Negotiating racial boundaries: Dialectic strategies of Supreme Court judges in appeals against racial (re)classification during apartheid

Yvonne Erasmus

Centre for Critical Research on Race and Identity; Global Studies Programme

Note to the reader

This draft paper draws on a chapter from my completed PhD thesis. I am reworking it for publication and would value any ideas and input on how to make it more publishable.

Introduction

National Party rule in South Africa (1948-1994) introduced and maintained an extensive programme of official racial classification and reclassification. These processes formed the basis for widespread discrimination based on race, and much has been written on the draconian nature of this system (see for example Jeppie and Soudien 1990; Louw 2004). The legislative cornerstone of racial (re)classification was the Population Registration Act (No. 30 of 1950) and its subsequent amendments. The Act divided South African citizens into three race groups: "Native" (later renamed "Bantu" then "Black"); "Coloured"; and "White" (Union of South Africa 1950). In 1959 the "Coloured" group was further subdivided into seven groups: "Cape Coloured"; "Malay"; "Griqua"; "Chinese"; "Indian"; "Other Asiatic"; and "Other Coloured" (Union of South Africa 1959). The government could at any time reclassify an individual, and objections to (re)classification were generally referred to special tribunals set up for this purpose, called Race Classification (Appeal) Boards. Objections that were not successful at the Boards could be appealed to the South African Supreme Court and thereafter to the Appellate Division of the Supreme Court. Until it was repealed in 1991, the Act was subjected to at least ten different Amendment Acts, many with retrospective effect; and related secondary legislation was issued more than forty times (Erasmus 2007:53). Some

of these changes altered the way the racial groups were defined or operationalised, while others modified the structures and procedures governing racial (re)classification.

These different tiers in the (re)classification process (the government, Boards and Courts) relate to Cornell and Hartmann's (1998:154) idea of the existence of "critical constructions sites" where "social actors make claims, define one another… exercise or pursue power, and engage in a wide array of other activities that variously… create or transform, and reproduce or ignore identities". Although the role of the judiciary in upholding apartheid's laws has been the subject of investigation, such as the hearing into apartheid's legal community before the Truth and Reconciliation Commission (Dyzenhaus 1998; TRC 1998), what is less clear is what role the judiciary played as 'construction site' for apartheid's racial categories. This is especially the case where Courts or tribunals interpret individual physical features and assign 'names', or racial labels to individual bodies (López 1996:118). What therefore needs to be explored is how the South African judiciary interpreted the legislation set out by the government, and on what basis the judiciary decided where to draw the boundaries between the different racial groups. Bamford (1967), Godfrey (1988) and Cloete (1993) have each investigated some of the (re)classification cases that appeared before the Supreme Courts, the reasons for the Courts' decisions, and what this might tell us about the (re)classificatory processes and tests that were applied at the time. To take their work further would require an investigation into a substantial number of cases that spanned the whole of the apartheid period in order to fully explore how the judges made their decisions. We know from other contexts and examples, such as US naturalization litigation during the late nineteenth and first half of the twentieth century where it was determined who was white and therefore citizens, that judges faced with similar laws elsewhere initially attempted to use science in conjunction with a commonsense approach to interpret racial categories (López 1996). But when race as a bio-scientific category was discredited, racial categories were not done away with, and were still interpreted in commonsense terms (López 1996). Other authors, such as Tehranian (2000), in turn identified the importance of identity performance[1] in these naturalization cases as evidence of racial group membership.

Against this comparative backdrop, and in the context of the institutionalization of nine different racial categories and constantly changing legislation, this paper investigates how the South African judiciary operationalised racial categories and negotiated the boundaries between racial groups during apartheid. This paper will answer the following questions: (i)

[1] See Butler, J. 1990. *Gender trouble: Feminism and the subversion of identity*. New York: Routledge; Butler, J. 1993. *Bodies that matter: On the discursive limits of "sex"*. New York: Routledge.

What techniques did the Courts use to evaluate the evidence? (ii) What can this tell us about the meanings of race in apartheid South Africa? Exploring the dialectic strategies adopted by the South African judiciary when negotiating racial boundaries might provide a better understanding of how a legal system coped with a nebulous construct such as race.

Description of the Court cases

Cases from the South African Law Reports

The analyses that follow are based on in-depth study of the judgments of Supreme Court cases dealing with racial (re)classification which were published in the *South African Law Reports*. The *Law Reports* is a quarterly publication that has been in print since 1947 and contains the judgments of *precedent setting* cases[2] heard at the Local, Provincial and Appellate Divisions of the South African Supreme Court; as well as some of the decisions made by Supreme Courts in Rhodesia (now Zimbabwe), South West Africa (now Namibia), and in apartheid's four self-governing homelands (Transkei, Bophuthatswana, Ciskei, Venda) (Du Plessis and Kok 1989). As none of the indexes to the *Law Reports* listed racial (re)classification cases separately, it was necessary to conduct a number of dedicated hand searches to identify relevant cases and compile a comprehensive list of these. In total, 71 cases were identified, but because the same parties were involved in more than one case, these 71 cases involved only 48 different parties (excluding the various government and civil servant officials involved). More than one case or hearing commonly took place when an appellant was unsuccessful at the Local or Provincial Division, and consequently took their appeal to the Appellate Division of the Supreme Court. This also happened when a procedural or technical issue was referred back to the Race Classification Board and the appellant subsequently returned to the Supreme Court to appeal against the second decision of the Board.

Of these 71 cases that were found in the *Law Reports*, eight were reported in the "Digest of Cases on Appeal" – a section of the *Law Reports* providing an abbreviated version of judgments. For the remainder a summary of the case and the full text of the judgment were

[2] According to Redgment (1984:140) the criteria applied when deciding whether a case is precedent-setting and should be published in the *Law Reports* include: "(a) the statement of a new principle; (b) a judgment so worded as to resolve any uncertainty in the law… (g) the application of a known principle to unusual facts…". In common with legal practice elsewhere, the South African "precedent system (also known as *stare decisis*) means that the judgments of higher Courts bind lower Courts and Courts of equal status" (Botha 1998:15). However, the South African approach to precedent is not inflexible and it is possible for judges to disagree with previous decisions and precedent if they have "a convincing reason arrived at after careful consideration" (Kahn in Redgment 1984:135).

published.[3] For three of these eight cases a summary of the case and the full transcript were also provided elsewhere in the *Law Reports*. The remaining five cases published in the "Digest" were excluded from this analysis because the summaries did not provide enough information for analysis, although all five of these cases were reported elsewhere, when they were in a different stage in the appeal process (for example at Local of Provincial division) in the *Law Reports*. The analysis in this paper therefore is based on 63 different cases that were heard by different Courts across South Africa.

