

**DISCRIMINATION ON THE GROUND OF  
CITIZENSHIP UNDER THE  
CONSTITUTION OF THE REPUBLIC OF  
SOUTH AFRICA, 1996**

By

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Submitted in part fulfilment of the requirements of the degree of

**MATER OF LAWS**

at the

**UNIVERSITY OF SOUTH AFRICA**

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**JUNE 2000**

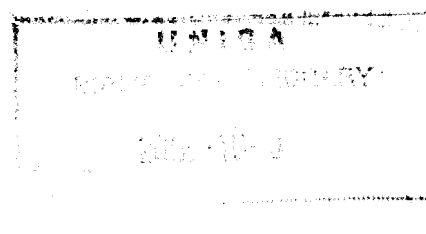
## Acknowledgement

The ideas presented in this work have their origin in my involvement in the project of drafting the legislation required by section 9 (4) of the Constitution which is intended to prevent or prohibit unfair discrimination, which process led to the publication of the Draft Bill on the Promotion of Equality and Prevention of Discrimination. Public comments on the Bill have been invited and the Bill is currently being considered by the Justice portfolio committee to beat the 4 February 2000 deadline for promulgation. The project has given me the privilege of discussing my ideas with distinguished constitutional law experts, academics, and other officials involved in the administration of justice. Among those I consulted there are those whose acclaim, criticism and advice I particularly cherish, among these, Professor Sandy Liebenberg of the University of Cape Town, Dr B Pityana Chairperson of the South African Human Rights Commission, Mr Jody Kollapen, Commissioner of the South African Human Rights Commission, Mr Tshidiso Tshipyane, a researcher at the South African Human Rights Commission, and of course the lecturing staff in the Unisa's Department of Constitutional and Public International Law who were always readily available whenever I needed guidance.

A special word of thanks to Prof Gretchen Carpenter, my supervisor for this work. Her guidance and invaluable advice gave much substance to this work.

I also wish to thank Mr Tumelo Motsepe who assisted with the typing of this work. To all persons who contributed in various ways to the production of this manuscript,

Thank you.



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# **DISCRIMINATION ON THE GROUND OF CITIZENSHIP UNDER THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996**

## **SUMMARY**

Prior to 1994, citizenship was one of the pillars upon which the erstwhile government's policy of separate development rested. The concepts of citizenship and nationality were manipulated by the apartheid government to justify the denationalisation of black people and the creation of different classes of citizenship. Race, colour and language were the distinguishing features used to classify people into the different classes of citizenship.

With the advent of the new constitutional order in 1994, common citizenship and the rights associated with it were restored to all South Africans. This discussion shows how in the post-1994 constitutional order citizenship has become an element of nation-building, while on the other hand it continues to perpetuate discrimination against non-citizens. The study aims to further the debate regarding the ill treatment of non-citizens with a view of influencing legislative and policy reform to replace the existing laws which are biased against non-citizens.

### **Key words**

Aliens, citizenship, common citizenship, unfair discrimination, freedom of movement and residence, freedom of trade, occupation and profession, limitation of rights, nationalism, the right to equality, the right to human dignity, refugee, State sovereignty.

### **Methodology**

An analysis of the relevant jurisprudence, legislation and policy instruments dealing with non-citizens, especially aliens and refugees.

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## 1. Introduction

The topic of this discussion requires an in-depth analysis of the right to equality entrenched in section 9 of the Constitution with specific emphasis on equality between citizens and non-citizens. It is an indisputable fact that equality, both as right and as a constitutional value, played a fundamental role in our country's transition from the old apartheid order to the current democratic order based on human dignity, equality and freedom. In this discussion, the main focus will be on discrimination based on the ground of citizenship.

Citizenship is the political relationship or legal status defining the relationship between the individual and the State. It defines the rights and duties each bears to the other, such as the citizen's duty to pay tax, to serve in the armed forces when called upon and to obey the laws of his or her country. Citizens have the right to vote, may run for political office or seek appointive office and participate actively in the political process of a country. On the other hand, the State must afford its citizens equal protection of the law and protection for their rights. In the classical sense the concept of citizenship was intimately linked with the performance of political power and obligations. In ancient Rome, rights and privileges were highly prized and the price of citizenship was substantial, in the form of service to the Republic and, later, to the Empire. The classical concept of citizenship can be understood from the Aristotle's definition of a citizen as "the responsible participant in the deliberate or judicial administration of any state"<sup>1</sup>. The South African Constitution, like the constitutions of other modern democracies, does not explicitly spell out the duties and obligations of citizens. These duties have to be implied from the Constitution itself because the entrenchment of a right in the Constitution presupposes the existence of a corresponding duty. The African Charter of Human and Peoples' Rights ("the African Charter") is an example of a human rights instrument that lists corresponding duties of individuals. Duties listed in the African Charter include the duty of each individual to respect his fellow beings without discrimination, to promote mutual respect, to enhance and preserve positive African values and to contribute to the promotion and achievement of African unity.<sup>2</sup>

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<sup>1</sup> *Matteo Denationalisation v "The right to have rights"* (1997) 7-11

<sup>2</sup> See Articles 28 and 29(7) and (8) of the African Charter of Human and Peoples' Rights

For most South Africans, citizenship encompassed much more than a constitutional or statutory definition. As our history shows, citizenship was manipulated to justify racial discrimination. One of the cornerstones of the policy of separate development was to deprive the majority of South Africans of their citizenship and accord them citizenship of the now defunct "independent" homelands.

This explains the reason why, for black South Africans, the struggle for freedom was primarily a struggle to regain their South African citizenship and to enjoy the rights associated with it. This sentiment is shared by Sachs<sup>3</sup> who wrote in 1990 that the struggle against apartheid was precisely a struggle against separateness and a struggle to be the same, and that the struggle for the right to be the same expressed itself as a battle for equal citizenship. It came as no surprise when, three years later, the first of the thirty-four Constitutional Principles agreed upon at the Multiparty negotiations for a political settlement for South Africa was "the establishment of one sovereign state, a common citizenship and democratic system of government committed to achieving equality between men and women and people of all races". This constitutional principle paved way to the promulgation of the South African Citizenship Act<sup>4</sup> which provide for the acquisition, loss and restoration of the South African citizenship indiscriminately.

Closely related to citizenship is the concept of nationality. Nationality, as Carpenter<sup>5</sup> explains, is seen as an international facet of citizenship, the basis of the citizen's status at international law, while citizenship relates to the national or municipal facet, indicating the individual's membership of a particular community. In the narrow sense "citizenship" is seen to relate to the individual's membership of a specific political community. Citizenship has been used to denote the status of those who enjoy full political rights and privileges while "nationals" refers to those who are subjects of the State but do not necessarily have full rights and privileges within the State they are permanently residing in.

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<sup>3</sup> *Protecting human rights* (1990) at 161.

<sup>4</sup> Act No. 88 of 1995

<sup>5</sup> "The Citizenship issue – still a thorn in the flesh" *SAYIL* 1988-89 at 14

While it is generally accepted that there is a legal distinction between citizenship and nationality, it is not unusual for lawmakers and courts to use the term "citizenship" to incorporate nationality as well. The Constitution of the Republic of South Africa<sup>6</sup> which is referred to as "the Constitution" or "the Final Constitution" throughout the discussion, does not distinguish between these two concepts in the sense that all South African citizens also have South African nationality. The provisions of section 28(1) which provide that every child has the right to a name and nationality from birth, have no practical implications.<sup>7</sup>

Originally, citizens enjoyed all the rights on the territory of the State whereas aliens had hardly any. The position gradually improved as human rights developed to become universally recognised and acceptable. This discussion, while acknowledging the great strides that have been made towards the attainment of equality since the advent of democracy in 1994, also shows that new patterns of discrimination against non-citizens on grounds of citizenship have resurfaced and continue to rise unabated. Failure by government and civil society to control this scourge which permeates our society, undermines the very culture of human rights which the Constitution seeks to inculcate.

