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Source: *Journal of African Law*, Vol. 45, No. 2 (2001), pp. 196-209

Published by: Cambridge University Press on behalf of the School of Oriental and African Studies

Stable URL: <http://www.jstor.org/stable/3558955>

Accessed: 17/03/2009 11:50

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## **NON-DISCRIMINATION ON THE GROUNDS OF RACE IN SOUTH AFRICA—WITH SPECIAL REFERENCE TO THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT**

GRETE S. VOGT\*

### **INTRODUCTION**

In view of South Africa's past history, the need for legislation to prohibit unfair discrimination and to set new values was pressing. In the South African Constitution, equality is enunciated as a value and as a right.<sup>1</sup> As regards the individual's immediate claim not to be discriminated against on the ground of race, one needs to focus on the right. However, given the vast legacy that apartheid has left behind, more is needed, i.e. something that addresses the inherited inequalities and imbalances. The constitutional equality guarantee states in section 9 of the Constitution:<sup>2</sup>

- “(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (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.
- (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). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

The section enunciates a general equality guarantee (subsection 1), defines it by outlawing unfair discrimination on a number of grounds (subsections 3 and 4), expressly allows for affirmative action (subsection 2) and lays the burden of proof upon the discriminator (subsection 5, applying when the grounds listed in subsection 3 are present). Furthermore, in line with the constitutional obligation in subsection (4), on 4 February, 2000, Parliament enacted the Promotion of Equality and Prevention of Unfair Discrimination Act (henceforth, “the Equality Act”).<sup>3</sup> This legislation, which follows the constitutional provision and some

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<sup>1</sup> C. Albertyn and B. Goldblatt, “Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality”, (1998) 14(2) *South African Journal of Human Rights* 249.

<sup>2</sup> The so-called final constitution came into force on 4 February, 1997, replacing the interim constitution of 1994.

<sup>3</sup> In terms of Item 23(1) of Schedule 6 to the Constitution this legislation had to be enacted within three years of the date on which the Constitution commenced.

constitutional court case law on non-discrimination, is meant to make the prohibition of discrimination even more effective. However, bearing in mind the inequalities that apartheid has left, a closer look at the concept of non-discrimination as well as the enforcement mechanisms in the Act reveals that there is little prospect of meeting these goals for the potential protection against racial discrimination has been limited.

## THE EQUALITY PROVISIONS

### Introduction

Section 9 of the Constitution aims at the prevention of discrimination and the promotion of equality, and the Equality Act seeks to give effect to this. The drafters sought to produce a comprehensive document that would define the concept of equality and offer a means to analyse any form of discrimination. In line with this, the Equality Act codifies preceding case law of the Constitutional Court.<sup>4</sup> How successful the Equality Act is in giving effect to the constitutional clause can be examined by focusing on the definition of the concept, the "test of discrimination" as it is described, and the way in which all this is drafted.

### The definition of equality

There are two ways of defining the right to equality. There may be a positive interpretation through the concept of equality itself and there may be a negative interpretation through the concept of non-discrimination.<sup>5</sup> Both definitions can be found in the Act. Equality is defined positively thus:<sup>6</sup>

"(ix) 'equality' includes the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes *de jure* and *de facto* equality and also equality of outcomes ..."

Read with subsection (2) of the constitutional guarantee, the South African concept of equality thus endorses substantive equality, allowing for differential treatment as long as it promotes previously disadvantaged groups of people. It means the right to be treated as equals but not the right to receive equal treatment.<sup>7</sup> This provides a possibility to tackle the inequalities that apartheid has left.<sup>8</sup> Two policies aim at such a concept of equality: equality of result and equality of opportunity. With its definition of equality, the Act clearly aims at the former. However, several reasons lead one to believe that such a concept does not appear appropriate for the country's needs.

During the debates on the Constitution there was an indication that South Africa had ruled out equality of result since it had opted for a market economy.

<sup>4</sup> Relevant Constitutional Court cases on equality are: *President of the Republic of South Africa v. Hugo*, 1997 (6) BCLR 708 (CC), 1997 (4) SA 1 (CC); *Harksen v. Lane NO*, 1997 (11) BCLR 1489 (CC), 1998 (1) SA 300 (CC); *City Council of Pretoria v. Walker*, 1998 (3) BCLR 257 (CC), 1998 (2) SA 363 (CC); *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, 1999 (1) SA 6 (CC).

<sup>5</sup> Even though the two concepts are often treated as if synonymous in international law. See A. Bayefsky, "The Principle of Non-discrimination in International Law", 11 *HRJ*, 1. Really they should be distinguished in view of their differing scope.

<sup>6</sup> S. 1(ix) Equality Act (EA).

<sup>7</sup> R. Dworkin, *Taking Rights Seriously*, London, 1977, 226, 227.

<sup>8</sup> For more detail, see the substantive proposals of the African National Congress, the National Party and the Inkatha Freedom Party at the constitution-making process in: H. Klug, "Analysen und Berichte—South Africa's New Constitution: the Challenges of Diversity and Identity", (1994) 28 *Verfassung und Recht in Übersee—Law and Politics in Africa, Asia and Latin America*, 421, 424–434.

