

**Reflections on Democracy
and
Human Rights:**

**A Decade of the
South African Constitution**

(Act 108 of 1996)

**South African Human Rights Commission
Human Rights House
29 Princess of Wales Terrace, corner York & St Andrews Sts
Parktown
Johannesburg**

**Private Bag 2700
Houghton
2041**

www.sahrc.org.za

© South African Human Rights Commission 2006

First published in South Africa in 2006

ISBN 0-620-36364-9

**All rights reserved. No part of this publication may be reproduced,
stored in a retrieval system or transmitted in any form or by any means,
electronic, mechanical, photocopying, recording or otherwise,
without the express permission, in writing of the publisher.**

**Copy editing and project management by Wordsmiths Publishing Services
www.wordsmiths.org.za**

**Designed, printed and bound by Creda Communications,
Cape Town, South Africa**

Foreword

On the occasion of the tenth anniversary of our Constitution, there can be little argument that the human rights values underpinning our democratic dispensation become increasingly entrenched with the passage of time. The language and message of human rights define critical processes such as law and policy-making; the relationship between citizens and the state; and the relationships among and between citizens and, in many instances, non-citizens. Notwithstanding the fact that they are most often contested, and that differing interpretations of human rights widely exist, more and more of our people have come to rely on and assert their rights. This can only be healthy for our democracy. However, it is also important that as people assert and claim their rights, they accept the responsibilities that come with having rights.

The South African Human Rights Commission is one of the institutions with the responsibility of ensuring that human rights remain at the centre of debate and dialogue in the nation; that the lofty provisions in the Bill of Rights are translated into reality for the many who need their protection; and that equality and human dignity are more than legal concepts; values that are internalised and reflected in our relations with each other.

An essential part of celebrating our significant achievements as a nation is reflecting seriously on how

we have gone about discharging the Constitutional contract, and, in particular, how we have collectively used the vision of the Constitution as a central vehicle in the transformation of our society.

This publication seeks to make a contribution in that process of reflection and assessment. Through the various contributions, we seek to present an overview of the progress made on various fronts and sectors, the interventions that have worked, the unfinished business, and challenges for the future.

In all of this we must remain mindful that, even with all that we have achieved, there remain considerable deficits in overcoming the legacy of discrimination and the grinding effects of poverty. The evidence of this confronts us with frequent regularity, and the challenge we face is to ensure that the promise of the Constitution is made good and realised in substantial terms by all our people.

We would like to thank all who have contributed to this publication, including the various contributors and the Commissioners and staff of the Human Rights Commission.

Jody Kollapen
Chairperson
South African Human Rights Commission

Contents

Chapter One: South Africa 1994–2004	1
Chapter Two: Promoting Equality through Administrative Measures	15
Chapter Three: Protecting the Right to Equality through the Constitutional Court	27
Chapter Four: The Challenge of Employment and Equity in the Workplace	37
Chapter Five: Socio-Economic Rights and the Distribution of Basic Services	53
Chapter Six: Land	67
Chapter Seven: Housing	73
Chapter Eight: Health	79
Chapter Nine: Food	85
Chapter Ten: Water	91
Chapter Eleven: Social Security and Social Assistance	97
Chapter Twelve: Education	101
Chapter Thirteen: The Right to Development: An Implied Right in South Africa's Constitutional Order	109
Chapter Fourteen: Environmental Rights	119
Chapter Fifteen: The Criminal Justice System	125
Chapter Sixteen: Political Participation	145
Chapter Seventeen: Freedom of Expression	153
Chapter Eighteen: The Right of Access to Information at Age Ten	167
Chapter Nineteen: Cultural, Religious and Linguistic Rights	173
Chapter Twenty: Conclusion	191
Epilogue	199
Authors	201

Acknowledgements

The South African Human Rights Commission herewith expresses its appreciation to the contributors for writing the various chapters. Our thanks also go to Professor Nasila Rembe for the overall editing of the publication and for writing the foreword and postscript.

The views expressed in this publication are those of the individual contributors and do not necessarily reflect the views of the South African Human Rights Commission.

INTRODUCTION

In 2004 South Africa celebrated ten years of democracy. This year heralds yet another milestone in the history of South Africa — commemoration of ten years of the Constitution. The Constitution of South Africa, 1996, has, since its adoption, provided the legal framework upon which the new social and political order is founded. It lays down the principles of democratic governance; and establishes and defines the powers and functions of governmental institutions, and the values that underpin the new democracy. The Constitution has been the yardstick to measure, and beacon to guide, conduct in private life and public administration, and the civility of governance in general. It has provided the compass that has steadily steered South Africa as a nation away from the dark days of apartheid to a future that is founded on freedom, respect for human rights and the rule of law, and in which there is hope for even greater realisation of social justice and prosperity for all South Africans.

The papers presented in this Review are a modest contribution to the commemoration of ten years of the South African Constitution. The South African Human Rights Commission provided the resources and space in which different contributors reflect on various key areas of democracy and constitutional development in South Africa over the past decade, the achievements that have been made, the challenges that were encountered in the process, and the lessons that can be learned. The views expressed in this Review are therefore not those of the South African Human Rights Commission or necessarily shared by the Commission. Needless to say, they are a pointer to a growing and maturing democracy, vibrant in ideas, some contested and at times critical of our government and democracy itself.

Initially, the contributions to this Review were written with the commemoration of a decade of South Africa's democracy, 1994-2004, in mind. For reasons that need not be explained here, this effort stalled. However, the ideas expressed by the different contributors, though two years old, still remain extant and resonate well with the commemoration of ten years of the Constitution.

We would like to thank individually and collectively all those who contributed to this publication.

The task of conceiving and refining the idea, the convening of different contributors, planning, coordinating and facilitating the process involved expertise and assistance beyond the South African Human Rights Commission. We would therefore like to thank all those who served as members of the reference group.

Democracy, and the Constitution need to be understood, nurtured and made to grow, so that their ideals, for which we have struggled for so long, can be translated into our daily lives. It is therefore our sincere hope that this contribution will generate interest among the government and its administration; relevant institutions of government and civil society formations; and academia on and beyond the areas discussed and the issues raised by the contributors. We have, and must share, a collective responsibility in ensuring that our young democracy works, and that South Africa emerges as a stable, peaceful and prosperous society, and always remains a winning nation.

Professor Nasila Rembe
Editor
March 2006

Chapter One

South Africa 1994–2004

Dr Chris Landsberg & Shaun Mackay

1. Introduction

This chapter has two areas of focus. The first provides an overview of the historical context of human rights in the pre-democracy era by giving an account of the struggle for liberation, the human rights deficit and inequalities caused by apartheid, as well as a background audit of what South Africa inherited in 1994. While it has not always been possible, this chapter attempts to move along timelines in the development of, and the fight against, apartheid.

The second area of focus looks at the nature of the post-apartheid state, the challenges of transformation, the changing nature of civil society, and South Africa's role in the world. It looks specifically at the achievements and challenges of the post-apartheid period. The period from 1994 to 1999 can be characterised as 'Transition to Democracy', during which Nelson Mandela held the presidency. The Mandela government emphasised policy-making, nation building and reconciliation. It abolished a litany of discriminatory apartheid legislation, which diminished the citizenship rights of blacks and reduced them to second-class citizens in their own country. This period had a largely inward-looking focus.

The second period is dubbed 'Stabilising Democracy', and it stretches from 1999 to the present. The era of the Mbeki presidency placed an emphasis on delivery, including widespread extension of essential services, the transformation of society, the economic empowerment of blacks, and the political, economic and cultural revival of Africa, or 'the African Renaissance'.

2. Historical Context of Human Rights in the Pre-Democracy

2.1 *The Essence of Apartheid*

Apartheid is synonymous with the gross violation of human rights. Between 1948 and 1989, South Africa gradually became one of the most oppressive and repressive regimes; in turn it became one of the most isolated pariah states because of this inhuman system.

The apartheid state made human rights violations an art form. During this period, South Africa consolidated one of the most racist states, basing its *raison d'être* on the apartheid system and doctrine of political, social and economic participation and exclusion of its citizenry according to crude racial criteria. This social engineering of apartheid secured a virtual monopoly of political and economic power for whites. South Africa was a racistocracy,¹ albinocracy and pigmentocracy.²

The *Universal Declaration of Human Rights*, which was adopted by the General Assembly on 10 December 1948, the same year that apartheid was formally adopted, was, at the very least, politically, if not legally binding on states. South Africa disregarded and violated the solemn proclamation in the Declaration which stated that:

*All human beings are born free and equal in dignity and rights . . . Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*³

Especially since the political revolts of 1976, there were blanket bans on outdoor political gatherings, and by the mid- to late-1980s, the apartheid regime banned even internal political gatherings, notably those which advocated work stoppages, stay-aways and educational boycotts. There was formal censorship of books, pamphlets and publications, with the state reserving for itself the right to declare certain material 'undesirable' and banning it under numerous publications laws.⁴ Between 1963 and 1989, tens of thousands of publications were banned, with government gazetting hundreds on a weekly basis since 1963.⁵ During the 1970s and 1980s, many newspapers were closed down by the apartheid state, and more were severely restricted. Press censorship was commonplace. There was also a prohibition on the quoting of listed persons.⁶

From the mid-1980s, the apartheid state began to rely on vigilantes and *kitskonstabels* to ferment 'black-on-black' violence, low-intensity and counter-revolu-

tionary warfare.⁷ These vigilantes were hit squads made up of 'unknown' persons who targeted opponents of apartheid and randomly killed them.⁸ This period also witnessed the passing of various draconian and public safety legislation and states of emergency.

The apartheid state pursued a destabilisation campaign against South Africa's black neighbours, notably Angola, Mozambique, Zimbabwe and Botswana. As a policy and strategy, destabilisation was an open and blatant form of cross-border violation of human rights.⁹ It sought to make the southern African countries accept apartheid by making the states in the region dependent on white-ruled South Africa, as well as making them militarily weak so that they could pose only a small threat to the apartheid state.

2.2 *Four Centuries of Oppression*

The origins of apartheid racism did not start in 1948; the foundations were laid long before this period. The 17th century saw South Africa becoming subjected to colonisation by Europe, with the Dutch East India Company of Jan van Riebeeck establishing a settlement at the Cape in 1652. In 1688, the Huguenot settlers also arrived in the Cape, while 'Trekboers' moved into the hinterland, robbing the Khoikhoi and the San people of their land and animals. The foundations for racism were therefore established more than three-and-a-half centuries ago. The 1700s also witnessed the brutality of slavery in South Africa until it was eventually abolished in 1834. But no sooner was slavery outlawed than the Great Trek from the Cape Colony began, with white racist trekkers declaring war against indigenous groups like the Ndebele and the Zulus, leading to the Battle of Blood River in 1836.

From 1838 onwards, numerous battles were fought between white British and Afrikaner settlers over control of territory and resources. Following the discovery of diamonds in Hopetown in the Northern Province in 1867, the settlers became more aggressive and greedy. This sparked numerous wars against each other, as well as against the natives. The first Anglo-Boer war broke out in 1880, and six years later, the Witwatersrand goldfields were discovered. This led to the birth of Johannesburg in 1886. The second Anglo-Boer war, also known as the South African War,¹⁰ started in 1899.

With the formation of the Union in 1910, great emphasis was placed on 'segregation' policies to guide 'native policy'.¹¹ The Union helped whites to consolidate white supremacy and black subjugation. The formation of the Union signalled clearly to blacks that the whites were not interested in creating a state based on equal rights; they were determined to establish a white state. Consequently, blacks felt compelled to establish their own liberationist institutions and in 1912 formed the South African Native National Congress (SANNC) — which became the African National Congress (ANC) in 1923.

But whites were not phased and in 1913, the Natives Land Act was introduced, limiting land ownership by blacks to tribal territories (non-quota land). Black South Africans launched numerous anti-pass campaigns that triggered more repression from the white settlers. The year 1936 was a significant period for settler domination as blacks were removed from the common voters' roll in the Cape, and the Native Trust and Land Act authorised blacks a maximum of 13,7% of all land in the Union (as non-quota and quota land).¹²

After 1948, the apartheid state turned anti-communism into a prime doctrine. The apartheid government introduced the Suppression of Communism Act in 1952. This Act set the platform for the introduction of broad-ranging and immensely repressive security legislation in the decades that followed.

2.3 *The Making of an Oppressive Pariah State*

South Africa was the only country post-World War II that was egotistical and racist enough to formally institutionalise racial discrimination and thereby defy the post-World War II drift toward self-determination of peoples. It showed total disregard for human rights values and freedoms, and defied the post-war spirit of democratisation. It introduced racist Acts such as the Mixed Marriages Act, the Immorality Act and the Bantu Education Act of 1953.

Democracy in apartheid South Africa was at best a sham — a limited whites-only democracy — in which white people contested for political power through democratic means, while black people were relegated to the level of spectators in this charade of democracy. Apartheid easily qualified as the world's foremost racistocracy; this racial engineering project was ethno-chauvinism *par excellence* (above all others).

Many actors in the international community singled out and campaigned against South Africa's discrimination, settler colonialism, prison conditions and violations of prisoners' human rights. They offered support for the victims of apartheid, the exploited and oppressed children under apartheid; and non-governmental organisation (NGO) conferences for action against apartheid. Campaigns ranged from international youth and student solidarity with the oppressed people of South Africa; to strategies for resistance against apartheid; support for women's movements against apartheid; culture against apartheid; education against apartheid; campaigns against apartheid in sports; and the international mass media against apartheid.

On the economic front, there were numerous efforts seeking implementation of sanctions; oil and arms embargoes against South Africa; study of the role of Trans-National Corporations (TNCs) in South Africa; seminars on loans to, and disinvestments from South Africa; and studies on determining the socio-economic implications of apartheid. By the 1970s, the interna-

tional community had begun to react against nuclear collaboration with South Africa. Even though some states, among them the world's established democracies in the West, chose to play the role of spoilers, small boycott movements quickly swelled into a global anti-apartheid movement. The Western powers were able to provide a new lease of life for the apartheid regime, as it emerged as a bastion against the international 'communist onslaught'.

2.4 *The International Anti-Apartheid Offensive*

From the inception of the UN, many of its members were conscious of their obligation to promote the elimination of all forms of racial discrimination. In July 1948, India cautioned the UN that:

*... if the belief that there is to be one standard of treatment for the white races and another for the non-white continues to gain strength among the latter, the future for solidarity among the members of the United Nations and, consequently, for world peace, will indeed be dark.*¹³

These were prophetic words indeed. In 1950, the General Assembly, for the first time, stated that apartheid was decidedly anti-democratic because it was necessarily based on 'doctrines of racial discrimination' contrary to the principles stated in the UN Charter. In 1955 the South African government began to feel the pressure as it was forced to withdraw from the United Nations Educational, Scientific and Cultural Organisation (UNESCO).

2.5 *The 'Winds of Change'*

The interplay between the policies and actions resulting from apartheid's repression on the one hand, and international reaction to these on the other, had begun to manifest itself by 1960. Domestic opposition to apartheid culminated in an event that drew the inequity of that system onto the centre stage. Sixty-nine people were killed during the Sharpeville massacre on 21 March 1960. This was followed by the banning of the ANC and the Pan-Africanist Congress (PAC). Following the massacre and the banning of political parties, the ANC established its armed wing, *Umkhonto weSizwe* (Spear of the Nation) to pursue a policy of armed struggle. The UN also began to threaten South Africa with punitive measures and, on 30 March 1960, the UN Security Council began considering the question of South Africa. In its first action on South Africa, the Council adopted Resolution 134 of 1960, which deplored the policies and actions of the South African government.¹⁴ In 1961, South Africa was forced to withdraw from the Commonwealth. Prime Minister H. F. Verwoerd tried to save the face of his white electorate by withdrawing in the interests of their 'honour and

dignity'.¹⁵ South Africa declared itself a Republic on 31 May 1961.

From 1962 there were numerous attempts by foreign players to deploy anti-apartheid institutions as mobilising agents against South Africa. In that year, for example, the United Nations *Special Committee Against Apartheid* was established.¹⁶ In the light of this development, the UN began to institutionalise punitive measures against the Republic. It began to maintain detailed surveillance of, and curtail, South Africa's trade, economic, financial, business, military, diplomatic, sports and cultural ties with the outside world.

In 1963, prominent leaders of the ANC and allied organisations were charged with 'treason' in the famous Rivonia trial. The trial ended with Nelson Mandela, Govan Mbeki, Walter Sisulu, Dennis Goldberg, Ahmad Kathrada, Raymond Mhlaba, Andrew Mlangeni and Elias Motsoaledi being sentenced to life imprisonment in 1964. In response, the UN Security Council agreed to a voluntary arms embargo against South Africa by member states. In that same year, the UN adopted the all-important *Declaration on the Elimination of All Forms of Racial Discrimination*, expressing concern at 'the manifestations of racial discrimination' in South Africa. It considered apartheid to be 'scientifically false, morally condemnable, socially unjust and dangerous'.

In the same year, the General Assembly also appealed to member states to assist the families of persons persecuted by the South African government for their opposition to apartheid. Conventions, conferences, manifestos, and resolutions remained important tools for popularising the anti-apartheid crusade. The 1969 *International Convention on the Elimination of All Forms of Racial Discrimination* similarly resolved to condemn racial discrimination and undertook to pursue, by all appropriate means, a policy to eliminate racial discrimination.

The Organisation of African Unity (OAU), the highest institutional expression of Pan-Africanism at the time, campaigned for sanctions, ostracism, international propaganda and armed struggle against apartheid. The objectives of this campaign were very clear: bring about democracy in South Africa by ensuring '... an end to the illegal government of settler minority'.¹⁷ The OAU set out to discredit and de-legitimise the white minority regime, and legitimise in its place the national liberation movements. The ANC and other liberation movements were declared 'the sole and authentic representatives of the peoples of South Africa'. Some of the labels the OAU used to discredit the apartheid state included: 'the Pretoria regime', 'minority racist regime', 'white minority government', 'racist and minority regime', 'European minority of fascist rule', 'the illegal racist minority regime', 'the racist minority government of European settlers', and 'colonial and racist rulers'.

In the early 1970s, the UN began exposing the anti-democratic nature of apartheid by passing resolu-

tions condemning the practice of apartheid as 'a crime against the consciousness of mankind' that posed 'a threat to international peace and security'. In 1971, the UN General Assembly rejected grand apartheid in the form of the establishment of Bantustan homelands and the forced removal of black people. In a dramatic move in 1974, the UN General Assembly rejected the South African delegation's credentials, thus revoking the country's right to participate in UN activities.

The year 1976 saw the student revolt, which started in Soweto and soon spread throughout the country. The death in custody of Black Consciousness leader Bantu Steven Biko in September 1977, together with the Soweto uprisings and the banning of numerous organisations and newspapers, triggered the UN Security Council to vote in favour of a mandatory arms embargo against South Africa. This was the first time ever that the Security Council had adopted such drastic actions against any member state. Subsequent to this, the symbolic opposition to apartheid was turned into widespread demands for the total isolation of South Africa.

2.6 *In Search of a Regional Cordon Sanitaire*

Zimbabwe (then Rhodesia) was liberated in 1980, and from that point on black-led states in southern Africa became militant in their opposition to apartheid. South Africa's attempts at creating a buffer zone of friendly states in southern Africa were dealt a severe blow when Angola, Botswana, Mozambique, Tanzania, Zambia and Zimbabwe constituted themselves as the 'frontline states' against the racist 'Pretoria regime'.¹⁸ The 'frontline states' sought to maintain a solid front that would wear down the regime to the point that it would yield on the 'major demand of black majority rule'.¹⁹

In April 1980, the Southern African Development Co-ordination Conference (SADCC) was established, thereby formalising an anti-apartheid alliance in the region. SADCC sought to expose and isolate apartheid South Africa and quickly articulated three avowed objectives: promoting regional development; lessening dependence on South Africa; and challenging Pretoria's aggressive destabilisation campaign in the region. The International Labour Organisation (ILO) General Conference, meeting in Geneva, condemned apartheid as degrading, criminal and inhumane. The Conference decided that the ILO would give assistance to South African liberation movements.

Student and youth movements throughout the world campaigned against apartheid; spearheaded academic, cultural and sports boycotts; and established ties and partnerships with progressive counterpart organisations in South Africa. This was another illustration that apartheid had become the world's foremost moral issue, and that efforts to uproot it transcended international borders. Just as the white apartheid state banned and forced black opposition forces into exile, so

the white-ruled Republic itself became an international exile. Many members of the international community declared South Africa *persona non grata* (unacceptable or unwelcome person); Pretoria had to be kept at arms-length at all costs.

2.7 *The Volatile 1980s*

The early 1980s saw the apartheid state experimenting with all sorts of cosmetic reforms. These culminated in the plans of the Botha regime to create a tri-cameral parliament, which established separate parliamentary chambers for whites, coloureds and Indians, and blatantly excluded blacks. This propelled the establishment of the United Democratic Front (UDF), a potent extra-parliamentary force. The UDF engaged in countrywide mass protest, and rendered many parts of the country ungovernable. The state responded with the imposition of a state of emergency and the country became embroiled in violence.

Internationally, apartheid had become a rallying point for civil rights movements, particularly amongst the African-American community in the United States. Congress also became a fierce anti-apartheid campaigner, contradicting President Ronald Reagan's anti-sanctions stance.

In Western Europe, anti-apartheid movements campaigned on the basis that 'apartheid was an evil to be combated by every means within their power'.²⁰ Demands for sanctions and isolation were their chief strategies. They worked in creative ways with multi-lateral organisations such as the UN, the Commonwealth, the Non-Aligned Movement, and the OAU, to increase the pressure against South Africa. More importantly, they forged close working relations with the South African liberation movements in exile, as well as the UDF and the Mass Democratic Movement (MDM) inside the country.

2.8 *Transition Years*

The period 1988 to 1989 turned out to be a crossroads for democratisation in South Africa. There was a constant interplay and convergence between national, regional and extra-regional forces and opportunities. When F. W. de Klerk succeeded P. W. Botha, first as leader of the National Party (NP), and subsequently as head of state, he felt compelled to move towards the politics of negotiations. By 1988, international opposition to, and pressure against, an increasingly repressive racial dictatorship began to affect South Africa. International pressure against South Africa's apartheid regime had increased and together with domestic revolt had helped to drag the Nationalist government to the negotiating table.

In August 1989, the ANC released its OAU-backed Harare Declaration setting out its preconditions for negotiations. These prerequisites included the demand that political prisoners, including Nelson Mandela, be released, and that the government lift the state of

emergency, including unbanning proscribed organisations. The Harare Declaration was supported and endorsed by important external actors like the Commonwealth and the United Nations. Regional factors such as Cuba's withdrawal from Angola and Namibia's independence added to this momentum. The crumbling of the communist regimes among the Warsaw Pact countries also impacted decisively on South African politics, while Mikhail Gorbachev's '*Perestroika*' and '*Glasnost*' helped to put pressure on the ANC to negotiate. All these events helped set the stage for De Klerk's reforms at the start of the decade.

Western powers pressurised De Klerk to level the political playing field by dismantling apartheid legislation and repressive laws so as to allow for free political activity and a negotiated settlement. De Klerk crossed his own 'Rubicon' on 2 February 1990 when he unbanned political organisations like the ANC, the PAC and the South African Communist Party (SACP). De Klerk's goal was to end the conflict and fashion a settlement based on 'reforming' apartheid so that it would guarantee 'minority rights'. Another goal was to end South Africa's international isolation, relax the pressure of sanctions, and change an international relations environment that worked against the NP government and favoured the ANC.

The NP government and the liberation movements decided to embark on a negotiation process and established the Convention for a Democratic South Africa (CODESA). However, the negotiation process was bedevilled by many complications outside the formal forums and was typically on and off. The process was complicated by the prevailing conflict and unrest on the ground. These events outside CODESA impacted negatively on peace prospects. Some within the opposition camp, such as the SACP, invoked the idea of a 'Leipzig option', that is, massive public pressure and mass action to compel the NP regime to negotiate and settle the apartheid dispute.

CODESA eventually collapsed when the ANC accused the apartheid government of fermenting violence through a third force of apartheid assassins. Negotiations were only resurrected under the banner of the Multi-Party Negotiations Forum at Kempton Park.²¹ After overcoming the breakdown in talks between the two principal negotiators, the NP government and the ANC signed a Record of Understanding. But no sooner had this happened than the peace process was threatened by another serious hurdle: the Inkatha Freedom Party (IFP) and other parties outside the talks such as homeland ruling parties, and the ultra-right. These parties boycotted the talks, interpreted the ANC-NP deal as a diktat, and threatened to derail the entire negotiations movement.²²

The international community resorted to preventive diplomacy and international mediation initiatives. The latter aimed at settling the differences between the ANC and NP on the one hand, and the IFP and other

boycotting parties on the other. What followed shortly thereafter was a dramatic breakthrough, based on mediation and shuttle diplomacy, which brought the IFP into the elections. This accommodation was based on an understanding that there would be international mediation after the elections to address the IFP's grievances. Notable among these grievances included the status of the monarchy and the King in Kwazulu Natal, and a greater devolution of powers to the provinces.

In the end, however, the preventive diplomacy of the international community paid off, as a relatively peaceful poll ensued, in spite of many forebodings. This resulted in the United Nations Observer Mission to South Africa (UNOMSA), the European Union (EU), the Commonwealth and the Organisation of African Unity (OAU) being able to certify the elections as 'substantially' free and fair. No other election in recent memory was as acclaimed as the South African election in 1994.

3. South Africa in the Period 1994-2004: Democratic, yet Unequal and Impoverished

3.1 Government's Transformation Agenda

From 1994 to 1999, the new government placed an explicit premium on transformation: the notion that the South African state and society should change fundamentally if South Africa was to move away from racism, autocracy, poverty and inequality. The challenges of formal democratisation, state reform, expanded delivery of social services, job creation, poverty alleviation and development all constituted salient elements of transformation. Transformation thus sought to deal with economic, political and social relations, and sought to improve the lives of the poorest South Africans.

In practical terms, the post-apartheid government was preoccupied with breaking ties with the apartheid past and putting in place new democratic and accountable institutions. The emphasis was on overhauling legislative frameworks; the creation of new institutional arrangements and structures to deliver the new policy frameworks; and transformation within government in line with the principles of broad representation.

Black Economic Empowerment (BEE), viewed as one way of addressing economic inequality, was a key government priority. Employment equity and affirmative action, that is legislative programmes of action aimed at redressing disadvantaged groups, was another major priority. The government sought to give blacks, coloureds and Indians, as well as women and the physically disabled, a greater share of the employment opportunities in the country, in order to counterbalance the disparities caused by apartheid exclusionism.

South Africa was committed to achieving gender equality as part of its human rights vision, which incorporated an acceptance of the equal and inalien-

able rights of all women and men. This ideal is a fundamental tenet under the South African Bill of Rights. The socio-cultural dictates of all groups defined women as inferior to men and assigned them to positions of legal minors in both private and public life. Here, too, the legacy of apartheid was one that maintained structured and entrenched inequalities, which subjected the majority of women — especially African women who lived in mainly rural areas — to abject poverty. The ANC-led government sought to entrench its commitment to gender equality by setting up the Commission on Gender Equality and the Office on the Status of Women under the President. The government also set a target to have one-third of its members of Parliament women. In addition, legislation outlawing gender-based discrimination and violence against women was passed.

Affirmative action legislation targeted not only racial affirmation but also gender, requiring more women in the workplace, particularly in decision-making positions. Despite these transformative measures, women continue to be the poorest group in South Africa and are mainly unemployed or underemployed. South Africa, especially in its rural areas, remains largely a patriarchal society. In addition, violence against women and sexual assault in South Africa has reached serious proportions.

3.2 Nature of the State and its Evolution

The final settlement of the negotiated transition in 1994, both the first and the second democratic polls of April 1994 and May 1999, together with the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution) mean that the post-apartheid state enjoys a very high degree of legitimacy. But this legitimate state is beset with enormous socio-economic and other challenges.

The South African Constitution is often hailed as one of the most progressive in the world. It provides the state with a progressive framework for the realisation of both political and socio-economic rights. The Constitution has a robust and elaborate Bill of Rights, which makes an explicit commitment to break away from the atrocities of apartheid by establishing a society based on human dignity, freedom and equality.

The interim Constitution of 1993 provided for:

... a historic bridge between a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future society founded on the recognition of human rights, democracy and peaceful co-existence and development of opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

The interim Constitution put an end to institutional discrimination and contained far-reaching guarantees of human rights. The 1996 Constitution recognises the injustices of the past and makes a commitment to

improving the quality of life of all citizens and freeing the potential of each person. The founding values of the new democratic South Africa include human dignity, the achievement of equality, the advancement of human rights and freedoms (including non-sexism and non-racism) and respect for fundamental principles of democracy — the rule of law, universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government aimed at ensuring accountability, responsiveness and openness. These founding values are all articulated in a Bill of Rights that is entrenched in the Constitution.

Over the past decade, the ANC-led government has been avowedly committed to creating a unified state, and to establishing and consolidating an effective government that would bring about 'a better life for all'. The state has committed itself to progressively realising the political and socio-economic rights of its citizenry. The task of rebuilding the state from its apartheid and racist ethos was no easy feat. Since 1994 government has had to systematically and deliberately unscramble apartheid institutions and replace them with new democratic and legitimate institutions. It was determined to replace the apartheid-order and polity with a rules-based democratic society based on the principles of equity, non-racism and non-sexism. The state has been gradually democratised and universal franchise has been extended to all citizens. However, the government's highly ambitious transformation programme placed enormous strain on an inexperienced state.

The transformation of the state involved overhauling the state machinery, fundamentally changing the entire policy tapestry, and introducing a new legislative framework. To this end, some 90 pieces of legislation were passed per annum. The Bantustans were reincorporated and their public services were melded with those in South Africa to create a single public service. The restructuring of the public service involved reskilling and retraining. It addressed representivity to the extent that some 72% of all public servants are now Africans. The affirmative action and equity drive has ensured that the civil service reflects the demographics of society.²³ The size of the public service was reduced from 1,2 million in 1994 to just over a million in 2001. But the public service faced many capacity constraints making it heavily reliant on consultants, with 25% to 30% of state tenders going to consultants.²⁴

Governance and administration objectives were also focused around delivery, and the government introduced the idea of integrated governance between different departments at the national level, strengthening the centre, and the co-ordination between the national, provincial and local government spheres. By 2002, a new focus had emerged and the government and governance stressed support for the New Partnership for African Development (NEPAD) activities. Thus South Africa's continental objectives began to be reflected in its internal policies.

3.3 Chapter Nine Institutions

The Constitution is premised on a separation of powers between the legislature, the executive and the judiciary. Separation of powers and upholding the Constitution requires vigilant and strong countervailing institutions. Chapter 9 of the Constitution provides for 'state institutions supporting constitutional democracy', which include the South African Human Rights Commission (SAHRC); the Public Protector; the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Commission); the Commission for Gender Equality (CGE); the Auditor-General (AG); the Independent Electoral Commission (IEC); and the South African Broadcasting Corporation (SABC).

The aim of these institutions is to inculcate a culture of democracy and human rights in South Africa. They are also tasked with the monitoring of political and socio-economic rights, and overseeing the roles of institutions such as the National Assembly.

In order to ensure that the socio-economic rights in the Bill of Rights are progressively realised, section 184(3) of the Constitution mandates the SAHRC to monitor and assess, on an annual basis, the observance of these rights and accordingly report to the National Assembly.²⁵ In terms of Section 183(4), the Commission has additional powers and functions prescribed by national legislation, such as the Promotion of Access to Information Act and the Promotion of Equality and Prevention of Unfair Discrimination Act, which require the SAHRC to report to the National Assembly.

In order to execute its constitutional mandate, the SAHRC developed a set of questionnaires (commonly referred to as 'protocols') in its first reporting cycle. The protocols were designed to provide it with information on policy and legislative, budgetary and other measures adopted during a reporting period in order to realise the socio-economic rights in the Constitution.

There is also a responsibility for the SAHRC, as an independent constitutional body responsible for monitoring socio-economic rights, to critically revisit its monitoring process. Other obligations include the mandate to carry out research, educate and raise awareness of human rights.

The Public Protector is another Chapter 9 institution. It is mandated to investigate complaints on maladministration, corruption, abuse of power, unfair behaviour and unreasonable delays in performing public functions by government officials. It is required to make recommendations to Parliament on these investigations and also to take remedial action on complaints reported. If the conduct of a government official leads to an interference with the enjoyment of economic and social rights, one can approach the Public Protector and lay a complaint.

The Public Service Commission was also established by the Constitution to promote and maintain

values and principles, including high standards of professional ethics; efficient and effective use of economic resources; provision of services impartially, fairly, equitably, and without bias; public administration which is broadly representative of the South African people; and cultivation of good human resource management and career development practices, to maximise human potential. The Public Service Commission is also mandated to investigate complaints against public administration practices and monitor and evaluate the organisation, administration, and personnel practices of the public service. The Public Service Commission also proposes measures to ensure effective and efficient performance within the public service, as well as reporting and giving directions aimed at ensuring that human resource policies comply with the stated values and principles.

Significantly, one mandate of the Public Service Commission states that the Commission should encourage public participation in policy-making and an immediate response to people's rights. This is one of the most understated, yet crucial indicators that should be advanced. The point that we emphasise here is that just as the government has clear obligations to advance human rights, so too do the public human rights institutions.

3.4 Macro-Economic Policy

3.4.1 The RDP

The post-1994 ANC-led Government of National Unity (GNU) adopted the Reconstruction and Development Programme (RDP), which was accepted as the *de facto* policy framework of the new government; it functioned as a 'blueprint' for social and political transformation in South Africa.²⁶ The overarching goals of the RDP included sustainable growth, viable employment creation and a movement to full employment, reduction in income disparities, and an equitable system of rights.

The RDP set some key targets: creating 2,5 million jobs in 10 years; building one million low-cost houses by 2000; providing electricity to 2,5 million homes by 2000; redistributing 30% of arable agricultural land to black farmers within five years; providing 10 years of compulsory, free education and instituting adult basic education and training programmes; and democratising and restructuring state institutions to reflect the racial, class and gender composition of society.

The RDP was institutionalised in the form of the RDP Ministry and the RDP Fund, both of which became highly centralised in their decision-making. The RDP office formed a focal point of donor support from 1994 to early 1996. It sought to facilitate cross-cutting policy approaches and encourage new approaches to public-sector management and budgeting in order to meet the government's overall reconstruction objectives.

Critics of the institutional arrangements and operational mechanisms established under the RDP broadly centred on the fact that it was highly centralised in its operations. Many suggested there was a real centralisation of planning associated with the programme. However, there was also an increasing understanding within the state that the RDP was not a full strategy for governance and development and it was open to wide interpretation. Given the major implementation problems caused by this, it was decided to shelve the RDP.

3.4.2 GEAR and Macro-Economic Austerity

A prime characteristic of post-1994 economic policies was the desire to create a favourable environment for market-led economic growth. To this end, in 1996, the government launched its macro-economic strategy — Growth, Employment and Redistribution (GEAR). Through GEAR, government committed itself to: creating productive employment opportunities for all citizens with a living wage; alleviating poverty, low wages and extreme inequalities in wages and wealth; meeting basic needs; democratising the economy and empowering the historically oppressed; removing racial and gender discrimination; and providing a balanced and prosperous regional economy in southern Africa.

The core elements of GEAR were a renewed focus on budget reform; a faster fiscal deficit reduction programme; a monetary policy to keep inflation low and stable; liberalised financial controls; a strong privatisation programme; tax incentives to stimulate new investment in competitive and labour absorbing projects; an expansionary infrastructure programme to address service deficiencies and backlogs; and wage restraint by organised workers and the introduction of regulated flexibility in the labour market.

The government has been hard pressed to highlight some of GEAR's successes. Its *Ten Year Review* points to the fact that the budget deficit has come down from 9,5% of GDP in 1993 to a fraction over 1% in 2002/03. Investment as a percentage of GDP has averaged around 16% to 17% and, since 1999, the government's investment expenditure has grown from 5,3% to 9,3%. While per capita growth was negative in the decade prior to 1994, the economy has since 1994 grown at a rate of 2,8% per annum; but this is way under par if South Africa is to address the problems of poverty and underdevelopment.

The new state placed an emphasis on financial management, and government passed the Public Finance Management Act of 1999. This led to improved budgeting and planning at national and provincial levels. The National Planning Framework was also introduced to improve policy planning.

The government embarked on a Public Works Programme, which has employed some 124 808 people since 1998.²⁷ Expenditure on education remains the largest budgetary item, with the government focusing

on both primary and secondary school enrolment. There was a general increase in literacy rates from 83% in 1996 to 89% in 2001. Public health care expenditure has increased in the last eight years, but real per capita expenditure has remained between just R907 to R967.²⁸

Outside government and the private sector, GEAR has been consistently criticised by, among others, the labour movement and the South African Communist Party (SACP). Among the criticisms advanced is that GEAR failed to facilitate growth and bring about serious redistribution of income and, as a result, South Africa witnessed a widening gap between the rich and poor. Critics argue that poverty is on the increase and the country lacks a comprehensive framework on poverty alleviation. GEAR sought to signal South Africa's credibility by impressing upon international actors South Africa's commitment to a stable macro-economic policy.²⁹ One of GEAR's biggest problems is that growth has remained low while unemployment has increased massively.

The rapid depreciation of the South African currency during 2001 and 2002 put further pressure on the economy. It was only towards the last quarter of 2003 that the currency appreciated again. However, one thing is certain: the currency was highly volatile. Privatisation of state assets remained government policy despite criticism from its social partners, especially the Congress of South African Trade Unions (COSATU) and the South African Communist Party (SACP). The main objections from these critics centred on the potentially negative impact on employment and consumer prices of privatised services.

3.4.3 The MTEF and Poverty Alleviation

One way in which the state tried to articulate a poverty alleviation macro-economic framework was the introduction, in 1998, of a three-year budget cycle, the Medium Term Expenditure Framework (MTEF). The MTEF's priorities, like those of the RDP and GEAR, stressed meeting basic needs — principally in education, health, water and sanitation, social services, welfare, land reform and housing; accelerating infrastructure development — ensuring investment (principally via private-public partnerships) in infrastructure, up-grading of roads, undertaking of Spatial Development Initiatives (SDIs), and addressing urban renewal; and economic growth, development and job creation — the stimulated growth of the economy in order to achieve sustainable, accelerated growth with corresponding redistribution in opportunities and income.

The MTEF further placed an emphasis on human resource development — the education and training of citizens in pre-primary, formative, tertiary and technical institutions, and life-long education and training for adults, the unemployed and undereducated youth; safety and security — the transformation of the criminal justice system, police and prison administrations and

an improvement in national defence and disaster management; and the transformation of government — the strengthening of administration and good governance and the implementation of a code of conduct (*Batho Pele — People First*) for service delivery by the public sector. The 2000 Integrated Sustainable Rural Development Strategy (ISRDS) recommended that government take on board:

... one of the key lessons of the international experience; namely, that successful rural development must be implemented in a fashion in order to respond to articulated priorities and observed opportunities at the local level.

The government has clearly embarked on a series of key policy initiatives over the past few years to address the country's vast socio-economic challenges. However, what is striking is the lack of a clear and comprehensive anti-poverty plan. Even though South Africa is exempt from adopting a Poverty Reduction Strategy Paper (PRSP), the country, it seems, could do with a comprehensive national anti-poverty strategy, as opposed to relying on disparate sets of policy programmes and initiatives to address the problems and challenges.

3.5 Policy-Making and Implementation

When South Africa's new inclusive democracy was initiated in 1994, the government sought to adopt policies and practices designed to serve the interests of all, regardless of race or gender, rather than separate development (apartheid). The new government was open to innovative approaches to policy. However, policy and policy challenges took place against the backdrop of a tough developing country setting. Resources and skills were limited, and the capacity to implement the new policies was in short supply.

The Nelson Mandela government placed an emphasis on policy-making and overhauling the old policy landscape. The government felt pressed to make new and progressive policies which enjoyed legitimacy.³⁰ The Mbeki government in turn felt the need to shift away from policy-making to a greater emphasis on consolidation and the implementation of policy. The emphasis was on policy formulation, with an increased focus on improving the effectiveness of implementation systems and enhancing the provision and delivery of basic services.³¹ The government articulated a programme of action aimed at 'speedier transformation towards delivery, and an improved quality of life for all South Africans, especially the poor'.

Both the Mandela and Mbeki governments adopted policies and policy implementation strategies that had to respond to the massive and daunting apartheid legacy by focusing on alleviating poverty, creating a black middle class or 'patriotic bourgeoisie', free market policies in search of foreign direct investment and job creation, and putting in place a responsive civil service.

However, ten years into South Africa's democracy, there was clearly a gap between policy and implementation. Policy-makers and bureaucrats charged with implementation have often been unaware of the many unintended consequences of policies and the fact that policies were often highly ambitious. Policies often came up against tough practicalities in the field.

Some of the unintended consequences of policy can now be highlighted. In terms of costs, the implementation of policies was often more costly than initially anticipated at the policy-making phase. Furthermore, the government was under constant pressure to re-vamp the skills of those people intended to implement them. For example, outcomes-based education required new curricula for teachers to be developed, and a whole new generation of students and teachers to be comprehensively oriented. This often brought about uncertainty in the ranks of implementers about their competencies and skills.

While the intentions behind many of the policies were always good and noble, often unexpected consequences resulted. For example, the government had a clear goal of empowering local communities, but policy sometimes achieved the opposite. School Governing Bodies (SGBs) in the poorer areas tend to be dominated by teachers because parents do not feel competent enough to engage teachers and help chart the course of their children's education, and often no attempt was made to make them feel competent in these circumstances. So the exercise sometimes became disempowering.

Where policy-makers failed adequately to consult the intended beneficiaries, such policies had unintended consequences. For years a debate ensued in formal housing forums and among experts on the kind of housing that South Africa's poor wanted. They finally decided that they wanted to purchase their houses rather than to have rental stock. What the policy-makers did was fail to ask the intended beneficiaries themselves what they wanted. The upshot was that people began selling their houses soon after they had obtained the necessary grants/subsidies to purchase them. There was a failure to recognise that township residents associated the ownership of homes with being evicted for non-payment of rent, as experienced during the apartheid era.

Foisting policies that worked in the 'developed countries' into a 'developing country' may have negative consequences. The quest for 'world class policies' denotes such a practice. South Africa developed a penchant for trying to learn from and emulate the developed countries. Sometimes, such 'world class' policies were not always readily implementable, as the necessary conditions for their successful implementation did not exist on the ground. Thus the policies are set up for failure, or they benefit only those sectors of the population that are able to access them. The debate around 'e-government', may be an illustration of this. Policies do not have to be world class to be

successful; what is needed are good policies for the particular circumstances that they seek to address.

Policies based on one important consideration may have consequences for other areas. For example, in principle, the release of prisoners to reduce the drastic overcrowding in prisons may well reduce the prison population and lead to an improvement in the way in which prisoners are housed. However, a proper programme of action needs to be followed through, such as public works programme or skills training, otherwise the policy could lead to an increase in crime. The freed prisoners may battle to survive in difficult economic circumstances in an economy that is actually losing jobs instead of creating them.

Many policy areas also required co-ordination with other sectors in order to ensure the delivery of the intended end-product to the beneficiaries. In the health sector, for instance, the policy decision to provide primary health care in rural areas through the provision of clinics was an important one, as the intention was to bring accessible health care closer to rural populations. However, several of these clinics have been built and are standing empty. This is because there are no roads leading to them, or there is no energy to power basic equipment, or there is no sufficient and professionally competent staff. So the Department of Public Works should also have been party to the making of this policy.

3.6 Civil Society and Public Participation

Given the historical as well as contemporary political and social contexts in South Africa, the 'progressive realisation' of rights can only come about through public participation in processes of monitoring human rights, and in decision-making processes in government and policy-making institutions. Thus, developing human rights indicators in South Africa requires the involvement of all relevant actors and stakeholders, especially the populace — including the poor and indigent — in the human rights domain. We can only hope to arrive at a more nuanced and realistic understanding of how to measure rights within the context of South Africa's realities if the emphasis falls on people and their rights.

Adam Habib argues that, in the post-1994 context, civil society organisations have redefined their roles in the context of democratisation and globalisation.³² A number of new and varying organisations have formed during this time. Many civil society organisations responded to what they perceived as the effects of 'neo-liberalism', as they linked rising poverty and inequality to the government's macro-economic strategies. We have witnessed, in particular, the rise of new social movements such as the Soweto Electricity Crisis Committee (SECC), the Anti-Privatisation Forum (APF) and the Concerned Citizens Group (CCG). They have campaigned against evictions, electricity cut-offs and the government's privatisation campaigns. Many such

movements have their roots in communities, but are often supported by urban-based activists and organisations. Mass mobilisation has been the key working method of such organisations. Other prominent social movements included the Treatment Action Campaign (TAC), a national organisation challenging the state's HIV/AIDS policies and campaigning for the roll-out of anti-AIDS drugs. Yet another is the Landless People's Movement (LPM). It enjoyed the support of the National Land Committee (NLC), and campaigned on the basis of demand for land and addressing the interests of the poor.

A key feature of social movement in South Africa is the links which many have developed with anti-corporatist and anti-globalisation movements. Platforms like the World Social Forum (WSF) and the World Summit for Sustainable Development (WSSD) have become important organising forums for social movements. Many new social movements and civil society actors have accused the post-1994 government of having developed an exclusionary style of decision-making from which key social constituencies, and civil society more broadly, are excluded. They have argued that such exclusionary tactics do in fact hinder progress towards the progressive realisation of rights.

As far as many civil society actors are concerned, a key feature of the post-1994 South African state policy decision-making approach has been ANC dominated. They accuse the ANC-dominated government of failing to consult widely, and failing to include a wide range of key actors in the policy-making process. The government was unfriendly, sometimes hostile, to those who thought differently on key policy issues. Also, while many affluent middle-class citizens, and especially NGOs, have developed ways to engage the post-apartheid state, it is not clear that ordinary grassroots citizens in the townships, shack settlements and the rural areas enjoy the same kind of access. Rural and poor citizens appear to be excluded from the state, and reality is that many people living and working in informal environments do not benefit from the reach of the state.³³ There has been limited incorporation into the state at grassroots level.

Many of the new civil society actors are convinced that transformation and change cannot come about simply by enhancing the managerial and administrative capacity of the government. If the new order is to induce its grassroots social base into its institutions, the democratic state must become a far more tangible and visible feature of citizens' lives. While a more responsive and accessible officialdom is important, the deepening of representative democratic institutions, so that citizens see the state as a source of protection and a terrain in which they can exercise rights, is imperative.

To be sure, the government and the state did view civil society as a key social actor. However, the government typically saw civil society as a vehicle for delivery and a guarantor of public buy-in from society

rather than a means of ensuring public participation on policy.

It is not only the government and the state that have shown weaknesses; there have also been many weaknesses on the part of civil society actors. Many NGOs have paraded as civil society even though they have shown themselves to have weak roots with communities and grassroots structures. Many NGOs, unlike real community-based organisations, are classically urban-based, very professional, and boast strong ties with donors. Many NGOs are poorly rooted in communities. Many have also developed a love-hate relationship with the state and, as far as both the state and NGOs are concerned, South Africa has become what Mhone and Edigheji call an 'exclusionary democracy'. They argue that, while in the macro sense South Africa became a model constitutional democracy, it excluded key social actors from policy-making and governance. Governance and civil society activities have become highly elite-driven processes.

But for a more complete understanding of civil society, one has to look to the labour movement and, in particular, COSATU. Even though COSATU has been in a formal alliance with the governing ANC and the SACP; labour in general, and COSATU in particular, have often played the role of 'genuine' opposition in South Africa on issues such as HIV/AIDS, privatisation, and even the government's policy on Zimbabwe.

3.7 Relations with the Outside World

During the apartheid years, South Africa behaved like a rogue elephant and destabilised several of its neighbours in its desperate efforts to make the region safe for apartheid and white minority domination. Over the past decade, the state has felt an expressed obligation to shed its pariah status and imprint its image as an activist global citizen seeking to bring about a more just and rules-based world order. Pretoria also felt a sense of obligation to reach out to its neighbours not as a hegemony or bully, but as a partner. South Africa's international strategy expressly sought to balance local needs and obligations with regional and international responsibilities.

South Africa was instrumental in negotiating NEPAD, through which Africa would extract commitments in favour of renewed development assistance, market access for Africa's traded goods, and debt relief, in exchange for commitments to democracy and 'good' governance.

South Africa was instrumental in establishing the African Union (AU). The latter seeks to foster greater continental unity on the basis of commitments to, and mechanisms in defence of, peace, security, and governance, and through which African states would make their own peace and the outside world would bolster such initiatives. Pretoria played a key role in devising the African Peer Review Mechanism. It is a voluntary mechanism to ensure that policies and practices of

participating states conform to agreed-upon norms and principles on democratic and corporate governance.

South Africa further played key negotiating and mediating roles in the Democratic Republic of Congo (DRC), Burundi, the Comoros, Swaziland, Lesotho and Zimbabwe. Sub-regionally and continentally, South Africa is party to the African Charter on Human and Peoples' Rights, an instrument which codifies both civil and political rights, economic, social and cultural rights, as well as other collective rights.

The country has positioned itself as a key player in resolving issues of interest to the global South. Since 1999, it deliberately attempted to place and help keep Africa and the developing South on the agenda of the G-8. It is playing an important role in the Doha round of the World Trade Organisation (WTO), where one of its major objectives will be to ensure that resources are optimised in achieving the objectives of NEPAD.

The government moved beyond the apartheid state's notion of South Africa as an outpost of Europe. Instead, it explicitly developed ties with Latin America, Asia and, of course, Africa. The government has committed itself to the implementation of the United Nations Millennium Development Goals (MDGs) through NEPAD. It has been a staunch defender of multi-lateral institutions and multi-lateralism, and has even come out against developments such as the United States-led war in Iraq. During the decade 1994-2004, South Africa became the conference capital of the world and hosted key international and global events such as the Non-Aligned Movement (NAM) Summit in 1998, the Commonwealth Heads of Government Meeting (CHOGM) in 1999, the UNAIDS Conference in 2000, the UN World Conference Against Racism of 2001, the World Summit on Sustainable Development of 2002, and the African Union Summit also in 2002.

3.8 Statistics and Two Nations, Two Economies

Ten years into democracy, and with the government under significant pressure to justify some of its policy directives, Pretoria prides itself on some aspects of delivery such as water and sanitation, electrification and housing. Similar to the income disparities, gross disparities also exist in access to basic services such as clean water, sanitation, education, health and welfare, employment and economic opportunities. The fact that the country has now reached the ten-year mark of democracy should therefore not conceal the fact that the country continues to face the twin challenges of addressing poverty and inequality, and putting the economy on an accelerated growth path.³⁴ Policies pursued thus far have had, at best, limited results, and at worst have contributed to a growing crisis.

The Organisation for Economic Co-operation and Development (OECD) and African Development Bank (ADB) argue that 'South Africa has inherited from apartheid a highly unequal economic and social system

that threatens social cohesion'.³⁵ The OECD/ADB report goes further, arguing that:

*... both education and health profiles reflect the impact of segregation. While the white population displays life expectancy and education statistics close to those recorded in OECD countries, the African population is characterised by both poor records on education and high mortality rates. Simultaneously, South Africa exhibits one of the most unequal income distributions in the world.*³⁶

The government tends to highlight statistics to show its achievements, such as the proportion of households with access to clean water increasing from 60% in 1996 to 85% in 2001.³⁷ This translates into around 9 million citizens or about 3,7 million additional households gaining access to water between 1995 and 2003.³⁸ The government has spent an estimated R5 billion on water and sanitation over the past decade.

In terms of electrification, the government points out that there has been a major increase in household electricity connections, from 32% of the population in 1996 to 70% in 2001. The record on housing suggests that, between 1994 and 2003, 1 985 545 subsidies were approved to the value of R24,22 billion.³⁹ In terms of gender equality, 49% of all subsidies approved were granted to women. Also in terms of gender equality, government contends that it has promoted such equity through the recognition of customary marriages, the establishment of the Office of the Status of Women in the Presidency, labour equality, maternity benefits, attending to issues of sexual harassment, and affirmative action.

Land and the challenge of land restitution and redistribution remains a key challenge and could even be a time bomb in a highly unequal society. Since 1994 about 1,8 million hectares of land have been transferred under redistribution programmes to about 137 478 households. About 80% of these transfers occurred between 1997 and 2002. The ANC has set a deadline of 2005 for the land restitution process; they regard this as imperative if South Africa is to avoid a 'Zimbabwe-style land grab'.

Despite the above-mentioned achievements, and ten years after apartheid was officially ended, statistics reveal many setbacks and problems. These statistics reveal the severity of a deeply uneven and unequal society. They reveal significant development challenges faced by the country, and bring to the fore the fact that South Africa exhibits both first world and third world characteristics. Serious disparities exist in the society given that the Republic has one of the most unequal distributions of income in the world, as measured by the Gini coefficient (0,57 in 2000).⁴⁰ These inequalities have led President Thabo Mbeki to observe that South Africa is a country of 'two nations': one rich and largely white, and one poor and largely black. The richest 10% of South Africans account for over 45% of

the national income, while approximately 5% of the national income is shared amongst the poorest 40% of the population.⁴¹ This disparity also has a racial basis, with white South Africa's Gross Domestic Product (GDP) ranked 45th in the world, while black South Africa's GDP is ranked 180th.⁴²

Progressive realisation of rights continues to be hampered by the fact that the country remains one of 'two nations', as President Mbeki stated. South Africa possesses 'a dual economy and society'.⁴³ The President observed that one '... is modern and well developed. The other is characterised by underdevelopment and an entrenched crisis of poverty'.⁴⁴

A report on poverty and inequality in South Africa, prepared for the government in 1998, corroborates these findings.⁴⁵ It classifies South Africa as an upper middle-income country. The report also highlights that due to apartheid policies and discrimination against blacks in terms of access to land, education, jobs and political rights, income distribution is extremely skewed. The result is that South Africa is one of the most unequal societies in the world.⁴⁶ Approximately 19 million of the country's 40 million people are classified as living below the poverty line, and 72% of the poor live in rural areas. Poverty is most serious in three of South Africa's nine provinces: Eastern Cape, Free State and Limpopo. Poverty too runs along race lines and is highest amongst blacks (61%) and coloureds (38%), and lowest amongst Indians (5%) and whites (1%).⁴⁷

During the period 1998-2001, the economy grew at less than 3% per annum. The sluggish growth has led to increased unemployment. High unemployment persists (about 30% or 4,7 million people of working age)⁴⁸ and the formal labour market continues to shed jobs. Apart from the unequal nature of South African society and the resultant disparities between the socio-economic conditions of black South Africans and those of their white counterparts, unemployment continues to be one of the country's most intractable challenges — one that could easily undo all of the good work that the government has put into stabilising the country. The government's own *Ten Year Review* of October 2003 frankly recognises that, while people employed in South Africa grew from 9 557 185 to 11 157 818, the number of unemployed people also rose from 1 909 468 to 4 271 302, a massive increase of 2 361 834.⁴⁹ This confirms that unemployment remains one of the more serious problems of the post-apartheid order.

In part, increasing levels of crime are a reflection of the increasing levels of joblessness and poverty in the country. The government is seeking a solution for this through growing the economy — thus kick-starting job-creation — as well as encouraging the growth of small and informal enterprises.

The *Ten Year Review* itself concedes that, by 1995, approximately 28% of households and 48% of the population were living below the estimated poverty line.

In 1999, there were 3,7 million such households out of 11,4 million, just under 33% living below the poverty line; of these most were African. Of female-headed households, 45% live below the poverty line compared with 26% of male-headed households. On average, says the *Ten Year Review*, the poor were living with incomes about 12% below the poverty line, and over the course of the decade, the government has equalised old-age pensions, and spread the reach of the child support grant amongst eligible children. The Department of Social Development currently runs some seven different social grants for pensioners, poor families with children, war veterans, foster care givers, and families taking care of children and people in need. The expenditure of these social grants has increased by 3,5 times from 1994 to 2003 from R10 billion to R34,8 billion. The number of the beneficiaries increased from 2,6 million to 6,8 million.

It is also important to highlight the issue of HIV/AIDS. According to UNAIDS, South Africa displayed in 2000 one of the largest infected populations in the world (after Botswana, Swaziland and Zimbabwe) with almost 20% of adults infected with the disease.⁵⁰ South Africa is one of the world's worst affected countries, and projections indicate that by 2006 almost 250 000 South Africans will die of AIDS each year.⁵¹ This figure could rise to more than 500 000 by 2008. Average life expectancy is consequently expected to fall from about 60 years to around 40 years between 1998 and 2008. HIV/AIDS will impact on both governance and economic costs, and will impact on GDP and growth rates, health care spending, education, and social welfare — especially as regards state care of AIDS orphans.

The South African government's stance on the HIV/AIDS issue has been ambivalent and often contradictory, and this has invited international concern and national polarisation. On the one hand, President Mbeki's invitation to renowned HIV/AIDS denialists to form part of South Africa's National Advisory Council on HIV/AIDS and the Minister of Health's numerous pronouncements questioning the link between HIV and AIDS, and her recent unwillingness to sign the National Economic Development and Labour Council (NEDLAC) National Treatment and Prevention Plan, drawn up in consultation with senior staff in the Health department, have drawn heavy criticism. Yet, on the other hand, much planning and infrastructure is being put in place by the department to combat the epidemic.

The government's own *Ten Year Review* argues that the prevalence of HIV/AIDS has shown a dramatic increase from 0,7% in 1990 to 26,5% in 2002; this is one of the most dramatic increases in the world. The overall prevalence rate was 22,4% in 1999, 24,5% in 2000, and 24,8% in 2001. This translates into an estimated 4,7 million South Africans infected with HIV, with about 400 000 at an advanced stage of AIDS. Complicating the HIV/AIDS issue is the fact that HIV is related to other diseases such as TB.

Correspondingly, government spending on HIV/AIDS programmes jumped from R30 million in 1994 to R342 million in 2001/2002. It is expected that expenditure will increase ten-fold to R3,6 billion in 2005/06.

4. Conclusion

It has been argued in this paper that pre-1994 South Africa created political, socio-economic and human rights crises that will haunt South Africa for decades, even centuries to come. Pre-1994 South Africa was one of the worst violators of human rights and thus came to be dubbed by the UN and many states as committing a 'crime against humanity'.

Apartheid caused deep and embedded structural violence in society, and today the country remains one of the most socially violent societies in the world. Increasing crime statistics, especially violent crime such as rape, murder, and hijacking, supported this assertion way back in 1994. So deep-seated was apartheid racism, that just as it took decades to evolve and manifest itself, so it is likely to take decades to deal with the consequences and legacies of this crime against humanity.

It can be concluded that South Africa remains a schizophrenic society: on first-generation rights it is doing well; on second-generation rights it has a very long road to travel. South Africa is a democracy with deep-seated poverty and inequality. This is a challenge that South Africa must confront.

Endnotes

- 1 See Christopher Landsberg, *The International Politics of South Africa's Negotiated Settlement*, D. Phil Thesis, Oxford University, July 1999, p. 6.
- 2 See Deon Geldenhuys, *The Diplomacy of Isolation: South African Foreign Policy Making*, Macmillan and South African Institute of International Affairs, 1984, p. 6.
- 3 Quoted in United Nations Department of Public Information, *The United Nations and Apartheid 1948-94*, United Nations Blue Book Series, Vol. 1, 1994, p. 8.
- 4 *Ibid.*, p. 17.
- 5 *Ibid.*
- 6 *Ibid.*
- 7 *Ibid.*, p. 38.
- 8 *Ibid.*, p. 39.
- 9 *Ibid.*
- 10 Dunbar Moodie, *The Rise and Fall of Afrikanerdom: Power, Apartheid and Afrikaner Civil Religion*, Berkeley, California, 1975.
- 11 See Bernard Magubane, *Apartheid*, in *The Oxford Companion to Politics of the World*, Oxford University Press, 1993, p. 35.
- 12 See Dan O' Meara, *Volkskapitalisme: Class, Capital and Ideology in the Development of Afrikaner Nationalism, 1934-1948*, Johannesburg, 1983.
- 13 E. S. Reddy, *The United Nations and Apartheid — A Chronology*, <http://www.anc.org.za/un/un-chron.html>, p. 2.
- 14 E. S. Reddy, *The United Nations and Apartheid — A Chronology*, op. cit., p. 6.
- 15 United Nations, Department of Public Information, *The United Nations and Apartheid 1948-94*, op. cit., p. 151.
- 16 See United Nations, General Assembly Resolution: The policies of apartheid of the government of South Africa, A/res/1761 (xvii), 6 November 1962, New York.

- 17 Organisation of African Unity, Assembly of Heads of State and Government meeting, First Ordinary session, Cairo, 17-21 July 1964.
- 18 N. M. Shemuyarira, *The Lusaka Manifesto on Southern Africa*, op. cit.
- 19 Ibid.
- 20 Kader Asmal, Address to the closing session of the symposium organised by the Anti-Apartheid Movement archives committee to mark the 40th anniversary of the establishment of the Anti-Apartheid Movement, op. cit., p. 5.
- 21 See Steven Friedman and Doreen Atkinson, *The Small Miracle*, op. cit.
- 22 Chris Landsberg, *Directing from the stalls?*, op. cit.
- 23 Ibid.
- 24 Ibid.
- 25 Section 183(4) provides that: Each year, the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken toward the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.
- 26 For an assessment of the Reconstruction and Development Programme, see Tobie Schmitz and Claude Kabemba, *Enhancing Policy Implementation: Lessons from the Reconstruction and Development Programme*, Research report no 89, Centre for Policy Studies, Johannesburg, September 2001.
- 27 Presidential Communication and Advisory Services (PCAS), *Towards a Ten Year Review, a Synthesis Report on Implementation of Government Programmes*, op. cit.
- 28 Ibid.
- 29 OECD/AfDB, *African Development Outlook 2001/2002*, Paris and Abidjan, 2002, p. 270.
- 30 For an analysis of the problem of the gap between policy and implementation in South Africa, review the three-year Centre for Policy Studies project on *Closing the gap between policy and implementation*. This project was concluded in early 2003.
- 31 Ibid.
- 32 See Adam Habib, *State-civil society relations in post-apartheid South Africa*, in SA Labour Bulletin, vol. 27 number 6, December 2003.
- 33 Steven Friedman and Ivor Chipkin, *A Poor Voice?: The Politics of Inequality in South Africa*, Johannesburg, Centre for Policy Studies, August 2001.
- 34 See OECD and ABD Group, *African Economic Outlook, 2001/2002*, Paris 2002.
- 35 OECD/AfDB, *African Development Outlook 2001/2002*, Paris and Abidjan, 2002, p. 276.
- 36 Guy Mhone and Omano Edigheji (eds), 2003, *Governance in the New South Africa: the Challenges of Globalisation*, Cape Town, University of Cape Town Press
- 37 Ibid.
- 38 Ibid.
- 39 Ibid.
- 40 Statistics South Africa, *Earning and Spending in South Africa, 2002*; Also, for an assessment of the poverty debate in South Africa, see Steven Friedman and Ivor Chipman, *A Poor voice?: The Politics of Inequality in South Africa*, Centre for Policy Studies, Research Report no 87, Johannesburg, August 2001.
- 41 Ibid.
- 42 Ibid.
- 43 President Thabo Mbeki, State of the Nation Address at the Opening of Parliament, 14 February 2002.
- 44 Ibid.
- 45 See M. Finnemore, *Introduction to Labour Relations in South Africa*, Eighth Edition, November 2002, LexisNexis/Butterworths, Durban, 2002, p. 44.
- 46 Ibid.
- 47 Ibid.
- 48 Statistics South Africa, *Bulletin of Statistics*, Vol.37 (1), March 2003.
- 49 Presidency, Policy Communication and Advisory Services, in *Ten Year Review*, op. cit.
- 50 Quoted in OECD/AfDB, *African Development Outlook 2001/2002*, op. cit, p. 276.
- 51 For further statistics and an overview of the HIV/AIDS pandemic, see UNAIDS, *Socio-economic impact of HIV/AIDS in Africa*, Kericho, March 2001.

