

Application and limitations of intersectionality by the Committee on the Elimination of Racial Discrimination (CERD) and how the Committee has used this concept to identify and unravel different layers of inequality.

1. *Introduction*

I was born in South Africa and lived for almost four decades under the system of legalised and institutionalised racism and racial discrimination. I suffered discrimination on several grounds, firstly, I was discriminated against because I was classified as “bantú”. The apartheid regime classified black people as “bantú”- people of African descent, Indians and Coloured - mixed descent. The “bantú” occupied the lowest position in the racial hierarchy created by the apartheid regime. Secondly, I was discriminated against as a woman. My chances of getting a good job were minimal because I went through an inferior education which was called “Bantu Education” whose main objective was to produce labourers and domestic workers. Intersectional discrimination has existed for a long time. It was however given a name by writers such as Kimberle Crenshaw in the eighties.

2. *The Committee on the Elimination of Racial Discrimination (CERD) and Intersectionality*

As you are aware, the International Convention on the Elimination of Racial Discrimination (Convention) sets five prohibited grounds for discrimination, namely race, colour, descent or national or ethnic origin. Mindful of the fact the Convention, being a product of its time, does not address the multiple and intersecting forms of discrimination suffered by marginalised groups, CERD decided embrace intersectionality as an approach to addressing complex and multiple forms of racial discrimination through the adoption of a number of General Recommendations (GR) which address intersectionality between racial discrimination and other forms of discrimination. Due to time and space constraints, I will only deal with a few of these GRs.

2.1. Intersection between racial discrimination and gender

- 2.1.1. Victims of multiple and intersecting forms of discrimination can only obtain effective redress if these multiple forms of discrimination are addressed. In 2000, CERD adopted General Recommendation (GR) 25 on the Gender Related Dimension of Racial Discrimination. The GR recognises that racial discrimination affects women in a different way than men and that such racial discrimination will not be detected if there is no explicit acknowledgment of different life experiences of women and men in both public and private life.

2.1.2. In this GR, the Committee requires States parties to give particular consideration to the following when combating discrimination on the basis of race and gender:

- a) the form and manifestation of racial discrimination;
- b) the circumstances in which racial discrimination occurs;
- c) the consequences of racial discrimination; and
- d) the availability and accessibility of remedies and complaints mechanisms for racial discrimination.

2.1.3. The Committee further requires State parties to describe, as far as possible in quantitative and qualitative terms, factors affecting and difficulties experienced in ensuring the equal enjoyment by women, free from discrimination, of the rights under the Convention. The Committee further states that data which has been categorised by race or ethnic origin, and which are then disaggregated by gender within racial or ethnic groups, will allow the States parties and the Committee to identify, compare and take steps to remedy forms of racial discrimination against women that may otherwise go unnoticed and unaddressed.

2.1.4. The Committee goes on to state that when examining forms of racial discrimination, it will integrate gender perspectives, incorporate gender analysis and encourage the use of a gender - inclusive language in its sessional working methods, including in the review of reports submitted by States Parties, concluding observations, early warning mechanisms and urgent action procedures and general recommendations. In its most recent concluding observations on the report of the United States of America which were adopted in August 2022, the Committee, in addressing the issue of violence against women used the intersectionality approach in raising concern about the persistent disproportionate number of women from racial and ethnic minorities, particularly indigenous women, migrant women, women of African descent, who are victims of violence, including sexual violence. In its recommendation, it recalled GR 25 and reiterated the recommendation it had made previously that the State party should redouble its efforts to prevent and combat violence against the categories of women affected and ensure that all cases of violence against women are effectively investigated, perpetrators are sanctioned, and victims are provided with adequate remedies.

2.2. Intersectionality: racial discrimination against non-citizens

2.2.1. In General Recommendation 30 on Discrimination Against Non- Citizens (Oct.1 2002) (para 5 and 8), the Committee recognises the importance of intersectionality. It affirmed that States parties are under an obligation to report fully on legislation on non-citizens and its implementation. Furthermore, the States parties should include in their periodic reports, in an appropriate form, socio-economic data on the non-citizen population within their jurisdiction, including data disaggregated by gender and national or ethnic origin.

2.2.2. The Committee further urges States parties to pay greater attention to the issue of multiple discrimination faced by non-citizens, in particular concerning the children and spouses of non-citizen workers, to refrain from applying different standards of treatment to female non-citizen spouses of citizens and male non-citizen spouses of citizens, to report on any such practices and to take all necessary steps to address them.

2.3. Intersectionality: The meaning and scope of special measures

2.3.1. The Committee also invoked intersectionality in General Recommendation 32(2009) on The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms of Racial Discrimination (para 7 and 17). In this GR, the Committee states that the grounds of discrimination are extended in practice by the notion of intersectionality- whereby the Committee addresses situations of double or multiple discrimination- such as discrimination on the grounds of gender or religion- when discrimination on such grounds appears to exist in combination with a ground or grounds listed in Article 1 of the Convention.

2.3.2. The Committee further states that appraisals of the need for special measures should be carried out based on accurate data, disaggregated by race, colour, descent and ethnic or national origin and incorporating a gender perspective, on the socio-economic and cultural status and the conditions of the various groups in the population and their participation in the social and economic development of the country.

2.4. Intersectionality: Racial profiling by law enforcement officials

2.4.1. In its General Recommendation No. 36 (2020) on Preventing and Combating Racial Profiling by Law Enforcement Officials (para 13 and 50), the Committee uses intersectionality in the definition of racial profiling and states, amongst others, that racial profiling is based on grounds of race, colour, descent, national or ethnic origin or their intersection with other relevant grounds such as religion, sex, or gender, sexual

orientation and gender identity, disability and age, migration status or work or other status.

2.4.2. The Committee recommended that States should regularly collect and monitor disaggregated quantitative and qualitative data on relevant law enforcement practices such as identity checks, traffic stops and border searches, which include information on the prohibited grounds for racial discrimination, including their intersecting forms.

3. *Limitations of intersectionality*

3.1. One of the measures that must be taken to address multiple and intersecting forms of discriminations is the collection of disaggregated data. There seem to be reluctance on the part of many States parties to collect statistics disaggregated according to race or ethnicity, not to mention their intersecting forms, as is apparent from the state reports submitted to the Committee. I am not certain whether this reluctance stems from lack of capacity or discomfort to collect race-based statistics. Arguments have been raised that collecting race-based statistics reinforces the existence of race, which is regarded as a social construct and that ethnicity-based statistics are preferable. I do not want to venture into the debate of race as a social construct save to say that the method of collecting statistics should depend on the context and history of each country. In South Africa for example, the only way in which the government and consequently the Committee can assess the effectiveness of the special measures adopted by the government to address the situation of persons or groups who were previously discriminated against, is through the collection of statistics disaggregated according to the racial classification which were used by the apartheid regime, namely, Africans, Coloureds and Indians. Statistics on gender must be disaggregated by race because black women were disproportionately affected by racism and racial discrimination than white women. The country does not collect statistics on ethnicity because the apartheid government used ethnicity as a criterion for what it termed separate development.

3.2. It appears to me that CERD can deal multiple forms of discrimination on certain grounds, only if such grounds exist in combination with a ground or grounds mentioned in Article 1 of the Convention. This means that the Committee can deal with discrimination on grounds such as disability and sexual orientation if these exist in combination with grounds of discrimination in Article 1 of the Convention. Except in so far as grounds such as disability, sexual orientation and gender identity are mentioned in the definition of racial profiling in referred to GR 36, as far as I am aware, the Committee has not dealt substantively with, for instance, intersectionality between race, gender, and disability.

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