## **2. Citizenship as a foundational value of the Constitution**

The Constitution contains two separate provisions on citizenship, one in section 3, and the other in section 20. Section 3 provides:

### **Citizenship**

- 3 (1) There is a common South African citizenship.
- (2) All citizens are –
  - (a) equally entitled to the rights, privileges and benefits of citizenship; and
  - (b) equally subject to the duties and responsibilities of citizenship.
- (3) National legislation must provide for the acquisition, loss and restoration of citizenship.

Section 20 provides:

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<sup>6</sup> Act 108 of 1996

<sup>7</sup> Rautenbach and Malherbe *Constitutional Law* (1996) at 44

## Citizenship

20 No citizen may be deprived of citizenship.

Constitutional law writers express different views on the relationship between sections 3 and 20 of the Constitution. Keightley<sup>8</sup> is of the view that both sections do not in themselves create a right to citizenship. According to her, what section 3 establishes is a right to a common and equal citizenship once South African citizenship has been acquired in terms of the South African Citizenship Act and that section 20 merely ensures that a person who is eligible for South African citizenship, is entitled to have that eligibility recognised and be granted citizenship. Erasmus,<sup>9</sup> on the other hand, argues that the fact that section 3 does not form part of the Bill of Rights but is placed under the first chapter containing "Founding Provisions" elevates the significance of "common citizenship". He further expresses the view that section 3(2) (a) – "the rights, privileges and benefits of citizenship" – should be linked with sections 19 and 20 in the Bill of Rights. The latter section qualifies the "rights, privileges and benefits" of citizenship stated in section 3. Therefore, according to this view, the right to live and return to the Republic, the right to have a passport and the right of adult citizens to vote and stand for office, are the same rights, privileges and benefits of citizenship referred to in section 3.

Although the concept of "common citizenship" has played a pivotal role in building up a new sense of belonging for a nation that was torn apart by racial divisions and inequalities in the past, the over-emphasis placed on citizenship has exacerbated the division between those "who belong" and those who are foreigners and strangers in this country.

### **3. The different categories of non-citizens and a critical analysis of the laws that apply to them**

A South African citizen is a person who has acquired South African citizenship by birth, descent or naturalisation as provided in sections 2, 3 and 4 of the South African Citizenship

<sup>8</sup> "The Child's Right to a Nationality and the Acquisition of Citizenship in South African Law" (1998) *SAJHR* 411-429

<sup>9</sup> "South African Citizenship in a Constitutional Context" (1998) *Journal for Juridical Science* at 1-19 at 4



Act. Any person who is the Republic and who is not a South African citizen is an alien. Aliens are classified as refugees, legal and illegal aliens.

### 3.1 Refugees

Refugees are special categories of aliens who are accorded international and national protection to enjoy fundamental human rights necessary for survival in safety and dignity. The primary sources of international protection are treaty law and customary law. The most important treaty law is the Convention on the Status of Refugees and Stateless Persons, known as the 1951 Convention, adopted by the United Nations Conference in 1951. The “non-refoulement” principle which is regarded as the cornerstone of international refugee protection is an example of customary law. The non-refoulement principle entails that States may not return a refugee to an area where his or her life or security would be in danger. This principle is embodied in Article 33 of the 1951 Convention which stipulates that no contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers or territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. This principle also finds recognition at the regional level: Article II (3) of the OAU Convention Governing the Specific Aspect of Refugee Problems in Africa (OAU Convention), states that no person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for reasons of his race, religion, nationality, membership of a social group or political opinion.

The Republic of South Africa has acceded to the 1951 Convention, the 1967 Protocol Relating to the Status of Refugees and the OAU Convention, and in so doing, assumed certain obligations to receive and treat in its territory refugees in accordance with the standard and principles established in international law. These international law principles have been incorporated in the Refugees Act.<sup>10</sup> In terms of section 3 of this Act an alien will be accorded refugee status if the person-

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<sup>10</sup> Act No.130 of 1998

- (a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or
- (b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; or
- (c) is a dependant of a person contemplated in paragraph (a) or (b) above.

Sections 27(a) and (b) and 28(2) of the Refugees Act are relevant for purposes of this discussion. Section 27 provides that a refugee-

- (a) enjoys full protection, which includes the rights set out in Chapter 2 of the Constitution and the right to remain in the Republic in accordance with the provisions of the Act.
- ...
- (g) is entitled to the same basic health services and basic primary education which the inhabitants of the Republic receive from time to time.

Section 28(2) provides that a refugee may be removed from the Republic on grounds of national security or public order with due regard to the rights set out in section 33 of the Constitution and the rights of the refugee in terms of international law. The rights protected in section 33 of the Constitution are the rights to an administrative action that is lawful, reasonable and procedurally fair; and the right of everyone who has been adversely affected by administrative action to be furnished with written reasons.

### 3.2 Prohibited and unprohibited persons

A distinction is made between aliens who are in the Republic legally, and those whose presence in the country has not been authorised under the Aliens Control Act.<sup>11</sup> In the Aliens Control Act these two categories of aliens are referred to as the unprohibited persons and the prohibited persons respectively. Unprohibited persons are aliens to whom either an immigration permit or a temporary residence permit has been issued in terms of sections 25 and 26 of the Aliens Control Act respectively. An immigration permit is issued to an alien who has applied for a permit to immigrate to the Republic for purposes of taking up permanent residence therein. A temporary residence permit is issued for short term visits in the Republic and is issued to tourists, business people, students, temporary workers, work seekers and aliens who come into the country for purposes of receiving medical treatment.

Section 44 of the Aliens Control Act authorises an Immigration Officer to remove or cause a prohibited person to be removed from the Republic, and may, pending his or her removal, detain or cause him or her to be detained as prescribed in the Act. Unprohibited persons may also be deported to their countries of origin. In terms of section 47(1) of the Aliens Control Act, the Minister of Home Affairs may, through a warrant under his hand, order the arrest and removal of any person who is not a citizen from the Republic if public interest so requires. Family members of the person in respect of whom the deportation order has been issued, may, in terms of section 48 of the Aliens Control Act also be removed if the person to be deported is the head of the family concerned.

The Aliens Control Act does not contain a provision similar to that in section 27 of the Refugee Act which extends the rights (or some of the rights) protected in Chapter 2 of the Constitution to the unprohibited or prohibited persons. One of the reasons for this could be that the Refugee Act was passed after the Constitution came into effect, while the Aliens Control Act was drafted and promulgated before the dawn of the new democratic order. As will become apparent later in the discussion, some of the few cases decided in respect of section 25 of the Aliens Control Act suggest that some of the provisions of the Act could be in conflict with certain provisions of the Constitution. The Department of Home Affairs had

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<sup>11</sup> Act No. 96 of 1991

an opportunity, at the time of drafting the White Paper on International Migration,<sup>12</sup> to re-align its immigration policies with the values enshrined in the Constitution. However, the White Paper does not seem to have remedied all the deficiencies in the government's immigration policies.

#### **4. The significance of the right to equality of non-citizens**

##### **4.1 The criteria for establishing a contravention of the equality clause**

The equality clause enshrined in section 9 of the Constitution provides an alternative remedy for prohibited and unprohibited persons against any act or conduct that excludes them unconstitutionally from the enjoyment of the fundamental human rights entrenched in Chapter 2 of the Constitution. Section 9 extends the right to equality to "everyone". Subsection (1) guarantees equality before the law and equal protection and benefit of the law. Subsection (2) is an Affirmative Action clause that provides for positive measures to advance persons or categories of persons disadvantaged by (past) discrimination. Subsections (3) and (4) are formulations of unfair discrimination and subsection (5) creates a presumption of unfair discrimination based on one or more of the grounds listed in subsection (3).

