

Apartheid in South West Africa: Five Claims of Equality, by Anthony D'Amato, 1 Portia
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Whatever her true feelings on the question of racial segregation, the Republic of South Africa has consistently argued to the outside world that *apartheid* results in genuine equality of treatment of the "Native" and "European" racial groups. Their arguments, similar to, but far more elaborate than, the "separate-but-equal" claims heard in this country in recent years should be carefully examined on their merits. Most African and Asian nations have refused to do so; they have even boycotted South African defenses of *apartheid* in the United Nations. Perhaps they fear that an essentially moral issue can only be made to appear negotiable, and thus be compromised, if it is discussed aloud. Nevertheless, boycott tactics only increase South African intransigence to change, and provide South African political leaders with the argument that the rest of the world is blindly prejudiced against them and will not listen to their side of the story.

It is my purpose here to categorize the various South African claims of equality of treatment of the races into five types, and then to examine the arguments in each category. This analysis will be confined to South West Africa, although similar conclusions can be drawn *mutatis mutandis* with respect to the Republic of South Africa. Both states are governed under an elaborate, pervasive policy of *apartheid*, officially termed "separate development of the races." The reason for choosing South West Africa, which is administered by South Africa, as the focal point for analysis is that unlike South Africa, which has become increasingly reticent, there now exists a wealth of factual and statistical information pertaining to South West Africa as a result of the protracted argumentation before the International Court of Justice in the South West Africa Cases. Furthermore, in the course of these legal arguments of unprecedented length and detail, numerous finely shaded justifications have been offered for the policy of separate development. I shall attempt to examine the most important of these claims of equality: mirror-image equality, strict equality, substantive equality, marginal inequality, and transitional inequality. In order to avoid any charge of misrepresentation, I shall base my analysis entirely on facts and statistics derived from official South West African sources.

The "white" government of South Africa administers, and is responsible for, the territory of South West Africa under a mandate issued by the League of Nations in 1920 and held by the International Court of Justice to be still in force.¹ The right to vote within the territory with respect either to the limited local government or to representation in South Africa's parliamentary government is confined to "white persons" under South African legislation.² The territory of South West Africa has an area of 318,261 square miles, nearly four times the size of the United Kingdom. It is divided horizontally into the "Northern Reserves," an area of 97,798 miles, and the Southern Sector or "Police Zone," an area comprising 220,463 square miles. The population is officially characterized as follows:³

¹International Status of South-West Africa (Advisory Opinion) 1950 ICJ Reports 128, 143.

²The Laws of South West Africa 1949, pp. 2ff., 170 ff.

³Republic of South Africa, Report of the Commission of Enquiry into South West Africa Affairs 1962-1963 (Pretoria, 1964), p. 39, table XVIII [hereinafter cited as Odendaal Report]. "Coloureds" are designated as such and also as "Basters." The latter of "mixed descent" live in the Rehoboth Gebiet. *Id.* at 33. There is no distinction, except for place of residence, between "Coloureds" and "Basters" in the Odendaal Report. In practice, of course, the determination that any given individual belongs to any of these

Group	1960 Population Total
"Europeans" (Whites)	73,464
"Coloureds" (mixed "European" and "Native" descent)	23,965
"Natives"	424,047
Grand Total	521,476

The major ethnic subdivisions of the "Native" group are, in order of size: Ovambo, Damara, Herero, Nama, Okavango, East Caprivians, Bushmen, Kaokovelders, and Tswana. More than half the "Natives" (to be exact: 286,476 "Natives" and 9 "Coloureds")⁴ live in the Northern Reserves, while the rest live in the Police Zone either in "Native Reserves," as laborers or servants on "European" farms, or in towns surrounding "European" urban areas. The entire "European" population of South West Africa lives in the Police Zone.

1. Mirror-image Equality

The laws, practices and policies most basic to "separate development" are those relating to exclusionary residential areas. These have at first glance an obvious mirror-image egalitarianism. For example, while "Natives" cannot live in urban areas in the Police Zone "occupied by the White population group," the reciprocal "exclusion of residence by White persons in the Native reserves is absolute."⁵ Similarly, with respect to farm land, legislation bars "Natives" from alienating land located in the Native reserves⁶ while, due to an aggregate of practices and policies, no "European" has ever transferred farm land in the Police Zone to a "Native."⁷ A related form of reciprocity is claimed for curfew restrictions applying to the residential areas. "Curfew hours" may be posted applying to "Natives" found in "European" urban areas (the hours are usually between 9 p.m. and 4 a.m.), while any "European" (exclusive of clergymen, medical practitioners, and officials) desiring to enter a "Native" residential area at any time must secure a permit.⁸

groups can often be a highly difficult and dissatisfactory procedure. For analogous difficulties encountered in South Africa, *see* Suzman, "Race Classification and Definition in the Legislation of the Union of South Africa, 1910-1960," 1960 Acta Juridica, pp. 339 ff.

