection and benefit of the law'. Elaborating on this proposition, it stipulates that no one 'may 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'. But then, in making provision for affirmative action, it countenances measures designed to protect or advance not just individuals but also 'categories of persons disadvantaged by unfair discrimination'.[11] In a thoughtful and measured commentary on the section, Laurie Ackermann, one of the founding judges of the SA Constitutional Court, has valiantly argued that:

> '"Categories" of persons are not "groups" (endowed with legal personality) but individuals with a common denominator as far as their identities or experiences are concerned; [and the] policy is "directed towards individuals actually discriminated against as opposed to one directed towards groups as such". [Were it otherwise] "individuals that are not 'needy' will in fact receive benefits at the expense of those who have been handicapped most by the effects of discrimination and thus are in most need of 'advancement'". To this one must add that an individual, though suffering no disadvantage because of discrimination, could perversely be entitled to restitution.'[12]

[11] The provision reads:

> '(2) 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.'

[12] L Ackermann *Human Dignity* Juta 357.

Regrettably, this is not the way the legislature has construed the provision. Instead, using the reference to categories as a cloak, it has enacted a raft of legislation that sanctions the implementation and evaluation of affirmative action initiatives by reference to race and gender criteria. Of these, the most important for present purposes is the Employment Equity Act. While prohibiting unfair discrimination, it mandates 'affirmative action measures designed to ensure that suitably qualified people from designated groups [i.e. everyone except white males] have equal employment opportunities and are equitably represented in all occupational levels in the workforce of a designated employer'. Echoing the ambiguities of the Constitution, it requires employers beyond a certain size to formulate employment equity plans that, by employing numerical targets to eliminate race and gender under-representation, will create equity in the workplace. The numerical targets, it goes out of its way to emphasize, should not amount to quotas.

The Act's rejection of quotas shows an acceptance that race and gender based social engineering is constitutionally impermissible. So is its use of the modifier 'equitable' in the expression 'equitable representation' – the word, which is obviously more nuanced and absolute than 'equal', implicitly recognises that current race or gender disparities are not axiomatically the consequence of past discrimination. But the benign aspects of the statute are undermined by making race and gender parity the determinative goal. This provides just the platform that state officials, now already overwhelmingly black African, need to deal with choices on a mechanical basis. Force of numbers provides the scope for promoting kith and kin almost at will, and the majority, far from exercising the 'particular care in formulating and applying remedial measures'[13] that should guide its actions, embraces with abandon the opportunities so produced. Representation, not reparation, is the object, and quotas, not targets, provide the means. One consequence of this approach is that, although South Africa

[13] L Ackermann, above, 344.

is in an electricity crisis adversely affecting all, Eskom, the State-owned electricity supplier, remains committed to a system of appointments and promotions dependent on a strict race formula.[14] Yet the achievement of these race quotas can only result in the departure of still more 'white' skilled engineers and technicians to the detriment of all South Africans.

Efforts to invoke the protections of the courts have, to say the least, yielded very mixed results. To be sure, the courts generally demonstrate an understanding of the basic principles and commonly employ the right rhetoric. In the leading case of *Barnard v SAPS*, for instance, the judges of the Constitutional Court stressed the importance of striking appropriate balances between group and individual interests,[15] cautioned against the implementation of remedial measures that unduly invade human dignity,[16] and made it plain that 'beneficiaries of affirmative action must be equal to the task at hand' so as 'not to sacrifice efficiency and competence at the altar of remedial employment'[17] and let affirmative action measures become a 'refuge for the mediocre or incompetent'.[18] Yet, when they turn to the facts of the instant case, the courts use a range of devices for wriggling off the hook.

In the *Correctional Services* case, for instance, the Labour Court felt that a declaratory order was the sole relief that the applicants merited. Without explaining herself, the judge simply treated the grant of consequential relief as unnecessary. Accepting that the individuals had been hurt and harmed in their dignity, she saw no reason why the remedy employed as the customary salve, compensation, should be needed in this case.

Cases so crudely decided are not the norm, however. Instead the courts use judicial legerdemain of a subtler sort in upholding the dominant ethos of race-based social

[14] Even in the face of a suggestion by the Deputy President that, extraordinarily, skills will be sought without reference to race.
[15] *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23 ('*Barnard*').
[16] *Barnard* at para 32.
[17] *Barnard* para 41.
[18] *Barnard* para 41.

engineering. The decisions in the Constitutional Court in *Barnard*, carefully studied, reveal a panoply of intricately worked devices by which support for the prevailing ethos of race norming might be demonstrated: reversing the onus of proof in the face of language of the plainest sort; vesting the decision-maker with a discretion (a margin of appreciation) that preserves the discriminatory act from comprehensive judicial reconsideration; recourse to hoary legal distinctions and shibboleths in an effort to show that the case is juristically miscast; reframing the issues so that the decision-maker's case becomes winnable; and stopping up deficiencies in the record by means of suppositions and assumptions of the most tendentious sort.