Promoting Equality through Administrative Measures

Thuli Madonsela

1. Introduction

This chapter provides an overview of measures implemented by the state to eradicate persisting structural inequality and systemic discrimination in all spheres of life. These measures were taken in pursuit of the constitutional vision of a new South African society, which is based on the achievement of equality, human dignity and the advancement of human rights and freedoms.

Since the following chapter deals with law reform interventions and the emerging jurisprudence of the Constitutional Court, this chapter will focus on administrative measures, referring to the law only in instances where necessary. This includes cases where the state has been confronted with litigation in response to administrative measures implemented to accelerate the equalisation of opportunities in public employment, state contracts and other areas of life. While more focused attention is given to the areas where most systemic disadvantage existed at the onset of democracy, some attention is also paid to other critical areas of difference and disadvantage that have emerged as comparably critical over the years. These include disability, HIV status, poverty and other grounds of discrimination and disadvantage.

This chapter examines measures undertaken and the impact they have had. It also touches on the challenges that have hampered the success of such measures. Attention is also briefly given to areas where measures need to be strengthened to accelerate the pace of progress towards the achievement of equality as envisaged in the Constitution.

2. Background

The drafters of South Africa's Constitution placed the achievement of equality, with emphasis on non-racialism and non-sexism, at the centre of the new democracy. This was in recognition of the systemic and structural inequality that pervaded all aspects of South

African life at the dawn of constitutional democracy.

The constitutional vision of equality is said to be a substantive notion of equality. It is as much concerned with impact as it is with the treatment that a person or group may experience. The substantive understanding of equality is based on an appreciation of the fact that an act (commission or omission) that appears neutral on the face of it may in fact impact differently on differently situated persons. Such an act may cause or exacerbate injustice against a person or a group who already suffers from accumulated disadvantage. It is often said that one of the earliest precursors to the substantive notion of equality is Judge Tanaka's dissenting judgment in South West Africa cases (Second Phase) Judgment¹, where he said:

Contrary to the standpoint of the Applicants who condemn the policy of apartheid or separate development of the Respondent as illegal, the latter conceives this policy as something neutral . . . Before we decide this question, general consideration of the content of the principle of equality before the law is required.

This principle has been recognised as one of the fundamental principles of modern democracy and government based on the rule of law. Judge Lauterpacht puts it:

*The claim to equality before the law is in a substantial sense the most fundamental of the rights of man. It occupies the first place in most written constitutions. It is the starting point of all other liberties.*²

The alternative view of equality, which is referred to as formal equality, is often likened to milk in a vessel being offered to a fox and the stock at the same time. Despite the appearance of equality, the reality is that one ends up getting the milk and the other does not.

It has come to be universally appreciated that to achieve real equality, differently situated persons may need to be treated differently. This may imply according

preferential treatment to a disadvantaged person or a group of persons as a means to redress imbalances. The South African Constitutional Court has confirmed that the Constitution adopts a substantive notion of equality. The case of *City Council of Pretoria v Walker*³ is quite illustrative in this regard. The case involved rate payment differentiation between historically disadvantaged townships and historically advantaged white suburbs. The Constitutional Court rejected a claim of indirect unfair discrimination against the Pretoria Municipality. The complainant had alleged that the municipality was responsible for indirect unfair discrimination against whites because it had subjected black townships to a flat rate and predominantly white suburbs to a consumption-based rate for water and electricity.

A substantive understanding of equality has also informed the conceptualisation of peremptory, constitutionally mandated legislation that seeks to give meaning to the right to equality as enshrined in section 9 of the Constitution. For example, the Promotion of Equality and Prevention of Unfair Discrimination Act, No 4 of 2000 defines equality as follows:

*Equality includes the full and equal enjoyment of all rights and freedoms as contemplated in the Constitution and includes de jure and de facto equality and also equality in terms of outcomes.*⁴

A similar understanding of equality underpins the Employment Equity Act, No 55 of 1998 and the Preferential Procurement Policy Framework Act, No 3 of 2000. Both legislations provide for special positive measures or preferential treatment of black people,⁵ women and persons with disabilities to address the legacy of past legal and social injustices. Similar reasoning has inspired the provisions of the Broad Based Black Economic Empowerment Act No 53 of 2003, which focuses on positive measures aimed at economic empowerment of black women, men and persons with disabilities to redress systemic economic inequalities that persist beyond legalised injustice.

Contemporary international approaches to equality are also increasingly leaning towards substantive equality as opposed to the historical formal notion of equality. The latter emphasised the appearance of identical treatment regardless of difference, disadvantage and adverse impact. For example, various UN instruments, including the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) 1969 and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1981, recognise the need and make provision for special measures in favour of historically disadvantaged groups such as black people and women to equalise opportunities and access to societal resources between them and beneficiaries of historical injustices. In recognition of social power in the private hands of the historically advantaged as a result of accumulated advantages, contemporary UN instru-

ments require state parties to intervene with positive measures in favour of those hitherto disadvantaged. In order to achieve equality, state parties have to level the playing field.⁶

The substantive notion of equality is informed by an appreciation of the fact that discrimination is not an occasional aberration in an otherwise equal society. It is a result of accumulated social advantage on the one hand and accumulated social disadvantage on the other. Discrimination and inequality remain structural, systemic and normative in society. In the South African context, the substantive notion of equality recognises that although most of the laws that blatantly discriminated against persons or groups on the basis of race, gender, disability or any other human qualities had been removed from the statute book by 1994, the social legacy of accumulated disadvantages as a result of the injustices that were institutionalised by such laws remained a defining factor of the South African social reality. Such accumulated disadvantages were evidenced by a number of social and economic indicators that permeated all spheres of life at the outset of democracy.

For example, those likely to own property, be appointed to senior management positions and control the job market remained the beneficiaries of the now defunct Job Reservation Act and Group Areas Act. The same applied to access to and control of financial capital for the acquisition of further means of production and basic necessities of life, such as housing, nutrition, health and a meaningful education. In the same vein, historically dispossessed and infrastructurally neglected black rural households remained without running water, sanitation, electricity and telephones. Historically black schools, clinics, courts and other historically neglected infrastructure in black communities remained dilapidated and under-funded, while those in historically white areas flourished. In recreation, adult affluent white men had more playing facilities, which received more local government subsidies than children, particularly children in historically black residential areas.

The social legacy of historical injustice was not limited to material terms. It extended to important aspects of life that, unfortunately, are rarely paid attention to in most dialogue around the promotion of equality. Colonialism and apartheid's damage also extended to spiritual deprivation. It covered the marginalisation of African languages, as well as the African justice system, which was seen as backward and unworthy.

The question that the following analysis seeks to answer is: how far have state administrative measures gone towards closing the gap between the constitutional vision of equality and the social reality of systemic inequality and discrimination that obtained at the onset of democracy in 1994?

3. Ten Years of Promoting Equality: What has been achieved?

3.1 Overview

Over the past ten years the state has implemented various administrative measures to promote equality. Some measures have been consciously targeted at reducing inequality, with an emphasis on structural inequality and the eradication of systemic discrimination. The pursuit of equality has also benefited from measures aimed at addressing socio-economic challenges, such as poverty. Most administrative measures dealing with socio-economic imbalances are not dealt with here, since part three of the book deals with socio-economic rights. Measures covered in this section include administrative measures introduced in the process of implementing legislation and those implemented independently. The following overview deals first with the key administrative policies that have been introduced to promote equality or that had an impact on promoting equality in the past decade. The analysis then proceeds to a brief overview of institutional interventions and administrative mechanisms beyond policy.

3.2 Administrative Policies

One policy framework introduced in the past decade that has had a major impact on the promotion of equality is the White Paper on the Reconstruction and Development Programme (RDP White Paper). Although not specifically targeted at the promotion of equality, one of the key themes underpinning the Reconstruction and Development Programme (RDP) articulated in the RDP White Paper was social reconstruction and redistribution of societal resources and opportunities. A lot of infrastructural inequalities have been dealt with in pursuit of the RDP and the programme continues to be a benchmark for government action targeted at societal transformation. This is reflected in, among others, the government's *Ten Years of Democracy Report*. However, in addition to the inherent weakness of not specifically presenting a clear roadmap towards the achievement of equality, the RDP's impact on equality has been undermined by its uncertain status after government's introduction of GEAR.

Despite a number of internal contradictions and failure to present a clear roadmap towards redistribution, GEAR has had some positive implications for equality. It was through its implementation that social expenditure in areas of critical need for historically disadvantaged groups, such as black people, women and people with disabilities, has been expanded in recent years.⁷ Notable areas in this regard include the deracialisation of and substantial increase in state old-age pensions, child grants and disability grants.

Another policy framework that has contributed significantly to the equality and redistribution project in the

public sector is the White Paper on Transforming the Public Service. This formed the basis of two other critical milestones in the pursuit of equality. One was the White Paper on Affirmative Action in the Public Sector. This focused primarily on achieving a demographically representative public service, eliminating employment discrimination and creating a working environment that affirms all, regardless of race, gender, disability and other forms of difference. It also contains concrete targets relating to the achievement of race (50%), gender (30%) and disability (20%) representation at senior management in the public service.

The second critical milestone was *Batho Pele: White Paper on Transformation of Public Service Delivery*. This focused on improving service delivery, with an emphasis on redirecting resources towards historically neglected areas in order to address historical imbalances in service delivery, including infrastructure for such delivery.

Although these policies had enormous potential for the promotion of equality, their impact has been undermined by poor implementation and enforcement. Implementation capacity has been a major weakness. One aspect of this weakness lies in the inheritance of a civil service that was not focused on service delivery but rather rooted in bureaucracy, with all the apathy and red tape that is rule-driven rather than service-oriented. The question of allegiance to the old policy framework has also played some role in hampering redistributive service delivery. Over the years, attempts have been made to shift from rule-driven public administration to results-focused public management. However, this demands new skills, including executive leadership and change management competencies.⁸ Implementation encountered the problem of having to dismantle the legacy of apartheid by relying on inherited public servants who had not undergone transformation in line with the new changes. It has been difficult to achieve the necessary paradigm shift in this regard and the uncertainties and concomitant discomfort that comes with change have not made things easier.

The Green Paper on Employment Equity, which formed the basis for the Employment Equity Act, was a major milestone with regard to the equalisation of labour market opportunities thus reversing the social consequences of the Job Reservation Act, Group Areas Act and related exclusionary policies of the past. Like the Constitution and other policies mentioned earlier, the Green Paper on Employment Equity was anchored on the substantive notion of equality. This understanding of equality served as the philosophical foundation for measures aimed at eliminating structural discrimination and promoting equality in the labour market. The approach was reiterated in the articulation of the objectives of the Employment Equity Act.

The government has also introduced numerous other policies, which although not having had an earth-shattering impact on equality have dealt visible blows to

remaining pockets of privilege and disadvantage in society. These include various pieces of labour legislation, including the Skills Development Act⁹ and the Skills Development Strategy, Labour Relations Act,¹⁰ Basic Conditions of Employment Act,¹¹ Extension of the Unemployment Insurance Act¹² and Extension of Workers Compensation¹³ to domestic workers. Government policy has also covered education legislation, which includes the Schools Act, various local government transformation policies and Integrated Development Plans (IDPs). Government departments have also introduced various policies aimed at promoting equality in and through procurement as envisaged in section 217 of the Constitution and the Preferential Procurement Policy Framework Act. Government policy and related administrative action around the restructuring of state assets has also sought to some extent to redress historical imbalances. This theme is explored further below, mainly under the section 'Challenges'.

The following provides an overview of policy interventions that focus on addressing historical disadvantages affecting black people, women and people with disabilities, the three designated groups that have been prioritised in most policy frameworks. Attention will also be paid to HIV/AIDS and poverty as emerging critical areas of concern for the achievement of equality to which government policy is increasingly responding.

3.3 Black Empowerment

Although it has taken almost a decade to see a decisive government policy statement on black empowerment, in the past two years or so this matter has received the attention it deserves. This has resulted in a formal policy framework and legislation, namely the Broad Based Black Economic Empowerment Act, promulgated by the President in January 2004.

The Act provides for the establishment of the Black Economic Empowerment Council as an advisory body to oversee its implementation. It also provides guidelines for the implementation of positive measures with a view to achieving the empowerment of black people, while taking into account compounded economic disadvantage owing to the intersection of race with factors such as gender- and disability-based disadvantage.

Prior to the advent of the Broad Based Black Economic Empowerment Act, a number of government departments and governmental bodies had already started to develop and implement sector policies on the subject. Among these were the Departments of Minerals and Energy, Trade and Industry and Public Works. Key milestones in this regard have included the Mining Charter and the Financial Services Charter. Some government departments have ensured that black empowerment policy is extended to the restructuring of state assets, including processes involving parastatals falling under their portfolio. Examples include special measures adopted in the disposal of Telkom and PET-

ROSA shares. Lack of consistency or uniformity in approaches and commitment to black economic empowerment has hampered visible progress in this area. However, this is likely to be remedied by the Broad Based Black Economic Empowerment Act and the work of the Council established under the Act.

The ratification of CERD and efforts aimed at fostering compliance with the convention have also contributed significantly to black empowerment in this country. A number of milestones have been achieved in this regard. These include the holding of a National Conference on Racism in 2000, the hosting of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCAR) in 2001, and the launching of the National Forum against Racism in 2003.

The impact of these policies, however, is yet to be felt. The character of persisting racial inequalities along the contours of previously legalised injustice is outlined below.

3.4 Women's Empowerment

A significant step made in the pursuit of women's empowerment and the achievement of gender equality was the establishment of a National Gender Machinery. This refers to a network of interrelated structures that operate collaboratively to facilitate and co-ordinate national efforts in pursuit of the advancement of women and the achievement of gender equality.¹⁴ The structures in question include the Commission for Gender Equality (CGE), which is a constitutional body; the Office on the Status of Women (OSW) in the Presidency at national level and in the Premier's Office at provincial level; Joint Monitoring Committee on the Status of Women in Parliament; Gender Focal Points (GFPs) in government departments; and appropriate Organs of Civil Society. Other constitutional structures, including the South African Human Rights Commission (SAHRC), the Public Protector, and the courts are also expected to play a role in the advancement of women and the promotion of gender equality.

Another landmark in the empowerment of women has been the development and issuing of the National Policy Framework for Women Empowerment and Gender Equality (National Gender Policy Framework). The importance of the policy has been boosted by the President's consistent reference to it and, in particular, his call for accelerating the pace of implementation of this policy in his State of the Nation Address (February 2003).

The adoption of the Prevention and Eradication of Violence Against Women and Children (Addendum to the SADC Declaration on Gender and Development), through the leadership of South Africa, was a major policy achievement in the fight against gender violence and in the promotion of gender equality. This was followed up by a local National Conference of Commitments, which emerged with a national framework for an

integrated response to violence against women. Various administrative activities agreed to at the conference in 1998, particularly those relating to public awareness, have been maintained over the years.

Women's empowerment has also influenced administrative interventions in the maintenance system, domestic violence, victim empowerment and family law. Key transformational interventions in this regard included improved infrastructure for family courts, maintenance administration, domestic violence and sexual offences. In the justice system, fairly concrete policy positions have emerged on the training of service providers with emphasis on the police, welfare officers, prosecutors, clerks of the court and judicial officers.

The establishment and work of the CGE has contributed significantly to the advancement of women and promotion of gender equality. One of the inherited policy gaps that the CGE has persistently drawn attention to is the issue of 'witch hunting'. The practice affected mostly elderly women and those suspected to be witches were burnt to death.

Despite all the above and other measures implemented to advance women generally and African women in particular, they continue to experience structural inequality and systemic discrimination in many of the areas where injustice against them was previously entrenched in law or policy. The only area where there seems to have been meaningful change for women is in political leadership. This will be examined below.

3.5 Disability Empowerment

A key policy in response to systemic inequality and discrimination on the basis of disability is the Integrated National Disability Strategy (INDS), which was issued in 1997. The issue of disability has also been given consistent attention in the policy dialogue around equalising opportunities in public sector employment. The Employment Equity Act prioritises the eradication of disability-based inequality and systemic discrimination in the workplace. Procurement policies have also integrated disability considerations in line with the Preferential Procurement Policy Framework Act, as does the White Paper on Transformation of the Public Service. People with disabilities feature among the three groups designated as target beneficiaries for empowerment under the Preferential Procurement Policy Framework Act and the Promotion of Equality and Prevention of Unfair Discrimination Act.

In the past decade, various laws have been implemented to ensure that people with disabilities are advanced and protected from discrimination. To address the issue of disability in education, the legislature enacted the South African Schools Act. The Act requires learners with special educational needs to be provided for, wherever reasonably possible, in regular schools. The White Paper for Learners with Special Needs proposed further the inclusion of learners with 'special education needs' or 'learning barriers' into

mainstream classes. The Higher Education Act protects people with disabilities from being discriminated against in tertiary institutions.

The White Paper on Arts and Culture was implemented in 1996 to ensure everyone has equal opportunity to participate in arts and culture. This policy ensures that disabled people have unhindered access to the means of artistic and cultural activity.

The Pan South African Language Board (PANSALB) was established to promote multilingualism and to ensure that no one is discriminated against on the basis of language. The board has succeeded in carrying out its duty by promoting and creating conditions for the development and use of sign language. As a result, South African Sign Language is recognised as a learning language in South Africa.

Measures have been taken to ensure that people with disabilities exercise their right to vote. Section 39 (2) of the Electoral Act provides that a person with a physical disability may be assisted to cast their vote. The election regulations further provide for off-site voting assistance for people with disabilities.

The Department of Health has implemented Human Genetics Policy Guidelines for the Management and Prevention of Genetic Disorders, Birth Defects and Disabilities. The main objectives of the policy are to reduce the burden of genetic disorders to the individual, family and society in general and to empower people with disabilities. As from 1 July 2003, people with permanent, moderate and severe disabilities and those who have been diagnosed with chronic, irreversible psychiatric disabilities have a right to access free health care.

To address the issue of discrimination in the housing sector on the basis of disability, various legislations and programmes have been implemented. In terms of the White Paper on a New Housing Policy and Strategy for South Africa, adopted in 1994, the government recognises housing as a basic human right for all. In terms of the policy, people with disabilities also have a right to housing. The legislature enacted the Housing Act, the purpose of which is to give effect to the constitutional right of access to adequate housing and to ensure that people with disabilities are not discriminated against in the housing development process. One of the key measures that the government has adopted to assist poor people with disabilities to purchase a serviced site and to build their own home is the National Subsidy Housing Scheme. In terms of this scheme, people with disabilities and people with visual impairment should get a top-up amount to the normal housing subsidy to make their houses more accessible and functional.

The White Paper on Social Welfare, which was implemented in 1997, has been used by the Department of Social Welfare as a basis for the development of policies and programmes for people with disabilities. It promotes non-discrimination in the distribution of social welfare resources. The policy provides that na-

tional and provincial Departments of Welfare have a duty to ensure that equal opportunities are given for people with disabilities in all services and programmes. This would enhance the independence and promote the integration of people with disabilities into the mainstream of society. The policy empowers people with disabilities to represent themselves in all processes and structures of decision-making that affect them. People with disabilities also benefit from the department's Poverty Relief Programme.

In spite of all the legislative and policy measures implemented by the government, people with disabilities are still the most vulnerable or disadvantaged members of our communities. They still cannot access some public buildings, public transport or houses, and a majority of them have been excluded from mainstream education. It is obvious that more effort is needed to ensure that the implemented legislations and policies are effective. There is a need to ensure that people with disabilities, especially those in rural areas, are educated about the legislation and policies that protect their rights. This will ensure their active participation in the policy development and implementation process.

While the position of people with disabilities is generally better than at the onset of our democracy, there is still much room for improvement, particularly with regard to social and economic integration.

3.6 Poverty, HIV, Age and Other Policy Concerns

The government has consistently placed poverty at the centre of its social and economic transformation initiatives. One of the key achievements in this regard was a national poverty study¹⁵ that culminated in a national summit in 1998. Since then, poverty considerations have been systematically integrated into most government policy pronouncements and attempts to close the gap between the rich and poor.¹⁶ However, success has been hampered by the absence of a clear, integrated government policy or strategic framework on poverty eradication and, consequently, the lack of a uniform approach between government departments and other entities. The *UN Report on Human Development* recently concluded, among other things, that black people generally and African people in particular remain the poorest in South Africa. The report also found that women bore the brunt of poverty.¹⁷

Government policy interventions have also extended to new pressing issues such as HIV/AIDS, equal access to health, and equality between nations at the global level, particularly within the United Nations. Policy interventions relating to sustainable development and the eradication of poverty have also been systematically integrated in efforts dedicated to the renewal of the African continent. The provisions of the New Partnership for Africa's Development (NEPAD) are instructive in this regard.

Over the years, the national AIDS plan and various Cabinet decisions have provided national guidance on responses to HIV/AIDS, including the prevention and eradication of unfair discrimination relating to HIV/AIDS. Other key administrative instruments in this regard include the Public Sector Guidelines on HIV/AIDS Management and the Code of Good Practice on Managing HIV/AIDS in the Workplace issued under the Employment Equity Act. The Department of Public Service and Administration has issued its own guidelines on Managing Disability in the Workplace. Other government departments have implemented their own policies on HIV/AIDS and disability. Among them is the South African Police Service (SAPS), which, in addition to having its own HIV/AIDS policy, has a R10 million-backed strategy on managing the impact of HIV/AIDS.

A number of departments have also dealt with policy challenges relating to equality rights involving issues such as age, sexual orientation and nationality. Notable achievements have been made in the areas of children's rights, the empowerment of young people, and the protection of elderly people. With regard to children's rights, much policy attention has been paid to child abuse resulting in, among other things, proposed changes to the Sexual Offences Laws.¹⁸ With regard to young people, policy interventions have dealt with justice matters such as incarceration, job creation and business related empowerment. Funding for economic empowerment for young people has been primarily channelled towards the National Youth Commission and the Umsobomvu Trust.

3.7 Administrative Action

Administrative action taken over the past decade with a view to promoting equality has mostly been targeted at issues such as affirmative action, ending discrimination in employment, equalising opportunities in state procurement (state contracts), and redressing infrastructural imbalances in service delivery. Some attention has been paid to ensuring that state-asset restructuring processes contribute to the promotion of equality, particularly with regard to race. An overview of key administrative interventions that have contributed meaningfully towards the achievement of equality in the past ten years is provided below.

3.7.1 Affirmative Action and Employment Discrimination (Employment Equity)

While affirmative action interventions in the public sector encountered difficulties in the beginning, measures that were adopted had significant impact and visibility over the years. Early interventions lacked proper policy analysis and frameworks and seemed to focus mainly on numbers (representativity) rather than holistic institutional transformation. Examples in this regard include the 'Jobs for Africa' fiasco, which, in addition to exposing government to a number of legal

challenges, led to a brain drain which left behind a lot of dead wood from the previous order. Another example of administrative weaknesses during the early phase of transformation was the Public Servant's Association (PSA) case against the Department of Justice.¹⁹ The case concerned serving white male public servants being overlooked for senior state attorney positions in a context where there was no Employment Equity policy or plan directing how Affirmative Action was to be implemented.

As indicated earlier, administrative interventions seeking to promote equal enjoyment of public sector employment opportunities have matured considerably over the years, with action moving beyond numbers and giving attention to the transformation of organisational cultures, working environments and structures. As a result of the 50% target for representation of black people at senior management level having been reached, it has now been reviewed to 75%. The 30% target for women's representation at senior management level has not been achieved. A target of 3% disability representation by 2005 has been set, while the achievement so far is approximately 1%. Concerns have been expressed around the gender question and, in particular, the decline in women's representation since 1999, as well as the serious brain drain.²⁰ There are also cross cutting pockets of concern regarding matters such as the representation of historically disadvantaged groups at middle management level and the transformation of organisational cultures, values and working environments. The National Defence Force is among the worst in this regard.

Pockets of resistance continue to bedevil Affirmative Action measures aimed at equalising opportunities in the public service. For example, there is a persistent call for a sunset clause on Affirmative Action. It is suggested that a date should be set for ending Affirmative Action. Such calls fail to understand that Affirmative Action is about corrective measures and that there will be a need for it as long as the problem of structural and systemic inequality along the contours of past injustices persists. This is in line with international instruments such as CERD and CEDAW.

An encouraging development is that the Department of Labour and the Commission for Employment Equity (CEE) have stepped up their enforcement machinery. The Department of Labour has, among other things, strengthened inspections and is gearing itself up for tougher action against non-compliance, which includes Director-General's reviews and the possible imposition of fines. The Commission has initiated site visits and is in the process of implementing its statutory mandate of initiating an award programme aimed at recognising employers who excel in implementing the 3.7.2 Employment Equity Act.

Another encouragement is the implementation of the Promotion of Equality Act and its provisions on equality plans. The Act covers institutions such as the Judiciary

and the Defence Force. Hopefully, this will accelerate the currently slow progress made with regard to institutional transformation and the representation of historically disadvantaged groups in these critical public institutions. For example, black people account for only a third (33%) of judges in the higher courts and the corresponding figure for women is around 10%. The Promotion of Equality Act and its requirement for equality plans also covers groups such as independent contractors, including persons seeking tenders. The combined impact of the Promotion of Equality Act and the Broad Based Black Economic Empowerment Act should see to accelerated progress in many areas where structural inequality and systemic unfair discrimination persist.

3.2.3 Procurement Equity

One area where progress has been undermined by a lack of uniformity or synergy within and between various levels of government and various sectors is in the procurement of state goods and services. The passing of the Preferential Procurement Policy Framework Act should have ideally provided better direction on the issue of procurement equity, including affirmative procurement, but it did not do so. One of the weaknesses of the Act was that it was both too vague and too specific. It was too specific because it provided specific thresholds on values that could be attached to redress past imbalances; it was too vague because, other than awarding power, it did not provide for any mandatory action to redress past imbalances or provide guidance on specific positive measures to redress historical imbalances.

The Broad Based Black Economic Empowerment Act has enormous potential for accelerating efforts with regard to the achievement of procurement equity in respect of black people, including black women and black people with disabilities. However, the success of the Act with regard to advancing black women and people with disabilities will depend on the extent to which these issues are mainstreamed and the seriousness with which such mainstreaming is enforced in the implementation of the Act. The implementation of the Promotion of Equality Act, particularly the chapter on the promotion of equality, should also have positive implications for the equalisation of procurement opportunities. However, since the implementation of this part of the Act has been deferred, only time will tell whether the impact will be felt in the area of procurement.

Private sector procurement, which currently has not progressed much with regard to addressing race, gender and disability gaps, is likely to be impacted positively by the Promotion of Equality Act and the Broad Based Black Economic Empowerment Act.

3.7.5 Redressing Historical Imbalances in Public Service Delivery

While the key sector policy frameworks on transformation, including the White Paper on the Reconstruc-

tion and Development Programme, the White Paper on Transformation of the Public Service and *Batho Pele*, emphasise the need for redirecting resources towards historical areas, the success of administrative action in this regard is uneven. Nevertheless, there are pockets of progress. Among these are administrative measures that led to the racial equalisation of social benefits, such as old-age pensions, child grants and disability grants.

Some government departments have embarked on holistic strategies aimed at promoting equality in service delivery. For example, the Department of Water Affairs and Forestry has adopted an extensive gender mainstreaming programme. This department has also initiated various administrative interventions aimed at ensuring equal access to water and forestry rights to indigenous and other historically disadvantaged communities. The SAPS has also implemented various administrative measures aimed at mainstreaming equality, particularly issues relating to gender and disability in service delivery. Local government restructuring has also taken on board a number of equality issues, including the integration of gender considerations in development.

However, limited success has been achieved at the level of outcomes, which means that current measures need to be strengthened. Administrative efforts that have targeted service delivery, particularly the alleviation of poverty at a colour-blind level, have often missed the equality boat. An example in this regard is the provision of housing. In an attempt to redress the historical imbalances and provide housing to all individuals, the pace has stalled.

3.7.6 Sector Interventions into Private Discrimination

A number of interventions by the state over the past ten years have been targeted at discrimination by private persons or entities. In addition to legislative reform, administrative action involving formal policies, written notices and ministerial pronouncements has sought to discourage discrimination while encouraging positive measures to promote equality at a horizontal level. The bulk of interventions in this regard relate to actions taken to promote or enforce the Employment Equity Act. This has included the work of the Commission for Employment Equity, work place inspections by the Department of Labour, and the Department of Labour's annual demand for and collection of employer reports on Employment Equity. While some success has been achieved, particularly with regard to maintaining a media spotlight on the Employment Equity Act, there is ongoing concern regarding the actual pace of the implementation of the Act.²¹ The impact of the Act on the private sector has been criticised by both the government and civil society as being unsatisfactory.²²

The success of administrative interventions in the private sector has been generally uneven. There

clearly has been some shift, particularly in terms of equitable representation of historically disadvantaged groups at levels and in occupations where they were previously excluded. However, progress has been very slow. If the current pace is maintained, ten years from now there will still be chronic structural inequality on the grounds of race, gender and disability. Figures from the last report of the Commission for Employment Equity, which covered large employers only, revealed the following:

- Top management: Black employees held 18.4% (Africans 10%, Indians 5%, coloureds 3.4%) of all top management positions, while white employees constituted the majority with 81.5% in top management. Women stood at 13.7% with white females occupying 10.4% , African females 2%, coloured females 0.7% and Indian females 0.6% of all top management positions.
- Senior management: Black employees held 22% (Africans 10.8%, coloureds 5.1% and Indians 6.3%). Whites constituted the majority with 78% in senior management. Women held 21.6% of the positions in senior management, with white women accounting for 16.3%, African females for 2.6%, coloured females 1.4% and Indian females 1.3%.
- Professionally qualified and middle management level: Of the total employment, black employees represented 31.4% (Africans 16.2%, coloureds 8.2% and Indians 7%). Women held 30% of these, with white females accounting for 21%, African females 4.9%, coloured females 2.8% and Indian females 2.1% of the positions in this occupational level.
- Decision making in the labour market remained firmly in white hands (68%), with white males occupying 51% and white females 17% of the total number of positions. Of the remaining 32%, African males took 13%, Indian and coloured males each took 5%, African females took 4%, coloured females took 3%, and Indian females took 2% of the positions.

In terms of recruitment and promotion, the analysis of the report revealed that the lion's share of top management recruitment positions went to whites (64%), with white males taking 46% and white females 10%. The remaining 36% saw African males take 19%, African females 6%, coloured males 4%, coloured females 1%, Indian males 4% and Indian females 2%.

Whites also took the lion's share of senior management recruitment positions (71%), with 51% of positions in this category going to white males and 20% to white females. A similar trend occurred at professional and middle management level, where whites took 64% of the positions, with white males taking 41% and white women 23% of all the positions.

In terms of general workforce representation by Sectoral Education and Training Authority (SETA), the

2001/2 CEE Report revealed that:

Blacks are best represented with 84.2% in the Mining and Mineral SETA (MQA) and least represented with 20.2% in the Banking SETA (BANKSETA). Women are best represented in the Health and Welfare SETA (HWSETA) with 76% and least represented with 3.6% in the Mining and Mineral SETA (MQA).

The emerging picture shows that while black people and white women have seen a considerable increase in their representation at top, senior and middle management levels, viewed on a ten year plan, the progress has been marginal. In view of the fact that those who hold social and economic power are likely to reproduce themselves, it is not surprising that white women and black men are doing better than black women with regard to advancement.

Other disadvantages that persist include the persistence of the racial, gender, disability and other forms of prejudice that emanated from the past. This expresses itself in subtle forms of discrimination that undermine the dignity and full integration of historically discriminated against groups into all areas of work. For example, these groups are least likely to be absorbed into the labour market. They receive the least company investment with regard to skills development. They are less likely to experience promotion at senior and top management levels. They receive less pay than their white male counterparts and are most likely to be unemployed, underemployed or poor.²³

There have also been a number of administrative interventions aimed at fostering equal access to resources within the banking sector, particularly in respect of housing and business loans. Some administrative attention has been paid to inequalities in education, health, agriculture and business. While some of the efforts have been broad and general, others have targeted specific groups, such as women.

The sports sector has also been an area of focus for a number of administrative interventions by the state aimed at fostering equality. Examples include changed subsidy formulae for sports and the insistence by the Department of Sport and Culture on representativity of teams representing the country at international level. However, the pace has been largely criticised as slow, with complaints peaking during a recent scandal on racist remarks allegedly made by a member of the national rugby squad.²⁴ Pronouncements regarding the undesirability of quotas in sports regarding the representation of blacks and coloured players have been attributed to the new Minister of Sport.

3.7.7 Economic Redistribution through State Asset Restructuring

Administrative interventions seeking to ensure that state asset restructuring furthers transformation goals for equality have been observed over the years. Some examples were referred to earlier. However, the strat-

egies have been uneven with the real benefit for historically disadvantaged groups in some cases reaching between only one and five.

There have also been complaints that the few real beneficiaries from historically disadvantaged groups have been a handful of black men who are already affluent.²⁵ It is largely in response to such criticism that the Black Economic Empowerment statute ended up with its weird and long name.

State asset restructuring's contribution to equality has also been undermined by a lack of concrete, uniform and constitutionally aligned government policy and strategy in this regard. One illustration of this problem was the initial attempt at empowering historically disadvantaged groups through the preferential acquisition of Telkom shares. This matter ended up being challenged by the Solidarity Union in court, with the latter attempting to resort to empowerment as a ground of argument. At local government level, redistribution through state asset restructuring has not only been undermined by the lack of an integrated approach, but there have also been administrative inefficiencies, including poor management of asset registers. This is particularly the case with regard to land redistribution.

All pointers suggest that the equality project would benefit more meaningfully if the government were to review its state restructuring policies and practices to ensure an integrated and coherent approach across sectors and at all levels of governance.

4. Institutional Mechanisms

Institutional capacity, at least at the structural level, is one of the strongest areas of administrative intervention to support the pursuit of equality and other transformation objectives. The key structures whose establishment have contributed meaningfully to the promotion of equality are those established in terms of Chapter 9 of the Constitution in support of constitutional democracy. These institutions have undertaken various administrative activities, individually and jointly, to combat discrimination and to promote equality in all spheres of life. The key institutions in this regard include:

The South African Human Rights Commission (SAHRC);
The Commission on Gender Equality (CGE);
The Public Protector; and
The Commission on the Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL).

A number of statutory bodies established to support constitutional democracy and the transformation process have also contributed meaningfully to the promotion of equality. The key institutions in this regard include:

The Commission on Employment Equity (CEE); the Public Service Commission (PSC); the quasi-judicial Commission for Conciliation, Mediation and Arbitration (CCMA); the recently established Equality Review Committee (ERC); and the Pan South African Language Board (PANSALB).

While the interventions of the SAHRC, CGE, Public Protector and CCMA have largely focused on complaints and related quasi-judicial action, the CEE, PSC and ERC are required to focus on policy development. All of these institutions, except for the relatively new ERC, have played a significant role in monitoring progress towards the achievement of equality and enhancing public awareness on equality and non-discrimination issues.

The SAHRC and CGE have been particularly instrumental with regard to efforts aimed at eradicating discrimination in all spheres of life. Most of their work in this regard has involved the receipt and investigation of complaints on unfair discrimination, which has often involved conciliation and mediation. These institutions have also played an active role in the litigation of discrimination cases in the courts. The implementation of the Promotion of Equality Act is likely to add more muscle to equality or non-discrimination related administrative interventions by institutions.

It is worth noting that major strides have been achieved with regard to the equality of participation in governance structures and processes. However, due to limitations in terms of access to information and other resources, historically disadvantaged groups such as women and rural communities still need assistance with regard to access.

5. Challenges

Some of the challenges faced in the process of undertaking administrative action to promote equality have been alluded to in the preceding parts of this section. A summary of the key challenges is presented below. This section also outlines some of the challenges that persist and new challenges that need immediate attention if the pace of achieving equality is to be accelerated.

5.1 Policy Framework

While policy generally has been one of the government's key strengths with regard to the promotion of equality, a few policy gaps remain. One such gap is in the area of customary law, particularly customary law of succession and the need to mainstream customary law. The issues raised earlier in relation to sport suggest the existence of serious equality gaps in sports policy. This area needs to be attended to holistically and urgently. Procurement is another area that requires integrated government attention. Attention also needs to be paid to the issue of equality in the education system, particularly issues relating to education con-

tent; impact on equality; composition of teaching staff, particularly in private schools; and cultural transformation to embrace human rights and diversity.

5.2 Policy Implementation and Legal Compliance

Almost every government policy initiative has suffered severe setbacks with regard to implementation. A good number of progressive policies, including the transformational White Papers referred to earlier, have failed to live up to their objectives due to poor implementation. The Skills Development Strategy has also generally been poorly implemented, particularly with regard to the provisions relating to redressing historical imbalances. Land redistribution is another area where administrative efforts need to be stepped up. If current trends continue, it is unlikely that the Promotion of Equality Act will have the kind of impact expected in terms of its provisions. It may well be that many of these policies have no implementation strategies or, if such strategies exist, they were poorly conceived. Therefore, the government needs to pay more attention to policy implementation. Fortunately, the government itself has also identified and is responding to this challenge.²⁶

5.3 Institutional Arrangements

South Africa boasts that it has the world's most generous institutional framework and, as such, there are hardly any complaints relating to the number of institutions to support the promotion of equality. It appears that inadequacies are largely a matter of resource deployment, and the levels and distribution of relevant skills and knowledge. Some institutions are faced with inadequate financial and human resources. This has been the case with the Commission for Employment Equity, the Equality Review Committee and the Commission for Gender Equality.

The court system also has numerous equality-related institutional inadequacies. Most inadequacies relating to the criminal justice system are receiving some attention. Key interventions in this regard have covered violence against women, family law and victim empowerment. However, not much attention has been paid to systemic inequalities in the civil justice system, including inadequacies relating to consumer protection and access to meaningful legal assistance.

5.4 Language

Language has been and remains a major institutional weakness. English and Afrikaans remain the dominant languages, thus requiring victims of apartheid and colonialism to cross three language barriers before they can participate effectively in the social and economic mainstream. The injustice involved in this arrangement was aptly illustrated by a participant in a recent TV programme, *Asikhulume*.²⁷ She alluded to

the fact that maths examination papers were in English, with an Afrikaans version at the back to which an Afrikaans speaking candidate could refer for clarity, whereas the African child was not provided with a language preference or resources. To ameliorate the problem, most entities have to adopt English as the main business language, thus limiting the problem to a single language barrier for those whose first languages are indigenous or foreign.

5.5 Co-ordination and Integrated Responses

One of the areas that has suffered due to poor co-ordination and integrated responses is the issue of gender equality. Despite the plethora of institutions that constitute the National Gender Machinery, gender transformation has one of the slowest transformation paces. There is a need to integrate more forcefully gender issues in mainstream human rights dialogue, the work of the public protector, black empowerment, youth/children's issues, and related administrative interventions.

A major weakness in equality seeking strategies over the past ten years has been the emphasis placed on rights enforcement, as if discrimination were an aberration that could effectively be dealt with through the individualised assertion of rights through the courts. This is the mentality that appears to have bedeviled the Promotion of Equality Act, which emphasises the Equality Courts.

The absence of an integrated strategy on the promotion of equality at government level has exacerbated the situation. As a result, many state entities do not see themselves as having a role in the promotion of equality beyond legal compliance with the Employment Equity Act.

5.6 Private Sector Interventions

There is clearly a need for more and stronger private sector interventions beyond employment in the mining and financial sectors. Sport has been identified as an area for more organised and consistent administrative interventions. Strategic interventions into private schools and the tertiary sector also need to be strengthened if all components of society are to play a meaningful role towards the eradication of the legacy of institutionalised injustices in all spheres of life.

5.7 Enforcement Measures

As indicated earlier, most private sector focus has been on employment. Even in this area, enforcement is not as strong as it could be. For example, section 53 of the Employment Equity Act, which presents a strategic tool for aligning state contracts with the objectives of the Employment Equity Act, is yet to be implemented. Furthermore, although the Employment Equity Act provision for fines against non-compliant employers is

weak, this provision is yet to be implemented. The legal and policy framework for state intervention in the other sectors is also rather weak. A glimmer of hope is presented by the Promotion of Equality and the Prevention of Unfair Discrimination Act. However, current resource allocation to this Act, including institutional resources deployed towards enforcing state compliance and giving effect to the provisions relating to the promotion of equality, do not inspire much hope in this regard. It is advisable that resources towards the implementation of the Act, particularly public mobilisation and co-ordinating mechanisms, be strengthened considerably.

6. Concluding Remarks

There has generally been visible progress with regard to the promotion of equality through administrative action by the state. However, while the position is clearly better than in previous years, it could be improved.

The development of an enabling policy framework and institutional capacity are among the key government successes in the past decade. At sector level, employment is one area where consistent attention has been paid and limited visible progress has been made. Progress also includes supportive administrative instruments that have been issued to support the implementation of the Employment Equity Act, such as Codes of Good Practice on HIV/AIDS, Disability and Human Resources.²⁸ The enactment of the Promotion of Equality Act has the potential to accelerate progress in the other sectors. The Broad Based Black Economic Empowerment Act has the potential to complement the Employment Equity Act and the Promotion of Equality Act in reversing the socio-economic legacy of years of black deprivation under colonialism and apartheid. However, the rate of success depends on the strength of implementation strategies, the resources deployed towards implementation, as well as the enforcement of and general commitment to the implementation of these policy instruments among key stakeholders.

Success over the next decade will depend on a clear identification of current gaps, a setting of clear goals and an unwavering commitment to the pursuit of such goals and the speedy implementation of policies. Success will also depend on the allocation of adequate resources towards policy implementation, the generation of the necessary capacity, including technical skills relating to mainstreaming equality and project management to support policy implementation. It is also critical for equality considerations to be mainstreamed into all practices, including planning and administrative activities such as budgeting. On the issue of budgeting, the government needs to be serious about enforcing the principle of redirecting resources to historically neglected areas.

Mainstreaming equality also entails integrating equality considerations in the government's legal de-

fence strategies. This means that, where appropriate, the government should support rather than oppose civil society initiatives that seek to dismantle systemic discrimination and inequality, particularly on the grounds of race, gender and disability. A good example in this regard is the effort aimed at dismantling obsolete interpretations of customary law that have the effect of maintaining women's subordination and economic deprivation. Mainstreaming equality ultimately means mainstreaming human rights, because the vision behind (substantive) equality is the equal enjoyment of all rights and freedoms by all, regardless of difference.²⁹

The Promotion of Equality Act has a lot of potential for transforming all areas of life. For such potential to be harnessed, more attention should be given to empowering the public to use the Equality Courts effectively. Professionals who provide services in these courts should also receive regular support, including continuous professional development and access to comparative jurisprudence. The Alternative Forums under the Act should also be strengthened and given more visibility. If properly used, these could provide a valuable bridge between the public and the formal court system.

More meaningful attention also needs to be given to the promotional aspects of the Act. As indicated earlier, inequality and unfair discrimination constitute a systemic problem rather than a matter of occasional aberration. The promotional aspect of the Act offers a proactive and systematic solution without which it would be impossible to eradicate the legacy of the past. Both the promotional and legal enforcement provisions need to be given equal priority for the Act's potential to be fully harnessed.

The following recommendations are presented with a view to accelerating the process of achieving equality over the next decade of democracy:

- Ensure the existence of solid policy frameworks and plans backed by consistent implementation, monitoring, evaluation and strong enforcement in all sectors. Mainstream human rights, with an emphasis on equality and the alignment of national practices with international human rights obligations,
- Marginalise gender and its intersection with race and other factors,
- Enforce compliance, particularly within state entities, and ensure that state action is always informed by and backed by competent legal advice,
- Base service delivery on service feedback surveys and ensure that budgets are user-disaggregated, particularly in terms of race, gender and disability,
- Cultivate a common vision on equality between state components and enhance co-operative governance in pursuit of such vision,

Facilitate the emergence of a stronger, more inclusive and vocal civil society, and
Maintain continuous dialogue on the nature of contemporary discrimination and disadvantage and mobilise societal components to play a meaningful role in accelerating effective responses to these phenomena in the next decade.

Endnotes

- 1 ICJ Reports 1966 pp. 304 and 315.
- 2 Sir Hersch Lauterpacht, *An International Bill of Rights of Man*, 1945, p. 115. Cited in Gutto SBO, *Equality and Non Discrimination in South Africa* (Cape Town, New Africa Books, 2001), p. 131.
- 3 1998(3) BCLR 257 (CC); 1998 (2) SA 363 (CC).
- 4 Section 1(ix) of the Promotion of Equality and Prevention of Unfair Discrimination Act, No. 4 of 2000.
- 5 The concept black is used in its generic sense which covers African, coloured and Indian women and men.
- 6 Article 4 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).
- 7 SA Country Report on CEDAW, June 1998.
- 8 The Minister of Public Service and Administration has announced plans for addressing this challenge.
- 9 Act 97 of 1998 to be read with Skills Levies Act No 9 of 2001.
- 10 Act 66 of 1995, as amended.
- 11 Act 75 of 1997, as amended.
- 12 Act 63 of 2001, as amended.
- 13 As provided for in the Compensation for Occupational Injuries and Diseases Act No 130. Also see the Occupational Health and Safety Act No 85 of 1993.
- 14 National Policy Framework on Women Empowerment and Gender Equality, issued by the Presidency, 2001.
- 15 National Poverty Report, 1998.
- 16 See State of the Nation Addresses and Budget Votes delivered by the Minister of Finance.
- 17 Released in April, 2004.
- 18 See Sexual Offences Bill, 2003 and proposed Child Legislation.
- 19 *Public Servant's Association of South Africa v Minister of Justice and Others* 1997 (3) SA 925 (T); 1997 (5) BCLR 577(T) at 248.
- 20 Commission for Employment Equity Report 2002.
- 21 Commission for Employment Equity Reports: 2001 and 2002.
- 22 Black Management Forum Conference, Cape Town, 2003 and various press releases by the Minister of Labour and various newspaper articles particularly those by Mokgadi Pela, *Business Report*, *The Star* and *Pretoria News*, 2003/04.
- 23 CEE Report 2002.
- 24 Geo Cronje scandal reported in various newspapers shortly before the Rugby World Cup in 2003.
- 25 CRES-Waweth Agency submission to the Portfolio Committee on the Proposed Broad Based Black Economic Empowerment Bill, July 2003. This theme has been canvassed in various newspaper articles, a number of them referring to a paper presented by Moeletsi Mbeki, 2003.
- 26 Presidential Review Report, 1998 and Public Sector Review Report, 2003.
- 27 *Asikhulume*, SABC3, Sunday January 25, 2004.
- 28 *The Code of Good Practice on Managing HIV/AIDS in the Workplace* and *The Code of Good Practice on Managing Disability in the Workplace* have accompanying Technical Assistance Guides (TAGS). The Human Resource Code is still a work in progress.
- 29 Section 9 (2) of the Constitution and Section 1 of the Promotion of Equality and Prevention of Unfair Discrimination Act.

Protecting the Right to Equality through the Constitutional Court

Professor Ronald Louw

1. Introduction

The 350 years of South African history that preceded the adoption of our first democratic Constitution were characterised by brutal racial oppression by a minority white regime. The oppression reached its height in the totalitarian policy of apartheid. Apartheid was the political expression of a narrow-minded Calvinist philosophy asserting itself primarily through enforced racism, treating people of colour as undeserving of basic human rights. It also oppressed South Africans on many other grounds including gender, language, ethnic origin, sexual choice and marriage, residential location, religion and political opinion. Thus, at the core of apartheid was the denial of the basic human dignity of millions upon millions of South Africans. It is impossible to summarise the iniquity of apartheid, but the Postscript to the interim Constitution succinctly captures the past, describing South Africa as a 'deeply divided society characterised by strife, conflict, untold suffering and injustice'. The broad and extensive sweep of apartheid oppression provides us with not only a context in which to understand our constitutional commitment to equality, but also partly explains the detailed and inclusive nature of our equality provision. Accordingly, Section 9 of the final Constitution was drafted as follows:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) 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.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.¹

The new democratic state that emerged on 27 April 1994 had the enormous task of developing a new society founded on 'human dignity, the achievement of equality and advancement of human rights and freedoms'. This task has been partly in the hands of the Constitutional Court which has, through a number of remarkable judgments, sought to realise the promise of equality by developing a progressive 'jurisprudence of transition'. It is this jurisprudence in respect of equality, together with certain legislative interventions, that will be considered below.

2. Equality — A Core Constitutional Right

2.1 Introduction

The right to equality is one of the central rights in the Constitution and is often referred to as a core right. Not only is it expressed as a substantive right in Section 9, but it is also the first such right. It features prominently, together with dignity, human rights and freedoms, in the founding provisions of the Constitution. Furthermore, when any right is to be limited, the right to equality has to be taken into consideration and the Constitution obliges the courts, in interpreting the Bill of Rights, also to consider equality. As the right to equality is a founding value that is so pervasive in the Constitution, it is a particularly powerful right. It will therefore considerably influence constitutional interpretation in the years to come. This is supported by the fact that the right to equality is also prominent in several interna-

tional instruments, in particular, the Universal Declaration of Human Rights (1948); the International Covenant on Economic, Social and Cultural Rights (1966); the International Covenant on Civil and Political Rights (1966); the Convention on the Elimination of All Forms of Discrimination Against Women (1979); as well as other domestic constitutions, making it internationally one of the most widely acknowledged rights to uphold.

2.2 *The Meaning of Equality*²

Despite its importance as a core right, the right to equality is difficult to define. Both national governments and the international community have made it clear that the prohibition of discrimination is an important goal. However, the court held in *Brink v Kitshoff* that each country has drafted their unique equality provisions arising out of different historical circumstances. Each country also has its own jurisprudential and philosophical understandings of equality. It is therefore necessary to interpret the concept of equality in South Africa by relying on the specific language of Section 9, our own constitutional context, and acknowledging the particular relevance of our history, specifically the history and consequences of apartheid. However, what is generally agreed is that the right does not mean that everyone is to be treated equally.³ This formalistic approach to the right will, in any divided society, entrench inequality. In order to achieve what the court has referred to as substantive equality, therefore, it will be necessary to treat different sections of the community differently.

In *Walker*, the court held that the term 'uniform structure' in respect of local governments' rates and tariffs charges did not mean that identical rates should be charged regardless of the quality of service or the type or circumstances of the user. The court reasoned that 'this could produce a highly inequitable result'. The court held in *President of the Republic of South Africa v Hugo* that it needed 'to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved' (para 41). Furthermore, in *National Coalition for Gay and Lesbian Equality v Minister of Justice* the court held that 'the desire for equality is not a hope for the elimination of all differences' (para 22). Section 9 uses different concepts in defining the right to equality including fair and unfair discrimination. It also prohibits both direct and indirect discrimination. The comment by the court in *Walker* is apposite here: 'In interpreting Section 8 of the interim Constitution, it seems to me to be of importance to have regard to the fact that it contains both an equal protection clause and an anti-discrimination clause' (para 43). In a more robust but minority judgment Sachs J held:

Looked at in its historical setting, the text makes it clear that equality is not to be regarded as being based on a neutral and given state of affairs from which all departures must be justified. Rather, equality is envisaged as something to be achieved through the dismantling of structures and practices which unfairly obstruct or unduly attenuate its enjoyment.

Significantly, the equality clause permits the government, in order to achieve equality, to implement various measures to promote or advance categories of persons who have been disadvantaged by unfair discrimination. Finally, the section has the additional provision that prohibits private persons from unfairly discriminating against other persons. Consequently the right to equality should be seen as a complex concept incorporating all of the above forms with the objective of achieving substantive equality.⁴

The court held in *Walker* that an analysis of the right to equality 'cannot be undertaken in a vacuum, but should be based both on the wording of the section and in the constitutional and historical context of the developments in South Africa'. Given the complexity of the right to equality and the historical and social context in which it must be analysed, the court recognised the necessity of not being prescriptive about the complete meaning of the right to equality at an early stage, but instead to allow the detailed content of the right to develop on a case-by-case basis.

2.3 *Equality and Dignity*

In giving content to the notion of substantive equality, the court has relied heavily on the notion of dignity.⁵ In *National Coalition* it recognised that the concept of dignity is 'a difficult concept to capture in precise terms' (para 28). At best the court has said that 'human beings are required to be treated as human beings' (*Government of the Republic of South Africa v Grootboom*, para 83). Dignity thus does not easily provide an appropriate interpretation of equality.

There is also the risk that the development of the right to equality may be restricted by a dignity jurisprudence and this would impede a more complex and nuanced notion of equality suggested at least by the wording of the equality clause. It may also lead to a blurring between rights, although the court has often emphasised the intersectionality of rights and even imported dignity into the interpretation of socio-economic rights. On the other hand, the interweaving of rights may be a source of strength in time, as any future attempts to interfere with or restrict certain rights will be curtailed by the interconnectedness of rights. Furthermore, our common law has a well-developed jurisprudence of *dignitas* which the court has yet to fully utilise. In order to best develop our jurisprudence of human rights, the court will have to simultaneously interpret the

interconnectedness of rights, but also contextually develop each right's individual and fullest content.

3. Establishing a Violation of the Right to Equality

In order to understand the complexity of the right to equality, it is useful to do so within the context of establishing a violation of the right. The process is a complex one as there are several steps to be followed. These are set out in Sections 9(1), 9(3) and 9(5).

First, a complainant has to show that the government has differentiated between people or groups of people. Thereafter, the government responds by arguing that such differentiation is rationally connected to a legitimate government purpose. If it is unable to do that, the complainant will have proven a violation to his or her right to equality. However, if the government is able to prove that the differentiation is rational, the complainant then has to prove that the differentiation amounts to discrimination. This is achieved by showing that the differentiation is pejorative. Furthermore, the complainant will have to show that the discrimination (the pejorative differentiation) is unfair. The complainant is helped in this regard, for if he or she can show that the discrimination is based on one of the grounds listed in Section 9(3), the unfairness of the discrimination will be presumed.

Whether the unfair discrimination is on a listed ground or not, the government has to show that the discrimination is fair. If the government is able to do so, it will have proven that there is no violation of the right to equality. If, however, the government is unable to show that the discrimination is fair, then the complainant will have succeeded in establishing that the government has violated his or her right to equality. Once it has been proven that the government has violated the right, it can still succeed if it is able to show that the right is justifiably limited in terms of the limitation clause.⁶

3.1 Section 9(1)

The phrases 'equal before the law' and 'equal protection and benefit of the law', also referred to as the 'two limbs' of the section, have not been extensively defined by the court. In *S v Ntuli*, the court held that, at the very least, equality before the law entitled 'everybody to equal treatment by our courts of law'. In *Prinsloo v Van der Linde* the court also held that no one is 'above or beneath the law and that all persons are subject to law impartially applied and administered' (para 22). However, the court also held that differential treatment of citizens is a feature of a modern state and must be permitted:

It must be accepted that in order to govern a modern country efficiently and to harmonise the interests of all its people for the common good, it is essential to regulate the affairs of its inhabitants extensively. It is impossible to do so without differentiation and with-

out classifications which treat people differently and which impact on people differently (para 24).

The court referred to the above differentiation as 'mere differentiation'. In *East Zulu* the court held that what is required of the government is that the differentiation should 'rationally be connected to a legitimate government purpose' (para 24). The test is not whether the government could have achieved its goal more effectively in a different manner or whether it could have acted in a manner 'more closely connected to its purposes'. Should the government act rationally as required by this test, there will be no violation of Section 9(1). On the other hand, should the government's act be arbitrary or manifest a 'naked preference' that serves no legitimate government purpose, then there will be a violation of Section 9(1).

Some of the complexities of applying the rationality test were evident in *Walker*. After the amalgamation of a number of municipalities into the City Council of Pretoria, the council levied electricity and water charges on a differential basis. The residents of the former, predominantly white, Pretoria were levied on the basis of actual consumption measured by previously installed meters on each property. However, the predominantly black residents of Mamelodi and Atteridgeville were levied a flat rate per household, irrespective of actual consumption. Although the council was in the process of installing meters in the predominantly black areas, it did not take readings of the installed meters but only intended to do so after meters had been installed in all houses in the former black areas.

In finding that the council's conduct was rationally connected to a legitimate government purpose, the court noted the differential levies had existed before the amalgamation. The disparities in services and infrastructure were a result of past apartheid policies which the council had inherited. The council had a duty to resolve the problem, albeit with limited resources, and the measures it had taken were temporary and were designed to provide for a continuity of service while phasing out an inequality of facilities, and during a difficult transition period.

The rationality test allows the government the greatest leeway in implementing policies that might differentiate between people. This approach aids the government in seeking to overcome patterns of inequality, but it also reduces the power of the equal protection provision to prohibit inequality. An applicant will now have the more difficult task to show that the differentiation impairs his or her fundamental dignity in order to prevent the differentiation.

3.2 Section 9(3)

Even after differentiation has been found to be rational, an applicant may proceed to show that the differential treatment amounts to unfair discrimination and is there-

fore in breach of Section 9(3).⁷ This is a two-stage process in which discrimination must first be established, followed by the establishment of unfairness. The sub-section specifies or lists a number of grounds on which unfair discrimination is prohibited, and in a sense it is a reflection of the particular history of the country. But the list does not constitute a closed one. Other grounds of discrimination may thus be alleged, such as discrimination on the basis of citizenship (*Larbi-Odam v MEC for Education (North-West Province)*) and on the basis of HIV status (*Hoffmann v South African Airways*). The difficulty is in devising a test to determine which unspecified grounds are analogous to the specified grounds. The court has done this primarily via a dignity test. The centrality of dignity to a determination of unfair discrimination was first posited in *Hugo*:

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

The court in *Prinsloo* expanded on the centrality of dignity in the equality enquiry by first noting that Section 9(3) makes explicit use of the term 'unfair discrimination' and not 'unfair differentiation'. The term 'discrimination', the court held, 'has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them'. The court held further that the history of South Africa was characterised by denying the humanity of the majority of its inhabitants; they were not treated as having inherent worth but rather as objects whose identities could be arbitrarily defined. 'In short, they were denied recognition of their inherent dignity.' The court thus held that there would be a clear breach of Section 8(2), of the interim Constitution, where differential treatment of persons impairs their fundamental dignity as human beings. Furthermore should the differential treatment adversely affect the persons in a 'comparably serious manner', this may also constitute a breach of Section 8(2).

Section 9(3) not only prohibits direct discrimination but also prohibits indirect discrimination, thus recognising in *Walker* that 'conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination' (para 31). In the same judgment, Sachs J holds that 'The inclusion of both direct and indirect discrimination within the ambit of the prohibition imposed by Section 8(2) evinces a concern for the consequences rather than the form of conduct'. The court's jurisprudence in this regard is still relatively undeveloped, but was applied in *Walker* in respect of race. The City Council of Pretoria had alleged that the levying of differential rates in the old Pretoria as opposed to Mamelodi and Atteridgeville was based on geographical areas rather than race. But the court held

that the council had differentiated 'between the treatment of residents of townships which were historically black areas and whose residents are still overwhelmingly black, and residents in municipalities which were historically white areas and whose residents are still overwhelmingly white' (para 32). Such differential treatment, the court concluded, amounted to indirect discrimination on the basis of race. The court held that the council's policy had a racial impact, and to ignore this would be 'to place form above substance' (para 33). Furthermore, it made no difference that there were a 'few black residents in old Pretoria' (para 32).

Sachs J, in an unsupported minority judgment robustly dissented from the court, holding that the differentiation was neither indirect nor racially based. He held that the differentiation was based on the 'identification of objectively determinable characteristics of different geographical areas' (para 105). This did not mean that simply because whites lived in one area and blacks in another, there was indirect discrimination. The coincidence of differentiation and race was insufficient to constitute indirect racial discrimination. Where it was apparent that the complainant had benefited from accumulated discrimination and continued 'to enjoy structured advantage of a massive kind', there could be no discrimination based on the ground of race. Sachs J required that there be an additional element of actual or potential prejudice. He argued that in the light of our history of institutionalised racism and sexism, direct discrimination on a listed ground did not require evidence of prejudice. However, in cases of differentiation of an indirect nature, the establishment of discrimination then required evidence of some element of prejudice. To require otherwise would be to apply the concept of indirect discrimination in a 'decontextualised and formulaic manner' (para 108). Sachs J bolstered his argument by noting that a finding of indirect race discrimination raised the presumption of unfairness which would be 'particularly incongruous' when the complainant belonged to a racial group that had 'benefited directly in the past from programmes that were systematically enforced and overtly racist' (para 110).

In the disappointing judgment of *S v Jordan*, the majority of the court⁸ failed to apply its jurisprudence on indirect discrimination and instead relied on a formal approach to equality rather than a substantive one. One of the accused had been charged with the contravention of Section 20(1)(a) of the Sexual Offences Act 23 of 1957, namely, engaging in sexual intercourse for reward. It was accepted by the court that sex-workers were overwhelmingly women and that the provision criminalised only the conduct of sex-workers and not their customers. Nevertheless, the court held that the provision did not discriminate directly against women as the provision penalised 'any person' who engaged in sexual intercourse for reward, and therefore the provision was gender-neutral. The court did not heed to its warning in *Walker* not to place form above substance.