⁴Odendaal Report, p. 39, Table XVIII.

⁵Republic of South Africa, Counter-Memorial: South West Africa Cases (Cape Town, 1963), Vol. 6, p. 81, para. 119. [hereinafter cited as Counter-Memorial.]

⁶The Laws of South West Africa 1915-1922, p. 12.

⁷Counter-Memorial, Vol. 5, p. 11, para. 4. Although there is no statutory impediment, this may be accounted for in part by local real estate practices, the inability of most "Natives" to afford such land, the fact that no "Native" has officially "requested" financial assistance under the land settlement laws of the purchase of such land (*id.* at 27, para. 13), and the fact that any purchase would give to a "Native" precarious tenure inasmuch as he could at any time be moved from his land "to any place within the mandated Territory" by a government in which he is not represented. The Laws of South West Africa 1928, p. 58.

⁸Counter-Memorial, Vol. 6, pp. 128-129, para. 50.

However, these mirror-images are clouded by factors relating to the size of the lands involved and their comparative economic development. "European" farms and towns in the Police Zone comprise a total of 394,390 square kilometers, while "Coloured" and "Native" areas combined within the Police Zone and the Northern Reserves amount to 240,891 square kilometers.⁹ On the basis of the 1960 population census given above, this works out to an average of 5.37 square kilometers per "European" and 0.54 square kilometers per "Coloured person" or "Native." Thus, there is a disparity of more than a factor of 10 between the size of possible residences in the "European" and "non-European" categories marked for reciprocal exclusions. In addition, the Police Zone contains most of the wealth of the territory and a highly developed economy, whereas the reserves provide no more than a subsistence economy. As the government concedes, this is precisely why the "Natives" wish to come to the "White" areas in the first place.¹⁰ Moreover, with respect to the curfew restrictions, theaters and other places of amusement are located primarily in the "European" urban areas, whereas there is little reciprocal reason for "Europeans" to want to visit the "Native" residential areas. This situation is aggravated by the fact that there are large numbers of "Natives" who have their real homes in the Northern Reserves working as migratory laborers under two-year contracts in the Police Zone. Separated from their homes and families, these "Natives" would be attracted to off-hour recreational facilities in the towns in the Police Zone, whereas there is no comparable group of "Europeans" working under contract near "Native" residential areas.

The statutory inability to transfer land in "Native" reserves to "Europeans" also operates to the detriment of the "Native" population group. This result is somewhat paradoxical in light of the original motivations for such legislation: that in the absence of restriction, "Native" chiefs might sell all the tribal land to "European" speculators for personal gain.¹¹ But at the present time, given the subsistence economy of the "Native" reserves, the only way to attract private capital for development from the "European" banks would be for a "Native" landholder to give the bank a mortgage on his only asset his land as collateral. But the statutory restrictions on land alienation mean that in practice the land is not mortgageable since it could not be foreclosed by a "European" bank in the event of default on the mortgage. Such limitations on property rights could ensure the self-perpetuation of subsistence economy, but in any event, alter the utility of property ownership to the unreciprocal disadvantage of the less-privileged groups.

2. Strict Equality

One type of claim that is obviously open to proponents of separate but equal policies is the claim of strict, or literal, equality. Some care must be taken, however, in judging whether the claimed

⁹The figures are obtained as follows: "European" farms, 389,650 sq. kilometers, Counter-Memorial, Vol. 5, p. 32, para. 24. "European" towns, 4,740 square kilometers, Odendaal Report, p. 29, Table XI. "Non-European" farms obtained by deducting above area of "European" farms from total farms given in Odendaal Report, p. 29, Table XI; this amounts to 21,249 square kilometers. Other "non-European" areas, 219,642 square kilometers, Odendaal Report, p. 111, para. 425G (given as 21,607,745 hectares). Unalienated government lands and nature reserves make up the difference of a total 823,145 square kilometers of land in the territory.

¹⁰Counter-Memorial, Vol. 6, p. 115, para. 5.