A distinction is made between formal and substantive equality. The Constitutional Court has delivered several judgments on the equality clause, and in some of the judgments the court has emphasised that equality must be understood substantively rather than formally. Several cases, notably *Brink*,<sup>13</sup> *Prinsloo*,<sup>14</sup> *Hugo*,<sup>15</sup> *Harksen*<sup>16</sup> and *Walker*<sup>17</sup> have all shaped our equality jurisprudence. In rejecting a formal or abstract notion of equality which ignores concrete differences in a quest for equal treatment regardless of those differences,

<sup>12</sup> Published in Government Gazette No. 19920 dated 1 April 1999

<sup>13</sup> *Brink v Kitshoff* 1996(6) BCLR 75 (CC)

<sup>14</sup> *Prinsloo v Van der Linde* 1997(6) BCLR 759 (CC)

<sup>15</sup> *President of RSA v Hugo* 1997(6) BCLR 708 (CC)

<sup>16</sup> *Supra*

<sup>17</sup> *Pretoria City Council v Walker* 1998(2) SA 363

the Constitutional Court has aligned itself with an understanding which seeks to address and remedy material differences. A commitment to substantive equality involves examining the context of an alleged rights violation and its relationship to systemic form of domination within society. It addresses structural and entrenched disadvantage at the same time as it aspires to maximise human development.<sup>18</sup>

Although most of the decided cases on equality were based on section 8 of the Interim Constitution, they remain authoritative. In *National Coalition for Gay & Lesbian Equality v Minister of Justice*<sup>19</sup> Ackerman J stated that the equality jurisprudence developed by the Constitutional Court in relation to section 8 of the Interim Constitution is equally applicable to section 9 of the Final Constitution, notwithstanding certain differences in the wording of these provisions. In *Harksen*, the Constitutional Court formulated the following criteria to determine whether a provision or an executive action is in conflict with the equality clause:

- (a) In the first analysis the question is whether the provision or the executive conduct differentiates between people or categories of people in a manner that amount to unequal treatment. If it does so differentiate, then in order not to contravene section 8(1) of the Interim Constitution there has to be a rational connection between the differentiation and the legitimate government purpose it is designed to achieve.
- (b) Differentiation that is justified by a rational connection may nonetheless constitute unfair discrimination and be in conflict with section 8(2). Once it is established that there is a differentiation and that this differentiation does not conflict with section 8(1), it becomes necessary to proceed to a consideration of the constitutionality of the differentiation in view of section 8(2).
- (c) The question whether a differentiation constitutes unfair discrimination in terms of section 8(2) involves a two stage analysis namely: firstly, the question is whether the differentiation amounts to discrimination, and if it does, the second question is whether such discrimination is also unfair discrimination as indicated by section 8(2).

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<sup>18</sup> Albertyn and Goldbatt "Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality" (1998) 4 SAJHR 249-276 at 250

<sup>19</sup> 1999(1) SA 6 (CC) at 22

- (d) The first question, whether the differentiation constitutes discrimination, is answered in terms of the two categories of differentiation. The first category is made up of differentiation on any one or more of the grounds specified in section 8(2), while the second category is differentiation on a ground not specified in section 8(2), but analogous to such a ground (the specified ground). The question whether there has been differentiation on either a specified ground or an unspecified ground is answered objectively. In the first case the question is simply whether there is differentiation on one of the specified grounds as set out in section 8(2). In the second case the question is whether there is a differentiation on a ground that, while not specified in section 8(2), is nevertheless analogous to such a ground in the sense that differentiation is based on characteristics or attributes of a person that have the potential to impair the fundamental dignity of persons as human beings or affect them adversely in a comparably serious manner.
- (e) If the answer to any of the above cases is in the negative, section 8(2) has not been breached and there is no discrimination. If the answer is in the affirmative, it is necessary to proceed to the second stage of the inquiry and to determine whether discrimination is unfair. In the case of discrimination on a specified ground it will be presumed that the discrimination is unfair. In the case of discrimination on an unspecified ground the unfairness has to be established before there will be breach of section 8(2).
- (f) The last leg of the inquiry becomes necessary where the unfairness of the provision or conduct has been presumed or established. If the discrimination is unfair, the question is whether the unfair discrimination can be justified in terms of the limitation clause provided in section 33 of the Interim Constitution. This involves the weighing up of the purpose and effect of the provision and a determination of its proportionality in relation to the extent of the limitation of equality it involves.

## 4.2 Unfair discrimination

It is trite for constitutions and human rights instruments to prohibit discrimination on any listed ground without using the word “unfairly” to qualify the word “discrimination”. Cachalia *et al*<sup>20</sup> argue that the word “discrimination” has both a pejorative and a benign meaning and that the inclusion of the modifier “unfair” is tautologous and therefore unnecessary. Fagan<sup>21</sup> is of the view that the term “discrimination” can have either a pejorative or a neutral meaning, depending on the context in which it is used. According to him, when used in its neutral sense, “discrimination” is synonymous with differentiation. When used in its pejorative sense, “discrimination” most commonly means differentiation that is unfair. Carpenter<sup>22</sup> express the view that given South Africa’s history of discrimination that went beyond what was unfair to what was, in many cases irrational, a cogent argument can be made out for emphasising that it is unfair differentiation that is proscribed, and not the making of any legitimate distinctions.

The use of the word “unfair” has also caused some problems with the application of the limitation clause. In *S v Makwanyane*<sup>23</sup> the court held that the limitation of rights called for a two stage approach, firstly, whether there is an infringement of an entrenched right, and secondly, whether the infringement is justified in terms of the limitation clause. In *S v K*<sup>24</sup> Farlam J contended that it was difficult to see how any discrimination which has already been stigmatised as unfair can ever be regarded as permissible to the extent that it is reasonable and justifiable in an open and democratic society based on freedom and equality. However, any uncertainty regarding the application of the limitation test in respect of the right of equality has been clarified by the Constitutional Court in the case of *Harksen* where the court held that it is only after the provision complained of has been found to constitute unfair discrimination that the limitation clause becomes applicable. What is to be determined at this stage is whether the unfair discrimination is justifiable in terms of the

<sup>20</sup> *Fundamental rights in the new Constituion* (1994) 28

<sup>21</sup> “Dignity and Unfair discrimination: A value misplaced and a right misunderstood” (1998) 14 SAJHR 220-247 at 227

<sup>22</sup> “Internal Modifiers and other qualifications in bills of rights – some problems of interpretation” 1995 SAPL 260-247 at 263

<sup>23</sup> 1995(6) BCLR 665(CC) paragraph 103-109

<sup>24</sup> *Supra* at 53

limitation clause. The limitation process involves the weighing up of competing values, and ultimately an assessment based on proportionality.

The current limitation clause differs radically from the limitation clause which was contained in the Interim Constitution. Firstly, it removes the requirement that a limitation must be necessary for certain classes of rights and freedoms. All limitations on the rights and freedoms enshrined in the new Bill of Rights must simply be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom in order to pass the constitutional muster. Secondly, it removes the ambiguous requirement that a limitation must not “negate the essential content of the right”. Aside from the deletions identified above, the language of the current limitation clause remains largely the same – with one notable exception. The limitation clause of the Interim Constitution did not spell out the kind of considerations a court was supposed to take into account when doing limitation analysis. In the Final Constitution the following factors, reproduced verbatim from the judgement of President Chaskalson in *Makwanyane*, are enumerated as factors to be taken into account, namely, (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and the extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.<sup>25</sup>

#### 4.3. Citizenship as an unspecified ground of discrimination

Section 9(3) and (4) prohibits the State or anyone from discriminating 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. The word “including” in section 9(3) presupposes an open-ended list of the grounds of discrimination. Any discrimination on an unspecified ground of discrimination has implications for the burden of proof. In terms of section 9(5), discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that it is fair.