Furthermore, the court held that the provision did not amount to indirect discrimination either: although the provision differentiated between sex-workers and their customers, the sex-worker is likely to be a repeat offender whereas the customer may or may not be a repeat offender; and the differentiation between a dealer and a customer is a common one made in a number of statutes. The customer is in fact criminally liable both as a participant in the crime and to statutory incitement. Although the court here seemed to have confused indirect discrimination with discrimination on an unspecified ground, it relied again on form rather than substance in determining a controversial case of alleged discrimination. On the other hand, the minority judgment was appropriately nuanced and in accordance with the sophisticated jurisprudence of *Walker*. The minority held that in impacting disproportionately on women and by emphasising differences between men and women, the provision reinforced patterns of sexual stereotyping and gender disadvantage, which the Constitution was committed to eradicating. They concluded at para 60:

In all these circumstances, we are satisfied that, as in Walker's case, this is a case where an apparently neutral differentiating criterion producing a markedly differential impact on a listed ground results in indirect discrimination on that ground.

3.3 Section 9(5)

Where the discrimination in Section 9(3) is on a specified ground, the second stage of the 'unfair discrimination' analysis is made easier for the complainant as unfairness is presumed. The burden will be on the government to show that the discrimination is fair. This applies equally whether the discrimination is direct or indirect. Where, however, the discrimination is on an unspecified ground, the complainant still has to show that the discrimination is unfair. In *Harksen v Lane* the court held that the test of whether the discrimination is unfair 'focuses primarily on the impact of the discrimination on the complainant and others in his or her situation'. That impact will be determined firstly by 'the position of the complainants in society and whether they have suffered past patterns of disadvantage'. Secondly, the court will consider the provision in question and the purpose to be achieved. Thirdly, the court will consider whether the complainant's dignity has been impaired or has suffered in a comparably serious manner.

In *Hugo* the court had to consider the constitutionality of a special remission of sentence granted by the President to disabled, young and women prisoners with children under the age of 12 years. The complainant was a male prisoner with a child under the age of 12. He alleged that remission unfairly discriminated against him on the ground of sex. Among the factors considered by the court were that the complainant did not

belong to a class of persons that had historically been discriminated against, that the groups who did benefit from the remission were vulnerable, and that women and the disabled had been victims of discrimination in the past.

In *National Coalition*, the court found that the criminalisation of sodomy discriminated against gay men on the specified ground of sexual orientation. Although there was a presumption of unfairness and although there was no assertion of fairness by the respondents, the court held that it still had to consider all the circumstances in order to be satisfied that the discrimination was unfair. Again the court held that 'in the final analysis, it is the impact of the discrimination on the complainant or the members of the affected group that is the determining factor regarding the unfairness of the discrimination'.

3.4 The Limitation Analysis

Even once unfair discrimination has been established, the court may still find that such discrimination is permissible in terms of the limitation clause, provided that it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. No such finding has yet been made by the court, and indeed it would seem to be strange to hold that a democratic society could justifiably and unfairly discriminate against an individual or group.

4. The Promotion of Equality

Section 9(4) makes explicit provision for what is termed the horizontal application of the non-discrimination provision. In other words, private persons may not unfairly discriminate against any other private persons. Although the Constitutional Court has not yet considered this provision, the government has enacted legislation to bring the reality of equality closer to implementation. This it has done via the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Although the Act is premised on giving effect to Section 9 of the Constitution, it has a broader reach than equality and unfair discrimination. It also explicitly deals with harassment and 'hate speech'. Furthermore, the Act is committed to fulfilling the state's international obligations in respect of gender and race equality and discrimination. The Preamble specifically refers to the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Elimination of All Forms of Racial Discrimination. Significantly, the Act follows the lead of the Constitutional Court in highlighting the function of the right to dignity to give effect to the letter and spirit of the Constitution.

In order to protect and enforce the rights contained in the Constitution and the Act, all High Courts are established as Equality Courts. The Minister for Justice and Constitutional Development may also declare Magistrate's Courts to be Equality Courts.

The Act seeks to do more than prohibit certain conduct; it actively seeks to promote equality by imposing duties on the state and on all persons who contract directly or indirectly with the state or who exercise public power. The Act seeks an even broader commitment to its aims by obliging a range of organisations such as non-governmental organisations, clubs, associations, etc to promote equality.

Although the Act is yet to become fully operational, it should in time serve as a valuable tool in establishing a culture of equality and non-discrimination in South Africa.

5. Affirmative Action

The affirmative action provision Section 9(2) appears immediately after the equal protection provision, assuring its crucial nature to any textual analysis of the overall equality provision. It is thus not an exception to equality but integral to it. This is to be expected given the country's history of exclusion and disadvantage. Noticeably, it does not refer to any particular category of persons but is rather more inclusive, broadly referring to those 'disadvantaged by unfair discrimination'. Although the court has still to deliver a judgment in terms of the section, this broad wording will allow the court to develop the provision on a case-by-case basis.

Two judgments from provincial divisions suggest two different approaches to the affirmative action provision. In *Motala v University of Natal* the applicant's daughter had been refused admission into the Faculty of Medicine on the sole basis that she was Indian, although her matriculation results were otherwise outstanding. The faculty did in fact have an admission policy that was based not only on school results but also on colour. As there were such deep historical differences in the school education of Indian and African pupils, the faculty sought to promote the qualification of African doctors by limiting the number of Indian students to a total of 40. In deciding in favour of the provision, the court applied a non-demanding test: it acknowledged that the Indian group had been disadvantaged by apartheid but held that the disadvantage suffered by African pupils in education had been 'significantly greater'.

In contrast, the court in *Public Servants' Association of SA v Minister of Justice* applied a more demanding test to determine whether an affirmative action provision met the requirements of the constitutional provision. In order to promote women and blacks into senior posts, the Department of Justice designated certain vacant posts as affirmative action posts. The decision was that no white male applicants would be considered for the posts. The court held that Section 9(2) of the Constitution did not permit haphazard or random affirmative action measures. There had to be a causal connection between the measures and the objectives. The interests of various groups also had to be taken into account in determining the fairness of the provi-

sion. Furthermore, the equality clause did not require an immediate achievement of affirmative action objectives and an incremental approach to affirmative action would therefore be permissible.

Of the two tests, it seems that the *Public Servants'* case more carefully examines the fairness of the affirmative action provision. The *Motala* judgment fails to interrogate the admission criterion and thus does not come to a reasoned assessment of its fairness. It would seem that any affirmative action measures will have to be carefully worked out within the context of the notion of fairness before being implemented. The simple imposition of quotas may also not be permitted by the equality clause.

The legislature, as required in terms of the interim Constitution, and no doubt aware of the slow pace of change if initiated only by litigation, has enacted the Employment Equity Act 55 of 1998. This Act introduces the most sweeping legislative changes since the introduction of democracy. The Act seeks to radically change the employment landscape in South Africa. The Act is based on the recognition that apartheid and other discriminatory laws created enormous disparities in the workforce. These disparities led to pronounced disadvantage for certain categories of persons, which can only be properly addressed by implementing equity provisions into the workforce.

The anti-discrimination provision is significantly broader than that of the Constitution. Not only does it include all the grounds of unfair discrimination included in Section 9, it also includes 'family responsibility', 'HIV status', 'political opinion' and has a special provision characterising 'harassment as unfair discrimination'. The section also explicitly permits affirmative action measures. It permits the distinction, exclusion or preference of any person on the basis of inherent job requirements. The courts will have to be especially vigilant in respect of the latter in order that it does not become a means to undermine the Act or a basis of indirect discrimination. In this regard, see the valuable comment in *Hoffmann v South African Airways* at para 34: '[W]e must guard against allowing stereotyping and prejudice to creep in under the guise of commercial interests. The greater interests of society require the recognition of the inherent dignity of every human being, and the elimination of all forms of discrimination'.

The most significant changes introduced by the Act are the two concepts of 'designated employers' and 'designated groups'. A designated employer is one who employs fifty or more persons, or has a specified annual turnover, or is a municipality, or is an organ of state, or is one bound by a specified collective agreement. Designated groups refers to 'black people, women, and people with disabilities' with black people being widely defined as 'Africans, coloureds and Indians'. The Act requires designated employees to implement affirmative action measures for people from the designated groups in order to achieve employment

equity. They are also required to prepare an equity plan in consultation with their employees and report on its implementation to the director-general of the Department of Labour. The Act also establishes a Commission for Employment Equity to report to the Minister, as well as ensuring oversight by the Council for Conciliation Mediation and Arbitration, and the Labour Court.

It is undoubted that the Act is a major step forward in the restructuring of South African society. Although not yet constitutionally tested, the Act seems to be in accordance with Section 9 of the Constitution. It explicitly seeks 'to promote the constitutional right of equality and the exercise of true democracy'. The Act should provide the court with an opportunity to more fully develop its notion of substantive equality.

6. Challenges for the Forthcoming Decade

Questions around race and gender are without doubt the most important equality issues that this country has to deal with. In both these respects it could be argued that although the court's jurisprudence of equality is powerful and sophisticated, its application to various circumstances has been ambivalent.

The most significant decision in respect of race discrimination was ironically brought by a white applicant in *Walker*. The court noted, firstly, that the group the applicant belonged to was neither disadvantaged nor vulnerable in the sense of past discrimination. However, the court also held that the victim was a member of a racial minority and thus might be politically vulnerable. It is such vulnerable groups that must look to the Bill of Rights for protection and the court has a duty to come to their assistance. The court cautioned, however, that it needed to 'distinguish genuine attempts to promote and protect equality on the one hand, and actions calculated to protect pockets of privilege at a price which amounts to the perpetuation of inequality and disadvantage to others on the other' (para 48). Although the court held that the discrimination was not unfair, it did decide that whites could claim protection from discrimination as whites. Sachs J differed in this respect. He felt that to be a victim of discrimination the complainant had to suffer some actual or potential prejudice. He felt further that equality was not a 'neutral state of affairs from which all departures must be justified' (para 109). Equality is rather something to be achieved by the dismantling of structures and practices of inequality.

Certainly there must be some sympathy for Sachs J's position. It does seem incongruous that an advantaged white citizen can claim protection as such a citizen against discrimination. Although the court has not yet decided a matter in terms of Section 9(2) (the Affirmative Action provision), the possibility was raised in *Walker* that the council's decision to levy differential rates could have been seen as a measure designed to protect or advance the inhabitants of Mamelodi and

Atteridgeville. This might then have more clearly precluded the complainant from objecting.

In order to prevent the potential abuse that was cautioned against in *Walker*, the court might in future see a closer correlation between Sections 9(2) and 9(3). The court might then interpret Section 9(3) in line with Sachs J's reasoning, requiring evidence of disadvantage or prejudice. This might, however, restrict the anti-discrimination provision to looking to the past only, whereas the Bill of Rights is rightly seen as a bridge to a democratic future. This should mean that the anti-discrimination provision should look to the future as well and protect all people irrespective of their past or current socio-economic position. On the other hand, those who have been, and still are, advantaged by apartheid do have Section 9(1) to rely on in the event of an irrational differentiation, a situation that prevails in most democratic countries. Perhaps this should be the court's approach in the interests of fulfilling our commitment to substantive equality. The court has already acknowledged that until we have reached the 'long-term goal of our constitutional order' of equal treatment for all (*Hugo* para 112), insisting upon equal treatment until then will result in the entrenchment of current inequality.

Despite the advancement of women in many spheres, their position in South African society remains appalling. At the most brutal level, the incidence of rape and sexual abuse against women is deplorable, as is the degree of domestic violence suffered by women. In the workplace, women continue to perform predominantly more menial roles than men. Consequently, they earn less despite the many women-headed households. Women continue to be subject to obnoxious stereotypes, and millions struggle to eke out an existence in rural poverty. And yet the equality clause probably protects women more than any other group, listing prohibitions on the grounds of sex, gender, pregnancy and marriage. (While sexual orientation is also an aspect of gender, it is a peculiar one that represents a small group of people including both men and women. Furthermore, the significant number of cases heard by the court in respect of sexual orientation suggests an articulate and well-organised minority not characteristic of the mass of women in South Africa.) Regrettably, it is usually not disadvantaged women who triggered the court's gender jurisprudence, but rather advantaged and male complainants.

In *Hugo*, an interesting question that arose was whether the provision, remitting the prison sentences of women who had children under the age of 12 years, relied on a permissible stereotype of women as primary caregivers of young children. Kriegler J took the position that although sex discrimination would not always be unfair, the stereotype relied on here was the 'root cause of women's inequality' and that it was both 'a result and a cause of prejudice'. He characterised it even more starkly as 'a relic and a feature of the

patriarchy which the Constitution so vehemently condemns' (para 80). In contrast, O'Regan J took a more flexible approach in that the application of this particular stereotype, which was in fact a reality for most mothers, did not cause 'any significant harm to other women' (para 113). Generalisations may thus be unfair if they result in greater disadvantages. While Kriegler J's approach is easier to apply, it is rather rigid. O'Regan J's approach is more subtle but raises the problem of having to determine when certain stereotypes may be beneficial in the short and long term.

The members of the court again took very different positions in respect of sex discrimination in the *Jordan* case of sex-workers. Even though it was almost exclusively women who were criminalised, prosecuted and stigmatised by the impugned provision, the majority of the court did not consider this as a case of sex discrimination. The minority were of the view that the provision perpetuated gender stereotypes, causing discrimination. But the minority in the *Jordan* case also required that women should not commodify their bodies and that by engaging in sex-work, a woman violated her own dignity beyond constitutional protection. The consequence of this position is that a woman does not yet have complete freedom over her body.

Given the historical entrenchment of gender stereotypes, it may take a long time before the court is able to speak with one voice that will clearly benefit all women. Until then, the question of gender equality remains one of the court's biggest challenges.

In respect of both race and gender, it is less likely that the court will be faced with examples of direct discrimination than discrimination disguised in the form of indirect discrimination. Thus it is imperative to develop a clear approach to indirect discrimination. The court has yet to do this, holding in *Walker* that it was not necessary in that case to formulate a precise definition of indirect discrimination. While formulating a precise definition may be difficult, it is apparent that it might be necessary in the light of Sachs J's dissent, holding that this was not a case of indirect discrimination. The problem becomes greater in the light of the court's judgment in *Jordan* where the court was split by six Justices to five on whether sex-workers were indirectly discriminated against on the ground of sex or gender. This uncertainty in respect of a definition of indirect discrimination allowed the court to waver from its commitment to substantive equality. Consequently, the determination of indirect discrimination is now one of the more urgent issues the court needs to clarify.

7. Conclusion

The overall assessment of the court's equality jurisprudence over the past decade is that the court has performed outstandingly. In a short space of time it has developed a remarkably progressive approach to discrimination, even allowing that the *Jordan* judgment remains significantly out of kilter with its overall juris-

prudence. The court has skilfully woven a sophisticated understanding and application of the interconnectedness of rights. This will ensure that in the next phase of judgments advancing democracy, which must surely deal with socio-economic rights, it will still be able to rely on its equality jurisprudence:

Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential (Grootboom at para 23).

However, neither the concept nor the realisation of equality can take place in isolation. Even after ten years of democracy, South Africa remains characterised by deep divisions and extensive poverty. Unless the government adequately addresses the pressing issues of at least employment, health, education and housing, no jurisprudence of whatever high standard can hope to bring about equality in the country.

Endnotes

- 1 Section 9 of the Constitution of the Republic of South Africa Act 108 of 1996 (the 'final Constitution'). The provisions of the equality clause in the final Constitution are substantially similar to those in the Constitution of the Republic of South Africa Act 200 of 1993 (the 'interim Constitution') (except Section 3(b) relating to land rights now dealt with elsewhere in the final Constitution):
 - (1) *Every person shall have the right to equality before the law and to equal protection of the law.*
 - (2) *No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.*
 - (3) (a) *This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.*
(b) *Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection (2) had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with sections 121, 122 and 123.*
 - (4) *Prima facie proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.*

All references to Section 9 in this chapter will be references to the final Constitution and references to Section 8 to the interim Constitution.

- 2 See generally J Kentridge (1999) 'Equality' in Chaskalson *et al. Constitutional Law in South Africa* (Revision Service 5), 14-1-14-6, Durban, Butterworths.
- 3 'In Dworkin's words, the right to equality means the right to be treated as equals, which does not always mean the right to receive equal treatment' *Prinsloo* per Ackermann J., O'Regan J and Sachs J at para 32.
- 4 For a fuller discussion on the concept of substantive equality, see *National Coalition v Minister of Justice* at paras 60 to 62.
- 5 This reliance on dignity has not been without debate. See in particular A Fagan (1998) 'Dignity and Unfair Discrimination: A Value Misplaced and a Right Misunderstood' in *South African Journal on Human Rights*, Vol 14, pp 220-247; C Alibertyn and B Goldblatt (1998) 'Facing the Transformation: Difficulties in the development of an Indigenous Jurisprudence of Equality' in *South African Journal on Human Rights*, Vol 14, pp 248-276; and S Cowen (2001) 'Can "Dignity" Guide South Africa's Equality Jurisprudence?' in *South African Journal on Human Rights*, Vol 17, pp 34-59, especially footnote 2.
- 6 The procedure was set out in *Harksen v Lane* at para 53:
 - (a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.
 - (b) Does the differentiation amount to 'discrimination'? This requires a two-stage analysis:
 - (i) Firstly, does the differentiation amount to discrimination? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
 - (ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there is no violation of section 8(2).
 - (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (section 33 of the interim Constitution).
- 7 In *National Coalition* the court stated that the rational connection stage need not always be necessary as when the court holds that the discrimination is unfair and unjustifiable at para 18 per Ackermann J. See *Hoffmann* where the court skips the 9(1) enquiry and proceeds directly with the 9(3) inquiry at para 26.
- 8 The majority judgment was delivered by Ngcobo J with Chaskalson CJ, Kriegler J, Madala J, Du Plessis AJ and Skeyiya AJ concurring; the minority judgment was delivered by O'Regan J and Sachs J with Langa DCJ, Ackermann J and Goldstone J concurring.

The Challenge of Employment and Equity in the Workplace

Dr Neva Makgetla

1. Overview

The apartheid system arose in large part out of colonial efforts to control African labour. It severely restricted African workers' rights to organise, negotiate and strike. More fundamentally, a variety of colonial and apartheid measures functioned to deprive most Africans of alternatives to low-paid, often migrant labour. In the process, they generated high but largely hidden levels of unemployment and underemployment, especially.

After the transition to democracy, the Constitution required respect for workers' rights on the job. The government implemented this mandate through substantial changes to the labour laws. As a result, in contrast to the apartheid era, all workers now have equal rights to organise. The government passed laws seeking to ensure fair treatment and equity on the job, reasonable working time and leave, occupational health and safety, skills development and insurance against unemployment. In the early 2000s, new wage determinations set minimum pay for employees in poorly paid sectors, including domestic and farm workers.

In the same period, however, the number of people seeking work increased while employment — especially in better-paid, formal work — grew only slowly. As a result, unemployment reached 31% in 2002, and the average wage fell in real terms. These conditions made it difficult to fully enforce the new labour laws, particularly in farming, domestic labour and the informal sector.

To understand these trends, this paper considers the evolution of employment in major segments of the South African labour market. It first outlines the scope of labour rights and the nature of labour-market segmentation. It then reviews how colonial and apartheid laws shaped the labour market. The third section describes the current legal framework. This sets the stage for a review of developments for workers in terms of unemployment and working conditions.

2. Scope and Segmentation

Employment rights have long formed part of the international framework of labour rights. To analyse their impact in South Africa requires an understanding of labour-market segmentation.

2.1 *Employment Rights*

Employment rights relate to the quality of work and to workers' rights to organise, to bargain collectively with employers and to strike. The International Labour Organisation (ILO), a multi-lateral tripartite agency charged with standard setting and defining the norms for employment, has developed a 'decent work' agenda (see ILO, 2004) that includes the following elements:

- access to paid work for those who want it;
- acceptable levels of pay, benefits and job security for the employed;
- protection against unfair employer action against workers who join unions, negotiate or strike;
- protection against unfair discrimination in hiring, promotion, pay and other employment-related decisions;
- elimination of child and forced labour; and
- assurance of acceptable protection against occupational threats to health and safety.

While employment rights generally centre on the relationship between workers and employers, they depend strongly on the level of employment. Where unemployment and underemployment are very high, workers will tend to accept sub-standard employment and find it hard to organise. In these circumstances, it becomes virtually impossible for government to protect labour rights through administrative means, such as inspectorates.

Indeed, even more than with other rights it is hard to define the state's role in protecting labour rights. While direct government intervention is always important for

vulnerable workers, the overall level of workers' rights invariably depends on workers' own efforts — and by extension on their general economic and social position.

The concept of 'rights' asserts broadly that society should ensure all individuals enjoy the specified conditions, but it never defines precisely the role of the state or other social actors in achieving this aim. It does indicate that the state has some ultimate responsibility for securing a given right as far as possible, taking into account resource constraints and competing needs and demands.

Most aspects of employment rights, however, are defined by the relationship between workers and employers. Except in state socialist economies, the public sector is not the main employer. By extension, workplace relations are shaped largely by the nature of the economy, the level of unemployment, skill levels, traditions, and the strength of workers' organisation.

The state can support employment rights principally by influencing these factors, rather than through direct action. Typical government measures to protect employment rights thus include:

- legislation requiring employers to adhere to specified minimum standards for aspects of workers' rights, for instance those involving safety, working hours and equity. Typically, these laws are enforced in part through direct inspections, but mostly through responses to complaints by workers, generally facilitated by unions.
- support for worker organisation and monitoring of conditions.
- limited direct employment both to deliver services through the public sector and through public employment programmes that combine income relief with service delivery, for instance road maintenance.
- policies to encourage employment creation and skills development. These policies take a wide variety of forms. In the North, they seek to encourage higher demand for labour and more efficient information flows on labour markets. In the South, they focus more on giving productive assets, such as land, finance and access to infrastructure and markets, to poor households.

As this summary suggests, measures to protect workers in the workplace differ substantially from those seeking to create jobs, but the two are inherently linked. High levels of unemployment generally force workers to live with worse conditions on the job. In the long run, where joblessness is high, government will not be able to ensure decent work for any vulnerable workers.

2.2 Labour-Market Segmentation and the Right to Work

South African labour markets are highly differentiated. Types of employment range from internationally competitive manufacturing and services to domestic labour

and street trading; from the unpaid labour of women and children in small-scale agriculture in the former homelands to hi-tech call centres at the cutting edge of globalisation. In these circumstances, it is meaningless to generalise about employment rights for all employees. Rather, workers' rights must be analysed separately for different segments of the labour market.

The concept of segmented labour markets suggests that national labour markets are rarely homogenous. Rather, they form more or less distinct segments, defined by:

- the legal framework determining the powers of employers and employees;
- the ability of workers to organise, which in turn depends largely on the nature of employment — especially skill levels and the number employed in one place; and
- the demand for labour and the extent of discrimination based on ethnicity, gender, citizenship or age.

While labour market segments emerge in all countries, they are particularly pronounced in South Africa. Apartheid can, indeed, be understood as an effort to divide the labour market into segments based on industry, race, gender and location. The segments shaped by apartheid — which are defined in the next section — thus provide a research agenda for understanding progress in realising the right to work over the past ten years.¹

3. The Impact of Colonialism and Apartheid

In effect, centuries of colonialism and then apartheid raised unemployment and underemployment amongst Africans in order to hold down wages. Explicitly racist and gender-biased laws impoverished most of the black population and allocated labour rights largely based on race, gender, area and skills. In this context, in the 1970s the growth in formal employment and workers' organisation led to a degree of rights for African formal-sector workers. Still, the labour market remained sharply segmented.

This section first looks at the way in which the broader apartheid system shaped employment opportunities, and consequently, workers' power in the workplace. It then describes labour market regulation in this context. The final part looks at the resulting segmentation of the labour market, laying the basis for exploring the effects of the new labour dispensation after 1994.

3.1 Apartheid and the Labour Market

Key elements of the apartheid dispensation worked to deprive African workers of alternatives to paid employment. The most important measures lay outside the normal purview of labour laws, and they were differentiated explicitly in terms of race and gender. They included:

- the land and pass laws, which over centuries tilted the balance of power in the workplace strongly toward employers of African labour. These laws worked to deprive Africans, especially in the homelands, of economic alternatives to migrant labour. In effect, they made them aliens in their own country, subject to the regulation and repression normally meted out to foreign workers.
- the measures preventing black households from access to education, skills, infrastructure and formal economic networks, especially access to financial and retail systems. Again, these strategies worked to deprive Africans of economic opportunities outside of poorly paid employment in white-owned companies.
- specialised laws encouraged reliance on foreign migrant workers in the mining and agricultural sectors. This system strengthened employers relative to workers, by increasing competition for jobs and by bringing in foreign-born workers, who were easier to intimidate and dismiss.

In contrast to the efforts to undermine African workers' position, the state worked to empower white workers relative to employers. To that end, it minimised white unemployment and fostered white skills. Only whites could attend many training institutions, for instance, those for agricultural and higher-level teachers' training. In addition, until the 1980s, the big parastatals provided apprenticeships on a large scale for whites and coloureds. Job reservation effectively increased the bargaining power of less skilled whites, especially in mining, until white workers moved up the hierarchy and out of production jobs. The public sector generally acted as a last-resort employer for white workers.

In short, apartheid effectively reduced the ability of black workers, especially Africans in lower-level jobs, to protect their rights, largely by generating underemployment and unemployment. At the same time, it systematically enhanced the position of white workers.

3.1.1 Labour Laws

The apartheid state imposed a highly discriminatory and segmented system of labour laws. In essence, it empowered white workers while providing virtually no protection for unskilled African workers. Moreover, in common with international practice, it ignored informal and unpaid family labour. Africans in formal employment were able to use their organisational and economic power to improve their conditions and win some legal rights, especially in the 1980s. Until 1994, however, they did not achieve full legal equality with white workers.

Under apartheid, workers' rights to organise, negotiate and strike were defined by occupation and race. Access to social insurance funds for unemployment and injury on the job was also racially discriminatory. Employers' internal practices and rules reinforced the overall legal discrimination. The public sector, which

provided over a fifth of formal jobs, discriminated strongly against black and female workers.

White (and to a lesser extent coloured) workers enjoyed considerable legal protection in the workplace. From the 1950s, only white and coloured workers could form legally recognised and protected unions. A system of Labour Courts acted strongly against unfair labour practices and dismissals.

The public service banned unions. But public service regulations made it almost impossible to fire or demote a white worker. White public servants had powerful staff associations that effectively lobbied management and protected individual members.

In the private sector, the labour laws supported collective bargaining through industrial councils, which until the 1980s did not cover African workers. Still, the degree of centralised bargaining should not be exaggerated. Except in iron and steel (which accounted for half of all workers in industrial councils),² the industrial councils never provided genuinely national bargaining forums. Most of them covered limited occupations in specific urban areas, such as hairdressers in Pretoria or the building industry in Kroonstad.

Beyond job opportunities and labour rights, the state provided direct assistance to white workers through social insurance schemes. The Unemployment Insurance Fund (UIF) and Workmens' Compensation Fund gave support on the European model for (white and coloured) workers who lost their jobs or suffered work-related ill health.

The array of labour rights enjoyed by white workers contrasted with the state's efforts to weaken African workers relative to employers, both by undermining organisation and through direct attacks by the security forces.

The state did not actually ban African unions, but unions with African members could not register. As a result, they were excluded from industrial councils as well as from legal protection against intimidation and the dismissal of organisers and shop stewards. Less formally, the state used the security forces both openly and covertly to harass unions and to break strikes. Directly, it worked through arrests and assassinations. Indirectly, it tried to reinforce ethnic conflict in the workplace, most obviously amongst migrant workers in the mines and municipalities.

Africans in lower-level jobs, especially in mining, domestic and farm labour and the public sector, faced the worst situation. As a rule, the state held that these workers were essentially casuals, temporary sojourners on contract. This status made it hard to fight dismissals or unfair treatment. Moreover, it excluded less skilled black workers from benefits, including pension funds, as well as career paths.

The legal fiction of temporary work was bolstered by special laws governing African employment in mining, farming and domestic labour, and by the regulations governing the employment of lower-level African work-

ers in the public sector. In these sectors, too, the police often acted as an extension of employer power, both in disciplining individuals and in acting against worker organisation. Workers who resisted employer demands could find themselves arrested on trumped-up charges or deported to the starving homelands.

African workers in more stable or skilled jobs — mostly in manufacturing and the public sector — fell between the extremes of privilege and deprivation. Increasingly, especially from the late 1970s, they won a degree of organisational and legal protection against unfair labour practices. On the one hand, this reflected the growth of African unions. Even less skilled workers with strong unions, especially in mining and to some extent the public sector, managed to improve their position. On the other hand, employers’ need for a more permanent and skilled black labour force led to growing pressure to normalise labour relations.

Even before 1994, African unions in many workplaces compelled employers to recognise and negotiate with them. Moreover, they won some protection for their members from the Labour Courts. Still, state harassment of unions continued, and discrimination based on race and gender remained the rule. The courts gradually whittled away at explicit racial discrimination in the 1980s, but did not prevent discrimination based on formal qualifications and job titles. They were still less consistent about gender discrimination. Even in the early 1990s, for instance, teachers’ pay was explicitly differentiated by gender, and women teachers who had children were routinely dismissed.

Finally, unpaid productive and reproductive labour by women and children fell entirely outside the regulation of the labour law system. This is the international norm, as states generally avoid direct intervention in family work relations. Still, apartheid fostered patriarchal family relations that reinforced the oppressive and discriminatory character of unpaid labour. The migrant labour system worked to force African women into the homelands, where there were few paid jobs. The weakness of infrastructure in black communities increased the amount of reproductive labour required. In this context, the apartheid state’s interpretation of customary law reinforced and rigidified the power of men in the household.

In these circumstances, unpaid reproductive labour cost women huge amounts of time. Even in 2002, around 5% of women spent at least one hour per day fetching water, with similar figures for the collection of

wood for fuel (calculated from Statistics SA, 2003a). Women and children also ended up doing considerable unpaid work in agriculture, both on commercial estates — where they were often treated as adjuncts of paid farm workers — and on smallholdings in the homelands.

3.1.2 Labour-Market Segmentation

The apartheid system effectively segmented the labour market according to sector, skills level, race and gender. In essence, as illustrated by Table 1 below, five separate sub-markets emerged:

- A highly skilled top end of the formal sector, populated by predominantly white, male professionals and managers. They enjoyed a special relationship with employers based in part on the skills shortage and in part on entrenched discrimination.
- A less skilled, predominantly black, lower end of the formal sector, which includes the large professions of the public service (mostly health, education and policing). White workers here enjoyed various privileges. African workers increasingly won legal rights based on their own militancy as well as employers’ need for a stable labour force.
- Segments ruled essentially by colonial labour relations — mining, domestic and agricultural labour, and unskilled workers in the public sector. In these sectors, African workers enjoyed little protection as citizens or as workers; local and foreign migrant labour was widespread; and occupations were heavily gendered. Nonetheless, by the late 1980s, workers in mining and the public sector had organised and won some rights from both employers and the state.
- Workers in the informal sector and homeland agriculture, which was largely illegal under apartheid, enjoyed no state protection as workers or entrepreneurs. Since the majority of these workers were self-employed, market conditions and broader social protection³ did much more than labour-market regulations to determine their income and working circumstances.
- Women and children engaged in unpaid production and reproductive labour, mostly in households and on farms. They had virtually no protection for their rights as workers, and very little as family members.

Table 1: Segmentation of the South African Labour Market

Characteristic	Formal Top	Formal Lower	Colonial	Informal	Unpaid
Occupations	Management, professional	Production and service workers, including big public service professions	Mining, low-level public sector, domestic, commercial agriculture	Micro enterprise — predominantly hawking and homeland agriculture	Mostly domestic and agriculture
Share in paid work ¹	Around 5%	Around 45%	Around 30%	Around 20%	N.A. ²

Characteristic	Formal Top	Formal Lower	Colonial	Informal	Unpaid
Skill levels	Post-secondary	Skilled, semi-skilled, unskilled	Skills typically not formally recognised	Skills typically not formally recognised	Skills not recognised
Race/ gender/ citizenship	Disproportionately white men, especially in the private sector, despite a growing representation of black workers	Predominantly black and from SA. Gender varies by sector (more women in services, light industry and retail)	Mining almost exclusively black men; domestic almost exclusively black women; agriculture mixed. Large numbers of foreign-born workers in mining, agriculture and domestic	Almost exclusively black workers, disproportionately women; apparently many undocumented foreign born in hawking	Mostly black women, especially domestic work of all kinds
Historic labour laws	Very strong protection for white employees	Formally differentiated, initially by race and gender; from 1980s by permanence and skills	Special dispensations favouring employers, linked to broader institutions of control (pass laws, criminal laws, etc.); special arrangements for foreign migrants in agriculture and mining	No applicable labour laws. Shaped largely by apartheid laws on access to urban jobs, training and infrastructure	No applicable labour laws. Shaped largely by apartheid laws on access to urban jobs, training and infrastructure
Current labour laws	Implemented for all	Generally implemented	Implemented in mining, but weak in agriculture and domestic	Mostly ignored	N.A.
Unionisation	Low	Strong	Strong in mining, very weak in agriculture and domestic	Non-existent	N.A.

Notes: 1. Calculated from Statistics South Africa (StatsSA), *Labour Force Survey*, September 2002, using a combination of figures for occupation, industry and formal versus informal employment. Informal employment is defined as self-employment or employment for an employer who is not registered to pay value added tax. 2. Unpaid labour, for instance, fetching wood and water or subsistence agriculture, is done by people with and without paying jobs.

In sum, apartheid shaped the South African labour market, with different economic circumstances and legal regimes for different segments. Worker militancy and organisation combined with changing economic conditions led to shifts through the 1970s and 1980s. The most contested arenas became the lower end of formal employment in manufacturing, mining and the public sector.

4. Progress since 1994

The transition to democracy brought profound transformation in labour-market regulation, especially in the lower-level formal and colonial segments. Labour laws still largely ignored informal and family labour. Still, broader social changes improved workers' power in these segments as well. The democratic order did not, however, much change the underlying conditions that generated high levels of unemployment and underemployment. In these circumstances, workers faced soaring unemployment and, despite improved organisation in some sectors, falling real pay.

This section first outlines the changes in the formal legal framework for the labour market, and then explores the evolution of workers' conditions since 1994.

4.1 The Legal Framework

Progressively, from 1994, the government worked to ensure equal rights for all workers. These efforts included stronger state support for workers whose conditions made unions hard to organise, especially farm, domestic and informal workers. More broadly, im-

proved socio-economic rights enhanced workers' bargaining power as well as their living conditions. Here we look at government efforts in three areas: ending workplace discrimination; protecting workers' organisational rights; and improving workers' overall socio-economic position.

4.1.1 Combating Workplace Discrimination

Efforts to end workplace discrimination were rooted in the Constitution. The 1996 Constitution banned unfair discrimination based, amongst others things, on race, gender, disability, age or ethnicity, by either the state or private interests.

In effect, unfair discrimination only applies where there is no economic justification for differentiation. This approach seeks to ensure that anti-discrimination measures do not undermine productivity, but it means that, as long as black workers in particular have less formal qualifications and experience than whites, employers can legally keep them in lower positions. The Employment Equity Act (1998) both implemented the constitutional ban on unfair discrimination and went beyond it, by:

- defining unfair discrimination explicitly to mean differentiation that does not follow from job requirements, and banning discrimination in hiring as well as existing employment;
- establishing dedicated dispute-settlement procedures. If conciliation fails, the dispute goes, not as usual to binding arbitration, but to the Labour Court;

- requiring designated employers to develop employment equity plans with pro-active, affirmative measures to promote black people, women and people with disabilities.

Employment equity plans could include work reorganisation, mentoring and training. As of 2003, employers with over 50 workers had to submit regular plans and progress reports to the Department of Labour. These enterprises employed half of all formal workers (calculated from Statistics South Africa, 2002).

In 2003, the government backed up the Employment Equity Act with the Black Employment Equity Act (BEE). The Act threw government support to sectors that adopted BEE charters, which set key targets for promoting blacks in management as well as black ownership; and companies that scored well on a 'BEE scorecard', with a third of the points for advancing black employees in high-level positions. The other two thirds reflected black ownership and support for black companies.

Finally, the government moved rapidly to end racial discrimination in access to social insurance funds for unemployment and compensation for work-related injuries. However, because these are formally insurance funds with only small government subsidies, the government felt it could not include many lower-income and more casual workers. The UIF only included domestic workers after 2000. The informal sector remained almost entirely outside the purview of social insurance.⁴

4.1.2 Labour Market Regulation

Both the 1994 and the 1996 Constitutions included a separate section on labour relations. This section gave workers and employers the right to organise, and protected workers' rights to form unions and strike. In addition, the Constitution banned forced and child labour, and provided that every South African had the right to choose freely their occupation and place of residence. This provision effectively addressed apartheid practices around the migrant labour system, prison labour and job reservation.

The Labour Relations Act (LRA) of 1996 provided the basic framework for employer-employee relationships. It defined workers' rights to organise, negotiate and strike. In this context, it defined procedures for protected strikes over socio-economic as well as workplace issues. Essentially, outside of essential services, workers can go on strike after mediation has failed.

In an effort to simplify and speed up dispute settlement, the LRA added a system of mediation and arbitration to the courts, through the state-funded Commission for Conciliation, Mediation and Arbitration (CCMA) and, for socio-economic disputes, through NEDLAC (the National Economic Development and Labour Council). The LRA also provided a legal framework for new negotiation forums at the sectoral level (replacing industrial councils) and in the workplace.

The LRA laid out basic procedures for disciplinary and productivity procedures by employers, and workers' rights in this context. It provided a framework for disciplinary hearings, with appeals to the relevant bargaining council or, if none existed, to the CCMA. Where workers were not sufficiently productive, the procedure was simpler: employers had to demonstrate a genuine effort to help the worker and, if that failed, the worker could be dismissed without a hearing. Again, appeals went to the CCMA.

The Basic Conditions of Employment Act (BCEA) of 1997 officially focused on issues of working time — especially leave and maximum daily working hours. It set a framework for sectoral minimum wages ('wage determinations') for workers whose circumstances made union organisation difficult. It also banned paid or dangerous labour by children under 15 years of age.

Perhaps the BCEA's biggest impact was in the definition of employee, which included all workers except the self-employed, irrespective of their contractual situation. This ruled out the previous distinction between casual/contract and permanent workers, ensuring much greater equity in legal protection across labour-market segments.

The government made relatively little change in occupational health and safety legislation, beyond ensuring that the same standards applied in all sectors. The main innovation was the introduction of a legal framework for joint worker/employer committees on health and safety in large workplaces. The new legal framework generally maintained the existing structure of inspectorates on basic conditions and health and safety. It added the CCMA for dispute settlement that was covered neither by a bargaining council or the Labour Court, and set up enabling frameworks for increased worker participation in monitoring conditions.

As of 2003, no consistent evaluation of the new institutions has been published. Some problems certainly existed. The extension of equitable rights to black workers increased the burden on the inspectorates, which did not enjoy a comparable increase in resourcing. The CCMA faced complaints about its reliance on relatively unqualified commissioners to facilitate especially low-level, individual disputes.

Still, labour law never works primarily through direct government inspection. That would overtax any state system. Rather, the new laws depend heavily on workers themselves, individually or through unions, raising disputes against employers. They therefore worked best in strongly organised industries.

4.1.3 Overall Socio-Political Changes

In addition to ensuring equitable rights in the labour market, the transition to democracy fundamentally changed the broader socio-political balance between workers and employers. Moreover, government efforts to improve conditions for the poor sought to open up alternative economic opportunities, improving workers'

bargaining power. Unfortunately, these latter initiatives did little to limit the rise in unemployment, as discussed below.

Under apartheid, state action and employer power had been co-ordinated. The provision of equal rights to all citizens undermined this coherence. Above all, workers no longer needed to fear expulsion from urban areas or criminalisation if they stood up against their employers. Special legislation protected farm workers' housing rights, so that losing their jobs should not automatically mean eviction.

These broader rights were particularly important for women workers, including those in unpaid labour. The government specifically sought to strengthen police action against family violence. Other measures worked to enhance women's economic independence. These included the extension of old-age pensions and child support grants to all poor families, as well as efforts to end discrimination against black women in home ownership and access to financial services.

The government also acted directly to increase the economic opportunities and resources available to workers, which should strengthen their position relative to employers. The strongest measures here included the establishment of a skills development strategy and the housing programme.

The skills strategy aimed to overcome the discriminatory policies of the past. It sought to ensure that every worker had access to skills and, on that basis, better jobs. It also tried to install mechanisms to provide certification for workers' informal skills. To support the strategy, the state imposed a 1% payroll levy on all employers. A new and rather complex set of institutions and systems was expected to implement the skills strategy. It had three pillars:

- Sectoral Education and Training Authorities (SETAs) to identify sectoral skill needs and provide training directly where employers did not.
- Workplace skills plans, developed in theory by employers and workers, which would be funded in part by reclaiming a share of the skills levy through the relevant SETA.
- The National Qualifications Framework (NQF), which was to be developed by the Department of Education, providing training equivalents for each level in the education system. That, in turn, aimed to let workers who had left school obtain qualifications for progression in their careers.

Two major weaknesses emerged in the overall system. First, the SETAs often seemed unable to provide much training directly, leading to enormous roll-overs of funds. Employers frequently did not submit workplace training plans, or faced long delays in obtaining the funding. Second, the development of the qualifications framework turned out to be very slow. In many sectors, the relevant qualifications still do not exist.

- The housing and infrastructure policy effectively transferred over R50 billion in assets to poor households. Initially, this strategy was expected to expand opportunities for earning incomes through home-based production. In practice, however, service levels were generally low and costs high, limiting economic use.⁵ Still, by reducing the amount of housework required, improved household infrastructure should ease the burden of unpaid reproductive labour.

Support for small and micro production, including through land reform and financial support for small enterprises, also aimed to provide alternatives to employment. Generally, however, these programmes had relatively little impact. Land reform affected only a small percentage of total arable land, despite the government's long-standing commitment to transfer 30% of the land to smallholders. Moreover, virtually all analyses showed that the government had failed to provide effective support for micro enterprise.

4.2 *Changes in Workers' Conditions, 1994-2003*

As it has been shown above, the democratic government initiated far-reaching changes in workers' legal rights. The question becomes whether and how these shifts affected workers' conditions.

The move to improve workers' position in the labour market was offset in part by broader forces. The end of apartheid saw the opening of the economy, a shift away from gold mining, and radical changes in socio-economic conditions. These trends were associated with substantial downsizing by large-scale employers in both the public and private sectors. At the same time, more people sought paid employment.

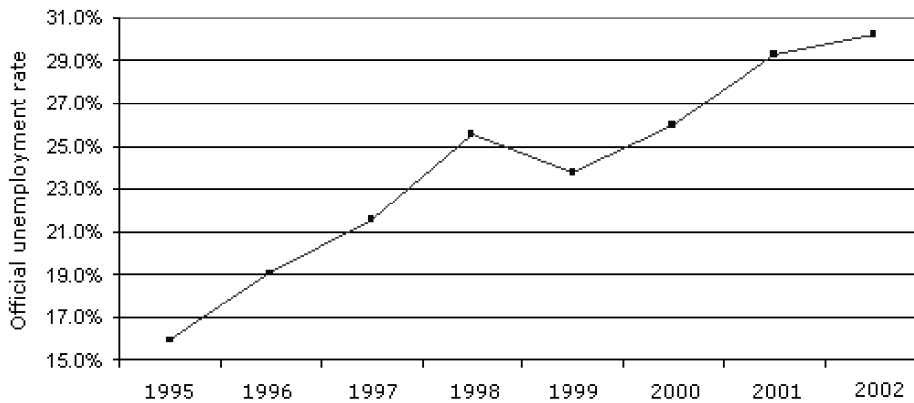
These factors meant that unemployment, already artificially high, rose rapidly. In turn, this undermined the ability of the less skilled workers to protect themselves against these conditions. In these circumstances, the government was often unable to enforce the laws on the books. Moreover, a trend toward informalisation and casualisation began to undermine the hard-won rights of workers in the lower end of the formal sector.

This section first looks at the overall employment situation. It then briefly explores changes in workers' conditions in each labour market segment.

4.2.1 Unemployment⁶

Between 1995 and 2002, unemployment officially rose from 16% to 30.5%. Figures for early 2003 put the figure at over 31%.⁷ These data do not include workers too discouraged to seek work. If they are included, the unemployment rate was 41%.

Chart 1: Unemployment Rate, 1995–2002



Note: The official definition of unemployment excludes workers too discouraged to seek work. Source: Figures calculated from StatsSA, *South Africa in Transition* (Pretoria: 2001) for 1995-1999, and from StatsSA, *Labour Force Survey*, September 2002, electronic database.

Unemployment in South Africa is extraordinarily high by world standards. According to the World Bank, in the early 2000s the unemployment rate in middle-income countries as a group averaged well under 10%. The discrepancy does not seem to reflect data problems. Many middle-income countries, such as South Africa, use household-based labour force surveys with norms drawn from international institutions (World Bank, 2003). Moreover, the 2000 time-use survey supports the unemployment figures (Wittenberg, 2002).

Rising unemployment was associated with falling remuneration. The percentage of workers earning under R1 000 a month in nominal terms rose from 36% in 1995 to 39% in 2001, and reached 41% in March 2003 (calculated from StatsSA, 1995, 2003a and 2003b). In these eight years, inflation cut the purchasing power of R1 000 by over 50%. Rising unemployment was also linked to a falling share for labour in the national income. In 2002, remuneration accounted for around 51% of national income, the lowest level in any year since records began in 1946, except for 1980 (which saw a soaring gold price). Labour’s share fell particu-

larly sharply in 1999-2002. In this period, profits rose from 29% to 34% of national income (calculated from SARB, 2003).

Since the apartheid government did not measure African unemployment, it is impossible to compare trends with pre-democracy days. Certainly, however, the creation of underemployment by the apartheid state led directly to the current unemployment situation. Since 1994, soaring unemployment has resulted from both slow growth in jobs, especially in the formal sector, and from an increase in the share of working-age people looking for paid work.

Unfortunately, the data on overall employment are inconsistent.⁸ Here we use survey data for more recent years and for details not covered by the Census. As the following table shows, the data (such as they are) suggest that job growth has not kept up with growth in the labour force, defined as the population aged 15 to 65. At the same time, the number of people seeking work has grown much more rapidly than either the labour force or jobs.

Table 2: Growth in Employment and Job-Seeking, 1995-2002

Employment status	Millions			Growth, 1995-2002	
	1995	2000	2002	Millions	% Change
Not economically active	14.3	11.1	12.1	-2.2	-18%
Employed	10.2	11.7	11.0	0.8	7%a
Unemployed	2.0	4.1	4.8	2.8	58%

Note: The growth in employment was 10% from 1996 — still 5% below population growth. According to the Census, however, the growth in employment was only 5% from 1996 to 2001. Source: Calculated from StatsSA, 2003, *Labour Force Survey*, September 2002 (Pretoria) downloaded from www.statssa.gov.za, June 2003, p. 3.

The following table shows that:

Soaring unemployment was associated with substantial expansion in the share of adults seeking work in the late 1990s, which levelled off after 2000. Overall, the share of employed people in the potential labour force fluctuated and declined after 2000.

Despite the growth in work-seekers, the labour force participation rate remains low by international standards. In middle-income countries it was around 75% in 2003, compared to below 60% in South Africa (World Bank, 2003, Page 20).

Table 3: Labour Force Participation and Unemployment Rates, 1995–2002

Indicator	1995	2000	2002
Labour force participation rate (employed plus unemployed as a percentage of the working-age population ¹)	48%	58%	57%
Unemployment rate (unemployed as a percentage of employed plus unemployed)	16%	26%	30%
Employed as a percentage of the working-age population ¹	40%	43%	39%

Note: 1. The working-age population is estimated from September 2002, using growth at 2% a year, or roughly equivalent to the population growth. This is because the figures for non-Africans in 1995–1997 distort the overall labour force figures. In contrast, the figures for the African labour force show growth equal to that in the population. Source: Calculated from StatsSA, 2003. *Labour Force Survey*, September 2002 (Pretoria) downloaded from www.statssa.gov.za, June 2003, Page 3.

Causes for the increased number of work-seekers have not been researched. According to the government (PCAS, 2003, Page 96), the main reason has been that, with the end of apartheid, more people from the former homelands — particularly African women — sought paid work. However, it seems more likely that rising unemployment and falling real incomes pushed more family members into the search for jobs.

Within the formal sector, most observers agree (see Altman, 2003; Bhorat, 2002) that the main job losses have occurred in the public sector, primarily amongst lower level African workers. In addition, substantial job losses occurred in commercial farming, mining, domestic labour and, especially from 1997, in manufacturing. Formal retail and business services, however, expanded employment. In contrast, the figures show rapid growth in informal employment, especially in 1998-2000, and thereafter stagnation. These sectoral shifts are explored in the following sections on individual labour-market segments.

Because the growth in work-seekers drove unemployment, it is not surprising that young people faced the highest jobless rates. In effect, school leavers came in at the tail end of the job queue. In 2002, people under the age of 30 made up 24% of formal employment, but 55% of the unemployed. These figures include only those who would take a job immediately, and exclude students. The unemployment rate for people under 30

ran at 61%. Overall, unemployment for Africans came to 47%, compared to 8% for whites. It was 53% for African women (calculated from StatsSA, 2002a). The predominance of young people amongst the unemployed had important social and economic consequences.

First, the unemployed displayed rising skill levels, as education has risen rapidly in younger cohorts. Amongst young Africans, the unemployed and employed had virtually identical levels of formal education, as the following table shows.

Second, despite the internationally high level of unemployment, relatively little unrest emerged. It appears that young people continued to depend on their families as they had before entering the workforce. Rising unemployment showed up more in higher dependency rates for workers than in retrenchments.

Finally, the extraordinarily high levels of unemployment, even amongst relatively skilled youth, permitted continued discrimination by employers. Thus, although young African women had higher education levels than African men, they were more likely to remain unemployed. Generally, unemployment hit Africans far harder than whites, irrespective of education levels. About 20% of Africans below the age of 30 with university degrees were jobless in September 2002, compared to 4% of non-Africans (StatsSA, 2003a).

Table 4: Employment and Unemployment by Age, Race and Education Level

Average Education Level		Unemployment Rate by Group		
Cohort	Employed	Unemployed	Total	With post-secondary education
Women under 30				
African	9.8	9.8	75%	58%
Coloured and Asian	10.1	9.1	48%	16%
White	12.4	11.1	14%	7%
Men under 30				
African	9.3	9.4	61%	50%
Coloured and Asian	9.7	9.1	38%	19%
White	12.6	11.3	15%	5%

Average Education Level		Unemployment Rate by Group		
Cohort	Employed	Unemployed	Total	With post-secondary education
Women over 30				
African	7.5	7.4	40%	15%
Coloured and Asian	8.1	7.1	25%	7%
White	12.7	11.7	10%	6%
Men over 30				
African	7.3	7.2	28%	12%
Coloured and Asian	7.9	7.6	15%	4%
White	12.8	11.5	4%	2%

Source: Calculated from StatsSA, *Labour Force Survey*, September 2002.

In sum, unemployment soared after 1994, as employment grew only slowly — with a shift to lower-income work — while the numbers seeking jobs rose rapidly. In these circumstances, workers were in an inherently weak position, making enforcement of legal rights more difficult, particularly in the worse-off segments of the labour market. We now look at developments in each of the segments shaped under apartheid.

4.2.2 Formal Managerial and Professional

The top end of the formal sector was historically mostly white and male. It enjoyed strong protection through the courts, based largely on precedents around unfair

labour practices. Most of these employees did not belong to unions. Nonetheless, as highly skilled workers, they retained considerable market power. As the table below indicates, this power was reflected in relatively low unemployment levels. In this segment, the new labour laws effectively confirmed existing worker rights. The main change after 1994 was to require employment equity and a degree of affirmative action. As the following table shows, progress toward equity remained fairly slow. The share of Africans in senior positions rose only from 32% to 35% between 1995 and 2002, while the share of women increased from 28% to 34%.

Table 5: Occupations by Race and Gender, 1995 and 2002

	African	Coloured/Asian	White	Total
Senior Management / Professionals				
1995	32%	11%	56%	100%
2002	35%	15%	50%	100%
Total Employees				
1995	62%	16%	23%	100%
2002	68%	18%	14%	100%
Population, 2001	79%	11%	10%	100%

Source: Calculated from StatisticsSA, *October Household Survey, 1995*. Table 22: *Labour Forces Survey*, September 2002.

Representativity remained particularly poor in the private sector, which accounted for two thirds of higher positions. In September 2002, half of all senior managers and professionals were white, and only a third were African. In the financial sector and manufacturing, whites held two thirds of all senior positions. In contrast, in government — represented here by community and social services — Africans held over half of senior positions. In the private sector, Africans only comprised a majority of senior management in the transport and communications sector, presumably because of the dominance of the taxi industry and parastatals.

Women, and especially black women, were also under-represented overall, with the worst disproportions

again in the private sector. Their relatively strong position in the public sector reflected the ANC's promotion of women as legislators, as well as women's dominance in education and health. In these sectors, they made up around three quarters of all employees, although their share in management was much smaller.

As a result of apartheid, relatively few black people, and especially black women had the formal education and experience required for senior positions. In addition, even after 1994, historically black schools remained under-resourced, leading to relatively poor matric pass rates, while many black learners could not afford university fees.

Table 6: Senior Management and Professionals by Race, Gender and Industry, 2002.

Industry	% of Senior Positions						% of all Senior Positions
	African	Coloured/Asian	White	Women	Men	African women	
Wholesale and retail trade	21%	23%	55%	33%	67%	7%	19%
Financial and business services	20%	13%	67%	27%	73%	5%	17%
Manufacturing	15%	18%	67%	17%	83%	2%	12%
Transport and communications	62%	17%	22%	14%	87%	6%	9%
Agriculture	13%	15%	72%	14%	86%	0%	3%
Construction	32%	12%	57%	8%	92%	2%	3%
Mining and quarrying	15%	0%	85 %	14%	86%	2%	2%
Electricity, gas and water	31%	13%	56%	25%	75%	13%	1%
Total private sector	25%	17%	58%	24%	76%	5%	65%
Government (community, social and personal services) ¹	53%	12%	35%	54%	46%	30%	35%
Total	35%	15%	50%	34%	66%	14%	100%

Note: 1. The data do not provide a split by public/private sector, but most community and social service workers are public servants. Parastatals are included under the private sector. Source: Calculated from StatsSA, *Labour Force Survey*, September 2002.

For most senior jobs, hiring and promotion involve a degree of networking and personal assessment of candidates, opening the door to discrimination. Moreover, many white employers effectively rejected all degrees from historically African universities, ignoring the substantial differences in quality between these institutions.

In short, while the constitutional prohibition of discrimination and the Employment Equity Act had some impact, ten years after independence senior managers and professionals — especially in business — remained disproportionately white and male.

Available evidence indicated that many companies did not devote much effort to developing or implementing employment equity plans. Moreover, the Department of Labour lacked capacity to examine and monitor all the required plans.

Sectoral BEE charters went some way toward setting targets for representativity at senior levels. As they were voluntary and self-regulated, however, they were generally not overly ambitious. The Financial Sector Charter, for instance, aimed to have black women hold 4% of senior management positions by 2008, up from an estimated 1.6% in 2002.

4.2.3 Formal Lower Level

The labour market segment comprising the lower end of the formal sector benefited considerably from the extension of labour rights after 1994. In particular, fewer skilled black workers enjoyed greater protection against dismissal and unfair discrimination, easier and faster dispute settlement, and more protection for organisational work. Some employers responded by informalising or outsourcing jobs, blurring the margin between formal and informal work. Worker organisation expanded rapidly, especially in the mid-1990s. Between 1994 and 2000, the largest union federation, COSATU, increased 50% in size, reaching almost two million members. In 2002, union prevalence in the formal sector, excluding agriculture and domestic work, rose to 45% — extraordinarily high by world standards. Most of the growth in union membership occurred in the public service, which soon reached near-saturation point. In contrast, falling employment in mining and manufacturing led to shrinking membership in these sectors. Still, unions largely maintained their share in total employment

Table 7: Union Prevalence by Sector, 2001

Sector	Prevalence	% of Formal Employment
Community, social and personal services	64%	30%
Manufacturing	39%	20%
Wholesale and retail trade	23%	18%
Financial and business services	25%	11%
Mining and quarrying	79%	10%
Transport and communication	41%	6%
Construction	20%	5%
Electricity, gas and water	56%	1%
Total	45%	100%

Source: Calculated from StatsSA, *Labour Force Survey*, September 2001.

Although workers in this segment made full use of most of their new rights, some elements of the LRA had little impact. In particular, national centralised bargaining remained the exception rather than the rule. The vast majority of bargaining councils simply inherited industrial council structures, and stayed entirely local in scope. Only around six new bargaining councils were established in the private sector after 1994. Bargaining councils covered virtually all public-sector workers, but under a quarter of private employees. Moreover, few workplace bargaining forums emerged.

Despite the high levels of unionisation and increased government protection, the available evidence suggests both growing insecurity and falling pay for many lower-level formal workers. The following table shows

that while these workers fared better than the labour force as a whole, they did not see much improvement in income in real terms.

Skilled and semi-skilled workers experienced a substantial worsening in real pay in 1995-2001, and at best a levelling out in the following two years. In other words, legal protection did not do much to improve these workers' economic circumstances.

Elementary workers saw a considerable improvement in the first few years after 1994, but thereafter also experienced falling real incomes. Moreover, even outside of domestic and farm labour, the majority of elementary workers earned under R1 000 a month in 2003.

Table 8: Workers Earning under R1 000 (in Nominal Terms) in Skilled, Semi-skilled and Unskilled Occupations

Occupation	% Earning under R1 000		
	1995	2001	2003
Technicians and associate professionals	4%	7%	7%
Clerks	12%	12%	11%
Service workers and shop and market sales workers	30%	41%	37%
Craft and related trade workers	27%	35%	35%
Plant and machine operators and assemblers	30%	29%	27%
Sub-total: skilled/semi-skilled	21%	26%	24%
Elementary occupations other than domestic and agriculture	76%	66%	66%
Total Labour Force	36%	39%	41%

Source: For 1995, StatsSA, *October Household Survey*, 1995; for 2001 and 2003, StatsSA, *Labour Force Survey*, February 2001 and March 2003.

The reasons for these disappointing outcomes lie in soaring unemployment reducing workers' market power; and relatively rapid growth in lower-wage sectors, especially retail trade, which are also poorly unionised. While the relatively well paid technical and

business services sectors grew rapidly, they remained relatively small. Informalisation and contracting out of many lower-level jobs, in part to evade the new requirements on dismissals, leave and overtime pay.

Table 9: Employment by Occupation in Skilled, Semi-skilled and Unskilled Occupations, 1996 and 2001 (Census Data)

Occupation	Millions of Workers		% change	% of total	
	1996	2001		1996	2001
Skilled/Semi-skilled	4.15	4.95	19%	46%	52%
Craft and related trade workers	1.30	1.16	-11%	14%	12%
Clerks	0.71	1.05	48%	8%	11%
Service workers, shop and market sales workers	0.82	0.98	19%	9%	10%
Technicians and associate professionals	0.54	0.92	69%	6%	10%
Plant and machine operators and assemblers	0.78	0.84	9%	9%	9%
Elementary occupations including domestic, agriculture and informal	2.38	2.54	7%	26%	27%
Total Labour Force	9.11	9.58	5%	100%	100%

Source: for 1996, StatsSA, *Census in Brief*, downloaded from www.statssa.gov.za, January 2004; for 2001, StatsSA, 2003, *Census in Brief 2001*, Second Edition, Pretoria.

4.2.4 Colonial Employment

The colonial sectors — lower-level work in mining, the public sector, domestic labour and farming — experienced by far the greatest change as a result of the democratic transition. These sectors also experienced

considerable job losses due to a combination of socio-political and economic changes.

The biggest changes resulted not from the labour law, but from broader social and economic changes brought by democracy. Employers in these sectors no

longer had undiluted political and social as well as economic power over their workers. This broader shift in power relations emerged in, among other areas, efforts to improve conditions for migrant workers and protect farm workers' rights as tenants.

In this context, African workers for the first time in these sectors enjoyed full organisational rights, basic conditions of employment, dispute settlement through the CCMA and access to the UIF. In addition, in the 2000s, the government increasingly used its power to set minimum wages for workers in weakly unionised sectors.

These circumstances led to increasing differentiation within this labour market segment. Lower-level public servants and miners were able to organise strong unions and take full advantage of their new rights. In contrast, domestic and farm workers remained poorly organised. As a result, despite greater legal protection, most continued to face poor pay and poor working conditions.

Mining and the public service saw substantial improvements in workers' conditions in the period immediately after 1994. In addition to the minimum standards set by the law, union prevalence in these sectors rapidly rose higher than elsewhere in the economy. An important gain was increased formal job security. Workers in this sector had historically been treated as casual employees to be fired at will without much redundancy payment. After 1994, this rapidly changed, initially as a result of negotiations and later the BCEA.

Moreover, minimum wages rose rapidly in mining and the public sector. Between 1994 and 2000, the incomes of lower-level public servants, who made up 20% of all government employees, more than doubled in nominal terms. From the late 1990s, however, wage increases in both sectors tended to level off. Yet mining and the public sector also experienced considerable job shedding. In mining, this reflected downsizing in gold. In the public service and parastatals, it resulted from the policy of limiting employment, which led to the freezing of well over 200 000 almost entirely lower-level positions in agriculture, forestry and public works. From 2000, outsourcing of public-service security, cleaning and food services also became common.

In contrast, while conditions in domestic and agricultural labour improved considerably over the period before 1994, they remained much worse than in other lower-level formal jobs. Union density stayed extremely low, at 8% in agriculture and 2% in domestic work. This situation reflected the objective difficulty of organising workers in these sectors. They still worked in fragmented and often isolated workplaces, with low skill levels and great competition from the rising numbers of unemployed. Moreover, it appears that many of these workers were foreign born, adding to their vulnerability.

In these circumstances, the available evidence suggested that the new legal framework was honoured almost only in the breach. The Department of Labour

simply did not have enough inspectors to make up for weak worker organisation. Wages also lagged behind the rest of the workforce. In March 2003, virtually all workers in these sectors earned under R1 000 a month, as the following table shows. The share of low-wage workers appeared to have actually increased over the previous two years.

Table 10: Share of Domestic and Agricultural Workers Earning under R1 000 a Month, in Nominal Terms

Sector	2001	2003
Domestic workers	92%	94%
Skilled agriculture and fishing workers	74%	82%

Source: StatsSA, *Labour Force Survey*, February 2001 and March 2003.

In the early 2000s, government set minimum wages for domestic labour and agriculture. In both cases, however, the amounts remained well under R1 000 a month. Rural domestic workers were to earn R400 a month, while urban workers should earn R600. Farm workers were to be paid R650 to R800 a month, depending on the area (Department of Labour, 2003).

Despite the low pay, it appears that domestic and farm workers saw considerable job shedding and casualisation. In part, job losses in farming arose from the substantial shake-out that followed the rapid deregulation of the sector in 1996. But it also reflected the fundamental change in power relations that resulted from the democratic transformation. Employers did not want workers on their land or in their homes if they could no longer exercise the degree of control given by the apartheid system.

