

# Race classification and equal educational opportunities in South African schools

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## Summary

In South Africa, there is constitutional protection against segregation and unfair discrimination on the basis of race. The connection between school integration and a legitimate governmental purpose to further or achieve equal educational opportunities for everyone necessitates an investigation into the meaning of equal educational opportunities for everyone. Transformation in South Africa relates to the consolidation of democracy by eradicating social and economic inequalities that were generated among others by the history of colonialism and apartheid. Remedial action (transformation) should be assessed against five criteria – moral foundations, constitutional foundations, burdens on previously disadvantaged groups, burdens on previously advantaged groups, and the existence of a logical stopping point. Equity of access and the removal of institutional discriminatory practices will not necessarily ensure the attainment of quality and equity in education, unless access and equity also imply providing learners with an equal chance to succeed. In applying race classification policies in South African schools, the best interests of the child shall be of paramount importance, such interests being determined from a subjective, child-centred perspective which attempts to make race classification meaningful from the child's point of view.

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## I. Introduction

The Population Registration Act<sup>1</sup> provided that all South Africans must be classified into three categories or races namely, white, black and coloured. Persons from Indian and Asian descent were classified under the category black. Resistance to these racial categorizations, with their accompanying social ordering and stratification on racial lines was a central element of resistance to apartheid.

The 1994 election provided the opportunity for the comprehensive dismantling of the edifice of schooling founded on race. If race separation was the defining feature of schools in the apartheid era, race integration became a defining feature in the post-apartheid era. The Constitution of the Republic of South Africa of 1996 forbids all forms of unfair discrimination<sup>2</sup> and the South African Schools Act<sup>3</sup> provides the basis for the reconstruction of schools in the image of non-racialism. However, after the dismantling of apartheid in 1994, census classifications still distinguish between “black African”, “white”, “Indian/Asian” and “coloured” people in South Africa. The Identification Act<sup>4</sup> which provides for the compilation and maintenance of a population register, however, makes no mention of race.

Government collects statistical data concerning race on a continuous basis through, for example, census surveys. The Department of Education, as an organ of state, collects data about the race of

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1 30/1950 repealed by the Population Registration Act Repeal Act 114/1991.

2 Sec 9.

3 84/1996.

4 68/1997.

learners to assist in strategic planning. The Gauteng Department of Education<sup>5</sup> states that the main purpose of the collection of data on race is to measure the level of transformation and redress that have taken place in South African schools. The circular requires parents to indicate their child's race on the school's admission forms.<sup>6</sup> If parents refuse, the school principal or senior educators have to determine the race of a child.<sup>7</sup>

In applying race classification policies in South African schools, two normative standards must be respected. First, the best interests of the child shall be of paramount importance, such interests being determined from a subjective, child-centred perspective which attempts to make race classification meaningful from the child's point of view. Secondly, children's inherent dignity and capacity to speak for themselves must be respected.

In the United States of America<sup>8</sup> the movement to eradicate racial segregation in schools has been "one of the most monumental developments in school law in the twentieth century".<sup>9</sup> But, the eradication of legally segregated schooling systems led to the discovery of more fundamental questions. The first question that comes to mind is if the cessation of forced racial segregation does not result in racially integrated schools, should school principals and governing bodies be forced to use racial or ethnic origin information to diversify their schools? Secondly, are racially homogenous schools detrimental to their learners' success?

Against this background, a policy studies approach to researching legal topics has been used to first determine whether a rational basis for race classification and the collection of data on race and identity in South Africa exists and secondly to investigate the connection between race integration and a legitimate governmental purpose to further or achieve equal educational opportunities for everyone. In other words, is race classification in schools serving the best interests of all children in South Africa?

## 42 II. Research methodology

The South African Constitution, in section 39, compels all forums to promote the founding principles of the Bill of Rights and to consider international law when interpreting any legislation. In this article both a comparative law research approach and a policy studies approach are used.

The aim of the comparative law research is to use information from another country to inform the interpreting and implementing of the policy on school integration and related policy-making in South Africa.

A major focus of comparative law is on practical aims, such as the advancement of legislation, juridical decision-making and the organisation of systems to ensure quality.<sup>10</sup> Comparative law can also involve a critical challenge and act as a prompt where content for the legal specification of most priorities in education policy, such as school integration, is concerned. Comparison is thus needed as a way of assessing where one's own education policy is situated and possibly as a source of inspiration for new law-making.<sup>11</sup> Comparative common law practice stresses the issue of protection of individual rights as an overall purpose of education law. In this context, legislation represents a process that focuses on the individual as the bearer of rights. However, education law everywhere should not be divorced from excellence in schools.

5 Circular 14/2005 of 4 April 2005: 1-3, available at [www.education.gpg.gov.za/legislation/circulars/CircularsArchives.htm](http://www.education.gpg.gov.za/legislation/circulars/CircularsArchives.htm).