Comparison with non precedent-setting cases

It is possible that the precedent-setting cases might be different from ones that did not set legal precedent because they involved judgments that altered the way legislation was subsequently interpreted and applied. To evaluate to what extent precedent-setting judgments were similar or different from cases that did not set precedent, the index of cases heard by the Transvaal Provincial Division (TPD) of the Supreme Court were hand searched at the National Archives of South Africa (NASA) in Pretoria to identify every relevant reclassification case that was heard, which would include ones that were not precedent-setting. Between 1950 and 1991, 27 different (re)classification cases were heard by the TPD of which 14 were precedent-setting. Judgments could only be found in five of the cases that did not set precedents. In some instances the judgments were missing, but in others the government had either decided not to oppose the appeal, or an unspecified settlement was reached out of Court. In some of these five cases the level of detail in which the judges considered the cases were equivalent to that found in the precedent-setting cases published in the *Law Reports*. But the main differences between the precedent and non-precedent setting cases seem to have been that the non-precedent setting ones highlighted ways in which cases were settled that initially involved Court action, but which were not seen through; and that the cases that were not precedent-setting were perhaps more straight forward and easier to decide.

Analyzing the cases

The *Law Report* judgments were analyzed in two ways. Firstly, content analysis was used to describe what the cases contained (Bernard 1994; Silverman 2006). This was followed by

[3] The only exception to this was the case of *Felton v. Race Classification Appeal Board (SALR 1972a)* where excerpts of the Board transcript that the judge had quoted were included in the original judgment, but were omitted in the *Law Reports* version. However, this omission was noted in the text of the judgment that had been published in the *Law Reports*.

discourse analysis (Wetherall et al. 2001) to explore the implicit reasoning and rhetorical strategies adopted when negotiating and regulating the contested racial boundaries. Silverman (2001) discussed how discourse analysis can be used on a macro level to study patterns, and variations in patterns in communication. In analyzing the data I searched for patterns and variations in the ways that the Courts discussed/engaged with and tested the evidence. I specifically sought out the broad rhetorical devices used by the Courts to test the evidence. The methods through which this was done included: identifying places in the judgments where the Courts were presented with evidence and assessed this evidence before making a decision; reading and re-reading these descriptions and making notes about how the Courts responded to the evidence; identifying initial patterns in how the Courts tested the evidence; and exploring the data to see if these patterns were consistent throughout the cases.

Decisions on reclassification procedures and racial boundaries

Decisions on the reclassification process and procedures

In light of the considerable body of amendments made to the Population Registration Act which affected the detail of the (re)classification and appeal process, it is perhaps not surprising that of the 63 cases identified in the *Law Reports*, 25 (39.68%) were procedural in nature. In other words, they were concerned purely with challenges to (re)classification procedures or the appeal processes that had been brought to the attention of the Supreme Court. Initially, these rulings were required to establish and clarify the appeal procedure and the roles of the different actors therein. Later such rulings became an inevitable consequence of the introduction and alteration of procedures and roles, which prompted or required judicial clarification. These cases are summarized in *Table 1* below and are best described by how they relate to the hierarchical process of appeal against (re)classification.

Stage of the appeal process	Issues dealt with by the rulings
Initial classification by the Secretary for the Interior	• The officials who were allowed to classify people and the steps they had to take in order to classify someone (SALR 1969a; SALR 1971a); • Changes to the categories into which the Secretary could classify individuals (SALR 1969b; SALR 1970a); • The evidence on which (SALR 1967a; SALR 1974), and frequency with which, the Secretary could reclassify a person (SALR 1969c; SALR 1969b; SALR 1970b).

Objections and appeals to (re)classification	• Opportunities available to individuals to object to/appeal against their (re)classification and their rights in this process: (SALR 1967a) o The right to review proceedings of the actions of the Secretary (SALR 1971b) and the right to have these proceedings even if they were initiated outside of the official time period in which objections to (re)classification were allowed (SALR 1974); o The right to place evidence before the Board despite the presence of parental classifications on official documents (SALR 1969b); and o The admissibility of objections lodged against an individual's (re)classification by a third party (excluding the Secretary for the Interior or the individual's parents in case of a minor) (SALR 1969d; SALR 1967b; SALR 1968a).
Responding to objections	• The Secretary's obligation to take action (SALR 1971b) and/or forward an objection against (re)classification to the Race Classification Board, provided that the individual(s) concerned had filed their objection in the correct manner and within the time period allowed (SALR 1970c); • The number of Race Classification Boards constituted (SALR 1969e); • The authority of the Secretary to decline to refer cases to the Race Classification Board because of the Board's excessive case load (SALR 1969f); • When appeals could be permitted outside the prescribed time-limit (SALR 1971c) • The circumstances under which the Secretary for the Interior had the right to appeal (SALR 1966a).
The role of the Supreme Court	• The authority of a single judge (versus a full bench) (SALR 1956b) and Circuit Local Division Courts to hear appeals against racial (re)classification (SALR 1966b); • Whether the Court was bound by the Board's decision on a person's appearance (SALR 1971d); • Whether it was necessary to obtain permission from the Provincial Division of the Supreme Court to appeal to the Appellate Division (SALR 1972b); • The possibility of referring a case back to the Board for further investigation (SALR 1967c).

Table 1: Thematic summary of rulings made on procedural issues.