¹¹*Id.* at 56-57, paras. 51-54.

equality is more than superficial. For example, in the educational sphere the policy of "mother-tongue instruction" is central to separate development in South West Africa. It is the government's "ultimate aim" that the vernacular be used "as the medium of instruction in all standards."¹² It is claimed that no language deserves preference over another, and that strict equality requires that English or Afrikaans be confined to the "European" children and not forced upon the "Natives."¹³ While some progress has been made in developing textbooks and instructing teachers in the "Native" languages — Ndonga, Kuanyama, Kuangali, Herero, Nama and Tswana having thus far achieved the status of school languages — other important languages have not yet achieved school status, including Diriku, Kuambi, Bushman, and Sikololo (Silosi). It would seem that the very difficulty of using such languages in textbooks would argue against their suitability as media for instruction; indeed, the government concedes that the "Native" languages, developed to meet the day-to-day needs of people living in a subsistence environment, "are all poor vehicles of abstract thought."¹⁴ Thus, this particular manifestation of the concept of strict equality could lead to permanent deprivation of great literature, abstract reasoning, and world culture to the "Native" children who are instructed in their "mother tongues," a detriment which is absent from the education of "European" children.

A variant form of strict equality is the policy justification which is itself grounded on the assumption that the consequences of *apartheid* are fair and equal. For instance, one frequently asserted justification for barring "Natives" from engaging in large-scale business operations,¹⁵ from promotion to senior positions in the civil service,¹⁶ or promotion to authoritative positions in business enterprises¹⁷ is that "Natives" lack the necessary experience which is a strictly equal prerequisite for all persons of any race who wish to attain these positions. Thus, with respect to mining operations, the government has argued in the *South West Africa Cases* that

the Native population has as yet not acquired the experience, and generally do not as yet have the initiative or the means, to undertake prospecting and mining operations, which. . . must usually be on a large scale to render them profitable.¹⁸

Yet it is difficult to see how "Natives" may attain experience when only "a European of the age of 18 years or more" may qualify for a prospecting license in the Police Zone,¹⁹ or when all the important technical and responsible posts in existing mining enterprises in South West Africa are

¹²Counter-Memorial, Vol. 7, p. 23, para. 18.

¹³*Id.* at 18-23, paras. 10-19.

¹⁴*Id.* at 83, para. 15.

¹⁵*See, e.g.,* Counter-Memorial, Vol. 5, p. 64, para. 42.

¹⁶*See, e.g., id.* at 180, para. 85 (d).

¹⁷*See, e.g., id.* at 72, paras. 11-12.

¹⁸*Id.* at 64, para. 42.

¹⁹The Laws of South West Africa 1954, p. 781 (Ordinance No. 26).

statutorily restricted to "Europeans."²⁰ The social system of *apartheid* which gave rise to such impediments to "Native" advancement cannot persuasively be cited in mitigation of the consequences of this form of strict equality.

3. Substantive Equality

More common than claims of strict equality, yet more difficult to evaluate, are policies which are obviously different in their application to population sub-groups but which are claimed to be fundamentally or substantively fair and reasonable. One instance may be seen in the various statutory provisions relating to old age, disability and blind persons' pensions or grants. This social security legislation explicitly differentiates between "Europeans" and "Coloured persons" in setting rate scales, while it excludes "Natives" altogether from the public pension schemes.²¹ The minimum income entitling a "European" person to a pension is fixed at a higher rate than it is for "Coloureds," and the maximum pension benefits payable to "Coloured persons" are fixed at lower rates than for "Europeans." The justification advanced by the government for these different scales is that the income of the "Europeans" is, "on the whole, substantially more" than the income of the "Coloured persons."²² Although there is no withholding of income to finance social security, the pensions are financed out of the public revenues to which the contribution of the "Coloured people" by way of taxes on incomes and on persons is "but a fraction of the contribution made by the European population."²³

This distinction could theoretically be vitiated by a showing that *some* individuals classified in the "Coloured persons" group have substantially higher incomes than a corresponding number of "Europeans," and thus to them the general pension scale is discriminatory. But although official figures are unavailable on this point, it is unlikely that a significant number of "Coloured persons" exists in this category. Numerous statutes and ordinances bar authoritative positions in the economy and public service to "non-Europeans."²⁴ Job discrimination exists because of the action of "European" labor unions (there are no "non-European" trade unions in South West Africa)²⁵ and the admitted fact that most "Europeans" would refuse to serve in positions where "non-Europeans" might be placed in authority over them.²⁶ However, a different case can be made against the scale differentiations. It is possible to argue that there exists a number of "Coloured" workers who, but for the legislative and social impediments just mentioned, would

²⁰See *infra* p. 15, text at fn. 56.