6 Circular 14/2005 of 4 April 2005: 2, available at [www.education.gpg.gov.za/legislation/circulars/CircularsArchives.htm](http://www.education.gpg.gov.za/legislation/circulars/CircularsArchives.htm).

7 Circular 14/2005 of 4 April 2005: 3, available at [www.education.gpg.gov.za/legislation/circulars/CircularsArchives.htm](http://www.education.gpg.gov.za/legislation/circulars/CircularsArchives.htm).

8 Hereafter referred to as the "US".

9 Kemerer, Sansom & Kemerer 2005: 406.

10 De Groof & Lauwers 2005: 42.

11 De Groof & Lauwers 2005: 42.

First<sup>12</sup> postulates that policies are manifestations of the choices society has made about its future. Policy can also be defined as a vision of where to go and as guidelines for getting there. A policy statement can range from an act to a series of decisions made and actions taken by decision makers such as departmental officials.

Policy analysis is the process of identifying the issues inherent in, or related to, a policy statement.<sup>13</sup> If we value ideals such as equality, dignity, justice and freedom, we would define race classification policies in relation to their effect upon these goals vis-a-vis its effect on the political ideologies in particular education directorates.

In South Africa, the goals of government in the education realm have varied through the decades from racially exclusive education<sup>14</sup> to equity and redress after apartheid. Underlying all these goals has been the continuing theme of choice.<sup>15</sup> Choice has emerged as a major goal itself, and in debating the parental right to choose which school a child will attend, policy researchers and decision makers come face-to-face with questions of values as well as emerging legal frameworks.

Social values relate to the goals that a society seeks to achieve. In South Africa the values of equality, dignity and freedom needs to be confronted, not ignored, in policy studies. In this article analyses of cases and South African legislation are used to examine the similarities and differences concerning race integration and equal educational opportunities for learners in South African schools.

### III. Race and race classification

The concept of race in the English language can be traced back to the sixteenth century, where it originally served as a demarcation of common ancestors. Not until the late eighteenth century did race come to be understood as indicating immutable, biological differences.<sup>16</sup> But what is race? Race was originally used as a unit of biological classification. The expansion of European colonialism created a history interspersed with creators and victims of race profiling. The socio-biological construction of race means that the colour of one's skin and other physical characteristics are used to serve as general indicators of someone's "race".<sup>17</sup> The legal definition of race, as contained in the Population Registration Act,<sup>18</sup> used three criteria to classify race: descent, appearance and social acceptance. As the Act gained momentum, and more cases emerged where classification was neither obvious nor easy, acceptance by society played an increasingly important role.<sup>19</sup>

Debate over the recording of race and ethnic identity in surveys and censuses is not peculiar to South Africa. An internet search<sup>20</sup> of the parameters "census+race" produced 8.3 million entries. In the US, the 2000 population census questionnaire provided more options under ethnicity than in previous years and for the first time allowed people to identify themselves with more than one race. The census questions relied on self-identification. In South Africa, intense discussions preceded the decision to include "race" or "population group" as a variable in the collection of statistics. Some argued that the non-racial aims of the majority of formations in the anti-apartheid struggle rendered categorising race offensive and unnecessary.<sup>21</sup> Apartheid and the racial identification which underpinned it explicitly linked race with differential access to resources and power. This was the reasoning that led to a "self-identifying" question about race or population group in both the 1996 and 2001 population censuses.

12 2006: 131.

13 First 2006: 136.

14 Jansen 2001: 12.

15 First 2006: 136.

16 Bowman 2001: 1751; Noel 1996: 157

17 Du Bois 1996: 47.

18 fn 1.

19 Smit 2006: 121

20 [www.google.com](http://www.google.com).

21 See Statistics South Africa's discussion documents at [www.statssa.gov.za/publications/DiscussSAM/DiscussSAM.pdf](http://www.statssa.gov.za/publications/DiscussSAM/DiscussSAM.pdf) and at <http://www.statssa.gov.za/news-archive/05may2005>.

There are still those who choose not to specify a racial identity and who refuse to complete such a question.

When racial classification is demanded from schools the results can be troublesome, because race offers no innate or inherited capabilities: Public schools struggle with trying to fit multi-racial children into official racial categories.<sup>22</sup> Some schools arbitrarily classify children in cases where parents and children apparently belong to different races. The first obstacle in race profiling in a school is clarifying “black”. Class, gender and age are obvious indicators, but what is “black”? The Employment Equity Act<sup>23</sup> defines “black people” as Africans, Coloureds and Indians. Socio-biologically, without any racial endogamy people have always been classified in terms of black-skinned, curly haired members of the human race and white-skinned, straighter haired ones.<sup>24</sup> However, people change their consciousness both of themselves and their status in society. Therefore, “ideologies about race are not self-maintaining, sometimes they are punctured and movements occur”.<sup>25</sup>

#### IV. The best interests of the child

*The Convention on the Rights of the Child*,<sup>26</sup> spells out the basic human rights to which children everywhere are entitled. The Convention sets minimum standards for children. It is based on the idea that a basic quality of life should be the right of all children, rather than a privilege enjoyed by a few. In article 2 the Convention states that all States shall respect and ensure the rights to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. Furthermore, children should be protected against all forms of discrimination on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members. Most importantly, in actions concerning children, by public institutions, courts of law, administrative authorities or legislative bodies, *the best interests of the child* shall be a primary consideration.