Furthermore, amendments to the legislation created a host of problems for appellants and the Court, not least because many of these were applied retrospectively, such as which of the different definitions for each racial group applied to specific cases.[4] These amendments and retrospective provisions must been seen in the context of increasing concern by the government over time to enforce its power as classificatory authority; to guard against what the government regarded as potential loopholes in the law; and as a response to certain Court decisions that ruled that the legislation was ambiguous, or that had resulted in reclassification decisions that the government did not approve of (Erasmus 2007). The latter created tension between the government and the judiciary. While the government's explicit motive was ostensibly to create certainty, uniformity and continuity, the retrospective application of legislation led to more confusion and uncertainty as it goes against one of the central aims of law, which is to create legal certainty. Finally, the number of cases that dealt with

reclassification procedure together with the amendments issued with retrospective effect is perhaps suggestive of the difficulty of establishing clear-cut and unambiguous procedures for racial classification.

Decisions on racial boundaries

The 25 cases on procedure aside, the remaining 38 (60.32%) cases comprised appeals against (re)classification decisions made by the Secretary or Minister of the Interior, the Race Classification Board, or a previous Court. Although a small number of these appeals, five (13.16%), also considered procedural issues, in most there was ostensibly implicit agreement between the appellant and respondent that the procedures followed by the official, Board or Court concerned had been correct. The appeals therefore focused on disagreements about the decision(s) that had been made about which racial category a person or family belonged to, rather than on the procedures that had been followed. *Table 2* below summarizes the principal features of these 38 appeals brought before the Supreme Court between 1956 and 1974. The first case to be published in the *Law Reports* took place in 1956 and the last in 1974. Three cases were reported in the 1950s; 21 in the 1960s; and 14 in the 1970s.

	Total n (%)	**Successful for appellant[I] (n)**	**Successful for individuals[II] (n)**
Decade			
1950s	3 (7.89)	3	3
1960s	21 (55.26)	17	18
1970s	14 (36.84)	5	7
Supreme Court Division			
Local[III]	4 (10.52)	3	3
Provincial[IV]	25 (65.78)	18	20
Appellate	9 (23.68)	4	5
Appellant			
Individual(s)	33 (86.84)	24	n/a
Secretary for the Interior[V]	5 (13.15)	1	n/a
(**Re)classification requested**			
Black to Coloured	10 (26.31)	9	9
Coloured to White	17 (44.73)	12	12
Between Coloured subgroups[VI]	11 (28.94)	4	7

Table 2: Variation in the distribution of successful and unsuccessful racial (re)classification appeals heard during the 1950s, 1960s and 1970s, at different Divisions of the South African Supreme Court, with different types of appellants and with requests for (re)classification between different racial groups.

I. Appeals that were successful for the appellant includes those where the Minister of the Interior was the appellant.

[4] See the following cases for problems caused by Amendment Acts and their retrospective nature: *Pinkey v. Race Classification Board and Another* (SALR 1968b); *Felton v. Secretary for the Interior* (SALR 1970d); *Hansa v. Secretary for the Interior* (SALR 1973a).

II. Appeals that were successful for individuals exclude those where the Minister of the Interior was the appellant.
III. These four appeals were heard at four different Local Divisions of the Supreme Court: Durban and Coast; Eastern Cape; Griqualand West; and Witwatersrand.
IV. Appeals were heard at only three of the four Provincial Divisions of the Supreme Court: 16 at the Cape Division; eight at the Transvaal Division; one at the Free State Division; and none at the Natal Division.
V. While the Secretary for the Interior was the appellant in all of the appeals made on behalf of the government, a range of officials as well as the Race Classification Board itself acted as respondent in cases brought by individuals.
VI. All but three of the appeals for reclassification between the Coloured subgroups were for Indian to Malay, the remainder being for Indian to Cape Coloured; Indian to Cape Coloured or Malay; and Indian to Coloured.

Throughout these cases there emerged three themes in the reasoning used by judges when assessing the evidence and making decisions about (re)classification. Judges seemed to have considered: (i) procedural irregularities; (ii) legislative ambiguities; and (iii), considerations of fairness, reasonableness and (in)justice in making their decisions.

- *Using procedural irregularities to negotiate racial boundaries*

The use of procedural irregularities to negotiate contested racial boundaries was distinct from the decisions on reclassification procedure described earlier, because although decisions on reclassification procedure helped to finalize the structure and format of the classification and reclassification process, they were not used to negotiate racial boundaries and did not involve any decisions on the (re)classification of individuals. However, in many of the 38 cases in which (re)classification decisions *were* made, it was clear that the judges used procedural irregularities to reach their decisions. This was because the judges were primarily concerned with the correct application of legal rules, standards and procedures and they were of the opinion that others, such as the Secretary and Board, had failed to uphold these standards. An example of this is the case of *De Bruin v. Sekretaris van Binnelandse Sake,* where Mr. De Bruin had appealed against his classification as Bantu by the Secretary and Board. According to the judge the Board had fallen foul of procedural issues in its treatment of witnesses and witness testimony. Mr. De Bruin had not given evidence before the Board, and although Mr. De Bruin had not been prevented from giving evidence, he was not made aware of the likely benefits of doing so. This, the judge ruled, was an irregularity on the part of the Board (SALR 1973b:547). Furthermore, when evidence was led at the Board hearing the Board had apparently not adhered to the rules about the treatment and questioning of witnesses. This

was evident from the unfair treatment of one of the primary witnesses who lived with Mr. De Bruin's grandmother and provided evidence on maternal descent. This 70-year-old witness apparently experienced difficulty with his memory, and was very susceptible to suggestive and leading questions posed to him by the Board. The Court was critical of the Board's failure to follow the appropriate procedures and the judge thereby questioned the quality of the evidence and the classification the Board had made.

The judges' desire to follow the correct procedure was also evident in the way it applied onus. In South African criminal law it is presumed that an accused is innocent until guilt has been proved (Hosten et al. 1980; Du Plessis and Kok 1989). The onus lies with the State to prove an accused's guilt "beyond reasonable doubt" (Du Plessis and Kok 1989:133). In civil cases, however, the onus rests on the plaintiff to prove his case on a "balance of probabilities" (Hosten et al. 1980:824). The question of the burden of proof was largely absent from the Population Registration Act (Erasmus 2007), until it was introduced through the 1969 Amendment Act that the onus was on the person whose classification was in question, and that they had to prove the case *beyond reasonable doubt* (Republic of South Africa 1969).

