AfriForum

SUBMISSION ON THE **DRAFT LEGAL SECTOR CODE**

Content

Annexures

Population Registration Act 1950

Proclamation No 46 of 1959

Proclamation No 21 of 1961

Proclamation No 123 of 1967

Race Classification in South Africa 1958

Helen Suzman Parliamentary Speech 1967

South Africa Institute of Race Relations Survey 1967

Hansard Vol 103 1982 col 323

Hansard Vol 13 1989 col 1077

Population Registration Repeal Act 1991

Freedom Charter 1955

Principles For a Democratic South Africa 1991

Introduction

The *Draft Legal Sector Code* is an affront to the Constitutional values of non-racialism and equality before the law. It harkens back to the apartheid era of racial classification and job reservation.

The Code seeks to introduce race-based targets to ensure that racial groups in the legal sector match the racial composition of the economically active population "based on regional and demographic representations, being Africans, Coloured and Indians."[1] It requires the state to allocate legal work and public funds to attorneys, law firms and advocates, based on their gender and race.[2] It requires all unexempted advocates, attorneys and law firms to be measured by the Code and its scorecard.[3]

This approach ties people's fortunes to their designated race and the choices made by others in their alleged racial group. For example, according to the 2011 Census, only 2,5% of South Africans were categorised as Indians.[4] It is unconscionable to seek a cap on the number of Indian lawyers in South Africa at 2,5% of legal professionals.

In terms of section 22 of the Constitution, "[e]very citizen has the right to choose their trade, occupation or profession freely." If individuals who happen to be categorised as being members of a particular racial group flock to the legal profession, they should not be punished because others who share their complexion have made the same choice.

People are not interchangeable with one other. Justice requires compensating those particular people who were historically disadvantaged on the grounds of their race. However, it is unjust to compensate those who were not historically disadvantaged on the grounds of race, but who happen to look like people who were.[5]

A person who was denied the right to vote and the right to live and work in an area of their choosing because of their race is not the same as someone who was born after the fall of apartheid, who participates in democratic elections, receives a world class education at a private school and lives in an affluent suburb and happens to be designated as part of the same racial group.

---

1 *Draft Legal Sector Code*, clauses 6.4.3, 20.2 and 20.3
2 *Id*., clauses 6.4.4 and 6.4.5
3 *Id*., clauses 13.2 and 14.2
4 Alexander, M.C. 2018. *South Africa's population*. Available at https://southafrica-info.com/people/south-africa-population. Accessed on 9 September 2022.
5 Benatar, D. 2008. Justice, diversity and racial preference: A critique of affirmative action. *South African Law Journal* 125(2): pp. 274–306. Available at https://hdl.handle.net/10520/EJC53823. Accessed on 12 September 2022.

AfriForum opposes all race-based legislation because it requires the state to take unjust and unconstitutional action. The Code relies on a system of state-imposed racial classification in conflict with the Constitution's value of non-racialism. The apartheid government used laws and administrative processes to classify South Africans according to race. It was unjust then and it remains unjust.

Before the first non-racial national elections in South Africa and the onset of the current constitutional order, racial classifications and racial set-asides were common. Race-based legislation like the Population Registration Act 29 of 1950, the Group Areas Act 41 of 1950 and the Prohibition of Mixed Marriages Act 55 of 1949 deprived people of the opportunity to marry those whom they loved, to work in professions of their choosing, and to live where they wanted.

This submission will detail the arbitrary and unjust means that were used historically to classify South Africans according to race. Sources from the period under discussion are attached as annexures for convenience.

Racial classification during apartheid

The Population Registration Act 30 of 1950 was passed into law (annexure 1) to classify South Africans according to race in the following manner:

> "white person" means a person who in appearance obviously is, or who is generally accepted as a white person, but does not include a person who, although in appearance obviously a white person, is generally accepted as a coloured person.
>
> "coloured person" means a person who is not a white person or a native.
>
> "native" means a person who in fact is or is generally accepted as a member of any aboriginal race or tribe of Africa.