Indeed, the South African Law Commission and the African National Congress intended to include such an economic policy in the Bill of Rights, even though this is not the function of such a document.<sup>9</sup> During the debates on the Equality Bill the importance of the economy was stressed again.<sup>10</sup> The choice of a market economy necessarily has an impact on the approach to racial equality. The economy, by its very nature, is driven by competition and thus cannot allow for an outcome where all would have the same standing. What the definition should have included instead is a policy of equality of opportunity that would allow all to stand on an equal footing when they set off for some goal or benefit.<sup>11</sup>

However, according to this definition, equal opportunity means the opportunity to compete for something and to earn it through productive effort. This definition may give the impression that it does not produce more overall equality as it creates a broader and stiffer competition. But that does not show that arguments for equality of outcome are justified. Equal opportunity means equal socially imposed obstacles. The (allegedly) inegalitarian effect which is created is the consequence of the deserved fruits gained by efforts of some—having competed under equal conditions. The situation is not in conflict with substantive equality since the interpretation of equal opportunity explicitly leaves room for individual development. This individual development does not need to be justified separately.<sup>12</sup> And it would be counter-productive to exclude this individuality by aiming at equality of outcome.

The majority of philosophers agree that there is an obligation—although to varying degrees—on the responsibility of the state or society to create such a situation.<sup>13</sup> And such understanding of the concept of equality has been developed at the international level as well. The UN Convention on the Elimination of All Forms of Discrimination acknowledges that there is a positive aspect to the principle of equality and makes special practical measures mandatory on the parties.<sup>14</sup> This positive aspect aims at equality of opportunities and not at outcome.<sup>15</sup> On the other hand, the negative definition of equality employs the concept of non-discrimination. Accordingly, racial equality means the prohibition

<sup>9</sup> J. Dugard, "Human Rights and the Rule of Law in Post-Apartheid South Africa" in R.A. Licht and B. de Villiers (eds.), *South Africa's Crisis of Constitutional Democracy—Can the U.S. Constitution Help?* Johannesburg, 1994, 130, 131.

<sup>10</sup> See for instance the submission of Business South Africa (BSA) on the Promotion of Equality and Prevention of Unfair Discrimination Bill [B57-99].

<sup>11</sup> A.H. Goldman, "The Justification of Equal Opportunity" in E.F. Paul *et al.*, *Equal Opportunity*, Oxford, 1987, 88.

<sup>12</sup> Goldman, above, uses the (indirect) justification of the possibility of desert which has to be achieved through fair procedures as a further justification besides equality. However, the inclusion of fair procedures as an additional condition is not really necessary because equal socially imposed obstacles already covers that point. If the procedures were not fair, then the socially imposed obstacles would not be equal.

<sup>13</sup> Disapproving of such an assumption, see R. Nozick, *Anarchy, State, and Utopia*, New York, 1974, ch. 3: From his standpoint of natural justice he believes coercive governmental mechanisms aiming to achieve egalitarian goals are morally impermissible; by coercing people into contributing to the welfare of others, the government violates the rights of those who are coerced. See also J. Rawls, *A Theory of Justice*, London, 1994, ch. 2.

<sup>14</sup> See, in particular, art. 2(2).

<sup>15</sup> M.S. McDougal *et al.*, *Human Rights and the World Public Order*, London, 1980, 458–459: The commitment is broader than one to mere non-discrimination. Equality is defined in positive terms as opportunities to discover, develop and exercise full capabilities for constructive participation in all value processes.

of unfair discrimination on the ground of race.<sup>16</sup> The Equality Act prohibits discrimination generally in section 6:

“Neither the State nor any person may unfairly discriminate against any person.”

Section 7 prohibits discrimination on the grounds of race specifically:

“Subject to section 6, no person may unfairly discriminate against any person on the ground of race, including –

- (a) the dissemination of any propaganda or idea, which propounds the racial superiority or inferiority of any person, including incitement to, or participation in, any form of racial violence;
- (b) the engagement in any activity which is intended to promote, or has the effect of promoting, exclusivity, based on race;
- (c) the exclusion of persons of a particular race group under any rule or practice that appears to be legitimate but which is actually aimed at maintaining exclusive control by a particular race group;
- (d) the provision or continued provision of inferior services to any racial group, compared to those of another racial group;
- (e) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons.”

In line with this, discrimination means:<sup>17</sup>

“... any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly –

- (a) imposes burdens, obligations or disadvantage on; or
- (b) withholds benefits, opportunities or advantages from any person on one or more of the prohibited grounds.”

Even if the definition of discrimination is comparable to the definition in international law, the content of the right still differs greatly from the provisions in (European and) international law, for it gives a wider scope to the right and imposes a different onus of proof. The definition may seem comparable to the one adopted in the UN Convention on the Elimination of All Forms of Racial Discrimination which defines discrimination as “... any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms ...”.<sup>18</sup> However, apart from the similar definition, the South African guarantee goes further in that it applies horizontally.<sup>19</sup> Furthermore, the South African definition includes the prohibition of indirect discrimination just like subsection (3) of the constitutional guarantee.