Before the 1969 Amendment Act both the Secretary and Board inconsistently applied the rules on onus (i.e. whether the burden of proof rested on the government or the objector) and inconsistently applied the degree of proof required (i.e. whether the onus had to be discharged beyond reasonable doubt, or on a balance of probabilities). Establishing the correct interpretation of onus in such cases was not an easy task, as the judges themselves often held different opinions. For example, in *Goliath v. Director of Census and Another* the judge held that the onus was on the Director, and should be discharged on a balance of probabilities rather than, as the Board had ruled, on the appellant who had to "discharge it beyond reasonable doubt" (SALR 1956c:99). However, in *Lambert v. Director of Census and Another* the judge disagreed with both the Board and the *Goliath* judgment, and argued that it had been a mistake in interpretation to consider the "subject-matter of the enquiry before the Board… a *lis* or law suit and that there must of necessity be an *onus* upon one or another party" (SALR 1956a:455). Instead, the judge in the *Lambert* case ruled that "the Board is required to make an independent decision in regard to the correct classification of the objector" (SALR 1956a:455) - in other words, there was no onus on either of the parties. What the judges' rulings had in common though was that the Secretary and Boards had erred in their overly strict interpretation of onus.

The question of hearsay evidence provided a final example of the judges' search for the correct application of legal rules and procedure. Although the 1969 Amendment Act prohibited the use of hearsay evidence on descent before a Board (Republic of South Africa 1969), it appeared that the Board refused to consider hearsay evidence even before this Amendment Act was introduced. This could be seen in the *Sithole* case where Mrs. Sithole had objected to her classification as Native and held that she was Coloured. The Secretary and Board were of the opinion that Mrs. Sithole was by descent a Native and that only certain evidence could be accepted in this case (SALR 1960:110). However, the judge held that if the hearsay evidence regarding Mrs. Sithole's descent was taken into account – this included that her father was a Coloured man with the surname of Mathews, that her paternal grandfather was White and grandmother was Coloured, and that she was told by her mother that her father was from the Cape Province (SALR 1960:110-111) - then it could not be said that she was undoubtedly a Native. The judge ruled that the hearsay evidence should be admitted and said that: "the board is in any case not bound by the strict rules of evidence, and for the sake of fairness the board should take into consideration the extent to which her descent as Native is doubtful" (SALR 1960:111).[5] A similar ruling regarding the allowance of hearsay evidence was made in the case of *Mabitle v. Secretary for the Interior* where the Judge held that: "statements of this nature, being matters of pedigree, are exceptions to the hearsay rule" (SALR 1968c:30).

Together, these cases illustrate how the judges aimed to apply legal rules, standards and procedures correctly, and criticized others, such as the Board and the Secretary, for failing to do so. Such a preference for following correct procedure was perhaps not unusual given, as Abel (1995:535) noted, that "[s]ome courts [during apartheid] would not tolerate 'procedural irregularities'". Adhering to high legal standards was clearly an aim in itself, but it also resulted in the judges bringing into question the quality of the evidence considered by the Secretary and the Board and, therefore, the validity of their (re)classificatory decisions. As Dugard (in Abel 1995:iii) noted, the law during apartheid was "both foe and friend", the latter perhaps because of its occasional ambiguity, to those subjected to it, and the inability of the Secretary and Boards to follow good practice in legislative procedures, together with the overly strict interpretation of legislative provisions by the Board, provided some scope for (re)classification appeals to the Courts to be successful because the rigour of (re)classificatory decisions and of the (re)classification process itself was brought into question.

[5] Translated from the original in Afrikaans: "is die raad in elk geval nie aan die strenge reëls van bewysleer gebonde nie en billikheidshalwe behoort die raad daarop ag geslaan het tot die mate dat haar afkoms as Naturel

- *Legislative ambiguity and contested racial boundaries: The question of appearance, descent and acceptance*

The 1950 Population Registration Act set out appearance, acceptance and descent as main criteria for racial (re)classification (Union of South Africa 1950; Erasmus 2007). Although these concepts were entrenched within the Act, their meaning remained largely elusive. Perhaps the most striking instance in which the ambiguity of these criteria was evident was the case of *Arnold v. Race Classification Appeal Board and Another*, where Dr. Arnold, who was classified as Indian by the Secretary and the Board, had appealed against this to the Court and claimed that she was Cape Malay. The judge ruled that Proclamation No. 46 of 1959, which provided definitions for the seven Coloured subgroups was "void for vagueness", because the subgroups were defined in such a way that a person could belong to more than one category (SALR 1967d:275). However, not all attempts at interpreting the three classificatory criteria ended on such a decisive note, although the cases summarized in the *Law Reports* indicate that all three criteria were extremely ambiguous. This section will examine each of these criteria in turn and concludes by reviewing the basis on which the Courts came to view acceptance as the most appropriate test for (re)classification purposes.

Emphasis usually fell on descent or acceptance as the primary classificatory criteria, with appearance being used as a way of informing these. For example, in the case of *Goliath v. Director of Census and Another*, the Court's view of appearance was that it was a component of acceptance that had to be taken into account, but that it could be a "deceptive" classificatory test, and was not a good indicatory of 'preponderance of blood' when determining descent:

> It is well-known in the science of genetics that some offspring of the same parents can show markedly more or less of the characteristics of a common ancestor than others. The only thing proved by the appearance is to my mind that the appellant has some Bantu blood, but preponderance can certainly not be inferred from this fact alone… (SALR 1956c:101-102)

Likewise, in the case of *Lambert v. Director of Census* the judge agreed that appearance was an unsatisfactory test of racial identity and commented on the unreliability of appearance as evidence of parentage:

> spouses who are respectively "white" and "native" may produce one child who is indistinguishable in appearance from a white person, another who is indistinguishable from a native and two other who in appearance clearly show that they are of mixed parentage. This

twyfelagtig is."