A census was then taken, and the Director of the census classified people according to race. Provision was made for people to object to their classification. The following portions of the Act set this out:

> 5. (1) Every person whose name is included in the register shall be classified by the Director [of the census] as a white person, a coloured person or a native, as the case may be, and every coloured and every native whose name is so included shall be classified by the Director according to the ethnic or other group to which he belongs.

And

11. (1) Any person who considers himself aggrieved by his classification by the Director in terms of section five and any person who has any objection to the classification of any other person in terms of the said section, may at any time object in register.

A series of proclamations were issued in 1959, 1961 and 1967 (annexure 2, annexure 3 and annexure 4, respectively) that further defined the term "coloured" person. Seven subcategories were listed, which created the following groups:

1. Cape Coloured
2. Malay
3. Griqua
4. Chinese
5. Indian
6. other Asiatic
7. other Coloured

An example of the arbitrary, irrational and indeterminable definition of the *Indian* Group is evident in the 1961 proclamation:

INDIAN GROUP

In the Indian Group shall be included —

(a) any person who in fact is or is generally accepted as a member of a race or tribe whose national home is in India or Pakistan; and

any person who in fact is or is generally accepted as a member of the race or tribe known as the Zanzibari Arabs (also known as Zanzibari or Kiwas), other than a woman between whom and a person (other than a white man) who is not, in terms of this paragraph, a member of the Indian group, there exists a marriage or who cohabits with such a person; and

(b) any woman, to whatever race, tribe or class she may belong, between who and a person who is, in terms of paragraph (a), a member of the Indian group there exists a marriage or who cohabits with such a person; and

(c) any white man between whom and a woman who is, in terms of paragraph (a), a member of the Indian group, there exists a marriage or who cohabits with such a woman.

This definition shows that a person's racial classification depended on arbitrary factors, which included the country in which they were born, whether others accepted them as being part of a racial group or whether they married or lived with someone of a particular racial group.

In 1958 the South African Institute of Race Relations produced a fact paper entitled *Race classification in South Africa – its effects on human beings* (annexure 5). The paper details the ill

effects of race classification since the inception of the Union of South African in 1910 and during the first few years of apartheid. The following extract demonstrates the perverse incentives that were created by racial classification:[6]

> Definitions of various racial groups were incorporated in a number of laws passed from 1910 onward. These definitions did not always correspond with one another; they were made for the purpose only of the legislation concerned.
>
> But the system was not rigid and immutably fixed. People could "pass" from one group into another if their physical features allowed of this. The reasons for the endeavours to "pass" are an indictment of a system which controls employment, rates of pensions, residential rights, the right of freedom of movement, and many other matters according to a man's features and the colour of his skin. Even if it meant breaking with their families, there was every inducement for Coloured people to try to "pass" as Whites. They could then send their children to better-equipped schools, could qualify for skilled jobs reserved for Whites, could visit select hotels and cinemas, could qualify for pensions at higher rates.
>
> But there was even more to be gained by Africans who could "pass" as Coloured, since they then became free of the whole system of passes, influx control, registration of service contracts, and extremely restricted residential and freehold rights.

The paper illustrates several cases where a person's race was determined in contradictory ways, which caused great hardship. The following is recounted:[7]

> It may be impossible to establish to which racial group certain individuals belong. A man in the Cape Peninsula, for example, was prosecuted under the Mixed Marriage Act on the charge that, being a Coloured man, he had married a European. In terms of this legislation the onus of proof lies on the Crown, and the case was dismissed, the judge ruling that the Crown had not proved that the man was Coloured.
>
> The name of this man's mother was removed from the voter's roll by the Electoral-Officer on the ground that she was Coloured. She took the matter to court and in this case the appeal was dismissed because she was unable to prove to the court's satisfaction that she was White.
>
> In the Appellate Division case Rex vs. Ormonde and Another, in which the accused was charged under the Mixed Marriages Act, the judge said, "The definition is so framed that there must be a great number of people who cannot be proved to be either European or Non-European for the purposes of the Act. No doubt that position was intentional, taking due note of the fact that there is a doubtful class with one foot on each side of the colour line, in respect of whom a rigid classification or a compulsory choice would be artificial and unreal and therefore likely to cause

---

6 Annexure 5, pp. 3–4.
7 *Id.*, pp. 13–14.

> grave injustice. Indeed, cases are quite conceivable in which a person may according to one branch of the definition (that of obvious appearance) fall in the one group and according to the other (that of general acceptance and repute) in the other."
>
> But the officials concerned with the implementation of the Population Registration Act are attempting rigid classifications, which are indeed often artificial and unreal, causing grave injustice.

