"Race" and the Constitution: A South African perspective

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For a South African constitutional lawyer, watching from afar, the current debate in Germany on the removal of the word "race" from section 3 of article 3 of the German Basic Law, is perplexing. In the South African context, a similar call would widely be viewed as a regressive step aimed at protecting white privilege and reinforcing the social and economic dominance of the white minority. The South African and German contexts and histories differ, and the word "race" might have different connotations in German than it has in English, but it may nevertheless be of interest to consider why the words "race", [1] "racial" and "non-racialism" are mentioned in several provisions of the South African Constitution.

The South African Constitution was drafted in response to the country's history of colonial conquest and, later during the apartheid era, the legal enforcement of the system of racial segregation. South Africa's Constitutional Court endorses this view and often invokes South Africa's apartheid past when interpreting the provisions of the Constitution, stating that the Constitution is aimed at preventing the recurrence of past unjust practices. [2] The specific references to "race" in the South African Constitution fulfil two functions. First, they aim to prevent the perpetuation of public and private forms of racial discrimination and racism. Second, they aim to address the effects of past and ongoing racial discrimination and racism by allowing or mandating race-based redress measures to correct the racial injustices of the past. To illustrate, I will now discuss some of the provisions in the South African Constitution that explicitly mention "race".

Section 9(3) of the Constitution prohibits "unfair discrimination" against anyone on one or more grounds, including on the ground of "race". This section does not only bind the state, but also private parties, in recognition of the fact that racism and racial discrimination lingers on long after the abolition of discriminatory legislation and policies. (Some academic commentators critical of South Africa's constitutional project go further, suggesting that racism and white supremacy are part of the foundation on which "Western constitutionalism" is built. [3] The absence of any reference to "race" in the Constitution, so the argument goes, would create a constitutional silence about racism (especially by private parties) and its devastating effects. This is a silence that may well benefit the social and economically dominant group (which would be "white" people), by promoting the idea that the non-recognition of "race" would strike a blow against racism, when it would in fact serve to hide the problem of racism.

The prohibition against racial discrimination contained in section 9(3) of the Constitution, must be read in conjunction with section 9(2). The latter section specifically permits the state to take redress measures "designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken". Such measures include so called "affirmative action" measures based on "race". The drafters of the Constitution insisted on the inclusion of this provision to ensure the Constitution did not prevent the state and other parties from addressing the effects of past and continued racial discrimination and racism. Section 9(2) is based on the premise

[1] I put "race", "black" and "white" in inverted commas throughout this piece to signal that "race" is a construct and does not say anything profound or accurate about any individual, while acknowledging that "race" has profound material effects. It is not real but it has real-life consequences.

that the abolition of racial discrimination does not automatically lead the eradication of racism and of racial discrimination by both the state and by private parties. (As the global protests under the banner of "Black Lives Matter" illustrate, informal or private racism and racial discrimination against black people also persist across the globe, despite the absence of racially discriminating legislation or policies.)

Section 9(3) and 9(2), must also be read in conjunction with section 9(1) which provides that: "Everyone is equal before the law and has the right to equal protection and benefit of the law." South Africa's Constitutional Court held in *Minister of Finance v Van Heerden*that there was no conflict between the general claim to equality before the law, on the one hand, and the enforcement of race-based redress measures on the other. This is because race-based redress measures were not, as some critics argue, a form of "reverse discrimination" or "positive discrimination", but a requirement to achieve the goal of equality before the law.[2] In this view, in order to achieve equality, it is essential to recognise the concept of "race" and to use it to undo the effects of past and ongoing racism and racial discrimination. The Constitutional Court explained in *Minister of Finance v Van Heerden* that:

"the provisions of section 9(1) and section 9(2) are complementary; both contribute to the constitutional goal of achieving equality to ensure "full and equal enjoyment of all rights"... Equality before the law protection in section 9(1) and measures to promote equality in section 9(2) are both necessary and mutually reinforcing but may sometimes serve distinguishable purposes."

"Race" is also mentioned in section 16(1) of the Constitution. Section 16 guarantees for everyone the right to freedom of expression. However, section 16(2) lists types of expression that are not protected, and this excluded expression includes (in section 16(2)(c)) "advocacy of hatred that is based on race", and "that constitutes incitement to cause harm". Once again, the section recognises the harmful effects of racism and invoke "race" as a category to allow the legislature to pass legislation to protect individuals against the effect of racial hatred.

Other provisions in the Constitution also permit "race" to be taken into account when appointing individuals to various institutions. Most notably, section 174(2) of the Constitution states that the "need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed". At the time when this provision was adopted, more than 90% of South African judges were "white" and male, despite the fact that less than 10% of the population are "white". The provision was included to help correct this historical injustice, caused again by formal racial discrimination during the apartheid era and lingering racism after apartheid laws were abolished.