### **The two-step test adopted**

In determining whether unfair discrimination on this ground has taken place the courts need to apply a two-stage enquiry. Firstly, they need to examine whether discrimination on the ground of race has taken place, and then, secondly,

<sup>16</sup> Ss. 6 and 7 EA.

<sup>17</sup> S. 1(viii) EA.

<sup>18</sup> International Convention on the Elimination of All Forms of Racial Discrimination, art. 1(1) (the International Convention).

<sup>19</sup> Article 2 para. 1(d) and article 5(e) and (f) of the International Convention clearly refer to vertical application.

whether such treatment has been unfair.<sup>20</sup> The first step of the examination is guided by the definition of discrimination in the Act.<sup>21</sup> Whereas the first step will usually be straightforward it is the determination of “unfairness” in the second step, where the problems arise.

Discrimination on the ground of race is, by section 9(5) of the Constitution deemed to be unfair unless the respondent rebuts this assumption.<sup>22</sup> How this needs to be done is stated in section 14:

- “(1) It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons.
- (2) In determining whether the respondent has proved that the discrimination is fair, the following must be taken into account:
  - (a) The context;
  - (b) The factors referred to in subsection (3);
  - (c) Whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned;
- (3) The factors referred to in subsection 2(b) include the following:
  - (a) Whether the discrimination impairs or is likely to impair human dignity;
  - (b) The impact or likely impact of the discrimination on the complainant;
  - (c) The position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;
  - (d) The nature and extent of the discrimination;
  - (e) Whether the discrimination is systemic in nature;
  - (f) Whether the discrimination has a legitimate purpose;
  - (g) Whether and to what extent the discrimination achieves its purpose;
  - (h) Whether there are less restrictive and less disadvantageous means to achieve the purpose;
  - (i) Whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to –
    - (i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or
    - (ii) accommodate diversity.”

The examination on this second step is inevitably wide-ranging. It is concerned with the impact on the complainant as well as factors that touch on reasonableness and justifiability. In prescribing such a procedure, the Act departs from the initial course set by the Constitution of curtailing the potential scope of the equality right. The following will analyse this problem more closely.

The Constitutional Court has also developed a two-step test to determine unfair discrimination within section 9. It first examines whether discrimination has taken place and then whether such discrimination is unfair. Since discrimination on the ground of race is a specified ground in the Constitution as well, the presumption of unfairness has to be rebutted by the respondent

<sup>20</sup> This is the effect of s. 13(2)(a) EA.

<sup>21</sup> S. 1(1)(viii) EA.

<sup>22</sup> According to the constitutional guarantee, discrimination on the grounds of race is deemed to be unfair since race is a specified ground; see s. 9(5) read with subsection (3) of the Constitution; The Equality Act aims at the same regulation, however not in such straightforward terms. Section 13 states:

“(2) If the discrimination did take place –

(a) on a ground in paragraph (a) of the definition of ‘prohibited grounds’, then it is unfair, unless the respondent proves that the discrimination is fair;”

Section 1(1)(xxii)(a) then lists race as the first specified ground.

within the second step. However, according to the Constitution, the non-discrimination guarantee in section 9 is subject to limitations. Section 36 states:

- “(1) The rights in the Bill of Rights may be limited only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
- (a) the nature of the right;
  - (b) the importance of the purpose of the limitation;
  - (c) the nature and extent of the limitation;
  - (d) the relation between the limitation and the purpose; and
  - (e) less restrictive means to achieve the purpose.”

Thus, if in a racial discrimination case that is examined within the constitutional equality guarantee it is found that unfair discrimination has taken place, the further question arises as to whether there is in these circumstances any justification for it under section 36. There should be a strict distinction between the analysis of unfairness and the examination of a justification within a limitation of the right. The justification of an infringement should take place in a separate, third step. Any other approach would make section 36 redundant for, if reasonableness and justifiability were meant to be tested as an element of unfairness, there would be no need for the separate provision in section 36. Nevertheless, already in the first equality cases the Constitutional Court has struggled with this distinction. It considered the intention of an act, public reaction and administrative inconvenience as relevant in the analysis of unfairness<sup>23</sup> even though these factors would seem to relate to the question whether or not there is a positive reason for limiting the equality right.

As in South Africa, the Canadian Charter guarantees non-discrimination<sup>24</sup> and stipulates limits to the right in terms of its justification. Section 1 states:

“The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

The Canadian Supreme Court has recognized the importance of keeping the two sections analytically distinct.<sup>25</sup>

By combining reasonableness and justifiability within the rebuttal of unfairness, the Equality Act erases the distinction that the Constitution has made. That has several potentially devastating effects. The reversal of the burden of proof provision, which is the same as the constitutional clause, is weakened considerably by such a broad understanding of “unfairness”. The effect is that the defendant can discharge the presumption of unfairness not only by showing that the discrimination was “fair” in a narrow sense, but simply by testifying that there was a legitimate purpose and that there was no less-restrictive means to reach

<sup>23</sup> *President of the Republic of South Africa v. Hugo*, 1997 (4) SA (CC) 1, 1997 (6) BCLR 708, at paras. 40–48, 46, 106.