> phenomenon is accepted in the science of genetics and can be observed by anyone who goes about this country with his eyes open. (SALR 1956a:456)

Similarly, in the case of *De Bruin v. Sekretaris van Binnelandse Sake*, where Mr. De Bruin had appealed against being classified as Black and wanted to be classified as Coloured, the judge held that the Board had placed too much emphasis on both the appearance of the appellant and witnesses. The Judge questioned this over-reliance on appearance and held that the Board should have been aware that: "someone who looks like a Bantu could still be classified as coloured because he is a coloured person" (SALR 1973b:548).[6]

The test of descent did not fare much better than appearance in terms of its ambiguity and the judges had considerable difficulty in deciding what degree of descent was required, i.e. a 'preponderance of blood' or 'full-blooded' descent. In the very first case that considered the interpretation of descent, namely *Goliath v. Director of Census and Another*, where Mr. Goliath objected to his classification by the Director of Census as Black and wanted to be classified as Coloured, the judge followed the decisions of other, non-(re)classification and pre-1950, cases where descent was interpreted as "preponderance of blood" (SALR 1956c:101) and concluded that this was the correct interpretation of descent:

> I am of opinion that 'preponderance of blood' is the correct test and that a man with a preponderance of native blood must be classified as native, although he may have spent the whole of his life among coloureds, not know a native language at all, and be married to a coloured woman who is classified as coloured… (SALR 1956c:101)

However, the contrary position, i.e. a preference for descent as 'full-bloodedness', was taken by the judge in the case of *Lambert v. Director of Census and Another*. Here the judge felt that if the evidence did not show that the appellant was a "full-blooded native" (and he might therefore have "mixed blood"), it cannot be said that the person is, "in fact" (i.e. is by descent) a Native, and instead the test of general acceptance had to be applied (SALR 1956a:456-457). Likewise, the judge in the case of *Mabitle v. Secretary for the Interior* found 'preponderance of blood' impossible to interpret as a criterion for defining who was Black: "What preponderance would be required, two-thirds, three-quarters, or seven-eights of full-blood, and what of the person who had, say, three-eights Bantu blood and the remainder a mixture of, say one-quarter European, one-quarter Indian and one-eighth Malay blood?" (SALR 1968c:31)

[6] Translated from the original in Afrikaans: "dat iemand wat soos 'n Bantoe lyk, nogtans geklassifiseer kan word as 'n kleurling omdat hy 'n kleurling is."

Even in cases where 'preponderance of blood' was deemed appropriate, there was still little consensus on what level of preponderance was sufficient. Although the judges were not as openly critical of descent as they were of appearance, judging by their lack of consensus on its interpretation it is clear they thought that descent was far from ideal.

Admissions of descent were of particular importance in the definition of a White person which, according to the 1962 Amendment Act excluded anyone who: "for the purposes of his classification under this Act, freely and voluntarily admits that he is by descent a native or a coloured person unless it is proved that the admission is not based on fact" (Republic of South Africa 1962). But several cases illustrated that it was no simple matter to determine when such an admission of descent had been made. An example of this difficulty was the case of *Du Preez v. Race Classification Appeal Board, Cape Town, and Another* where the Board and Secretary argued that Mr. and Mrs. Du Preez had made several admissions of descent. Mr. Du Preez had stated that his father "worked as a coloured person", and that his paternal grandmother "was from St. Helena – she looked coloured" (SALR 1967e:281-283). Mrs. Du Preez, on the other hand, had stated that her mother "was classified as coloured" (SALR 1967e:283). Yet, according to the judge, none of these statements were admissions of Coloured descent (SALR 1967e:283), but were instead simply admissions of (claimed) acceptance and prior classification. Similarly, in the case of *Olieslager v. Sekretaris van Binnelandse Sake,* the Secretary had relied on various forms completed by Mr. and Mrs. Olieslager on which they had recorded their race as "mixed", or "Coloured" (SALR 1966c:563-565). The Secretary held that when the appellants used the word "mixed", they had meant "Coloured", but the judge disagreed and held that although the appellants' application forms for identity documents and their marriage certificates were indicative that at the time when they were completed the appellants saw themselves as Coloured, this was not proof that they wanted to acknowledge that they were, by descent, anything other than mixed (i.e. White and Coloured or White and Black) (SALR 1966c:563-565). From its focus on what constituted an admission of descent, the *Olieslager* case illustrated that this was not as straightforward as the government might have supposed, while it also showed the inadequacy of descent as test of racial identity, not least because the Act did not allow for someone to belong to more than one group by descent, e.g. both Black and White.

In contrast to repeated critiques of appearance and descent, the contents of the *Law Reports* reveal that the judiciary considered general acceptance to be the most appropriate classificatory test. Acceptance was of particular importance in cases on the White/Coloured borderline because of the way in which a White person was defined, but also formed part of

the definition of the other race groups. The judge in the case of A*rnold v. Race Classification Appeal Board and Another* acknowledged the importance of acceptance when he stated that: "The emphasis both in the legislation and in dicta of our Courts seems to have fallen upon general acceptance rather than descent…" (SALR 1967d:274).

Once again, the Board and Courts were at odds as to how to interpret this term. The Board drew up a detailed list of contexts or "compartments", especially for those individuals wanting to be classified as White (SALR 1967e:287), in all of which acceptance had to be shown. This included:

> (a) he must not be obviously non-white in appearance; (b) his residence must be in a white area amongst white people; (c) he must be treated by white people as a friend or at least as a neighbour; (d) he must intermingle socially with white people who accept him in their midst as white without question; (e) he must possess the style, demeanour, manner of speech and address of a white person; (f) he must be employed as a white person and unquestionably accepted and not merely tolerated as such by his fellow employees; (g) he must be able to move about in public places and on public vehicles as a white person without suspicion or question; (h) he must attend or have attended schools and/or universities as a white person and have the right to send his children there; (i) he must maintain personal contact with only those members of his family and relations as are unquestionably white, rejecting and forsaking all others, not because it may be necessary by law to do so but because his being a white man compels him to do so. (SALR 1967e:278)

In particular, in the case of *Francisco v. Secretary for the Interior and Another,* the Board held that the term general acceptance should be seen as full acceptance in all contexts, and not just the majority of these: "For then the door would be left ajar, in each of the so-called compartments or divisions, to admit of some coloured elements or characteristics foreign to the conditions of a white person and this, the Board felt, would not be in consonance with the will of the lawmaker" (SALR 1967f:287).

However, the judges did not agree with the Board's approach, which required acceptance to be demonstrated across multiple social contexts. In particular, they held that the absence of evidence (of acceptance) in any one such area should not be viewed as evidence of absence (of acceptance) therein:

> the enquiry is not whether the applicant has fulfilled a particular condition but whether the non-fulfillment of the condition is a circumstance going to show that the applicant is not generally accepted as a white person. It is wrong… to make the non-fulfillment of certain of these conditions as proof positive that the applicant is not generally accepted as a white person (SALR 1967e:278).