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<sup>25</sup> See Woolman “Out of Order? Out of Balance? The limitation clause of the Final Constitution” 1997 *SAJHR* 102-134 at 103-108



Therefore discrimination on the listed ground is *prima facie* unfair. In the case of an unlisted ground, the person alleging discrimination will have to establish unfairness of the alleged discriminatory conduct. Therefore, strictly speaking, the 17 listed grounds of discrimination enjoy a higher hierarchical status than any unlisted ground.

The Interim Constitution initially listed fourteen grounds. In the final Constitution, the grounds of pregnancy, marital status and birth were added to make the list of 17, probably as a result of the pressure from feminist groups. It is surprising that discrimination based on nationality or citizenship has been omitted from the Final Constitution. The omission of citizenship as a ground of discrimination in the Interim Constitution is understandable in the sense that, prior to 1994, discrimination on this ground was not so prevalent that it needed constitutional protection. Thipanyane<sup>26</sup> argues that ethnic or social origin should be construed extensively to include nationality. The author's view is misplaced. Section 9(3) lists "ethnic or social origin" and not "national or social origin" as a ground of discrimination. The author may have confused section 9(3) of the Constitution with some of the international human rights instruments such as Articles 2 and 26 of the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) which prohibit Member States from discriminating *inter alia* on the ground of "national or social origin". Ethnicity and nationality are two separate concepts with different meanings. The one does not imply the other.

While the criteria specified by the Constitutional Court to determine contravention of the equality provision are clear in respect of specified grounds, they are not as clear as regards unspecified grounds of discrimination, and this has exposed to the court to severe criticism. In the four cases cited above, namely *Hugo*, *Prinsloo*, *Harksen* and *Walker*, the court linked unfair discrimination with human dignity. It all started in *Hugo* when Goldstone stated:

At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect

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<sup>26</sup> "Status of Aliens in the Post-Apartheid South Africa" *South African Public Interest Review* (1998) Inaugural edition 81-110 at 99

regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.<sup>27</sup>

In *Harksen*, Goldstone J stressed once again that the prohibition of unfair discrimination in the Constitution provides a bulwark against invasions which impair human dignity or which affect people adversely in a comparably serious manner and that in the final analysis it is the impact of the discrimination on the complainant that is the determining factor regarding unfairness of the discrimination.<sup>28</sup> In *Walker Langa* DP endorsed Goldstone J's view, finding that the impact of the policy of the Pretoria City Council on the respondent and other persons similarly placed, viewed objectively in the light of the evidence on record, would, in his view, have affected them in a manner which is at least comparably serious to an invasion of their dignity.<sup>29</sup>

Fagan<sup>30</sup> criticises the Constitutional Court's unfair discrimination-human dignity analysis. He argues that if human dignity were to be both at the centre of unfair discrimination, then it should apply equally to discrimination on both specified and unspecified grounds; that the right against unfair discrimination has content of its own and constitutionalizes the right to equality; that the right against unfair discrimination is a catch-all right in that it enhances the protection of independent constitutional rights, and that its connection with human dignity has the effect of enhancing the protection of only one of them, namely the right to dignity entrenched in section 10 of the Constitution.

It is my honest submission that Fagan's criticism fails to give a practical alternative to the unfair discrimination – human dignity analysis as expounded in *Harksen*. Given the South Africa history characterised by systematic forms of domination and material disadvantage based on race, gender, class and other grounds of inequality, it is understandable why equality and dignity have been placed at the centre of our constitutional transformation. Equality and human dignity are foundational to the creation of the new constitutional order and the mentioning of one will in some cases justify the mentioning of the other, hence the

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<sup>27</sup> Supra at paragraph 41

<sup>28</sup> Supra at paragraph 51

<sup>29</sup> Supra at paragraph 81

<sup>30</sup> "Dignity and Unfair Discrimination: A value misplaced and a Right misunderstood" (supra) at 241-247

Constitution's emphasis on the phrase "an open and democratic society based on human dignity, equality and freedom".

## 5. Rights expressly excluded by the Constitution

The Constitution directly excludes non-citizens from enjoying the following human rights: the so-called political rights, such as the right to vote, the right to form a political party, the right to participate in the activities of such political parties, the right to stand for public office and to have free, fair and regular elections (section 19); the right not to be deprived of citizenship arbitrarily (section 20); the right to enter, remain and reside anywhere in the Republic and the right to a passport (section 21); and the right to choose a trade, occupation or profession freely (section 22). Save for these rights, all other rights in the Bill of Rights are extended to both citizens and non-citizens. In *Tettey and another v Minister of Home Affairs*<sup>31</sup> the court held that where the Bill of Rights makes a distinction between those rights that are exercisable by a citizen and those that are to be enjoyed by all individuals, it says so. Accordingly individuals are referred to as "every citizen", "everyone" etc. Only the right to vote, freedom of movement and residence and freedom of trade, occupation and trade will be analysed further.

### 5.1 The right to vote

The right to vote is one of the few rights in international law which are strictly limited to citizens. Article 25(b) of the International Covenant on Civil and Political Rights (ICCPR) provides that only citizens shall have the right and the opportunity to vote and to be elected at elections which shall be by universal and equal suffrage. The Universal Declaration of Human Rights (UDHR) is more extensive: Article 20(3) states that the will of the people shall be the basis of the authority of government which shall be expressed in periodic and general elections which shall be by universal and equal suffrage. The right to vote is regarded as "the voice of the people" in the democratic process. In *New National Party of*

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<sup>31</sup> Purshotam "The right of aliens and migrants to administrative justice and a brief look at the abuse suffered by them in South Africa" (1999) *SALJ* 116 32-35

*South Africa v Government of the Republic of South Africa and Others*<sup>32</sup> the court stressed the significance of the franchise when O'Regan J stated that the right to vote is more than a symbol of our common citizenship and that it is an instrument for determining who should exercise political power in our society. The judge cited the American decision of *Yick v Hopkins*<sup>33</sup> where the Supreme Court stated that the right to vote is preservative of other civil and political rights.

While universally the right to vote in a national election remains a well-guarded privilege for citizens, in several western countries there is a gradual trend to extend the right to vote in municipal elections to residents of the municipal areas concerned. In 1976 Sweden extended the municipal vote to foreigners who had resided in the municipality for more than three years. Finland extended this right in the same year, but only to citizens from other Nordic countries who had been resident in Finland for at least two years. Denmark and Norway followed suit in 1978 and 1979 respectively. In the United Kingdom the right to vote is enjoyed by British citizens by virtue of their status as such combined with, *inter alia*, status as resident. Commonwealth citizens and citizens of the Republic of Ireland are entitled to vote in local, national and European elections.<sup>34</sup>

A significant development in Europe is the development of the notion of European Citizenship. The European Union was created by the European Community (EC) Treaty signed in Maastricht on 7 February 1992. Citizens of Member States who are party to the EC Treaty are also citizens of the European Union. Article 8b, paragraph 1, grants citizens of the Union the right to vote and to be elected in the municipal elections held in the Member States where they reside and of which they are not nationals, under the same conditions as nationals of that state. Paragraph 2 of Article 8b recognises the right of citizens of the Union to participate in the elections for the European Parliament in the Member States of residence, where they may vote and be elected.<sup>35</sup> For the citizens of Europe this brought about a system of dual citizenship which enables citizens to have both

<sup>32</sup> 1999(5) BCLR 489(CC) paragraph 22

<sup>33</sup> 118 US 356 (1886) at 370

<sup>34</sup> Citizenship: The White Paper 39-46

<sup>35</sup> See Directives 93/109/EC of 6 December 1993 and 94/80/EC of 19 December 1994 as adopted by the Council. Both Directives are discussed in *Citizenship and State Succession* (1997) at 116-121

the citizenship of their countries of origin and citizenship of the European Union. African countries have not yet conceived the idea of a continental citizenship.