<sup>24</sup> S. 15(1) of the Charter of Rights and Freedoms states:

“Every individual is equal before and under the law and has the right to equal protection and benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental and physical ability.”

<sup>25</sup> *Re Ontario Human Rights Commission et al. and Simpson-Sears Ltd* (1986) 23 DLR (4th) 321 (SCC), at 329; *Law Society of British Columbia v. Andrews* (1989) 56 DLR (4th) 1 at 21.

that purpose. In consequence the initial force of the guarantee of racial equality becomes practically worthless.<sup>26</sup>

Furthermore, jurisprudentially there is a big difference between finding that an act does not infringe the equality guarantee, and finding that it does infringe the guarantee but that the limitation which it contains is justified. While the court order in both instances may be the same, the two legal routes have differing impacts on the scope of the equality right. A finding that an act does not infringe the racial equality guarantee reduces the scope of the right so that it excludes the class of cases exemplified by that particular act. However, a finding that the act infringes the racial equality guarantee but that the infringement is justified, means that the right usually prohibits such acts but that in the particular case the guarantee is set aside for the higher value of the common good. The latter route leaves more room for corrective policies, as well as measures for situations which may not be foreseeable at the moment.

The Equality Act has therefore, through its approach to testing unfair discrimination, limited the scope of the equality right. The situation might have been slightly different if the Act applied only to relations between private persons because the Constitution allows a limitation only in terms of a law of general application. Indeed section 7 of the Act does not mention the State as a violator but rather discriminatory acts by one person against another person although the State is mentioned in the general discrimination prohibition in section 6.

### **A drafting disaster**

To enable victims of racial discrimination to protect themselves against the violation of their rights, they need to be able to understand them. On the other hand, the content of the legislation must not be over-simplistic as that would lead to extensive legal challenges to clarify the legal situation. The Act as it stands, however, is neither simple nor clear. Once again, the under-educated majority, especially in the rural areas, is disadvantaged.

The provisions of the Act also appear repetitive. This conclusion can be drawn regarding the prohibition of race discrimination as well as the determination of its unfairness. Section 6 proclaims the general prohibition of unfair discrimination stating that neither the State nor any person may unfairly discriminate against any person.<sup>27</sup> Section 7 then prohibits discrimination on the grounds of race specifically listing some examples.<sup>28</sup> Additionally, the definition of “prohibited grounds” lists race as the first specified ground.<sup>29</sup> However, the drafters have torn up the single prohibition in section 9(3) of the Constitution and created three separate provisions which appear at three different locations.

There is a similar situation regarding the determination of unfairness. What the Constitution deals with in one section<sup>30</sup> appears in several separate sections

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<sup>26</sup> This is what distinguishes the Equality Act from the Employment Equity Act as the latter does not feature such a reversed onus of proof. Indeed, the approach adopted there—examining reasonableness and justifiability within unfairness—also limits the scope of equality. However, the Employment Equity Act does not contradict itself in the way the Equality Act does, by first granting wider protection (by reversing the burden of proof) and then taking such wider protection away in the same test.

<sup>27</sup> S. 6 EA.

<sup>28</sup> S. 7 EA.

<sup>29</sup> S. 1(1)(xxii)(a) EA.

<sup>30</sup> S. 9(3) and (5) Constitution of South Africa.



of the Act. Thus section 7 prohibits unfair discrimination on the grounds of race whilst section 13(2)(a) read together with section 1(1)(xxii)(a) states that if discrimination takes place on the specified ground of race it is presumed to be unfair. According to section 13(2)(a), in the same manner as the constitutional provision, the respondent has to rebut the presumption. In line with this, section 14 then lists what has to be taken into account when determining unfairness.<sup>31</sup> This section was presumably intended to make it easier to reach decisions as to whether the burden of proof had been discharged by codifying the factors. However, it appears more confusing than the test as previously applied by the Constitutional Court.