Unfortunately, as neither domestic nor commercial farm labour was included separately in the normal employment surveys before 2000, it is hard to specify long-term trends. The Census shows a 10% drop in the number of domestic workers between 1996 and 2001. It shows growth in overall agricultural employment, but does not distinguish farm workers from smallholders. In contrast, it shows a fall of 25% in skilled agricultural workers (calculated from StatsSA, 1997 and 2003). As might be expected, the introduction of labour rights had perhaps the greatest impact on workers who before 1994 laboured under an essentially colonial regime. Workers in mining and the public sector took advantage of the new laws, based on their ability to organise strong unions. As a result, their conditions of employment essentially came to resemble other parts of the formal sector, but despite the government's efforts, domestic and farm labour saw very little improvement.

All these industries saw substantial job shedding, partially for economic reasons and partly as employers responded to changes in power relations with the advent of democracy.

4.2.5 Informal work

Employment in the informal sector was little affected by labour laws. The sector benefited from deregulation and the ending of formal discrimination in the economy after 1994. Still, it faced great obstacles to expansion, and remained predominantly centred on street trading and subsistence agriculture. Incomes remained extremely low. Only 30% of workers in the informal sector were employed by someone else, compared to almost 95% of those in the formal sector and domestic labour (calculated from StatsSA, 2003a, table 2.11.2). Most labour laws, however, do not apply to the self-employed. This in itself meant they did not much affect informal jobs.

It appears that the informal sector expanded substantially in the late 1990s, but essentially stagnated in the early 2000s. The data on the informal sector fluctuate dramatically, however, suggesting problems with survey methods. For one thing, the *October Household Survey* apparently combined informal, some subsistence farmers and domestic labour; the Labour Force Surveys disaggregate these categories and include subsistence farmers more systematically. Thus, the rise in informal employment from 1999 to 2000 in part reflects the introduction of the Labour Force Survey. This methodological change makes it difficult to assess how much non-formal employment actually grew.

Table 11: Informal Workers, Domestic Labour and Subsistence Farmers Relative to Total Labour Force

Year	Millions of Workers	% of Labour Force
1995	1,740	17%
1999	2,706	26%
2000 (September)	3,822	33%
2003 (March)	3,270	28%

Source: StatsSA, relevant *October Household* and *Labour Force Surveys*. Downloaded from www.statssa.gov.za, December 2003.

The vast majority of informal workers did not earn enough to live on, as table 12 shows. In March 2003, three quarters of workers in the informal sector earned under R1 000 a month, compared to a quarter of formal-sector workers.

Table 12: Formal and Informal Incomes, March 2003

Income Category	Formal	Informal	Domestic
Under R1 000	25%	78%	90%
Under R2 500	57%	93%	100%
Total (%)	225%	278%	290%
Total (millions of people)	7,53	2,19	0,98

Source: Calculated from, StatsSA, 2003. *Labour Force Survey, March 2003*. (Pretoria). Table 3.5

Constraints facing the informal sector included the lack of productive assets and skills left by apartheid. As

noted above, government efforts around land reform and infrastructure generally failed to resolve these problems. In addition, the formal economy remained biased toward mining and refining plus some high-level manufacturing. This in turn encouraged concentration in the financial sector and marketing, effectively shutting out new, and especially informal, entrepreneurs (see Shafer 1994 for a general discussion of this phenomenon).

In these circumstances, the vast majority of informal workers remained in dead-end sectors. In 2003, some 40% engaged in trading (largely street trading) and 20% in subsistence agriculture (StatsSA, *Labour Force Survey*, March 2003, Page 5).

4.2.6 Unpaid Labour

Unpaid labour is entirely left out of the labour laws, which do not affect family labour. Still, conditions for these workers have been improved by the state's emphasis on improving women and children's rights, economic security, and access to infrastructure. These issues are covered in other papers on socio-economic rights.

5. Improving Labour Rights In the Future

The analysis here suggests that legislation protecting workplace rights will not achieve much unless more is done to address the high level of unemployment and underemployment and to support union organisation in vulnerable sectors. Some authorities argue (see, for instance, Lewis 2001; DA 2004) that the enforcement of labour rights in itself leads to lower employment levels. However, there is virtually no evidence to support this view. On the other hand, there is considerable evidence to the contrary.

Most studies show that elasticity of demand for labour is well below 1%. By extension, cutting wages would lead to a smaller proportionate increase in employment, and ultimately reduce the total income available to workers. A World Bank study of labour laws (World Bank, 2003) found that South Africa's laws ranked as the 19th most flexible amongst the 133 countries studied. The legislation is particularly flexible on conditions of employment, and moderately relaxed on hiring and firing. On dismissal, South Africa has more relaxed laws than, amongst others, Korea, Thailand or Ireland.

Undercutting workers' rights, then, will not solve the unemployment crisis. Rather, the legacy of apartheid has to be addressed by increasing the ability of marginalised groups to engage, and by restructuring the formal sector toward more labour-intensive sectors. Strategies to that end include:

Public employment programmes that can give young people, in particular, access to skills and experience as well as a small income.

Sector strategies geared to raising employment, rather than simply increasing exports and competitiveness. Expanded programmes to improve the resource and skills base of poor households, and increase access to formal financial and marketing networks.

This overall approach was essentially articulated in the RDP, and was reinforced by the recent Growth and Development Summit (NEDLAC, 2003). The difficulty clearly arises in ensuring consistent implementation. A particular challenge is to design macro-economic policies to support broader development, by providing sufficient resources for redistributive programmes and by ensuring interest and exchange rates are low enough to stimulate domestic production and investment.

Endnotes

1 The concept of labour market segments originally arose in the United States to explain differences in income and career path

associated with race and gender. From this standpoint, labour market segments provide not a research agenda, but an explanation of how women and black people are systematically pushed into worse jobs.

- 2 Based on an analysis of industrial council registrations with the Department of Labour.
- 3 Social protection refers to the array of measures that governments use to improve the conditions of the poor, including the provision of basic services and social grants.
- 4 For historic reasons, the UIF also did not include public service workers, but since the public service provided almost permanent employment, this did not prove to be a major disadvantage.
- 5 For instance, national government proposals in 2003 on free basic electricity would not provide enough to run a refrigerator, but anyone using more than the minimum might lose the free services altogether.
- 6 This section draws on Makgetla, 2004b.
- 7 As discussed below, the 2003 survey data were reweighted using the 2001 Census, and so may not be comparable to the earlier figures that used the 1996 Census.
- 8 For more detail, see Makgetla, 2004a.

Socio-Economic Rights and the Distribution of Basic Services

Dr Neva Makgetla & Robin Autry

1. Introduction

Under apartheid the majority of South Africans were deprived of the most basic services needed for survival and development. These services were constructed as privileges to be distributed on the basis of apartheid's distorted logic.

There were three major manifestations of this system in the unequal distribution of government services: services were distributed along racial lines with blacks, and especially Africans, being refused adequate services; employment and earned income were harder to secure for Africans than any other population group, making it harder for them to pay for services; and Africans, particularly African women, were systematically pushed into rural areas, where infrastructure is less developed in general and often costs more to provide.

Each of these expressions of apartheid has serious implications for the quality and affordability of basic services in South Africa today. The South African Constitution addresses these issues by establishing the right of all citizens to basic housing, health care, education, food, water, and social security, in addition to political and civil rights. These socio-economic rights are protected irrespective of social categories and status groups. Section 7(2) of the Bill of Rights provides that 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights'. One of the major challenges of government the past ten years has been the realisation of these rights for all South African citizens. In this chapter, a number of social and economic rights are addressed.

This chapter focuses on the accessibility, quality, and affordability of basic government services over time. These patterns are discussed for basic water, electricity, sanitation, housing, education, health care, social security and land, using a combination of primary and secondary data. In particular, we use the main government surveys — the *October Household Survey* (OHS) and the *Labour Force Survey* (LFS) — for 1996 and

September 2003 to look at the extent of provision of government services. These time periods were selected to avoid statistical shortcomings of data released during the interim years.¹

This chapter shows that while the government has made progress in securing socio-economic rights, considerable obstacles to universal access remain. In particular, the gap between Africans and non-Africans with access to basic services is large, with Africans being far less likely to enjoy access to the services promised by socio-economic rights. The data indicate that this disparity in provision is predominantly based on income levels and geographic location. These phenomena overlap so that the greatest deprivation is seen among the lowest income groups in rural areas, which are overwhelmingly African.

The disproportionate representation of Africans in rural areas and in low income and unemployed groups is a relic of the apartheid order, and seriously complicates the distribution of basic services. First, government provisions are far more widely available in urban areas than in less densely populated rural areas that lack infrastructure. Second, while racial disparities in service provision have been eradicated, income disparities plague government efforts to secure the socio-economic rights of all South African citizens. The government requires some co-payment for many services, which may make them unaffordable for the very low-income group, even if the fees are relatively modest.

The following section considers the extent of rural-urban migration and shifts in income distribution, as these cross-cutting factors affect service delivery in all areas. The rest of this chapter considers changes in access to basic services and, where possible, their affordability.

2. Rural-Urban Migration and Income Distribution

As the previous analysis indicates, the evaluation of the distribution of government services over the past de-

cade requires an understanding of South African society across income groups and geographical regions. Without this background, disparities in provision, quality, affordability, and access to basic services may be misinterpreted. Using 1996, 2001 and 2003 data, we can piece together a picture of South Africa's social and economic landscape since the birth of democracy. These factors help to make sense of patterns in the distribution of socio-economic rights across regions and social groups.

Table 1a shows the population distribution by province in 1996 and 2001. It indicates substantial migration from provinces that inherited former homelands to those with metropolitan areas. This table understates the overall rural-urban migration, which is not published by the government, since it hides substantial migration within provinces.

Table 1b shows population growth in South Africa's largest metropolitan areas during the same period.² These cities grew between 3,8% and 5,1%, far greater than the national population as a whole.

Table 1a: Population by Province, 1996 and 2001

Year	Population in Thousands		Average Annual % Change
	1996	2001	
Northern Cape	840	823	-0,4%
Eastern Cape	6 303	6 437	0,4%
Free State	2 634	2 707	0,6%
Limpopo	4 929	5 274	1,4%
North West	3 355	3 669	1,8%
Mpumalanga	2 801	3 123	2,2%
KwaZulu-Natal	8 417	9 426	2,3%
Western Cape	3 957	4 524	2,7%
Gauteng	7 348	8 837	3,8%
SA	40 584	44 820	2,0%
Losers	18 061	18 909	0,9%
Gainers	22 523	25 911	2,8%

Source: Calculated from, Statistics South Africa, 2001 Census in Brief. Pretoria. Downloaded from www.statssa.gov.za, December 2003.

Table 1b: Growth in Major Metropolitan Areas, 1996-2001

	Population in Thousands			Difference Due in-Migration*
	1996	2001	% Change	
Johannesburg	2 520	3 230	5,1%	3,0%
Cape Town	2 400	2 890	3,8%	1,7%
Durban	2 520	3 090	4,2%	2,1%
Total	7 440	9 210	4,4%	2,3%
SA	40 580	44 820	2,0%	0,0%
SA less these three cities	33 140	35 610	1,4%	-0,5%

Source: Calculated from Census 1996 and 2001.

* Calculated assuming a 2% growth rate in each city in the absence of internal migration.

Table 2 gives income distribution for income earners (including the self-employed) between 1996 and 2003. It indicates that the share of workers earning under R1 000 a month, in nominal rand, has actually in-

creased slightly. It also suggests a substantial fall in earnings, since the purchasing power of R1 000 dropped by around two thirds between 1996 and 2003. Incomes remain heavily differentiated by race.

Table 2: Income Distribution by Race, 1996-2003

	% of Population Group by Income		% of Income Group	
	1996	2003	1996	2003
African				
Up to R1 000	47%	51%	78%	88%
R1 001 to R2 500	35%	27%	66%	75%
R2 501 to R4 500	9%	12%	56%	59%
R4 501 to R8 000	7%	9%	37%	42%
Over R8 000	2%	1%	16%	19%
Total	100%	100%	63%	71%
Coloured/Asian				
Up to R1 000	36%	26%	17%	10%
R1 001 to R2 500	37%	31%	20%	19%
R2 501 to R4 500	11%	21%	18%	23%

% of Population Group by Income			% of Income Group		
	1996	2003	1996	2003	
R4 501 to R8 000	12%	18%	18%	19%	
Over R8 000	4%	3%	10%	13%	
Total	100%	100%	17%	16%	
White					
Up to R1 000	10%	4%	5%	1%	
R1 001 to R2 500	23%	11%	14%	6%	
R2 501 to R4 500	13%	19%	26%	18%	
R4 501 to R8 000	28%	45%	45%	39%	
Over R8 000	26%	21%	73%	68%	
Total	100%	100%	20%	13%	
All employed people					
Up to R1 000	38%	41%	100%	100%	
R1 001 to R2 500	33%	26%	100%	100%	
R2 501 to R4 500	10%	14%	100%	100%	
R4 501 to R8 000	12%	15%	100%	100%	
Over R8 000	7%	4%	100%	100%	
Total	100%	100%	100%	100%	

Source: Calculated from 1996 October Household Survey and Labour Force Survey, September 2003. Statistics South Africa. Pretoria. Databases on CD-Rom.

These factors mean the following: in the urban areas, infrastructure and housing must expand more rapidly than the national population to keep up with in-migration. Thus, despite the rapid increase in formal housing for the low-income group, the share living in informal housing has remained virtually unchanged, while the share living in traditional housing has dropped.

Charges for services, even if low, may make them unaffordable for the low-income group, which is predominantly African. As a result, the cost to government of providing the services is higher, while access to virtually all government services remains relatively limited for those earning less than R1 000 a month.

3. Basic Infrastructure

3.1 Overall Access

The positive impact of government spending on access to basic infrastructure over the past decade is clear. As table 3 shows, the percentage of households with access to electricity for lighting and cooking has grown, as is the case for households with access to piped water and flush toilets. Access to electricity for lighting has grown most rapidly, from 64% in 1996 to 79% by 2003.

Table 3: Access to Infrastructure, 1996-2003

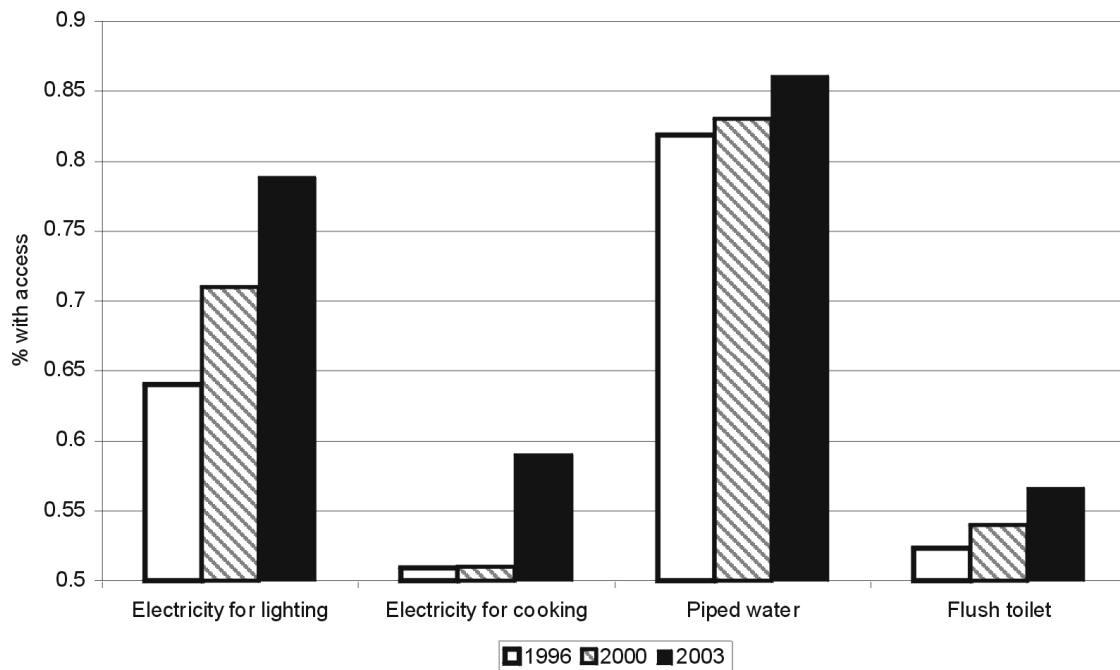
	Percentage of Households with Access to Service			Average Annual Increase in Share with Access	
	1996	2000	2003	1996-2000	2000-03
Electricity for lighting	64%	71%	79%	2,1%	3,6%
Electricity for cooking	51%	51%	59%	0,0%	5,0%
Piped water	82%	83%	86%	0,3%	1,2%
Flush toilet	52%	54%	57%	0,6%	1,6%

Source: Calculated from 1996 October Household Survey and September 2000 and 2003 Labour Force Surveys. Statistics South Africa. Pretoria. Databases on CD-Rom.

Chart 1 indicates that most of the growth in access to basic infrastructure has occurred since 2000. This presumably reflects the more relaxed budgetary stance

in this period, following cuts in real terms in the late 1990s.

Chart 1: Access to Infrastructure, 1996-2003



Source: Calculated from 1996 October Household Survey and September 2000 and 2003 Labour Force Surveys. Statistics South Africa. Pretoria. Databases on CD-Rom.

While there has been significant improvement in the distribution, quality and costs of basic infrastructure, there are still gaps in access, particularly by income level, race, and locality.

3.2 Water

Access to piped water has expanded substantially during the past ten years, but access and affordability

are still challenges in rural areas and among poor populations. Table 4(b) shows that people of all races in urban areas are likely to have access to piped water irrespective of income level. In contrast, in rural areas access to piped water remains problematic for all racial groups.

While rural people are less likely to have piped water, they are also less likely to pay for it.

Table 4a: Water by Income, Race, and Locality, 2003

Monthly Income	Water source	African	Coloured/Asian	Rural White	African	Coloured/Asian	Urban White
Under R1 000	Not piped	22%	50%	41%	0%	1%	0%
R1 001 to R2 500	Piped	78%	50%	59%	100%	99%	100%
	Not piped	21%	49%	31%	1%	1%	0%
R2 501 to R4 500	Piped	79%	51%	69%	99%	99%	100%
	Not piped	20%	28%	44%	0%	0%	0%
R4 501 to R8 000	Piped	80%	72%	56%	100%	100%	100%
	Not piped	18%	28%	27%	0%	0%	0%
Over R8 000	Piped	82%	72%	73%	100%	100%	100%
	Not piped	16%	22%	34%	0%	0%	0%
Total	Piped	84%	78%	66%	100%	100%	100%

Source: Calculated from, September 2003 Labour Force Survey. Statistics South Africa. Pretoria. Database on CD-Rom.

Table 4b: Payment for Water across Locality (2003)

Payment for Water		% Who Pay		% of Total	
Water source		Rural	Urban	Rural	Urban
Not piped	Yes	2%	8%	1%	0%
	No	98%	92%	25%	0%
Piped off site	Yes	23%	18%	9%	2%
	No	77%	82%	29%	7%
Piped on site	Yes	37%	84%	13%	76%
	No	63%	16%	22%	15%

Source: Calculated from September 2003 Labour Force Survey. Statistics South Africa. Pretoria. Database on CD-Rom.

The cost of water may, however, make access unaffordable for many poor households. The available evidence suggests that the official policy of ensuring some free water for poor households has not had a substantial impact. Tables 5 and 6, which are drawn respectively from survey data and from reports by local governments, indicate that, at best, only half of poor households received free water.

Table 5: Payment for Water, 1996-2003

	% Paying For Water	
Income group	1996	2003
Others	55%	58%
Indigent (R500 p.m. in 1996, R1 000 in 2003)*	55%	52%
Total	55%	56%

Source: 1996 October Household Survey and 2003 Labour Force Survey.

* R1 000 in 2003 was about 25% higher than R500 in 1996.

Table 6: Provision of Free Basic Water, 2003

	Total	Access to FBW: Numbers	Access to FBW: Percentage
Total Population	46,5 million	28,4 million	61%
Poor Population	29,4 million	13,6 million	46%
Population with access to infrastructure	35,7 million	25,0 million	70%
Number of municipalities and metros providing free basic water	262	214	82%

Reproduced from: *People's Budget 2005-2006*, p. 19.

Source: Department of Water Affairs and Forestry, Fair Share, 2003.

As table 7 shows, where poor families paid for water in 2000, the cost was relatively high, at around 14% of

their incomes. It is not clear how the shift to free basic water affected these costs.

Table 7: Expenditure on Water by Income Category, 2000

	R0-500	R501-1 000	R1 001-2 500	R2 501-4 500	R4 501-8 000	Over R8 000 ^a
% of households	10%	18%	31%	16%	11%	14%
% of income spent	14%	7%	7%	2%	2%	1%
% of total income from water payments	2%	5%	28%	14%	16%	35%
% of households paying	22%	35%	44%	56%	69%	79%

Source: Calculated from, Statistics South Africa. 2002. Database on expenditure and income, 2000. CD-ROM. Pretoria.

Note: ^a average income in this category was around R200 000 a year.

3.3 Electricity

The highest rate of growth in government provision of basic infrastructure has been in electricity for cooking and lighting. Between 1996 and 2001 there was a 38% increase in the number of electricity connections made across South Africa.³

While there has been an increase in the proportion of households with electricity over the past decade, Chart

1 above indicates that the majority of electricity used is for lighting rather than cooking. Additionally, less than half of the households in poor areas use electricity for heating purposes.⁴ This apparently reflects the installations of low-capacity fuse boxes in most poor households, which makes it impossible to use energy-intensive appliances. The fuse box can be replaced for a relatively modest sum, but it appears many families are

not aware of this fact. It also reflects the relatively high cost of electricity. Unfortunately, in contrast to water, we do not have data on the impact of the shift to free basic

services for electricity. As the following Table 8 shows, in 2000 most poor families did not pay for electricity at all. For those who did, however, the cost was high.

Table 8: Expenditure on Electricity by Income Category, 2000

	0-500	501-1 000	1 001-2 500	2 501-4 500	4 501-8 000	Over 8 001a
% of households	10%	18%	31%	16%	11%	14%
% of income	16%	9%	6%	5%	3%	2%
% of electricity revenues	2%	6%	17%	18%	19%	39%
% of households paying for electricity	38%	49%	57%	71%	85%	90%

Source: Calculated from Statistics South Africa. 2002. Database on expenditure and income, 2000. CD-ROM. Pretoria.
 Note: ^a average income in this category was around R200 000 a year.

3.4 Sanitation

Growth in sanitation has been slower than for water or electricity. As the following table shows, the share of

households with flush toilets rose from 52% in 1996 to 57% in 2003. The proportion of households with off-site toilets declined rapidly.

Table 9: Access to Sanitation by Type of Toilet, 1996 and 2003

	1996	2003	% Change 1996-2003
Flush toilet on site/in dwelling	52%	57%	51%
Pit latrine with ventilation pipe, on site	n.a.	5%	n.a.
Pit latrine without ventilation pipe, on site	4%	25%	796%
Toilet off site	39%	11%	-60%

Source: Calculated from 1996 October Household Survey and September 2000 and 2003 Labour Force Surveys. Statistics South Africa. Pretoria. Databases on CD-Rom.

In rural areas, the government has argued that households should receive ventilated pit toilets (VIPs) rather than flush toilets. This approach reduces both the cost of infrastructure and the use of water. But some critics argue that besides the obvious implications for the quality of life, it may damage ground water, enable the proliferation of mosquitoes, and prove unsanitary in the longer run.

3.4 Housing

Since 1994, the government has delivered close to 1,5 million houses. As Table 10 indicates, the bulk of this growth occurred in the late 1990s, falling between 1999 and 2001, and recovering in 2002. The rate of housing growth varies by province, as the bulk of growth is concentrated in Gauteng, KwaZulu-Natal, Western Cape and Eastern Cape. Gauteng and KwaZulu-Natal account for almost half of all housing built between April 1994 and June 2003.⁵ Housing development has been much slower in Limpopo and the Free State.

Table 10: Number of Houses Completed (by Province), 1994-2002

Province	1994/96	1998	2000	2002	Total
Eastern Cape	6 511	24 659	34 021	58 662	194 686
Free State	13 042	17 391	16 088	9 155	91 230
Gauteng	56 239	58 170	38 547	23 344	355 556
KwaZulu Natal	17 553	53 105	28 547	12 077	256 542
Mpumalanga	11 108	22 899	20 996	14 953	117 489
Northern Cape	19 884	16 838	16 457	21 649	120 012
Limpopo	6 666	2 387	4 148	6 056	32 136
North West	21 287	18 367	14 109	23 784	131 554
Western Cape	25 321	34 575	17 730	20 500	190 305
South Africa	177 611	248 391	190 643	203 588	1 489 510

Reproduced from: *South African Human Development Report*; p. 34.

Source: Department of Housing, 2003; ABC of Housing.

Table 11 shows that the majority of housing growth has been in formal housing with three bedrooms or less. The growth of smaller houses arises largely out of government subsidy programmes, and has been asso-

ciated with smaller household size, possibly indicating less overcrowding. Average household size declined from 4,5 to 3,8 people, or by 16%, between 1996 and 2003.

Table 11: Household Type 1996-2003

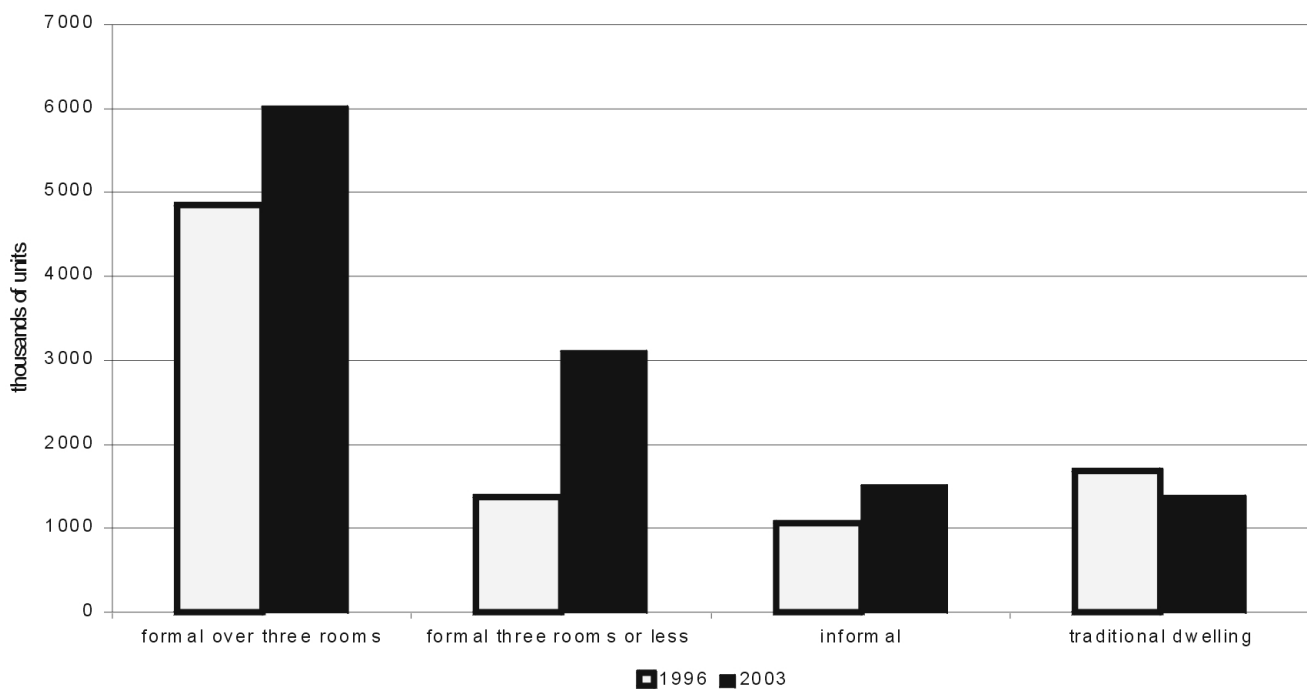
Type	1996	% of Total	2003	% of Total	% Change
Formal with more than three rooms	4 854	44%	6 020	50%	24%
Formal with three rooms or less	1 380	13%	3 116	26%	126%
Informal	1 067	10%	1 519	13%	42%
Traditional dwelling	1 689	15%	1 386	12%	-18%
Total	10 986	100%	12 041	100%	10%

Source: Calculated from 1996 October Household Survey and September 2000 and 2003 Labour Force Surveys. Statistics South Africa. Pretoria. Databases on CD-Rom.

Despite the growth of formal housing, the share of informal housing as a percentage of total housing has increased. This essentially reflects rural-urban drift, as

traditional housing has shrunk by 18% between 1996 and 2003 (see Chart 2).

Chart 2: Housing Type, 1996-2003



Source: Calculated from 1996 October Household Survey and September 2000 and 2003 Labour Force Surveys. Statistics South Africa. Pretoria. Databases on CD-Rom.

By international standards, the South African state still spends relatively little on housing. In 2003/04, housing absorbed 1,4% of all government spending. The housing share rose rapidly from 0,7% of the budget in 1994 to 2,4% in 1996, but then declined to its current levels. In contrast, the international average for housing expenditure as a proportion of total expenditure for developing countries has typically been between 2% and 5%.⁶

The government has relied largely on housing subsidies to realise the right to adequate housing for South

Africans earning less than R1 500 a month. Table 12 indicates that between 1994 and 2003, almost two million housing subsidies were approved by the government. During this period, six million citizens received housing through approved subsidies; 49%, or nearly three million, of these recipients were women. Moreover, the deeds of 481 373 houses built prior to 1994 were transferred to occupants by the end of 2003. Housing subsidies have been disproportionately granted in urban areas; some 7% of all urban housing is subsidised compared with 2% of rural housing.⁷

Table 12: Housing Subsidies, 1994-2003

Housing	Quantity
Subsidies approved	1,985 million
Subsidies for women	49%
Housing received	6 million citizens
Transfer of deeds	481 373

Reproduced from: *Towards a Ten Year Review* (PCAS 2003); p. 26.

Various concerns have been raised around the reliance on subsidised housing. First, relatively low subsidies have led developers to cut corners on quality and size, and locate new housing far from urban centres, leaving residents distant from employment opportunities and amenities. Table 13 shows that while subsidised housing in rural areas is closer to vital amenities, the opposite is true in urban areas. In urban areas, more non-subsidised housing is located within 30 minutes of schools, clinics, welfare offices and other services, than subsidised housing.

Table 13: Housing Subsidies and Distance to Amenities 2003

	Clinic	Hospital	Primary School	Secondary School	Welfare Office	Postal Services
Urban						
Up to 30 minutes						
— with subsidy	84%	60%	92%	86%	70%	78%
— without subsidy	87%	66%	94%	90%	78%	84%
30 minutes to an hour						
— with subsidy	14%	32%	8%	14%	27%	20%
— without subsidy	12%	30%	6%	9%	21%	15%
60 minutes or more						
— with subsidy	2%	8%	0%	1%	3%	2%
— without subsidy	1%	4%	0%	1%	1%	1%
Rural						
Up to 30 minutes						
— with subsidy	59%	39%	76%	68%	39%	54%
— without subsidy	48%	23%	74%	56%	31%	43%
30 minutes to an hour						
— with subsidy	34%	35%	23%	28%	49%	39%
— without subsidy	39%	48%	22%	34%	46%	40%
60 minutes or more						
— with subsidy	7%	26%	1%	5%	12%	7%
— without subsidy	14%	28%	4%	10%	23%	17%

Source: Calculated from, September 2003 Labour Force Survey. Statistics South Africa. Pretoria. Database on CD-Rom.

Second, subsidised housing has relied heavily on small single-family housing. This in turn has encouraged the persistence of low-density settlements, with consequent costs for infrastructure.

Third, while housing has been subsidised, services have been relatively expensive. Estimates suggest that a family receiving a Reconstruction and Development Plan (RDP) house must pay around R100 to R150 a month on services. Initially, the RDP itself assumed that recipients would find it easier to gain and hold a job once they had formal housing. In the event, especially given the remote location of new housing, this has not occurred. Therefore some families have found it impossible to maintain their subsidised housing.

Finally, the subsidy programmes provide only for private individual ownership, with little scope for rental housing or state ownership. This may build rigidities

into the housing market, with few options for low-income families beyond ownership of a stand-alone formal or informal house, or residence in rented backyard space.

3.5 Education

A major challenge facing the government is the reversal of apartheid education and its impact on educational opportunities across local groups and regions. As table 14 shows, the average years of school attendance between 1996 and 2003 increased by approximately half a year overall, with the largest improvement for Africans. In September 2003, Africans under 30 years old had an average of 10,2 years of education, compared with an average of 7,3 years for those over 30 years old.

Table 14: Average Years of Education of Adults¹ by Race, 1996 and 2003

Years of Education			% Change, 1996 to 2003
	1996	2003	
Men			
African	8,2	8,9	8%
Coloured/Asian	9,7	10,2	5%
White	12,7	13,0	2%
Women			
African	7,8	8,6	9%
Coloured/Asian	9,2	9,8	6%
White	12,4	12,7	2%

Note: ¹ Aged 15 to 65. Source: Calculated from 1996 October Household Survey and September 2003 Labour Force Survey. Statistics South Africa. Pretoria. Databases on CD-Rom.

By the 2000s, virtually all children eligible for primary education were in school. The share of children aged seven to 15 attending school rose from 92% in 1991⁸ to 97% in 2003. That means that in 2003, almost 300 000 potential learners remained outside the education system.⁹ Around 88% of learners eligible for Further Education and Training (FET) were in school.¹⁰

In terms of infrastructure, schooling has improved substantially over the past ten years, although schools in the former homeland areas remain both hard to reach and poorly resourced. Table 15 indicates that by 2003, the majority of rural and urban households were less than half an hour from both primary and secondary schools. Still, a quarter of rural households were over half an hour from primary schools, and almost half were as far from secondary schools. Obviously, this places a significant burden on the children concerned.

Table 15: Distance from Schools, 2003

	Primary Schools	Secondary Schools
Rural		
Up to 30 minutes away	74%	56%
30 to 59 minutes away	22%	34%
60 minutes or more away	4%	10%
Total	100%	100%
Urban		
Up to 30 minutes away	99%	98%
30 to 59 minutes away	1%	1%
60 minutes or more away	0%	0%
Total	100%	100%

Source: Calculated from September 2003 Labour Force Survey. Statistics South Africa. Pretoria. Database on CD-Rom.

The share of schools with telephones, running water, toilet facilities and electricity has risen significantly.

Most of those without these amenities are in the former homeland areas. Furthermore, the number of schools with computer access nearly tripled between 1996 and 2000, although only about 10% have computers for learners' use (See table 16).

Table 16: Delivery of Basic Education Services, 1996-2000

Service	1996	2000
Schools with access to telephones	41%	64%
Schools with running water	66%	73%
Students with access to toilet facilities	45%	84%
Schools with access to electricity	40%	55%
Number of schools with computers	2 241	6 581

Source: *South African Human Development Report* (UNDP 2003); p. 24

Overall, the education system proved a powerful mechanism for redistribution, with much greater equity in spending per learner than in overall income distribution.¹¹ Still, the cost of education led to substantial inequalities between schools, and barred poor learners from the better institutions. In contrast with most countries, public schools in South Africa may charge fees, set by school governing bodies that combine parent representatives and educators. Historically white schools, which inherited better facilities and were generally located in relatively prosperous areas, often charged substantial fees, generally running between R2 000 and R10 000 a year. Legally, learners could not be excluded if they could not afford to pay, but this rule was often breached. The National Department of Education characterised some schools' practice in this regard as 'horrifying' and a breach of the Bill of Rights.¹² Even where schools did not set fees, parents had to pay for uniforms.

As the following table shows, school fees absorbed a higher share of the income of poor families than richer ones.

Table 17: Percentage of Income Spent on Education by Income Level, 2000.

Fees for Public Schools Only	Total Cost of Education	% of Households
Under R500	1,3%	3,1%
R501 to R1 000	0,9%	2,0%
R1 001 to R2 500	0,7%	2,0%
R2 500 to R4 000	0,7%	2,6%
R4 001 to R8 000	0,7%	2,7%
Over R8 000	0,6%	2,5%

Source: Calculated from Statistics South Africa, *Income and Expenditure Survey 2000*. Database on CD-ROM.

The fee system maintained substantial inequalities between schools. Thus, a school with 1 000 learners that can charge R2 000 a year per learner will have a budget R2 million higher than a school where parents cannot afford to pay fees. A Department of Education study suggested that in the early 2000s, private funding meant the richest quintile of schools spent two to three times as much per learner as the other 80% of schools.¹³

3.6 Health

Health indicators show mixed progress in improving the health status of the general population. Table 18 shows progress in immunisation rates, antenatal care, and birth weight, nationally. However, mostly because of HIV, life expectancy has decreased — a trend that a mass roll-out of anti-retroviral medication should reverse. South African males aged 15 to 39 years have the highest rate of mortality from unnatural causes, while women in the same age category died primarily as a result of HIV infection in 2001.¹⁴

The government embarked on a massive clinic-building programme, which brought health care much closer to rural and especially urban communities. This programme substantially improved the access of African communities in particular to health care. By 2003,

virtually no households in urban areas were more than an hour from a clinic, and 13% of those were in rural areas.

Table 18: Health Indicators 1994-2002

Indicator	Period	Rate
Immunisation	1994	63%
	2002	72%
Underweight children	1994	9,1%
	1999	11,17%
Infant mortality	1991	40 per 1 000 births
	1998	45 per 1 000 births
Antenatal care	1994	89%
	1998	94%
Life expectancy UNDP	1995	65 years
	2000	52 years
Life expectancy MRC	1995	57 years
	2000	55 years

Source: PCAS, *Towards a Ten Year Review* (October 2003).

Despite this progress, as table 19 shows, South Africa's health outputs were poor compared with other countries that spent less both absolutely and as a percentage of GDP. In part, this reflected continued inequalities in health care. In part, it resulted from high levels of HIV, which in turn could also be seen as a result of shortcomings in public health.

Table 19: Health Inputs and Outcomes, 1995-2000^a

South Africa	Country groups:				Brazil	Cuba	Mauritius	Tanzania
middle income	low income				high income			
Inputs								
% of GDP	8,8%	5,9%	4,3%	10,2%	8,3%	6,8%	3,4%	5,9%
Expenditure p.c. in US dollars	255	116	21	2 736	267	169	134	12
Private health care as % of total	58%	48%	73%	38%	59%	11%	44%	53%
Physicians per 1 000	0,6	1,9	0,5 ^b	3,0	1,3	5,3	0,9	0,0 ^b
Outcomes								
6% of one-year-old children immunised against diphtheria, whooping cough and tetanus (lock-jaw) DTP	81%	85%	61%	94%	97%	99%	92%	85%
Infant mortality rate	56	31	80	5	31	7	17	104
Survival to age 65 — women	33%	78%	60%	90%	79%	88%	85%	31%
Survival to age 65 — men	27%	68%	55%	80%	62%	81%	70%	27%
HIV prevalence	20%	1%	2%	0%	1%	0%	0%	8%

Notes: ^a Figures for various years between 1995 and 2001. ^b 1980. ^c Under 0,05. Source: World Bank. 2003. World Development Indicators 2003. Washington, D.C. USA.

3.7 Social Security

Before 1994, Africans were not eligible for social grants. Soon after the transition to democracy, they became equally eligible for all social grants. The main social grants in 2003 were the old-age pension, the child support grant and the disability grant. As the following table shows, the share of the African popula-

tion receiving a grant has grown rapidly since 1996.

Interestingly, the share of the white population receiving grants is almost the same as for other groups, although incomes in this group are much higher. This would indicate that the boundaries of poverty are slowly drifting to the hitherto affluent group.

Table 20: Share of Population Receiving State Pensions and Social Grants

	African	Coloured/Asian	White
1996			
State pensions (includes civil service pensions)	15%	13%	8%
Social grants	2%	8%	1%
% earning under R1 000	46%	36%	8%
2003			
State old-age pension	19%	18%	16%
Disability grant	5%	6%	5%
Child support grant	14%	12%	14%
% earning under R1 000	51%	26%	4%

Source: Calculated from 1996 October Household Survey and September 2003 Labour Force Survey.

Statistics South Africa. Pretoria. Databases on CD-Rom.

The majority of social grants are child-support grants and old-age pensions. Table 21 shows that these two grants make up the largest portion of the total number of beneficiaries. The highest rates of growth in social grants, however, have been in child-support and disability grants, during the early 2000s. The bulk of the

growth in child-support grant beneficiaries reflects the extension of eligibility to children under 14 years old, which doubled the pool of eligible applicants.¹⁵ Of the approximately 3,6 million children up to 7 years of age who are eligible for child-support grants, only 2,5 million are currently receiving such support.¹⁶

Table 21: Number of Social Grant Beneficiaries by Type of Grant, 2001-2003

Grant Type	April 2001	March 2003	Growth, 2001-2003	% of Total Grants, March 2003
Child-support	974 724	2 513 693	158%	45%
Old age	1 877 538	2 000 041	7%	36%
Disability	627 481	897 050	43%	16%
Foster care	85 910	133 309	55%	2%
Care dependency	28 897	56 150	94%	1%
Grant in aid	9 489	12 279	29%	0,2%
War veterans	6 175	4 629	-25%	0,1%
Total	3 610 215	5 617 151	56%	100%

Reproduced from: People's Budget 2005-2006 (COSATU, SANGOCO, SACC 2004); p. 22.
Source: National Treasury, 2003d.

As table 22 indicates, there is considerable variation in social grant beneficiaries across the nine provinces. Nearly half of all recipients are located in Eastern Cape and KwaZulu-Natal.

Table 22: Social Grant Beneficiaries By Province, 2001-2003

Province	April 2001	March 2003	Growth, 2001-2003	% of Total Grants, March 2003
Free State	205 003	356 518	74%	6%
KwaZulu-Natal	792 144	1 285 463	62%	22%
Gauteng	425 615	682 156	60%	12%
Limpopo	491 680	784 082	59%	14%
Western Cape	318 136	501 126	58%	9%
Mpumalanga	250 849	387 071	54%	7%
North West	304 075	450 712	48%	8%
Eastern Cape	722 440	1 035 763	43%	20%
Northern Cape	100 271	143 260	34%	3%
Total	3 610 215	5 617 151	56%	100%

Reproduced from: People's Budget 2005-2006 (COSATU, SANGOCO, SACC 2004); p. 22.
Source: National Treasury, 2003d.

3.8 Land

Over the past decade, land reform has been pursued to provide land as a basic socio-economic right for all South African citizens. Land rights involve the ability of all citizens to acquire land through equitable processes; the restoration of land to people forcibly dispossessed under apartheid; and provision of security to those with access to land but without legal rights due to past discriminatory laws. Land reform is constitutionally protected and is comprised of three land transfer programmes: redistribution, restitution, and tenure.

The official goal for land reform is the transfer of 30% of South Africa's commercial agricultural land to black people by 2015. However, by mid-2003, only 2,3% of land outside of the homelands, less than 2 million hectares (ha), had been transferred. Despite this poor performance, the pace of actual delivery of commercial agricultural land has increased between 2000 and 2003.¹⁷

Land redistribution and reform aims to improve access to land for commercial and productive use and is targeted to the rural poor, including poor households, labour tenants, farm workers, women, and emergent farmers. Table 23 shows that 1 480 834 ha of land was redistributed between 1994 and 2002. While the amount of land transferred under the redistribution programme increased during the early 2000s, the number of beneficiaries significantly declined. More land has been transferred through redistribution than restitution in all the nine provinces and has been more common in rural provinces, but still not at high rates.¹⁸ The notable exception is the Northern Cape, which accounted for over half of all land transferred between 1994 and 2002. Land transfers in KwaZulu-Natal are also largely the result of redistribution efforts and include over 300 000 ha of quality land transfers.¹⁹

Table 23: Land Redistribution 1994-2002

Year	Total Hectares	Total Beneficiaries
1994	71 656	1 004
1995	11 629	1 819
1996	60 120	5 068
1997	139 849	10 259
1998	229 009	15 995
1999	239 764	24 900
2000	233 426	34 768
2001	263 071	20 920
2002	203 567	12 216
Unspecified	28 743	3 504
Total	1 480 834	130 453

Reproduced from: People's Budget 2005-2006 (2004), p. 10.
Source: DLA 2003.

Another instrument to realise land as a socio-economic right is through the land restitution programme. This programme is designed to provide restoration and redress for individuals and communities that were unfairly dispossessed of their property after 1913. Table 24 shows that 591 721 ha of land was transferred through the restitution programme between 1996 and 2003, at an award cost of R2 012 465 451. The number of beneficiaries significantly increased from 2 100 in 1996/97 to 117 873 in 2002/03.

By the end of 2002, nearly half of the 63 455 restitution claims lodged prior to the 1998 deadline were settled.²⁰ These claims are largely urban and have generally been settled through financial compensation for forced removals, at a total award cost of R1,2 billion by the end of 2002.²¹ The average rate for settling urban claims is R40 000 per claim and R1,5 million for each rural claim.²² Thus, the frequency of claims settled is strongly associated with budget allocations and priorities.

Table 24: Restitution Claims Settled per Financial Year 1996-2003

Financial Year	Claims	Households	Beneficiaries	Hectares	Total Award Cost
1996/97	1	350	2 100	2 420	R5 045 372
1997/98	6	2 589	14 951	31 108	R15 568 746
1998/99	34	569	2 360	79 391	R2 988 577
1999/00	3 875	10 100	61 478	150 949	R 155 045 907
2000/01	8 178	13 777	83 772	19 358	R 321 526 061
2001/02	17 783	34 860	167 582	144 111	R994 168 313
2002/03	7 031	27 266	117 873	164 384	R518 222 476
Total	36 908	89 511	450 116	591 721	R2 012 465 451

Reproduced from: People's Budget 2005-2006 (2004), p. 10. Source: CRLR, 2003a:25

In the area of land tenure, a number of laws have been passed to recognise statutory land rights and regulate evictions, including the Land Reform (Labour Tenants) Act of 1996 and the Extension of Security of Tenure Act of 1997. However, poor reporting systems within the Department of Land Affairs make it difficult to track the number of legal and illegal evictions made under the laws.²³

4. Conclusion

The realisation of access to quality basic services as a socio-economic right for all South Africans has been only partially achieved over the past decade. Many of the obstacles to improving access are related to large income inequalities, the lack of basic infrastructure in historically black areas, and rural-urban disparities fostered under the apartheid system. The imposition of high user charges relative to the incomes of the poor has multiplied the impact of these problems.

All of these factors mean that, while public provisions are no longer allocated according to racial criteria, gaps in infrastructure provision still correlate largely with race. Because Africans are disproportionately represented in lower income groups and rural areas, they are less likely than other population groups to have access to basic services. Thus, despite the progress made over the past ten years, a substantial majority of South Africans are in need of basic infrastructure and services.

Government efforts have led to the most comprehensive and non-discriminatory social service delivery programme in South African history. But the persistence of barriers to access highlights the close relationship between poverty and living standards, and suggests the need for sustained and co-ordinated efforts to treat both the causes and outcomes of inadequate access.

Endnotes

- 1 The 1996 and 2003 data sets use the Census weights for 1996 and 2001, where the interim surveys used a demographic model that apparently underestimated overall growth and rural-urban migration.
- 2 Population figures at the municipal level may not be entirely comparable due to differences in demarcation. Despite this limitation, the data indicate a significant increase in the five-year period. However, some of this growth may be due to immigration, rather than rural-urban migration.
- 3 PCAS, *Towards a Ten Year Review*, October 2003, p. 25.
- 4 PCAS, *Towards a Ten Year Review*, October 2003, p. 24.
- 5 COSATU, SANGOCO, SACC, *People's Budget 2005-2006 (2004)*.
- 6 World Bank, 1993; May, 1998; UN Human Settlements Programme, 2003.
- 7 Calculated from, September 2003 Labour Force Survey. Statistics South Africa. Pretoria. Database on CD-Rom.
- 8 National Department of Education. 2003. Review of Financing, Resourcing and Costs of Education in Public Schools. Downloaded from www.education.pwv.gov.za in January 2004, p. 13.
- 9 Calculated from, September 2003 Labour Force Survey. Statistics South Africa. Pretoria. Database on CD-Rom.
- 10 National Department of Education, op cit. p. 14.
- 11 National Department of Education. 2003. op cit. p. 15 ff.
- 12 Ibid. p. 54.
- 13 Ibid. p. 72.
- 14 UNDP, *South African Human Development Report (2003)*.
- 15 COSATU, SANGOCO, SACC, *People's Budget 2005-2006 (2004)*.
- 16 Ibid.
- 17 COSATU, SANGOCO, SACC, *People's Budget 2005-2006 (2004)*.
- 18 Ibid.
- 19 Ibid.
- 20 COSATU, SANGOCO, SACC, *People's Budget 2005-2006 (2004)*.
- 21 PCAS, *Towards a Ten Year Review*, (October 2003).
- 22 Ibid.
- 23 COSATU, SANGOCO, SACC, *People's Budget 2005-2006 (2004)*.

Land

Karin Lehman

1. Historical Context

Apartheid and colonial policies denied the majority of black South Africans adequate access to land, which was an infringement not only of their rights to dignity and equality, but also to the economic opportunities that follow from access to land. In its 1997 White Paper on Land Reform, the government made a four-fold case for land reform: to redress the injustices of apartheid; to foster national reconciliation and stability, to underpin economic growth, addressing in particular rural unemployment; and to improve household welfare and alleviate poverty.¹ Since 1994, the government's restitution and redistribution programmes have resulted in the transfer of about 2% of land to black South Africans, while tenure reform remains beset by controversy. There is growing discontentment with the slow pace of land reform in South Africa, and the need for expeditious reform that meets the government's own case is exemplified by the crisis land unrest has led to in Zimbabwe.

The first step towards redressing three-and-a-half centuries of land dispossession was taken in 1991, with the Abolition of Racially Based Land Measures Act 108 of 1991. The Act repealed legislation relating to land-use and ownership with a racial bias, most notably the Black Land Act 19 of 1913. Under the latter, black South Africans were prohibited from owning land outside scheduled reserves in all parts of South Africa, and other population groups were prohibited from owning land inside the reserves. The reserves, in total, comprised 7% of the South African landmass when the Act was first introduced in 1913. Later additions, as a result of the Development Trust and Land Act 13 of 1936, increased the total area to about 13% of the country.² As was recognised in the 1997 White Paper on South African Land Policy, reversing the effects of colonial and apartheid land policies is a mammoth task, but one that is vital for the well being of the majority of South Africa's citizens, for whom landlessness and poverty are closely linked.³

This Act also created the South African Development Trust, to which ownership of most of the reserve land was transferred. It was these reserves that, after 1948,

were transformed into the supposedly 'self-governing' and 'independent homelands', the cornerstone of the spatial apartheid policies by which African peoples were ultimately stripped of their South African citizenship and made citizens of one or other of the homelands.⁴ Between 1960 and 1980 alone, it is estimated that 3,5 million black South Africans were dispossessed of their land by various apartheid laws.⁵

2. International Standards

The right to property — not specifically land — is included in Article 17 of the Universal Declaration of Human Rights, 1948. There is, however, no explicit recognition of this right in either of the two covenants adopted in 1966, due to controversy over the definition and limits of such a right. However, the right to property has been included in the Convention on the Elimination of All Forms of Racial Discrimination (CERD) 1965, and the Convention on the Elimination of All Forms of Racial Discrimination against Women (1979). It also features in regional human rights conventions, particularly the African Charter on Human and Peoples' Rights (1981), and the American Convention on Human Rights (1969). Apart from guaranteeing the right to property in Article 14 of the African Charter on Human and Peoples' Rights, Article 21 provides:

- (1) All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
- (2) In the case of spoliation, the dispossessed people shall have the right to the lawful recovery of their property as well as to an adequate compensation.

The right to land for indigenous peoples is dealt with in the International Labour Organisation (ILO) Convention (169) Concerning Indigenous and Tribal Peoples. This Convention, *inter alia*, protects ownership of traditional land by indigenous communities and rights to access of natural resources found on them.

3. South African Law and Policy

Although the interim Constitution expressly mandated only a land restitution programme, various legislative measures aimed at redistribution and tenure reform were adopted between 1991 and 1996, when the final Constitution came into effect. The final Constitution mandates restitution, redistribution and tenure reform, while remaining committed to the protection of private property rights.⁶

The land reform provisions of the 1996 Constitution form part of the 'property clause' of the Bill of Rights in Section 25 which provides that:

- (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
- (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
- (7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

The purpose of the land reform programme is to redress the wrongs of spatial apartheid by, optimally, restoring land to people of which they were forcibly dispossessed; to provide those without land access to land, so as to improve their economic well being; and to provide those who do have access to land, but whose continued access is precarious because they do not enjoy rights in the land, with security of tenure.⁷

Land reform is a multi-faceted and complex process. As a result, there is no single statute through which the entire land reform programme has been implemented. Instead, there are multiple statutes, adopted at different times to address different problems, each of which gives the Department of Land Affairs, and other agencies, extensive powers. The lack of a single comprehensive statute, or even of a clearly articulated and co-ordinated vision linking the various land reform measures, especially as they relate to broader agrarian reform, rural development and poverty alleviation; as well as the lack of co-ordination between different levels of government, has attracted considerable criticism.⁸

In the interests of space, this chapter concentrates on those aspects of the land reform programme that are considered to have had the greatest direct impact on people's access to land, in particular their ability to obtain ownership of land.

3.1 Land Restitution

The legislation through which the land restitution programme has been implemented is the Restitution of Land Rights Act 22 of 1994 which, in accordance with Section 25(7) of the Constitution, entitles any person or community, deprived of a right to land after 19 June 1913, to restoration of that right or to other equitable redress. The forms that such redress may take are principally the grant of alternate land or an award of financial compensation.⁹ The Act establishes a Commission on Restitution of Land Rights and a Land Claims Court.¹⁰ The Commission is empowered to investigate claims and to attempt mediation and settlement of disputes.¹¹ If such disputes cannot be settled, the Commission must refer the dispute to the Land Claims Court.¹²

In order to qualify for restitution, claimants were required to lodge their claims by no later than 31 December 1998.¹³ The total number of claims lodged timeously are estimated to be approximately 68 787.¹⁴ A total of 46 727 claims had been settled as at 31 December 2003, affecting 112 472 households and 590 880 individual beneficiaries.¹⁵ Extrapolating from these figures, the total number of beneficiaries at the end of the restitution process will be in the region of 200 000 households and one million people, far short of the numbers dispossessed of their land after 19 June 1913. Many potential claimants failed to lodge claims timeously, and their subsequent appeals to the Commission to be permitted to do so belatedly have been unsuccessful, as the Commission is bound by the provisions of the Act.¹⁶ Since the Commission and Land Claims Court have been directed by the President to complete the restitution process by 2005, it appears unlikely that the Act will be amended to allow the lodgement of additional claims.

As at 31 December 2003, approximately 29 000 claims remained outstanding, many of them the more complicated rural claims.¹⁷ Although it has taken eight years to settle 46 727 claims, it is possible that the restitution process will be completed by the end of 2005, judged from the increased rate of settlement over the past few years. The slow pace of resettlement in the first three years, in which only 41 claims were settled, was at least partly attributable to the cumbersome procedure required under the Restitution Act in its original form. Amendments introduced in 1999, which allowed claimants to bypass the Commission and submit their claims directly to the court,¹⁸ together with the power given to the Minister to settle land claims without an order of court, are thought to have contributed to the significant increase in the number of claims settled per annum.¹⁹

Of the 46 727 claims settled, 17 080 involved the restoration of land, while 27 165 have involved awards of financial compensation, and a further 2 482 alternative remedies.²⁰ The overwhelming majority of settled claims relate to urban land, with 40 894 urban claims

settled in comparison with 5 833 rural claims, which represent about 20% of the total number of claims lodged.²¹

The 17 080 restoration awards have resulted in the transfer of only 810 292 hectares (ha) of land, which is less than 1% of South Africa's total land area. The restitution process therefore looks unlikely to change, to any significant extent, the racially skewed patterns of land ownership that resulted from the post-1913 land transfers under apartheid, or to contribute to the sustainable economic development of beneficiaries, of which 25% have been women.²² The reasons for the greater number of financial compensation awards over restoration awards are varied, and include the personal preferences of claimants, as well as difficulties experienced by the department in acquiring land back from its present owners.²³ On the other hand, the majority of rural claims are still outstanding, in which restoration awards are likely to increase, and which could, given the size of some such claims, still have an appreciable impact on land ownership patterns.²⁴

In order to facilitate future restoration, a controversial amendment to the Restitution Act²⁵ has been approved by both houses of parliament.²⁶ The amendment gives the Minister of Land Affairs the power to expropriate land for restoration or other land reform purposes even in the absence of a prior court order or an agreement with the land owner, as is required under the Act at present.²⁷ The rationale for the amendment is that the present expropriation procedure under the Restitution Act is cumbersome, and that the amendment simply gives the Minister of Land Affairs equivalent power to that enjoyed by the Minister of Public Affairs under the Expropriation Act 63 of 1975.²⁸

The overall impact of the land restitution programme on land reform in South Africa, especially rural land-holding patterns, will only be clear once the restitution process is complete.

3.2 *Land Redistribution*

The intended beneficiaries and purposes of the redistribution programme are identified in the 1997 White Paper on Land. The programme is intended to provide 'the poor with access to land for residential and productive uses, in order to improve their income and quality of life', and its intended beneficiaries are 'the poor, labour tenants, farm workers, women, as well as emergent farmers'.²⁹ The White Paper emphasises the need for a land redistribution programme that responds even-handedly to all the above groups, with priority given to poor households.³⁰

In contrast to the restitution programme, the redistribution programme has not been implemented through a single statute. Instead there are a number of statutes which confer a range of powers upon the Minister. Collectively, they empower the Minister to designate land for settlement or development purposes. The principal statutes are the Provision of Land and Assis-

tance Act 126 of 1993 and the Development Facilitation Act 67 of 1995.³¹ The most important component of the redistribution programme, from the perspective of persons who wish to access land, is contained in the Provision of Land and Assistance Act. The Act entitles the Minister to grant financial assistance to any person without land or with limited access to land, for the purpose of acquiring land for residential, agricultural or small business development purposes.³²

Relying on the Provision of Land and Assistance Act, the Department of Land Affairs has developed various sub-programmes through which to effect the transfer of land from both the state and white land owners to black beneficiaries. Between 1994 and 1999, the principal sub-programme was the Settlement/Land Acquisition Grant (SLAG). SLAG was intended to enable poor households, with an income of less than R1 500 per month, to obtain land for subsistence purposes, for which grants of up to R16 000 could be awarded. It was envisaged that the scheme's principal beneficiaries would be the rural poor.³³

SLAG survives as the Land Affairs Department's only mechanism for providing land for rural settlement (housing). Very little has been done in this regard, however, and the department's medium-term strategic and operational plan for the period 2002 to 2006 shows an intention to steadily decrease land transfers for rural settlement.³⁴

In 2001, a new Land Redistribution for Agricultural Development sub-programme (LRAD)³⁵ was introduced, in terms of which individuals are also entitled to apply for grants. The department considers it its flagship redistribution programme, yet only 400 000 ha had been transferred under the programme by September 2003, which is less than 0,5% of South Africa's total land area.³⁶ The significantly higher grants awarded under LRAD, ranging from R20 000 to R100 000, and the introduction of an 'own contribution' component has led to concern that its principal beneficiaries are no longer the very poor, but wealthier emergent farmers.³⁷ There is also concern over the levels of project failures, which are attributed to beneficiaries' receiving inadequate post-transfer support.³⁸

Total redistribution land transfers since 1994 account for approximately 1% of South Africa's total land area, and 2,5% of agricultural land. At the present rates of transfer, the Department of Land Affairs seems unlikely to meet its target of transferring 30% of all agricultural land by 2015.³⁹ In order to do so, it will need to increase its current rates of transfer five-fold.⁴⁰ Of the 24 million ha of land owned by the state,⁴¹ 772 626 ha have been transferred under the redistribution programme.⁴²

A further component of the redistribution programme is the municipal commonage programme, introduced in 1997. Commonage refers to land owned or controlled by municipal authorities, and is a potentially valuable resource to alleviate the land needs of the poor. The

programme encourages municipalities to make commonage land available for poor residents for use as food gardens, grazing land, eco-tourism and other purposes. Financial assistance has been provided to municipalities to acquire additional land for commonage purposes and, until the end of 2002, this accounted for 31% of all land transferred within the redistribution programme. The commonage programme was actively implemented only in some provinces, however, and since the introduction of LRAD, there has been a sharp decline in departmental support for the acquisition of new commonage.⁴³ Commonage administration in many municipalities is moreover poorly managed, and large tracts of commonage continue to be leased to white commercial farmers, exacerbating land hunger amongst previously disadvantaged farmers.⁴⁴

The 1997 White Paper promises that the needs of marginalised individuals and women will receive top priority in the redistribution programme.⁴⁵ The LRAD policy document similarly promises that not less than one third of land transferred under the LRAD will accrue to women. Despite these promises, women, youth and the disabled are expected to receive at most 7,5% of all land transferred under the redistribution programme.⁴⁶

Critics of the government's redistribution programme attribute the slow pace of reform to the government's continued commitment to the demand-driven, market-based 'willing-seller, willing-buyer' principle, to which the government committed itself in the 1997 White Paper, and the fact that expropriation is seen as a mechanism of last resort.⁴⁷ In keeping with this, the Minister has to date rarely exercised the powers of expropriation that have been conferred on her by the Provision of Land and Assistance Act.⁴⁸ The proposed amendments to the Restitution Act to facilitate expropriation, have met with considerable resistance from commercial agricultural groups.⁴⁹

3.3 Land Tenure Reform

In contrast to the restitution and redistribution programmes, tenure reform is characterised by the existence of a slew of legislation. The numerous legislative measures that have been adopted are in themselves evidence of the government's commitment to tenure reform, but since most tenure reform does not require direct transfers of land, it is more difficult to measure the success of the tenure programme than it is to measure the success of the restitution and redistribution programmes.

There is no single overarching purpose to tenure reform, and the 1997 White Paper describes tenure as a 'particularly complex process'.⁵⁰ It is complex because occupiers of land range from farm dwellers (whose entitlement to occupy derives from an employment contract) to communities that have occupied land under indigenous systems of law for generations and prefer communal forms of tenure, to illegal squatters in

desperate need of land and housing.

Since the result of colonial and apartheid land laws is that the majority of black South Africans fall into one of these categories, the tenure reform programme is the programme likely to have the greatest impact on land-holding in the long run, despite the fact that its effects are less readily quantifiable.