Using these techniques, the court was able to conclude in *Barnard* that the applicant, though a woman and so a member of the designated group, was not the victim of discrimination when the SAPS Commissioner decided that, though she had been recognised by the selection committee as a quite outstanding candidate, the post in question was better left unfilled until a suitable black person might one day emerge. The fact that she had previously been turned down in comparable circumstances was regarded as relevant, not to show that the discrimination was egregious, but to demonstrate that nothing would prevent her from applying for promotion when the post was advertised once more.

The decisions in the Constitutional Court pale into insignificance, however, when compared with the unanimous decision of the three judges of the Labour Appeal Court (LAC) who presided over an earlier iteration of the self-same litigation. The gravamen of this judgment, whose reasoning found no favour even in the Constitutional Court, was that decisions by employers in the pursuit of employment equity are all but immune from judicial scrutiny. In examining the equities of the decision, the judges seemed to forget that, as a woman, Barnard is a member of a designated group and so deserves preference in her own right. But the *piece*

de resistance is the following statement, gratuitously injected by the LAC Judge President into the unanimous judgment:

> 'On the facts of the case before us, there is no evidence of differentiation. We are here dealing with a matter where no action by way of appointment took place, meaning that no overt differentiation occurred. The discriminatory conduct accepted by the Labour Court is not the conventional type …. of preferring someone over another(s). It is the omission, *per se*, to appoint Barnard on the basis that she is a white person. It is not necessary to decide this particular issue and I express no firm view either way.'

The Employment Equity Act on which this memorandum has so far focused is close to the heart of Solidarity since, as a trade union, it is principally concerned with labour and employment relations. In fairness to the drafters of the Act, it should be repeated that they manifestly tried to give effect to the imperatives of the equality clause in the Constitution. The same can scarcely be said of the Broad-Based Black Economic Empowerment Act, fleetingly referred to above, that now deserves a little more elaboration. Its racialist object is spelt out in no uncertain terms in its opening clauses: it is to 'establish a legislative framework for the promotion of black economic empowerment' [19] by fostering black ownership of business enterprises. Proponents of the statute naturally justify it by referring to the exclusion of blacks from the economy under apartheid. To remedy the problem, the statute seeks to effect a more equitable distribution of economic wealth by denying state tenders to suppliers whose 'scorecards' reveal too low a level of black participation in the firm.[20]

The so-called BEE Commission, which helped formulate thinking on black empowerment, defined the policy as 'an integrated and coherent socio-economic process … which aims to address past imbalances by transferring and conferring ownership, management and control

[19] BBBEE Act Long Title.
[20] T Balshaw & J Goldberg *Broad-Based Black Economic Empowerment Final Codes and Scorecard* 2008 p 16.

of South Africa's financial and economic resources to the majority of its citizens and ensure broader participation of Black people in the economy in order to achieve sustainable development and prosperity'.[21] Its true rationale is described as driving 'transformation from all levels as opposed to waiting for it to happen on a purely free-market basis, which would need more time than is politically available'.[22]

In short, the commission's concern is not with past disadvantage as such, but with the inclusion of middle class blacks in the economic framework of the country. Its beneficiaries comprise a handful of favoured members of the black bourgeoisie, not a few of whom have over the period since 1994 become fabulously wealthy. Its justification is redress, but this is a piety. Its recipients are scarcely 'disadvantaged' and a cursory examination of the policy shows that it was implemented in order to aggrandise select individuals. This being its objective, it would have been adopted and implemented whether or not its beneficiaries were the victims of past discrimination.

The re-racialisation of the post-apartheid state by these means – legislative, executive and judicial – might be justified on grounds of expediency if it were creating a more inclusive society. Tragically, the very opposite is true. Old divisions are being perpetuated and, indeed, aggravated as the struggle for resources becomes more acute in this woefully misgoverned country. The instances of racial friction, which are a daily source of concern, are deftly woven into themes in the book by Anthea Jeffery to which we have already referred. To try even to summarise them in this memorandum would be an exercise of futility and we must content ourselves by saying simply that no good can possibly come from policies so riven by division, fraught with racial hostility, and inimical to economic growth and wider prosperity.