It is important to note that during the first democratic general elections held in 1994, both South African citizens and permanent residents in the Republic were eligible to vote in the national and provincial election. Section 15 of the Electoral Act<sup>36</sup> provided that every person of the age of 18 or older who was a citizen of or permanently resident in the Republic and who was in possession of a voter's eligibility, was entitled to vote at the election. In my view, the reason for extending the franchise to non-citizens in 1994 was mainly a matter of convenience rather than a matter of constitutional choice. Many South Africans still had the "citizenship" of their erstwhile homelands in the sense that they still possessed the different kinds of identity documents issued by the TBVC States. With the elections having been held at a short notice and without a common voters' roll, it could have been difficult to distinguish citizens from non-citizens. After the 1994 elections, the Independent Electoral Commission recommended to the government that a common voters' roll be compiled to ensure that future elections were credible and efficient.<sup>37</sup> The recommendation was accepted and incorporated in the Constitution with a provision extending the right to vote to citizens only.

It is further worth noting that permanent residents were eligible to vote in the 1995 local elections by virtue of section 179(3) of the Interim Constitution. In terms of this section every natural person who was ordinarily resident within the area of jurisdiction of that local government or was under law liable for the payment property rates, rent, service charges or levies to that local government and was registered as a voter, was entitled to vote. The requirement of "ordinarily resident" was wide enough to include both permanent and temporary residents. However, the franchise that was extended to certain non-citizens by the

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<sup>36</sup> Act No. 202 of 1993

<sup>37</sup> See *New National Party of South Africa v Government of the RSA and Others* (supra) at paragraph 29

Interim Constitution and the 1993 Electoral Act was nullified by subsections (2) and (3) of section 19 of the Final Constitution. In terms of these subsections, only adult citizens have the right to vote for any legislative body established in terms of the Constitution.

Many see globalisation and increased interaction between States as a threat to the concept of citizenship, and arguments in favour of all rights being extended to everyone regardless of citizenship are gaining momentum. Galloway “Citizenship: A jurisprudential paradox”<sup>38</sup> examined the Canadian Charter of Rights and Freedoms which provides for different benefits and entitlements for citizens, permanent residents and visitors, and wrote:

The reservation of these rights for citizens is problematic. Citizens are not only the group whose interests are affected by legislation. Permanent residents, in particular, often have a clear stake in the content of legislation, yet they have no constitutional right to vote. Thus, we have a conundrum of democratic legitimacy: how are we to reconcile the denial of a legislative voice to those whose interests are significantly affected with democratic principles?

He continued:

Why should the law classify all earthlings as citizens and non-citizens and create rights, duties, and disabilities that hinge on that distinction?

The reasons for extending the right to vote in local elections are not difficult to find. In the South African context, local government is being perceived as the hub of democracy. It is the sphere of government that is closest to the communities, and which has the responsibility of ensuring community participation and accountability to promote participative democracy. It therefore sounds reasonable to extend the municipal vote to permanent residents, as it will give them a say in the local affairs, in which they are stakeholders by virtue of the property rates and service charges they are obliged to pay.

## 5.2 Freedom of movement and residence

Section 21(3) of the Constitution provides that every citizen has the right to enter, to remain in and to reside anywhere in the Republic, while section 21(4) grants every citizen the right to a passport. Article 13 (2) of the UDHR and article 12 of the ICCPR contain similar

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<sup>38</sup> in La Torre *European Citizenship An Institutional Challenge* (1998) at 66

provisions relating to freedom of movement and residence. Article 11 of the ICCPR extends the right to freedom of movement and residence to “everyone lawfully within the territory of a State”. In South Africa this right does not extend to illegal or prohibited aliens. While citizens have the right to reside anywhere in the Republic, an alien granted permanent residence on the basis of his or her occupation is obliged to stay for a minimum of 12 months in the province in which he or she intends to pursue his or her occupation. Temporary residence permits may be issued subject to the condition, *inter alia*, that the holder of the permit may enter a part of the Republic, and to sojourn therein. Failure to comply with any of the conditions entitles the Minister of Home Affairs to withdraw the residence permit and to order the holder of such permit to leave the Republic within a given period.<sup>39</sup>

The reason why the Constitution restricts the right to a passport to citizens only could be attributed to the fact that a passport is still perceived as a document that regulates and controls travel, and not as document of identity enabling its holder to exercise the rights of free movement and invoke diplomatic protection of the issuing State. Carpenter<sup>40</sup> acknowledged, even prior to the adoption of the Constitution, that the basis and recognition of the right to travel is to enable politicians, businessmen, students, academics and journalists to earn a living and to explore and develop their full potential. Permanent residents have same reasons to travel and the fact that they have chosen South Africa as their permanent home makes it even more difficult for them to obtain passport from their countries of origin. Under the European Community Law, nationals have a right to a passport which is issued by their State of nationality. This entitles a national of any Member State to leave the Community national’s Member State, and thereafter any other, to enter and reside in another, and to re-enter the territory of the issuing State.<sup>41</sup>

The right to enter the Republic is extended to citizens only, and this is merely the right to return to one’s country. Grahl-Madsen, Melander and Ring<sup>42</sup> support the right to enter any

<sup>39</sup> Section 25(3) of the Aliens Control Act

<sup>40</sup> “Passports and the right to travel – the South African perspective” *XXIII CILSA 1990* 1-33 at 4

<sup>41</sup> Citizenship: The White Paper (supra) at 36-37

<sup>42</sup> In Alfredsson and Eide *The Universal Declaration of Human Rights – A common Standard of Achievement* (1999) at 265-278

other country other than one's own country - which they refer to as the "right of entry" or the "right to immigration". In their work they analyse the provisions of the UDHR and express their discontent that the right of entry has not been included in the UDHR or any other international instrument. They concede, however, that the protection offered by the "non- refoulement" principle comes closest to a right of entry. They are also of the view that the Nordic agreements give recognition to the right of entry, but only to participating States. The Nordic agreements allow citizens of participating States to enter and settle in the territories of all participating States.

### 5.3 Freedom of trade, occupation and profession

Section 26 of the Interim Constitution extended the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory to "every person". In contrast, the provisions of section 22 of the Final Constitution do not apply to "every person", but to citizens only. In addition, section 22 of the Final Constitution, unlike its predecessor, does not seem to provide a right to work. It is formulated similarly to Article 12 of the German Basic Law which provides that "all Germans have the right freely to choose their occupation or profession, their place of work, study or training". Such a provision is intended to guard against unjustified regulation of professions by the State and to prevent a system whereby people are directed towards specific occupations or professions at the whim of the government and not to reserve employment opportunities for citizens.

During the certification of the amended text of the Constitution, an objection was raised that the right of "every citizen" to "choose their trade, occupation or profession freely" should be extended to all persons irrespective of citizenship in order to comply with Constitutional Principle II, which provided that every person shall enjoy universally accepted rights, freedom and liberties.<sup>43</sup> The objection was based on article 6.1 of the International Covenant on Economic Social and Cultural Rights (ICESCR) which recognises the right of "everyone" to "the opportunity to gain his living work which he freely chooses or accepts". The court came to the conclusion that non-citizens are not

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<sup>43</sup> *Certification of the Amended Text of the Constitution of the Republic of South Africa*, 1996 1997(1) BCLR 1 para's 17-20



entitled to be treated on the same footing as citizens when it comes to freedom of occupational choice, and that Article 6.1 of the ICESCR does not prevent the State from differentiating between nationals and non-nationals as such. While the restriction on the freedom of occupational choice is intended to minimise the importation of skills and expertise that are in abundance in the country, cognisance must be taken of some of the practical situations occurring in the Republic, namely, that nationals from poverty-stricken African countries take occupations of low standards which citizens of the Republic would normally not take.