The most significant tenure reform measures adopted have been the Interim Protection of Informal Land Rights Act 31 of 1996, and the Communal Property Associations Act 28 of 1996. The first Act provides that certain categories of occupiers enjoy 'informal' rights to land, of which they may not be deprived except with their permission. In keeping with indigenous legal conceptions of land ownership, the second Act allows groups and not simply individuals to own land. The Act is specifically intended to benefit disadvantaged communities. In order to hold or acquire land as a group, a Communal Property Association (CPA) must first be registered with the Director-General of Land Affairs. The 300 CPAs registered as at May 2001 represented 75% of all land reform projects at that time.⁵¹

'Acute problems' have, however, been experienced with the operation of CPAs, and the Directorate of the Monitoring and Evaluation of the Department of Land Affairs has recommended that ongoing research and monitoring of CPAs be undertaken.⁵² The results of such research are not yet publicly available, and the Director-General has yet to submit an annual report on CPAs to the Minister, as is required of the Director-General under the Act.⁵³ Research by private organisations is particularly critical of the lack of government support for CPAs, particularly by local authorities.⁵⁴

Other tenure reform legislation includes the Upgrading of Land Tenure Rights Act 112 of 1991, the Land Reform (Labour Tenants) Act 3 of 1996, the Extension of Security of Tenure Act 62 of 1997, the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, and the Transformation of Certain Rural Areas Act 94 of 1998. Little published research on the impact of these measures on land reform as a whole is available,⁵⁵ but tenure reform in general continues to be regarded as the most 'intractable' part of South Africa's land reform programme, with an estimated 13 million people in the former homelands alone, whose rights are not yet secure.⁵⁶ It is still not certain whether the controversial Communal Land Rights Bill will be adopted.⁵⁷ The most serious criticism that has been levelled at the Bill is that it may entrench the powers that traditional leaders exercise over the administration of communal land. It is feared that the administrative bodies envisaged in the Bill will undermine the security of tenure of individual members within the community, because the land administration committees may replicate traditional councils and need not be democratic decision-making bodies.⁵⁸ It is also feared that rural women in particular will suffer in the face of traditional

leaders' continued intransigence in recognising their equal entitlement to land.

There is a need for a comprehensive evaluation of the land tenure programme, but at present it is not receiving the institutional and financial support being given to the land restitution and redistribution programmes. The promise made in the 1997 White Paper that a Green Paper specifically on land tenure would be forthcoming by the end of 1997, has yet to be fulfilled.

4. Assessment

The total volume of land transferred under the land reform programme as a whole since 1994 is approximately 3 million ha, or 2,5% of South Africa's total land area, which has benefited approximately 700 000 individuals and households.⁵⁹ Despite the DLA's failure to deliver the promised area of land to all the promised beneficiaries, and despite uncertainty as to the actual success of the various tenure reform measures, the past year has witnessed significant improvement in the operation of the Department of Land Affairs and its land reform programme as a whole. One important indicator is the fact that the department, for the first time, used almost its entire budget (98%) in 2003, of which 79% was spent on land reform.⁶⁰ Underspending in the department had been a significant problem in previous years, particularly in the 1996/97 financial period, when the department spent only 31% of its budget.⁶¹

As the department improves its delivery performance, budgetary constraints are likely to prove an increasing problem. Despite a significant increase in the department's total budgetary allocation for 2003, it remains below 0,5% of the national budget.⁶² Already the department has over-committed itself in respect of LRAD funding.⁶³ The allocation of additional resources will be vital to the department in increasing its delivery of land, particularly in the redistribution and tenure reform programmes, in respect of which expenditure is decreasing, as expenditure on the restitution programme is growing.⁶⁴ This pattern may however be driven by the need to complete the restitution programme by 2005, at which point land redistribution and tenure reform should claim the entire land reform budget. Key components of future action should include the development of a co-ordinated strategy for land reform as a whole, increased co-operation amongst different levels of government, and an increased budget.

Endnotes

- 1 Department of Land Affairs, *South African Land Policy White Paper*. Chapter 2. Law and Policy. <http://land.pwv.gov/white%20Paper/whitetab.htm>.
- 2 Saunders C, *Historical Dictionary of South Africa*, p. 123.
- 3 (n 120 above) p. 7.
- 4 By the Bantu Homelands Citizenship Act 26 of 1970.
- 5 (n 1 above) p. 11.
- 6 The three-pronged land reform programme was first set out in the African National Congress *The Reconstruction and Devel-*

opment Programme: A Policy Framework (1994).

- 7 See further the White Paper (n 120 above) Chapter 2.
- 8 Lahiff E & Rugege S, *A critical assessment of land redistribution policy in the light of the Grootboom judgment* (2002), 6, *Law, Democracy and Development* pp. 279-302; Hall R *et al.* 'Final report' in *Evaluating land and agrarian reform in South Africa*, Series No 10 Programme for Land and Agrarian Studies (PLAAS) 2003 p. 33; *Annual Report 2003 Surplus People's Project*, <http://www.spp.org.za/publications/default.htm>.
- 9 Section 35.
- 10 Sections 4 and 22.
- 11 Sections 6 and 13.
- 12 Section 14. See section 22 for the various orders the court may make.
- 13 Section 2(1)(e).
- 14 Commission on the Restitution on Land Rights, *Annual Report of the Commission on the Restitution of Land Rights 2002/2003*, <http://land.pwv.gov.za/restitution/booklet.pdf>.
- 15 Commission on the Restitution on Land Rights, *Cumulative Statistics as at 31 December 2003*, <http://land.pwv.gov.za/restitution>.
- 16 Commission on the Restitution on Land Rights, *Commission on Restitution of Land Rights (CRLR) Achievements and Challenges*, <http://land.pwv.gov.za/restitution> p. 4.
- 17 Hall *et al.* (n 127 above) p. 5.; CRLR Achievements and Challenges (n 135 above) p. 4.
- 18 Section 38B.
- 19 Section 42D.
- 20 Cumulative Statistics (n 134 above). The CRLR would prefer claimants to opt for land restoration. See Achievements and Challenges (n 134 above) pp. 5-6.
- 21 A breakdown between rural/urban claims settled, <http://land.pwv.gov.za/restitution>.
- 22 CRLR Annual Report 2002/3 (n 133 above) p. 1.
- 23 *Ibid.*
- 24 One such rural claim is that of the Mbila community in KwaZulu-Natal which involves more than 1 000 households and 43 000 ha of land. CRLR Annual Report 2002/03 (n 133 above) p. 1.
- 25 Restitution of Land Rights Amendment Bill.
- 26 As at 15 January 2004, <http://thor.sabinet.co.za>.
- 27 Sections 5 and 5A. By mid-2003, only two properties had been expropriated for restitution purposes. See Hall *et al.* (n 127 above) p. 10.
- 28 Notes on the Indaba regarding the Restitution of Land Rights Bill held on 26 June 2003, <http://land.pwv.gov.za/restitution>.
- 29 White Paper (n 120 above) para 4.3.
- 30 Para 4.4.
- 31 This Act introduces measures to fast-track the release of land for development projects, in particular the provision of low-cost housing. For criticism of the fact that insufficient attention is given to the development of urban land for housing purposes by the Department of Land Affairs, see Lahiff & Rugege (n 127 above) p. 293.
- 32 Section 10(1)(b). The Minister is also entitled to grant financial assistance to persons who wish to secure or upgrade their tenure or who wish to develop the land with the permission of the owner, and to persons dispossessed of their land who do not have a right of restitution in terms of the Restitution of Land Rights Act; section 10(1) read together with sections 10(2)(b) & (c).
- 33 White Paper para 4.7. The limit of R15 000 set in the White Paper was later raised to R16 000. See Grants and Services (version 6) at <http://land.pwv.gov.za/redistribution/newpage6.htm>.
- 34 The target for 2002/03 is 38 843 ha, and is down to 17 185 ha for 2005/06. Medium term operational and strategic plan 2002-2006, http://land.pwv.gov.za/publications/news/Strat_Plan.htm.
- 35 <http://land.pwv.gov.za/redistribution/lrad.htm>.

- 36 'DLA continues upward trend in getting people back to land' *Land News* No 5 2003, http://land.pwv.gov.za/publications/formal/land_news.htm.
- 37 Hall *et al.* (n 127 above) p. 5. The report further states that 'the access of the very poor to LRAD is increasingly in doubt' at p. 9.
- 38 Jacobs P. *et al.* 'Land Redistribution' in *Evaluating Land and Agrarian Reform in South Africa*, Series No 1 (PLAAS) 2003 19ff. 'Emerging farmers face lack of support on new land study', *Business Day*, 23 September 2003.
- 39 The 30% target appears not to include agricultural land within the former homelands. See 'Vital to speed up land reform', *Mail & Guardian*, 20 October 2003.
- 40 Hall *et al.* (n 127 above) p. 7.
- 41 Jacobs *et al.* (n 157 above) p. 15.
- 42 *Land News* No 5 (n 155 above).
- 43 Hall *et al.* (n 127 above) p. 15.
- 44 Department of Land Affairs, 'Municipal commonage administration: Can the new-look municipalities promote emergent farming', *Land News* No 5, 2003, http://land.pwv.gov.za/publications/formal/land_news.htm.
- 45 Para 4.7.1.
- 46 Jacobs *et al.* (n 157 above) p. 9.
- 47 Lahiff & Rugege (n 127 above) pp. 306-307.
- 48 Section 12. Lahiff & Rugege (n 127 above) p. 295.
- 49 Hearings on Restitution of Land Rights Amendment Bill, 25 August 2003, *Land News* No 4, 2003, http://land.pwv.gov.za/publications/formal/land_news.htm.
- 50 Para 4.15.
- 51 500 CPAs had been registered by June 2003. 'Labour problems plague land reform's laatlammetjie', *Mail & Guardian*, 18 June 2003.
- 52 An Assessment Framework for Communal Property Associations Directorate Monitoring and Evaluation Department of Land Affairs 2001, <http://www.me-dla.org.za/systems/cpa.pdf>, p. 3. See also Nonyona M. *A Trust Instrument Given to the Operation of CPAs* (June 2002), Butterworths Property Digest p. 3.
- 53 Section 17.
- 54 See the sources at (n 170 above), and Hall *et al.* (n 127 above) p. 28.
- 55 The Land Claims Court has the jurisdiction to decide disputes under the Land Reform (Labour Tenants) and Extension of Security of Tenure Acts. Its judgments are available electronically, at <http://wwwserver.law.wits.ac.za/lcc>.
- 56 Wisbourg P. & Rohde R., *TRANCRAA and Communal Land Rights: Lessons from Namaqualand* PLAAS (2003) Policy Brief No 4 p. 1.
- 57 B67 — 2003. See Nonyona M. *The Communal Land Rights Bill 2002 and Related Legislation* (December 2002), Butterworths Property Digest.
- 58 Sections 21 and 22.
- 59 Jacobs *et al.* (n 157 above).
- 60 'How all the ministers fared this year', *Mail & Guardian*, 19 December 2003.
- 61 Jacobs *et al.* (n 157 above) p. 9.
- 62 'More money for land reform reflects state's political will', *Business Day*, 27 February 2003.
- 63 Hall *et al.* (n 127 above) p. 9.
- 64 Department of Land Affairs, 'Poor emphasis on tenure reform and redistribution', *Land News* No 4, 2003, http://land.pwv.gov.za/publications/formal/land_news.htm; Lahiff & Rugege (n 127 above) p. 310.

Chapter Seven

Housing

Professor Pierre de Vos

1. Historical Context

Before the advent of democracy in 1994, the apartheid government's housing policy was intimately associated with the implementation of apartheid. The Group Areas Act 41 of 1950 prohibited black South Africans from living in areas reserved for whites. The government used this Act in conjunction with other legislation to systematically segregate the races; and to force black South Africans out of 'white' towns and cities into townships and, if possible, to rural areas designated as 'homelands'. Many black South Africans were evicted from their houses and many others were left homeless by forced removals and 'influx control' measures.¹

Although the government did provide housing for black South Africans during the apartheid era, this was done in the context of 'influx control' measures, which tried to stem massive migration of rural inhabitants to the large cities. Thus, in 1994 more than seven million South Africans — most of them poor and black — lacked access to adequate housing.²

2. International Standards

On an international level, the right to adequate housing is provided for in the Covenant on Economic, Social and Cultural Rights (CESCR), and the Committee on the implementation of the CESCR has elaborated on the right in General Comments 4 and 7. According to the Committee, the core guarantees include legal security of tenure; availability of services, materials and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy. It is stated in the National Housing Code (see below) that South Africa concurs with this concept of housing, although it is not party to the CESCR.

The right of access to adequate housing thus includes sustainable access to clean drinking water; energy for cooking, heating and lighting; sanitation; washing facilities; food storage facilities; refuse disposal; site drainage; and emergency services. Adequate housing should provide adequate space and protection from the cold, damp, heat, rain, wind, structural hazards or other

threats to health. The costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised. Housing should be located to allow access to employment, health care, schools, etc. Disadvantaged groups should be ensured some degree of priority consideration in the housing sphere. There is no provision on the right to housing or shelter in the African Charter on Human and Peoples' Rights. However, the African Commission in its decision in *SERAC v Nigeria* decided that a right to housing or shelter was implicitly recognised in the Charter.³

3. South African Law and Policy

Section 26 of the South African Constitution guarantees for everyone the right of access to housing:

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative or other measures, within its available resources, to achieve the progressive realisation of this right.
- (3) No one may be evicted from their home, or have their homes demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

Other provisions in the Constitution also contain guarantees regarding housing. Section 28(1)(c) accords every child the right to shelter. Furthermore, Section 35(2)(e) provides for prisoners' rights to adequate accommodation. Section 21 is also indirectly implicated in the right to housing in as much as it guarantees for everyone the right to freedom of movement and for every citizen the freedom to reside where they choose. The latter three provisions have not yet been used effectively to further the housing rights of individuals. In the case of *Government of the Republic of South Africa v Grootboom*, the Constitutional Court held that parents bear the primary obligation to provide shelter for their children.⁴ The court thus decided to deal with the case in terms of the state's duty to provide access to housing in terms of Section 26, despite

arguments that Section 28(1)(c) places a duty on the state to provide all children with shelter immediately.

The right of access to housing in Section 26 engenders both a negative and a positive obligation on the state and other relevant role players, but the right does not entitle anyone to individual relief, as the state's duty is not immediately to provide each and every South African with the highest attainable standard of housing, but to devise and implement a comprehensive plan that will achieve this goal over time. When devising and implementing this plan, the state must take cognisance of the conditions and capabilities of people at all levels of society. Special consideration must be given to the most vulnerable sections of the community.

3.1 The Negative Duty to Respect the Right of Access to Housing

Section 26 places a negative obligation on the state and other relevant role players to desist from preventing or impairing the right of access to adequate housing. Every individual has a constitutional right to enjoy unhindered access to housing and not be disturbed in existing access to housing. This negative duty on the state to respect the right of access to housing is further elaborated upon in Section 26(3), which addresses the question of unlawful evictions. This section explicitly outlaws people being evicted or having their homes demolished without an order of court after due consideration having been accorded to all relevant circumstances. Whilst a criteria as to what constitutes 'all relevant circumstances' is required, it is clear that this sub-section is significant in the sense that it is subject to immediate implementation and not qualified by the availability of resources. In addition, it unequivocally prohibits legislation that permits arbitrary evictions.

The prohibition on arbitrary, forced evictions is in line with other regional and international obligations. The UN Sub-Commission on Human Rights has adopted a Resolution on Forced Evictions,⁵ urging governments to undertake immediate measures, at all levels, aimed at eliminating the practice of forced evictions. It has further urged governments to confer legal security of tenure on all persons currently threatened with forced evictions, and to adopt all necessary measures giving full protection against forced evictions, based upon effective participation, consultation and negotiation with affected persons or groups.

The sub-commission has also recommended that all governments provide immediate restitution, compensation and/or appropriate and sufficient alternative accommodation or land, consistent with their wishes or needs, to persons and communities who have been forcibly evicted, following mutually satisfactory negotiations with the affected persons or groups.

Furthermore, the UN Commission on Human Rights has adopted a Resolution on Forced Evictions.⁶ It recognises forced evictions to mean 'the involuntary removal of persons, families and groups from their

homes and communities, resulting in increased levels of homelessness and inadequate housing and living conditions'.⁷ It has further noted its concern with the fact that forced evictions and homelessness intensify social conflict and inequality, and invariably affect the poorest, most socially, economically, environmentally and politically disadvantaged and vulnerable sectors of society. In addressing the prevalent issue of forced evictions, the UN Commission on Human Rights has emphasised that governments bear the ultimate legal responsibility for preventing forced evictions.⁸

The Committee on the Implementation of CESCRC has also placed considerable emphasis on forced evictions. It has asserted that 'instances of forced evictions are *prima facie* incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances and in accordance with the relevant principles of international law'.⁹

3.2 Positive Obligations to Protect, Promote and Fulfil the Right to Adequate Housing

Section 26 of the Constitution also places a positive obligation on the state and other relevant actors to 'protect, promote and fulfil' the right of access to housing. This means, at the very least, that the state must take steps — including the enactment of legislation — to ensure that individuals can acquire access to housing without interference from private actors and institutions. It furthermore means that the state has a duty to devise and implement — progressively and within its available resources — a comprehensive plan to ensure the full realisation of the right of access to housing. This plan cannot merely be aimed at providing individuals with shelter or basic housing; it must be aimed at providing adequate housing.¹⁰ What is required is a holistic approach aimed at providing all South Africans with access to adequate, comprehensive housing that will enable an individual to live a dignified and productive life. This means that the state has a duty to foster conditions to enable citizens to gain access to housing on an equitable basis.¹¹

What is required is for the state 'to devise a comprehensive and workable plan to meet its obligations' in terms of Section 26.¹² When devising and implementing this plan, the state must take cognisance of the conditions and capabilities of people at all economic levels of our society.¹³ Those who can afford to pay for housing should do so themselves, but where people have no money to pay, the state has a duty to take steps to unlock the system through legislation and other measures. What is required is that the state must address the needs of those who can afford housing and those who cannot. More importantly, the 'poor are particularly vulnerable and their needs require special attention'.¹⁴

The crux of any inquiry into whether the state has met its obligations in terms of sections 26(1) and (2) will

depend on what constitutes 'appropriate steps'. Steps will be appropriate if they meet three key elements set out in Section 26(2), namely (a) whether they are reasonable legislative or other steps; (b) to achieve the progressive realisation of the right; and (c) within available resources.

To judge the 'reasonableness' of the steps taken, it must be determined whether there is a comprehensive policy that encompasses all three spheres of government, to progressively realise the right of access to housing.¹⁵ Legislation in itself will not be sufficient. What is required is for the state to act in order to achieve the intended result according to comprehensive policies and programmes that are reasonable both in their conception and implementation.¹⁶ The programme must be 'balanced and flexible' and one 'that excludes a significant segment of society cannot be said to be reasonable'.¹⁷ More pertinently, those whose needs are the most urgent, and whose ability to enjoy all rights are most in peril, must not be ignored by the measures aimed at achieving the realisation of the goal. Where measures, though statistically successful, fail to respond to those most desperate, they may not pass the test of 'reasonableness'.¹⁸

The progressive realisation of the right means that the state must take steps immediately to progressively facilitate access to adequate housing. The state has a duty to move expeditiously and effectively towards that goal. Any deliberate retrogressive measures in that regard would also require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided in the Bill of Rights.¹⁹ To determine whether the state's action or inaction is reasonable, one has to take into account the resources available to actually realise the right in question. There always has to be a balance between goal and means. The measures have to be calculated to attain a goal expeditiously and effectively, but the availability of resources would always be an important factor in determining what was reasonable in a particular case.²⁰ While it would be inappropriate for the court to make orders directed at rearranging budgets, a determination of the unreasonableness of government action or inaction might well have budgetary implications.²¹

To give effect to the right to housing, the South African parliament adopted the Housing Act 107 of 1997. A National Housing Code, setting out the housing policy of South Africa, was adopted in March 2000.²² The Housing Act is the supreme housing law in South Africa. According to the National Housing Code, the Housing Act:

- (1) prescribes the principles applicable to housing development, to which all spheres of government must adhere;
- (2) clearly defines the housing-related functions of each sphere of government;

- (3) provides for the establishment of a South African Housing Development Board (SAHDB) and the continued existence of Provincial Housing Boards (PHBs) under the new name of Provincial Housing Development Boards (PHDBs);
- (4) addresses the financing of national housing programmes, with specific reference to the role of each sphere of government and the procedures that are applicable;
- (5) provides for the termination of previous housing arrangements; and
- (6) repeals all previous housing legislation.

The Housing Act defines 'housing development' as:

- (1) (vi) . . . the establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas allowing convenient access to economic opportunities; and to health, educational and social amenities in which all citizens and permanent residents of the Republic will, on a progressive basis, have access to:
 - (a) permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements; and
 - (b) potable water, adequate sanitary facilities and domestic energy supply.

Among other laws in this area, the Rental Housing Act 50 of 1999 protects the occupation rights of (lawful) occupiers of residential property; the Land Reform (Labour Tenants) Act 62 of 1997 protects (lawful) occupiers of agricultural land; the Extension of Security of Tenure Act 31 of 1996 protects the occupation rights of persons who (lawfully) occupy rural land with consent of the landowner; the Interim Protection of Informal Land Rights Act 31 of 1996 protects (lawful) occupiers of land in terms of informal land rights; and the Restitution of Land Rights Act 22 of 1994 protects occupiers of land who have instituted a restitution claim. A number of other Acts affect the availability of services, which constitutes one aspect in determining the adequacy of housing.

Although the state has made important strides in providing more South Africans with access to housing, it has been less successful in fulfilling the requirement — set out in *Grootboom* — of tailoring its housing policy also to address the needs of the most poor and vulnerable. Despite the court statement in *Grootboom* that a housing policy that fails to address the needs of the homeless will be seen as unreasonable, the state has not yet changed its policy to give effect to this judgment.

Parliament has also adopted legislation to regulate forced evictions. The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) regulates eviction of unlawful occupiers in order to give effect to the provisions of Section 26(3) of the Consti-

tution. The PIE prohibits the eviction of the 'unlawful occupier' of land, unless the eviction is ordered by a court of law and unless certain procedures are followed. There is still some uncertainty whether the legislation also applies to individuals who occupied property lawfully but became unlawful occupiers through defaulting on rent or bond payments, or refusing to vacate premises after the expiry of a lease. In August 2002, the Supreme Court of Appeal in the case of *Ndlovu and Another v Ngcobo and Another*,²³ found that PIE indeed applied not only to cases where land or housing was unlawfully occupied, but also where occupation of land and housing became unlawful after a previous period of lawful occupation.²⁴ Harms J argued that:

... having regard to the history of the enactment with, as already pointed out, its roots in section 26(3) of the Constitution which is concerned with rights to one's home, the preamble to PIE which emphasises the right to one's home and the interests of vulnerable persons, the buildings listed and the fact that one is ultimately concerned with 'any other form of temporary or permanent dwelling or shelter', the ineluctable conclusion is that, subject to the ejusdem generis-rule, the term was used exhaustively. It follows that buildings or structures that do not perform the function of a form of dwelling or shelter for humans do not fall under PIE, and since juristic persons do not have dwellings, their unlawful possession is similarly not protected by PIE.

However, as Van der Walt points out, the situation remains somewhat murky as the *Ndlovu* decision is based on an interpretation of the relevant provisions of PIE and not on the jurisprudential analysis of the relationship between Section 26(3) of the Constitution, land reform legislation and the common law.

The fact remains, however, that a big proportion of the population has access only to inadequate housing, or, for some, no access to shelter of any kind.²⁵ Thus, although the state has made significant progress in preventing the forced removal of individuals and families and providing families with access to housing, much more must be done before all South Africans will have access to adequate housing.

4. Assessment

In its General Comment on the right to adequate housing, the Committee on CESCR stated that the right to housing 'should be seen as the right to live somewhere in security; place and dignity . . . In the first place the right to housing is integrally linked to other human rights and to the fundamental principles upon which the Covenant is premised. Thus the "inherent dignity of the human person" . . . requires that the term "housing" be interpreted so as to take account of a variety of other considerations, most importantly that the right to housing should be ensured to all persons, irrespective of

income or access to economic resources.' This interpretation resonates with the imperative of the Bill of Rights, and in particular Section 26.

The right of access to housing can be realised only subject to the availability of adequate resources. Given the limited funds allocated every year in the budget for this purpose, it will take many years before the housing backlog will be eradicated. Moreover, the large number of people who live in informal housing, or who have no access to housing whatsoever, also poses a serious challenge to the state, which is constitutionally obliged to formulate programmes taking account of this reality. While the state understandably wishes to formulate and implement an organised and coherent housing strategy, the continued failure to take account of the poorest of the poor might lead to future constitutional challenge. Apart from these obvious constraints, the greatest challenge standing in the way of realising the right of access to housing is part of the obstacles generally associated with service delivery in South Africa.

Endnotes

- 1 A web of laws were put into place to implement the apartheid government's housing policy, including the Natives (Abolition of Passes and Co-ordination of Documents) Act 67 of 1952. See also the Population Registration Act 30 of 1950; the Prevention of Illegal Squatting Act 52 of 1951; the Native Laws Amendment Act of 1952; and the Natives Resettlement Act 64 of 1965.
- 2 This meant that there was a housing backlog of more than two million houses and that there was only one brick house for every 43 Africans compared with one brick house for every 3.5 whites in 1994. See Department of Housing Maps and Statistics, <http://housing.gov.za/maps/indicators.asp?sectionid=13> (accessed 16 January 2004); Richard Knight, *Housing in South Africa* (July 2001), <http://richardknight.homestead.com/files/sisahousing.htm> (accessed 16 January 2004).
- 3 Communication 155/96, *The Social and Economic Rights Action Centre v Nigeria*, 15th Annual Activity Report of the African Commission on Human and Peoples' Rights.
- 4 Government of the RSA and Others v *Grootboom and Others* 2000 11 BCLR 1169 (CC) paras 70-79.
- 5 Resolution 1992/14.
- 6 Resolution 1993/77.
- 7 Ibid., Preamble para 5.
- 8 Ibid., Preamble para 8.
- 9 General Comment 4 (1991): The right to adequate housing, para 18.
- 10 *Grootboom* (n 187 above) 1189 para 35, where the court states that the right of access to housing 'requires more than brick and mortar'.
- 11 Ibid., para 93.
- 12 Ibid., para 38.
- 13 Ibid., para 35.
- 14 Ibid., para 36. See also *Minister of Health and Others v Treatment Action Campaign and Others* 2002 10 BCLR 1033 (CC) para 70.
- 15 *Grootboom* (n 187 above) para 41.
- 16 Ibid., para 42.
- 17 Ibid., para 43. See also *Treatment Action Campaign* (n 197 above) para 68.
- 18 *Grootboom* (n 187 above) para 44.
- 19 Ibid., para 45, relying on para 9 of General Comment 3.
- 20 *Grootboom* (n 187 above) para 46.

- 21 *Treatment Action Campaign* (n 197 above) para 38. See also the Limburg Principles.
- 22 The Code is available at <http://www.housing.gov.za/code/default.asp>.
- 23 4 All SA 384 (SCA).
- 24 *Ibid.*, para 20.
- 25 In 1999 12% of the population lived in informal dwellings/shacks; *Ibid.*, 395.

Chapter Eight

Health

Professor Charles Ngwena

1. Historical Context

In April 1948, the World Health Organisation (WHO) took the lead in recognising health as a fundamental human right. The preamble to WHO's Constitution¹ stated, *inter alia*, that:

The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being, without distinction of race, religion, political belief, economic or social conditions.

In its Constitution, WHO recognised health as essential to the attainment of peace and security of individuals and states. It placed the primary obligation of providing health care on governments. Ironically, in the same year that WHO inaugurated its Constitution, a diametrically opposite development was taking place in South Africa. In 1948 the National Party came to power, and South Africa began reinforcing, with fervour, the lasting contours of a health care system that, for decades, would resolutely refute rather than affirm the notion of health as a fundamental right.²

Historically, income, geographical location, and most importantly race, have been the main determinants of the quantity and quality of health care received by the people of South Africa.³ In 1994, the ANC-led government inherited a health care system that had been indelibly shaped by the overarching apartheid political superstructure. According to the Medical Research Council, the South African health care sector at the peak of apartheid was no more than 'a bureaucratic entanglement of racially and ethnically fragmented services; wasteful, inefficient and neglectful of the health of more than two-thirds of the population'.⁴

The most prominent feature of the South African health care system before democratisation was differential and unequal service provision on the basis of race. While racial inequality in the provision of health services preceded apartheid,⁵ apartheid magnified the inequality to a grand scale. During apartheid, the health care sector, in common with other sectors, became an instrument for maintaining white supremacy.⁶ Apartheid became the most important force moulding the health

care system and the health of the people of South Africa.⁷ Apartheid expressed itself not only in the organisation, provision and distribution of health care, but also in health outcomes. Apartheid ensured that the health care system would be dominated and controlled by whites for the prime benefit of a white clientele.⁸ Gross racial segregation characterised the services that were provided. The facilities were not equal in quantity and quality. Whites disproportionately enjoyed the bulk of public expenditure of health, receiving four times as much as their African counterparts.⁹

The salient feature of the homelands policy was the creation of 'Bantustans' for Africans as part of cordoning 'white' South Africa from Africans. Each homeland had its own department of health. Health care provision and health outcomes in the homelands were markedly inferior to those in 'white' South Africa. Per capita expenditure on curative care in white South Africa in 1983/84 ranged between a highest figure of R127 in the Cape Province and a lowest figure of R79 in the Orange Free State. In contrast, in the homelands, per capita expenditure ranged between a highest figure of R45 in Ciskei and a lowest figure of R16 in Lebowa.¹⁰

In the early 1980s, only 3% of doctors were practising in the homelands and, thus, serving about 50% of the country's population.¹¹ The homelands became lasting reservoirs of poor health and diseases of poverty and poor living conditions.¹² The poor standard of health in the homelands manifested, *inter alia*, in worse infant mortality figures than in the cities. In the early '80s, for example, Transkei had an infant mortality rate of 130/1 000 while the infant mortality rate in Soweto was 25,6/1 000. During the same period, the national infant mortality rate was 12,3/1 000.¹³ Thus, the homelands suffered a double jeopardy in terms of access to health care services and health outcomes.

It would be a mistake, however, to ascribe all the ills of the health care system during the pre-democracy era to apartheid. A report published in 1995, for example, shows that in 1992/93, close to 81% of public health

expenditure was allocated to curative hospital-based care, of which 44% went to tertiary or academic hospitals.¹⁴ Community health facilities or clinics, which are the first line of contact with the health care system for the majority of the people, were given least priority.

The social divide in the South African health care system has also been a product of income. South Africa has historically nurtured a two-tier system — an underprovided public health sector and a better provided private one.¹⁵ Though the public health sector, which serves approximately 80% of the population, has been financed mainly from taxation, it has derived 5% of its revenue from user fees.¹⁶ Such fees have been a deterrent to the poor who form a substantial part of the country's population. The private health sector is financed essentially through employment-related medical schemes. It is largely inaccessible and is characterised by exclusivity and exorbitant fees.

Structural inequality in the South African health care system continued fundamentally unchallenged until the demise of apartheid. Attempts to reform the public health sector, for example, through the Health Act of 1977, so as to render access to health care more equitable and more comprehensive, failed not least because it operated within the confines of a system that had cemented racial inequality, and did not recognise access to health care as a fundamental right.

2. International Standards

Rights concerning health enjoy the status of fundamental rights in international law. As alluded to earlier, the WHO took the lead in recognising health as a human right. The Universal Declaration of Human Rights followed in December 1948 when it provided in Article 25 that everyone has a right to a standard of living adequate for health and well being, including medical care and necessary social services.¹⁷

Article 12 of the Covenant on Economic, Social and Cultural Rights (CESCR) provides as follows:

- (1) State parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
- (2) The steps to be taken by the state parties to the present Covenant to achieve the full realisation of this right shall include those necessary for:
 - (a) the provision for the reduction of the stillbirth rate and of infant mortality and for the healthy development of the child;
 - (b) The improvement of all aspects of environmental and industrial hygiene;
 - (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
 - (d) The creation of conditions that would assure to all medical attention in the event of illness.

In General Comment 14, the Committee on CESCR has specifically elaborated on the nature and content of the right to health.¹⁸

The right to health is relative rather than an absolute right. It should not be understood as a right to be healthy, as health cannot be guaranteed.¹⁹ Biological determinants, socio-economic conditions, and resources at the disposal of the state, all have a bearing on the attainment of health. However, notwithstanding these variables, the duty upon the state to take positive steps to provide health care on an equitable basis is what is crucial to the realisation of the right to health under international human rights law. To pass the muster under Article 12, health care must be available, accessible, acceptable and of good quality.²⁰

Health care facilities must be available in sufficient quantity to all, including underlying determinants such as safe and potable drinking water, and adequate sanitation. Health care must meet four inter-related requirements of accessibility, namely non-discrimination, physical accessibility, economic accessibility and information accessibility. The thread that runs through these interrelated requirements is the right to universal access to health care by all, including the poor and the socially disadvantaged. Race or some other extrinsic factor, distance, economic means or ignorance should not be bars to access. To be acceptable, health care must be ethically and culturally appropriate. The requirement of quality enjoins that the health care be scientifically and medically appropriate and of good quality.

It is not open for governments to do nothing and shield behind 'progressive realisation'. The obligation 'to take steps' in Article 2(1) is mandatory.²¹ Notwithstanding that the right in question will generally not be realised within a short period of time, governments must move expeditiously and effectively towards the realisation of the rights in the CESCR.²² Even in times of economic constraint, government should seek to provide low-cost programmes that target the poor and vulnerable.²³ Even in resource-poor settings, the discharge of a certain core minimum of obligations is envisaged.²⁴

The human right to health is also recognised in numerous other international instruments, including Article 5(e)(iv) of the Convention on the Elimination of All Forms of Racial Discrimination; Article 12 of the Elimination of All Forms of Racial Discrimination Against Women; and Article 24 of the Convention on the Rights of the Child. The right to health is also found in regional instruments, including the European Social Charter (Article 11), the African Charter on Human and Peoples' Rights (Article 16) and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988 (Article 10).

Notwithstanding the plethora of human rights instruments acknowledging the right to health, Article 12 of

the CESCRC is significant for a number of reasons. It constitutes the most comprehensive provision on the right to health in international instruments. Moreover, it has been subject to quasi-judicial interpretation by the Committee on CESCRC, thereby becoming a yardstick for determining the nature and content of the right to health. Article 12 has particular significance for South Africa, not least because the formulation of duties concerning socio-economic rights under the South African Constitution, including duties for discharging the realisation of a right of access to health care, closely resembles the formulation of state duties under the CESCRC. This is despite South Africa not being a party to CESCRC.

3. South African Law and Policy

As part of the transformation from apartheid, South Africa has followed international human rights jurisprudence in recognising rights concerning health as fundamental rights. While the South African Constitution has a number of provisions dealing with rights concerning health, the most significant is Section 27, which provides that:²⁵

- (1) Everyone has the right to have access to:
 - (a) health care services, including reproductive health care;
 - (b) sufficient food and water; and
 - (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The state must take reasonable and other measures, within its available resources, to achieve a progressive realisation of each of these rights.
- (3) No one may be refused emergency medical treatment.

Since 1994, numerous major reforms have taken place. Health policy, health legislation, and the structure and content of the health care system have fundamentally changed.²⁶ The reforms are essentially aimed at rectifying the gross disparities in access to health care that characterised the pre-democratic era. The Reconstruction and Development Programme of the ANC²⁷ and the ANC's National Health Plan²⁸ were initially instrumental in delineating the direction of reform. Subsequently, however, the 1997 White Paper on the Transformation of the Health System of South Africa has articulated comprehensively the direction, strategies and pace of reform.²⁹ The Constitution has served as a firm basis for legitimising ongoing reforms. The following is a summary of the main reforms that have been instituted.

3.1 *Dismantling Racial Fragmentation in the Provision of Services*

The edifice of policies, laws and structures that ensured differential and unequal access to health care services,

as part of shoring up separate amenities, homelands and tri-cameral policies, have been dismantled. The erstwhile 14 departments of health have been dismantled in favour of a unified, but decentralised, system with one national department and nine provincial departments. The current National Health Act puts the new structure on a statutory footing.³⁰

3.2 *Primary Health Care and the District Health System*

Primary Health Care (PHC) is now the concept around which health care is organised. PHC was born out of the WHO's Alma Ata Declaration.³¹ A central tenet of PHC is universal access to a package of essential health services. The government has developed a framework for implementing PHC over a ten-year time scale.³² As part of the implementation of PHC, health services are now being reorganised around a decentralised system — the District Health System (DHS).³³ DHS is an instrument for decentralising, regionalising and democratising health care so as to bring it as close as possible to the people. The DHS entails dividing the nine provinces into smaller administrative and service units — 50 health regions and 170 districts.³⁴ Communities become part of the planning and organisation of health care services.

Both the PHC and the DHS call for a fundamental shift in allocation of health care resources. They entail not only dismantling the racial bias of the past, but also, equally significant, dismantling the curative and urban biases of the past. The health budget is being diverted from academic and tertiary hospitals to fund PHC and DHS. From 1996/97 to 1997/98, there was a shift of 8% from hospital services and 10,7% towards district health services.³⁵ As part of rectifying the dearth of services in rural areas, a massive Clinic Building and Upgrading Programme has been underway to reduce an unmet need of 1 000 clinics. From 1994 to 1999, between 450 and 500 clinics were built.³⁶

3.3 *Policies and Legislation on More Accessible and Affordable Health Care*

Since 1994, significant progress has been made towards removing income as an impediment to access health care services. In 1994, the government decreed that pregnant women and children under the age of six were entitled to free health care at public health facilities.³⁷ Access to free health care has also been broadened to PHC services.³⁸ Indeed, this is in line with the egalitarian values that underlie the concept of PHC. Free services have also been introduced for children up to 12 years at public clinics.

Several pieces of legislation that impact on free health care policies have been passed. The Choice on Termination of Pregnancy Act 92 of 1996 has radically transformed access to abortion services. In the first 12 weeks of pregnancy, abortion is obtainable on re-

quest.³⁹ Abortion services are free at the point of access. Notwithstanding that there are still problems in accessing abortion services for rural women especially, access to abortion has vastly increased.⁴⁰ The Medical Schemes Act 131 of 1998 outlaws discrimination in access to medical schemes, *inter alia*, on the grounds of disability and state of health. The Act requires medical schemes to offer a prescribed minimum of benefits to all members.

Legislation has been passed with a view to rendering drugs cheaper. The Pharmacy Amendment Act 88 of 1997 extends ownership to non-pharmacists providing that prescribed medicines are dispensed under the supervision of a pharmacist. It is envisaged that this measure will encourage the setting up of pharmacies in areas hitherto underserved, such as rural areas. The Medicines and Related Substances Control Act 90 of 1997 was passed with a view to making medicines cheaper through a variety of ways, including parallel importation; institution of price controls; promotion of generic substitution; and prohibition of bonusing and rebates, which drug companies use to offer discounts to dispensers of medicines. However, this measure has yet to be implemented. Some of its provisions, especially the provision of parallel importation, have been the subject of controversy and strong opposition by the drug companies.

3.4 Judicial Decisions on more Accessible and Affordable Health Care

Although government policy and legislation have been primarily responsible for charting the course of reform in respect to accessing health care, courts have also contributed to the reform process, albeit as part of their adjudicatory functions. In three cases — *B and Others v Minister of Correctional Services*,⁴¹ *Soobramoney v Minister of Health, KwaZulu-Natal*,⁴² and *Minister of Health and Others v Treatment Action Campaign and Others*,⁴³ the courts made important pronouncements on rights concerning health under the Constitution. In *B and Others*, a High Court ordered the state to provide free anti-retroviral therapy to two prisoners living with HIV/AIDS for whom the therapy had been prescribed by doctors. The prisoners had relied on Section 35(2)(e) of the Constitution which, *inter alia*, guarantees persons who are incarcerated by the state the provision of adequate medical treatment at state expense. The government had pleaded lack of resources, failing to provide sufficient evidence. The case demonstrates willingness on the part of the courts to enforce a constitutional provision that mandates access to free health care.

Soobramoney, on the other hand, demonstrates that the guarantee of access to health care in Section 27(1) of the Constitution, and the right not to be refused emergency medical treatment in Section 27(3), should be read subject to availability of resources, as is, indeed, clearly suggested by Section 27(2). In this

case, the Constitutional Court turned down an application for an order to compel a state renal unit to provide, at state expense, lifelong renal dialysis on the ground that the resources at the disposal of the unit were limited and had to be rationed. The applicant suffered from chronic renal failure. His poor medical history and prognosis had placed him well outside the eligibility criteria for access to renal dialysis at state expense. The criteria that had been devised by the medical profession in consultation with the national Department of Health were judged by the court to be fair and reasonable criteria for rationing scarce resources.

The *Treatment Action Campaign* case raised a difficult policy question for the courts. The government policy of confining Nevirapine for the prevention of mother-to-child transmission of HIV (PMTCT) to 18 pilot sites in the country (two in each province) had been challenged on a number of constitutional grounds, including Section 27. The government had argued that before rolling out Nevirapine, it wished to study further the safety and efficacy of the drug, as well as to gather information for the feasibility of universal access to a comprehensive package for PMTCT.

The Constitutional Court held that by confining Nevirapine to the 18 sites, the government had unreasonably failed to discharge its duties under Section 27(2). The court ordered the government to provide universal access to the drug to pregnant mothers and their babies. According to the court, as the drug was safe, easy and cheap to administer, there were no compelling reasons for withholding treatment that was meant to preserve the health and save the lives of babies. The court took into account that the government's programme effectively shut out 90% of mothers who access public health facilities, and that such mothers were indigent and unable to access the private health sector. While the decision of the court effectively rewrote HIV policy in the country, the court would have abdicated its constitutional duty if, on account of the doctrine of separation of powers, it had decided not to scrutinise the legitimacy of government policy.

4. Assessment

The first ten years of democracy have witnessed monumental reforms in the health sector. However, the provision of health care is just one of the determinants of health. Formal equality is being realised, but substantive equality is still outstanding. The face of apartheid has been dismantled, but not its effects. The eradication of poverty; the levelling of income disparities; provision of adequate housing, clean water and sanitation; and general economic growth hold the key to the enhancement of health much more than the mere provision of health care. The Constitution, law, policy and health care reforms mean little if they are not accompanied by socio-economic empowerment. Sustainable development is a precondition to the attainment of equality in health outcomes. Long-standing extreme differentials in income and standard of living

combined with pervasive poverty suggest that the achievement of substantive equality in health will be a long-term process rather than an event.

Diseases and poverty will remain one of the most formidable challenges for the public sector, as the HIV/AIDS epidemic has demonstrated. With approximately 4,7 million people living with HIV/AIDS, South Africa tops the league of countries infected and affected by the pandemic.⁴⁴ The pandemic is now responsible for 25% of adult mortality.⁴⁵ Access to life-long anti-retroviral therapy has thus far been limited to the well-off on account of cost. However, the picture is poised to change significantly, with the rolling out of anti-retroviral therapy on a universal basis.

In November 2003, the government announced a comprehensive treatment plan to establish an anti-retroviral therapy service point in every health district within a year, and a service point in every municipality within five years.⁴⁶ Delivering equitable access to anti-retroviral therapy poses a huge challenge for the public health sector. The cost of drugs apart, it requires a major capacity-building effort, including the recruitment of thousands more health care professionals and a training programme for health workers to ensure a safe, effective and ethical delivery of treatment. Even if South Africa succeeds in rolling-out anti-retroviral therapy, it must not be forgotten that such therapy will essentially be tackling the symptoms, but not the underlying causes of the epidemic. Until poverty is substantially eradicated, gross disparities in mortality and morbidity rates between the rich and the poor will remain, regardless of augmentation of health services and increased access to services.

Endnotes

- 1 Opened for signature on 22 July 1946 and entered into force on 7 April 1948: Toebes, B.C.A. The right to health as a human right in international law (1999) 31.
- 2 Van Rensburg, H.C.J., Fourie, A. & Pretorius, E., *Health and Health Care in South Africa: Structure and Dynamics* (1992) p. 57.
- 3 *Ibid.*, pp. 56-94.
- 4 Medical Research Council, *Changing health in South Africa: Towards new perspectives in research* (1991) 7.
- 5 Van Rensburg, H.C.J. & Benatar, S.R. 'The legacy of apartheid in health and health care' (1993) 24, *South African Journal of Sociology* 99; Van Rensburg *et al.* (n 210 above) p. 64.
- 6 Price, M. 'Health care as an instrument of apartheid policy in South Africa' (1986) 1, *Health Policy and Planning* 158.
- 7 Van Rensburg & Benatar (n 213 above).
- 8 Savage, M. 'The political economy of health in South Africa' in Westcott, G. & Wilson, F.A.F. (eds) *Perspectives on the health system: economics of health in South Africa* (1979) pp. 140-156.
- 9 Van Rensburg, H.C.J. 'South African health care in change' (1991) 22, *South African Journal of Sociology* 1; McIntyre, D.E. & Dorrington, R.E. 'Trends in the distribution of South African health care expenditure' (1990) 78, *South African Medical Journal* p. 125.
- 10 De Beer, C. 'Picking up the pieces — The present and future consequences of the fragmentation of South Africa's health structures' in Owen, C.P. (ed) *Towards a National Health Service* (1988) pp. 69-78.
- 11 Gardee, M.R. 'An aspect of community medicine. The medical care implications of manpower and other resources, with the rural black population as an example' (1977) 52, *South African Medical Journal* pp. 362-367; De Beer, C. *The South African Disease: Apartheid, Health and Health services*. (1984).
- 12 Van Rensburg *et al.* (n 213 above) p. 66.
- 13 De Beer (n 218 above).
- 14 *Health Systems Trust and World Bank Health expenditure in South Africa* (1995) Durban Health Systems Trust and World Bank.
- 15 *Ibid.*, p. 57, pp. 79-82.
- 16 McCoy, D. & Khosa, S., 'Free health care' policies' in *Health System Trust South African Health Review* (1996) Durban Health Systems Trust, pp. 157-164.
- 17 United Nations General Assembly Resolution 217A (III) of 10 December 1948.
- 18 General Comment 14 UNCESCR 2000 Doc No E/C 12/2000/4.
- 19 *Ibid.*, para 8.
- 20 *Ibid.*, para 12.
- 21 CESCR Committee, General Comment 3, Doc No E/1991/23.
- 22 *Ibid.*, para 9.
- 23 *Ibid.*, para 12.
- 24 *Ibid.*, para 10.
- 25 Other provisions are Section 12 which, *inter alia*, provides everyone with rights to bodily and psychological integrity, including 'a right to make decisions concerning reproduction' and 'not to be subjected to medical and scientific experiments without their informed consent'; Section 24(a) which guarantees everyone a right to 'an environment that is not harmful to their health'; Section 28(1)(c) which guarantees children a right to 'basic health services'; and section 35(2)(e) which guarantees every sentenced prisoner a right to conditions of detention consistent with human dignity, including the provision of 'adequate medical treatment' at state expense.
- 26 Van Rensburg, H.C.J. 'Health and health care in South Africa in transition: A macro perspective' (1999) 31, *Acta Academica* 1.
- 27 African National Congress. *The Reconstruction and Development Programme — A Policy Framework* (1994) Johannesburg: Umanyano Publications.
- 28 African National Congress. *National Health Plan for South Africa* (1994).
- 29 Department of Health White Paper on the Transformation of the Health System in South Africa (1997).
- 30 Government Gazette Vol 437 No 22824, 9 November 2001.
- 31 International Conference on Primary Health Care (1978).
- 32 n 238 above.
- 33 Van Rensburg (n 234 above).
- 34 *Ibid.*
- 35 Van den Heever, A.M. & Brijlal, V., 'Health care financing' in *Health Systems Trust South African Health Review* (1997) pp. 81-89.
- 36 Abbot, G. 'Upgrading health facilities' in *Health Systems Trust South African Health Review* (1997) pp. 119-127.
- 37 Government Gazette Notice 657 (1994).
- 38 Van Rensburg (n 234 above).
- 39 Section 2(1)(a) of the Act of 1996.
- 40 The Act took effect from 1 February 1997. From February to July 1997, 12 887 abortions were performed. By December 1997, the number had risen to 26 406: Barometer (1997) 1 2. During the currency of the predecessor to the Choice on Termination of Pregnancy Act, the Abortion and Sterilisation Act of 1975, a yearly average of 800 to 1 200 abortions were performed: *South African Institute of Race Relations South Africa Survey 1996/1997* (1997).
- 41 1997 6 BCLR 789 (CC).
- 42 1997 12 BCLR 1696 (CC).
- 43 2002 10 BCLR 1033 (CC).
- 44 Department of Health 2003. *National HIV and Syphilis Antenatal Sero-prevalence Survey in South Africa 2002*. Pretoria: Department of Health.

- 45 Medical Research Council 2001. *The Impact of HIV/AIDS on Adult Mortality*. Tygerberg: Medical Research Council.
- 46 Department of Health 2003. *Operational Plan for Comprehensive HIV and AIDS Care, Management and Treatment for South Africa*. Pretoria: Department of Health.

Chapter Nine

Food

Danie Brand

1. Introduction

The vagaries of apartheid, and, increasingly, current global economic realities, have caused a growing national nutritional crisis in South Africa. Despite an adequate national food supply,¹ many South Africans are exposed to what has been called 'the daily terrorism of hunger'.² Approximately 37% of our population are food insecure,³ meaning that they do not on a regular and sustainable basis get enough of the right kind and quality of food. One in two children, for example, ingests less than half the recommended daily amounts of energy, vitamins A and C, iron, zinc and calcium.⁴ A survey conducted in 1999 found that 21.9% of households nationally regularly go hungry.⁵

This food insecurity clearly hampers the physical development and general health of our population: 16% of South African babies are born underweight, 21.6% of children under nine are stunted, 10.3% are underweight, and 3.7% experience wasting.⁶ Micro-nutrient deficiencies are also prevalent. In 1994, about 33% of children between six and 72 months were Vitamin A deficient, 10% were iron deficient⁷ and 10.6% were iodine deficient.⁸

The physical impact of malnutrition in turn severely restricts the extent to which those affected by it can participate in the processes and privileges of society. The physical and social impact of hunger and malnutrition in South Africa is severe and permanent. An alarmingly large number of South Africans suffer not only from under-nourishment, but also full-blown nutritional deprivation, in the sense that they do not have access to even basic essential levels of food necessary for dignified survival.⁹

This deprivation permanently affects their physical and mental health and development, and drastically hampers their ability to participate productively in society and the economy. This situation constitutes a crisis — not one of a temporary nature or caused by some natural or economic event out of the ordinary, but one that can only, counter-intuitively, be described as an endemic crisis. Importantly, this crisis exists not because there is not enough food in South Africa; but

rather because of the lack of access to food, caused by a complex range of interlinked factors, including household income, poverty, and lack of access to productive assets.¹⁰

2. International Standards

The right to food is widely protected in international law.¹¹ The most important document remains the Covenant on Economic Social and Cultural Rights (CESCR), which proclaims in Article 11 the right to adequate food and freedom from hunger. The Committee established under CESCR recently interpreted Article 11 in its General Comment 12.¹² The Committee describes the content of the right to food as follows: 'The right to adequate food is realised when every man, woman and child . . . has physical and economic access at all times to adequate food or means for its procurement.'¹³ It is the state's duty to institute a 'national strategy',¹⁴ preferably set out in a 'framework law',¹⁵ to achieve the realisation of the right to food. International law does not prescribe specific measures that must be taken to realise the right to food.¹⁶ However, it is clear that the state must engage in two areas of activity: it must take steps to ensure both the availability of, and access to, food.¹⁷

Availability of food refers to national food security. The state must take steps to ensure that a sufficient supply of food exists nationally to meet the nutritional demands of its people, and that this food is geographically distributed, and nutritionally adequate and safe. This duty can, of course, be met in a variety of ways. The state must first ensure that national food production is such that an adequate supply of food is available. The state must also ensure that international trade in basic foodstuffs is on a sound footing so that shortfalls in production that occur from time to time can be addressed through food importation. In both instances, the state can itself be directly involved (for instance in stockpiling food for use in times of crisis, or itself importing food when the need arises). Perhaps more importantly, the state must regulate private trade

and production to ensure the maintenance of an adequate supply.

Accessibility of, or entitlement to, food requires that people must be able to access the available food, resulting in household food security. To meet its duty to engender entitlement to food, the state must first take steps to facilitate access to food to make it possible for self-sufficient people to obtain food for themselves. This it can do in a variety of ways, ranging from measures to make food more affordable (Value Added Tax (VAT) zero-rating basic foodstuffs, food-price monitoring, market regulation, subsidisation or actual price control), to measures providing assistance to people who produce food for their own use (education or actual material assistance to small and subsistence farmers). Again, the duty here is a mixture of direct provision by the state, and regulation of private processes of food provision to make them more accessible.

Secondly, the state must have measures to provide food or resources to acquire food directly to those who are unable to make use of existing access to food. This duty is relevant to crisis situations (in international law terms, the right to freedom from hunger rather than the right to adequate food gives rise to the duty): both are crises of an intermittent nature and the kind of endemic crisis that currently exists in South Africa. Again, there are different ways to meet this duty. The state can directly provide food; institute food stamp programmes; or enable people to buy food through social assistance cash grants. The duty here rests squarely on the state.

Thirdly, the state must take steps to make existing entitlement to food effective. It must institute policies to ensure that, when people gain access to food, the food is of a good nutritional quality and safe enough to maintain an adequate nutritional status for those who ingest it. This can also be done in different ways. The state might institute educational programmes, teaching people to prepare and store food in an optimal way, and it can also regulate food production, requiring food to be demonstrably free of adverse substances and/or requiring the micro-nutrient fortification of food. Here the state is itself required to provide education services and support, and to involve the private sector through regulation of food production, storage and presentation when it is sold.

The right to food finally requires the state to monitor the food security situation in the country so that it is able to adapt its policies to deal with problems as they arise. The state must have in place systems to monitor food production and trade, entitlement (food prices and so forth), and the actual nutritional status of the population.

Although the state is allowed to meet the above duties progressively and subject to its available resources, international law is clear that 'when a state fails to ensure the satisfaction of . . . the minimum essential level required to be free from hunger', it 'has to demonstrate that every effort has been made to use

all the resources at its disposal . . . to satisfy, as a matter of priority, those minimum obligations'.¹⁸ This duty arises in the case of intermittent crisis, but it is of course also in place in a situation such as in South Africa, where on a long-term basis, large numbers of people do not meet 'the minimum essential level to be free from hunger'.

On a regional level, the African Charter on Human and Peoples' Rights does not explicitly recognise a right to food. However, the African Commission on Human and Peoples' Rights has held that a right to food is implicit in the African Charter.¹⁹

3. South African Law and Policy

The scheme of duties developed in international law translates neatly into South African legal terms. Section 27(1)(b) of the Constitution recognises the right to have access to sufficient food, and Section 28(1)(c) covers the right of children to basic nutrition. Together, the two rights neither require the state to achieve a certain result, nor to institute specific policy measures. These two rights simply require the state to devise and implement a policy scheme that is reasonably capable of achieving their realisation²⁰ and, within that policy scheme, to prioritise the basic food needs of children.²¹

In this light it could be said that the right to food requires the state to first devise and implement a comprehensive policy scheme containing measures that address all the aspects of the realisation of the right to food listed above (measures to ensure both the availability of and entitlement to food, and specifically to facilitate access for self-sufficient people, provide access to indigent and otherwise vulnerable people, ensure that access to food is effective, and monitor the food situation in the country). This basic duty is structural in nature: the state must have in place a plan that structurally makes provision for all aspects of the right to food.

In addition, the state must ensure that this policy scheme is indeed capable of realising all aspects of the right to food — that it is rational, inclusive of all significantly 'at risk' groups in society, co-ordinated, flexible enough to respond to both short- and longer-term needs, effectively implemented and transparent. Particularly, the policy scheme must take account of those South Africans who are in food crisis. Finally, this policy scheme must effectively prioritise the food needs of children. This additional duty is substantive in nature: it is not enough for the state to have a plan that on paper addresses all aspects of the right to food in the sense that it makes some provision for all aspects of the right to food. In both its conceptualisation and its implementation, this plan must be reasonable and capable of achieving full realisation of all aspects of the right to food.

Food-related policies are co-ordinated through the Integrated Food Security Strategy for South Africa

(IFSS).²² In addition, efforts are underway to draft a food framework law, to further address the co-ordination and management of a national nutritional strategy.

Within this framework, the government runs a wide range of programmes. On the access side, the government has first instituted a number of programmes to make it possible for self-sufficient people to gain access to food for themselves. The most important examples are the Department of Agriculture's Food Security and Rural Development Programme;²³ the Land Redistribution for Agricultural Development Programme;²⁴ the Department of Public Works' Community-Based Public Works Programme;²⁵ and the Department of Social Development's Poverty Relief Programme.²⁶ Recently, in reaction to unprecedented sharp rises in the prices of basic foodstuffs,²⁷ the government also entered into temporary agreements with food retailers to provide food to the poor at special low prices.²⁸

Secondly, various programmes provide access to food to those who cannot access food for themselves. The bulk of these take the form of special needs, social assistance cash grants that enable especially vulnerable groups to acquire food. The scope of coverage and monetary amounts of some of these grants were recently raised specifically in response to the sharp rise in food prices experienced during 2002. Two programmes also focus on providing food directly to children. These are the Primary School Nutrition Programme (PSNP)²⁹ and the Programme targeting children with acute protein Energy Malnutrition (the PEM programme).³⁰ Finally, in 2002, the government introduced a programme to provide food parcels and agricultural starter packs to destitute families.³¹

Thirdly, government runs programmes that seek to ensure the effectiveness and safety of access to food. The most important is the Department of Health's Integrated Nutrition Programme, in terms of which nutritional education is provided and micro-nutrient deficiencies in food-stuffs are addressed.

On the availability side, the Department of Agriculture and the Department of Trade and Industry have programmes in place and currently manage to maintain an adequate national food supply and so ensure national food security.³²

There are also programmes to monitor national and household food security in South Africa. An important recent addition to these programmes is the appointment of the Department of Agriculture's National Food Pricing Monitoring Committee (for a period of one year) to investigate and advise the government on food prices in South Africa.

4. Assessment

The overview above shows that the government has embarked on important and substantial measures to meet its duties in terms of the right to food. It has in place a 'national strategy', soon to be further co-

ordinated through a framework law, to realise this right. This scheme contains at least some programmes to meet all the duties in terms of the right to food — measures intended to facilitate, provide and make effective access to food, and those to ensure the availability of food and monitor the country's food situation. A significant number of programmes (the Child Support Grant, the PSNP and the PEM programme) are aimed specifically at children, and so, as is required, prioritise their food needs. Some programmes (special needs-based, social assistance grants and the recently introduced food parcel scheme) also aim directly to attend to the food needs of those in food crisis.

However, this policy scheme still fails, both with respect to the state's basic structural duty to have in place a comprehensive scheme, and the additional substantive duty. First, there are problems of scope and implementation. Despite significant annual growth in programme outputs and budgets,³³ the government's existing programmes are still, in terms of scope, woefully insufficient to comprehensively address South Africa's food problems. Those programmes facilitating access to food reached a ballpark figure of only 120 300 people in 2001.³⁴ Efforts to provide access to food are similarly insufficient. The uptake rate of social assistance grants, manifestly an important form of direct provision of access to food, remains poor. The child support grant currently enjoys an uptake rate of only 2,5 million children, whilst there are an estimated 6,1 million children between the ages of six and 15 alone who live below the poverty line and therefore presumably require social assistance.³⁵ In addition, the levels of grants, despite recent increases, remain out of touch with the actual cost of living.³⁶

Another important programme intended to provide access to basic nutrition directly, the PEM programme, is similarly insufficient. This programme, which provides in-patient treatment, including nutritional supplementation to severely malnourished children to stave off death, is not available at all public health facilities. Also, even those children who are successfully treated in the programme regularly have to be re-admitted, because, once back home they again have no access to basic nutrition due to household food insecurity.³⁷ Finally, even the government's recent emergency food parcel scheme does not provide nearly the required coverage.³⁸ Clearly, a large number of the state's programmes are not reasonably capable of achieving the realisation of significant aspects of the right to food because they are simply too small in scope, insufficiently financed, and inadequately implemented.

There are also conceptual problems — the state's programme structurally does not make any provision for meeting the basic nutritional needs of a large number of South Africans. The figures cited in the introduction to this section show that a large number of South Africans, apart from experiencing simple under-

nourishment, suffer full-blown nutritional deprivation, as they do not even meet basic essential levels of access to food.³⁹ Such people do not even enjoy freedom from hunger, let alone access to adequate food; they are in food crisis and their crisis is long-term in nature. International law requires the state to take steps to meet the needs of these people as a matter of priority. South African law requires the state reasonably to take account also of the needs of those in food crisis. Tested against these duties, the government's current food security strategy simply has a gap.

Taken together, the various policy initiatives show a marked preference for longer-term interventions aimed at facilitating access to food through capacity building and income generation, rather than direct initiatives aimed at providing access to food to those in food crisis. The government's food policy scheme, of course, makes quite a substantial provision for such direct transfer of food, or the means with which to acquire food, through the PSNP, the PEM programme and the various social assistance grants.

However, all of these efforts, apart from being themselves inadequate in scope and implementation, are targeted only to special needs. The PSNP benefits only primary school learners. The PEM programme benefits only severely malnourished children treated at public health facilities. The child support grant benefits only children under 10; the state old-age pension benefits only men older than 65 and women older than 60; and the disability grant benefits only disabled persons.

However bad your nutritional situation may be, if you are older than 10 and younger than 60 (for women) or 65 (for men), physically and mentally able, not in foster care and not a war veteran, there is no regular state assistance to meet even your most basic food needs.⁴⁰ The only state assistance that is available for such persons is Social Relief of Distress and the current food parcel programme. Both these programmes provide only temporary relief; they are intended to deal with crises of an intermittent, short-term nature. In general, the government seems to see its role as that of a facilitator, with only a residual role to provide limited instances of direct assistance in very narrowly defined circumstances. This general approach fails to take account of the long-term crisis proportions of South Africa's food problems. The state's existing programme does not make any provision for the basic food needs of a large number of South Africans who find themselves in long-term food crisis.

Endnotes

1 Meaning that there is enough food in South Africa for the population. South Africa usually produces enough basic food for its own population and for export purposes. In those few instances where there has been a shortfall in production, South Africa has always been able to import sufficient food timeously. This situation does not seem to be under any threat for the foreseeable future. *Department of Agriculture Integrated Food Security Strategy for South Africa* (2002) pp. 19-20.