Given the various constitutional provisions referencing "race", and given the jurisprudence of South Africa's Constitutional Court, it was not surprising when last week a court, while considering whether regulations allowing the government to use "race" as one of the criteria in allocating Covid-19 related financial aid, affirmed that the South African Constitution, read as a whole, "cannot be construed as a libertarian constitution" [4] nor as a "race-neutral" Constitution. To ignore race, according to the court, would be to ignore the country's "egregious history in which race overlaid by class and gender was the central determinants of the distribution of resources in our society for more than 300 years of its existence."

The fact that the South African Constitution is not "race-neutral" does not mean that "race" ought to guide the manner in which relations among people in

[2] On the use of history see for example S v Zuma 1995 (4) BCLR 410 (SA) (CC) par 15, per J Kentridge. ('...regard must be paid to the legal history, traditions and usages of the country concerned...'); S v Makwanyane 1995 (6) BCLR 665 (CC) par 39, per P Chaskalson. ('we are required to construe the South African Constitution... with due regard to our legal system, our history and circumstances ...'); and par 264, per D P Mahomed. ('It is against this historical background and ethos that the constitutionality of capital punishment must be determined.'); par 322–23, per J O'Regan. ('... the values urged upon the Court are not those that have informed our past...' and in '...interpreting the rights enshrined in Chapter 3, therefore, the Court is directed to the future'.). See also Pierre de Vos 'A Bridge Too Far?: History as Context in the Interpretation of the South African Constitution' (2001) 17 South African Journal on Human Rights 1.

[3] Joel M. Modiri "Conquest and constitutionalism: first thoughts on an alternative jurisprudence" vol. 34 (2018) South African Journal on Human Rights pp 300-325

society should be structured in the long run. The long term aim of the Constitution is to create a "non-racial" society in which the importance of "race" would fade away. This is why section 1 of the Constitution lists "non-racialism" as one of the founding values of the Constitution. (Section 1 is "super entrenched" and can only be amended with a 75% majority vote in the lower house of Parliament.)

Non-racialism means different things to different people. [5] It could denote a belief that "race" does not exist and that the law should not recognise "race" in any form to categorise people or their experiences. This view is often dismissed by South African scholars as a "colour blind" approach which denies the reality that race – and its twin, "racism" – have a profound impact on people's lives and their life-chances. [6]

South Africa's Constitutional Court has adopted another view on non-racialism which is also the dominant view in South African political discourse. In this view "non-racialism" is an ideal, but one that can only be reached by accepting the reality that "race" has a profound effect on how we view people, how the world is arranged, and what life-chances individuals enjoy. In other words, in order to create a non-racial society, it is necessary to acknowledge and deal with the effects of lingering racism and formal and informal racial discrimination. To do that, one has to acknowledge that "race" continues to have real-life consequences. The Constitutional Court explained this in in its 2004 judgment in *Minister of Finance and Other v Van Heerden* as follows:

"However, it is also clear that the 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."

One way to understand this approach is to distinguish, on the one hand, between the notion that "race" is an invented or constructed concept which does not say anything profound or accurate about any human being, and, on the other hand, the idea that "race" may be an invented concept, but nevertheless has material *effects*, which means avoiding the use of "race" as a legal concept would make it difficult, if not impossible, for the law to respond to the consequences of racism and white supremacy.

In this view "race" has been used in the past, and continues to be used (also by private parties), to discriminate directly and indirectly against people who are "black". "Race" may be a construct, but to ignore the many ways in which "race" impacts on the lived reality of those on the receiving end of racism and racial discrimination, is to condone existing racial inequality. This view is captured by former Chief Justice Ngcobo in the judgment of *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others*where he states:

"In this fundamental way, our Constitution differs from other constitutions which assume that all are equal and in so doing simply entrench existing inequalities. Our Constitution recognises that decades of systematic racial discrimination entrenched by the apartheid legal order cannot be eliminated without positive action being taken to achieve that result. We are required to do more than that. The effects of discrimination may continue indefinitely unless there is a commitment to end it." At the heart of this approach is an acknowledgement that the constitutional claim that everyone is equal before the law is the expression of an ideal, not a description of reality. Everyone is not equal before the law, partly because of the way in which "race" and racism impact differently on different people. In this view, the claim that we are all equal before the law – while racism, among other things, makes this impossible – and that "race" does not exist, is a dangerous one as it may serve to hide the

[4] The court referred to the various social and economic rights provisions in the Bill of Rights, including the right of access to housing (section 26, and the right of access to health care (section 27) to justify this claim.

[5] Peter Ratcliffe Race, Ethnicity and Nation: International Perspectives on Social Conflict (2005) at p 80

[6] Tracy S Robinson "Race, Rights and Representation in a Cape Town Magistrate's Court: Is a Colour Blind Constitutional Discourse Possible in Post-Apartheid South Africa?" vol. 13 (1997) South African Journal on Human Rights pp 581-601.

many different ways in which racism impacts on people who are not "white". In short, this is a view that a "colour-blind" approach to "race" inevitably leads to turning a blind eye to racism and its consequences.

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