²¹The Laws of South West Africa 1956, Vol. 1, pp. 4-183, 206-207; *id.* 1960, Vol. 1, pp. 10-23; *id.* 1962, pp. 4-21.

²²Republic of South Africa, Rejoinder: South West Africa Cases (Cape Town, 1964), Vol. 2, p. 307, para. 44 [hereinafter cited as Rejoinder].

²³*Ibid.* It is assumed that the government is talking about *per capita* contributions here; otherwise the argument would be trivial.

²⁴See, e.g., Counter-Memorial, Vol. 5, p. 59, para. 29; *id.* at 72, para. 12; *id.* at 144-145, para. 110.

²⁵Rejoinder, Vol. 2, p. 333, para. 39.

²⁶Counter-Memorial, Vol. 5, p. 59, para. 30.

have been receiving a higher pay on the open market for the work they are doing because of their skills and the quality of their job output. This, of course, would not apply to all the members of the categorized "race," but it is inconceivable that it would not apply to a significant percentage of them. The higher pay that these workers would have been receiving finds its way, instead, into the profits of the employers where it is then taxed. Thus, this amount of money is an indirect contribution by the "Coloured" workers to the public finances, yet no recognition of it appears to be given in the pay scales for "Coloured" as opposed to "European" pensioners.

With respect to "Natives," total exclusion from social security is justified on the ground that "a form of communal subsistence is practiced within the family group" of "Natives" living in the reserves.²⁷ Although the connection is not made, it is implicit in this justification that the "Native" worker will *continue* to receive subsistence when he returns to his family group, just as his wages supplied a subsistence living. Yet it is also arguable that a significant number of "Native" workers are receiving lower wages than they would command in an open market because of their association with the "Native" group. Or, it could even be argued, citing the labor theory of value, that the entire economic well-being of the area is the result of the labor contributed by the "Natives."

A single case study offers a somewhat dramatic insight into a more specific claim of substantive equality than the social security example just cited. During 1958 and 1959, South West Africa experienced a very acute drought. Extensive governmental measures were undertaken for the relief of persons affected. Under one governmental program, financial assistance in the amount of R4,900,000 (1 Rand is equivalent to approximately \$1.40) was made available to "European" farmers and R217,000 was made available to "Natives." The plaintiffs in the *South West Africa Cases* charged, in April 1961, that the disparity in these figures evidenced discriminatory treatment.²⁸ Replying to this charge in 1963, South Africa pointed out that the amount made available to the "European" farmers was applied solely towards providing *loans* at approximately four percent, whereas the distribution to the "Native" farmers was primarily in the form of free grants (R170,000 as grants,²⁹ R47,000 in loans³⁰), mostly as subsidies for "mealies" and transport.³¹

In general, it is indisputable that an outright grant is more desirable than a loan, and could be a substantial compensation for a differential in amounts made available. However, a very large loan can often be more economically useful than a very small grant. In particular, in emergency situations when one is faced with total ruin, an adequate loan is almost as desirable as an equivalent grant and infinitely preferable to an inadequate grant. The future can take care of itself. Future interest payments are trivial compared to the necessity of avoiding starvation or bankruptcy. In this light, it is interesting to note that the total amount given to the "Natives" in the form of free grants falls short by R26,000 of just one year's simple interest at four percent on the R4,900,000 loaned to "European" farmers. On a *per capita* basis, the amount loaned to a

²⁷Rejoinder, Vol. 2, p. 307, para. 45.

²⁸Government of Liberia, Memorial: South West Africa Case (The Hague, 1961), p. 89, para. 33 (v).

²⁹Counter-Memoria, Vol. 5, p. 39, para. 36.

³⁰Rejoinder, Vol. 2, p. 302, para. 34.

³¹Counter-Memorial, Vol. 5, pp. 36-38, paras. 31-35.

"European" was R66.7 compared to a "Native" *per capita* grant of R0.4 and a loan of R0.1.³² Absent these comparisons, the general claim that the financial assistance to the "Natives" was comparable because it was largely in the form of grants might have been a persuasive example of substantive equality.