- 2 Justice Tolakele Madala, address to International Right to Food Seminar, Centre for Human Rights, University of Pretoria, Pretoria, 27-29 January 2002.
- 3 Mjijima, C. 'South African Government: Department of Health' in South African Human Rights Commission International consultative conference on food security and nutrition as human rights (1999) p. 60.
- 4 Labadarios, D. (ed) *The National Food Consumption Survey* (1999) Pretoria Department of Health, p. 242.
- 5 Department of Social Development. *Transforming the present — Protecting the future: Report of the Commission of Inquiry into a Comprehensive System of Social Security for South Africa* (2002) p. 29.
- 6 Labadarios (n 258 above) pp. 167-169. 'Underweight' indicates a weight-for-age ratio under two standard deviations from the norm; 'stunting' a height-for-age ratio under two standard deviations from the norm; and 'wasting' (an indicator of severe current malnutrition) a weight-for-height ratio under two standard deviations from the norm.
- 7 Labadarios, D. & Van Middelkoop, M. *Children aged 6-71 months in South Africa, 1994: Their anthropometric, Vitamin A, iron and immunisation coverage status* (1995) Isando South African Vitamin A Consultative Group 1.
- 8 Steyn, N. & Labadarios, D. 'Nutrition policy implementation' in *South African Health Review 2002* (2002) pp. 327-330.
- 9 Nutritional deprivation indicates a condition of not receiving enough nutritional input to avoid stunting, wasting, being underweight and other serious health risks; under-nourishment indicates a condition of not receiving enough nutritional input to live a normal, active working life, without facing serious and long-term health risk. (Drèze, J. and Sen, A., *Hunger and public action* (1998) p.35)
- 10 See, for instance, Caelers, D., Sylvester, E. & Gano, E. 'Quarter of Western Cape families starving' (2001) *Cape Argus*, 28 May 2001, who detail a study done at the University of Cape Town indicating that 42.6% of households in South Africa are in 'food poverty', meaning that they do not earn enough money to afford even a basic subsistence diet.
- 11 Kunneman, R. 'The right to adequate food: Violations related to its minimum core content' in Brand, D. & Russel, S. (eds) *Exploring the core content of socio-economic rights: South African and International Perspectives* (2002).
- 12 Committee on ESCR General Comment No 12 (1999) Substantive issues arising in the implementation of the CESC: The Right to adequate food (Article 11 of the Covenant).
- 13 *Ibid.*, para 6.
- 14 *Ibid.*, paras 21-28.
- 15 *Ibid.*, para 29.
- 16 *Ibid.*, para 21.
- 17 *Ibid.*, paras 12 & 13.
- 18 *Ibid.*, para 17.
- 19 Communication 155,96, *The Social and Economic Rights Action Centre v Nigeria*, 15th Annual Activity Report paras 67-69.
- 20 *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC) paras 34 & 38; *Minister of Health and Others v Treatment Action Campaign and Others* 2002 5 SA 721 (CC) paras 23 & 29-23.
- 21 *Treatment Action Campaign* (as above) paras 39-44.
- 22 Department of Agriculture Integrated Food Security Strategy for South Africa (2002).
- 23 Provides agricultural starter packs and food production information packs to food-insecure rural households.
- 24 Provides financial support to small farmers from previously disadvantaged communities.
- 25 Job creation through involvement of poor rural communities in public works programmes.
- 26 Support for rural food production clusters; skills development to create employment opportunities for youth; and local economic development projects amongst poor rural women to generate income.

- 27 The food price index rose by 11.4% in 2001 (as opposed to an increase in items other than food of only 3% for that year) and 21% in 2002 (International Labour Research and Information Group (ILRIG) (2003) 'Food inflation' in *Workers World News* 27 July 2003).
- 28 The government reached an agreement with food retailers Premier Foods, Metro, the farming group Afgri Corporation and other donors who agreed to provide 1 400 tons of maize every month for three months at a recommended price of R25,99 per 12,5 kg bag, compared with the normal rate of R43.
- 29 In terms of which one nutritious meal per day is provided to primary school learners at school.
- 30 In terms of which children suffering from acute protein energy malnutrition are hospitalised and treated.
- 31 R230 million was allocated to provide food parcels and agricultural starter-packs once a month for three months during 2003 to 240 000 poor households across South Africa. Food parcels and starter packs were distributed to 249 000 households during this phase. A further R800 million has been allocated for the continuation of the programme through 2004 and 2005.
- 32 Although current production of most basic foodstuffs equals current consumption, projections show that production of basic foodstuffs will not be able to keep up with consumption in future.
- 33 The PSNP, e.g., in 1994/95 reached 13 167 primary schools and in 2002/03 15 653. In 2001/02 the PSFS reached 77% of the 6,1 million children between the ages of six and 15 who live below the poverty line (Kloka, D. *Integrated nutrition programme: School feeding* (2003) Background document for Cabinet briefing Pretoria: Department of Health 12). It will see an average 15% real annual growth in budget over the next three years (As above, 10-11; National Treasury National medium-term expenditure estimates 2003 (2003) <http://www.treasury.gov.za>).
- 34 See Brand, D., 'Budgeting and service delivery in programmes targeted at the child's right to basic nutrition' in Streak, J. & Van Zyl, A., *Budgeting and service delivery in programmes targeted at children's socio-economic rights* (2004) (forthcoming).
- 35 Ibid.
- 36 COSATU has pointed out that the increases in social assistance grants were not increases in real terms, as they only just kept up with general inflation and did not nearly keep up with food price inflation. (See Reuters 'Cosatu hails food help, but . . .' (2002) http://www.news24.com/contentDisplay/level4Article/0,1113,2-1134_1270080,00.html10/10/2002).
- 37 See, in general, Chopra, M., Sogaula, N., Jackson, D., Sanders, D., Karaolis, N., Ashworth, A., & McCoy, D. 'Poverty Wipes out Health Care Gains' (2001/02) 6:4 *Children First* pp. 16-18.
- 38 See the remarks of the Minister of Social Development during his 2003 budget speech (Sapa 2003) 'Not enough funds for food relief. http://www.news24.com/News24/South_Africa/Politics/0,,2-7-2_1372887,00.html (accessed 18 June 2003).
- 39 'Nutritional deprivation' indicates a condition of not receiving enough food to avoid stunting, wasting, being underweight and other serious health risks. 'Under-nourishment' indicates a condition of not receiving enough food to live a normal, active working life, without, however, facing serious and long-term health risks; Drèze, J. and Sen, A. *Hunger and public action* (1998) p. 35.
- 40 This group, according to the Taylor Commission, translates into more than half of poor South Africans, or 11 840 597 people (Department of Social Development (2002b) *Transforming the present — Protecting the future: Report of the Commission of Enquiry into a Comprehensive System of Social Security for South Africa* at <http://www.welfare.gov.za/documents/2002/2002.htm> (accessed 22 October 2002) p. 59.

Chapter Ten

Water

Tim Mosdell

1. Introduction

Water is an essential part of the human diet and integral to survival. It is also an indispensable element of other rights, particularly the rights to adequate food (nutrition), health, a clean and/or healthy environment, and water conservation. Other human rights, such as housing and education, may also protect specific aspects of the right to water.

Access to the limited water resources in South Africa has historically been dominated by those with access to land and economic power, resulting in the majority of South Africans having to struggle to secure the right to water. Apartheid era legislation governing water did not discriminate directly on the grounds of race, but the racial imbalance in ownership and distribution of land resulted in the disproportionate denial to black people of the right to water. Beyond racial categorisations, the rural and poor urban population was traditionally especially vulnerable in terms of the access to the right.¹

2. International Standards

The right and access to water does not enjoy wide explicit recognition at international level and is mentioned by name in only a few international documents. Where the right is explicitly mentioned, it is in most cases restricted to access to water for drinking and other domestic purposes. Nevertheless, other internationally recognised human rights, for example, food or a healthy environment, may entitle an individual to water for other purposes. The close link between water, food (nutrition), health and hygiene, renders international documents that protect these rights relevant.

Article 11(1) of the Covenant on Economic, Social and Cultural Rights (CESCR) proclaims:

The state parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing.

The Committee on CESCR boldly interpreted the right to an adequate standard of living and the right to health

to include an independent right to water for personal and domestic uses. The Committee on the CESCR General Comment 15 provides an extensive interpretation of the implications of the right to water for state parties in terms of the duties incumbent upon them to realise the right. The Committee stated:

The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival.

Article 12 of The Convention on the Elimination of All Forms of Racial Discrimination (CESCR) provides for the right of everyone to the highest attainable standard of health. Under Article 12(2)(b) state parties to the Covenant must aim to improve all aspects of environmental and industrial hygiene. This duty 'encompasses taking steps on a non-discriminatory basis to prevent threats to health from unsafe and toxic water conditions'. States are also obliged to aim for the prevention, treatment and control of epidemic, endemic, occupational and other diseases. In an earlier General Comment, the Committee stated that the underlying determinants of the right to health include potable water.²

Article 14(2)(h) of the Convention on the Elimination of All Forms of Racial Discrimination against Women (CEDAW) obliges state parties to ensure the right of rural women to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

Article 24 of the Convention on the Rights of the Child (CRC) obliges state parties to implement children's rights to health by taking appropriate measures to combat disease and malnutrition within the framework of primary health care. It specifically requires that readily available technology should be applied, and that adequate nutritious food and clean drinking water should be provided, taking into consideration the dangers and risks of environmental pollution.

International humanitarian law provides extensive protection during armed conflict with respect to water.

Sufficient drinking water is to be supplied to prisoners of war and other detainees. They are to be provided with shower and bath facilities as well as water, soap and other facilities for their daily personal toilet and washing requirements.³ The Additional Protocols of 1977 also prohibit the destruction of 'objects indispensable to the survival of the civilian population, such as food-stuffs, agricultural areas for the production of food-stuffs, crops, livestock, drinking water installations and supplies and irrigation works'.⁴

A number of international conferences on environmental issues and/or water have taken place, recognising and affirming the right of all human beings to have access to clean water and sanitation at an affordable price. These include the Preamble to the Mar del Plata Declaration of the 1977 United Nations Water Conference; the 1991 UN Principles for Older Persons; and the 1992 Dublin Statement on Water and Sustainable Development.⁵ Action programmes adopted by states at such conferences, such as the 1992 Agenda 21 and the Programme of Action of the 1994 International Conference on Population and Development, have likewise included the right to water.

Turning to the regional level, the European Social Charter does not explicitly refer to a right to nutrition or water. Article 11 states that contracting parties should, either directly or in co-operation with public or private organisations, as far as possible remove the causes of ill-health and prevent epidemic, endemic and other diseases. The Committee of Ministers of Member States of the Council of Europe has recognised that 'everyone has the right to a sufficient quantity of water for his or her basic needs'.⁶

Article 11 of the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988 states that 'everyone shall have the right to live in a healthy environment and to have access to basic public services'. Article 16(2) of the African Charter on Human and Peoples' Rights proclaims that state parties to the Charter must take the necessary measures to protect the health of their people. Access to water is not explicitly mentioned, but the obligation to protect the health and environment of its citizens would imply that a state party must ensure that its subjects enjoy basic water and sanitation services.

The African Commission on Human and Peoples' Rights has previously derived rights such as food and housing from the right to health and other related rights in the African Charter.⁷ In *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Inter-africaine des Droits de l'Homme, Les Témoins de Jehova v Zaïre*⁸ the Commission held that 'the failure of the government to provide basic services such as safe drinking water and electricity and the shortage of medicine . . . constitutes a violation of Article 16 (right to health)'.

Article 14(1) of the African Charter on the Rights and Welfare of the Child provides that every child has the

right 'to enjoy the best attainable state of physical, mental and spiritual health'. Article 14(2)(c) explicitly stipulates that:

State parties to the present Charter shall undertake to pursue the full implementation of this right and, in particular, shall take measures to ensure the provision of adequate nutrition and safe drinking water.

Article 15 of the Protocol to the African Charter on the Rights of Women in Africa states that:

State parties shall ensure that women have the right to nutritious and adequate food. In this regard, they shall take appropriate measures to:

- (i) provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food;
- (ii) establish adequate systems of supply and storage to ensure food security.

3. South African Law and Policy

3.1 Constitutional Provisions

The right of access to water is guaranteed under Section 27 of the 1996 Constitution, which provides:

- (1) Everyone has the right to have access to —
... (b) sufficient food and water . . .
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

The Constitution does not provide explicit guidance as to the meaning of 'sufficient' water, in particular the quantity and quality of water each individual is entitled to access, and the meaning is yet to be considered by a South African court. However, 'basic water supply' is defined in Section 2 of the Compulsory National Standards and Measures to Conserve Water Regulations⁹, as a minimum quantity of potable water of 25 litres per person per day accessible within 200 metres.

In terms of Schedule 4 Part B of the Constitution, local government is tasked with providing water and sanitation services including potable water supply systems and domestic waste-water and sewage disposal systems. These obligations are concretised in the Municipal Systems Act 32 of 2000 and are discussed later in this chapter.

The Water Services Act 108 of 1997 recognises the right to access a basic water supply. This is stated explicitly as one of the main objectives of the Act.¹⁰ The Act clearly spells out the duty of Water Services Authorities to provide access to water. Every water services authority has a duty to all consumers or potential consumers in its area of jurisdiction to progressively ensure efficient, affordable, economical and sustainable access to water services.¹¹ While this duty is subject to a number of conditions including, *inter alia*, the availability of resources and the duty of consumers

to pay reasonable charges,¹² the Act entrenches this duty by stating the following:

A water services authority may not unreasonably refuse or fail to give access to water services to a consumer or potential consumer in its area of jurisdiction.¹³

And further:

In emergency situations a water services authority must take reasonable steps to provide basic water supply and basic sanitation services to any person within its jurisdiction and may do so at the cost of that authority.¹⁴

The current policy of the Department of Water Affairs and Forestry entails the provision of 6 000 litres of water for every household per month without charge. Water for other purposes, such as livelihoods, is covered by the National Water Act 36 of 1998, and a system of licences has been established for securing access to water.¹⁵

The manner in which the right has been framed makes it clear that the state is not obliged to provide every inhabitant of South Africa with free water supply. The state's duty towards those individuals who have the ability to pay for water services entails that the state must create the conditions and opportunity to ensure that those individuals have 'access' to sufficient water.¹⁶ Sections 11(4) and 11(5) of the Water Services Act, as outlined above, suggest that where individuals are unable to pay for water services, water service authorities are obliged to provide such access.

3.2 Free Basic Water Policy

The primary intention of the Free Basic Water (FBW) policy is to alleviate poverty by ensuring that no one is denied access to a basic water supply. Underlying this is the recognition that it will improve community health, and free women from drudgery. The programme was initiated by the Department of Water Affairs and Forestry (DWAF) in December 2000. The intention is that the provision of free basic water should be funded using a combination of the equitable share of revenue of local government and internal cross-subsidies. To date the DWAF reports that 57% of South Africans are receiving free basic water, and 214 of the 309 municipalities are already implementing the FBW Policy.

The DWAF reported that the FBW programme is primarily targeting the poor, being those people living in rural areas, people living in informal settlements, low-income groups, and those racial groups disadvantaged by past discriminatory laws and practices. The department indicated that the policy measures did not make any provision with regard to homeless persons, as these policies are not specifically designed to cater for such a category of people; and that the whole FBW policy is aimed at assisting the marginalised and vulnerable groups through cross-subsidisation of their

water supply by the wealthier higher consumers or by the fiscus.¹⁷

3.3 Legislative Measures

The following legislative measures were taken in the period 2000/2002 to realise the right to have access to sufficient water:

The Municipal Systems Act 32 of 2000 providing the legislative framework for the service delivery responsibilities of local governments: In section 73(1) the Act instructs municipalities: (a) to give priority to the basic needs of the local community; and (b) to ensure all members of the local community have access to at least the minimum level of basic municipal services; and promulgation of regulations in terms of sections 9(1) and 10(1) of the Water Services Act to set compulsory national standards and measures to conserve water and set norms and standards in respect of tariffs for water services.

3.4 The Ruling of the Constitutional Court in the Grootboom case

Although the onus for providing access to basic services rests with the local government sphere, the Constitutional Court in *Grootboom* highlights the national sphere's responsibilities in terms of ensuring that laws, policies and programmes are adequate to facilitate these obligations.

In September 2003, the Minister of Water Affairs and Forestry tabled a Strategic Framework for Water Services, providing the sort of detail implicit in the *Grootboom* ruling. The framework sets out in some detail the sector vision; goals and targets; the institutional framework; the financial framework; the planning framework; national norms and standards; the regulatory framework; and the support and monitoring framework.

3.5 Case Law

The obligation to respect the right of access to water has been tested in at least two High Court decisions dealing with the disconnection of existing water services. In *Manqele v Durban Transitional Metropolitan Council*¹⁸ the applicant, an unemployed woman who occupied premises with seven children, sought a declaratory order that the discontinuation of water services to the premises was unlawful. She argued that the by-laws in terms of which the water services had been disconnected were *ultra vires* the Water Services Act. The applicant relied on her right to a basic water supply as referred to in the Act and did not rely on the Constitution. The respondent argued that as no regulations had been promulgated to give meaning to the right to a 'basic' water supply, the right had no content. The court agreed with the respondent's argument. It has been argued that had constitutional arguments been advanced, the court would have been confronted

with assessing the scope of the right to basic water supply under the Act.¹⁹

In *Residents of Bon Vista Mansions v Southern Metropolitan Local Council*,²⁰ the applicants sought interim relief on an urgent basis for the reconnection of their water supply. The applicants relied directly on the Constitution in this matter. The court held that the obligation to respect existing access entails that the state may not take any measures that result in preventing such access. By disconnecting the water supply, the council had *prima facie* breached the applicants' existing rights. The court held that a *prima facie* violation of a local council's constitutional duty occurs if a local authority disconnects an existing water service, and that such disconnection therefore requires constitutional justification.

The government's duty to promote a right also provides a shield against claims arising from other legal provisions or constitutional rights.²¹ In *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others*²² the right to adequate housing assisted the national government in defending its right to create temporary housing for flood victims despite objections by neighbouring residents. Thus in the case of water, Section 25(8) provides:

No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination . . .

4. Assessment

In response to the DWA and DPLG report, the South African Human Rights Commission in its *4th Economic and Social Rights Report*²³ had the following comments and recommendations to make in relation to the right to access sufficient water:

The information provided indicates that free basic water has not been provided to everyone, especially the poor. The lack of bulk infrastructure was cited as one of the impediments to delivery of such and requires more funds to be allocated to programmes, since FBW to everyone is dependent on municipalities having a sound revenue base.

Capacity-building is a prerequisite for a functional and competent local government and for sustainable water and sanitation development. Therefore, the DPLG and its provincial subsidiaries should do more to build the capacity within municipalities. As long as the problems of capacity persist, government will not be able to realise its goal of providing basic services to the poor and the marginalised. The provision of the Municipal Systems Act on the recovery of debt contradicts those in the Constitution, because it means households will have their water cut off because of arrears either from rates or electricity. There should be other methods employed to recover costs,

because the high unemployment rate means the poorest of the poor will continue to have their water disconnected if this method of collecting debt continues to be used by the municipalities.

The poorest of the poor in rural areas have to be the main focus in the actual delivery of water and sanitary facilities. This is because, although they are recognised in policy documents, in practice the poor are excluded through projects that require connection fees and full cost recovery in tariffs.

The right to have access to water can be seen to place two interrelated but distinct obligations on the state. First, it must ensure that all people have physical access to water. This means that the facilities that give access to water must be within safe physical reach for everyone, especially the vulnerable and the marginalised. It must also ensure that all people have economic access to water. This implies that the cost of accessing water should be pegged at a level that will ensure that all people are able to gain access to water without having to forgo access to other basic needs.

Endnotes

- 1 Report by the Department of Water Affairs and Forestry (DWA) in South African Human Rights Commission *1st Economic & Social Rights Report: Baseline Information 1997-1998*. Available at http://www.sahrc.org.za/socio_economic_report_main.PDF (accessed 14 January 2004).
- 2 General Comment No 14.
- 3 See Articles 21, 25, 29, 46 & 85 Geneva Convention III, Articles 89 & 127 Geneva Convention IV; and Article 5 Additional Protocol II.
- 4 See Article 54 Additional Protocol I, and Article 14 Additional Protocol II.
- 5 The statement was issued by government-designated experts from 100 countries and representatives of 80 international, intergovernmental and non-governmental organisations at the International Conference on Water and the Environment.
- 6 Para 5, Recommendation Rec (2001) 14 of the Committee of Ministers to Member States on the European Charter on Water Resources. See also para 19.
- 7 Communication 155/96, SERAC and *CESR v Nigeria*, 15th Annual Activity Report.
- 8 Communication 25/89, 47/90 & 56/91, 100/93 (joined), 9th Annual Activity Report.
- 9 Gazette 22355, Regulation Gazette 7079, 8 June 2001.
- 10 Section 2.
- 11 Section 11(1).
- 12 Section 11(2).
- 13 Section 11(4).
- 14 Section 11(5).
- 15 The responsible licensing authority must *inter alia* take into account factors such as the need to redress the results of past racial and gender discrimination, efficient and beneficial use of water in the public interest and the resource quality objectives of the water resource. Conditions may be attached to a licence *inter alia* relating to the protection of the water resource, water management, return flow and discharge or disposal of waste.
- 16 In *The Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC) para 36, the Constitutional Court described this obligation as having to 'unlock the system' by *inter alia* providing a legislative framework. 'Access' to water entails economic and physical access. With

regard to economic access, the CESCR Committee has commented that 'water, and water facilities and services, must be affordable for all' (General Comment No 15 paras 12 & 27; *Grootboom* paras 35 & 36). Regarding physical access, the Committee has stated that water must be within the 'safe and physical reach' of everyone (General Comment No 15 para 8), meaning 'within, or in the immediate vicinity, of each household, educational institution and workplace'. Special attention should also be paid to those persons who face particular difficulties in physically accessing water.

17 See South African Human Rights Commission *4th Economic and Social Rights Report 2000/2002* available at http://www.sahrc.org.za/4th_esr_chap_9.pdf (accessed 16 January 2004) p. 410.

18 (2001) JOL 8956 (D); 2002 6 SA 423 (D); referred to by Niklaas, L. & Stein, R. 'Negotiating the rights of access to water through the courts' 2nd WARFSA/WaterNet Symposium: Integrated Water Resources Management — Theory, Practice, Cases, Cape Town 30-31 October 2001, p. 267.

19 See De Wisser, J. 'Disconnection of water supply', *Local Government Law Bulletin* 3(1) April 2001.

20 2002 6 BCLR 625 (W); referred to by Niklaas & Steyn (n 307 above) p. 266.

21 See Budlender, G. 'The justiciability of the right to housing: The South African experience', available at <http://www.lrc.org.za/>

22 2001 3 SA 1151 (CC).

23 n 306 above, pp. 412-413.

Social Security and Social Assistance

Nick de Villiers

1. Historical Context

Social security is an umbrella term for public and private measures that enable people to maintain themselves if their earning power ceases and they are unable to avoid poverty. It includes unemployment insurance, workers' compensation for accidents on duty, and social assistance. Social assistance refers to the payment of an amount of money from public funds for the maintenance of a person or his or her dependents during economic vulnerability, such as old age, early child-rearing and disability.¹ In South Africa, the delivery of social security takes place through the Unemployment Insurance Fund Act 63 of 2001, the Compensation for Occupational Injuries and Diseases Act 130 of 1993 ('COIDA'), and the Social Assistance Act 59 of 1992.

Under the separate development policy of the apartheid state, workers' compensation and unemployment insurance were administered by the different governments of the so-called 'independent states',² while the homelands shared the workers' compensation and unemployment insurance schemes managed from Pretoria under the Workmen's Compensation Act 30 of 1941. Although these laws were not overtly racially discriminatory, low wages paid to black workers were reflected in poor benefit rates, and the poor administrative service made access for black people difficult, despite this being the sector most needing support. The schemes were funded by contributions from workers and employers, and a nominal state subsidy.

Social assistance was initially provided to specific vulnerable categories in a range of statutes. There was no racial discrimination in the financial value of the benefits payable after 1967, but qualification criteria varied, depending on race. With effect from 1973, the Social Pensions Act 37 of 1973 consolidated the different Acts providing social assistance to categories of vulnerable people. During the 1970s, the 'homelands'³ and the 'independent states' administered their own social assistance schemes. KwaZulu, Lebowa, Gazankulu and Qwa-Qwa legislated on social assistance, as did the 'independent states'. The administration for

whites, coloureds and Indians was delegated to the various departments of the tri-cameral legislative and administrative state. From the 1980s, there was thus a patchwork of rights and standards of administrative efficiency. These schemes were all centrally funded by the Pretoria government, which, through its fiscal power, determined the benefits and the criteria needed to qualify in the greater apartheid hegemony. The value of benefits was comparable with present levels.

2. International Standards

The Covenant on Economic, Social and Cultural Rights (CESCR) requires states to 'recognise the right of everyone to social security, including social insurance'.⁴ Article 23 of the Convention on the Rights of the Child (CRC) explicitly states that every child has the right to benefit from social security, including social insurance.

The International Labour Organisation has adopted a number of conventions and recommendations in the field of social security. The Social Security (Minimum Standards) Convention No 102 of 1952 is the most comprehensive. Not only does this convention insist on the periodicity and regularity of available cash benefits, it also provides for minimum standards for medical care, sickness, unemployment, old age, employment injury, family, maternity, invalidity, and survivors' benefits.

CESCR and the Social Security (Minimum Standards) Convention have not been ratified by South Africa, but because social assistance is the principal measure for providing rights to sufficient food to everyone,⁵ and shelter and basic nutrition to children,⁶ the standards set under CESCR are of importance in developing the underlying constitutional rights.

The Convention on the Elimination of All Forms of Racial Discrimination against Women (CEDAW) addresses the eradication of discrimination in social security, as well as the right of equality to family benefits and insurance.⁷ Article 14 gives rural women the right to benefit directly from social security benefits. The

Convention on the Elimination of All Forms of Racial Discrimination (CERD) prohibits the perpetuation of racial discrimination in policies and legislation, and guarantees equality in accessing unemployment benefits and social security.⁸ Most of the provisions of CEDAW and CERD are embodied in South African domestic legislation.

The African Charter on Human and Peoples' Rights does not directly guarantee social security or social assistance, but it provides a number of provisions connected to social security. These include the right to the best attainable state of mental and physical health; protection of the family's moral and physical health, the right of the aged and disabled persons to special measures of protection; as well as the rights to life and dignity.⁹ The African Charter on the Rights and Welfare of the Child also provides for various rights contingent upon social security and social assistance, as does the Protocol to the African Charter on the Rights of Women, adopted by the African Union.

3. South African Law and Policy

The linkage between sections 27(1)(c) and 27(2) of the Constitution allows the state to develop the content of the right to social security and social assistance as circumstances require and its resources permit.¹⁰ The workers' compensation, unemployment insurance and social assistance schemes embody the fulfilment of the right of access to social security and social assistance. But it is not only the content of the rights that is important to their realisation. They must be reasonably implemented. This includes an obligation to budget for staff to administer the rights appropriately.

3.1 Compensation for Occupational Injuries and Diseases

Under COIDA, a worker can obtain compensation for accidents during the course and scope of employment, and various diseases, without proving negligence on the part of the employer. The scheme provides benefits from a dedicated fund made up mainly by employer levies. It is responsible not only for the payment of benefits to injured workers, but also its own administration and salaries.

The state has done little to support workers' compensation and nothing has been done to rationalise COIDA with other legislation.¹¹ Benefits have remained unaltered and are based on a percentage of the worker's previous salary. Where the accident or disease has caused permanent damage, benefits are calculated on a percentage of loss of total body function that takes no account of the psycho-social or economic significance of the injury to the particular worker. The resultant benefit rates are much lower than is justifiable.

The most serious defect in the scheme is its administration. Outspoken condemnation by doctors, the public and lawyers has been published in the national

press.¹² The National Economic, Development and Labour Council (NEDLAC) has called for a review of its operation. The state has done little to address this, other than to appoint various commissions to investigate the scheme. At the root of these complaints is the attitude amongst the staff of the scheme that it is an insurance scheme for and by employers, and not primarily for employees. The scheme accordingly fails to investigate or prosecute complaints by workers where employers do not comply with COIDA. Where employers do not co-operate, benefits to the worker are not paid. Claims are often delayed for years. Delinquent employers are not criminally prosecuted and the scheme's statutory powers to investigate on behalf of workers are not used.¹³

A central fund to finance all staff employment as well as the investigation of complaints and the payment of compensation has given rise to concerns about a conflict of interest in the management of the fund. COIDA has been amended in an attempt to address this concern, but the changes are superficial.¹⁴ The internal appeal process under COIDA is presided over by a small number of senior administrators who are identified with the fund. Independent decision-makers on internal appeals are needed.

This litany of complaints reflects a failure to respect or protect the right of access to social security.

3.2 Social Assistance

The Social Assistance Act took effect on 1 March 1996. Through it, the state repealed all apartheid-based legislation and rationalised all the separate administrations into a centralised database. It proceeded to assign the administration of the Social Assistance Act to the new provinces created under the interim Constitution, thereby undermining its ability to determine national norms and standardise delivery. Serious administrative shortcomings have manifested in the Eastern Cape, KwaZulu Natal, Mpumalanga, the North West and the Limpopo provinces.¹⁵ The assignment is under legal challenge and the state is legislating to centralise the administration of social assistance in a national agency.¹⁶

The Social Assistance Act has been haphazardly amended on a number of occasions, and a consolidated Social Assistance Bill that retains the present benefits is under parliamentary consideration. Disaster relief is also under consolidation.¹⁷ Benefits under the Social Assistance Act have been much extended. In addition to the old-age pension and disability grant, a child support grant to children from infancy to eight years¹⁸ has been implemented to replace the maintenance grant. There is a foster child grant and a care dependency grant for children whose disabilities require full-time care. A similar grant-in-aid is available for care-givers to adult disabled people. Social relief of distress is a temporary immediate grant to people facing crisis.

The amount of benefits has been periodically improved and presently ranges from R700 for an old age or disability grant to R160 for a child-support grant. The means test remains unaltered, but the applicant's residential property is no longer considered as an asset for calculation.¹⁹ The state has implemented a nationwide drive to register people for the child support grant, and uptake figures suggest it is between 60% and 75%. The regulations are presently under revision so that children without birth certificates can qualify. The growth in state expenditure in this scheme has increased by approximately 17% over the past four years,²⁰ representing the largest growth over this period in the national parliamentary budget. Although this unquestionably demonstrates the depth of the state's commitment to poverty eradication, concern at the growth in the state's financial commitments is now leading to increased attention to public works programmes and community development programmes as an alternative to cash-based social assistance.

The old-age grant and child support grant largely account for this growth, but the delivery of other grants remains problematic. Delays in obtaining foster placements for children in need of care,²¹ particularly AIDS orphans, reduce the efficacy of the foster child grant. The criteria to qualify as a disabled person in the Act and the Constitution differ significantly. A test espoused by the national Department of Social Development, which gives some weighting to socio-economic factors, remains arbitrary. There is presently a national process to develop a uniform assessment tool for disability. Its results are long overdue. Consequently, disability, care dependency grants, and grants-in-aid remain under-utilised; much litigation has ensued and this trend is likely to continue. The right of disabled people to social assistance is not respected as long as arbitrary definitions bar them from access to the scheme.

Social relief of distress is not effectively provided. No scheme was available until 2003 in Mpumalanga and Limpopo, and the North West had to be compelled by litigation to implement these regulations. In Gauteng, the Western Cape and the Free State, social relief is available only in major centres that the poor typically cannot travel to. This programme is accordingly irrationally and unequally provided. Social assistance is limited to vulnerable groups. No protection exists for people between 14 and 60 (for women) and 65 (for men). With unemployment ranging between 28% and 61%, it is clear that the labour market cannot provide for the needs of many ordinary people. Widespread poverty leading to malnutrition and starvation exists.²²

In an effort to provide a legislated measure for people in desperate need,²³ the state has undertaken to provide social relief of distress to people facing 'undue hardship'.²⁴ This was due for implementation on 1 April 2004, and is a welcome extension of the rights to social assistance. Although the state has implemented vari-

ous poverty alleviation measures to redress poverty outside the Act — including a food emergency scheme and maize price subsidy — statutory provision for people in desperate need is essential to redress the exclusion of people between the ages of 14 and 60 or 65. The Act allows only South African citizens to access benefits.²⁵ (This is currently under consideration by the Constitutional Court).²⁶ The exclusion of refugees breaches the Refugees Act 130 of 1998, the Constitution and CRC.

The Minister of Social Development convened a Committee of Inquiry into a Comprehensive System of Social Security of South Africa (The Taylor Commission).²⁷ The Committee developed 'minimum' requirements for a comprehensive social protection package and recommended ways of improving administrative access for people to the various social security benefits. It proposed the eventual introduction of a basic income grant, the extension of the child support grant to cover children under the age of 18, and free basic services. Many of these recommendations have been supported by the South African Human Rights Commission²⁸ (but none have been accepted by the government).

3.3 Unemployment Insurance

The Unemployment Insurance Act has consolidated the unemployment insurance scheme. It retains the benefits under the previous Act, and provides for maternity and adoption benefits. It includes farm workers and domestic workers as beneficiaries. Periodic benefits for unemployment or illness are limited to four years after losing employment. The precarious financial situation of the fund, which faced bankruptcy in the early 1990s, has improved. As part of its duty to 'protect' the right to social security, the state has taken steps to regulate private unemployment protection schemes. Unfair discrimination in the private insurance industry (medical aid schemes, life and disability insurance) is prohibited on the basis of race, gender, HIV/AIDS status and sexual orientation.²⁹

4. Assessment

The improved administrative efficiency and interface with users that the Taylor Commission identified is probably the single biggest challenge for the next ten years in each of the categories of rights considered in this chapter. Institutionalised responses to hunger and malnutrition must still be put in place. The establishment of a viable public works programme and a broad-based community development scheme is important for the viability of the social assistance scheme. These will require a locally focused economic policy premised on developing livelihoods rather than jobs, and restricting exploitation by the international market forces.

Endnotes

- 1 Evidence of Prof. Francis Lund in *Mashavha v the President of the Republic of South Africa and Others*, Transvaal High Court case number 17220/02 and Constitutional Court case number 67/03.
- 2 Transkei, Bophuthatswana, Venda & Ciskei.
- 3 KwaZulu, Lebowa, Gazankulu, KwaNdebele & Qwa-Qwa.
- 4 Article 9.
- 5 Section 27(1)(b) of the Constitution.
- 6 Section 28(1)(c) of the Constitution.
- 7 Articles 11 & 13 respectively.
- 8 Article 2(1)(c) & (d) and 5 respectively.
- 9 Respectively Articles 116(1), 18(1), 18(4), 4 & 5.
- 10 *Minister of Health and Others v Treatment Action Campaign and Others* 2002 5 SA 72 (CC); *The Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC).
- 11 Particularly the Occupational Diseases in Mines and Works Act 78 of 1973.
- 12 Accurate details of these complaints are not at hand at the time of writing, but include letters to *The Star*; SABC radio talk shows; and an inquiry on *Special Assignment*, an investigative SABC television programme.
- 13 The Compensation Commissioner has not filed an annual report since 1999 and no statistics on the scheme's operation are available. The data for these comments is drawn from discussions with people in the field.
- 14 They do no more than make the Director-General of Labour the chief accounting officer who delegates functions to the Compensation Commissioner, and other similar divisions of functions between these two offices.
- 15 Evidence of the Director-General (national) Department of Social Development in Mashavha. As further examples, see *Ngxuza and Others v The Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another* 2001 2 SA 609 (E). The appellant's disability grants were wrongfully terminated. The court ordered the province to reinstate the grants, with payment of arrears and interest. See also *The Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuza and Others* 2001 4 SA 1184 (SCA). Another example is the case of *Maluleke v MEC, Health and Welfare, Northern Province* 1999 4 SA 367 (T), where the province had suspended payments of social pensions to some 92 000 people. In *Mbanga v MEC, Health and Welfare, Eastern Cape and Another* 2002 1 SA 359 (SE) and *Mahambehlala v MEC, Health and Welfare, Eastern Cape and Another* 2002 1 SA 342 (SE), the provincial government failed to process claims for social grants within a reasonable time.
- 16 National Social Security Agency Bill.
- 17 Disaster Relief Bill.
- 18 On 1 April 2004 it was to be made available to nine- and ten-year-olds and to 11- to 13-year-olds in 2005.
- 19 Amendments to the regulations, November 2001.
- 20 Evidence of Johannes Kruger, Chief Director, Social Services in the National Treasury in *Saleta Mahlaule and Another v the Minister of Social Development and Others*; *Louis Khosa and Others v the Minister of Social Development and Others*; Constitutional Court case numbers CC 13/03 & 12/03 respectively.
- 21 As provided for by sections 12 to 15 of the Child Care Act 74 of 1983.
- 22 See the discussion of poverty levels in the Taylor Commission Report 28.
- 23 Following *Grootboom* (n 327 above).
- 24 *Kutumela and Others v Member of the Executive Committee for Social Security, Sports, Arts and Culture in the North West Province and Others*, Bophuthatswana High Court case number 671/03.
- 25 Even though non-citizens can legally access the foster child grant, delivery does not take place.
- 26 *Saleta Mahlaule* (n 337 above).
- 27 Committee of Inquiry into a Comprehensive System of Social Security for South Africa (March 2002) *Transforming the Present — Protecting the Future Consolidated Report*.
- 28 South African Human Rights Commission *4th Annual Economic and Social Rights Report 2000-2002* at 229.
- 29 In terms of the Medical Schemes Act 131 of 1998, medical schemes may, as a rule, no longer refuse membership or differentiate between members of a scheme on the basis of age and medical history. Certain core medical services have to be covered by these schemes.

Chapter Twelve

Education

Faranaaz Verieva

1. Introduction

The underlying rationale for the worldwide recognition of the right to education — often also seen as a cultural right — has been described as its importance in enabling individuals to develop their personalities, exercise their own human rights, and respect the rights of others.¹ It is therefore viewed as an ‘empowerment right’, because through education, individuals are able to exercise their enjoyment of other rights.² The right to education differs from most socio-economic rights in that aspects of this right are often held not to be subject to the internal qualifications of other socio-economic rights, such as progressive implementation.

2. Historical Context

In South Africa, prior to 1994, education was structured along racial lines so as to prepare learners of different race groups for the roles they were expected to serve under the apartheid society. The main characteristics of the apartheid education system included gross inequality in the financing of education, differentiated curricula and standards of education, and restricted access of black people to higher education.³ The post-apartheid government therefore adopted a policy of transforming the education system through the development of a new policy framework founded on constitutional principles and with the following objectives:⁴

... increasing access and retention of black students, achieving equity in public funding, eliminating illegal discrimination, creating democratic governance, rehabilitating schools and raising the quality of performance.

3. International Standards

Education is entrenched as a fundamental right at the level of international and regional law and in many national constitutions. Some of the general instruments include the Universal Declaration of Human Rights (UDHR)⁵ and the International Covenant on Economic, Social and Cultural Rights CESCR⁶. In the African

region, the right to education is entrenched in the African Charter on Human and Peoples’ Rights⁷ and the African Charter on the Rights and Welfare of the Child.⁸

The right is further affirmed in international instruments in respect of the protection of specific vulnerable groups, such as the Convention on the Rights of the Child (CRC),⁹ the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW)¹⁰ and the Committee on the Elimination of Racial Discrimination (CERD).¹¹ There are also certain specialised instruments that deal specifically with education, such as the United Nations Educational, Scientific and Cultural Organisation (UNESCO) Convention Against Discrimination in Education and the World Declaration on Education for All.

4. South African Law and Policy

Section 29 of the Constitution is a hybrid provision that comprises a bundle of education rights, divided into sub-sections. Each right confers specific and separate entitlements on right holders, and the different sub-sections place concomitant obligations on the state that vary in nature and degree. Section 29(1) is a socio-economic right and sections 29(2) and (3) are civil and political rights that contain freedom of choice guarantees, such as language choice in schools and the freedom to establish and maintain independent educational institutions, and hence the freedom of individuals to choose between state-organised and private education.¹² The socio-economic entitlements under Section 29 are also distinguishable from each other, in that Section 29(1)(a) does not contain the internal qualifications that are found in Section 29(1)(b). Below we focus on the social and economic guarantees under Section 29.

5. The Right to Basic Education

Section 29(1)(a) states: ‘Everyone has the right to a basic education, including adult basic education.’

The text of this right is broad and generally phrased. In *In Re School Education Bill of 1995 (Gauteng)*¹³ the Constitutional Court held:

Section 32(a) [of the interim Constitution] creates a positive duty that basic education be provided for every person and not merely a negative right that such person should not be obstructed in pursuing his or her basic education.

The court therefore recognised that the state has a positive duty to make provision for 'basic education', but is yet to comment more definitively on the meaning of 'basic education' or the extent of the state's obligations in respect of this right.

In the White Paper on Education and Training, 'basic education' is defined as 'appropriately designed programmes to the level of the proposed General Education Certificate (GEC)', which is the one-year reception class (pre-school) plus nine years to Grade 9.¹⁴ The state has attempted to meet its obligations in respect of the provision of 'basic education' by making this phase of education compulsory, and by prioritising this phase of education in spending.¹⁵ This definition of basic education is narrow in scope, if one considers the question of whether or not individuals who have completed Grade 9 are sufficiently equipped with knowledge and skills that will enable them to develop to their full potential, particularly in the context of wide-spread unemployment in South Africa.¹⁶

The basic education guarantee, in contrast with other socio-economic rights, is unqualified. The absence of internal qualifiers in respect of basic education suggests a standard of review higher than that in respect of the qualified socio-economic rights. This higher standard requires that the state implements measures to give effect to the right as a matter of priority. Thus, where the state fails to allocate resources for the building of a primary school in a particular area, and learners from that area have to go to extraordinary lengths to attend school by, for example, walking long distances every day, those learners may have a direct claim against the state to build a school or to provide transport to other schools. An inquiry as to whether the state is meeting its obligations should require firstly an analysis of the content of the right, and secondly an evaluation of whether or not the state has prioritised this right in its planning and provisioning.

Within the context of redressing apartheid education, the content of the right must encompass the principle of non-discrimination; education must be both physically and economically accessible; and education must be of an adequate standard so as to ensure that all entitled to the right are able to develop to their full potential.¹⁷

The current policy framework for education has as its objective the 'redressing' of apartheid education.¹⁸ Thus the past 10 years have seen the passing of a plethora of legislation to regulate and transform *inter alia* the funding of schools, governance for schools,

discipline for learners, and language and admission policies. The most significant policy reforms may be summarised as follows:

5.1 Non-discrimination

The South African Schools Act 84 of 1996 ('Schools Act') places a general prohibition on unfair discrimination in the admission of learners, thus ending racially segregated schooling.¹⁹ It also specifically outlaws other practices that have the potential to discriminate against learners of different races, cultures or socio-economic backgrounds. For example, it prohibits excluding a learner from admission to a school on certain specified grounds such as failing to subscribe to the mission statement of a school or parental inability to pay school fees.²⁰

The current policy framework cannot rule out all forms of discrimination, particularly covert discrimination, likely to be experienced by learners. An example of this is the case of *Matukane and Others v Laerskool Potgietersrus*²¹ that dealt with discrimination on the basis of race. In this case the High Court held that black learners had been unfairly discriminated against when their application to a dual-medium school had been rejected on the basis that the school had an exclusively Afrikaans culture and ethos, which would be detrimentally affected by admitting learners from a different cultural background. The school attempted to rely on arguments about the protection of minority rights to exclude black learners.

The Department of Education has demonstrated a commitment to outlaw systemic patterns of discrimination and exclusion in certain areas where they have been identified as such, but must at the same time improve its efforts in other areas. For example, pursuant to a South African Human Rights Commission investigation and report into initiation practices and their impact on learners' access to education, regulations were promulgated outlawing initiation practices in schools.²² At the same time, however, the state has failed to address gender violence in schools, despite a Human Rights Watch report in 2000 that looked at the impact of sexual harassment and sexual violence on learners, and found that it erected a 'discriminatory barrier for young women and girls seeking an education'.²³ Cultural and religious practices in schools is another area where detailed policy guidelines promoting diversity could eradicate the potential for discrimination against learners on religious grounds. The Schools Act²⁴ allows religious observances, such as school prayers, to be conducted at schools, provided that such observances are conducted on an equitable basis and attendance at such observances is voluntary. No provision is made however to protect learners from exercising their religious beliefs in other contexts. For example, there is no specific provision that protects a Moslem girl-learner's right to wear a headscarf, where a school governing body bans the wearing of the scarf at school.²⁵

5.2 Funding of Basic Education

An analysis of the resourcing of basic education must determine the extent to which it provides basic education that is of an adequate standard and economically accessible for all entitled to it.

The Schools Act directs that funds must be made available for public schools from public revenue according to the principles of equality and redress. It then directs that charging fees and/or undertaking fundraising should supplement deficits in state funding.²⁶ Personnel funding for schools is distributed according to the Regulations for the Creation of Educator Posts in a Provincial Department of Education and the Distribution of Such Posts to the Educational Institutions of such a Department (the 'Post Provisioning Norms').²⁷ Basic infrastructure provisioning is guided by the National Norms and Standards for School Funding ('Norms and Standards').²⁸ In terms of the latter, state funding is distributed according to a formula for socio-economic targeting that ranks schools from the poorest to the least poor, and distribution occurs by a formula where 60% of available recurrent non-personnel expenditure should go to the poorest 40% of schools.

In terms of the Schools Act, the decision to charge school fees is one of individual school governance.²⁹ Thus, in theory, there may be schools that do not charge school fees. The policy framework then attempts to alleviate the burden of school fees for those parents who are unable to pay such fees. The Exemption of Parents from the Payment of School Fees Regulations ('Regulations')³⁰ sets out a mandatory means test for the granting of full and partial exemptions that individual schools are obliged to abide by when determining their exemption policies.³¹

5.3 Adequacy

This funding model has failed to sufficiently address the disparities between the historically advantaged (white) and disadvantaged (black) schools. As a result, an adequate standard of education in the latter schools has not been met. This is because non-personnel expenditure, which is equity driven, constitutes only 8% to 10% of state spending, while personnel provisioning that constitutes 85% to 90% of state spending continues to favour historically advantaged schools.³² Thus, the amount of education-spending actually distributed in terms of an equity formula is minimal.

Furthermore, those schools that rely on wealthier parents and communities are able to charge higher school fees to make up deficits in state funding, and hence to provide sufficient teachers and services necessary to meet basic learning needs; while those schools in poor communities, even after the distribution according to the equity formula, will not receive sufficient income to make up the deficits in school budgets.³³

As a result of the above, few resources exist in poor schools to upgrade the services of those schools that have historically existed in conditions of abject poverty and that continue to survive under those conditions. This is reflected in a comparison between the state of South African schools in 1996³⁴ and in 2002.³⁵

Adequate resourcing and upgrading of poor schools is essential in addressing inequalities in society and ensuring that learners attending these schools can compete on equal terms with their wealthier counterparts. According to Wilson³⁶ the inequality in the education system of funding continues to be a major reason why educational achievement is still determined by racial and economic background.

5.4 Economic Accessibility

School fees, despite the exemption system, pose a barrier to education. Many schools are failing to implement the exemption policy and to grant exemptions.³⁷ In many instances, poor learners are treated differently at schools by being sent home from school until fees are paid, or by having reports withheld because they have not paid school fees.³⁸ In circumstances where school governing bodies have no option but to rely on school fees to subsidise deficient school budgets, governing bodies and school principals will continue to avoid the implementation of the exemption policy in their efforts to extract fees from parents, whether or not these parents would qualify for an exemption.

Schools also add other access costs such as transport, uniforms and textbooks. Exemptions provide no relief from such costs. These costs, especially uniform and transport costs, can present an absolute barrier to school access.³⁹ The means test is also problematic in several respects. For example, it fails to take into account the number of children a family has at school.⁴⁰ It also fails to provide relief for those families who narrowly miss qualifying for an exemption, but who are nevertheless poor.

The system of charging schools fees fails to comply with international law.⁴¹ Nor can the exemption system be interpreted as satisfying the free education guarantee in the light of international or comparative law.⁴²

The Department of Education, acknowledging some of the problems with the current funding regimes, has published a Plan of Action for 'Improving Access to Free and Quality Basic Education'.⁴³ This plan is vague as to the precise nature of the proposed reforms, but nevertheless promises an array of regulatory reforms to facilitate better access to schools that include *inter alia* the regulation of the cost of uniforms and books, and improved systems for schools to administer schools budgets. The plan also suggests that school fees will be abolished in the bottom two quintiles of schools, and that schools in these quintiles will be obliged to seek departmental approval before charging school fees. It then suggests a system for the closer monitoring and enforcement of the exemption policy for the remaining

quintiles. It also suggests a 'basic minimum package' to bring about adequate funding of schools.

The indicators by which this basic minimum package is to be introduced are not set out in the plan. It is therefore yet to be determined whether or not the proposed reforms will improve accessibility or provide an adequate standard of education for all. It is clear, however, that the status quo in terms of reliance on school fees for at least 60% of schools will remain. The Department of Education was to begin its implementation of the plan by 2004. To date, however, there appears to be no amendments to the current funding that will enable this to happen.

6. Adult Basic Education

In the state's policy document on Adult Basic Education (ABE), ABE is defined as education that 'subsumes both literacy and post-literacy as it seeks to connect literacy with basic (general) adult education on the one hand and with training for income generation on the other hand'.⁴⁴ The policy document states further that there are approximately 9,4 million potential ABE learners.⁴⁵ Yet, every year, spending in respect of ABE appears to be de-prioritised in favour of other programmes with ABE-spending bearing no relationship to the relative need for ABE.⁴⁶ For example, according to the *South African Human Rights Commission Third Socio-Economic Rights Report*, the Limpopo Department of Education's termination of adult educator services, and the insufficient allocation of payment in the financial year 2001/02 resulted in the suspension of services of 795 Adult Learning Centres in the province, and hence led to the denial of the right to basic education of 34 685 learners.⁴⁷ Such an approach to ABE provisioning is obviously contrary to the priority obligation imposed on the state by its specific inclusion in the basic education guarantee.

7. The Right to Further Education

Section 29(1)(b) states that 'everyone has the right to further education, which the state, through reasonable measures, must make progressively available and accessible'.

This right, unlike the right to basic education, is a qualified socio-economic right. This suggests that the standard of review in respect of Section 29(1)(b) is likely to be whether the measures taken to make further education available and accessible are 'reasonable'. However, a feature of Section 29(1)(b) that distinguishes it from the other internally qualified socio-economic rights is that the phrase 'within available resources' is omitted from the text of the clause. This could be interpreted to mean that where a state policy or programme is challenged in terms of this right, the criteria for assessing the reasonableness of the programme could, in addition to those set out in *Grootboom v Republic of South Africa*,⁴⁸ entail an evaluation

of the sufficiency of funding made available for the programme's implementation.

Access to higher education⁴⁹ is regulated in terms of the Higher Education Act 101 of 1997, which establishes the 'legal basis of a single, national higher education system on the basis of the rights and freedoms in our Constitution'.⁵⁰ However, institutions maintain a degree of self-regulation in respect of 'student admissions, curriculum, methods of teaching and assessment, research, establishment of academic regulations and the internal management of resources'. Thus, there may be institutions reluctant to adopt a programme of institutional transformation that facilitates access. The Act accordingly gives the Minister of Education a wide discretion to withhold state funds under such circumstances.⁵¹

In a context where the majority of students were denied opportunities for further education, facilitating access through institutional transformation requires that institutions develop and implement policies and programmes that redress this legacy. An example of such a programme includes selection tests that have been developed at certain universities to assess the potential of students whose schooling results do not necessarily qualify them for university entrance, but who nevertheless through these tests demonstrate an ability to succeed at university.

In the case of *Motala and Another v University of Natal*,⁵² the university's admission policy was the subject of an equality challenge. In this case, the parents of an Indian student brought an application against the university after her application to medical school had been rejected, despite good academic results. The parents claimed that the university admission policy discriminated against their daughter and favoured African applicants. The court found that the discrimination was not unfair and that the policy was within the meaning of Section 8(3)(a) of the interim Constitution. The court accepted that, although the Indian community had been decidedly disadvantaged under apartheid, the disadvantage suffered by African pupils under apartheid was significantly greater, and accordingly an admission policy that acknowledged this was not unfair.

A national student aid scheme has been established in terms of the National Student Aid Scheme Act 56 of 1999. The Act provides for the establishment of a board, among other things to allocate funds for loans and bursaries to eligible students, and develop the criteria and conditions for the granting and withdrawing of such loans and bursaries.⁵³ Funding in terms of the scheme is provided from various sources such as state allocations, private funding, and the repayment of loans.⁵⁴ A scrutiny of the reasonableness of the Act would require an inquiry into whether or not the Act facilitates access to all students, particularly those from disadvantaged backgrounds, who meet the criteria for

admission to institutions falling within the Act.

A vexing issue in this regard is that of the financial exclusion of those students who initially receive assistance in terms of the Act but then have such assistance withdrawn because of poor academic performance. Factors that therefore need to be considered when setting conditions for granting and withdrawing loans should include an assessment of the impact of economic hardship on an individual learner's academic performance, and whether or not processes are in place to bridge the gap between the schooling received and the demands of the particular institution. As stated above, an inquiry into the reasonableness of the Act could also entail a scrutiny of sufficiency of the funding in facilitating access to all students who meet the criteria for admission to institutions falling within the Act. Thus, to the extent that the fund does not make sufficient provision for all eligible students, the Act may not be reasonable.

11. Assessment

The state's main achievements in the past ten years in redressing apartheid education can be seen as the rationalisation of the education system into a unified system, the removal of formal barriers of access to education, and the initiation of a regulatory framework based on constitutionalism that is committed to redress. The state measures its own achievements during this period by using indicators such as *inter alia* increasing levels of enrolment at the early education, primary and secondary phases; increasing pass rates at the varying stages; and, as a primary indicator, increases in adult literacy.⁵⁵

In the same report where the state reflects on its achievements in respect of education, it also notes that 71% of the population over 20 years old has not had a secondary education,⁵⁶ unemployment has increased between 1995 and 2002 by 2 361 834; and that while many unskilled workers are unemployed, there is a shortage of skilled workers.⁵⁷ An incrementalist approach to education will not work, but will produce another generation without sufficient skills or opportunities. The child or adult who misses out on the full benefits of education today is denied development opportunities and perhaps even a livelihood forever.

Endnotes

- 1 Nowak, M. 'The right to education' in Eide, A. *et al.* (eds) *Economic, Social and Cultural Rights* (2001) pp. 245-271.
- 2 Coomans, F. 'The core content of the right to education' in Brand, D. & Russel, S. (eds) *Exploring the Core Content of Socio-economic Rights: South African and International Perspectives* (2002) p. 160.
- 3 In 1994 South Africa had 15 ministries of education, including those in the homelands. Per capita expenditure was as follows: R5 403 for white children; R4 687 for Indian children; R3 691 for coloured children and between R2 184 and R1 053 for African children. See *Report of the Committee to Review the Organisation, Governance and Funding of Schools, Department of Education*, August 1995 15.

- 4 White Paper: Education and Training in a Democratic South Africa: First Steps to Develop a New System, March 1995 para 1.
- 5 Article 26.
- 6 Articles 13 & 14. The CESCR Committee deals with the right to education in General Comments 11 and 13.
- 7 Article 17.
- 8 Article 11.
- 9 Articles 28 & 29.
- 10 Article 10.
- 11 Article 5.
- 12 In *In Re School Education Bill of 1995 (Gauteng)* 1996 4 BCLR (CC) para 7, the court, interpreting the meaning of the equivalent provision under the interim Constitution, stated that this right did not place a positive obligation on the state to establish such institutions. Instead, what it does provide is 'a defensive right to a person who seeks to establish such institutions and it protects that right from invasion by the state, without conferring on the state an obligation to establish such educational institutions'.
- 13 *Ibid.*, para 9.
- 14 March 1995, para 15.
- 15 See Section 3(1) of the Schools Act 84 of 1994. See also para 95 of the Norms and Standards for School Funding General Notice 2362 (*Government Gazette* 19347) October 1998 that requires that in the building and extension of schools this phase of education take precedence.
- 16 The World Declaration on Education for All has a broader definition. It de-emphasises as a yardstick for 'basic education' the completion of specific formal programmes or certification requirements. Instead it emphasises the acquisition of basic learning needs such as literacy, oral expression, numeracy, problem solving and other skills necessary for an individual to realise his or her full potential and participate in society, thus connecting the meaning of basic education with the objectives to be achieved by the guarantee of the right. See Articles 1 & 4.
- 17 Article 13(2) of General Comment 13 to the CESCR has developed the '4-A' scheme as a useful device to analyse the content of the right to basic education. It states that, while the exact standard secured by the right to basic education may vary according to conditions within a particular state, education must exhibit the following features: availability, accessibility, acceptability and adaptability. It then defines each of these performance indicators.
- 18 This is stated as a clear objective in the Preamble to the Schools Act.
- 19 Section 5.
- 20 Act 84 of 1996.
- 21 1996 3 SA 223 (WLD). The issue of discrimination on the basis of age was raised in the case of *Minister of Education v Harris* 2001 4 SA 1297(CC), but the case was not decided on that basis.
- 22 See Regulations to Prohibit Initiation Practices in Schools Government Notice 1589 (*Government Gazette* 24165) December 2002.
- 23 Human Rights Watch (March 2001) 'Scared at school: Sexual violence against girls in South African schools' <http://www.hrw.org> (accessed June 2002).
- 24 Section 7.
- 25 See *The Star*. 'Wrangle over headscarf at Joburg school'. 23 January 2004.
- 26 See sections 34, 36 & 39.
- 27 76 of 1998, Government Notice R1676 (*Government Gazette* 19627) December 1998.
- 28 General Notice 2362 (*Government Gazette* 19347) October 1999.
- 29 Section 39. At an annual general meeting of parents it is decided whether or not to charge school fees, the amount of fees to be charged and the content of exemption policy. See below.
- 30 Government Notice 1293 (*Government Gazette* 19347) October 1998. These regulations have been developed pursuant to

- Section 39(4) and Section 61 of the Schools Act.
- 31 See Regulation 3(1)(a) as read with 5(3), in terms of which a school must fully exempt parents whose incomes are less than ten times the annual school fee, and partially exempt those whose incomes are less than 30 times but more than 10 times the annual school fees. Partial exemptions are subject to the discretion of the school governing body.
 - 32 See Porteus, K. 'Education financing: Framing inclusion or exclusion' (2002) 9 *Quarterly Review of Education and Training* in South Africa 13. According to Porteus, personnel provisioning is distributed according to 'weighted norms' to different fields of study which favour historically advantaged schools. Secondly, historically advantaged schools enjoyed educators with higher qualifications. Thus, in practice, historically advantaged schools would enjoy higher per capita personnel expenditure than historically disadvantaged schools.
 - 33 Porteus compares a school budget for a poor school charging R50 per year and a relatively richer school charging R2 500 per year. Even after the planned re-distribution of public funds to schools has been completed, poor schools can still expect to have less than half of the budget of the more advantaged school. As n 378 above, p. 13. See also Wilson, S. *Taming the Constitution: Rights and Reform in the South African Education System* (2002), paper presented at the workshop on Human Rights, Democracy and Social Transformation: When Do Rights Work? Centre for Applied Legal Studies, 12-13 November 2002, unpublished pp. 13-14.
 - 34 The 1996 School Register of Need Survey reflects the conditions in South African schools as follows: Schools without telephones 16 666 (61%); secondary schools with science labs 2 429 (31%); with biology labs 1 779 (23%); condition of school buildings: 1 713 (6%) not suitable for education, 3 090 (11%) need major repairs, 785 (40%) need minor repairs and 11 095 (41%) are in good/excellent condition; schools with libraries 4 638 (17%); schools with no water on site 6 516 (24%); schools with no electricity 14 145 (52%); schools without toilet facilities 3 288 (12%), schools with bucket system 335 (1%); classroom shortage 57 499; 62% of schools were adequately provided with stationery and 49% with textbooks; 82% had no media equipment; 72% had no media collections; 73% had no learning equipment and 69% had no materials.
 - 35 The following statistics reflect the conditions in the 27 148 schools in 2002: 2 280 (8,4%) of schools with buildings in state of disrepair; 10 723 (39%) schools have a shortage of classrooms; 13 204 (49%) schools have inadequate textbooks; 814 295 learners reside beyond a 5 km radius from the school; 10 859 (40%) schools are without electricity; 9 638 (36%) schools are without telephones; 2 496 (9%) schools are without adequate toilets; 19 085 (70%) schools lack access to computer facilities; 21 773 (80%) lack access to library facilities and 17 762 (65%) lack access to recreational and sporting facilities. *South African Human Rights Commission 3rd Socio-Economic Rights Report 2000/2002* 258.
 - 36 According to him, while the matric pass rate has jumped by 11% nationally since 1995, the proportion of learners obtaining university exemptions has fallen by 1%. He states further that while disaggregating pass rates by socio-economic background are hard to come by, matric mathematics attests to ongoing racial inequality. That is, 30% of learners from poor (African) schools passed higher grade maths in 2002, while 90% of learners from rich (white) schools passed higher grade maths in that same year. Wilson (n 379 above) p. 8.
 - 37 On 16 September 2002, the Minister of Education, Kader Asmal, initiated a review of the current regulatory framework on the basis of, amongst other issues, the failure by individual schools to implement the exemption policy and the discrimination being experienced by poor learners. Press Statement, Department of Education (16 September 2002).
 - 38 Testimonies of parents and children during the Poverty Hearings conducted throughout South Africa as well as the South African Human Rights Commission investigation into racism in schools both reflect the differential treatment accorded to learners who cannot afford to pay school fees. For example, cases are recorded where learners who have not paid school fees are forced to sit on stairs as opposed to desks in classrooms. Vally, S. & Dalamba, Y. *Racism, Racial Integration and Desegregation in South African Public Secondary Schools* (1999) pp. 47-50. See also Liebenberg, S. & Pillay, K. *Poverty and Human Rights in South Africa — Poverty Hearings background paper* (1998) pp. 38-39.
 - 39 Liebenberg & Pillay (n 384 above). Research conducted in the Sol Plaatje Settlement in Gauteng attests to this burden: 'Education access costs in Sol Plaatje are regressive. The proportion of household income spent on costs normally associated with sending a child to school is inversely proportional to the level of household income. Except in the very poorest households, transport costs make up between 50% and 70% of the access burden.' Wilson, S. 'Relocation and access to schools in Sol Plaatje' Law and Transformation Programme, Centre for Applied Legal Studies, University of the Witwatersrand (2003) 26.
 - 40 Eligibility in terms of the formula for an exemption is determined by considering the school fees of the child for whom the exemption is being sought in relation to the family income. Parents generally, however, have more than one child at a school or at different schools. Thus, the percentage of the family income being consumed by school fees may not appear to be high when considered in respect of one child, but may constitute the highest expenditure in a family when considered in respect of the total amount of school fees being paid for all of the children in the family.
 - 41 International law requires that education be free and compulsory, at least during the primary school phase, and that free education be progressively introduced during the secondary school phase.
 - 42 See, e.g., Article 28(1)(a) of the CRC which requires that state parties 'make primary education compulsory and available free to all'. Article 28(1)(b), by contrast, provides that state parties should make secondary education 'available and accessible to every child, and take appropriate steps such as the introduction of free education and offering financial assistance in the case of need', thus suggesting that state parties take steps such as those in terms of the above-mentioned exemption provisions only with regard to secondary and not primary education, which should be free. See also the definition of 'free of charge' in para 7 of General Comment 11 to the CESCR. See also the US case of *Hartzell v Connell* 679 P 2d 35 (Cal 1984), where the court rejected a fee waiver scheme as a violation of the free education guarantee. The scheme allowed fees to be waived where needy children qualified in terms of the scheme.
 - 43 Department of Education (2003) *Plan of Action — Improving Access to Free and Quality Education for All* http://education.pwv.gov.za/DOE_sites (accessed June 2003).
 - 44 The Policy Document on Adult Basic Education and Training (undated).
 - 45 Ibid. n 351
 - 46 Wildeman, R.A. 'Reviewing Provincial Education Budgets 2003.' (2003) Idasa — Budget Information Service. 27
 - 47 See n 381 above, pp. 277-278.
 - 48 2001 1 SA 47 (CC).
 - 49 The term 'further education' is not used in international legal instruments (international instruments distinguish between 'primary', 'secondary' and 'higher' education). In South Africa, further education and training is defined in the Further Education and Training Act 98 of 1998 as levels above 'general education' but below 'higher education' (Section 1), while higher education is defined in terms of the Higher Education Act as 'all learning programmes leading to qualifications higher than Grade 12 or its equivalent in terms of the National Qualifications Framework'. This includes universities, technikons and colleges (Section 1). Despite this legislative categorisation, further education in terms of the constitutional right should be read as referring to all

education of a higher level than basic education, including higher education. Such an approach would be consistent with the international interpretation given to the meaning of the right (Article 13 of the CDESCR, Article 28 of the CRC and Article 3 of the African Charter on the Rights and Welfare of the Child) and would be the only way to make sense of the constitutional distinction between basic and further education.