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#### V. Racial classification and the law

When does the Constitution of the Republic of South Africa allow government officials to discriminate on the basis of race? To assist us in answering this question we can study how the US deals with similar problems. In the US this question the American judiciary has engaged with this question for at least 130 years, and to this day it remains unanswered to a significant degree.

The US Equal Protection Clause of the Fourteenth Amendment to the Constitution<sup>27</sup> prohibits actions by state governments that draw lines favouring or disfavouring a particular class of persons based on impermissible criteria. The US Supreme Court has made it quite clear that racial classifications are highly suspect and impermissible unless government gives a very good justification for them.<sup>28</sup> The legal rule applied to determine the constitutionality of racial classification is the so-called ‘strict scrutiny’ test. The reason for application of strict scrutiny review to racial classifications is clearly enunciated by Justice O’Connor in *City of Richmond v. JA Croson Co* where she says that the “purpose of strict scrutiny is to ‘smoke out’ illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspected tool”.<sup>29</sup> This test implies that a race-based policy

22 Bowman 2001:1758

23 55/1998: sec 1.

24 Du Bois 1996: 49

25 Martin Luther King in Cashmore 1996: 118.

26 Adopted on 20 November 1989 by the United Nations General Assembly.

27 Enacted on 7 September 1868 by the U.S. Congress.

28 *City of Richmond v JA Croson Co* 488 U.S. 469 (1989).

29 488 U.S. 469 (1989): 493.

must be “narrowly tailored to a compelling governmental interest”<sup>30</sup> Under the strict scrutiny test the Supreme Court will ask two questions: (1) Does the racial classification serve a compelling interest, and (2) is it narrowly tailored to the achievement of that goal?<sup>31</sup> Strict scrutiny measures assure that the courts will give racial classification careful attention and a detailed examination both as to ends and as to means.<sup>32</sup>

In determining the constitutional legitimacy of race-conscious government policy a court must ask two questions.<sup>33</sup> First, does it indeed involve racial classification? Second, is the government’s justification one that the courts have recognised as “compelling”? The term “compelling state interest” is used to uphold the state’s action in cases where there is a threat to the equal protection clause or First Amendment rights provided for in the U.S. Constitution. In South Africa these factors also need serious consideration. First we need to consider the fact that the majority of schools in South Africa are mono-racial and second, race classification in multi-racial primary schools place an unnecessary burden on the educators and learners.

South African Constitutional values of particular importance to this discussion include: human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism.<sup>34</sup> Some of these values (e.g. equality, human dignity and freedom)<sup>35</sup> are also recognised as individual fundamental rights and thus enshrined in the Bill of Rights<sup>36</sup> as fundamental rights of all the people in our country. This trilogy of values constitutes one of the central themes of the South African Constitution and features in various contexts throughout the Constitution. Constitutional values have also become part and parcel of education values and are indispensable for the cultivation of a human rights culture of tolerance and respect in education.

Before turning to the right to equality and its application against racial discrimination in the school, it must be borne in mind that the Bill of Rights protects the right of every person to human dignity, equality and freedom, thereby also guaranteeing the human dignity, equality and freedom of every learner in the school environment. The core of the equality right lies in the prohibition of unfair discrimination (directly and indirectly) by both the state and other persons on one or more of the listed grounds, including race, sex, gender, age, birth, marital status, pregnancy, disability, religion, belief, culture and language.<sup>37</sup> The constitutional guarantee of equality must be interpreted contextually. A distinction must be drawn between formal and substantive equality. Formal equality means sameness of treatment while substantive equality requires the law to ensure equality of outcome<sup>38</sup>. In assessing these two approaches in the context of the principles and purposes of the Constitution a formal understanding of equality risks neglecting the commitments of the Constitution.

In *Harksen v Lane NO*<sup>39</sup> the Constitutional Court explained the enquiry into the violation of the equality clause by asking whether the conduct differentiates between people or categories of people. In other words, is there a rational basis for differentiating between races? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of section 9(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination. The principle of equality does not require everyone to be treated the same, but simply that people in the same position should be treated the same.