Section 14(2) determines that the context, and the factors listed in subsection (3)(a), as well as objectively determinable criteria intrinsic to the activity need to be taken into account. It may be commented, firstly, that listing the factors referred to in section 14(2)(b) separately in section 14(3) does not assist one's understanding. Secondly, the factors listed in section 14(3) are "objectively determinable criteria" according to which it is determined "whether the discrimination reasonably and justifiably differentiates between persons". Section 14(2)(c), which uses these words, is thus repetitive. Thirdly, section 14(1) expressly allows for affirmative action. However, this subsection again seems unnecessary and repetitive given that the factors for determining fairness listed in section 14(2) and (3) will preclude the affirmative action referred to from being held unfair. It may be that the drafters tried to make the enforcement of affirmative action policies easier by discouraging extensive analysis through the courts. However, this way limits scrutiny by the courts. Further, while international law imposes a limit on positive measures by providing that they must terminate as soon as the inequality is remedied,<sup>32</sup> the South African provision has no similar limit.<sup>33</sup>

Section 7 lists some examples of unfair discrimination on the grounds of race.<sup>34</sup> As regards these five forms of discrimination it does not appear possible to prove fairness in line with section 13(2)(a). Whatever the context<sup>35</sup> or the factors determining the impact on the complainant,<sup>36</sup> there is no possible argument to rebut the presumption of unfairness for propounding racial superiority or inferiority and racial violence,<sup>37</sup> for racial exclusivity, direct<sup>38</sup> or indirect,<sup>39</sup> or for the denial of opportunities on the grounds of race.<sup>40</sup> The provision of inferior

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<sup>31</sup> S. 14(1)–(3) EA.

<sup>32</sup> Article 1(2) of the International Convention states:

"Special 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, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved."

<sup>33</sup> Clearly, such limit may be implied in the South African provision.

<sup>34</sup> S. 7(a)–(e) EA.

<sup>35</sup> S. 13(2)(a) EA.

<sup>36</sup> S. 13(2)(b) read together with s. 13(3) EA.

<sup>37</sup> S. 7(a) EA.

<sup>38</sup> S. 7(b) EA.

<sup>39</sup> S. 7(c) EA.

<sup>40</sup> S. 7(d) EA.

services, however, is unavoidable until the municipalities succeed in bringing the services up to date.<sup>41</sup> Thus it does not seem appropriate to list such examples.

## Conclusion

With the Equality Act there is a danger of developing contradictory and confusing jurisprudence. Even though it is intended to give effect to the letter and spirit of the Constitution in its aim to provide for measures to facilitate the eradication of unfair discrimination,<sup>42</sup> several aspects are counter-productive. Thus the meaning and scope of equality is not sufficiently clear and to aim at equality of outcome conflicts with the Constitution as well as the principles of a market economy. The procedure through which an infringement of racial equality is to be established narrows the scope of the equality guarantee and is confusing. Further the provisions prohibiting racial discrimination are confusing and repetitive.

## ENFORCEMENT MECHANISMS

### Introduction

The formal guarantee itself does not make racial equality work. This is illustrated by the United States' poor history of genuine racial equality in the early period of the constitutional equality guarantee.<sup>43</sup> What is also needed is an institutional framework that is committed to the concept of racial equality. In the South African context, non-discrimination on the ground of race is meant to be implemented by so-called Equality Courts, supported by the South African Human Rights Commission, the Commission for Gender Equality, and the Equality Review Committee. In line with this, section 16 states:

- “(1) For the purposes of this Act, but subject to section 31 –
  - (a) every magistrate's court and every High Court is an equality court for the area of its jurisdiction; and
  - (b) any magistrate, additional magistrate and judge may be designated by the Minister, after consultation with the Judge President or the head of an administrative region defined in section 1 of the Magistrates' Courts Act 1944 (Act No. 32 of 1944), concerned, as the case may be, as a presiding officer of the equality court of the area in respect of which he or she is magistrate, additional magistrate or judge, as the case may be.
- (2) A presiding officer must perform the functions and exercise the powers assigned to or conferred on him or her under this Act or any other law.”

Equality Courts, before which proceedings are instituted in terms of or under the Equality Act, hold inquiries, determine whether unfair discrimination has

<sup>41</sup> See the cases regarding municipal service: *City Council of Pretoria v. Walker*, op cit. or at the Supreme Court: *Kempton Park/Tembisa Metropolitan Substructure v. Kelder*, 51/98 (Unreported, 31 March, 2000).

<sup>42</sup> S. 2 EA.

<sup>43</sup> The influence of the American Supreme Court, as one institution, on the enforcement, or non-enforcement of this guarantee, is illustrated by the possibility of institutionalizing racial inequality through a doctrine of “separate but equal” which the Court authorized for more than 80 years despite a general equality guarantee. See K.L. Hall *et al.*, *American Legal History—Cases and Materials*, 2nd ed., Oxford, 1996, 510–516; B. Derrick, *Race, Racism and American Law*, 3rd ed., London, 1992, 43. In the South African context this has been pointed out by C. O'Regan, “The Enforcement and Protection of Human Rights: The Role of the Constitutional Court in South Africa” in B. Ajobola and D. van Zyl, *The Judiciary in Africa*, Cape Town, 1998, 1–16.

taken place, and make an appropriate order in the circumstances.<sup>44</sup> The South African Human Rights Commission (the Commission) and other relevant institutions may assist complainants in instituting proceedings and conduct investigations.<sup>45</sup> Furthermore, the Commission and the Commission on Gender Equality supervise the implementation of so-called equality plans.<sup>46</sup> The Equality Review Committee (ERC) was established immediately upon promulgation of the Equality Act and advises about its operation.<sup>47</sup>

The relevant institutions thus consist of old and new elements, the courts being the inherited element with the Commission as well as the ERC being the newcomers. This marriage of old and new will be able to enforce racial equality only if the framework and the powers suit the country's specific needs. The formal structure of the enforcement mechanisms, the enforcement powers, and the public access to it must be examined.