Rather than expecting appellants to demonstrate acceptance across a wide range of public and private contexts, the judge in the *Francisco* case argued that:

> The true approach seems… to be to view all the various factors pertaining to each individual including the various facets of his life, some of which may be important and others unimportant, and then having regard as a whole to the picture of acceptance by others, decide whether or not he is generally accepted as white…(SALR 1967f:287-288)

Thus, although the Board drew up a list of contexts in which acceptance had to be shown, the Court preferred to adopt a more balanced view of each individual's life. This did not mean that acceptance in certain contexts was seen as more or less important than others, but that in the absence of evidence of non-acceptance, the judges were prepared to accept evidence from limited contexts as sufficient grounds for acceptance overall.

In a similar vein, the Courts interpreted acceptance as a contemporary issue, and this allowed some individuals to reclassify to another group if they were able to show that they had subsequently been accepted as such. For example, in the case of *T. v. Secretary for the Interior* the judge argued that, when considering acceptance, "the relevant time [under investigation] is the time of the lodging of an objection, or the time of the enquiry into the validity of that objection" (SALR 1966d:568).

But, where in the absence of evidence of non-acceptance, the judges were prepared to accept evidence from limited contexts as sufficient grounds for acceptance overall, it was also true that in a large number of cases that were unsuccessful before the Courts, evidence of non-acceptance were provided. In each of the cases that were unsuccessful at the Courts there was some evidence that the appellant was not accepted by members of the group to which they claimed to belong. One such example was the case of *C. en 'n Ander v. Sekretaris van Binnelandse Sake en 'n Ander* where the appellants used amenities for White people, such as transport services and clinics, but were not accepted by the school principal, church leader and most of their neighbours (SALR 1967g:348-349). Likewise, in the case of *Hughze v. Secretary for the Interior*, although Mr. Hughze had lived with a Coloured woman, had two children with her and was accepted by her as Coloured, she admitted that "his speech is different from hers" and her brother admitted that "his [Mr. Hughze's] appearance different materially from his" (SALR 1972c:350). The judge interpreted the disparities in speech and appearance as evidence of non-acceptance. Moreover, wherever appellants had made admissions of descent that did not support their claims of group membership, such admissions constituted damning evidence of non-acceptance since they were interpreted as evidence that the appellants themselves did not accept that they were a member of that group. Cases that fell into this category, in which appellants had presented evidence of acceptance as White but had made

admissions of non-White descent, included: (i) *Felton v. Race Classification Appeal Board* in which Mr. Felton had made an admission before the Board that his mother was a Coloured person (SALR 1972a:499); (ii) *Pinkey v. Race Classification Board and Another* in which Mr. Pinkey had made several admissions of Coloured descent (on his 1951 census form, in an application for an ID card, in his affidavit, and in verbal evidence before the Court) (SALR 1972d:639); and (iii), *Pitcher and Others v. Secretary for the Interior* in which Mrs. Pitcher had: described her maternal grandfather as "mixed"; said that her mother was "mixed" and had not been accepted as White; and described herself as "Coloured" on a form for inclusion in the population register (SALR 1968d:239-240).

The role of legislative ambiguity in the application of appearance, descent and general acceptance as criteria for racial classification demonstrates that, where possible, the judges concluded that general acceptance was the most appropriate and legitimate way to make classificatory decisions - albeit after working their way through the different criteria prescribed in the legislation. Using a more flexible (re)classificatory test such as acceptance meant that it was easier, or more likely, for people's cases to be successful, unless there was evidence of non-acceptance in some form or another, including a contradictory admission of descent or identity by the appellant(s) concerned.

In their decisions on (re)classification cases the judges were guided by the three criteria set out in the legislation: appearance, descent and general acceptance. The Court's view of these criteria fell into one of two categories: (i) the definitions of the groups were either felt to be completely ambiguous and therefore declared "void for vagueness"; or (ii) the ambiguous definitions were used by the judges to work towards what they considered to be the most accurate and appropriate test(s) for (re)classification. When they declared the Coloured subgroups "void for vagueness", the Courts were clearly commenting on the usefulness and applicability of these definitions. The legislature had not foreseen that a person would be able to fall into one subcategory based on descent, and into another based on acceptance, and had therefore not given clear guidance to the Secretary, the Board and the Courts as to what they should do were this to occur (SALR 1967d:273). The Court had the power to declare these definitions "void for vagueness" because the proclamation which had defined these groups was subordinate (secondary) legislation, and therefore fell within the reviewing competence of the Court (Eloff 1990:31). However, this reviewing competence, under the system of parliamentary sovereignty or supremacy, did not extend to statutes or original (primary) legislation, such as the 1950 Act itself, and, instead, was confined to subordinate or

"delegated legislation" such as proclamations and notices (Botha 1998:8-13). So, although the ruling over the vagueness of the definitions of the Coloured subgroups indicates the power of the Courts over subordinate legislation and its dissatisfaction with the unworkability of the definitions, it ultimately illustrates their limited power in (re)classification cases and the ultimate power of the government when dissatisfied with the Courts' decision. For example, in response to this ruling on the ambiguity of the legislation, the government merely revalidated an amended version of the proclamation containing the definitions of the Coloured subgroups, through Section 62 of the General Law Amendment Act (No. 70 of 1968). And, by validating the proclamation in a statute, the government thereby indemnified it "against [further or repeated] invalidation by the Courts" (Eloff 1990:31). This strong-arm response by the government was a good example of one of the characteristics that Budlender (in Abel 1995) discussed with reference to cases that were successful and unsuccessful in challenging the injustices of apartheid laws. Budlender (in Abel 1995:v) argued that there would be no possibility of success if the "legal attack threatened the very foundations of the system" – which was in part the outcome of the *Arnold* case where the definitions of the Coloured subgroups were declared to be vague. If, therefore, the Courts sought a more just application of an unjust law, they had to tread carefully or risk the imposition of statutory conditions by government.