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[21] See V Jack *Broad-Based BEE – The Complete Guide* 2007 p 21.
[22] V Jack *Broad-Based BEE – The Complete Guide* 2007 p 22.

South Africa, as a member state of the United Nations, is part of the broader international community. Recognising as much, the SA Constitution requires that, when interpreting the Bill of Rights, a court must consider international law,[23] and, when construing statutes, must heed the country's international law obligations.

The United Nations Charter ('the Charter'), which codifies the major principles of international relations, exacts a pledge from member states to promote 'respect for, and universal observance of, human rights and fundamental freedoms'.[24] It reaffirms faith in human rights, in the dignity and worth of human beings and in the equal rights of men and women.[25] The UN's Universal Declaration of Human Rights ('the Declaration') picks up the theme. Pledging to promote universal respect for and observance of human rights as 'fundamental freedoms',[26] it sets out three main categories of human rights, namely freedom, equality and dignity. These rights are regarded as 'inalienable' and must be respected without distinction of any kind.[27]

These principles have been developed in international instruments that emphasise the importance of dignity and equality and contain non-discrimination clauses. At their forefront is this Convention. [28] In clause 4, this instrument pertinently states that '[s]pecial measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination.' The clause, which manifestly countenances

[23] Constitution s 39(1)(*b*).
[24] Charter Article 55(*c*).
[25] Charter Chapter 1 Article 1(1).
[26] Declaration Preamble.
[27] A Chaskalson 'The third Bram Fischer lecture human dignity as a foundational value of our constitutional order' (2000) 16 *SAJHR* 197.
[28] Article 2(1).

affirmative action, propounds a conception of substantive equality that is sensitive to past disadvantages and systemic patterns of discrimination.

In deciding what this permits, recourse can be had to the guidelines framed by UNESCO in order to evaluate affirmative action policies.[29] As a point of departure, the guidelines state that differentiation on the basis of sex, race, colour, language, religion, political or other opinion, membership of a racial minority, or birth or other status is illegitimate. Measures based on such criteria can, however, become legitimate if their object is to redress past systemic discrimination practised over many years on the self-same grounds, provided they do not disadvantage any person arbitrarily. The proviso is important. Affirmative action programmes, in seeking to bring about equality, must not use extreme or irrelevant distinctions to achieve equality-of-outcome objectives, and must be kept under constant scrutiny to ensure that this principle is observed. [30] Not every measure taken in pursuit of affirmative action should be accepted as legitimate merely because the object of the distinction is to improve the situation of the disadvantaged group[31] - a legal rule is not necessarily legitimate because it pursues a legitimate goal. Affirmative action policies are thus permissible under international instruments only insofar as they do not contravene the principle of non-discrimination.[32]

Crucial to ICERD's conception of affirmative action, however, is the proviso to clause 4. It states that affirmative action 'measures [shall] not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the

[29] UNESCO 'Prevention of discrimination: the concept and practice of affirmative action' Final Report submitted by Mr Marc Bossuyt, special rapporteur in accordance with Sub-Commission Resolution 1998/5 17 June 2002 ('UNESCO Final Report') at paras 81 to 100 and 112.
[30] UNESCO 'Prevention of discrimination and protection of indigenous peoples and minorities' progress report submitted by Mr Marc Bossuyt, special rapporteur, in accordance with Sub-Commission Resolution 1998/5 26 June 2001 at para 91(*a*).
[31] UNESCO) 'Comprehensive examination of thematic issues relating to racial discrimination: the concept and practice of affirmative action' preliminary report submitted by Mr Marc Bossuyt, special rapporteur, in accordance with Sub-Commission Resolution 1998/5 19 June 2002 at para 62.
[32] UNESCO Final Report para 112.

objectives for which they were taken have been achieved.'[33] It is this proviso that, Solidarity contends, is being traduced by the South African State in all three of its branches. In promoting neo-racialism and black advancement irrespective of past discrimination, the State is, in the words of the proviso, pursuing policies that lead to the maintenance of separate rights for different racial groups that are likely to continue after the objectives for which they were taken have been achieved.

SUBMISSIONS BASED ON SELECTED ARTICLES

Article 1 of the ICERD recognises that measures may be taken by states 'for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals' equal enjoyment or exercise of human rights and fundamental freedoms'. The implementation of affirmative action in South Africa under the Employment Equity Act and BEE has become a quest for demographic representation that does not meet the standard set by Article 1. This appears from a comparison between non-racialism (the standard of Article 1) and neo-racialism (as pursued by the South African Government)

[33] Emphasis supplied.