And:[8]

> Many people are, as a result of all this, left in a continual state of anxiety. In its issue of 19 February 1958, the Cape Times told of one such case. Mr. B, it reported, fell in love with a European girl but could not marry her because his birth certificate was "not in order". The only way he could get his birth certificate changed was through the Population Registration Office in Cape Town. The officials there scrutinized him and noted the colour of his hair, eyes and skin. They sent the details to Pretoria for a decision, but nothing happened. In desperation, Mr. B went to Pretoria himself. "I was desperate and humiliated and I can't tell you the misery I and my fiancée have been through", he said. "Finally I managed to get an affidavit from an influential man to the effect that I was a European. They changed my birth certificate and now we can get married.
>
> "But I am afraid to say anything because something might happen. They told me that if any complaint was made against me they could reconsider my case and change their decision."

Once a person was classified by the state, it was possible to appeal this decision and be reclassified. However, the process was burdensome and fraught with uncertainty:[9]

> The worst feature of the Population Registration Act is that, instead of placing the onus on officials to prove that a person is not of the racial group he claims, the onus of proving that an allegation by an official is unfounded has in effect been placed on the individual concerned. It would cost the Department of the Interior nothing to institute a legal enquiry; but in some cases it may cost an individual citizen hundreds of pounds to prove his case. He may be doubly penalized for he stands to lose not only his money, but also his status in the South African hierarchy of race and it must also be remembered that, because of the lack of clarity in the definitions, it may be very difficult, if not impossible, for a man to prove to which racial group he does belong.

And:[10]

> The procedure at the Population Registration Office is highly secret. No observer is in any circumstances allowed to attend. Legal representation is permitted but as an inquiry by the Board is not analogous to a lawsuit, the ordinary rules of court do not apply. The officials may ask any questions they wish. It is pointless for the legal representative to object, since he may succeed only

8 Annexure 5, p. 24.
9 *Id.*, p. 27.
10 *Id.*, pp. 31–32.

in raising a doubt in the official's mind, or in antagonizing him -this would be highly undesirable as the official's opinion carries so much weight.

It is said that detailed questions are asked about the ancestry, friends and mode of living of the person concerned, the schools he attended and the jobs in which he has been employed. His complexion, eyes, hair, features and bone structure are examined. The official may summon any living relative, including grandparents, and question them in a similar way.

The recommendations by the local officials are sent to the Director of Census in Pretoria, who makes the decision. The person whose classification is being considered is not given a copy of the recommendations and has no opportunity of refuting any statement made. One attorney asked whether it would assist his client if he obtained a sworn affidavit of association; but was informed that the official was uncertain whether or not the Director of Census would require such a document.

It may take months or even years before the matter is settled - and meanwhile the person concerned is left in grave anxiety, and often also in acute difficulty should he wish to marry or to buy, lease or sell property.

In 1967, Helen Suzman gave a speech in parliament (annexure 6) about the then latest amendment to the Population Registration Act 30 of 1950. The following extracts are a chilling reminder of the unjust nature of race classification by a state, but they also serve as a warning against repeating those mistakes:

A person can be white under the Population Registration Act and the very same person can be classified as coloured under the Group Areas Act. Sir, there is nothing easy about classification in this country and there never will be. I want to point out just how hopeless is this new attempt in this amending bill to define the indefinable.

As I mentioned earlier the reason why people want to be classified in a notch up, and I have to say "up" in terms of our law because it is going a notch up if one is an African to be classified as Coloured and if Coloured to be classified as White, is because race is the make or break factor in South Africa on whether one is treated as a first class, second class or third class citizen. That is why people try to get themselves reclassified by one notch. People say that this is not true but I wonder how many hon. members here would not faint in their desks if they thought that there was any chance of their being reclassified as Coloured people. They would faint at the thought of it and I do not blame them because they would be suffering disabilities as a result of such a reclassification.