The provisions in the Bill of Rights relating to some of the occupational positions and professions have been given substance elsewhere in the Constitution. For example, sections 47(1), 106(1) and 158(1), which provide that only citizen may be members of Parliament, Provincial legislatures and municipal councils have to be read in conjunction with section 19(3)(b), which permits only citizens to stand for public office. Similarly, section 193 and 196(10) require the Public Protector and any other member of any commission established in terms of Chapter 9, as well as commissioners of the Public Service Commission to be South African citizens. As will be shown later, judges of the Constitutional Court must be South African citizens while judges of other courts need not be citizens of the Republic.

## **6. The courts' approach to citizens' and non-citizens' rights: Case-by-case analysis**

### **6.1 The *Baloro* Judgment**

The first case to be decided on equality between citizens and non-citizens is *Baloro v The University of Bophuthatswana and Others*.<sup>44</sup> The four applicants in this case were lectures from Ghana, Zambia and Sri Lanka and members of the academic staff of the University of Bophuthatswana. The matter arose after the university advertised senior academic positions for which the applicants applied. However, only applications of the South African citizens were considered. The applications of non-nationals were not considered as there was a "moratorium placed on short-listing and/or interviewing of non-South Africans. The

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<sup>44</sup> 1995(4) SA 97

applicants challenged the university's decision on the grounds, *inter alia*, that the moratorium constituted an unfair discrimination on the grounds of citizenship.

In the judgment delivered by Friedman JP, the court held that the decision by the Interim Council of the University to place a moratorium on promotions of non-national staff (expatriate), while promoting members of staff with South African citizenship, was a gross violation of section 8(2) of the Constitution for the following reasons:

- (a) The applicants are members of the academic staff of the first respondent with valid contracts of employment. Why must their applications for promotion be subjected to a moratorium, while the promotions of other members of the staff are promotion based, *inter alia*, on the fact that they are South African citizens?
- (b) The words "(n)o person" in s 8(2) also apply to aliens. "Persons" does not mean only a citizen of South Africa.<sup>45</sup>

The court further held that for the respondent to argue that, before re-incorporation of Bophuthatswana into South Africa there were no suitably qualified Bophuthatswanan citizens in Bophuthatswana, hence the appointment of the applicants, was absurd, and that qualification for appointment to the staff of a university is, and should be, merit and suitability for the position, and not ethnic or national origin.<sup>46</sup>

## 6.2 The *Larbi-Odam* judgment

The second case to be brought to court by non-citizens based on equality, and which became the first case to be decided by the Constitutional Court on the matter is *Larbi-Odam*.<sup>47</sup> In this case the Minister of Education had issued regulation 2(2) under the Educator's Employment Act which provided that no person shall be appointed as an educator in a permanent capacity, unless he or she is a South African citizen and meets the requirements of section 212 (4) of the Interim Constitution. The Member of the Executive Council for Education (North West), relying on this regulation, converted the temporary posts occupied by non-nationals into permanent posts and issued notices to the incumbents of those posts, notifying

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<sup>45</sup> Supra at 246-247

<sup>46</sup> Ibid

them of her intention to terminate their employment. The appellants, who originate from Ghana, Swaziland, Zimbabwe, and Uganda, and some of whom are permanent residents, challenged the decision in the Bophuthatswana Provincial Division of the Supreme Court. The Provincial Division ruled that although regulation 2(2) contravened section 8(2) of the Interim Constitution, it was justified under the limitation clause (section 33(1) of the Interim Constitution). In his judgment Waddington J stated *inter alia*:

The department was part of the overall administration of the existing government the responsibility of which must be to protect the interests of South Africans, and that it was a matter of common sense that government of any state would wish to ensure that, in fields where employment opportunities are limited, available jobs should, in the first instance be made available to the citizens of the state.<sup>48</sup>

Appellant appealed to the Constitutional Court against the judgment. In a unanimous judgment the Constitutional Court upheld the appeal and declared that regulation 2(2) was inconsistent with the Constitution and therefore invalid. Mokgoro J, in delivering the judgment of the court, applied the criteria set out by the court in *Harksen* and held that citizenship is an unspecified ground of discrimination and it is a ground which “has the attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them in a comparably serious manner”. The judge reiterated that the characteristic of citizenship is one typically not within the control of the individual and, in this sense, is immutable; that citizenship is a characteristic of personhood not alterable by conscious action and in some cases not alterable except on the basis of unacceptable costs; and that foreign citizens are a minority in all countries, and have little political muscle.<sup>49</sup>

The acknowledgement by the court that non-citizens are a minority group supports the contemporary definition of minorities. The pre-World War II definition described minorities as groups “numerically inferior to the rest of the population of the State, in a non-dominant position, whose members - being nationals of the State – possess ethnic, religious, or linguistic characteristics differing from the rest of the population”. This definition excluded

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<sup>47</sup> Supra

<sup>48</sup> supra at paragraph 8

<sup>49</sup> Supra at paragraph 19

aliens from its coverage by its limitation to “nationals of the state”.<sup>50</sup> The post World War II definition is extensive and is universally acceptable. The definition refers to a minority as “a category of people who can be defined by a sizable segment of the population as objects for prejudice or discrimination, or who, for reasons of deprivation, require the positive assistance of the State”. A non-dominant position of the group in political, social and cultural matters is the common feature of the minority. In this definition fall various groups, including aliens and refugees.<sup>51</sup> This definition emphasises the fact that minorities are a vulnerable group that needs protection.

The Constitutional Court has reiterated that it is duty bound to lend protection to minorities. This view was expressed in *Makwanyane* as follows:

If public opinion were to be decisive, there would be no need for judicial adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public and is answerable to the public for the way its mandate is exercised...The reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process.<sup>52</sup>

In *Larbi-Odam* the court distinguished between permanent and temporary residents and concluded that regulation 2(2) constituted unfair discrimination against permanent residents; that permanent residents are generally entitled to citizenship within a few years of gaining permanent residency and can be said to have made a conscious commitment to South Africa, and that they are therefore entitled to compete with South Africans in the employment market; and that unless posts require citizenship for some reason, for example due to the particular political sensitivity of such posts, employment should be available without discrimination between citizens and permanent residents. Judges of the Constitutional Court are included in the list of occupations that are available only to citizens. As judges of the highest and final court on constitutional matters, they are the custodians of the constitutional order and their allegiance to the Constitution must be unquestionable. After all, the Constitutional Court possesses the power of judicial review to

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<sup>50</sup> Sigler *Minority Rights – A comparative analysis* (1983) at 4

<sup>51</sup> Ibid

<sup>52</sup> Supra at 431

strike down any legislation passed by the members of the legislatures elected by citizens. Therefore it is conceivable that the judges of the court must be citizens themselves. Furthermore, the President of the Republic, Premiers of provinces, Cabinet Ministers and Members of Executive Councils must swear or affirm his or her faithfulness and allegiance to the Constitution before the President of the Constitutional Court or any other judge of the Constitutional Court designated by him or her.<sup>53</sup> This demands of the judges of the court to be citizens of the Republic.