Some claims of substantive equality, like their "strict equality" counterparts, appear to reply on an assumption that the consequences of *apartheid* are themselves equitable. An obvious example is found in the field of expenditure for education. In 1920 when the Mandate for South West Africa was granted, education of "Natives" in the territory was almost nonexistent. On the basis of this fact, South Africa has argued before the International Court of Justice that

the various factors and conditions which inhibited the introduction and development of education in the case of the Native groups, rendered it almost inevitable that expenditure in the Territory should have begun on a basis of substantial excess on the side of European education over that of Native Education.³³

Rather, it is clear that the only reason why the precise opposite did not hold true is the reliance on an assumption of the desirability of a system of social *apartheid*.

This assumption persists in the justifications for present-day disparities in educational expenditures. The figures for 1962-1963 are as follows:³⁴

	<i>Per capita expenditure (in Rand) on all children of school age</i>	<i>Per capita expenditure (in Rand) on all children attending school</i>
<i>"Native" Children</i>		
Police Zone	11.92	27.32
Northern Territories	3.92	8.19
South West Africa as a whole	6.59	14.28
<i>"European" Children</i>		
Including net estimated hostel expenditure	156.50	157.02
Excluding hostel expenditure	108.09	108.45

³²Using 1960 population figures, *supra*, p. 2, at n. 3.

³³Counter-Memorial, vol. 7, p. 213, para. 24.

³⁴The *per capita* figures on all children attending school are given by the government in Counter-Memorial, Vol. 7, pp. 128-129, paras. 79-81, and *id.*, p. 182, para. 35. These figures may be misleading, as only 46.16% of "Native" children of school age attended school in 1962 as opposed to 99.66% of "European" children. Odendaal Report, p. 245, Table LXXXXII. The *per capita* expenditures for all children of school age have been calculated using the population figures given for 1962 in the Odendaal Report, p. 245, Table LXXXXII, and *id.*, p. 249, Table LXXXXIII.

The Union government has argued in the *South West Africa Cases* that "although there has been differentiation, there has in fact been no unfair discrimination"³⁵ for the following reasons:

(a) Educational expenditure "must, in the first place, be considered in the light of the social and economic status and levels of development of each of the groups, and their respective educational needs."³⁶

(b) Although salary scales of "European" teachers are higher, the average "European" primary school teacher generally spends about six years more at training institutions than the average "Native" primary school teacher.³⁷

(c) There are many more "European" students in the upper primary and secondary classes than "Native" students, and their expenses run higher because of the better equipment, materials, and better-trained instructors.³⁸

Although these explanations are persuasive within their context, it is apparent that they rest fundamentally on the assumption of the equitability of the consequences of *apartheid* which they are trying to justify.

Still another form in the educational field of claimed substantive equality occurs with respect to the sharp contrast between syllabuses offered for "Native" children and for "European" children. In the lower primary courses, the "Native" children, but not the "European" children, receive instruction in the following subjects: drawing, cleaning work, weaving and claywork, needlework (girls), scrap work (boys), and gardening.³⁹ Since these subjects obviously take up school-day time, proportionately less time must be allocated to basic study in academic subjects that the "European" children receive. In the higher primary courses, subjects given to the "Native" children but not to the "European" children include gardening, tree planting and soil conservation (boys), wood, leather and scrap work (boys), needlework (girls), and handicrafts.⁴⁰ In the secondary schools, the difference lies in the options open to "European" students to take a strictly academic course or the general or practical courses, while the "Native" children do not have the option to follow the strictly academic course.⁴¹ There is additional differentiation within the "industrial course" programs at some schools. The "European" children may take highly differentiated courses in these fields, while the "Native" children are confined almost totally to practical courses in woodworking, tailoring and bricklaying.⁴² Further technical training is possible on the winning of one of six bursaries open to all students in South West Africa. However, the Union government has testified in the *South West Africa Cases* that "thus far no Native student

³⁵Counter-Memorial, Vol. 7, p. 213, para. 24(a).

³⁶*Id.* at 213, para. 24(c).

³⁷*Id.* at 214, para. 24(d).

³⁸*Id.* at 214, para. 24(e). In 1960 in the upper standards VII-X, there were 2,151 "European" students and 111 "Native" students. *Ibid.*

³⁹*Id.* at 119, para. 66.

⁴⁰*Ibid.*

⁴¹*Id.* at 119, para. 67; 176, para. 26.