### Institutions

Enforcing the Act through magistrates' and high courts is practical and efficient. The court structure is available and the high number of courts ensure easy accessibility. Additionally, the court buildings are being refurbished and additional buildings are being built in rural areas.<sup>48</sup> Given the ongoing financial constraints,<sup>49</sup> the establishment of separate equality tribunals, which had also been a debated option,<sup>50</sup> appears impractical as they would require the establishment of new structures besides the existing "normal" courts.

Even so, the use of the courts generates its own problems, not least the shortage of adequately trained staff<sup>51</sup> and work load.<sup>52</sup> Also, ideologically, the majority of the population does not have confidence in the inherited judiciary.<sup>53</sup> Part of the reason for this is that the personnel structure of the courts remains largely the same and as a consequence of the apartheid policy a shortage of non-white candidates leaves the courts unrepresentative of the population's

<sup>44</sup> S. 21(1) and (2) EA.

<sup>45</sup> S. 25(3) EA.

<sup>46</sup> S. 25(4), (5) EA.

<sup>47</sup> S. 33(1)(a)–(c) EA.

<sup>48</sup> Statement by Dr M.P. Maduna, MP, Minister of Justice and Constitutional Development, on the Efficiency of the Courts, made in Parliament on 9 September, 1999.

<sup>49</sup> That resources are limited had been recognized in *S v. Makwanyane*, 1995 (3) SA 391 (CC); 1995 (2) SACR 1; 1995 (6) BCLR 665 (CC). See also *Soobramoney v. Minister of Health (KwaZulu-Natal)*, 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC).

<sup>50</sup> See the public submissions on the Promotion of the Equality and Prevention of Unfair Discrimination Bill (B57-99) in line with the hearings by the ad hoc Joint Committee of Parliament in November 1999, especially the submission of the Commission on Gender Equality.

<sup>51</sup> As a result of high living costs and safety aspects officials are not interested in working in Johannesburg Magistrates' Court; Maduna, above.

<sup>52</sup> There are huge backlogs, particularly in the Western Cape and Eastern Cape, see Budget Speech: Department of Justice and Constitutional Development, delivered by Dr Maduna, Minister of Justice and Constitutional Development, 6 June, 2000, "Meeting the Challenges of the 21st Century".

<sup>53</sup> This became clear during the debate regarding the reform of the judiciary after the collapse of apartheid. There was no differentiation between the institution as a purely technical entity and its personnel. Because of its record under apartheid, many have suggested a completely new institution because judicial review cannot be handed over to the inherited judiciary; see, for instance J. Dugard, above, at 141. See also C. Forsyth, "Interpeting a Bill of Rights: The Future Tasks of a Reformed Judiciary?" (1991) 7 *SAJHR*, 5; J. Hlophe, "The Role of the Judges in a Transformed South Africa—Problems, Challenges and Prospects" (1995) 112 *SALJ*, 24.

composition,<sup>54</sup> especially regarding higher positions. By October 1998—four years after the collapse of apartheid—as few as two black judges had been recruited to leading positions: one as Judge President and another as Deputy Judge President of provincial divisions.<sup>55</sup> However, the cultural attitude of the judge does have an impact on the outcome of the decision.<sup>56</sup> The lack of representation of the majority of the population as well as the insufficiency of training in human rights questions results in a danger of biased judgment. This has been experienced by other legal systems as well.<sup>57</sup>

In the South African context this poses an obstacle particularly in racial equality cases. The reason for this lies in the legacy of apartheid. The nature of Equality Courts is such that these judges have to define what are the underlying values of racial equality and judge what is best for the community.<sup>58</sup> Furthermore, the equality jurisdiction requires the comparison of similar situations.<sup>59</sup> However, because of the composition of the Equality Courts, instead of a neutral standard as a basis for testing racial equality, “whiteness” will be implicit in the norm.<sup>60</sup> Hand in hand with this goes a degree of complacency of lawyers about the profession’s devotion to justice and its aptitude for meeting social needs, when clearly these characteristics in reality are present only to a limited degree.<sup>61</sup>

Before the introduction of Equality Courts this potential for bias or prejudice had been less acute. Regarding the constitutional equality guarantee, magistrates’ courts had limited powers whilst the Constitutional Court had exclusive power to declare an Act of Parliament null and void. Orders regarding the validity of legislation made by the lower courts were submitted to it for confirmation.<sup>62</sup> In line with this, it was considered desirable—and in the interest of racial equality—that magistrates’ courts were excluded from pronouncing on the validity of legislation.<sup>63</sup> Thus whenever any issue concerning racial equality was raised in a case, the court would either have to assume the validity of the act or conduct in question, or it would have had to refer the dispute to a higher court.<sup>64</sup> With the promulgation of the Equality Act the magistrates’ courts have taken on greater responsibility

<sup>54</sup> In 2000 there were 51 black judges and 141 white judges in the high courts, and 719 black magistrates and 1,013 white magistrates: information furnished by the Department of Justice, 11 August, 2000.