It is also of interest that of the three criteria for (re)classification set out in the legislation the Courts decided on general acceptance, albeit with certain qualifications, as the most accurate and appropriate measure of racial (re)classification. In the process, the Courts shied away from more scientific approaches based on appearance and descent to adopt one based on the subjective and commonsense notion of acceptance. Here a limited comparison can be drawn to López's findings on the naturalization cases in the US between 1878 and 1952 (López 1996:4,6,7,) where the US judges initially justified their decisions by referring both to "scientific evidence" and "common knowledge" when determining whether an applicant qualified for citizenship as a White person, but later preferred "common knowledge" to science. López (1996:6-7) attributes this shift to "changes in immigrant demographics and in anthropological thinking [which] combined to create contradictions between science and common knowledge". Yet instead of questioning commonsense beliefs about race, the Courts chose to question the science, as the science involved could no longer confirm the differences between races that were popularly held to be true (López 1996:7). Similarities to the South African reclassification cases are evident in the Courts' decisions to favour acceptance, informed by commonsense (although bio-scientific criteria such as appearance and descent informed acceptance), as the most appropriate (re)classificatory test. However, an important

difference between the US and SA cases is that in the cases published in the *Law Reports* there were hardly any instances where the judgments specifically referred to science (Erasmus 2007). So although the function of the judiciary was to create rigid lines between essentially flexible and nebulous groups, on some level it refrained from doing so by choosing the more flexible test of general acceptance as their preferred classificatory criterion. In their choice of classificatory criteria the Courts were constrained by the legislation that the government provided, and it must be asked, in its preference for acceptance as test, to what extent the Courts merely mirrored the government's preference for flexile classificatory criteria.[7] However, it seems as if the government and the Courts preferred acceptance as test for different reasons - the government because it was a socially acceptable way in which to classify, and the Courts because the other criteria that the government suggested (appearance and descent) were on their own too ambiguous.

- *Informing decisions on reclassification: Questions of reasonableness, fairness and (in)justice*

The third and final dialectic strategy used by judges to reach (re)classificatory decisions involved the quasi-ethical concepts of reasonableness, fairness and (in)justice. Whenever these concepts were invoked they, more often than not, resulted in favourable decisions for the appellant(s) and in rulings that overruled (re)classificatory procedures set out in the legislation.

As we have seen, the primary concerns of the Supreme Court judges appeared to be the validity of the (re)classificatory decisions which entailed following the correct legal evidence and processes, and using the most appropriate tests for classification. In pursuit of valid classifications the judges were also willing to follow a more flexible approach to some of the strict provisions set out in the legislation if these would result in unfair or unjust (re)classifications. An example of this was the 30-day time limit introduced by the 1956 Amendment Act (no. 71 of 1956), within which people could object to their (re)classifications. In the case of *Phillips v. Direkteur van Sensus* the appellant's objection took 31 days to reach the Secretary who consequently refused to refer the case to the Board (SALR 1959:372). However, the Supreme Court judge overruled this decision on appeal, arguing that classifying a person correctly was more important than following the letter of the law, when doing so would bring about an unjust outcome (and go against the spirit of the law):

[7] See Posel 2001 and Erasmus 2007 for discussions on reasons for the government's preference for flexible (re)classification criteria.

> Apart from the general consideration that we are here concerned with the restricting of a fundamental right of the individual… [and] as the appellant's right to object after the thirty days expires irrevocably… he will, assuming that he is really a coloured, without being heard, for the rest of this life bear the negative consequences of a wrongful classification, and it could least of all have been the intention of the Legislature to create such an injustice. (SALR 1959:375)[8]

A similar decision was made in the case of *Sithole v. Sekretaris van Binnelandse Sake en 'n Ander* where Mrs. Sithole had appealed to the Board in good time, but her appeal to the Supreme Court against the Board's decision fell outside the 30-day time limit. The judge in this case echoed the judge in the *Phillips* case, discussed above, when he said that:

> the right of every individual to object to a wrongful determination of status shall not be denied merely because he did not punctually meet the time provision for an appeal. I am of the opinion that it could never have been the intention of the legislature that a wrongful determination of status would be frozen for life (SALR 1960:109).[9]

Rulings that invoked fairness often considered the harsh social, economic and political consequences of unnecessary or inaccurate racial (re)classifications, and therefore the seriousness of such decisions, as we saw earlier in the *Phillips* case. This approach was also evident in the case of *Goliath v. Director of Census and Another*, where the judge cited "considerations of fairness" (SALR 1956c:110) to justify his decision to overturn the Board's ruling (that the onus rested on objectors to prove their case beyond reasonable doubt):

> On a matter where his whole future way of life is at stake, as well as that of his family, where his very livelihood might be adversely affected, it is unthinkable that the Legislature of a free country intends to place such an *onus* on the subject… This may impose far-reaching disabilities on people who have peacefully gone their way in a certain stratum of society or a racial group, and have been completely accepted there. (SALR 1956c:99-100)

From these examples it seems clear that the judges explicitly acknowledged the enormity of (re)classificatory decisions and did not take their responsibilities lightly. Indeed, acknowledging their responsibility to act fairly seemed to provide judges with an obligation to make valid reclassificatory decisions, even if that meant a more flexible interpretation of what the letter of the law had provided.

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[8] Translated from the original in Afrikaans: "Afgesien van die algemene oorweging dat dit hier gaan oor die inkorting van 'n fundamentele reg van die individu… As appellant se reg om beswaar te maak na verstryking van dertig dae onherroeplik verval… dan sal hy, aannemende dat hy in werklikheid 'n kleurling is, sonder om aangehoor te word, vir die res van sy lewe die nadelige gevolge van die foutiewe klassifikasie moet verduur, en dit kan allermins die bedoeling van die Wetgewer gewees het om so 'n onreg te skep."

[9] Translated from the original in Afrikaans: "die reg van elke indiwidu om beswaar te maak teen 'n verkeerde bepaling van status hom nie ontsê word nie bloot omrede hy nie die tydsbepaling vir 'n appel stiptelik nagekom het nie. Dit kon myns insiens nooit die bedoeling van die wetgewer gewees het dat 'n verkeerde statusbepaling lewenslank bevries sal bly nie."