I say that all this will achieve is to reveal once again our sick obsession in South Africa in regard to race and colour. It is a sick obsession that we have in this country. It is the sort of thing that rules out any possibility of our being accepted as a mature or civilised country by the rest of the world. In terms of 1967 this is a sick obsession.

In 1967 the South African Institute of Race Relations produced a survey paper (annexure 7) that detailed the latest developments regarding racial classification. The following extracts demonstrate the arbitrariness of racial classification:[11]

> There have been differences of opinion between appeal boards and courts of law over both of the criteria adopted in 1962. Three examples are given relating to appearance. A woman in Cape Town was considered by the board to be obviously non-white in looks, but a judge found her to be obviously white. There was similar disagreement over the appearance of a man who was sunburned from working in the open. A Durban man won an appeal against his classification as Coloured when a judge decided that he was "a White of the Mediterranean type".
>
> If, as in cases like these, no clear-cut decision can be reached about a person's appearance, then his associations became the criterion. Appeal boards have frequently insisted that an appellant must satisfy them on every point. A man who looks White, and is readily accepted by the community as being White, for example, could be refused registration as such if many years previously he attended a Coloured school, or if a large proportion of his friends were Coloured, or if he had not rejected and forsaken all family members who were not classified as White.

And:[12]

> In a Press statement the Director of the Institute of Race Relations said that the Bill was an attempt to set up a rigid colour caste society. The principle was repugnant. "However benign, sympathetic and understanding the race classification board may be, the procedures it has to adopt submit applicants for re-classification to a humiliating experience. The affront to human dignity is enormous. This attempt to obtain clearer definition will not obviate the human tragedies that the Act has already brought about," he said.

The injustice and absurdity of allowing administrators an arbitrary discretion to dictate their own grounds for determining racial lines is illustrated by the calling of barbers as expert witnesses to testify as to the texture of a man's hair.[13]

Hansard lists the number of people who applied to be reclassified and how many were successful. The extracts from 1982 and 1989 are attached as annexure 8 and annexure 9 respectively. The 1982 extract reads as follows:

> [T]he following reclassifications took place during the period January to December 1981 —
>
> Cape Coloured to White 558

[11] Annexure 7, p. 22.
[12] *Id.*, p. 27–28.
[13] *Id.*, p. 20.

White to Cape Coloured	15
Chinese to White	8
White to Chinese	7
Indian to White	1
White to Indian	3
Malay to White	6
White to Malay	2
Cape Coloured to Chinese	2
Chinese to Cape Coloured	1
Indian to Cape Coloured	40
Cape Coloured to Indian	20
Indian to Malay	21
Malay to Indian	13
Other Asian to Cape Coloured	2
Black to Cape Coloured	79
Cape Coloured to Black	8
Black to other Asian	4
Black to Indian	2
Black to Griqua	2

In 1989, 1142 people applied to be reclassified of which 275 were unsuccessful.

In 1990, Theuns Eloff published his book *Government, justice and race classification*, in which he states the following about the dramatic effect that racial classification had on the rights of South Africans:[14]

> The status that is probably most radically affected in South Africa is the general active status of the individual – because the active status of a person has to do with his right and competence to take part in the management of affairs of state. The fact that, because of their race (classification), certain South Africans have no say in the election of members of Parliament, and are therefore also not eligible to be office bearers or representatives in the state, is a radical infringement on the active status of those subjects.

[14] Eloff, T. 1990. *Government, justice and race classification.* Stellenbosch: University of Stellenbosch, p. 30.

> It is clear that, due to its legal nature, race classification has radical consequences on the general public law status (and private law competencies) of South African subjects. This also applies to the Population Registration Act. The legal nature of race classification is therefore a unilateral administrative act, affecting the common law-based existing public law status and private law competencies fundamentally, either burdening or favouring. When someone is classified by the Director-General by virtue to his/her race, his/her status is radically affected.