<sup>55</sup> Judge Bernard Ngoepe had been appointed Judge President of the Transvaal Provincial Division and Judge Vuka Tshabalala as Judge Deputy President of the KwaZulu-Natal Division.

<sup>56</sup> See, for example, Forsyth, above; J. Sarkin, “The Political Role of the South African Constitutional Court”, (1997) 11(1) *SAJL*, 137.

<sup>57</sup> Even in other legal systems the appearance of non-bias is a relative virtue, see G. Henry, “Pinochet: In Search of the Perfect Judge” (1999) 21 *Sydney Law Review*, 668. On issues of gender see B. Gaze, “Some Aspects of Equality Rights: Theory and Practice”, in B. Galligan and C. Sampford, *Rethinking Human Rights*, Sydney, 1997, 189–209.

<sup>58</sup> Hlophe, above, states that “Judges are the upper guardians of such values and cultures”, at 29.

<sup>59</sup> The underlying rule for equality cases here will be the same as in foreign and international cases: to treat like alike and unlike cases according to their differences.

<sup>60</sup> Similar developments could be observed during the debate on reparations for past racism that took place in the United States: see D. Bell, *Race, Racism and American Law*, 3rd ed., London, 1992, 53.

<sup>61</sup> E. Cameron, “Judicial Accountability in South Africa” (1990) 6 *SAJHR* 1990, 256; Cameron criticizes the complacency of lawyers in the context of an actual lack of independence from those who control the market or the state. His thesis can be used with equal force in the context of the question of neutrality.

<sup>62</sup> Constitutional Complementary Act, Act 13 of 1995.

<sup>63</sup> S. 170 EA. Section 110(1) of the Magistrates’ Courts Act, as amended by Act 80 of 1997, prevents magistrates’ courts from pronouncing on the validity of any law.

<sup>64</sup> These were the options that the interim constitution proclaimed; for the assumption of validity, see also s. 110(2)(b) of the Magistrates’ Courts Act, as amended in 1997.

and it is not clear whether they are ready for that. From the wording of section 31<sup>65</sup> it appears that the drafters of the Act have noted this problem:

- “(2) For the purposes of giving full effect to this Act and making the Act as accessible as possible –
  - (a) and in giving effect to subsection (1), the Minister may designate suitable magistrates, additional magistrates or judges, as the case may be, and clerks referred to in subsection (1) as presiding officers and clerks, respectively, for one or more equality courts;
  - (b) ...
- (4) The Minister must, after consultation with the Magistrates Commission and the Judicial Service Commission, issue policy directives and develop training courses with a view to –
  - (a) establishing uniform norms, standards and procedures to be observed by presiding officers and clerks in the performance of their functions and duties and in the exercise of their powers; and
  - (b) building a dedicated and experienced pool of trained and specialised presiding officers and clerks.”

The drafting and issuing of policy directives as well as the building of a pool of trained and specialized staff will take time. Furthermore, the making of the appointment of equality judges as the responsibility of the Minister for Justice and Constitutional Development<sup>66</sup> jeopardizes the independence of the judiciary. It grants the executive excessive power, especially when the Judicial Service Commission and the Magistrates' Commission have been set up for exactly that purpose. The Judicial Service Commission, whose members are drawn largely from the legal profession and the legislature, makes recommendations to the President for appointments to the higher courts.<sup>67</sup> The Magistrates' Commission makes appointments to the magistrates' courts.<sup>68</sup> Given that the Equality Courts are basically the same courts, except that they adjudicate on a specific matter, it does not appear justified to withdraw the responsibility in this area from the Commissions.

Outside the normal court process, the South African Human Rights Commission has an important contribution to make in the enforcement of the Act. It is much more representative than the courts and, as an institution created after apartheid, enjoys considerably more trust than the judiciary. A further institution of importance is the Equality Review Committee. This committee may be seen as important for the interim period during which the equality courts are being established. Since it will be these committees that will be presented with the large bulk of discrimination cases before they go to the courts, confidence in them is important.

## **Powers**

For the Equality Act to be effective, these institutions need to enjoy sufficient powers. Before the Equality Act came into force, the oversight role of the Constitutional Court was crucial. However, the sole reliance on the Constitutional

<sup>65</sup> S. 31 EA.

<sup>66</sup> “Minister” means the Minister for Justice and Constitutional Development, s. 1(1)(xvi) EA.

<sup>67</sup> The composition is laid down in s. 178 of the Constitution. Of the 23 members 10 are from the legislative, 8 from the legal profession, 1 from the executive (Minister of Justice) and 4 are designated by the President (of which 3 must be advocates).