⁴²*Id.* at 137-139, paras. 1-4; 182-183, paras. 36-37.

has in any way merited" one of these bursaries.⁴³

The claimed justification for this differentiation is that it is derived from the position of the various groups in society and therefore is utilitarian. As explained by Dr. H. F. Verwoerd to the South African House of Assembly, in introducing the Bantu Education bill in 1953:

What is the use of teaching a Bantu child mathematics, when he cannot use it in practice? That is quite absurd.⁴⁴

Earlier in his presentation he stated:

Racial relations cannot be improved if the wrong type of education is given to the Natives. They cannot improve if the result of Native education is the creation of frustrated people who, as a result of the education they receive, have expectations in life which circumstances in South Africa do not allow to be fulfilled immediately, when it creates people who are trained for professions not open to them, when there are people who have received a form of cultural training which strengthens their desire for the white-collar occupations to such an extent that there are more such people than openings available.⁴⁵

The argument with respect to South West Africa has remained essentially the same. In 1963 the Union government argued before the International Court of Justice that

a Bantu who qualifies himself for a profession in which he will, because of the stage of advancement of his own group, have to depend for his livelihood on the services of European employees, or on European patronage, runs a grave risk of total frustration.⁴⁶

Thus, the utilitarian scheme of education designed to train "Natives" to take their place in society without "frustration" can be argued to be logically necessary to the social system of *apartheid*. The argument, of course, supports itself by its own bootstraps: because of the initial racial differentiation, separate educational policies having sharply divergent aims are justified, an effect of which is to *create* differing skills and abilities among the population.

A similar logic pervades the explanations for sharply lower salary scales for "Native" as opposed to "European" teachers in the territory.⁴⁷ One argument is that there are more economic

⁴³*Id.* at 150, para. 25.

⁴⁴Union of South Africa, Parliamentary Debates, House of Assembly (1953), Vol. 83, col. 3585.

⁴⁵*Id.* at col. 3576.

⁴⁶Counter-Memorial, Vol. 7, p. 206, para. 20(e).

⁴⁷See tables, *id.*, pp. 122-127, 133-136, and *cf.* tables, *id.*, pp. 178-181. The commencing salary of a married male "European" teacher in the lowest category, including a special allowance, is R1,406, *id.*, p. 181, para. 34, compared to R696 for a "Native" teacher, *id.*, pp. 125-126, paras. 74-75, with comparable qualifications (Standard X plus a teacher's training course; grade 3: *id.*, p. 125, para. 74; . *id.*, p. 54, para 72).

alternatives open to "Europeans," and thus a greater salary inducement is needed.⁴⁸ Second, "the qualifications demanded in the case of European teachers are generally higher. . ."⁴⁹ Finally, a teacher's salary

should, in [the government's] view, bear a relationship to the normal income of other members of his group, otherwise he might become separated or estranged from them as a result of an artificial financial barrier.⁵⁰

As Dr. Verwoerd explained to the South African Senate in 1954:

The Bantu teacher must be utilized as an active factor in this process of development of the Bantu community to serve his community and build it up and learn not to feel above his community so that he wants to become integrated into the life of the European community and becomes frustrated and rebellious when this does not happen, and he tries to make his community dissatisfied because of such misdirected and alien ambitions.⁵¹

As to this last argument, it cannot be denied that assimilation might operate in the short run to deprive the lesser privileged groups of important personalities. Nevertheless, it should be noted that the argument that salaries should not be raised so that assimilation does not start is based solely on the desirability of extending the system of *apartheid* and for that reason cannot be held to prove that this particular manifestation of *apartheid* results in substantive equality.

The use of an argument which has historically proved to be invalid as a justification for substantive equality may reveal an unexpressed bootstrap reliance on the system of *apartheid*. This may be seen with respect to collective bargaining in South West African industry. There are no "Native" trade unions in the territory, and the relevant ordinances neither recognize nor provide for the registration of such unions.⁵² The government contended in the *South West Africa Cases* that

the Native inhabitants of the Territory have, as a whole, not yet reached a sufficiently high level of development to appreciate the true meaning and purpose of trade unionism.⁵³

Moreover,

⁴⁸*Id.*, p. 210, para. 22(c).

⁴⁹*Id.*, p. 210, para. 22(b).

⁵⁰*Id.*, p. 211, para. 22(d).

⁵¹Union of South Africa, Parliamentary Debates, Senate (1954), 11th Parl., 2nd Sitting, cols. 2606-2607.

⁵²The Laws of South West Africa 1952, pp. 464 ff. (Ordinance No. 35).