What then needs to be considered is whether the Education Department’s focus on the extent of enrolments of African learners in Indian, coloured and white schools constitutes indirect discrimination

30 Alexander & Alexander 2006:931.

31 488 U.S. 469 (1989): 495..

32 Alexander & Alexander 2006: 931.

33 Alexander & Alexander 2006: 932.

34 Constitution: sec 1.

35 Sec 9, 10 & 12.

36 Constitution: Chapter 2.

37 Sec 9(3).

38 Currie and De Waal 2005: 232

39 *Harksen v Lane NO* 1998 (1) SA 300 (CC)

in terms of section 9(3) on the basis of race. It is thus necessary to show both the purpose of collecting information on race in schools and that the means selected to collect this data are reasonably capable of meeting the goal of substantive equality. Above all, what needs to be shown is whether race classification in schools is in the best interests of the children in the school.

## VI. Segregation (desegregation) histories and contemporary dynamics of the United States and South Africa

In 1954, the US Supreme Court first recognized the right of students to be free from government-imposed racial segregation in *Brown v Board of Education of Topeka, Kansas*.<sup>40</sup> If seen as a case about race, *Brown* is applauded because it outlawed state-sanctioned apartheid. But if reviewed as a decision about education, *Brown* is observed with some disappointment because the public schooling system in the US remains highly segregated. Despite the initial zealous implementation of *Brown* to encompass *de jure* segregation, eradicating *de facto* segregation remained a practical problem. The problem was aggravated when the U.S. Supreme Court ruled that *de facto* segregated schools are beyond the reach of the equal protection clause.

In the US the apparent divide between popular political sentiment and judicial interpretation of the state's constitution produced a very complex and contradictory situation. While the affirmative obligation on school officials to remedy *de facto* racial segregation regardless of the cause still exists, it is unclear how the problem of *de facto* racial segregation can be solved.

In South Africa *de jure* segregation was effectively ruled out by the equality provision in the Constitution,<sup>41</sup> the admission clause in the Schools Act<sup>42</sup> and cases such as *Matukane v Laerskool Potgietersrus*.<sup>43</sup> The population demographics in South Africa are such that *de facto* segregation will always exist. The challenge for the Department of Education is to ensure quality educational opportunities for everyone and to ensure that there are programmes available to assist all learners to acquire the knowledge, skills, values and attitudes for negotiating the challenges and potential presented by our rich and varied multicultural society.

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## VII. Is there a rational basis for race profiling and the collection of data on race integration in the South African education system?

There are both similarities and differences between the US and South Africa, particularly in the contemporary period. In both, there is a constitutional protection against segregation and unfair discrimination on the basis of race. In both countries decisive action has been taken to integrate schools where *de jure* segregation had existed. In both countries a transition to a non-racial system of public education is the ultimate goal. In the US the emphasis shifted from mathematical ratios and racial quotas to remedy the effects of past intentional discrimination to good-faith compliance with the desegregation and integration policies.

The demise of apartheid in South Africa was heralded nationally and internationally as a victory for democracy and human rights. It offered unique opportunities – and responsibilities – to reconstruct a fragmented and deeply discriminatory education system, and establish a unified national system underpinned by democracy, equity, redress, transparency and participation. However, the reconstruction of a non-discriminatory education system in South Africa cannot succeed without addressing the huge quantitative and qualitative differences in education between races which existed in South Africa.

40 347 U.S. 483 (1954).

41 fn 2.

42 fn 3.

43 1996 (3) SA 223 (T),

There is still a significant lack of a reliable, comprehensive baseline databases and other relevant knowledge underpinning systematic, coherent policy frameworks to enable schools and education systems to address educational inequalities. Much of what is said – and not said- about the education of black learners reflects the political context, rather than the educational facts. What data is available nationally in South Africa is predominantly of a quantitative nature and provides “how many” answers. Profound questions like learners’ perceptions of the effect of the education to which they have been exposed on the development of, among others, their sense of belonging to a nation, being accepted and welcomed, being treated as equal citizens, their hope for the future and a sense of commitment to the future of their countries and their inhabitants remain largely unanswered. Surprisingly, the body of literature that does exist on the questions is as disparate, impressionistic and fragmented as the initiatives that address them.

In order to ensure basic education for all learners, previous inequalities can be overcome by providing the same opportunities equally for all learners. This approach could be called the “one-size-fits-all” model. But, one size does not fit all because learners/schools are not located in homogeneous, stable, social and economic and political environments.<sup>44</sup> The Constitution recognises eleven official languages,<sup>45</sup> guarantees freedom of religion<sup>46</sup> and participation in the cultural life of one’s choice.<sup>47</sup> Social inclusion initiatives assume that social equality will remove all divides.<sup>48</sup> Focusing on mathematical ratios and race quotas in multiracial schools to erase the inequalities of the past does not show a commitment to providing equal educational opportunities for all learners in South Africa. The challenge is not simply racial integration in a small percentage of South African schools. The challenge is the successful promotion of the values of dignity, equality and the advancement of human rights and freedoms for every learner in South Africa through the provision of quality education to all.