<sup>68</sup> The Magistrates' Act, Act 90 of 1993 establishes the Magistrates' Commission which regulates the appointment and removal of magistrates.

Court for the effective implementation of racial equality was not a practical solution in the long run as it would have tended to reduce the importance of the other courts.<sup>69</sup> With the introduction of Equality Courts, a slightly different approach was adopted. These courts can make orders that have the effect of orders of the same courts, sitting as magistrates' and high courts, in civil actions. The list of possible orders is long and includes interim orders, declaratory orders, orders for the implementation of special measures to address particular instances before the courts of unfair discrimination, hate speech or harassment, and even orders to make unconditional apologies. However, where the magistrates' courts, sitting as Equality Courts, enjoy more powers than before the Act,<sup>70</sup> an order must be submitted to a judge of the High Court for confirmation.<sup>71</sup> Thus, even though more powers have been granted there is still some form of control over the use of the wider power.

Under the Constitution, magistrates were excluded from applying the equality guarantee directly because their jurisdiction in discrimination cases had been restricted to applying the values of equality and making any necessary interpretation arising therefrom.<sup>72</sup> Since positive action cannot be interpreted so as to comply with the equality clause (being definable only as a justified departure from equality of treatment), these courts had no means to combat private discrimination which could always be claimed to be justifiable positive action. Whereas it was commendable to require magistrates to override all acts of private discrimination without regard to their alleged justification, it is not quite clear whether the courts are ready to take on the responsibility of distinguishing between justified and unjustified discrimination. Given that in South Africa private discrimination poses the central problem, some form of control through a higher court is therefore sensible.

This control, however, can be sufficient only if the High Court sitting as an Equality Court is staffed by a pool of trained and specialized staff that is dedicated to the purpose of the Equality Act. The reservations mentioned concerning the magistrates' courts also apply to the high courts. These courts have been inherited from the previous order as well. And even though there has been some remarkable progress in their transformation, training in human rights issues will still be needed to maximize the potential of the racial equality provisions.

In practice, many discrimination cases will be dealt with by the supporting institutions. The South African Human Rights Commission and the Commission for Gender Equality are specifically mentioned in the Act and they have been given specific responsibilities. These include investigatory powers<sup>73</sup> and a

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<sup>69</sup> N. Haysom, "Bill of Fundamental Rights", *De Rebus* 1994, 126 warned against judicial apartheid through the possible consequence of first and second class courts.

<sup>70</sup> Magistrates' Courts Act, Act 32 of 1944, Supreme Courts Act, Act 59 of 1959 and the Rules Board for Courts of Law Act, Act 107 of 1985.

<sup>71</sup> S. 19(3)(a) EA. Regulations need to be made by the Minister, see s. 30(1)(a).

<sup>72</sup> Magistrates' Courts may neither enquire into nor rule on the validity of any law, see s. 170 of the Constitution. Furthermore section 110 of the Magistrates' Courts Second Amendment Act, Act 80 of 1997 states that a magistrates' court shall not be competent to pronounce on the validity of any law or conduct of the President.

<sup>73</sup> S. 25(2) and (3) EA.

supervisory position over the implementation of so-called equality plans.<sup>74</sup> The Equality Review Committee comprises seven members, including the chairpersons of the South African Human Rights Commission and of the Commission on Gender Equality.<sup>75</sup> Thus, it is likely that the supporting commissions will deal with most complaints.

## **Conclusion**

The Equality Act is backed up by a remarkable institutional framework with equality courts being distributed all over the country and enjoying wide powers. The Act is also supported by the South African Human Rights Commission and the Equality Review Committee. Two challenges that equality courts face are the need to enjoy adequate staffing and the need to develop public confidence in their ability to deal with the issues effectively.

### CONCLUSION

Whilst the Equality Act is designed to give effect to the letter and spirit of the Constitution, its potential for achieving racial equality has been limited considerably by the unsatisfactory nature of parts of the legislation itself. It is a very ambitious undertaking to seek to define complex concepts like equality and non-discrimination and the attempt has, in fact, narrowed the scope of the equality right and created confusion. In this respect, the Equality Act does not fulfil the country's specific needs, i.e. an equality right that has a wide scope and allows for measures to redress the existing inequalities. Furthermore, it needs a right to non-discrimination that is understood by the people to whom it applies. As it is at the moment, the country has not yet provided the adequate training, either for those who are meant to benefit from the legislation or for those who are meant to give effect to the provisions. Finally, those sitting in the Equality Courts need to be demonstrably independent and selected in an open and representative process. Hopefully the Equality Review Committee will prove effective in its role of advising on the operation of the Act.

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<sup>74</sup> Such equality plans need to be formulated with the Minister of Finance and include measures that aim to achieve equality in the ministers' areas of responsibility. These plans must be submitted to the South African Human Rights Commission within two years after the commencement of the Equality Act. The South African Human Rights Commission must then consult with the Commission on Gender Equality when dealing with these plans; see s. 25(4)(b) and (5)(a) and (b) EA.

<sup>75</sup> S. 32 EA.