Klaaren<sup>54</sup> expresses the view that the judgment in *Larbi-Ordam* confirms that non-citizens, like citizens, are protected by the Constitution. He also points out that the judgment is likely to have an impact on other instances such as where citizenship is a prerequisite for employment or affiliation to professional bodies. He warns that steps must be taken to bring all statutes which still discriminate on the grounds of citizenship in conformity with this judgment and the Constitution.<sup>55</sup>

### 6.3 *The Xu, Naidenov, Parekh, Foulds and Tettey judgments*

The Constitutional Court has yet to decide an immigration case under the Constitution. However, few cases have already been decided by the High Courts, among them *Xu*<sup>56</sup>, *Naidenov*,<sup>57</sup> *Parekh*<sup>58</sup> and *Foulds*.<sup>59</sup> In *Xu* Stafford J had to consider whether in terms of section 24 of the Interim Constitution an alien who is unlawfully present in the Republic has any rights, interests or legitimate expectations which entitle him or her to written reasons for the refusal by the Minister of Home Affairs to issue an immigration permit to him or her. The Judge held that such an alien does not have such rights, interests or legitimate expectations. The Court based its decision on the following reasons:

<sup>53</sup> See Schedule 2 to the Constitution

<sup>54</sup> "Non-citizens and constitutional equality" (1998) 4 SAJHR 286-297

<sup>55</sup> Supra at paragraph 23

<sup>56</sup> 1995(1) SA 185

<sup>57</sup> 1995(7) BCLR 891 (T)

<sup>58</sup> 1996(2) SA 710 D

<sup>59</sup> 1996(4) SA 137

- (a) as a consequence of its territorial sovereignty in terms of international law, a State has an absolute discretion to decide whether or not it will permit or suffer an alien's presence in its territory and that this principle is not limited by statute or treaty;
- (b) the Constitution confirms that an alien has no right to enter or remain in the RSA;
- (c) the alien is informed *ab initio* that his residence in the RSA would be temporary and that he would only be allowed to sojourn in the RSA for the period mentioned in his permit; and
- (d) without the required permission, an alien's mere presence in the RSA constitutes an offence.

In *Naidenov* the court followed the decision in *Xu* and reiterated that since an alien was informed from the beginning that his residence would be temporary, the *audi alteram partem* rule does not apply. In this case it was also argued on behalf of the applicant that the written reasons were sought to enable the applicant to lodge an application for political asylum in the RSA. The court further held that the failure to give reasons for the refusal to grant an immigration order did not prevent the applicant from seeking political asylum in any country of his choice, including the RSA.

Similarly in *Parekh* the court dismissed an alien's application for written reasons for refusal to grant the alien permanent residence. Of the four these four cases, only *Foulds* was decided in favour of the alien. In this case, Streicher J departed from the decisions in *Xu*, *Naidenov* and *Parekh* and justified his departure on the ground that in those cases a legitimate expectation was not alleged and therefore not considered. The judge cited with approval the following passage from the well-known decision on this subject, *Administrator, Transvaal, and Others v Traub and Others*:

(T)he legitimate expectation doctrine is sometimes expressed in terms of some substantive benefit or privilege which the person concerned could reasonably expect to acquire or retain and which it would be unfair to deny such person without prior consultation or a prior hearing; and at other times in terms of a legitimate expectation the person to be accorded a hearing before some decision adverse to the interests of the person concerned is taken.<sup>60</sup>

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<sup>60</sup> 1989(4) SA 731 at 758 D-E

The court concluded that the Immigration Selection Board was obliged to make a disclosure of the reasons for failure to authorise the issue of a permanent residence to the applicant as the applicant had a reasonable and legitimate expectation that the Board would properly and fairly consider his application for a permanent residence permit.

In an unreported case decided in October 1998, *Tetty and Another v Minister of Home Affairs*<sup>61</sup> the applicant, a Ghananian, sought, *inter alia*, an order that the Minister of Home Affairs furnish reasons for the rejection of his application for an immigration permit. The Minister of Home Affairs in his reply, argued that the administrative justice provision in the Constitution did not apply to aliens and that the Aliens Control Act gave the him an absolute and exclusive discretion to determine whom to admit into its territory, and once a person was admitted, whether such a person would be permitted to remain. The court held that, notwithstanding any wide discretion the Minister may have under the Aliens Control Act, such discretion is not absolute in view of the fact that the Constitution guaranteed to every person the right to procedurally fair administrative action, where any of his or her rights or legitimate expectation is affected or threatened.

Klaaren<sup>62</sup> argues that the judgments in *Foulds* and *Tetty* could lead to administrative and financial burdens for the State in that the decisions of these two cases may lead to an influx of applications for written reasons in every case where the Minister of Home Affairs has rejected an alien's application for an immigration permit. The internal qualification in section 33 of the Final Constitution, that written reasons be given only where one's rights have been adversely affected, could minimise the burden on the State placed by section 24(c) of the Interim Constitution. It is hoped that an opportunity will arise soon for the Constitutional Court to adjudicate on an immigration matter to give clarity on matter.

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<sup>61</sup> Discussed by Purshotam "The rights of aliens and migrants to administrative justice and a brief look at the abuse suffered by them in South Africa" (Supra) at 33

<sup>62</sup> "So far not so good: An analysis of immigration decisions under the Interim Constitution" (1996) 12 SAJHR 605-616 at 610

## 7. The application of the limitation clause as a means of limiting some of the rights to citizens only

It is an accepted fact that aliens find themselves competing for scarce resources with millions of South Africans living in poverty. The preamble of the Constitution speaks of the need to “improve the quality of lives of citizens”, and the entrenchment of the following socio-economic rights, namely the right of access to land (section 25), the right of access to adequate housing (section 26), the right of access to health care services, sufficient food and water and social security (section 27) and the right of access to basic education (section 29) aims to achieve that vision. The emphasis of the preamble on “citizens” presupposes that the entrenched rights may be limited to citizens only. All socio-economic rights are progressive rights, the realization of which depends on the State’s available resources. These rights are qualified by a provision in the Constitution that the State “must take legislative and other measures, within its available resources, to achieve the progressive realisation of these rights”. In *Soobramoney v Minister of Health, KwaZuluNatal*<sup>63</sup> the Constitutional Court had the opportunity to analyse the meaning of the expression “within its available resources” and contended that the time will come when the State would be required to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society.

Now the question is whether the limitation clause may be used to limit the rights extended to “everyone” to apply to citizens only. It does not appear that the court is empowered to limit or qualify the rights entrenched in the Bill of Rights to apply only to certain categories of people. This view is supported by the White Paper on International Migration which provides that there is no constitutional basis for excluding persons from the application of the Bill of Rights on the basis of the status of a person while in South Africa. The limitation clause may not be invoked to prevent a class of people, however identified, from enjoying the total use and benefits of a given constitutional right. Therefore, in the absence of a justifying circumstantial and factual reason, one may not limit the

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<sup>63</sup> 1997(12) BCLR 1969(CC) paragraph 31



constitutional rights of, for instance, Muslims, or homosexuals or people of French origin.<sup>64</sup> From a comparative point of view, it may be useful to refer to Carpenter<sup>65</sup> who discusses the so-called “Siracusa principles” which are used as guidelines for the limitation of the provisions of the ICCPR. The principles provide *inter alia*, that no limitations may be imposed other than those contained in the Covenant; no limitation may discriminate; and that the limitation must be interpreted strictly. These principles illustrate that the limitation clause may not be modified or adapted to cover what was never envisaged by the provision in question.

#### **8. State sovereignty as a justification for denying non-citizens the enjoyment of certain rights**

State sovereignty is an international law principle which grants States the sovereignty and the autonomy to decide who may be admitted to their country, and once admission has been granted, what entitlements and privileges will be extended to such admitted persons. Despite the improved interaction and inter-dependence between States in the political and economic spheres, there is still much resistance by States to the surrender of their individual sovereignty. To adapt to these changing times, it is necessary for States to adopt a less rigid and relative concept of sovereignty. Somerville and Wilson<sup>66</sup> correctly argue that adherence to the notion of absolute sovereignty will result in the exclusion of aliens and the creation of imaginative boundaries between “them” and us; between stranger and friend; between the moral and the immoral; and between the diseased and the healthy. The authors examined the increasing intolerance towards migrants and challenged the immigration policies of the United States and Canada which restrict the admission of persons infected by HIV into their respective countries. They chose these two countries because, as they put it, these are countries “of immigration” which pride themselves on the human rights protections entrenched in their constitutions. It was their purpose to examine whether their policies in relation to HIV-related entry restrictions and immigration law in general match up to their

<sup>64</sup> See paragraph 2.2 of the White Paper (*supra*)

<sup>65</sup> “The importance of the limitation clause in the South African Constitution of 1996” (1993) *South African Yearbook of International Law* 96-116

<sup>66</sup> “Crossing boundaries: Travel, Immigration, Human Rights and Aids” (1998) 43 *McGill Law Journal* 781-834

stated human rights standards and, if not, how they should be re-formulated with these in mind.