Forced racial integration of black learners into the former white schools could be tested against the Constitutional Court ruling in *Minister of Finance v Van Heerden*.<sup>49</sup> The Court held that a remedial measure must carry a reasonable likelihood of meeting the objective. The Promotion of Equality and Prevention of Unfair Discrimination Act<sup>50</sup> requires the education authorities to develop substantive equality and address unfair discrimination. However, in South Africa there are between 26 000 and 27 000 schools, of which more than 80% are mono-cultural schools attended only by black learners.<sup>51</sup> Racial integration in less than 10% of South Africa’s schools will not address the inequalities suffered by black learners in the past. Furthermore this begs the question of whether transferring to learning in a heterogeneous integrated environment necessarily eradicates all problems that handicap learners. Thomas Sowell<sup>52</sup>, the American socio-political commentator, believes that assumptions about being educated in a multi-racial environment do stand up to rigorous scrutiny. It goes without saying that many policy specialists and educationists believe that equality of outcomes and quality education cannot be achieved in segregated schools.

Racial classification as part of the data collected by the Department of Education from schools is justified by referring to concepts such as equity, redress, transformation and diversity. Finding a rational basis for race profiling and the collection of data on race and identity require an understanding of these frequently-used concepts.

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44 Soudien, Carrim & Sayed 2004: 25.

45 Sec 6.

46 Sec 15.

47 Sec 30.

48 Bray & Joubert 2005: 121

49 *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC)

50 4 of 2000

51 Department of Education Statistics 2006

52 Sowell 2005: 222

## A. Equity

The Essential English Dictionary<sup>53</sup> explains that an equitable system is a system where everyone is treated equally, for example, spreading work and its benefits equitably through societies. The preamble to the Employment Equity Act<sup>54</sup> explains that equity encompasses the elimination of discrimination and the establishment of specific measures to accelerate the advancement of designated groups. “Designated groups” in terms of the Equity Act<sup>55</sup> include black people, women and people with disabilities. The word equity is not used in any legislation anywhere in terms of learners in schools, because it refers to treating everyone equally and providing equal benefits to everyone. In this regard the Constitution guarantees equal educational opportunities for everyone, which the state “must make progressively available and accessible”.<sup>56</sup> The Employment Equity Act<sup>57</sup> in its preamble promotes the constitutional right of equality and the exercise of true democracy.

Transformation is about more than just admitting more black learners into former white schools. Equity of access and the removal of institutional discriminatory practices will not necessarily ensure the attainment of quality and equity in education, unless access and equity also imply providing learners with an equal chance to succeed. “In effect this means that the instructional programme, learning contact, learning styles, teaching strategies, assessment and environmental needs need to be designed to promote the chances of all learners”.<sup>58</sup> Bennet<sup>59</sup> also warns that equity should not be confused with sameness of result, identical treatment and identical experiences. Different treatment may rather be required in accordance with relevant differences.

## B. Redress

“Redress” means to restore a balance, to re-adjust, to remedy and to make-up for.<sup>60</sup> The Promotion of Equality and Prevention of Unfair Discrimination Act<sup>61</sup> acknowledges the significant progress that has been made in restructuring and transforming our society and its institutions. The preamble of this Act also makes it clear that progressively redressing inequalities lies in the Constitution, which upholds the values of human dignity, equality, freedom and social justice. In terms of section 2 of this Act, its purpose is to promote the value of non-racialism. Furthermore, no person may engage in any activities that are intended to promote, or have the effect of promoting, exclusivity based on race or provide, or continue to provide inferior services to any racial group compared to those of another racial group.<sup>62</sup> A question asked by Soudien *et al*<sup>63</sup> query the specific strategies and mechanisms the Department of Education has put in place to ensure educational inclusion and overcome specific histories of exclusion. These strategies need to be revisited. For the Department of Education focusing on political arithmetic<sup>64</sup> could be seen as a disguise for not restoring a balance between schools who provide quality education in inclusive institutions and schools who despite equity efforts still continue to deliver thousands of learners with an inferior education. In this regard Pandor<sup>65</sup> refers to ex-Model C schools “that are facing the challenge of integration, because black learners are looking for quality education”. She also mentions former “coloured” schools in Cape Town that are absorbing an increasing number of black learners from the Eastern Cape for the same reason.<sup>66</sup>

53 Collins 1989.

54 fn 24.

55 Sec 1.

56 Sec 29(1).

57 fn 24.

58 Lemmer & Squelch 1993; 183 Bennet 1986: 36

59 1986.

60 The Concise Oxford Dictionary.

61 4/2000.