50 Higher Education White Paper (July 1997) p. 38.

51 Section 42.

52 1995 3 BCLR 374 (D) 383.

53 See sections 3, 4 & 19.

54 Section 14.

55 Government Communication and Information Systems (October 2003) GCIS: *Ten Years of Freedom: South Africa 1994-2004* (2002) <http://www.gcis.gov.za> pp. 19-20 & 85-65 (accessed January 2004). According to the report, between 1996 and 2001, literacy rates have increased in the general population from 83% to 89%, and in the 15- to 24-year-olds from 83% to 96%.

56 *Ibid.*, n. 366.

57 *Ibid.*, n 382.

The Right to Development: An Implied Right in South Africa's Constitutional Order

Professor Shadrack Gutto

1. Introduction¹

The Constitution of the Republic of South Africa is reputed for its broad and far-reaching Bill of Rights. This is especially so because it provides for both civil and political rights, as well as for a number of social, economic and cultural rights and freedoms. There is, however, no clear official categorisation of rights that fall under the umbrella of 'social and economic rights' in the Bill of Rights. Conventional usage, influenced mainly by the categorisation reflected in the two international covenants of 1966,² seems to include rights to or of the environment,³ property (including land and natural resources),⁴ housing,⁵ health care, food, water and social security,⁶ education,⁷ and child-specific rights to basic nutrition and shelter.⁸

All the rights and freedoms recognised in the Bill of Rights are justiciable in courts of law⁹ — an uncommon feature that is replicated in only a few other national constitutions and legal systems.¹⁰

Despite such comprehensiveness, the Constitution is far from being exhaustive in its recognition of fundamental human rights and freedoms that enjoy international recognition. Of the rights that enjoy recognition in regional and international treaties that are not expressly recognised in the Bill of Rights, the right to work¹¹ and the right to development are the most prominent. However, the fact that the Bill of Rights does not incorporate the right to development does not mean that the right is of less importance than those that are expressly incorporated; neither does it mean that South Africa's Constitution in its entirety fails to make reference to a number of specific elements that constitute the right to development.

It is argued in this chapter that the Constitution implicitly incorporates a number of elements that constitute the right to development. The incorporation takes three forms: (1) the Constitution's developmental imperatives and promotion of public participation in important affairs of state and in development; (2) the Constitution's reference to 'sustainable development'

and the 'right to self-determination'; and (3) the overall impact of the realisation of all other rights recognised in the Bill of Rights. In other words, the national development vision and mission that permeate the new democratic constitutional order point to a model of a developmental state and society that sits comfortably with the right to development. As argued elsewhere, this was perhaps less evident under the interim Constitution¹² that was in effect between April 1994 and February 1997.¹³ Even then, some legislation to promote development and enhance public participation could be put in place.¹⁴

In addition to reading the right to development in the overall constitutional framework, South Africa has also assumed regional and international obligations to implement the right to development within its national jurisdiction.

Given the lack of express recognition of the right to development as a right in the Bill of Rights, the presentation of this chapter makes a slight departure from the other rights-specific chapters with regards to the jurisprudence of the courts to date. Courts have not been able to develop specific jurisprudence on the right to development, save for indirect reference to some elements of the right in the jurisprudence that refer to the expressly recognised rights in Chapter 2 of the Constitution. The chapter however opens a new path for rights inquiry and discourse that should inform future incorporation of the right to development and also expand and deepen the interpretation and development of other rights.

This chapter introduces an understanding of the right to development as a self-standing right on its own as well as being the sum total of all other rights, into the corpus of fundamental rights and freedoms that should be promoted and protected in South Africa. Its other key elements include: its being an 'individual' and 'group or collective' right, the principle of direct participation by the right-holders in development, and self-determination.

The *Ten Year Review*¹⁵ by the government highlights major achievements but also major gaps and un-met needs in practically all areas of human life that fall within the scope of the right to development. It is envisaged that incorporation and mainstreaming of the key elements of the right to development will have the potential of making South Africa's human rights approach to development much more focused and measurable. Overall, it is an added arsenal in the continuing and continuous building of a culture of human rights in South Africa.

2. Understanding 'Development' to which the Right to Development Refers

A discussion and analysis of the right to development would be incomplete and deficient if not cast within some clear understanding of what 'development' means. This ought to be easily understandable to anyone familiar with rights discourse. It is not any different to the discussion of the right to equality, dignity, expression, assembly or education. Discussing these categories of rights presupposes, at the very least, some conceptual understanding of the meaning of equality, dignity, expression, assembly or education.

As manifest in the few examples cited below, 'development', at the very minimum, refers to the attainment of some generally agreed standard of 'human progress' — mental, spiritual, intellectual and physical. It is also understood as progress for the present that does not undermine the basis for progress of future generations.

Since all development takes place in the context of material resources or the material world, there is necessarily an interrelatedness and interdependence between individual human progress and changes in material conditions necessary for sustaining human life. An added dimension is that individuals operate within societal environments — local and external. Individual human progress is therefore linked to the material world, but within immediate as well as broader societal contexts.

Amartya Sen, a recent winner of the Nobel Prize in economic science, views development as the expansion of freedom of choice for human beings, both in terms of 'processes that allow freedom of actions and decisions, and the actual opportunities that people have, given their personal and social circumstances'.¹⁶ He points out that conditions of poverty, for example, are not merely low income status but rather the deprivation of capabilities for freedom of choice.¹⁷ Development implies overcoming problems such as 'persistence of poverty and unfulfilled elementary needs, occurrence of famines, and widespread hunger, violation of elementary political freedoms as well as basic liberties, extensive neglect of the agency of women, and worsening threats of our environment and the sustainability of our economic and social lives'.¹⁸

Sen's approach to and understanding of development challenges does not differ materially from those in the 2000 UN Millennium Declaration¹⁹ and the Millennium Development Goals.²⁰ Confronting poverty; improving on life expectancy, education and health; combating diseases; expanding access to clean water, sanitation and shelter; as well as improvement in the observance of basic human rights and democratic governance, are all important indicators for development. It is remarkable that the annual budget speeches by the Minister of Finance, Trevor Manuel, for 2003/05 and 2004/05 have been prefaced by direct reference to Sen's ideas on development.

Understanding development in the context of proper environmental management has introduced two essential elements that need to be taken into account: 'sustainability' and 'inter-generational' or 'intergenerational equity' principle²¹ concerns. At the international level, 'sustainable development' has been defined as:

... development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts:

1. the concept of 'needs', in particular the essential needs of the world's poor, to which overriding priority should be given; and
2. the idea of limitations imposed by the state of technology and social organisation on the environment's ability to meet present and future needs.²²

This understanding of development was reinforced recently by the World Summit on Sustainable Development (WSSD) that was held in Johannesburg in 2002.²³

South Africa has incorporated some elements of sustainable development within the legal system. For example, the concept of inter-generational responsibilities or equity, which accords with the African philosophy of *ubuntu*, is clearly expressed in the Bill of Rights under Section 24 of the Constitution. The section reads:

Everyone has the right:

- (a) . . .
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

As will become clear below, the concept of self-determination in international law and within the context of the right to development applies to all spheres of life, including economic, social, cultural and political aspects.

3. The Right to Development: Its Legal Recognition, Meaning and Development

The right to development first found unambiguous legal expression in 1981 in the principal African regional human rights instrument, the African Charter on Human and Peoples' Rights.²⁴ Article 22 of the Charter reads:

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

Read contextually and within the broader framework of the corpus of rights and freedoms in the International Bill of Rights²⁵, the provision clearly refers to social, economic and cultural rights, as well as civil and political rights. It further introduces the 'common heritage' norm that is typical of environmental rights — a 'third generation' or 'solidarity' right. Furthermore, in the paradigm of rights and duties commonly understood in Africa,²⁶ the right to development is necessarily linked to the duties or responsibilities that exist mutually between individuals and their families, communities and societies.

The African Charter reinforces the right to development with the right to political, economic and social self-determination and the right of a people to sovereignty over their natural resources.²⁷ Self-determination is a right that straddles all categories of rights and is a common feature of the two international covenants of 1966.²⁸

Early studies on the right to development naturally focused on the African Charter provisions.²⁹ But, even then, some scholars viewed the right as a derivative of the international community's efforts to operationalise obligations under the UN Charter, especially early efforts such as the UN Conferences on Trade and Development (UNCTAD), and the overall link between human rights and development.³⁰ Others argued that the right to development derived specifically from Article 55 of the UN Charter and that the African regional system only clarified it and gave it a concrete legal recognition.³¹

A quantum leap was made in 1986 with the adoption by the UN General Assembly of Resolution 41/128 of 4 December on the Declaration on the Right to Development. The Declaration was adopted by a vote of 146 to 1 (the USA) with eight abstentions.³² Within the strict normative hierarchy of international law, the declaration, like all other such declarations or resolutions, falls within what some international lawyers regard as 'soft law'. But, it should not be forgotten that it is the very same General Assembly that adopted the Universal Declaration of Human Rights (UDHR) by a resolution in 1948. Few would argue that the UDHR has no legal significance or force only because it is a declaration adopted by a General Assembly resolution.

After affirming the inalienability of the right to development, Resolution 41/128 states that by virtue of this right:³³

1. . . . every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised;
2. The human right to development also implies the full realisation of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

The definition of the right to development in Resolution 41/128 clearly expresses the right as cross-cutting and straddling and also a self-standing and enabling right. It is also an 'individual' and a 'collective' right — hence the identification of 'every human person' and 'all peoples' as the right-holders.

These multiple features simply reflect the understanding of what development in a holistic sense means or implies. The resolution also expands the scope of the right beyond the first enunciation in the African Charter of 1981. It is therefore important to point out that the classification of Resolution 41/128 under the section on 'Social Welfare, Progress and Development' in the official UN compilation of human rights instruments³⁴ may be for convenience only and should not be read to mean that the right falls into only 'social' and 'welfare' categories.

The right to development then falls neatly within the letter and spirit of the principles contained in the Vienna Declaration and Programme of Action,³⁵ especially paragraph 1.5 which provides in part that:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis . . .

By emphasising the connectivity of rights and the need to avoid artificial hierarchies within them, the Vienna Declaration is not by any means challenging the importance of each single recognised right or freedom, nor is it precluding reasonable prioritisation of measures directed at confronting human rights challenges. Neither does universalism, one of the basic principles of human rights, mean 'sameness' and total disregard for diversity and differences in circumstances on the ground.

In addition to placing obligation on states, individually and collectively, to promote and protect the right to development,³⁶ Resolution 41/128 also places the responsibility on all peoples, individually and collectively, to contribute to the realisation of the right to development.³⁷ The right therefore imposes vertical³⁸ as well as horizontal³⁹ responsibilities.

4. The Realisation of the Right to Development

As defined above, the right to development is universal in two senses. First, the definition has neither a geographical nor a cultural limit or specificity. Second, the right is relevant to challenges that face developing as well as developed countries. From this perspective, 'development' is an ever-evolving process. Nevertheless, the low level of development of material resources and institutions of governance in some third world countries means that aspects of the right place added challenges to those societies.⁴⁰ Universalism does not mean uniformity and lack of differentiation.

As stated in part 3, above, human rights to development, like any other human rights, place the duty on the state (or a collective of states) and on non-state entities, including natural persons. In practical terms, the duty of realisation takes the form of activities of *promotion* and/or *protection* by the state and the people as a whole.

Justiciability or litigation — claims in courts of law for redress by the rights-holders — is one of the methods and means of compelling compliance by those who are charged with the responsibility to protect and promote human rights. Because the right to development is not explicitly recognised in the Bill of Rights, and the rights discourse in South Africa has hardly embraced it, there has so far been no direct litigation on the subject. Indirectly, however, low-level development of people's skills and knowledge, as well as low-level or inappropriate levels of development of material conditions, have been the subject of scrutiny in some cases brought to court in pursuit of the rights that are expressly recognised in Chapter 2 of the Constitution.

Another strategy for realising human rights objectives involves the integration of human rights criteria into a range of activities and practices. Of recent, concepts and principles for integration going under the umbrella of human rights approaches to development have emerged and are being adopted and applied by states and regional and international organisations and institutions.⁴¹ A rights-based approach is encompassing and increases the effectiveness of implementation of human rights in policy formulation, law-making, budgeting and practical translation of theory into action. For example, the UN Office of the High Commissioner on Human Rights recently convened a 'high-level' seminar on the right to development with participants from academia, various UN agencies, the World Bank, the World Trade Organisation, the International Monetary Fund and selected state representatives with a view to evaluating progress in incorporating the right to development and human rights approaches in the development activities of all role players.⁴²

Monitoring that involves evaluation and assessment of implementation is of critical importance.⁴³ Monitoring should also apply to strategies directed at mainstreaming of human rights in the development process. Court

decisions also require monitoring to ensure that they are implemented, or to ascertain compliance. This is of utmost importance given the general right to effective remedy that those whose rights have been violated or denied are entitled to.⁴⁴ It is important to understand that the effectiveness of a remedy is not because a judicial forum pronounces on a matter or issue before it and directs a particular remedial action. Rather, it is how the remedy it directs is relevant and how it addresses the wrong caused by the violation or denial of a right. Decisions of courts of law should themselves be the subject of critical scrutiny from a human rights perspective.

With specific reference to the right to development, a rights approach would entail predicting, auditing and undertaking impact assessment of all activities designed to promote or protect all facets of 'development'. This has to be continuous and to run throughout the life cycle of the activity: before, during and after. Unfortunately, unlike 'environmental impact assessment' that has been refined and is applicable in several jurisdictions,⁴⁵ human rights impact assessment is still in its infancy.

Sometimes the rights-based approach to development is implemented or applied through a methodology popularly known as 'mainstreaming'. This is clearly borrowed from the vocabulary of gender mainstreaming.⁴⁶ What human rights mainstreaming implies is total integration of comprehensive rights concerns in entire activities, from conception to implementation and evaluation, as opposed to adding or appending rights as some secondary and separate activity from the main or primary activities. In other words, it is not mainstreaming to use human rights as some icing on the cake. The South African Human Rights Commission and the Foundation for Human Rights in South Africa have recently taken a joint initiative to develop a methodology for human rights mainstreaming and approach in the field of education.⁴⁷ A similar exercise was carried out between the Commission and the South African Qualification Authority.⁴⁸ Such methodologies and others can be improved upon, adapted and creatively used to integrate all aspects of human rights, including the right to development, in various activities of human endeavour.

Even within the UN system, human rights mainstreaming is not yet fully understood or accepted, except at the higher levels — and perhaps only in theory. The reason for this seems to lie either in the uneven understanding of and commitment to human rights among individuals and different agencies or in competition for resources and the pressure to achieve divergent mandates. However, there are continuing efforts to encourage greater internalisation and incorporation of rights approach in activities of all UN agencies.⁴⁹

Inclusive participation of people in the development effort is a distinctive and core element in the definition

of the right to development. Some commentators have correctly pointed out that failure of most development initiatives that impact on human rights in the past were because of the exclusion and alienation of the people from direct participation.⁵⁰

5. The Right to Development and South Africa's Constitutional Framework

As stated in the introduction, the Constitution implicitly incorporates a number of elements of the right to development. The incorporation takes three forms: (1) the Constitution's developmental imperatives and promotion of public participation in important affairs of state and in development,⁵¹ (2) the Constitution's reference to 'sustainable development'⁵² and the 'right to self-determination',⁵³ and (3) the overall impact of the realisation of all other recognised rights in the Bill of Rights.⁵⁴ In other words, the national development strategies and objectives point to a model of a developmental state regime that sits comfortably with the right to development.

The other legal medium through which the right to development may find some expression in South Africa's constitutional ambit is through creative interpretation of the rights and freedoms that are expressly recognised. This can be achieved by reference to international obligations and international law,⁵⁵ as well as holistic contextual 'text setting' interpretation of legal instruments like the Constitution — as has been suggested in the Constitutional Court's jurisprudence.⁵⁶ The latter is a legal interpretation principle that requires understanding specific provisions in a statute or other legal instrument in the context of all other relevant provisions and not in isolation.

The Constitution's developmental imperatives that support the argument for reading the right to development in the constitutional order also inhere in the Constitution's founding values of the pursuit of equality, non-racialism and non-sexism.⁵⁷ In the context of apartheid racism and the historical exclusion of women from power, the realisation of these basic founding values necessarily implies construction and engagement with developmental policies and laws that uplift the previously disadvantaged in all spheres of human endeavour, irrespective of the enumerated and the omitted rights and freedoms in the Bill of Rights. Section 9(2) of the Constitution is quite explicit on this:

Equality includes 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 undertaken.

It should be noted however that the wording of the sub-section limits itself to the protection and advancement of those 'disadvantaged by unfair discrimination'. For it to apply to all who are disadvantaged, irrespective of the cause, it would be necessary to read in other relevant rights and the right to development.

The other important constitutional vision and mission are expressed in the goal of establishing 'a society based on democratic values, social justice and fundamental human rights' and the improvement of 'the quality of life of all citizens and free of the potential of each person'.⁵⁸ The freeing of people's potential imposes a wide obligation on the part of the state and society to continuously pursue improvement in people's abilities and opportunities. It is the development of the person and people-centred development, or what, as explained above, Sen conceptualises as 'freedom'.

The requirement for commitment on the part of those employed in public administration to the basic values and principles of efficient, economic and effective use of resources, development-orientation and efficient service delivery,⁵⁹ all add up to the overall constitutional imperatives of a developmental state and society within a constitutional framework.

The element of participation by the people in governance affairs, including law-making, that finds expression in the Constitution further reinforces the argument that the right to development underlies South Africa's constitutional order. The Constitution also recognises the right to internal self-determination based on culture and language.⁶⁰

As pointed out above, participation is a key element in the UN Declaration on the Right to Development.⁶¹ Participation is also a central requirement in NEPAD's continental economic and social renewal and development paradigm. It is clearly stated in NEPAD that:

The New Partnership for Africa's Development centres on African ownership and management. Through this programme, African leaders are setting an agenda for the renewal of the continent. The agenda is based on national and regional priorities and development plans that must be prepared through participatory processes involving people. We believe that while African leaders derive their mandate from their people, it is their role to articulate these plans and lead the process of implementation on behalf of their people.⁶²

South Africa was one of the few African countries that took the initiative to conceptualise, promote and adopt NEPAD. The interim NEPAD secretariat is housed at the premises of the Development Bank of Southern Africa (DBSA) in Midrand, Johannesburg.

6. The Right to Development, 'Reconstruction and Development' and 'Growth and Employment' Development Strategies

Without getting into the ideological debates about South Africa's development path, and whether or not the RDP or GEAR is the appropriate policy mix to realise progressive development objectives, it suffices to record here that the RDP correctly points to 'development' and not simply 'growth'. Growth, especially economic growth, can take place without necessarily leading to 'development', as understood in this chapter. The 'trickle-down' theory that is often associated with growth has proven to be a mirage in many circumstances.

On the other hand, GEAR correctly identifies 'employment' as an important objective of promoting people's direct participation in development and a challenge to South Africa's development. Since employment is the subject of contribution in the book, it is not interrogated any further in this chapter.

It is important, however, to point out that the national budget for 2004-5 FY has attempted to combine elements of the RDP with that of the macroeconomic policy.⁶³ The road to this has not been smooth, as the government has faced persistent criticism from organised labour and other social forces for having departed from the RDP since 1996 when the macroeconomic policy (GEAR) was adopted.

7. The Need to Prioritise Social Transformation and Poverty Eradication in the Implementation of the Right to Development in South Africa

Prioritising poverty eradication and narrowing the inequality gap in the immediate and progressive realisation of all the rights recognised in the Bill of Rights and those implied, such as the right to development, is necessary to the preservation of the legitimacy of the new constitutional order. In several judgements of the Constitutional Court, the judges have referred to poverty and inequality as major hindrances to the realisation of not only social and economic rights but also traditional civil and political rights. The judges have also pointed out the need to deal with these historical heritages as part of the overall commitment to the promotion and protection of human rights.

The specific rights areas in which poverty and inequality have been expressly mentioned as hindrances, or as relevant in the judicial pronouncements, include capital punishment or the death penalty in relation to the right to life,⁶⁴ the right to health,⁶⁵ the right to housing — including the right to shelter for children⁶⁶ — and the right of accused persons to legal aid.⁶⁷ Since the categories of rights represented in these cases fall into civil, political, economic and social

rights, it implies that poverty and inequality are a threat to rights across the board.

Unfortunately, the court pronouncements have all been by the way of *obiter dicta* — general observations and reflections commonly made by judicial officers in decisions but which do not form part of the core reasons and justification for the specific findings. *Obiter dicta* are often persuasive and morally significant, but they do not form part of legal precedent.

Notwithstanding the weak legal force of the *obiter dicta* about poverty and inequality, and how they impact negatively on the capacity of the broad masses to realise the rights, the judicial pronouncements point to two important realities: (1) that the realisation of all the rights recognised in the Bill of Rights must have the overall objective of poverty eradication and the reduction of social inequalities; and (2) that without poverty eradication and reduction in inequalities the achievement of the culture of human rights will remain illusory. What this means is that overall development within a human rights paradigm that is informed by the understanding of the right to development is at the core of the business of human rights.

In its *Ten Year Review* covering the period 1994-2003, the government has pointed to several forms of poverty that were inherited from the colonial and apartheid past, which have been, and continue to be, the target of its stated policy goal: income, human capital and asset capital.⁶⁸ Although the government correctly demonstrates that it has achieved much in addressing poverty and inequalities inherited from the past, its critics argue that it has not done as well as was expected.⁶⁹ The critics do concede, however, that colonialism and apartheid bequeathed to the new democracy a legacy that was far worse than was realised in 1994.⁷⁰

President Thabo Mbeki has often stated that South Africa is composed of two nations, one of a minority rich and the other a majority poor. The rich minority is largely white, while the poor majority is mostly black.⁷¹ The majority ruling party, the African National Congress, as a matter of fact, focused on creation of work and poverty eradication in its election manifesto in 2004.⁷² But, it is not only poverty that is the problem. Inequality, also still very much a reflection of the society that colonialism and apartheid created, is equally a challenge. Of the two challenges, some have argued that inequality poses the greatest danger to the democratic project.⁷³

It should be noted that gender inequality, which is as entrenched as racial inequality, is another developmental and human rights challenge. In this regard, it is significant that the recently adopted Protocol to the African Charter on the Rights of Women in Africa has an elaborate provision on the right to sustainable development. It reads:

Women shall have the right to fully enjoy their right to sustainable development. In this connection, the State's Parties shall take all appropriate measures to:

- (a) introduce the gender perspective in the national development planning procedures;
- (b) ensure participation of women at all levels in the conceptualisation, decision-making, implementation and evaluation of development policies and programmes;
- (c) promote women's access to and control over productive resources such as land and guarantee their right to property;
- (d) promote women's access to credit, training, skills development and extension services at rural and urban levels in order to provide women with a higher quality of life and reduce the level of poverty among women;
- (e) take into account indicators of human development specifically relating to women in the elaboration of development policies and programmes; and
- (f) ensure that the negative effects of globalisation and any adverse effects of the implementation of trade and economic policies and programmes are reduced to the minimum for women.⁷⁴

South Africa participated in the negotiations, the drafting and adoption of the protocol. It is therefore expected that it will hence ensure that the gendering of poverty, with women at the bottom, will be addressed as a matter of urgency. Given the gendered nature of social and cultural roles that women have played and continue to play, as the Constitutional Court correctly observed in one of its early decisions,⁷⁵ poverty eradication strategies that focus on women are most likely to have real impact on the whole society.

As indicated in the earlier parts of this chapter, other multilateral bodies such as the UN General Assembly have also identified poverty as the main challenge to development.⁷⁶

8. The Global Context and Challenges to Effective Realisation and Implementation of the Right to Development in South Africa

The global context within which each country operates is characterised by unequal historical circumstances and uneven endowment of natural resources. These factors militate against fast-tracking development in a sustainable manner. However, within these constraints, it is possible that properly conceived policies and correct implementation strategies can make huge strides in achieving reasonable development goals. Naturally, this brings into the picture social, cultural and moral issues as well as the institutions and systems of governance.

The liberation of South Africa and the establishment of a people-centred government in 1994 took place within the climate of the hegemony of a global capitalist neo-liberal economic paradigm. The young democracy could not have been insulated from the impact and influence of this paradigm — this is irrespective of the fact that it developed its own 'home-grown' model. The so-called 'Washington Consensus',⁷⁷ which is characterised by a particular form of structural adjustments in the economies of most countries, has been roundly blamed for inappropriate economic and social models and prescriptions which largely reinforce the marginalisation of third world countries and entrench their debt burdens. Some of the critics of globalisation in its current form include leading economists who have worked for the international financial institutions that are responsible for and oversee the inappropriate economic models and prescriptions.⁷⁸

As far as debt is concerned, the government has consistently maintained that it will not default in meeting its legal obligations to repay, including the high interest rates involved. Many however view the debt as 'apartheid debts' that should not be paid by the democratic government on moral grounds. In 1985, the apartheid government declared that it could not repay or service foreign debt amounting to US \$24 billion. The negative impact of the debt on the economy is self-evident. For example, it is only recently in 2004 that the Reserve Bank was able to eliminate a structural overhang in the economy caused by the apartheid debt — the oversold forward book.⁷⁹ One may not agree with the government's position but it is important to understand the reasoning behind it. The potential impact of punitive measures that the international financial oligarchies may visit on individual countries that offend them may be debilitating. It must be appreciated that these oligarchies consist of a coalition of powerful industrialised states and the international financial institutions they control. Debt is a political economy issue — it is not a simple contractual arrangement between two parties with equal power. It is for this reason that the 'debt trap' or the 'debt crisis' should be pursued through multilateral international solidarity initiatives.

International trade and investment are other fronts of global engagement that impact either negatively or positively on development in all countries. For countries in the geographical and socio-economic 'South', the rules and decisions made by official and non-official bodies and fora such as the World Trade Organisation, the G-7+1 and the World Economic Forum determine, to a large extent, the space within which 'development' or 'underdevelopment' may occur. Recent battles between those who seek fair terms of trade from the 'South' and those who seek to maintain the vastly unequal terms of trade from the 'North' have led to solidarity groupings in the South such as the G-20+ and the G-3. South Africa has played a central role in the creation of these resistance clubs in the South.

There are also the regional dimensions of trade and investment that impact on the status of rights realisation in South Africa and in the countries that trade with or host capital exports from South Africa. South Africa's capital export to the rest of Africa has grown steadily since 1994. Trade and investment in the region is spearheaded mostly by the private sector. Recently published information indicates, however, that a number of state-owned enterprises, such as Transnet, South African Airways, Eskom Enterprises, Arivia.com and Denel/Mechem, have made significant inroads into the economies of a number of African countries.⁸⁰ No information is available at present regarding the human rights impact assessment of these activities and the activities of the private investors and traders on the continent.

9. Development and the African Cultural Context

Whatever path to development a country like South Africa may embark upon, it is always important to draw lessons from the experiences of other countries or regions of the world. Europeans in Europe and in the former European colonies such as the United States of America, Canada, Australia and New Zealand have all relied on and harnessed their collective cultural attributes spanning several centuries. Of course, each European country has its own claim to some form or the other of a 'national identity', but there are also certain common features of cultural identities that are discernable across the European countries. Japan, the emergent modern economies of the 'Asian Tigers' and modern China and India, all have drawn inspiration from the positive aspects of their diverse cultural, including religious and linguistic, traditions in the pursuit of development.

Most African countries, especially South Africa, appear to have problems in identifying and embracing positive values and ways of social engagement that are inherent in indigenous cultures and traditions. Blind copying or mimicking Eurocentric ways of doing things will continue to constrain the unleashing of the full potential of the masses in the development process. It is in this respect that the African Renaissance becomes an important resource and inspiration because it seeks to purge dependency, subservience and lack of self-belief among the majority of our people.⁸¹

10. Concluding Remarks

It has been demonstrated that the Bill of Rights does not directly and comprehensively incorporate the right to development. This is despite the fact that the right is expressly provided for in the African Charter on Human and Peoples' Rights to which South Africa is an active State Party. The right to development was enhanced by the recognition and expanded definition given to it in 1986 by the UN General Assembly in Resolution

41/128. Both the regional and the international instruments clearly identify the right to development as a self-standing right as well as being a right that expresses optimal promotion and protection of all other rights.

The right to development straddles all categories of rights. It is therefore not only economic, social or cultural. It embraces developments within rights perspectives in civil, political and other areas falling within the so-called 'third' and 'fourth' generation or 'solidarity' rights.⁸² The right imposes obligations on the state and the people. It therefore applies vertically and horizontally. The development paradigm envisaged by the right is people-centred and must involve direct popular participation by the rights-holders — individuals and groups or communities. These are referred to as 'all peoples'. The development must also be 'sustainable' — an element arising from the intergenerational equity principle in modern environmental norms that flow from recent advances in international environmental law and Section 24 of the Constitution. 'Sustainable development' has been boosted by the recently adopted Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Furthermore, a case is made for development to be focused on the eradication of poverty and the achievement of substantive equality. Some *obiter dicta* in decisions of the Constitutional Court reinforces the need for focus on poverty eradication and bridging the gap of inequality.

It is argued in this chapter that South Africa should expressly incorporate the right to development in the Bill of Rights. Before this ideal is realised, the right is certainly capable of being given expression through creative and purposive interpretation and understanding of other rights. This can be aided by several provisions in the Constitution, outside of the Bill of Rights, that express the vision and mission of participation in sustainable development and the building of a society based on democracy and social justice.

The charter also points to contradictory external pressures at regional and international level that challenge the effective pursuit of the right to sustainable development.

Endnotes

- 1 The paper has undergone two review processes in conferences organised for the researchers/writers, the SAHRC and human rights academics and representatives of legal/ human rights civil society organisations.
- 2 International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.
- 3 Constitution of the Republic of South Africa, 1996, Section 2
- 4 *Ibid.*, Section 25.
- 5 *Ibid.*, Section 26
- 6 *Ibid.*, Section 27.
- 7 *Ibid.*, Section 29.
- 8 *Ibid.*, Section 28.
- 9 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC) at paragraph 76-78.

- 10 See a more developed analysis in Gutto, SBO, *Equality and Non-Discrimination in South Africa: the Political Economy of Law and Law Making* (Cape Town, New Africa Books, 2001) Chapters 11 and 13.
- 11 For example, Article 15 of the African Charter on Human and Peoples Rights (1981), Article 23 of Universal Declaration of Human Rights (1948), and Article 6 of the International Covenant of Economic, Social and Cultural Rights (1966).
- 12 Gutto, S B O (1997), 'Constitutions and the Bills of Rights: Limitations and Obligations on the State's Participation in Economic and Social Development' in N. Steytler (ed) *Human Rights, Democracy and Economic Development in Southern Africa*, Johannesburg (Lex Patria, Jo'burg), pp. 173-200
- 13 Act No. 200 of 1993.
- 14 For example, Development Facilitation Act, No. 67 of 1995.
- 15 Government of South Africa: The Presidency, Pretoria (2003), *Towards a Ten Year Review: Synthesis Report on Implementation of Government Programmes — Discussion Document*.
- 16 A. Sen (1998), *Development as Freedom* (N. York, Alfred A. Knopf) p. 17
- 17 *Ibid.*, at p. 20
- 18 *Ibid.*, at p. xi.
- 19 OHCHR (2002), *Human Rights: Compilation of International Human Rights* (in 2 volumes and 3 parts) (UN, N. York & Geneva, 2002); the Resolution is in Vol. 1 (First Part), Universal Instruments at pp. 69-77. The declaration was adopted by the General Assembly as Resolution 55/4 of 8 September 2000.
- 20 UNDP (2003), *Human development Report 2003: Millennium Development Goals — A compact among nations to end human poverty* (N. York, Oxford University Press) pp. 1-13.
- 21 Glazewski, J. (2000), *Environmental Law in South Africa* (Durban, Butterworths) p.18
- 22 World Commission on Environment and Development (the Brundtland Commission), *Our Common Future*, 1987 at p. 43.
- 23 WSSD, Johannesburg, South Africa, 2002. See, Johannesburg Declaration on Sustainable Development and the Johannesburg Plan of Implementation.
- 24 Adopted by the OAU in Nairobi, Kenya, in 1981.
- 25 Comprising the Universal Declaration of Human Rights (1948), the International Covenant on Economic, Social and Cultural Rights (1966), and the International Covenant on Civil and Political Rights (1966) together with its two Optional Protocols.
- 26 The issue of balancing rights and obligations, duties or responsibilities is often made to be controversial.
- 27 African Charter, above, Articles 20 and 21
- 28 Common Article 1 of the International Covenant on Economic, Social and Cultural Rights (1966), and the International Covenant on Civil and Political Rights (1966).
- 29 See, for example, P. Nobel, 'Notes on the Right to Development' in P. Nobel (ed.) *Refugees and Development in Africa* (SIAS, Uppsala, 1987) pp. 47-52; and A. Dieng, 'Background and Growth of the Right to Development — The Role of Law and Lawyers in Development' in P. Nobel, above at pp. 55-60.
- 30 V. P. Nanda, 'development as an Emerging Human Right Under International Law', in DEN. J. INT'N L. & POL'Y VOL. 13:2-3 (1984) 161-179; see also P. Alston, 'The Right to Development at the International Level', in R-J Dupuy (ed.) *Le droit de développement au plan international — The Right to Development at the International Level* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980) p. 99 and K. M'baye, 'De droit au développement', in R-J Dupuy (ed.), above, at p.72.
- 31 M. Bedjaoui, 'Some Unorthodox Reflections on the 'Right to Development'', in F Snyder (ed), *International Law of Development: Comparative Perspectives* (1987) pp. 87-116.
- 32 These were Sweden, Denmark, Iceland, Finland, West Germany (as it was then), Israel, Japan and the United Kingdom.
- 33 Resolution 41/128, Article 1.
- 34 OHCHR (2002), *Human Rights: Compilation of International Human Rights* (in 2 volumes and 3 parts) (UN, N. York & Geneva, 2002); the Resolution is in Vol. 1 (First Part), Universal Instruments at pp. 454-458.
- 35 World Conference on Human Rights, Vienna, Austria, 25 June 1993, in OHCHR (2002), Vol. 1 (First Part), Universal Instruments above at pp. 43-68.
- 36 Resolution 41/128, Articles 2(3), 3-6 and 8.
- 37 *Ibid.*, Article 2(2).
- 38 Between the state and people. Here the relationship is viewed in terms of power relations, with the individual holding less power than the state. This assumption is certainly incorrect in situations where powerful individuals and corporations exercise greater economic power and influence than weak states.
- 39 Between or among people. The underlying assumption here, which is often not reflected in real life, is that people possess equal power.
- 40 N. J. Udombana, 'The Third World and the Right to Development: Agenda for the Next Millennium', in *Human Rights Quarterly*, Vol. 22 (2000) 753-787.
- 41 B. I. Hamm, 'A Human Rights Approach to Development', in *Human Rights Quarterly*, Vol. 23 (2001)1005-1031.
- 42 The seminar on 'Global Partnership for Development: High-level Seminar on the Right to Development' took place in Geneva on the 9th and 10th February 2004. It was mandated by Resolution CHR 2003/83 adopted by the Commission on Human Rights at its 59th session.
- 43 Section 184(3) of the Constitution incorporates one of the mechanisms for monitoring state compliance with social and economic rights by the South African Human Rights Commission. There is however no similar mechanism for the other rights and freedoms. Whether intended or not, this introduces an element of differentiation and hierarchical ordering of rights — the tendency that the Vienna Declaration of 1993 is seeking to discourage.
- 44 'Everyone has the right to effective remedy by the competent national tribunal for acts violating the fundamental rights granted him by the constitution or by law' — UDHR, Article 8.
- 45 See, for example, part XII, especially Articles 205 and 206, United Nations Convention on the Law of the Sea, 1982 (acceded to by South Africa in December 1997) and Section 21 of the Environmental Conservation Act, No. 73 of 1989.
- 46 See, for example, M. Were and J. Kiringai, *Gender Mainstreaming in Microeconomic Policies and Poverty Reduction Strategy in Kenya* (FEMNET, Nairobi, 2002).
- 47 S Le Motte assisted by A Keet (2003), *Human Rights Inclusivity in the Curriculum: A Resource Book for Educators* (Pretoria, FHRSAs).
- 48 SAHRC & SAQA (2003), *Human Rights and the National Qualification Framework: A Guidebook* (Pretoria, EFHRSAs)
- 49 See n 445, above.
- 50 See P Ntsime, 'Public Participation is Basis of Sustainable Development', *Mail & Guardian*, February 27 to March 4, 2004, pp 32-33.
- 51 For example, sections 152 (1), 180 (c) and 195(1)(c) of the Constitution.
- 52 Section 24(b)(iii) of the Constitution.
- 53 Section 235 of the Constitution.
- 54 Covered by the other contributing authors in the various chapters in this publication.
- 55 The methodology of interpretation that is internationally friendly is a general requirement of Section 233 of the Constitution.
- 56 *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), at paras 22-24. In the judgment, the court referred specifically to 'textual setting' within the Bill of Rights and not the Constitution as a whole. There is however no reason why the reasoning may not be extended to the entire body of the Constitution.
- 57 Constitution of the RSA, section 1.
- 58 *Ibid.*, Preamble.
- 59 *Ibid.*, Section 195.
- 60 *Ibid.*, Section 235.

- 61 Part 3 above.
- 62 Paragraph 47 of NEPAD. NEPAD was adopted by the Assembly of Heads of State and Government of the OAU in Lusaka, Zambia, July 2001 as the 'New African Initiative'. The NEPAD name was subsequently adopted for the programme by the group of implementing states in Abuja, Nigeria, in October 2001.
- 63 Republic of South Africa, National Treasury (2004), *Budget Review 2004* (Pretoria, 18 February 2004) pp 1-2.
- 64 *S v Makwanyane and Another* 1995 (3) SA 391 (CC).
- 65 *Soobramoney v Minister of Health, KwaZulu-Natal*, 1998 (1) SA 765 (CC) para 8
- 66 *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC).
- 67 *S v Vermaas; S v Du Plessis* 1995 (7) BCLR 851 (CC), 1995 (3) SA 292 (CC).
- 68 See n 418 above.
- 69 See for example Terreblanche, S., (2002), *A History of Inequality in South Africa 1652-2002* (University of Natal, Pietermaritzburg & KMM Review Publishing).
- 70 *Ibid.*, at p. 419.
- 71 Mbeki, T. (1998), *Africa: The Time Has Come* (Mafube, Johannesburg & Tafelberg, Cape Town), p. 72.
- 72 ANC (2004), *2004 Manifesto — A People's Contract to Create Work and Fight Poverty* (ANC, Johannesburg)
- 73 Everatt, D. (2003), 'The Politics of Poverty' in Everatt, D. & Maphai, V. (eds.) *The Real State of the Nation: South Africa After 1990, Development Update — Special Edition*, Vol. 4 No. 3 (2003, Interfund, Johannesburg) pp. 75-99 at pp. 76-77.
- 74 Article 19 of the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa, adopted by the Assembly of Heads of State and Government of the African Union, Maputo, Mozambique, July 2003.
- 75 *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (CC), 1997 (4) SA 1 (CC).
- 76 See n 423 above.
- 77 Davis, D., 'From the Freedom Charter to the Washington Consensus' in Everatt, D. & Maphai, V. (eds.), see above note 462 at pp. 31-49
- 78 J. Stglitz, *Globalisation and its Discontents* (W. W. Norton & Co, N. York, 2002, 2003).
- 79 Wessels, V., 'Central bank cleans away apartheid's dollar overdraft', *Business Report*, 2 March 2004, p.1.
- 80 State Owned Enterprises and Department of Public Enterprises, (2004), *Africa First! State-Owned Enterprises in Africa* (Pretoria).
- 81 See S. Gutto, 'Creating a New African' in 'UNEMBEDDED' column, *This Day*, Johannesburg, 15 June 2004, p. 11.
- 82 The author does not generally subscribe to the 'generations' theories of rights and fundamental freedoms because the paradigm is commonly associated with or is susceptible to approaches and perspectives of hierarchy and selectivity.

Chapter Fourteen

Environmental Rights

Professor Loretta Feris

1. Historical context

In 1994, South Africa inherited a country famed for its beautiful landscapes, abundant wildlife, bountiful biodiversity, and rich marine life. The reality for millions of South Africans was, however, far removed from this idyllic picture. While privileged South Africans associated the environment with conservation, the majority of South Africans associated it with the denial of access to natural resources, forced removals from land proclaimed as parks, and exclusion from recreational opportunities reserved for a privileged minority. It was a country where the majority of the population did not have access to running water, sanitation or clean energy sources, were subjected to high levels of pollution, and exposed to toxic waste. Blue-collar workers worked in unsafe environments and carried the risk of exposure to harmful environmental practices, at odds with the notion of a safe and healthy environment for all South Africans.¹ The legal system similarly failed to adequately protect against environmental degradation and ensure sustainable development.

The utilisation of principles of common law in environmental actions has been limited, mainly owing to the existence of very few remedies suitable for use in an environmental context and the difficulty in using them. In some instances, nuisance law was used in cases related to noise, smoke or water pollution.² Furthermore, common-law remedies generally served only the interests of private litigants.³ Even where the public interest was pursued, the high cost of litigation combined with the evidentiary difficulties made proceeding financially unviable. For poor people whose rights are affected, expensive litigation was a particular obstacle.

South Africa had a range of laws that regulated the environment under the previous dispensation. Some of the most important laws that controlled conservation and pollution control before 1994 were the Water Act,⁴ the Atmospheric Pollution Control Act,⁵ the Mining Rights Act,⁶ the Sea Fishery Act,⁷ the Conservation of Agricultural Resources Act,⁸ the Health Act,⁹ the Hazardous Substances Act¹⁰ and the Environment Conservation Act.¹¹ Together with the regulations published in

terms of these acts, these laws attempted to address some of the main environmental concerns in South Africa. Despite a wealth of legislation, however, the environment and people living in the environment were not adequately protected. The main reasons were ineffective environmental protection through legislative means and limited *locus standi*.¹²

Administrative law and judicial review of administrative action play a crucial role in environmental protection. Pre-1994 it was difficult to challenge administrative actions. Not only did the government have expanded discretionary powers, but the grounds on which any administrative acts may be challenged were also extremely narrow. As a rule, courts were not able to decide on the merits of an administrative act. They could only determine whether administrative bodies had acted within the scope of their powers. In addition, South African legislation made no provision for appeals against administrative decisions.¹³ It was therefore impossible to challenge the merits of an environmentally unsustainable administrative decision.

Thus, in the past, the law has not proven to be an effective tool to alleviate inequities in the environment or to provide for a sustainable environment.

2. International Standards¹⁴

There is no general, comprehensive international treaty on human rights and the environment. However, there are international instruments that proclaim a right to the environment.¹⁵ The 1972 Stockholm Declaration on the Human Environment¹⁶ adopted at the UN Conference on the Human Environment is an important instrument along the path to recognition of a link between the environment and human rights. Principle 1 of the Stockholm Declaration provides that:

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well being, and he bears the solemn responsibility to protect and improve the environment for present and future.

Both the Rio Declaration on Environment and Development of 1992¹⁷ and the Johannesburg Declaration on Sustainable Development¹⁸ contain no references to environmental rights. Instead, Principle 1 of the Rio Declaration merely provides that human beings 'are at the centre of concerns for sustainable development'. The avoidance of environmental rights in the Rio and Johannesburg Declarations is probably indicative of the uncertainty of the place of human rights in international environmental and sustainable development law.¹⁹

Perhaps the most significant document regionally which gives recognition to environmental rights is the African Charter on Human and Peoples' Rights. The significance of the Charter lies in that it was the first international instrument to recognise the right to the environment.²⁰ It is also the first system that has interpreted the right to a satisfactory environment.²¹ Another instrument that recognises environmental rights is the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights.²² The European Convention on Human Rights does not proclaim environmental rights. However, the European Court of Human Rights has adopted the indirect approach of fashioning environmental rights from already existing, and generally accepted, human rights.²³

3. South African Law, Policy and Practice

The inclusion of an environmental right in the Constitution was in line with the trend in many other countries to lend constitutional protection to the right to a healthy environment.²⁴ Several other rights listed in the Bill of Rights also need to be considered in conjunction with the environmental right. These are the rights to equality,²⁵ access to information,²⁶ and just administrative action.²⁷ In addition, the extended *locus standi* provision²⁸ and the potential horizontal application of the environmental right plays an important role.

The notion of including an 'environmental right' in a domestic constitution is not a novel one in Africa. It is estimated that approximately two-thirds of African countries have incorporated a constitutional provision that ensures the right to a healthy environment.²⁹

Section 24 of the Constitution states:

- Everyone has the right —
- (a) to an environment that is not harmful to their health or well being; and
 - (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that —
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and

- (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

It can be argued that Section 24 has two general aims. Sub-section (a) guarantees a healthy environment to everyone in general, while sub-section (b) mandates the state to take certain measures in order to realise the guarantee proclaimed in the first part of the section.³⁰ Sub-section (b) also provides protection against any infringement by the state that negates environmental protection or that is in any way harmful to the environment.³¹

In contrast to the way in which environmental rights have been formulated in some international instruments, Section 24 has been framed as an individual right and not as a collective one.³² The collective nature of environmental rights is significant in light of the fact that environmental degradation often affects groups of people. The right should therefore protect groups and not just individuals. Groups may therefore utilise the broadened standing provisions to enforce the environmental right where the infringement is of a collective nature.

4. The Scope of the Concept 'Environment'

The wording of Section 24 indicates a human-centred approach to the environment, which means that 'environment' should not be limited to the non-human natural environment, but should rather be defined broadly to specifically include the inter-relationships between humans and the natural environment.

In addition, 'environment' should not be limited to the natural environment, but should also include man-made objects and cultural and historical heritage.³³ Thus, in interpreting Section 24, due respect should also be paid to the traditional rights, needs, values and dignity of indigenous cultures and communities.³⁴ South African legislation, in line with this notion, has adopted an equally broad approach in statutory law.³⁵

5. The Concepts 'Health' and 'Well Being'

The concepts 'health' and 'well being' are central to the purpose of Section 24. 'Health' clearly relates to human health and generally incorporates both mental and physical integrity. Health has been defined by the World Health Organisation as a 'state of complete physical, mental and social well being'.³⁶ The guarantee of a 'healthy' environment will be significant largely for groups who are socio-economically disadvantaged, since they have to rely much more on the natural environment for basic needs such as drinking water.³⁷

'Well being', on the other hand, is a more elusive term and it appears to have largely subjective dimensions.³⁸ It has been argued that while harm to 'well

being' need not amount to mental or physical ill health, something more is required than a sense of emotional insecurity or aesthetic discomfort before the section becomes applicable.³⁹ In contrast, well being can be regarded as inclusive of spiritual or psychological aspects such as the individual's need to be able to communicate with nature.⁴⁰ Human well being therefore also depends on conservation and the maintenance of wilderness areas and biodiversity.

The concept of well being could also be useful to those individuals who wish to employ the right in situations where it is difficult to substantiate a claim that someone's health has been affected.⁴¹ Since it is a broader concept, infringement of well being may be easier to substantiate. Over and above a spiritual and psychological meaning, it is submitted that 'well being' may also encompass social and economical dimensions. Many indigenous groups, for example, depend on biodiversity as a source of nutrition and for its medicinal and cultural value. These groups would be able to argue that the destruction of biodiversity is harmful to their well being.

6. Intergenerational Equity

Section 24(b) of the Constitution places a duty on the state to protect the environment for the benefit of both the present and future generations. The reference to future generations is in line with the notion of intergenerational equity. Since a pre-condition for intergenerational equity is sustainability, the environment should be used in a manner that will not only meet the needs of present generations, but will also provide for the needs of future generations.⁴²

7. Sustainable Development

A welcome inclusion in Section 24 is the concept of sustainable development. Although developed in international law, the principle of sustainable development is one that needs to be interpreted, applied and achieved primarily at a national level.⁴³ Principles 3 and 4 of the Rio Declaration on Environment and Development⁴⁴ may serve as guidelines in the interpretation of Section 24(b)(iii).⁴⁵ In terms of these principles a careful balance should be sought between individual rights of consumption and development, and the wider interests of present and future generations. Development decisions should, therefore, not discard environmental considerations.

The principle of 'sustainable development' contains both substantive and procedural elements.⁴⁶ It is thus also linked to participation in decision-making regarding development strategies, which carries risk to the environment and to the right of access to information regarding such strategies.⁴⁷ It is vital that peoples themselves determine development strategies and adapt them to their particular conditions and needs.⁴⁸

8. Assessment

Section 24(b) places a positive duty on the state to establish a regulatory framework to give effect to the environmental right. Environmental laws and regulations should not only provide for the substantive aspects of environmental protection, but should also provide for related procedural safeguards such as standing, access to information and just administrative action. To the extent that present legislation does not meet constitutional requirements, Section 24 imposes an obligation on the state to bring current legislation in line with the Constitution.

8.1 Policy and Legislative Measures

Over the past ten years, the government has made a real attempt to address the environmental inequities of the past and give effect to Section 24. Legislation such as the Promotion of Administrative Justice Act 3 of 2000 now allows for more scrutiny of administrative acts related to the environment and environmental rights, whilst the Promotion of Access to Information Act 2 of 2000 gives citizens a wide-ranging right to access information held by the state which affects the environment. It is also now more expedient to bring environmental claims, as standing provisions have been broadened significantly and litigants do not necessarily face a cost order when taking a case to court.⁴⁹

The National Environmental Management Act (NEMA)⁵⁰ addresses a number of the inadequacies in environmental management and provides a framework and guidelines for environmental policy-making and implementation. It speaks to the major environmental areas, namely resource conservation, pollution control and waste management, and land-use planning and development, and sets out a range of principles that lay the foundation for environmentally sustainable development. In addition, a regulatory framework for environmental impact management has finally been provided for as a means to assess those development activities that may have a significant adverse impact on the environment.⁵¹ The National Environmental Management: Air Quality Bill will furthermore tackle the escalating problem of pollution in South Africa.

Some inroads have been made in enforcement and compliance⁵⁰, and the National Environmental Management: Amendment Bill is designed to strengthen this area significantly.⁵² Two environmental courts have also been established to deal with specific environmental crimes such as the poaching of marine resources.

In the area of access to resources, key legislation in fulfilment of state obligations includes the National Water Act 36 of 1998, which focuses on water resource management and provides broader access to water; the Marine Living Resources Act 18 of 1998, which conserves and manages marine biodiversity and provides for the long-term sustainable utilisation of marine living resources; and the National Forests Act 84 of

1998, which deals with sustainable forest management and promotes community forestry and joint management of state forests. In the area of bio-resources, the National Environmental Management: Biodiversity and Protected Areas Bills aim to provide for community conservation areas and equitable sharing of benefits from bio-prospecting. The issue of protection of traditional knowledge related to bio-resources is, however, not dealt with. Finally, there are also a number of government initiatives to create awareness around the environment,⁵³ to alleviate poverty through environmentally sustainable employment,⁵⁴ and to address some of the historical environmental justice issues.⁵⁵

8.2 The Courts

Whilst there is a need to create awareness about environmental law in general, and the enforcement of Section 24 rights in particular amongst the South African judiciary, there have been some promising decisions. In *Director: Mineral Development, Gauteng Region, and Another v Save the Vaal Environment and Others*,⁵⁶ the notion of public participation in the environmental decision-making process was stressed and the need to recognise and respect environmental consideration in the administrative process was underscored.⁵⁷ Similarly, the right to access to information was given effect in the case of *Van Huyssteen NO and Others v Minister of Environmental Affairs*.⁵⁸

There have, however, been some missed opportunities in the development of environmental jurisprudence. In *Minister of Public Works and Others v Kyalami Ridge Environmental Association*⁵⁹ the conflict between development (socio-economic) and environmental rights arose when after serious flood damage to homes in Alexandra Township, flood victims were accommodated (as a temporary solution) on a portion of state-owned land on which Leeuwkop Prison stands. A number of residents in the neighbouring area of Kyalami objected to the accommodation on several grounds, including their environmental rights under Section 24.⁶⁰ Whilst this was a perfect opportunity for the Constitutional Court to balance these two (seemingly) opposite needs, the opportunity was missed as the court proceeded to decide the case also on other grounds. It will be important to flesh out the meaning and content of Section 24, and to assess how it will be balanced against social and economic development — a task that will hopefully be taken up by South African courts in future.

Endnotes

1 One of the most insidious examples of environmental injustice is the case of the Durban South community which, over the years, has been exposed to excessive and uncurbed pollution from huge oil and petroleum refineries, a massive paper mill, a chromium processing plant, an airport, and a multitude of chemical industries. For a more comprehensive exposé of environmental conditions in a pre-apartheid South Africa, see Feris, L. 'The conceptualisation of environmental justice within

the context of the South African Constitution', unpublished doctoral dissertation, University of Stellenbosch.

- 2 See *Regal v African Superslate (Pty) Ltd* 1963 1 SA 102 (A) and *De Charmoy v Day Star Hatchery (Pty) Ltd* 1967 4 SA 188 (D).
- 3 Rabie, M.A. et al. 'Implementation of environmental law' in Fuggle, R.F. & Rabie, M.A. (eds) *Environmental Management in South Africa* (1996) pp. 120 & 137.
- 4 Act 54 of 1941, repealed and replaced by the National Water Amendment Act 45 of 1999.
- 5 Act 45 of 1965.
- 6 Act 20 of 1967, repealed and replaced by the Mineral and Energy Laws Rationalisation Act 47 of 1994.
- 7 Act 12 of 1988, repealed and replaced by the Marine Living Resources Act 18 of 1998.
- 8 Act 43 of 1983.
- 9 Act 63 of 1977.
- 10 Act 15 of 1973.
- 11 Act 73 of 1989. The National Environmental Management Act 107 of 1998 has amended this Act and will eventually replace it.
- 12 See Loots, C.L.J. 'Making environmental law effective' (1994) 1 *South African Journal on Environmental Law and Policy* p. 17.
- 13 Rabie (n 488 above) p. 138. See also Rabie, M.A. 'Aspects of administrative appeals to environmental courts and tribunals' (1995) 3 *Stellenbosch Law Review* p. 369.
- 14 For a more detailed analysis, see Feris, L. & Tladi, D. 'Environmental rights' in Brand, D. & Heyns, C. (eds) *Socio-economic Rights in South Africa* (2004) (forthcoming).
- 15 See Article 12 of the CESC and Article 24(2)(c) of the 1989 Convention on the Rights of the Child.
- 16 UNEP <http://www.unep.org/> (accessed 1 October 2001).
- 17 1992 Rio Declaration on Environment and Development (1992) International Legal Materials 876.
- 18 The 2002 Johannesburg Declaration on Sustainable Development, available at <http://www.johannesburgsummit.org/html> (accessed on 29 November 2002).
- 19 Boyle, A. 'The role of human rights law in the protection of the environment' in Boyle, A. & Anderson, M.R. *Human Rights approaches to environment* (1996) 1. See also Pallemmaerts, M. 'International environmental law from Stockholm to Rio: Back to the future?' in Sands, P. *Greening International Law* (1994) who argues that the fact that this provision was not included in the instruments adopted at the Rio Conference on the Environment and Development (UNCED) is indicative of the unwillingness of the states participating at Rio to accept that individuals may be the bearers of rights to the environment independent of any national legal system.
- 20 Article 24. See Van der Linde, M. 'African responses to environmental protection' (2002) *Comparative and International Law Journal of Southern Africa* 99.
- 21 Van der Linde, M. and Louw, L. 'Considering the interpretation and implementation of Article 24 of the African Charter on Human and Peoples' Rights in light of the SERAC communication (2003) 3 *African Human Rights Law Journal* 167 170 referring to Communication 155/96, *The Social and Economic Rights Action Centre and Another v Nigeria*, Fifteenth Annual Activity Report available at <http://www.achpr.org>. In this communication the African Commission on Human and Peoples' Rights stated that the right to a satisfactory environment requires, amongst other things, that a government take reasonable measures to prevent pollution and ecological degradation, promote conservation and ensure ecological sustainable development and the use of natural resources and provide access to information to communities involved. Paras 43 to 53.
- 22 (1989) International Legal Materials 698.
- 23 An example of this approach can be found in *Lopez Ostra v Spain* (1995) ECHR Ser A 03-C. In that case the court ruled that the right to a private life under Article 8 of the European Convention on Human Rights should be interpreted to imply for individuals guarantees against environmental pollution. For other cases in which the European Court used environmental

- approaches to resolve human rights disputes, see *Fredin v Sweden* (1991) ECHR Ser A 192 and the dissenting opinion of Pettiti J in *Balmer-Schafroth and Others v Switzerland* (1998) 25 EHRR 598.
- 24 Similar provisions have been enacted in many countries, including Ireland, Spain, Peru, Ethiopia and Namibia. Glazewski J 'The environment and the new interim Constitution' 1994 (1) South African Journal on Environmental Law and Policy 4.
- 25 Section 9.
- 26 Section 32.
- 27 Section 33.
- 28 Section 38 of the Constitution states: 'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:
(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or a class persons;
(d) anyone acting in the public interest; and an association acting in the interest of its members.'
- See also Section 32 of the National Environmental Management Act (NEMA).
- 29 See Bruch, C., Coker, W. & Van Arsdale, C. 'Constitutional environmental law: Giving force to fundamental principles in Africa' (2001) 26 Columbia Journal of Environmental Law pp. 131-145.
- 30 De Waal, J., Erasmus, G. & Currie, I. *The Bill of Rights Handbook* (1999) p. 390.
- 31 *Ibid.* The authors refer to Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996 1996 4 SA 744 (CC), para 78, where it was noted that socio-economic rights can be negatively protected from improper invasion.
- 32 Art 24 of the African Charter recognises the right of all peoples . . . 'to a generally satisfactory environment favourable to their development'. Glazewski notes that since environmental rights fall within the scope of third generation rights, they cannot be exercised by individuals per se, but rather by groups of people. Glazewski J 'The environment, human rights and a new South African Constitution' (1991) South African Journal on Human Rights pp. 167-172.
- 33 De Waal (n 515 above) p. 393.
- 34 Glavovic, P.D. 'Environmental rights as fundamental human rights' (1996) 3 South African Journal on Environmental Law and Policy 71 72.
- 35 The National Environmental Management Act 107 of 1998 defines 'environment' as '. . . [t]he surroundings within which humans exist and that are made up of (i) the land, water and atmosphere of the earth; (ii) micro-organisms, plant and animal life; (iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and (iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well being'.
- 36 World Health Organisation, Preamble of Constitution (1978).
- 37 Kidd, M. *Environmental Law: A South African Guide* (1997) p.36.
- 38 Liebenberg, S. 'Environment' in Davis, D. et al. (eds) *Fundamental Rights in the Constitution — Commentary and Cases* (1997) pp. 256 259.
- 39 *Ibid.*
- 40 De Waal (n 515 above) p. 394.
- 41 Kidd (n 522 above) p. 36.
- 42 *Ibid.*
- 43 Principle 3, Rio Declaration on Environment and Development United Nations Earth Summit Press Summaries 1-12 June 1992.
- 44 Boyle, A. & Freestone, D. 'Introduction' in Boyle, A. & Freestone, D. (eds) *International Law and Sustainable Development — Past Achievements and Future Challenges* (1999) p. 7.
- 45 UNEP <http://www.unep.org/unep/rio.htm> (accessed 7 July 2002) These principles refer amongst others to the right to development, poverty alleviation and capacity building.
- 46 Principle 3: The right to development must be fulfilled so as to meet developmental needs of present and future generations equitably. Principle 4: In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it. Robinson, N.A. (ed) Agenda 21 and the UNCED proceedings (1992) 1 cxi.
- 47 *Ibid.*
- 48 Ksentini, F. 'Human rights, environment and development' in Lin, S. & Kurukulasuriya, L (eds.) *UNEP's New Way Forward: Environmental Law and Sustainable Development* (1995) p.98.
- 49 Both the Constitution (Section 38) and the National Environmental Management Act (NEMA) 107 of 1998 (Section 32) now allow for action to be brought in the interest of a group or in the public interest. Section 32(2) of NEMA furthermore gives a discretion to the court to not award costs against a litigant if the court believes that the person or group of persons acted reasonably out of concern for the public interest or the interest of the protection of the environment.
- 50 *Ibid.*
- 51 R1182 to R1184 in *Government Gazette* No 18261 5 September 1997. The National Environmental Management: Second Amendment Bill will replace current regulations and is aimed at improving EIAs.
- 52 The government has also recently clamped down on illegal dumping of toxic waste and arrested a property owner for the illegal dumping of hazardous waste on his property and potentially exposing surrounding communities to serious health risks. SA Government Online 12 January 2004 available at <<http://www.gov.za>>.
- 53 For example the 'State of the Environment Report'.
- 54 Through the Working for Water, Working for the Coast and Working for Wetlands programmes.
- 55 An attempt is now underway to address the situation in the Durban South community (see n 486 above) through the establishment of an air quality management plan for the South Durban Basin.
- 56 1999 (2) SA 709 SCA.
- 57 *Ibid.* at 719.
- 58 1995 (2) SA BCLR 1191(C).
- 59 Case CCT 55/00.
- 60 See para 57.