⁵³Rejoinder, Vol. 2, p. 334, para. 41

the interests of Native workers, if left to the protection of trade unions, could be neglected and. . .such workers could be exploited by unscrupulous individuals.⁵⁴

Similar arguments were often advanced in the early days of trade unionism in other countries. Yet, if it is accepted that such arguments have proved erroneous in practice, then they must be all the more dependent in the case of South West Africa on the assumption of social *apartheid*. For if the experience (however fumbling at first) of trade unions is denied to the "Natives," they may never attain a level of development on a plane with the "European" workers who presumably "appreciate the true meaning" of trade unionism.

Finally, a reverse twist to the notion of substantive equality may be seen in the government's explanation of the miscegenation clause in farm leases in the Police Zone. The standard form of lease contains a condition that, if the lessee marries or habitually cohabits with a "Native" or "Coloured" person, his lease becomes subject to immediate cancellation. The government has explained this regulation on the basis that it was contemplated that farm leases would be granted to "Europeans" only, because the "Native" population was and is not yet considered "ripe" for individual land settlement.⁵⁵ In other words, the miscegenation clause does not act as a deprivation on the freedom of cohabitation, but acts merely as a device to ensure that "Natives" do not come into positions of authority over farms in the Police Zone. Nevertheless, this argument at best answers one charge of unfair discrimination by invoking the assumption that the consequences of *apartheid* are substantively equal in their effect on population sub-groups.

4. Marginal Inequality

The South African government may claim that observed instances of unequal treatment are relatively insignificant compared to the underlying equality. If the instances are truly insignificant, the argument has merit. Sometimes, however, this justification is used for situations which only appear to be marginal. For example, the Mining Regulations of 1956 provide that only "Europeans" can be employed in the following posts in existing mines in South West Africa.⁵⁶

<i>Designation of Post</i>	<i>Number of Posts in the entire mining industry</i>
Manager	6
Assistant, sectional or underground manager	4
Mine overseer	6

⁵⁴Counter-Memorial, Vol. 5, p. 99, para. 35.

⁵⁵*Id.* at 36, para. 30.

⁵⁶Rejoinder, Vol. 2, p. 260, para. 77.

Shift boss	22
Ganger	104
Winding engine driver	20
Banksman and onsetter	28
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Total posts	190

The argument of marginal inequality, upon which there is no necessity for me to comment, is formulated by the South African government as follows:

If . . . the assumption is made that there is a sufficient number of Natives competent to fill all the said 190 posts, then the regulations in question would at present prejudicially affect only 190 Natives, i.e., slightly more than two percent of the Native employees in the industry.⁵⁷

5. Transitional Inequality

Another justification for the admittedly discriminatory provisions of the mining regulations just examined is that they are only transitional in nature and do not affect long-run considerations of equality. In the words of the South African government arguing before the International Court of Justice, the mining provisions

constitute one of the "unpopular control methods"⁵⁸ [quoting Prime Minister Verwoerd] which are considered desirable in the phase of transition from guardianship to separate self-realization, and which are destined to fall away when developments in the latter respect remove the reason for them.⁵⁹

The difficulty with transitional inequality is the indeterminate length of the period of transition. Transitional socialism in the Soviet Union, for instance, has demonstrated remarkable longevity. Or, to take an example from the history of South West Africa itself, the following letter may be cited. It was written by the representative of the Union government to the Permanent- Mandates Commission of the League of Nations in 1928:

Owing, however, to the present low state of civilisation among the natives, no native is at present employed either by the Administration or by the Railway Department on work involving the risk of human life, such as driving a motor-car or working an engine. A certain colour bar is therefore being observed in practice, but it is certainly not a statutory enactment and is purely temporary, that is until such time as the native is

⁵⁷ *Ibid.*

⁵⁸ Union of South Africa, Parliamentary Debates, House of Assembly (1959), Vol. 99, col. 64.

⁵⁹ Counter-Memorial, Vol. 5, p. 60, para. 30.

sufficiently advanced to be able to undertake this responsible work.⁶⁰

While some "Natives" since 1928 have achieved slightly better jobs on the railways, such as boiler attendant, cook, station porter, stoker, and pumper,⁶¹ it is clear that the general policy remains basically unchanged. As the Minister of Transport announced to the South African House of Assembly in March, 1956:

We only employ Natives to serve their own people where it is practicable, and where it is acceptable to the rest of the staff. But it will certainly not be acceptable to the staff or the public that Natives should be employed, even on Native trains, as firemen, conductors, or guards. That is not my policy, and it will not happen.⁶²

6. Concluding Note

The preceding claims of equal treatment of the races necessarily present only the static aspect of the racial situation in South West Africa. Yet, as the civil rights movement in this country has amply demonstrated, present dissatisfaction can be tolerated if the context is one of steady improvement. The dynamic dimension, in other words, must be taken into account in order to place the South African arguments in proper perspective. It is necessary, therefore, to conclude with some broader remarks about the direction being taken in South West Africa to deal with the racial problem.