62 Chapter 2: sec 6-12.

63 2004: 21.

64 Zuberi 2001: 91.

65 2004: 14.

66 Pandor 2004: 14.

### C. Diversity and transformation

The South African Constitution protects seventeen aspects of diversity of which race is but one. To maintain diversity is a frequently cited as a rationale for justifying racial balancing. In the light of the constitutional suspicion in the US of distinctions based on race, racial classifications by a state agency, such as educational authorities, can be justified only if they are shown to be for a compelling state interest.<sup>67</sup>

In South Africa race profiling and the use of racial classifications in education are justified for “benign purposes”. Politicians, education officials and policy makers claim race identification processes accelerate integration and integration guarantees successful promotion of the values of dignity, equality and the advancement of human rights and freedoms.

The challenge for the Department of Basic Education in South Africa would thus be to justify any form of racial profiling in schools to be for the protection of the right to equality of all learners. Education Management Information Statistics (EMIS) data collection instruments must be standardised across provinces (collecting exactly the same information) in order to process data at a national and provincial level. What the Department of Basic Education has to justify is why data on race and identities are required from millions of learners in mono-racial rural and township schools throughout South Africa.

Transformation in South Africa relates to the consolidation of democracy by eradicating social and economic inequalities that were generated by the history of colonialism and apartheid. Transformation cannot be achieved through racial classification practices. The construct of race is negative with emphasis on dissociation and exclusion.<sup>68</sup> Cashmore gives the example of Brazil, parts of the Caribbean and Spanish America where racial lines are extensively blurred and although a few societies have remained race conscious no distinct, corporate racial groups exist any more.<sup>69</sup>

UNESCO<sup>70</sup> emphasises the importance of education to develop communities and societies rooted in the principles of democracy, justice and respect for human rights. To ensure equal access to education for all in practice means to establish and implement standardised methods to measure and track the educational performance of disadvantaged children and youth of the whole country and to support efforts to ensure safe school environments, free from violence and harassment, racial discrimination and related intolerance.<sup>71</sup>

## VIII. Understanding equal educational opportunities for everyone

Understanding the connection between race integration in schools and a legitimate governmental purpose to further or achieve equal educational opportunities for everyone necessitates an investigation into the meaning of equal educational opportunities for everyone. The Constitution of South Africa 1996, in section 29, guarantees basic and further education, which the state must make progressively available and accessible for everyone. In other words the Schools Act guarantees equal educational opportunities for everyone. Equal educational opportunities in all its forms and at all levels must exhibit the following interrelated and essential features:<sup>72</sup>

- Availability – functioning educational institutions have to be available. For example, all schools are likely to require well-maintained buildings, sanitation, safe drinking water, trained professional teachers, relevant learning support materials.

67 Alexander & Alexander 2005: 931.

68 Cashmore 1996: 18.

69 Cashmore 1996: 18.

70 United Nations Educational, Scientific and Cultural Organization.

71 Singh 2005: 57.

72 De Groof & Lauwers 2005: 37.

- Accessibility – educational institutions must be accessible to all. Accessibility has three overlapping dimensions, namely non-discrimination, physical accessibility and economic accessibility.
- Acceptability – the form of education must be relevant, culturally appropriate and of good quality.
- Adaptability – education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of learners within their diverse social and cultural settings.

The Department of Basic Education pays considerable attention to the integration of former white schools. Orfield has done extensive research in the US on desegregation and integration processes and achievements. In reflecting on implementing change he concludes that the best way to accomplish desegregation quickly requires effective training of educators in disadvantaged schools, more funding and creating new educational opportunities for all learners.<sup>73</sup> Orfield warns that the worst result came from pushing mandatory change in ways that produced greater instability of societies.<sup>74</sup> Successful integration is not reflected in numbers but in sound planning that includes thoughts about demography, underlying trends, effective training, fair leadership and teaching practices, and fairness in access to schools for all learners.

Schools formerly defined as White, Indian and Coloured now appear to be much more diverse than they were before 1994. Qualitative research and small-scale surveys have drawn attention to “the flight of students from former black schools (but) no parallel movement whatsoever of children classified coloured, white and Indian into former black schools”; that “children classified black appear to constitute a larger proportion of the total school population in former Indian and coloured schools than in former white schools (and that) children classified black, it would appear, are not entering Afrikaans-speaking former white schools in significant numbers”<sup>75</sup>

Sujee<sup>76</sup> recommends that a study should be undertaken to establish why learners have moved to other schools and whether the movement reflects a real desire for racial integration on the part of the learners and parents or rather the desire to access schools that provide quality education.