In 1991, the Population Registration Act 30 of 1950 was repealed through the Population Registration Repeal Act 114 of 1991 (annexure 10).

Non-racialism

The principle of non-racialism was a potent rallying cry against racial classification by the state. It permeates the text of the *Freedom Charter* (Annexure 11, as adopted by the Congress of the People at Kliptown in 1955), which includes the following proclamations (own emphasis):

> South Africa belongs to all who live in it, black and white, …
>
> The rights of the people shall be the same, regardless of race, ...
>
> **All national groups shall have equal rights!**
>
> All national groups shall be protected by law against insults to their race and national pride;
>
> **All shall be equal before the law!**
>
> All laws which discriminate on grounds of race [...] shall be repealed.

In 1991 the ANC produced a document entitled *Constitutional principles for a democratic South Africa* (annexure 12), which proclaimed that

> [t]he African National Congress envisages a united, democratic, non-racial and non-sexist South Africa, a unitary State where a Bill of Rights guarantees fundamental rights and freedoms for all on an equal basis, where our people live in an open and tolerant society, where the organs of government are representative, competent and fair in their functioning, and where opportunities are progressively and rapidly expanded to ensure that all may live under conditions of dignity and equality.
>
> A non-racial South Africa means a South Africa in which all the artificial barriers and assumptions which kept people apart and maintained domination, are removed. In its negative sense, non-racial means the elimination of all colour bars. In positive terms it means the affirmation of equal rights for all.
>
> It presupposes a South Africa in which every individual has an equal chance, irrespective of his or her birth or colour. It recognises the worth of each individual.

Section 1(b) of the Constitution stipulates non-racialism as a founding value of South Africa, while section 1(c) stipulates the supremacy of the Constitution itself as well as the rule of law.

The Constitutional Court has pronounced on the role of founding values in a line of cases. In *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae) (No 2)* the Court held that:[15]

> These founding values have an important place in our Constitution. They inform the interpretation of the Constitution and other law, and set positive standards with which all law must comply in order to be valid.

In *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* Chaskalson CJ noted:[16]

> The values enunciated in section 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution.

Section 1(b) of the Constitution provides:

> [The Republic of South Africa is one, sovereign, democratic state founded upon the following values:]
>
> Non-racialism and non-sexism.

The other founding value of the Rule of Law, in section 1(c), itself demands a non-racialist approach to the contextualization of facts and the interpretation of legislation. This is so because the Rule of Law demands substantive equality before the law. As Albert Dicey, the jurist most associated with the idea of the rule of law wrote in his *Introduction to the study of the law of the constitution*:[17]

> [The Rule of Law] means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts; the 'rule of law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens […]

---

15 *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae)* (No 2) (CCT23/02) [2002] ZACC 21; 2003 (1) SA 495; 2002 (11) BCLR 1179 (4 October 2002), at par. 19.

16 *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* (CCT 03/04) [2004] ZACC 10; 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC) (3 March 2004) at par. 21.

17 Dicey, A.V. 1982. *Introduction to the study of the law of the constitution*. Reprint of 1915 edition. Indianapolis: Liberty/Classic, p. 120.

This was accepted by Madala J in his minority in *Van der Walt v Metcash Trading Limited*,[18] when he held that:

> The doctrine of the rule of law is a fundamental postulate of our constitutional structure. This is not only explicitly stated in section 1 of the Constitution but it permeates the entire Constitution. The rule of law has as some of its basic tenets:
>
> > the absence of arbitrary power – which encompasses the view that no person in authority enjoys wide unlimited discretionary or arbitrary powers;
> >
> > equality before the law – which means that every person, whatever his/her station in life is subject to the ordinary law and jurisdiction of the ordinary courts;
> >
> > the legal protection of certain basic human rights.

