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District Six
Cape Town
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This is a submission to the Constitutional Court from an ordinary citizen, me, Peter Denneby.

I read in the newspaper yesterday that we have only until the end of the month to make submissions about the new constitution. I have been able to get a copy of the section that concerns me, the clause in the Bill of Rights which allow affirmative action.

Chapter 2 of the constitution, clause 9(2) says: 'Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken'.

My main submission is that the phrase 'or categories of persons' should be deleted.

My reason for asking this is that it seems unfair to me -- and I hope also to you -- that persons who were not disadvantaged by the unfair discrimination of apartheid, but belong to a category of persons who were, should now be given preference in respect of appointments to jobs or promotion.

I do not know what 'categories of persons' the drafters of the constitution had in mind here, but I suspect these were the categories that apartheid imposed -- black, coloured, Asiatic, other coloured and so on.

Let's assume that we will have the constitution for 100 years with this clause unaltered. If we leave in the words 'categories' and those categories are construed as racial categories (as seems reasonable in the context), then we could have the following scenario:

My own daughter, Talia, who was born in 1993, may in 20 years be competing for a job, or a promotion with other contenders of various 'categories' yet very similar capabilities and potential. Would she enjoy preference over the 'white' candidate because she belongs to a 'category of persons disadvantaged by unfair discrimination'? She would have been regarded as coloured by the old South African regime, had she been born before the Population Registration Act was scrapped. I was categorised 'white'. Talia's mother was categorised 'coloured'. I want all of us to get away from this racial madness as soon as possible, yet instead we seem to be entrenching it in our new constitution.

There are a lot of wonderful-sounding clauses in the constitution, such as 9(1), (3), (4) and (5), but I suspect that the second sentence of clause 9(2) supercedes them. This is because your court will regard it as fair for someone to take measures to advance a person who belongs to a category of persons disadvantaged by unfair discrimination in the past.

I would like my daughter to be an equal citizen in this country of ours, not a 'coloured' who must be advanced through special measures to promote the achievement of equality.

Talia's mother may regard herself as disadvantaged by 'unfair discrimination', but in comparison with 'blacks' as opposed to 'coloured', she was given an advantage by apartheid. The present ... (illegible) over the reduction of teachers: ... (illegible) ratios in Western Cape schools is ... (illegible) one illustration of this.

I want to take another example. A Zimbabwean, or else someone from the United States of America, comes to South Africa and is 'advanced' here by affirmative action, to promote the achievement of equality which is seen in terms of the colour composition of his or her workforce.

Let's say someone objects to this advancement. The matter goes to the Constitutional Court. Your hands will be bound by this clause, 'or categories of persons', if the Zimbabwean or American who immigrated in mid-1996, for example, is 'black' or 'coloured' or belongs to any category of persons disadvantaged by unfair discrimination. You will have to allow the affirmative action in their favour, even though this seems unfair.

I cannot see what purpose that phrase 'or categories of persons' serves other than to free any person being 'advanced' of the onus of showing they were disadvantaged by apartheid, or unfairly discriminated against in the past.

Will all women be able to claim forever under that clause that they must get special consideration for 'advancement' or 'protection'? If so, the equality clauses elsewhere in the constitution ultimately mean nothing.

In the last part of my letter, I want to argue for the deletion of one other phrase: the words 'or advance' in the second sentence of 9(2).

I fail to see how one person can be 'advanced' on the grounds of being disadvantaged in the past, without unfairly discriminating against persons who had nothing whatsoever to do with the past discrimination, and may not have benefited from it either.

I doubt my latter point will succeed, but I will be pleased if at least my main point is taken.