## IX. Recommendations

### A. Finding other means of fostering diversity

There has been a flight of students out of African schools, there has been no parallel movement towards them; children classified as African comprise a substantial portion of the school populations in schools formerly classified Indian and Coloured; African children are not entering Afrikaans-speaking schools in great numbers; the teaching corps in schools is much less integrated and the dominant form of desegregation has been that of assimilation rather than integration and whereas learner populations may in some instances be desegregating, the teaching corps is not.<sup>77</sup> Failure to understand the complex manifestations of racism has resulted in the absence of a systematic programme of transformation of the learning and teaching spaces and the elimination of all forms of racism and racial discrimination.

A persuasive legal argument for the diversity rationale must do more than articulate why diversity is important to education. It also must explain why the importance of educational diversity as a matter of policy merits the protection of equality rights for everyone. The diversity rationale is fundamentally grounded in a democratic ideal. It conceives of affirmative action as a means of fostering an educational environment that prepares students to live, work, and learn together as citizens in a pluralist nation. It views racial isolation and racial separation as antithetical to democratic self-governance, and its central aspiration is to create an integrated society.<sup>78</sup>

73 Orfield 2004: 119.

74 Orfield 2004: 119.

75 Soudien, Carrim & Sayed 2004: 51.

76 2004: 57.

77 Soudien, Carrim & Sayed 2004. 60

78 Liu 1998: 381

Diversity encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single, though important element. Attaining a racially diverse school where race is valued alongside other characteristics, such as geography, personal talents, or life experiences requires educational pluralism.<sup>79</sup> Educational diversity encompasses both racial and non-racial diversity. Moreover, an admissions policy designed to further educational diversity must be flexible enough to consider each applicant as an individual. There is no necessary convergence between educational diversity and racial proportionality.

## B. Taking remedial action to transform education

Remedial action appeals to notions of corrective justice. It conceives of affirmative action as a means of redressing the present harms of past discrimination, and it aspires to create a society in which individuals enjoy the wealth and opportunities they would have in a world untainted by historical wrongs. This rationale justifies racial preferences enacted by government entities both voluntarily and pursuant to a constitutional or statutory obligation. Remedial action should be assessed against five criteria – moral foundations, constitutional foundations, burdens on previously disadvantaged groups, burdens on previously advantaged groups, and the existence of a logical stopping point.<sup>80</sup>

One might argue that an interest in remediation has special moral force because it “is rooted in our country’s shameful history of racial wrongs”. We must first observe that the Constitution provides a public entity with an affirmative mandate to use race-conscious measures for the purpose of substantive equality, but that the remedial action must be designed to protect and advance a previously disadvantaged group. One precondition of our democratic system is the equality of all of its members. The Constitution repeatedly and explicitly affirms the concept of equality. Efforts to combat prejudice are therefore vital to the maintenance of democracy. Because schooling “provides the common currency of political and social life”, they must offer an education that anticipates the demands of democratic politics.<sup>81</sup> In particular, they must provide learners with opportunities to bridge the racial gaps that continue to divide our nation.

## X. Conclusion

“Racism will cease to exist when we recognise, understand, and dismantle the system of White privilege that supports it. A crucial step in this change is understanding the ways White privilege is reinforced by the White–Non–White dichotomy that defines quality education in relation to the White norm.”<sup>82</sup>

Race classification in schools and focusing on political arithmetic affirms the divide created by the apartheid laws. The Department of Basic Education’s fixation on integration of the former white schools seems to create the impression that only former white schools provide quality education and therefore the aspiration of every black parent who has the best interest of his/her child in mind is to be able to enrol their children in former white schools. The role of former white schools in providing equal educational opportunities to the African component in particular is however very small.

Educational institutions are microcosms of society, and are bound by the policies of the new democracy to provide all learners with the opportunity to realise their true potential, and for all learners to develop in an atmosphere of respect and dignity. Schools are the site of the inculcation of knowledge. Value-based judgments are implicit in what is deemed worthy to be taught. Those judgments are communicated, perhaps unconsciously and almost certainly unintentionally, through classroom discussions about non-racism, equality and quality.

79 Liu 1998: 381

80 Liu 1998: 385

81 Liu 1998: 385

82 Bowman 2001: 246

When racial classification is demanded the results can be troublesome, because race offers no innate or inherited capabilities directly linked to educational achievement. One of the factors determining whether discrimination had an unfair impact is the purpose of the conduct or action. In other words there must be a proportional relationship between ends and means. A dignity-based approach to equality must be followed which determines, *inter-alia*, that discrimination based on an unlisted ground that impinges on a learner's human dignity will be presumed unfair until proven otherwise.