The treatment of foreigners provides a mirror which reflects a State's observance or non-observance of fundamental values and human rights. The observance of such values provides an excellent opportunity for States to improve their image globally. Concepts such as "global community" are now commonplace and the article by Sommerville and Wilson suggests that if this concept is not to bring hollow, greater attention must be paid to its substantive content. The authors propose that there should be a presumption that all visitors to a country should have the right of entry, unless the State can show justification for excluding them; that while the state may exclude immigrants, *inter alia* on medical grounds, such exclusion should comply with principles of human rights and justice; and that refugees should never be excluded on the grounds of medical inadmissibility. This view supports the idea of a "right of entry" or a "right to immigration" advocated by Alfredsson and Eide, discussed above.

## 9. Conclusion

According to the latest statistics obtained from the Department of Home Affairs, since 1994 the number of illegal immigrants has risen from 3,5 to 5 million. The number of applications for citizenship and permanent residence have also increased drastically. An estimated 160 000 illegal aliens are being deported annually. South Africa is a developing country and there has been a greater generosity in developing countries, as compared with developed ones, in accepting large numbers of refugees and immigrants. Persistent economic disparities between the first and third world countries, as well as poverty and political instability in the latter countries, continue to attract illegal aliens into the Republic. The Constitution, with its lucrative socio-economic rights blend, is currently being perceived by some as the most liberal constitution in modern democracies, and it has become the main drawcard for the influx of aliens into the country.

The Constitution, together with the national flag and the national anthem has enabled South Africans to re-discover themselves as a "rainbow nation"<sup>67</sup>, which has instilled a sense of belonging. However, as I have explained earlier, the emphasis on citizenship has a negative effect in the sense that it allows the creation of a visionary boundary between citizens and non-citizens. This boundary between "them" and "us" is characterised by hostilities, discrimination and racism. Morris<sup>68</sup> has conducted a survey on the relationship between these two groups and found that most aliens felt that they were being discriminated against and treated in a racist fashion by most South Africans. Their common view was that South Africans, especially South African men, were not welcoming and often treated them inhumanly. This evoked anger, surprise and anguish, particularly for the Nigerians who felt that they deserved better, having given the South African liberation struggle a great deal of tangible support.

As history tells, most African States are an artificial construction, the result of colonial aspirations, interests and compromises. On the one hand borders cut through pre-existing social groups and on the other they bring together groups without previous relationships. The penetration by the national State of this periphery and the integration of its constituent groups as well as the loyalty and participation of these groups are therefore fundamental challenges which face African states for the foreseeable future. This situation has a dual impact on the form of government and thus on respect for human rights. On the one hand, as loyalties are subnational first, there is an ever present temptations to discriminate against groups to which one does not belong ('tribalism'); on the other, the expression of divergent opinions and interests is considered contrary to the aspiration of nation-building, and is therefore repressed.

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<sup>67</sup> A term coined by Archbishop Desmond Tutu, the former Chairperson of the Truth and Reconciliation Commission (TRC)

<sup>68</sup> "Our fellow Africans make our lives hell: The lives of the Congolese and Nigerians living in Johannesburg" *Ethnic and Racial Studies* (1998) 21 1116-1135

The above view finds support in the address given by former Mpumalanga Premier Mathews Phosa at the conference on xenophobia.<sup>69</sup> He argued that it is unpatriotic to the continent to want to exclude non-citizens from neighbouring countries, most of whom contributed to the wealth of this country by working at the mines. He warned that we must not forget that we are Africans before we are South Africans, and that South Africa is a product of colonial boundaries, while Africa is not. Addressing the same conference, Constitutional Court Judge Yvonne Mokgoro called for a mindshift towards immigrants. She pleaded that people should resist from referring to immigrants as illegal aliens, as the word "illegal" already presupposes punishment. According to her, it is preferable to refer to them as undocumented immigrants.

For South Africa to be "able to take its rightful place as a sovereign state in the family of nations" as envisioned by the Preamble of the Constitution, it has to subscribe to the concept of a "global community". The motto on the title page of the pocket size Constitution which reads *One law for One nation* not only rejects the idea of separate legal privilege, but also proclaims our shared membership in a nation.

As Botha<sup>70</sup> puts it, our new Constitution is a response to the injustice and division of the past. It establishes constitutionalism, broadens the moral community and seeks to promote national unity and reconciliation. As a step forward, the State needs to be urged to do more to make democracy a reality for all the inhabitants of the Republic. It must do no less than to respect, protect, promote and fulfil the rights in the Bill of Rights,<sup>71</sup> and to observe the international human rights instruments it has ratified, and ratify those that seek to advance the attainment of equality and improve the quality of life of all the inhabitants of this country. The expression in the Preamble of the Constitution which reads: "We, the people of Africa" must embrace all who live in it.

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<sup>69</sup> The conference was hosted by the University of Venda on 5 August 1994. (See Article "Don't blame Aliens" Sowetan Wednesday August 11 1999)

<sup>70</sup> "Legal meaning and the other: Beyond a mythology of negotiation" (1995) *Myth and Symbol* 2 3-8 at 2

<sup>71</sup> The obligation created by section 7(2) of the Constitution

It is hoped that this discussion will challenge everyone who come to read it to engage in a critical debate that could lead to the revision of our immigration and refugee policies, in order to put in place policies that take into cognisance the human rights culture envisioned in the Bill of Rights. Some of the views expressed in this discussion were submitted to the Department of Home Affairs after it invited public comments on the White Paper on International Migration. Some of inputs submitted are that the White Paper places responsibilities on citizens to identify and report prohibited aliens to law enforcement agencies and representatives officials of the Department of Home Affairs, a move that has the potential of worsening the already existing animosity between citizens and non-citizens; and that the creation of special immigration courts and detention centres is likely to have serious constitutional implications. There has already been a general outcry about the appalling conditions under which aliens are being detained at the Lindela Repatriation Centre, a detention centre on the West Rand run by a private company, Dyambu. From the reports submitted to the South African Human Rights Commission, the conditions at the centre fall short of the minimum conditions set out in section 35(2)(e) and 35(3) of the Constitution. Section 35(2) (e) provides that everyone who is detained, including every sentenced prisoner has the right to conditions of detention that are consistent with human dignity, including, at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment. Section 35(3) guarantees every accused person the right to a fair trial, which includes, *inter alia*, the right to have a legal representative assigned to him or her by the State and at State expense, if substantial injustice would otherwise result. The conditions in the Lindela Repratriation Centre have compelled the South African Human Rights Commission to contemplate taking the Department of Home Affairs to Court to seek the release of the detainees.<sup>72</sup>

Although the published White Paper does not seem to cover most of the submitted inputs, it is hoped that the inputs will be of assistance at the time when the legislation envisaged by the White Paper is formulated.

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<sup>72</sup> See article by the South African Human Rights Commission titled "Insisting on Justice" in the Sowetan Monday November 15 1999 at p8

Finally, the anti-discrimination legislation required by section 9(4) of the Constitution provides another vehicle through which institutionalised discrimination against and segregation of non-citizens may be eliminated.

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