This commitment to equal application of the law regardless of the inborn characteristics of citizens is not only stated as a founding value but is expressed in terms of the right to equality before the law in terms of section 9(1) of the Constitution:

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

In *Minister of Finance and Other v Van Heerden*, Moseneke J held that:[19]

> [T]he long-term goal of our society is a non-racial, non-sexist society in which each person will be recognised and treated as a human being of equal worth and dignity. Central to this vision is the recognition that ours is a diverse society, comprised of people of different races, different language groups, different religions and both sexes. This diversity, and our equality as citizens within it, is something our Constitution celebrates and protects. In assessing therefore whether a measure will in the long-term promote equality, we must bear in mind this constitutional vision. In particular, a measure should not constitute an abuse of power or impose such substantial and undue harm on those excluded from its benefits that our long-term constitutional goal would be threatened.

In *Pretoria City Council v Walker*, Sachs J held that:[20]

> No members of a racial group should be made to feel that they do not deserve equal "concern, respect and consideration" and that the law is likely to be used against them more harshly than others belonging to other race groups.

---

[18] *Van der Walt v Metcash Trading Limited* (CCT 37/01) [2002] ZACC 4; 2002 (4) SA 317; 2002 (5) BCLR 454 (11 April 2002), at par. 65

[19] *Minister of Finance and Other v Van Heerden* (CCT 63/03) [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC); [2004] 12 BLLR 1181 (CC) (29 July 2004), at par. 44.

[20] *City Council of Pretoria v Walker* (CCT8/97) [1998] ZACC 1; 1998 (2) SA 363; 1998 (3) BCLR 257 (17 February 1998), at par. 81.

In *South African Police Service v Solidarity obo Barnard*, Cameron J, Froneman J and Majiedt AJ held that:[21]

> To achieve the magnificent breadth of the Constitution's promise of full equality and freedom from disadvantage, we must foresee a time when we can look beyond race.

Non-racialism, if it is to mean anything, must imply that government will not treat individuals of different races differently for that reason alone. The importance of this principle, given South Africa's racially discriminatory history, cannot be overemphasized. Discriminatory treatment at the hands of the state can and will only lead to the systematic denial of rights.

As its pedigree shows, non-racialism is framed as the absence of its opposite — racialism or racial prejudice. Thus, non-racialism cannot be achieved without acknowledging that its opposite, racialism, actually exists; without recognising that its effects should be countered and its power neutralised. Non-racialism implies that the Constitution is founded on the imperative that a state should not racialise society by creating discreet statutory categories of identity from which there is no escape and between which there is no natural overlap.

Conclusion

Race-based legislation like the Code requires some form of racial classification to determine who counts as "black" or "white". Any state-imposed system of race classification – creating as it does apparently objective and discreet categories of race – is deeply undesirable because it requires a return to the philosophy underlying the humiliating classificatory processes such as those that were used in terms of the Population Registration Act 30 of 1950.

A state-imposed, race-based system of preferences requires us to ask a series of repulsive questions in order to draw a clear line between those entitled to preferences and those with no such right. One question that arises, for example, is how much "blood" from a particular "race" is required for an individual to be considered a part of that "race". Is one "black" parent, grandparent or great grandparent enough to be considered "black"? Will the same test be used to determine who is "white"?

The system requires administrators and employers to engage in the same kinds of repugnant classification tests as were used in the past. Race preference does this terrible thing to our

[21] *South African Police Service v Solidarity obo Barnard* (CCT 01/14) [2014] ZACC 23; 2014 (6) SA 123 (CC); [2014] 11 BLLR 1025 (CC); 2014 (10) BCLR 1195 (CC); (2014) 35 ILJ 2981 (CC) (2 September 2014), at par. 81.

communities and to ourselves: It compels us to measure people by the colour of their skin and not the content of their character.

Racial classification is at odds with the Constitution's commitment to non-racialism. Race is impossible to define on a governmental level and by implication requires an irrational and arbitrary process of classification, often, as in the current case, without the knowledge of or input from the classification subject.

Any attempt to create a free and tolerant society is hindered by race-based policies. The state should not determine the worth of a person – be it based on the colour of their skin or the communities to whom they choose to belong.

Therefore, the Department of Trade, Industry and Competition should withdraw the Code.

Counsel for AfriForum
Mark Oppenheimer