NON-RACIALISM v NEO-RACIALISM

Dividing people up into races and deciding how they should consequentially be treated may look similar in form but it is very different in substance

- Neo-racialism, seeing races as separate, creates silos in which races are expected to be representative. Affirmative action within a non-racial society, in contrast, creates no silos, employs class-based considerations wherever possible, and uses race only where absolutely necessary.
- Neo-racialism institutionalises race norming and heralds a socially engineered future. By contrast, affirmative action within a non-racial society seeks to redress past discrimination and is wholly compensatory in nature.
- Inherited from apartheid, neo-racialism used race divisions as the basis for decision-making. But affirmative action within a non-racial society is wary of invoking such debased distinctions and particularly wary of distinguishing between races who were all the victims of apartheid.
- Neo-racialism is wholly insensitive to past disadvantage. Affirmative action within a non-racial society is concerned exclusively with past disadvantage and gives the currently privileged no preference.
- Neo-racialism has no sunset clause but keeps redistributing whenever disparities are evident. Affirmative action foresees a time when redress will be completed and longs for the moment when individuals will finally be judged on merit.
- Neo-racialism, typically if not axiomatically, makes representativeness a threshold precondition for advancement. Affirmative action within a non-racial society postulates a consideration of the triad of imperatives: equity, individual merit, and institutional need.
- Neo-racialism focuses on mathematical outcomes. Affirmative action focuses on training and development.
- Neo-racialism employs race quotas irrespective of the effects on service delivery. Non-racial affirmative action aims to improve service delivery to all, but particularly the poor and disadvantaged.

Solidarity requests the CERD to request further information from South Africa on its creation of a neo-racial society, where the concern is not with the creation of equal opportunities for all, but with achieving demographic representation in all spheres of society. Solidarity proposes that the CERD further interrogates the use by the South African government of race classifications employed by the South African government to reserve economic opportunities. The indirect effect of these efforts at demographic representivity on foreign nationals, and the creation of a climate for the promotion of xenophobia, are not addressed in the government report. Recent xenophobic episodes in the country illustrate why immediate attention to this problem is required.

Article 2 obliges state parties to refrain from racial discrimination; to nor sponsor, defend or support racial discrimination; to 'amend, rescind or nullify any laws creating ... racial discrimination'; and to 'discourage anything which tends to strengthen racial division'.

Statutes such as the Employment Equity Act signify the perpetuation of precisely the institutionalized race consciousness that had already proved so divisive and destructive in our country. The statute is concerned not with disadvantage, but with racial representativeness, which it uses as its organising concept.

But race-based policies are not limited to this statute: representivity requirements have been included in a myriad pieces of legislation[34] and it has been observed that, with 'representivity

[34] See Koos Malan 'Observations on representivity, democracy and homogenisation' *TSAR* 3 2010 pp 427 – 449 at para 2.2 pp 428 – 432, including footnotes 6 – 22.

being eagerly enforced and promoted with such a formidable array of legislation covering virtually all aspects of current South African society, there is in all probability no other legal principle that is so virulently and unrelentingly pursued'.[35] Ultimately, all that is pursued is an output-based affirmative action programme that is hardly concerned with upliftment yet heavily concerned with racial obsession.

Racial division is once again growing in South Africa, where race-based allocation of opportunities emphasises once again the 'difference' between the various 'races' - with those excluded or granted 'lesser' status expressing resentment, and those who benefit most expressing surprise and anger at the expression of such resentment.

CERD may request information on effective and concrete measures the South African Government has taken to eliminate discrimination and comply with its obligations under Article 2, with particular emphasis on efforts to promote true equality rather than mere representation.

Article 3 condemns racial segregation and apartheid. The system of apartheid was based on the notion that South Africa did not comprise a single nation, but was made up of four distinct racial groups – in other words, apartheid was concerned with 'racial difference'.[36] The consequence of the official classification of persons under the Population Registration Act was that, 'if it had not already been so, race became the *sine qua non* of South African

[35] Koos Malan 'Observations on representivity, democracy and homogenisation' *TSAR* 3 2010 pp 427 – 449 at para 2.3 p 432.