Apartheid as currently practiced in South West Africa is potentially unstable, on account of increasing foreign interventionist pressures as well as internal dissatisfactions. There are two alternative routes that *apartheid* might take in the territory. One would be its steady transformation into multi-racialism, an alternative that might erode some of the inequalities previously considered. The other is *apartheid* carried to its logical extreme; namely, physical partition of the races. Recent events have demonstrated that the very fact of Southern Africa's increasing ideological estrangement from the rest of the world has dimmed the voices calling for multi-racialism and has strengthened the national commitment to *apartheid*. The government has argued before the International Court of Justice that the only alternative to *apartheid* is "domination of the whole Territory by majority Native groups (or, possibly, by a despotic regime derived from them)."⁶³ All suggestions for a multi-racial compromise are viewed as "expedients and manipulations," amounting to nothing more than "extended ways of arriving at majority rule by Natives."⁶⁴ This trend would appear to gather its own momentum due to the very nature of *apartheid*. For it is feared that

⁶⁰Permanent Mandates Commission, Minutes, Vol. 14, p. 278 (letter of Mr. Werth, November 19, 1928).

⁶¹Counter-Memorial, Vol. 5, p. 73, para. 15.

⁶²Union of South Africa, Parliamentary Debates, House of Assembly (1956), Vol. 7, cols. 2135-2136.

⁶³Rejoinder, Vol. 7, p. 274, para. 3.

⁶⁴*Ibid.*

if parliamentary democracy of the ordinary pattern were to be introduced, the whites would be overwhelmed by the superior number of Black voters and would soon become an impotent minority in a Black State. They would thus surrender not only their dominance over others but their own right of self-determination which they necessarily and justly claim."⁶⁵

In short, the present "dominance" of minority over majority would be reversed by universal suffrage. The interesting aspect of this argument for present purposes is not the fear of democracy that it betrays, but the underlying assumption that the "Natives" would vote as a bloc in asserting "dominance" over the "European" minority. This fear is of course nourished the more *apartheid* is stressed, and could become a self-fulfilling prophecy. The government's alternative of partition involves the enormously ambitious task of geographic isolation of the "non-White" ethnic groups within South West Africa by carving out of the territory for them independent "homelands" or "Bantustans." To transform the Bantustan plan into reality may prove impossible,⁶⁶ but there is no doubt of the national commitment to this goal.

If there were no inter-association between the people living in the Bantustans and the "Europeans" in the remainder of the territory, there would of course be little chance of prejudicial discrimination. But true "independence" appears neither contemplated nor feasible. The "European" central government has no present intention -- and probably will never have -- of letting the various partitioned enclaves control their own foreign policy or immigration.⁶⁷ Moreover, complete economic "interdependence" is envisaged.⁶⁸ Factories are being planned for erection along the borders of the various Bantustans, though within the "European" areas, so that they may draw upon the nearby labor of the "Natives" from the Bantustans. Because of these inter-associations and inter-dependencies, the basic questions of equality of treatment will probably persist. What their resolution will be in South West Africa, must await developments.

⁶⁵Penderel Moon, *World Opinion and South Africa* (1962), p. 7, quoted favorably by the Union government in Counter-Memorial, Vol. 4, pp. 117-118, para. 61.

⁶⁶See Christopher R. Hill, *Bantustans* (1964), pp. 102-109. The legality of the Bantustans in South West Africa was contested in the South West Africa Cases but was left unresolved when the International Court of Justice dismissed the Case on July 18, 1966 on a jurisdictional ground.

⁶⁷Under present plans, the following governmental functions are to be withheld from the Bantustans even when they are completely set up: defense, foreign affairs, internal security and border control, posts, water, power and transport. In addition, all homeland legislation is subject to the approval and signature of the State President of South Africa. Odendaal Report, p. 83, para. 302.

⁶⁸Rejoinder, Vol. 1, p. 312, para. 58. See D'Amato, "Long range aspects of the Bantustan Proposal for South West Africa," *Journal of Modern African Studies*, forthcoming.