In a similar fashion, one last device used by the judges to deliver (what they felt to be) a valid (re)classificatory decision, regardless of the strict interpretations of the law, involved arguing that it would be unfair to expect a lay individual to know the law in sufficient detail to avoid making the occasional, relatively unimportant, yet potentially crucial, error. This was evident in the case of *Sithole v. Sekretaris van Binnelandse Sake en 'n Ander* where, while commenting on Mrs. Sithole's four and a half year delay in appealing to the Court against the Board's decision, the judge said that: "The applicant is a relatively unskilled person. The classification of persons for the population register and appeals against was at that time a relatively unknown institution and it can hardly be expected that laymen would have been familiar with the prescribed procedure" (SALR 1960:109).[10]

Likewise, in the case of *Le Kubie v. Secretary for the Interior* a lack of familiarity with the law was cited as sufficient grounds to follow a more flexible approach to what the legislation provided, thereby obtaining a more just and fair outcome. In this instance, Mr. Le Kubie had been issued with two documents on each of which his race had been differently recorded. The Court had to decide which of these classifications was correct. The first document was a Bantu reference book issued in 1958 (SALR 1969g:186). The second was a Coloured identity card issued in 1961. Mr. Le Kubie's double classification continued until 1965 when his legal advisors wanted to "regularize his position completely" (SALR 1969g:186) and forwarded the Bantu reference book to the Department of the Interior. The Secretary argued that the Bantu reference book was a valid classification and that Mr. Le Kubie had not lodged an objection within the prescribed time limit. However, one of the reasons the judge dismissed the Secretary's argument was that no letter had been sent to Mr. Le Kubie in 1958 informing him of his classification, while a letter had been sent to him in 1965 after he had returned his Bantu reference book. As the judge put it:

> It is extremely doubtful whether the average person realizes that the issue of a reference book is a classification in terms of the Population Registration Act. We as Judges had to refer to the statue book first to be sure… This is no place for the presumption that everyone knows the law… Here we have the position that in 1961 the applicant applied for Coloured classification. He said nothing of the reference book. The Board regarded this as evidence of false pretences. It is equally consistent with ignorance that he had already been classified. (SALR 1969g:189)

Once again, these cases illustrate that the judges were keen to make both correct *and* just decisions. These considerations of fairness, justness and reasonableness, and the judges' consequent overruling of strict interpretations of the legislation in favour of these concepts,

[10] Translated from the original in Afrikaans: "Die applikante is 'n betreklik ongeskoolde persoon. Die klassifisering van persone vir 'n volksregister en appelle daarteen was destyds 'n betreklike onbekende instelling en dit kan ternouernood verwag word dat leke met die voorgeskrewe prosedure bekend sou gewees het."

was often to the benefit of those whose classifications were based on fraught procedures or ambiguous categories. Under the system of parliamentary sovereignty judges were obliged to interpret unambiguous legislation even if they felt the legislation was unjust (Dyzenhaus 1998:14-15). However, when faced with ambiguous laws the judges used what Dyzenhaus (1998:16-17) has called the "plain fact approach" which holds that "the role of judges in upholding the rule of law largely involves judges' seeing to it that the officials who implement a statute do so in accordance with the law as it was, as a matter of plain fact, *intended* to be implemented" [author's emphasis]. This meant that the judges were obliged to interpret the law according to what they thought the legislature *intended*. This was particularly evident in the cases citing fairness, reasonableness and (in)justice where the judges made use of their responsibility to interpret the intention of the legislature whenever the strict application of the law was deemed unjust, by arguing that the government would not have intended or desired an unjust outcome. However, it is not possible to tell from the *Law Reports* whether the use of fairness and justness signaled: an honest belief in the fairness and justness of the apartheid government and its policies; that judges were not prepared to accept unjust racial (re)classification even when they were obliged to accept unjust treatment of different racial groups; or a deliberate strategy used by those judges who resented the fact that they had to interpret and apply unjust laws and interpreted these in a partial way to act in the best interests of the appellants. The latter falls within what Van Blerk (1988:153) called a "value choice" – one of the options available to apartheid era judges when deciding a case. Perhaps the answer to the judges' motivations and their use of fairness, justness and reasonableness lies in the further investigation of who the judges were; what their political stance on apartheid was; as well as their track record on the bench. Although this calls for further investigation, it must be noted as this point that the *Law Report* cases referred to here were heard by a number of different judges, and the interpretation is therefore not skewed by a handful of judges with anti-apartheid sentiments. But irrespective of the motivations behind the use of fairness, reasonableness, and (in)justice, such rulings tended to advantage those whose cases were on appeal.

Conclusion

The paper has illustrated how a substantial number of the litigation on racial (re)classification that created legal precedent centered on the detail of the (re)classification procedures and processes. However, the majority of litigation resulted from individuals appealing against their own, or their families' racial (re)classification. Here the Courts used three ways of assessing

the evidence and making their decisions, namely procedural irregularities, legislative ambiguity and fairness, (in)justice and reasonableness.

This paper has also shown that although racial classification remained elusive, the Courts followed a more rigorous, even-balanced approach aimed at valid and just (re)classificatory decisions. Although appearance and descent informed acceptance, the Courts' assessment of the criteria set out in the legislation illustrate a preference for a broader application of acceptance through more popular conceptions of commonsense, although these were still informed by the bio-scientific criteria of appearance and descent.

What the *Law Report* cases clearly illustrate is how, working within the constraints of the law and a system of parliamentary sovereignty, the judges used the law and their authority to negotiate racial identities to pursue what they held to be the most valid and/or just outcome. This perhaps brings into question the orthodox view that apartheid judges were predominantly obsequious to the apartheid state. But most importantly the analyses illustrate how it was the ambiguity of race itself and the inability to measure and define race that inevitably resulted in ambiguous legislation that was subsequently open to challenge by the Courts.

Although the Courts were obliged to interpret the law laid down by parliament, they also engaged in determining what the most appropriate classificatory criteria were and in the boundary decisions about when someone is White/Coloured/Black. By deciding where one category ended and another began, they were contributing to the legislation's attempts to make concrete what were essentially flexible and nebulous categories. The judiciary therefore participated with the government and the legislature in the creation, ascription and legalisation of racial categories and acted as 'construction site' (Cornell and Hartmann 1998) where the content of these categories were determined and contested.

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