## XI. Bibliography

- ALEXANDER K & ALEXANDER MD 2005. *American Public School Law*. 6<sup>th</sup> ed. Belmont: Thomson West.
- BENNET CI 1986. *Comprehensive multicultural education: theory and practice*. Boston & London: Allyn and Bacon.
- BOWMAN KI 2001. The new face of school desegregation. *Duke Law Journal* (50): 1751-1767
- BRAY W & JOUBERT R 2005. *Reconciliation and Peace in Education in South Africa: The Constitutional Framework and Practical Manifestation in School Education*. Paper read the "Sustained Peace Educational Efforts for Social Cohesion in International Conflict and Post-Conflict Societies" The Hebrew University of Jerusalem. June 6<sup>th</sup>-8<sup>th</sup>.
- CALIFORNIA CONSTITUTION Section 31
- CASHMORE E 1996. *Dictionary of race and ethnic relations*. New York: Routledge.
- CASHMORE E 1990. *Introduction to race relations*. London: Routledge.
- COLLINS 1989. *Essential English Dictionary*. London: Collins
- DE GROOF J & LAUWERS G 2005. Increasing access to education throughout European society. In RUSSO C, BECKMANN J & JANSEN J (EDS) *Equal educational opportunities*. Pretoria: Van Schaik.
- DE WAAL J & CURRIE I 2005. *The Bill of rights handbook*. Kenwyn: Juta.
- DU BOIS R 1990. *Illusions of race*. New York: Routledge.
- FOWLER HW & FOWLER FG 1982. *The Concise Oxford Dictionary*. Oxford: Oxford University Press.
- GAUTENG DEPARTMENT OF EDUCATION 2005. Protocol for Race profiling in GDE Institutions. Circular 14/2005. 4 April 2005.
- KEMERER F, SANSOM P & KEMERER J 2005. *California School Law*. Stanford: Stanford University Press.
- LEMMER E & SQUELCH J 1993. *Multicultural Education: A teachers manual* Pretoria: Southern Book Publishers.
- LIU G 1998. Affirmative action in higher education. *Harvard Civil Rights-Civil Liberties Law Review*. Summer: 381-398.
- NOEL I 1996. *How the Irish became white*. London: Routledge.
- ORFIELD G2004. The American experience: desegregation, integration resegregation. In NKOMO M, MCKINNEY C & CHISHOLM L (EDS) *Reflections on school integration*. Cape Town: HSRC Publishers.
- PANDOR N2004. Integration within the South African landscape: are we making progress in our schools? In NKOMO M, MCKINNEY C & CHISHOLM L (EDS) *Reflections on school integration*. Cape Town: HSRC Publishers.
- SINGH K2005. Non-discrimination and equal educational opportunities: UNESCO's normative action. In RUSSO C, BECKMANN J & JANSEN J (EDS) *Equal educational opportunities*. Pretoria: Van Schaik.
- SMIT L 2006. *Race and research. Science in Africa* Available at <http://www.scienceinafrica.co.za/2006/april/classification.htm>
- SOWELL T2005. *Black Rednecks and White Liberals*. .California: Encounter Books
- SOUDIEN C, CARRIM N & SAYED Y 2004. School inclusion and exclusion in South Africa: some theoretical and methodological considerations. In NKOMO M, MCKINNEY C & CHISHOLM L (EDS) *Reflections on school integration*. Cape Town: HSRC Publishers.
- STATISTICS SOUTH AFRICA 2005. *Debate over race and censuses not perculiar to SA*. Available at <http://www.statssa.gov.za/news-archive/05may2005>.
- STATISTICS SOUTH AFRICA 2005. *Constructing a social accounting matrix. Comparisons across eleven countries*. Available at <http://www.statssa.gov.za/publications/DiscussSAM/DiscussSAM.pdf>.
- SUJEE M2004. Deracialization of Gauteng schools – a quantitative analysis. In NKOMO M, MCKINNEY C & CHISHOLM L (EDS) *Reflections on school integration*. Cape Town: HSRC Publishers.

*THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA*, 1996. 1996.

*THE SOUTH AFRICAN SCHOOLS ACT* 84/1996.

*THE EMPLOYMENT EQUITY ACT* 55/1998.

*THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT*. 4/2000

UNESCO 2001. *Universal Declaration on Cultural Diversity Available* at <http://www.unesco.org>.

UNITED NATIONS 1998. The International Convention on the Rights of the Child. In DAVEL C (Ed).

*Children's rights in a transitional society*. Pretoria: Centre for Child law.

ZUBERI T 2001. *Thicker than Blood: How racial statistics lie*. Minnesota: University of Minnesota Press.

### **South African Cases**

*HARKSEN V LANE* NO 1998 (1) SA 300 (CC)

*MINISTER OF FINANCE V VAN HEERDEN* 2004 (6) SA 121 (CC)

*MATUKANE V LAERSKOOL POTGIETERSRUS* 1996 (3) SA 223 (T).

### **U.S. Cases**

*BROWN V BOARD OF EDUCATION OF TOPEKA, KANSAS* 347 U.S. 483 (1954)

*CITY OF RICHMOND V JA CROSON Co* 488 U.S. 469, 109 S. Ct 706 (1989)