[36] Deborah Posel 'What's in a name? Racial categorisations under apartheid and their afterlife' in *Transformation* 47 (2001) at 52.

society'.[37] Apartheid's central theme was of a 'society in which every "race" knew and observed its proper place – economically, politically and socially':[38]

> 'Race was to be the critical and overriding faultline: the fundamental organising principle for the allocation of all resources and opportunities, the basis of all spatial demarcation, planning and development, the boundary for all social interaction, as well as the primary category in terms of which this social and moral order was described and defended.' [39]

The Interim Constitution of 1993 constituted a 'historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.'[40] Accordingly, the adoption of the Interim Constitution laid 'the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge'.[41] Ultimately, the legacy could be 'addressed on the basis that there is a need for understanding, but not for vengeance, a need for reparation but not for retaliation, a need for *Ubuntu* but not for victimisation'.[42] And so, with the Interim Constitution 'the people of South Africa opened a new Chapter in the history of our country.[43]

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[37] *Long Walk to Freedom: The Autobiography of Nelson Mandela* 1st Paperback Edition Little, Brown and Company Boston, New York and London 1994, 1995 at p 121.
[38] Deborah Posel 'What's in a name? Racial categorisations under apartheid and their afterlife' in *Transformation* 47 (2001) at 52.
[39] Deborah Posel 'What's in a name? Racial categorisations under apartheid and their afterlife' in *Transformation* 47 (2001) at 52.
[40] 'National Unity and Reconciliation' – Postamble to the Interim Constitution.
[41] 'National Unity and Reconciliation' – Postamble to the Interim Constitution.
[42] 'National Unity and Reconciliation' – Postamble to the Interim Constitution.
[43] 'National Unity and Reconciliation' – Postamble to the Interim Constitution.

On 10 May 1994, Nelson Mandela was inaugurated as the first democratically elected South African president. He spoke in ringing words:

> 'The moment to bridge the chasm that divides us has come … We enter into a covenant that we shall build a society in which all South Africans, both black and white, will be able to walk tall without any fear in their hearts, assured of their inalienable right to human dignity – a rainbow nation which is at last at peace with itself and the world at large… We must therefore act together as a united people for national recovery … Never, never and never again shall it be in this beautiful land will experience the oppression of one by another'.

Unfortunately, the creation of the non-racial population register has not prevented Government from seeking to arrange society as four distinct 'races' – as if the classification of South African citizens in race groups is a matter of 'common sense', racial designations are employed to make decisions on the allocation of opportunities – particularly in employment and the award of tenders to perform work for Government.

Article 6 calls upon states to provide effective protection and remedies. This report shows that the court system functions well, but that victims of race-based discrimination under the Employment Equity Act are not afforded redress or remedies. The Correctional Services case illustrates this particularly well.

Finally, Solidarity requests CERD to interrogate efforts by the South African Government to introduce measures to combat prejudice, and to promote understanding, tolerance and friendship. There appears to be an increasing race-consciousness in the public debate, and Government's response to this, and to recent spates of xenophobic violence, underlines that much progress is required.

The South African Government's failure to report regularly in accordance with Article 9, and its failure to raise the matters included in this shadow report, must be interrogated.

CONCLUSION

South Africa has failed to comply with its proper reporting obligations. The report is incomplete, and gaps have been left.

South Africa should be called upon to explain its concept of the differences between legitimate 'fair discrimination' and illegitimate 'unfair discrimination'. The Government must be asked to explain whether its affirmative action policy and BEE systems result in reverse discrimination against those who benefited during apartheid (or who were 'less' discriminated against under the system). Especially South Africa should come and explain the effect its current affirmative action programme has on minority groups, specifically those who also suffered under apartheid. Its particular compliance with the various CERD Articles referred to above must be addressed.

Solidarity invites the Committee to interrogate the report of the Government submitted pursuant to the Convention. If it concludes that Solidarity's objections have merit, it asks the Committee to recommend the appropriate steps to remedy the problem. Solidarity believes

that Judge Ackerman provides, with his customary eloquence and lucidity, a context for the investigation and recommendation when he states:[44]

> '… [N]o country where serious and systemic discrimination has occurred can – for administrative and other financial reasons – be expected to devise and administer a remedial system that has, in all cases, to consider the awarding of a remedy on a case-by-case, individual-by-individual basis. The logistics and costs might make this impossible. No legislation or comprehensive administrative measure can always operate with the surgeon's scalpel, given the vast number of cases involved. It is, in appropriate circumstances, compelled to use a broader sword, but *where an individualised remedy is reasonably possible it should be employed*.' The greatest challenge facing the remedial challenge of s 9(2) [i.e. the affirmative action provision] is finding the appropriate balance in this regard. In trying to determine what this is, a number of features should be borne in mind. The overarching goal is not limited to establishing, progressively, a society in which the consequences of past discrimination are eliminated, but a society in which the dignity of all is equally respected. Remedies are not justified which would turn the white 'category of persons' into an underclass.'

[44] At 358, emphasis supplied.