The Criminal Justice System

Professor Lovell Fernandez

1. Introduction

Since the onset of democracy in South Africa, no other area of the country's legal culture has been as incisively influenced by the Constitution as the criminal justice system. In fact, constitutional democracy would have no meaning to the majority of South Africans if it did not impact on the criminal justice process, for it is in this arena that the battle against racial oppression in all its guises was most manifest. Today, more than ten years into democracy, crime, criminal laws, criminal processes and sanctions are among the uppermost things in the minds of ordinary people. Criminal justice is front-page news. The public is claiming its right to safety and security, which the state is mandated to provide. At the same time, the courts are required to ensure that the state does not overstep its authority in dealing with those accused of crimes.

This chapter focuses mainly on key aspects of the criminal justice system, namely the police services, the prosecution system, the courts, and correctional services. These are singled out because they have traditionally been the most problematic aspects, and the target of well-founded, vehement criticism. Broadly, the inquiry concentrates on what has, and what has not, been achieved to make the criminal justice system responsive to the needs of the public. Protection of human rights within the criminal justice system is a key focal area.

By becoming a democracy and entering into the community of nations, South Africa committed itself to protecting and promoting human rights under international law. However, to assess the criminal justice system ten years into democracy, one has to take account of how criminal justice was administered for decades before the onset of constitutional democracy.

2. The Pre-1994 Era: the Apartheid Criminal Justice System

The criminal justice system under the apartheid legal order was, in many ways, a grim experience for many who were caught in its wide net. It was predominantly

arbitrary, harsh and retributive. The criminal law and the laws of criminal procedure were the two main devices used to entrench the political repression of the majority of the population. The police and the courts became the chief criminalising and victimising instruments. As former President P.W. Botha said in the 1950s, when he was then Secretary of the Cape Nationalist Party: 'If you stand for the domination and supremacy of the European, then everything you do must in the first place be calculated to ensure that domination.'¹ The high frequency of the police raids into black townships, the violence and untrammelled arrogance with which they were conducted, their severely intrusive reach into the privacy of homes, accompanied by the vulgar disrespect of the dignity of the person — all these, including a host of other ugly traits that became part of their policing culture, constitute the main reason why the majority of the population hated the administration of criminal justice intensely.

The apartheid criminal justice apparatus was classically modelled on the crime-control model, in which the procedural rights of the accused exist only in theory. For example, although the law provided for a right to legal representation, most black accused persons could not afford the services of a lawyer. Legal aid in criminal matters was very limited, in line with the official policy on legal aid spelt out by Mr P.C. Pelser, the Minister of Justice in 1969, when he introduced the legislation to create the Legal Aid Board: 'If legal aid is to give rise to the state having to guarantee to the *skolly* element who loaf about . . . the additional security of being defended free of charge by legal practitioners provided by the authorities when they appear in court, I can say at this very early stage that the writing is on the wall. I want to put it very clearly that I shall never be party to subsidising crime.'² In the Pass Courts, accused were routinely convicted without legal representation in hearings lasting less than five minutes.³ Apart from this, the right to counsel in political cases was heavily compromised by sections in the state security laws, which provided for detention without access to a lawyer.⁴ People facing capital crimes had no automatic

right to counsel; they were assigned young and inexperienced *pro Deo* counsel, not as a right, but as a matter of judicial practice.

As less than 12% of the police were trained in actual detective work, arrested people were frequently forced to make confessions under pain of physical assault. Studies conducted in the 1980s and subsequent disclosures made before the Truth and Reconciliation Commission (TRC) show that accused persons were routinely tortured and, in many cases, killed by the police whilst in police custody. The courts could not be relied upon to protect the victims of police abuse. Magistrates rarely made a finding against the police. Until 1993, magistrates were public servants who exercised both executive and judicial functions. Like all other civil servants, they were liable to a possible departmental disciplinary enquiry by the Executive, and to being found guilty of misconduct, which included disobeying a lawful order given by a person having the authority to give it — for example the Minister of Justice or the Director-General. Misconduct also included commenting in public ‘upon the administration of any department’ — a state of affairs explaining partially why magistrates were reluctant to criticise policemen whom they found guilty of criminal acts. In addition, they could be transferred, as frequently happened, without their consent.

During colonial times, when the colonial power placed great emphasis on rigorous centralised authority, it was practical and expedient to appoint magistrates who were primarily agents of the Executive. They were carefully screened as they were an important extension of the government of the day. In times of war, for example, magistrates were in charge of military defence operations in their respective jurisdictions.⁵ Under apartheid they also discharged the function of ‘security officers’ (in collaboration with the police) in the recurrent ‘emergencies’ that government policy increasingly imposed on the people of South Africa.⁶ Until the enactment of the Magistrates Act 90 of 1993, magistrates were in theory appointed by the Minister of Justice. However, in practice, with appointing authority being delegated by the Minister, the Director-General was the appointing instance. Though in theory magistrates could be appointed from outside the civil service, in practice this never happened. They were appointed from the ranks of senior public prosecutors and tended generally to regard the accused from a prosecutorial perspective, making it difficult for the accused (who were invariably black people) to believe in their objectivity.

The professional relationship between the magistrate and the prosecutor was yet another eyesore to the public. While, professionally, prosecutors were under the control of an Attorney-General, in practice magistrates administered control over them regarding promotions, leave and transfers. In some magisterial districts the local prosecutor performed other administrative functions as well. It was not uncommon for the pros-

ecutor to be called upon to do duty as clerk of both the criminal and civil court, to assist in the registration of births and deaths, and to act as secretary of the Liquor Licensing Board.⁷ Prosecutors would also be seen accompanying magistrates from place to place.⁸ In 1983, the Hoexter Commission noted that it often happened that ‘the magistrate and the prosecutor share the same motor car and are seen to arrive together at the seat of the court where the trial is about to take place’.⁹ A public prosecutor, whose promotion depended greatly on the goodwill of the magistrate, could not exercise discretion independently. Prosecutors were ‘in fact serving two masters’, the Hoexter Commission found.¹⁰ As a lecturer in the Department of Justice observed in 1971, ‘magistrates are sometimes tyrants on the bench and any effort on the part of the prosecutor to assert himself can lead to friction.’¹¹

Another jarring feature of criminal justice under the apartheid legal order, and one which undermined the professional status of the prosecutor, let alone the image of the courts generally, was that in many rural areas police also doubled as prosecutors. This unwholesome practice blurred in the public eye the distinction between the investigation and the prevention of crime on the one hand, and the exercise of prosecutorial discretion on the other. Abuse of police power was rampant in rural areas, and complaints brought against police rarely resulted in prosecutions in situations where the police themselves had been delegated the prosecutorial function. Here again it was the black rural communities who bore the brunt of this aberration.

The police, courts and prisons were agents of racial oppression; they existed to rubber-stamp pernicious racially discriminatory laws. They were the central pillars of the apartheid state. When, in 1962, Nelson Mandela asked Magistrate Dormehl to recuse himself from the trial due to the racist nature of his conduct and its potential for injustice, Dormehl’s reply was blunt and frank: ‘After all is said and done, there is only one court today and that is the white man’s court. There is no other court.’¹² With this perception of the court as a white man’s court, magistrates and, to a lesser extent, judges, allowed apartheid to intrude into judicial proceedings by enforcing the racial segregation of lawyers in the courtroom;¹³ not according black witnesses the formal civilities accorded to white witnesses,¹⁴ explicitly discounting the value of evidence given by black people;¹⁵ making judicial comments endorsing racially derogatory myths; and belittling the value of a black person’s life compared with that of a white person.¹⁶

This prejudice was not only race-based, but gender-based as well. For example, until very recently it was accepted judicial practice for the defence counsel to lead evidence of a rape victim’s sexual history to discredit the validity of her allegations. In 1952 the Appellate Division of the Supreme Court held that a trial judge did not err by taking judicial notice of the fact that black women submit to rape without protest.¹⁷

3. Change from Apartheid to Constitutional Democracy

One of the most formidable challenges confronting the new democratic government was to set up a credible administration of criminal justice; one responsive to the needs of society and respected by all.

However, with the change of government in 1994, many who had grown accustomed to the rigid formalism of the old order felt threatened by the new democratic order and resigned from their posts. For some, the notion of administering justice in a human rights setting under an ANC-led government was hard to swallow. The aloof and mysterious way in which criminal justice was previously administered had now to give way to the openness and fairness commanded by the Constitution. The military titles that ranked the order of seniority within police and prison departments were scrapped, much to the dismay of the old guard. The 'South African Police Force' became the 'South African Police Services'. The 'General' was now the 'Commissioner'. The title of 'Attorney-General' was replaced by that of 'Director of Public Prosecutions'. The Department of Prisons was renamed the Department of Correctional Services. 'Law and Order' was substituted with 'Safety and Security'. Afrikaans, the lingua franca of the criminal justice system until then, was substituted with English.

All these developments, essentially aimed at transforming the autocratic and arcane character of the criminal justice system into a service-orientated and people-friendly organisation, combined to produce a feeling of frustration and debility from within the establishment. Suspicion and scepticism in the ranks of the old guard ruled supreme.

The homelands policies and the emergence of so-called independent states and self-governing territories under apartheid had resulted in a fragmented criminal justice system characterised by lack of infrastructure, scarcity of properly trained personnel, and poor service delivery. The new Ministry of Justice, which is a national portfolio, with the Minister of Justice and Constitutional Development as political head of the department, inherited 11 different departments created under the former homelands. Many of the magistrates' courts in these territories had become dysfunctional. Some lacked even the most rudimentary infrastructure required to function: with no electricity, no proper office equipment, run-down sanitation facilities, no security, broken windows, leaking roofs, some without even potable water, etc. Courts were financially mismanaged, chiefly as a result of lack of basic training in financial management and accounting skills. Legal aid, insofar as provision was made for it, existed only on paper.

Rationalisation meant redeployment, equalising salary structures, training, and monitoring from the Justice Head Office in Pretoria. Those who had become used to living relatively luxurious lifestyles through various

patronage schemes had now to trim their sails according to the winds of change. In some cases it meant having to sell a house, debt re-scheduling, and even taking children out of expensive private schools. These changes prejudiced the affected prosecutors and magistrates materially, resulting in low work morale, absenteeism from work, corruption, and resignations from office. Delays in filling critical posts increased the workload of others, causing them to leave as well.¹⁸ Similarly, within the police services, many trained detectives opted for highly paid jobs in the private sector.

The advent of the Constitution and the Bill of Rights certainly destabilised the personnel component within the administration of criminal justice. As Judge Johan Kriegler of the Constitutional Court (as he then was) observed:¹⁹

The retention of the existing legal and administrative structures facilitated a reasonably smooth transition from the old order to the new. But the transition did have an effect on the country's criminal justice system. People who had acquired specialised knowledge of the system, and had become skilled and sure-footed in its practice, were confronted with a new environment and lost their confidence. Particularly in the lower courts, where the bulk of the country's cases is decided, judicial officers, practitioners and investigating officers were uncertain about the effect of super-imposing the norms of a rights culture on a system that had evolved under a wholly different regime, and about the effect of that super-imposition in a given case.

In the Department of Justice alone, some 630 prosecutors resigned between January 1994 and December 1997.²⁰ This amounted to 2 000 years of work experience lost to the prosecution service.²¹ They were replaced, with more prosecutors replacing them in absolute numbers, but as Martin Schönreich correctly observes, "high personnel turnover has meant a decline in the experience level of the average prosecutor."²²

In some cases this came at a very high cost. A number of state advocates who had taken severance packages had to be re-employed as highly paid consultants to wind up very lengthy and convoluted commercial crime cases entrusted to them from the start, and whose intricacy only they understood.

It was clear to the new government from the outset that unless the personnel make-up of the criminal justice system became racially representative, and unless there was a marked departure from the male-orientated employment policies, it could not count on the trust and support of the majority of the population. While the government knew that it could not afford to dither on this matter, it was equally clear that there were no quick fixes.

The Ministries of Justice and of Safety and Security were headed by ANC cabinet members, and the

Correctional Services Portfolio was assumed by an Inkatha Freedom Party Cabinet Minister. Of the three respective incumbents, the Minister of Justice, Dullah Omar, himself a seasoned lawyer, was the most experienced in the workings of the criminal justice system. The Minister of Correctional Services, Dr Siphon Mzimela, was a former prison chaplain in the United States. The American idea of a private prison had impressed him so greatly that he immediately set about introducing it to South Africa — to no avail, as described below. The National Commissioner of Police Services, George Fivaz, then Major-General in the SAP, was handpicked in January 1995 by the then President Mandela on the basis of his managerial experience.

From the start, each of the ministries had to put up with institutional resistance of some sort or the other. Lest one forget, although the political leadership had changed, the top echelons of management remained in the hands of trusted apartheid-era appointees. Soon after being appointed, the Minister of Justice was faced with go-slow strikes by prosecutors clamouring for higher salaries. In the policing sector, Commissioner Fivaz had to quell some 2 000 heavily armed police rebels who had blockaded the town of Umtata because of a pay dispute. He took a firm stand, stating that he would not tolerate undisciplined elements in the police ranks as this would mean that South Africa would be at the mercy of increasing crime and violence.²³ Minister Mzimela immediately faced huge prison riots over the amnesty issue. Prisoners had believed that they would be released once there was majority rule. The rioters were placated through negotiation and after the Minister announced a six-month blanket sentence reduction.²⁴

Notwithstanding ideological resistance from some quarters within their respective departments, all three ministers set about transforming the racial profile of their departments aggressively. By March 2002 there were 121 305 police personnel (including both uniformed and non-uniformed personnel) in the country. The percentage of SAPS personnel by race was as follows: African (59,5%); coloured (9,1%), Indian (3,8%) and white (27,2%).²² The Department of Justice, too, has moved quickly to transform the racial composition of its personnel. Most of the key positions at head office (Director-General, Deputy Directors-General, Chief Directors, and Directors) are occupied by black people. Unthinkable in the past, the Chief Director of the Justice College is a woman. The Department of Correctional Services launched its transformation agenda under the banner of the Transformation Forum on Correctional Services, which consisted of various stakeholders, including NGOs. The forum broke down, not least because of institutional resistance and the apparent reluctance of the then Minister Mzimela to work with the forum.²⁵ Policy and staff changes that were introduced were accompanied by

extensive allegations of corruption and mismanagement which led to the departure of Commissioner K Sithole.²⁶ This led to a leadership crisis, with acting commissioners put in charge until the appointment of the present commissioner in 2001.

4. The South African Police Services

The primary function of the criminal justice system is to protect the safety of the individual and that of society against crime. Organs of state entrusted with this task are therefore required to work to prevent crime, fight it where it occurs, and punish the offender. Crime destroys the fabric of society and undermines economic development.²⁷ The South African Revenue Service estimates that because of white collar crime (pure economic delinquency), between 12% and 25% of the country's gross national product is within the so-called 'hidden economy' which falls outside the tax net.²⁸ In 2003, more than R100 million worth of known fraud transactions took place in South Africa.²⁹ As a means to curb crime and enjoy the much-needed co-operation of the public in this effort, a well-functioning criminal justice system should be predictable in its response to crime, measurable in its effectiveness, and compatible with international best practices in its dealing with global crime syndicates.

Police are in the front line of the fight against crime in a society based on the protection and promotion of human rights. Outlining their crucial role, Goldstein writes:³⁰

... a democracy is heavily dependent upon its police ... to maintain the degree of order that makes a free society possible. It looks to its police to prevent people from preying on one another; to provide a sense of security; to facilitate movement; to resolve conflicts; and to protect the very processes and rights — such as free elections, freedom of speech, and freedom of assembly — on which continuation of a free society depends. The strength of a democracy and the quality of life enjoyed by its citizens are determined in large measure by the ability of the police to discharge their duties.

The police, as pointed out, inherited an abysmally bad image from the apartheid past. They were confronted with huge challenges that required the following: a change in the style and method of policing; combating soaring crime rates; internalising the principles of accountability; inculcating a human rights ethos within their ranks; working in consultation and in co-operation with community-based bodies; and winning the hearts and the minds of the communities they served.

But today, victims of crime continue to encounter poor services at a large number of police stations. Although the police have toned down their violent policing methods in public, abuse of awaiting-trial prisoners continues to occur in police stations. Media reports frequently report on police brutality against

people held in custody.³¹ Whereas in the 1980s, for example, police abuse of arrested persons was shown to focus strongly on political detainees,³² it became apparent already in the early 1990s that ordinary common law criminal suspects, too, were victims of police violence — a fact that had escaped the attention of the public generally.³³ Today, mysterious deaths continue to occur in police custody. In the Western Cape alone, in a six-week period starting from 3 December 2003, a total of 11 people died in police cells. Inquests are held routinely but invariably no dockets are opened.

In 2002 the Constitutional Court found Section 49 of the Criminal Procedure Act, which authorises the use of deadly force during arrest, to be unconstitutional.³⁴ This means that nobody who kills a suspect in an attempt to arrest him or her may rely on this section any longer. The court held that an arrest may never be used to punish a suspect, and where force is necessary to effect the arrest, only the least degree of force reasonably necessary to carry out the arrest may be used. It further held that shooting is permitted only if the suspect poses a threat of violence to the arrester or others. The court, however, upheld the arrester's right to kill a suspect in self-defence or in defence of another person. The police were aggrieved by this decision, for a large number of police officers (some 2 177 between 1994 and 2003) have themselves been killed on duty over the past decade. This figure represents roughly 1,8% of the total number of police in the country).³⁵ According to the SAPS 2002/03 Annual Report most police deaths occur during hot pursuits of suspects or whilst police are making an arrest.³⁶

4.1 Challenges

The SAPS has increased its effectiveness in fighting crime greatly through using modern technology, restructuring its detective units, increasing police visibility on the streets and co-operating with the public in community police forums. This has improved its public image and helped to establish a degree of public confidence in the criminal justice system. However, the SAPS remains heavily challenged on the human rights front, particularly with regard to the way they deal with crimes committed against women and children. Rape survivors and women abused in other ways still undergo humiliating experiences when they seek to lay charges at police stations. Police are still largely perceived as being indifferent, if not sometimes manifestly discourteous, to women seeking legal redress against those who abuse them. A much-publicised example is the very recent case of Alix Carmichele.³⁷ It took her six years to secure a Constitutional Court finding that she could go back to the Cape Town High Court to pursue a damages claim against the police and the prosecution service on the ground that they had negligently allowed her attacker, a habitual offender with a disturbing history of violence against women, to roam around

instead of being kept away from her and out of society.

The crucial challenge facing the SAPS is to cultivate a culture of human rights across the board. Human rights should not be reduced to informing suspects of their rights upon arrest. It needs to inform police conduct throughout, including how to interact with victims of crime. A recent case study conducted by the Consortium on Violence against Women³⁸ shows that unless rape victims have an intermediary to pursue the case on their behalf, in numerous cases, investigating officers tend to lose interest in the case as time passes. This results in victims losing trust in the investigating officers, which in turn causes them to abandon their cases.

Far too many people, especially children, are being arrested for petty and technical offences. The overcrowding of prisons resulting from such arbitrary arrests results in serious human rights violations suffered by detainees, especially juveniles. The judiciary has repeatedly criticised this phenomenon, but it continues unabated.³⁹ On the other hand, police have shown an inexplicable degree of reluctance to bring to book the people suspected of causing the deaths of the numerous initiates who have died as a result of botched rural circumcisions.⁴⁰

The Independent Complaints Directorate (ICD), the civilian oversight body charged with monitoring and investigating police abuses, is regrettably not making an impact. To start with, most people have never heard of it. It also makes no robust and imaginative attempts to market itself and the service it offers to the public. One hears about it, or from it, mainly when people escape from or die in police custody.

The ICD has authority to investigate police misconduct on its own or when it receives a complaint. It may recommend disciplinary action or a criminal prosecution, but has no power to force the police to take action. The Internal Investigative Units of the various provinces are not compelled to provide the ICD with statistics on the outcomes of investigations undertaken by the police themselves. Piers Pigou⁴¹ correctly points out that this is a remarkable drawback for the work of an oversight body. The police are obliged to report only deaths in custody, which means they do not have to report other kinds of violence inflicted on suspects in custody. Therefore the ICD does not have comprehensive statistics on abuse of police power and is not in a position to analyse trends and practices — a deficit by its own admission.⁴² A notable drawback is that the ICD has no authority to make unannounced visits to police cells. In order to play a more effective role in curbing abuses, the ICD needs to be given a broader investigative authority; one extending to other incidents of alleged abuse of police powers.

4.1.1 Private Security Police

From the early 1990s the private security industry has grown rapidly, reflecting the increased fear of crime and

the accompanying public scepticism in the ability of the police to ward off potential criminals. However, private security firms existed under the apartheid order, which used them to do some of the usual work ordinarily done by the SAP, leaving the police more time to deal with state security issues.⁴³ Regarding border defence, the apartheid state relied in part on the commando system, which dates back to the Anglo-Boer War when Afrikaner commandos fought against the British troops.⁴⁴ The commandos, which consist mainly of farmers involved in farm watch activities, have declined in number since 1994. They operate mainly on the borders with Zimbabwe, Swaziland and Lesotho.

In February 2001 President Mbeki announced that the commandos were to be disbanded. This was prompted by allegations that commandos perpetrated violent criminal acts against black people in rural areas. The announcement drew criticism from the agricultural farming sector. The Chairman of Agri-SA, a Free State farmer, told the United Nations Office for the Co-ordination of Humanitarian Affairs in April 2003 that the farmers needed the commandos, 'and saw them as one of the backbones of the rural protection plan, without a doubt.'⁴⁵ However, for a large number of black people in rural areas, this is a painful reminder of the repressive apartheid Defence Force. As Minister of Defence Mosiua Lekota said: 'A structure like that, which is not under proper training, proper regulation, and doesn't even have arresting powers — they are just citizens armed with weapons — that think that they can do anything they choose to do, cannot be allowed in a constitutional order.'⁴⁶

The government has since been mute about the disbandment process which, it seems, will continue for at least another five years before all remaining 50 000 commandos will have been redeployed as police reservists.⁴⁷ The hushed-up way in which the disbandment is proceeding has drawn the criticism of the parliamentary opposition Democratic Alliance, which expressed concern that a vacuum might be left in rural areas which the police could not fill.⁴⁸

Since 1994 the new government has implemented a number of laws to tighten control of the private security establishment.⁴⁹ A Security Industry Regulatory Authority was set up in 2002 to look after the interests of both the public national interest and the private security interest itself, including security officers who might be exploited within the industry.⁵⁰

Most South Africans cannot pay for private security services. A recent survey suggests that only 2% of black people, compared with 45% of white people have a private security or an armed response system.⁵¹ Valji, Harris and Simpson state that this demonstrates that the preoccupation with criminal violence and victimisation plays out in racially, as well as economically, defined ways. They argue that high walls around residential homes continue to have the effect of marginalising an almost exclusively black population, fuelling

"resentment and injustice, and a sustained sense of privilege on the other. Both sentiments pose an obstacle to meaningful reconciliation'.⁵² On this point it may be said that the growth in the number of security companies, with over 40 security associations representing different aspects of the industry,⁵³ has not been accompanied by a more effective policing of traditionally neglected black townships by the state police. Vigilantism appears to be on the rise, with some 40% of deaths in police custody caused by vigilante action.⁵⁴

4.1.2 Challenges

Throughout South Africa today, towns and cities are surrounded by impoverished communities in which state institutions are glaringly almost non-existent. Where the state fails to perform a central state function, such as guaranteeing security and order and the rule of law, individual arming, warlordism, vigilantism, the formation of rackets, and the growth of gangs become part of an organised form of security operating parallel to, but outside, the borders of the state-serviced social order. As a leading South African policing expert, Erena van der Spuy, contends, 'the demand for safety exists in all sections of society. The demand that the state should discharge its obligation to provide a public policing good to its citizens, and to do so in a manner that is both effective and non-partisan, is not unreasonable.'⁵⁵

The essential challenge is for the state to manifest its policing ability in precisely those rural districts where the poor and economically marginalised have been victimised at the hands of the criminal justice system. The disbandment of the commandos, for example, should not leave a void which cannot be filled by the South African Police Services. South Africa, lest it be overlooked, is neither a quasi state nor a semi-democracy. It is a fully functional democratic state with the constitutional duty to ensure that 'everyone has the right to freedom and security of the person.'⁵⁶ Government therefore has the political and moral duty to ensure that policing takes place squarely within the bounds of the Constitution, and that the citizenry develop an active belief in the commitment by the police to protect the physical integrity of all who live in South Africa. The challenge is to ensure that in places like rural areas where the private security services are replaced by state policing, the poor are not policed more punitively and the rich in a highly regulated way. Ultimately, it points to the need, as Shearing and others have argued persuasively, for both state and non-state policing to be regulated by a common framework that upholds the rule of law.⁵⁷

5. The Courts

The establishment of the Constitutional Court in 1995 was unquestionably the highlight of the justice transformation process. Since its inception, the court has made

momentous decisions that have benefited individual people as well as communities in a number of ways. Although the court has been criticised for its judgments favouring the wide exercise of power by Parliament,⁵⁸ its decisions in the field of criminal justice have given meaning to constitutional tenets safeguarding the procedural rights of the accused, especially as regards the concept of a fair trial. Amongst the court's many important decisions in the area of criminal justice, is the one that found the death penalty to be unconstitutional.⁵⁹ Other judgments include the abolition of judicial corporal punishment (whipping) of juveniles,⁶⁰ the abolition of imprisonment of civil debtors,⁶¹ the recognition of the right of the accused to have access to the police docket and to consult state witnesses,⁶² and more recently, the recognition of prisoners' right to vote in a general election.⁶³

However, the challenge of transforming the judiciary has proven to be more formidable than was originally thought. The past ten years teach us that judicial transformation entails a great deal more than the racial and gender transformation of the bench. It encompasses institutional and attitudinal transformation on an ongoing basis — something that has happened only marginally.

The creation of the Magistrates' Commission and the Judicial Services Commission has helped to extricate the judiciary from the political grip of the Executive and place it on a more independent platform. Judges and magistrates are appointed according to a constitutionally prescribed democratic procedure that involves various stakeholders in the justice sector. The past decade has indeed witnessed a significant increase in the percentage of black and women incumbents within the judiciary. By any standards, the progress made in this regard is nothing short of impressive. In fact, from a racial point of view, the judiciary is well on its way to becoming representative. Women, however, continue to be under-represented. Current appointment patterns do not suggest that this is likely to change significantly in the foreseeable future.

The need for equitable representation within the judiciary is particularly important in South Africa, for the simple reason that most of the accused in criminal trials come from social and cultural backgrounds with which most magistrates and judges are not acquainted. Second, the majority of the accused are not mother-tongue speakers of English or Afrikaans, the official languages used in court. Therefore, from the accused point of view, and in the interests of justice being seen to be done, it is important, especially in the criminal process where the liberty of the individual is at stake, that the judiciary be drawn from as wide a racial and cultural background as possible.

The need for greater female representation becomes all the more urgent given the fact that the South African society is internationally notorious for its extremely high incidence of women and child abuse. The judiciary

continues to be seen as being out of touch with the realities affecting women. The Constitutional Court, for example, in a very conservative judgment, found that there is no gender discrimination where a law criminalises a prostitute for services rendered, but not a client for services received. Prostitutes, so the argument ran, were not vulnerable since they chose to engage in sex-work. The judgment clearly fails to appreciate the fact that those involved in the sex industry in South Africa import up to 2 000 sex slaves into the country from central Europe, Thailand, Mozambique, Lesotho and other African countries.⁶⁴ They are sold to brothels and are forced to have sex against their will.

5.1 Challenges

Despite the positive strides towards achieving equitable racial representation within the judiciary, the media continue to report on the outcomes of court cases suggesting manifest judicial prejudices extending beyond the racial factor, and which have more to do with institutional culture than anything else.

A number of appointees, irrespective of whether or not they are white, black or women, bring to the bench the prejudices and traditions inculcated in them when they served under the apartheid justice authorities. This has nothing to do with colour, but with habit and attitude. In the rural areas in particular, old-style magistrates are reluctant to accept that they are now purely judicial officers and no longer the 'big shots' they used to be. In many ways, the onset of constitutional democracy has caused some to become frustrated, a feeling that is occasionally vented in overtly outrageous court judgments and anti-social extra-judicial behaviour.

The need to address this educational gap remains. Until now, very little has been undertaken in practice by either the Magistrates' Commission or Judicial Service Commission by way of offering ongoing, long-term human rights training for incumbents in respective judicial posts. In the case of magistrates, the task has been left largely to the Justice College, which offers human rights as an extra module in some of its functional training courses for magistrates. This does not derogate from the overarching need for the judiciary in general to become alive to the fact that judicial training is an indispensable feature of the administration of justice in a constitutional democracy. It is indeed disconcerting that today, more than ten years into democracy, South Africa still has no judicial academy with an established faculty and core curriculum.

5.1.1 Matters Related to the Courts

5.1.1.1 *Legal Aid in Criminal Trials*

The Bill of Rights gives the accused, who cannot afford a lawyer, the right to state-funded legal aid if substantial injustice would otherwise result. The accused is entitled to be informed of this right promptly.⁶⁵ This represents

a clean break with the old-style official thinking on legal aid, which was essentially opposed to the idea of making legal aid available in criminal matters.

When the Mandela government came into power, it found the administration of legal aid in a sorry state. The Legal Aid Board continued to flounder badly in the 1990s to the point where corruption and mismanagement nearly caused its demise. This was the result of a high-handed and autocratic style of management, which was vested with vast discretionary powers that were often exercised in an inscrutable manner. Legal aid was virtually inaccessible to accused persons in rural areas, and non-existent for accused persons in the former homeland 'states' and self-governing territories.

The revamping of the Legal Aid Board under the chairmanship of Judge Mohamed Navsa reversed the rot that had set in, placing legal aid on a new and healthier footing. Today, the board runs over 60 Justice Centres around the country, ensuring that criminal legal aid and advice reach a wider clientele. The centres are staffed by attorneys and paralegals who are paid by the board. According to the Legal Aid Board's Annual Report 2002/03, most of their cases are now being dealt with by the centres, with less than 40% being referred to private practitioners.

Despite clearly identifiable progress in the provision of state-funded legal aid over the past three years, widespread unemployment and lack of social security (with between 45% and 55% of the population living below the poverty line), the high incidence of crime continues to present the legal aid system with intractable problems. The report for 2002/03 states that the board assisted in 55% of the 400 000 criminal cases dealt with by the National Prosecuting Authority. However impressive this figure may be, it needs to be balanced against the fact that the number of people who fall back into crime generally is very high (50%). Another sobering fact is that on average, persons who were arrested, appeared in court and were sent to prison as awaiting-trial prisoners spent three months in prison, and some, years.⁶⁶ On 31 March 2004, 3 883 prisoners had been awaiting trial for between one and two years; and 1 324 had waited for more than two years.⁶⁷

The Legal Aid Board previously over-relied on the so-called *judicare* system. According to this system, legal aid recipients choose their lawyers from those in private practice. However, it has failed to stimulate innovative and imaginative ways of applying the legal aid idea in the criminal justice system. Matters were traditionally dealt with on a case-by-case basis, with the legal profession contributing very little by way of progressive reform of access to justice. Instead, some legal aid attorneys in private practice are alleged to have claimed hundreds of thousands of rands for legal aid work not, in fact, done.

A major weakness of the legal aid scheme, as regards both civil and criminal matters, is that it has been litigation-oriented. The result is that the profession, as a whole, has failed to devote sufficient energy to giving effect to preventative legal aid. Lawyers' organisations have been relatively quiet on the discussion on the decriminalisation of certain technical crimes (e.g. those without victims or complainants, and which do not endanger the lives of others), diversion, alternatives to imprisonment; and on how to involve paralegals more systematically in providing out-of-court legal advice and assistance to the poor in criminal matters.

The Department of Justice has traditionally not been at the forefront of the access to justice movement. The impetus has come mainly from the NGO sector, but the contributions here have been mainly in the area of civil law. Given the fact that the Legal Aid Board has begun to assert its image more rigorously since revamping its methods of operation, it also needs to involve itself more audibly in the transformation of the criminal justice sector. Being a unit essentially concerned with the promotion and granting of access to justice, the board needs to add its voice to the discussion on issues such as decriminalisation of certain types of conduct, diversion, plea bargaining, lay participation in the criminal justice system, bail reform, fast-tracking of awaiting-trial matters, use of non-custodial sentences, etc.

5.1.1.2 Crime and Traditional Courts

The courts of chiefs and headmen are an integral feature of the criminal justice system and decide hundreds of thousands of minor criminal cases each year. The traditional courts have jurisdiction over customary law offences and minor common law and statutory crimes. They thus play a significant role in the rural areas in adjudicating minor criminal matters falling within their jurisdiction. However, with the onset of democracy, critics questioned their legitimacy in a constitutional state based on the rule of law. The main points of criticism have been that traditional courts forbid legal representation, do not presume the innocence of the accused, are sexist in their composition, and the adjudicators have no legal training.

The mounting pressure for change caused the Justice Ministry to place the issue of the criminal jurisdiction of the traditional courts on the agenda of the South African Law Commission in 1996.⁶⁸ The commission published a discussion paper⁶⁹ which was extensively commented upon by the major role-players. This resulted in the drawing up of draft legislation, the Traditional Courts Bill of 2003, which strongly emphasises reconciliation as well as rehabilitation and the re-integration of offenders into the community.

The drafters of the Bill have declined the requests by traditional leaders to be given the authority to impose corporal punishment on youths. The drafters of the Bill were no doubt influenced in part by the decision of the Constitutional Court in *Christian Education of South*

*Africa v The Minister of Education*⁷⁰ in which the court held that the state is obliged to take appropriate steps to reduce violence in private and public life.⁷¹

From a criminal procedural point of view, the most significant innovations contained in the proposed legislation are the following: that ethnic- or race-based jurisdiction be abolished and replaced with jurisdiction established by the geographic area in which the offence was allegedly committed; that the accused be given the right to have the case transferred to another court with competent jurisdiction (i.e. to magistrates' courts); that chiefs and headmen continue to preside over such courts and that no new formal rules of evidence and procedure be superimposed on the courts; that the fines imposed by the courts be paid into a special account and that the monies in the account be used for local community development.

From a global criminal justice point of view, it is important that parliamentary policy-makers and the leading role-players in the administration of criminal justice come to accept the fact that customary law courts are an integral and critically important part of the country's legal system. It would be naive to imagine that the formal criminal justice system could deal single-handedly with all criminal matters. The ordinary courts would simply choke to a halt with all the case bottlenecks that would arise. Therefore, customary courts need to be appreciated for the valuable role they play in the legal culture of the country. They are a major asset. From an access-to-justice point of view, traditional courts embody the very features that modern law reformers elsewhere in the world are calling for: physically and financially accessible proceedings, convenient to attend, inexpensive, quick in process, simple and informal procedures, and the use of familiar language.

The real danger though is that the courts might be deprived of these features should the issue of legal representation be successfully challenged in the Constitutional Court. Should litigants be given the right to be defended by lawyers in traditional courts, this would inevitably lead to the imposition of formal sets of rules which, in turn, would not only lead to lengthy procedural delays, but also to financially unaffordable court cases. The drafters of the Bill have left the question of legal representation open, hoping that the traditional informal style and tone of the proceedings would discourage the use of lawyers as a matter of course.

5.1.1.3 Lay Assessors

In 1998 the law was amended to provide for the appointment of so-called lay assessors to sit with magistrates to adjudicate certain kinds of criminal cases. Lay assessors are people who have no experience in the administration of criminal justice and who do not have any proficiency in any other field. The idea is to involve the ordinary person on the street in the judicial process and for the accused persons to know

that they are being tried by their peers. Assessors do not have a say on questions of law; only on questions of fact. Pilot projects on this arrangement were started by the Department of Justice in 1995, but with mixed effect. While magistrates in the metropolitan centres — where media scrutiny is intense — were receptive to the idea, those in the rural areas were generally stoutly against this innovation, seeing it as a provocative insult, an unwarranted nuisance, or a direct threat to their discretionary authority. This scheme, which was not properly costed by Parliament in the first place, got off the ground in fits and starts, and has worked well here and there. But some areas have been marked by considerable political and racial in-fighting amongst lay assessors, with magistrates feeling let down by the community, without themselves making any concerted efforts to put things straight.

It is not clear to what extent lay assessors are used in magistrates' courts' criminal trials today. What is known is that judges of the High Court have strenuously resisted attempts to extend the lay assessor scheme to High Court criminal trials, the argument being that High Court trials require specialised knowledge on the part of the assessor. While this is certainly so in highly technical criminal matters, there is no reason why lay assessors should not sit in the majority of criminal trials before the High Courts.

There is no reliable information as to how well the lay assessor scheme is known in public, or by accused persons facing certain charges that warrant the presence of assessors. In murder cases before the Regional Court, the magistrate must be assisted by two assessors, unless the accused requests that the trial proceed without assessors.

In practice, most accused persons and witnesses are unaware of how to go about lodging grievances against judicial conduct. The need to inform the public of a structured complaints procedure arises from the fact that there are many cases in which the accused are before the lower courts all alone, without legal representation and where the case is not automatically reviewable.

6. The National Prosecution Service

Without doubt, the creation of the National Directorate for Public Prosecutions⁷², as required by Section 179 of the Constitution, has boosted the effectiveness and esteem of the criminal justice system considerably. From a public image point of view, the institution of the National Prosecution Authority (NPA) has helped to impart respect, admiration and public support for the prosecutorial profession.⁷³ The fearless and resolute manner in which the NPA prosecuted high-powered public figures, resulting in their conviction and stiff sentencing, has earned it both national and international acclaim.

The prosecution service is now subject to a uniform prosecutorial policy, policy directives and a code of

conduct. In addition, public prosecutors in the field have with them a 'Handy Hints' manual, a toolkit for tricky procedures. Its national convictions rate stands at 83% in the District Courts (ordinary magistrates' courts which have the power to sentence a person to up to three years' imprisonment or impose a fine of up to R60 000), 74% in the Regional Courts (which handle all criminal cases except treason, and are authorised to impose a sentence of up to 15 years' imprisonment), and 82% in the High Courts (which may try any crime and impose a life-long imprisonment or an unlimited fine).⁷⁴ Since it was established in 1998, the NPA has consciously taken on and internalised the human rights ethic in its prosecuting standards.⁷⁵

Whilst the NPA has shown itself to be tough on criminals, it works hard to ensure that the victims of crime receive fair and humane treatment. The NPA has established a number of care centres to address the special needs of women and reverse secondary victimisation. These *Thutuzela* Care Centres exist in Manenberg (Cape Town), Mdantsane (East London- Buffalo City), Ntlaza (Umtata) and Soweto (Johannesburg). This facility provides support for rape survivors, taking utmost care that they are treated with respect, sensitivity and empathy.⁷⁶ Each centre is located inside a hospital, thus facilitating access to medical help, investigation officers, emergency support services and counsellors. According to the NPA's 2002/03 Annual Report, this initiative has good NGO support, and the conviction rate in the sexual offences courts is now between 70% and 75%.⁷⁷

Notwithstanding these accomplishments, rape and domestic violence remain a serious challenge for the criminal justice system. Large parts of the country are not serviced by the facilities as outlined above. The crime of rape continues, for the most part, to be dealt with in a disjunctive and disruptive sequence — from reporting (if it is reported) to the court stage (if the case ever gets there). What is needed is a seamless investigative and prosecutorial process that is predictable and quick.

Human rights training within the entire criminal justice system needs to be boosted. The Justice College in Pretoria started in 1998 to integrate human rights issues and social context training in its functional training programmes. However, due to the short duration of the courses (six weeks on average) the college is not able to offer a rigorous and comprehensive programme. At present, the college is in the initial stages of having a human rights manual drawn up with British support. The manual is intended to cover human rights in international criminal law. This is an area in which there is a great need for training, given the fact that South Africa has signed, ratified and incorporated the International Criminal Court Statute into domestic law. As Jessberger and Powell⁷⁸ argue:

Although South African judges and lawyers are schooled in the common law tradition and familiar

with sources other than statute, they are not particularly well schooled in customary international law. Having been a pariah state during the apartheid era, South Africa is for the most part merely beginning to engage with international legal developments in legal education and practice. Most of the current judges were trained at a time when international law was barely considered relevant in South Africa and they are not particularly well equipped to deal with it. The scanty framework of the ICC Bill will require our courts to stay abreast of developments within customary and treaty law.

Coming back to the NPA, there are still formidable hurdles to be overcome in order to solidify public faith in the prosecution service.

6.1 Challenges

In order to continue inspiring public confidence in its workings, the NPA will need to withstand political attempts to curb its discretionary authority. It is therefore critical that the National Director uphold the principles of justice and the integrity of the prosecutorial function. Notwithstanding the success achieved by the first National Director, Mr Bulelani Ngcuka, in polishing the public image of the prosecution service, a great deal of attention needs to be devoted to enhancing the career opportunities of individual prosecutors within the service. This would help to stem the exit of highly experienced personnel.

Prosecutors need to acquire more skill in handling economic crimes. Those with a flair for commercial law need to be afforded opportunities to further their studies in areas such as accountancy, tax law, international economic transactions, company law, insurance law, etc. Prosecutors skilled in these areas are indispensable to bringing economic delinquents to book. The high-profile media coverage portraying raids by the NPA's special units, such as the Scorpions, belies the fact that the prosecution service is insufficiently skilled in the area of effectively litigating sophisticated financial crimes.

Improving communication between public prosecutors and the victims of crime requires urgent and enduring attention. Empirical research has shown that the communication of basic information to victims is an underestimated empowerment device. The studies have found that victims have modest expectations, but that their 'greatest frustrations come from being treated rudely or dismissively, and from the failure of police, prosecutors and the courts to keep them informed about the progress of cases and what has happened to the perpetrators'.⁷⁹

7. Children in the Criminal Justice System

The situation of children in the South African criminal justice system is particularly invidious. According to the

2003 Human Rights Watch World Report⁸⁰, 20 000 children were raped in South Africa in 2001. Close to one million children have been orphaned by HIV/AIDS-related deaths of their parents. This makes them more vulnerable to criminal abuse. Young children are targeted as sexual victims in order to reduce the risk of contracting HIV/AIDS and because of the belief that sex with a virgin cures HIV/AIDS. Given the scale of abuse, The United Nations Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography has recommended that South Africa set up a National Centre on Child Abuse and Neglect, or an autonomous agency for children which is fully resourced.⁸¹ Domestic and international child trafficking, though little is reported on it, is also a huge problem in South Africa. The country acts as a reception or transit country for child victims of trafficking from other African countries and from the Far East.

The Criminal Law (Sexual Offences) Bill, still before the Justice Portfolio Committee, provides for a national register of sex offenders. This controversial provision, if enacted, may face legal challenges on the basis that it would violate the constitutional right to privacy. The Bill allows a court to declare a convicted accused as a dangerous offender, who would be monitored on early release from prison. At present, sexual offenders are tracked only when they are investigated, and not upon release. Criminal records are kept by the South African Police Services and this information is constitutionally protected. According to the draft Bill, sex offenders would be obliged to disclose their convictions when applying for work involving the care of children. The Bill envisages a register to be established and maintained by the Office of the National Director of Public Prosecutions. The courts would decide which sexual offences would be included in the register. While the Bill provides for restricted access to the register, one cannot rule out the possibility of someone being exposed to discrimination or even physical harm because of incorrect information contained in such a register.

Contentious issues in the Sexual Offences Bill remain unresolved. The lack of public debate on issues surrounding the Bill is delaying amendments to the proposed legislation. In September 2003 both Amnesty International and Human Rights Watch made a submission⁸² to the Justice Portfolio Committee, expressing concern that after Cabinet had considered the Bill in July 2002, a clause was deleted which would have obliged the government to give anti-retroviral drugs to sexual assault survivors as part of a wider support package that included counselling, treatment for sexually transmitted diseases, and testing for and prevention of HIV transmission as a result of rape.

The position of children and juveniles in prison is equally disturbing. In April 2002, 5% of the country's prison population consisted of persons under 18 years old.⁸³ In April 2003 there were 101 awaiting-trial juveniles in Johannesburg Medium A Prison who were

crammed into cells designed to hold 38 prisoners, 'with a single toilet that at 10am was not flushing because the water tank had run dry. There was also no water to drink at that hour.'⁸⁴

The NPA, together with other role-players, has diverted over 30 000 juveniles in the period 2000 to 2002.⁸⁵ The crime rate amongst the youth is high. The government's RDP policies have not shown any concrete results in the youth sector, in which unemployment is as high as 80%. The National Youth Commission, very regrettably, has shown no interest in dealing with this menacing problem.⁸⁶

Presently before the Justice and Constitutional Development Portfolio Committee is the Child Justice Bill, which aims to establish a more humane criminal justice system for children, one which is essentially geared to divert child offenders away from the traditional courts. The idea is that child offenders be tried in child justice courts and to extend the sentencing options as far as children are concerned. The Bill is a product of a long consultative process in which a network of NGOs, CBOs, academic institutions (the Child Justice Alliance) and government departments has worked together from the mid-1990s in the interests of the child.

At the public hearings in 2003 the Portfolio Committee was generally supportive of the Bill, but raised a number of concerns. Firstly, whether diversion was desirable in all cases; secondly, whether it was justified to prohibit the imprisonment of children younger than 14 years; and lastly, whether it would be constitutionally defensible (from the point of view of applying different criminal and evidentiary procedures) to separate a trial where a child offender was co-accused with an adult.

The enactment of this law is hampered by the fact that the financial implications pertaining to probation officers, secure care facilities, and training have yet to be confronted more realistically. Members of Parliament are determined not to support this legislation unless there are clear implementation plans, and unless they are convinced that government departments have the resources to implement the provisions.⁸⁷

There is also a concern within the portfolio committee that the different sectors within the criminal justice cluster are not working together in an integrated way. The impression is that each sector continues to work on its own, leading to duplications and overlap of some services and shortfalls in others.⁸⁸ Parliament has also become more circumspect in passing over-ambitious laws. Experience has taught us that enacting laws without planning and without the implementation resources at hand creates expectations that are met only partially, mainly to the disadvantage of people living in rural areas.

8. Witness Protection

Witnesses are critically important to the outcome of criminal proceedings. They are a particularly vulnerable group, subject to intimidation, exploitation and various

abuses by criminals facing charges which carry heavy penalties. Throughout the 1990s many criminal trials were thrown out of court because witnesses did not appear. Much of this had, and still has, to do with the fact that witnesses are treated shabbily by prosecutors and court personnel. Very few courts have citizen's advice desks which help witnesses to find their way around. These courts have been funded mainly by the Irish government and have, in fact, contributed to a more people-friendly court environment.

The initial implementation of a witness-protection programme in the mid-1990s was not well thought through. It therefore functioned haphazardly and to some extent naively, not taking into account key needs of witnesses. It was poorly administered and riddled with corruption. Much has improved since it was taken over by the NPA in 2001. In March 2003, there were 375 witnesses (including some 500 family members) under protection, 90% of whom were classified as being at high risk, but none suffered harm.⁸⁹ For the period between 1 January 2002 and 31 March 2003, the conviction rate in cases where witnesses were under the NPA's Witness Protection Unit (WP) stood at about 77%, though it is difficult to tell from the way the statistics are presented.⁹⁰

In the 2002/03 Annual Report, the NPA states that 21st century law enforcement philosophies inform its witness protection standards, according to which witnesses are treated with 'humanity, fairness, dignity, sensitivity and respect'. This does not derogate from the fact that there are still thousands of other people who have never heard of the WPU or who deliberately withhold their co-operation out of sheer fear for their lives. The reality is that poverty, fear, and the absence of visible policing will continue to render many a potential witness fearful of being targeted by crime syndicate chiefs and their henchmen.

9. Correctional Services

The relationship between imprisonment and human rights has been a difficult one. It is a highly emotive issue with the public, the majority of whom are calling for the resurrection of the death penalty. Developing the human rights idea in such an environment is hard, as Stessens writes:⁹¹

The endemic tendency in many societies which are faced with crime and violence, to be 'tough on crime' is often perceived to conflict with the need to protect individual human rights.

Prisoners are people who have been convicted by the courts for committing crimes. They are popularly seen as 'problem' people, a menace to society, people who prey on others, and who therefore needed to be removed from society. Carried to its conclusion, the popular view is that whatever happens to prisoners inside prison is their problem, not one of society. It is enough that they are clothed, fed and housed at the

taxpayers' expense. They have no say. Media reports on prisons, too, are generally couched in words depicting them as a problem — overcrowded, violent, corrupt, filthy, disease cesspools, unmanageable, insecure, and so forth. In other words, what prisons need is good management and proper security.

Robben Island Prison — now a prime tourist destination and a world heritage site — symbolises the struggle for human rights in South Africa. It is a sought-after conference venue for human rights lectures and workshops. But within the country itself, there has been hardly any public debate on prison reform, prisoners' rights, human rights, rehabilitation, or social re-integration. The government has been lethargic and overly bureaucratic in developing a coherent human rights policy on prisons. Not that the government is unaware of the need; on the contrary and by its own admission, it has acknowledged the fact that torture continues to occur in South Africa today.⁹² In 2002, television showed extensive abuses of prisoners held at the Grootvlei Prison in the Free State. A hidden camera pictured how warders assisted in making it possible for juvenile prisoners to be raped by other prisoners. In November 2003 the Independent Prison Visitors compiled a report containing serious allegations of widespread physical and verbal abuse of juvenile prisoners by warders at both the Pollsmoor and Goodwood prisons in the Western Cape.⁹³

The challenge of managing South Africa's overpopulated prisons cannot be underplayed. A critical paper by the Civil Society Prison Reform Initiative (CSPRI) shows that over the past decade the country has made very expensive mistakes in the area of correctional services — mistakes which could have been avoided. Based partly on earlier research by Dissel and Ellis, Berg, and Luyt, the CSPRI paper describes, for example, how the maximum-security private prisons outside Mangaung (Free State) and Makhado (Limpopo) came to be built at an astronomically high cost to the taxpayer. No proper feasibility studies were conducted beforehand, and tenders were awarded even before the enabling legislation had been tabled before Parliament.⁹⁴ The two prisons are contracted out fully to the private sector. The costs of these two facilities, which house 6 000 of South Africa's 180 000 prisoners in comparative luxury, have exploded beyond original forecasts. For the year 2003 to 2004, the budget for them was R492 million (6% of the departmental budget). At the Mangaung private prison, the cost per prisoner per day is R132,20, compared with R93,67 per day for prisoners in public facilities.

The criticisms levelled against the private prisons is that, instead of using them to house hard-core criminals for indefinite periods at such exorbitant costs, it would have been more worthwhile to make use of their corrective facilities to break the cycle of crime for first offenders. Others have suggested that they could have been used for juvenile offenders.⁹⁵ The official position

today is that no more private prisons will be built because they are too expensive and the costs of running them keep rising unpredictably.

9.1 *Matters Related to Correctional Services*

9.1.1 Restorative Justice

The notions of victim empowerment and restorative justice found substantial support amongst criminal justice researchers in the post-apartheid period. These ideas gained currency through the creation of the Truth and Reconciliation Commission, the aims of which were said to be 'victim driven'. The victims of gross human rights violations under the apartheid era received their reparations payments only in 2003, and the delay attracted wide criticism from all quarters. This protracted delay in making reparations under the TRC Act overshadowed efforts to place the needs of crime victims firmly on the reform agenda. Much of the discussion is still ongoing.

The concept of restorative justice, a core element of African customary legal practices, embodies the approach that conflicts between persons need to be resolved by reconciliation and restoration of harmony between the parties and between the offender and the community. Healing and the taking of responsibility for the wrong caused to others and the community are ideas at the heart of the restorative approach.⁹⁶

In its Draft White Paper on Corrections in South Africa, the Department of Correctional Services committed itself to taking on the 'principles of restoration' as a management objective.⁹⁷ This is understood to mean that Correctional Services will devote its attention to enable offenders to: (a) recognise the nature and impact of the offences they have committed; (b) come to terms with their court-imposed sentences. Furthermore, this approach requires Correctional Services to encourage offenders to show remorse for the crimes they committed and restore broken relations with their victims and families, and community institutions.⁹⁸ Restoration here is essentially 'about restoration of the offender as an individual' as well as 'the restoration of relations between the offenders and their victims.'⁹⁹

A drawback is that the White Paper does not spell out timeframes within which the outcomes will be achieved — an omission that has been criticised by the Centre for Study of Violence and Reconciliation (CSV) in its submission to the Parliamentary Portfolio Committee on Correctional Services in February 2004.¹⁰⁰ The department's restorative justice approach is spelled out in sufficiently broad language to allow for imaginative and groundbreaking pilot projects. This is a plus. The negative side of this is that in huge bureaucracies little gets done unless someone is entrusted with the responsibility of implementation.

While the stated theoretical outcomes of the restorative justice approach may be appealing, not enough

thought — at least in South Africa — has gone into the question of how and when the private interests of the individual override the public i.e. state interests. The discussion is therefore mainly rhetorical.

As regards victim support, we have referred above to the efforts underway to address the victims of sexual abuse. Apart from this, we have not witnessed any significant progress. Indeed, this is an area in which civil society can co-operate more imaginatively with the policing authorities. A case in point is the recent establishment of the Cape Town Central police station's victim support room (VSR), which is the outcome of a concerted campaign in 2003 that brought together volunteer counsellors, NGOs and the private sector. The VSR offers counselling services to traumatised victims of crime within the central boundaries of the Cape Town jurisdiction area, be it bag-snatching or a more serious assault.¹⁰¹ This facility, which is much appreciated by victims of crime, is open all hours. Counsellors, assigned on a roster basis, are available at all times and refer people to other support services where necessary.

9.1.2 The Judicial Inspectorate of Prisons

In 1998, the Judicial Inspectorate was established, under the control of Inspecting Judge Hannes Fagan, to report on the treatment of prisoners and on prison conditions.¹⁰² The office is independent. In turn, the Inspectorate appointed close to 200 Independent Prison Visitors (IPVs) who are deployed in all provinces, with one IPV for each prison with more than 100 prisoners. Before they go into the field they are given a three-day induction course in which they learn the basics of prison law and prisoners' rights.¹⁰³ Working between 14 and 67 hours a month, depending on the size of the prison, they interview prisoners privately and take up their complaints with the prison authorities, the idea being to avoid confrontation and to resolve the problems internally.¹⁰⁴

A strong aspect of the Judicial Inspectorate is that all complaints and outcomes are reported electronically to the head office in Cape Town. This helps to identify trends of human rights abuses and to intervene preventatively. According to the Inspectorate's 2002/03 and 2003/04 Annual Reports, most of the problems relate to, or arise from, the endemic and systemic deplorable overcrowding. The awful conditions in prisons persist, and heads of prisons have admitted under oath that overcrowding 'constitutes a material and imminent threat to the human dignity, physical ill health and safety'¹⁰⁵ of the inmates.

A striking deficit that pertains to both the existing oversight bodies in the criminal justice system is that although the ICD and the Judicial Inspectorate focus on human rights abuses in detention facilities, they do not appear to be in contact with each other. They operate individually, without any exchange of information. Collaboration on the part of civic-driven bodies is a pre-

requisite for effecting change on a wider front. Even more importantly, there is a need to encourage community-based initiatives or structures to share information on conditions in prisons. This would help to crystallise areas in which community-based groups become involved in drawing up and presenting training courses for officials who interact with prisoners on a daily basis.

In order for this to happen it is necessary that the Minister of Correctional Services and the Commissioner show themselves to be more willing to allow outside scrutiny of the running of prisons. The appointment of the Jali Commission was a useful starting point. In the course of its inquiry, abominable and shocking practices of corruption and sexual abuse of young prison inmates by older prisoners have been shown on national television. This was the first time that the public was given an insight into the scale of uncontrolled deprivation in our correctional facilities. The Prisons Act of 1959 has prevented public insight into the workings of correctional institutions, making it punishable to publish 'any false information concerning the administration of any prison . . . without taking reasonable steps to verify such information.'¹⁰⁶

The Draft White Paper expressly commits the department towards a partnership with the community. The idea is to involve national or international NGOs, community-based organisations (CBOs), tertiary institutions and private organisations to help the Department of Correctional Services work on projects aimed at: (a) fighting crime; (b) repairing relationships; and (c) rehabilitating offenders. The White Paper acknowledges that 'rehabilitation of offenders can only be truly successful and their re-integration into the society meaningful, if all stakeholders are allowed to participate in the process'. In addition, the White Paper announces several impressive projects incorporating 'the need for a holistic approach on African correctional matters.' While this may seem over-ambitious, such radical and innovative thinking is necessary for transformation to occur. The most important requirement for effective partnership-building with NGOs is that the Department of Correctional Services needs to prepare its personnel for interacting with community organisations. In other words, access to prisons should be eased and not made subject to the whims of warders or prison directors.

9.2 Challenges

Overcrowded prisons and other places of detention (such as police stations, psychiatric institutions, refugee camps, etc) where people are involuntarily deprived of their freedom are notorious for human rights violations. Although South Africa ratified the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)¹⁰⁷ in 1998, it has not incorporated the definition of torture into South African law. There is no specific

legislation that criminalises the act of torture for which a penalty is prescribed.

However, Articles 4 and 5 of CAT oblige a state party to make torture a crime under its domestic law, and to implement measures conferring jurisdiction over an act of torture committed within its territory when either the offender or the victim is a national. This means that practices which would otherwise be regarded as torture under the CAT definition of the crime are still dealt with under the common law crime of assault with intent to do grievous bodily harm, or even common assault, under South African law.

Mindful of its obligation under CAT, in February 2004 the Ministry of Justice and Constitutional Development published the draft Criminalisation of Torture Bill (2003) for comment. The Bill provides for the prosecution in South African courts of persons accused of having committed the crime of torture in South Africa and outside the country in certain circumstances. The definition of torture in the draft Bill is taken over verbatim from the CAT definition and the penalties suggested are those for assault, assault with intent to do grievous bodily harm, or attempted murder. The fact that the person who commits an act constituting torture is a head of state, or any public official, or a member of the armed forces obliged to obey a manifestly unlawful order of a government or a superior, will be neither a defence nor a ground for imposing a lighter sentence.

The proposed legislation is in a very early stage, and there is likely to be vigorous debate about how it will be enforced at a practical level. The legislation will necessarily entail revisiting departmental standing rules as well as their respective regulations regarding the reporting and lodging of complaints of torture. The CAT provides for an investigative procedure by which an international entity, the Committee Against Torture, can enquire into allegations of torture.¹⁰⁸ A drawback of this arrangement is that the Committee's effectiveness is undermined by the fact that such investigations are confidential. Added to this, no fact-finding investigation may take place without the prior consent of the state concerned.

In order to make South Africa's incorporation of the provisions of CAT meaningful for the category of persons it seeks to protect, it would make more sense for the government to ratify the Optional Protocol to CAT as well. This international instrument allows for international and national visiting teams to make unannounced visits to prisons and all other places where people are deprived of their freedom of movement involuntarily. The idea is not to punish states, but rather to win their co-operation in preventing the cruel, inhuman or degrading treatment of persons in detention. It is a proactive rather than a reactive measure. A similar international visiting mechanism exists in Europe — the European Committee for the Prevention of Torture (ECPT).¹⁰⁹ It was established under the framework of the Council of Europe, has been ratified by 44 member

states of the Council of Europe, and is reputed to be highly effective.¹¹⁰

Given the fact that South Africa is likely to be peer reviewed in 2005 under NEPAD's¹¹¹ African Peer Review Mechanism (APRM), the country — as chief architect of the APRM — has to allow its prisons to be scrutinised by the African Commission's Special Rapporteur on Prison Conditions in Africa. Mali, for example, has put into effect a number of recommendations made by the Special Rapporteur with regard to conditions in Malian prisons.¹¹² By being available for such a visit, South Africa would give significant credibility to its commitment to promote open governance across the African continent.

10. New Approaches

10.1 *Need for the Abolition of Minimum Sentences*

In the face of widespread public demand for severe penalties for those found guilty of crimes, Parliament passed a law in 1997 prescribing harsh compulsory sentences for a large number of serious offences.¹¹³ While some judges have welcomed this law,¹¹⁴ others regard it as downright invasive of their judicial discretion.¹¹⁵ The effect of this law is that it has led to a significant increase in the percentage of prisoners serving sentences of more than 10 years imprisonment. A point of criticism is the vague wording of the phrase 'substantial and compelling circumstances'. The courts diverge on what this means. An example is the controversial decision in *State v Abrahams*¹¹⁶ where the court found that a father found guilty of raping his 14-year old daughter did not deserve a minimum sentence because the substantial and compelling circumstance here was that the rape did not pose a threat to the community as it was committed in his own family environment.

Another absurdity flowing from the minimum sentence legislation is the untrammelled discretionary authority it gives the prosecution authority to determine the sentence likely to be imposed by choosing the court in which the accused is to be tried. While district courts, which try less serious offences, are not bound by the provisions of the minimum sentence legislation, they have jurisdiction under the Drugs Act to impose a sentence of up to 25 year's imprisonment.¹¹⁷

In practice, the minimum sentence legislation also results in large numbers of convicted persons having to sit in prisons for lengthy periods awaiting sentencing by a High Court. These are people who have been tried in a magistrates' court, but because these courts have no jurisdiction to impose penalties under the minimum sentences provisions, they are referred for sentencing to the High Courts, which have their own case bottlenecks.

In 2000, the South African Law Reform Commission recommended a new sentencing framework, which

includes the establishment of a Sentencing Council that would set guideline sentences for some crimes.¹¹⁸ Nothing has come of the report since it was tabled with the Minister. Apparently, the idea is being opposed by sections of the judiciary on the grounds that guidelines intrude on judicial discretionary authority.

10.2 *Introduction Of Payment Of Admission-Of-Guilt Fines*

A successful KwaZulu-Natal pilot project, according to which first-time offenders bypass the judicial process by paying fines of up to R5 000, is scheduled to be implemented countrywide by October 2004.¹¹⁹ According to this initiative, first-time accused in cases of theft, fraud, possession of dagga, receiving stolen property, forgery, as well as cases of perjury, common assault, *crimen injuria*, malicious damage to property, and negligent driving, will receive fines of up to R5 000 without having to go to court. In the Durban Magistrates' Court, the initiative has resulted in 10 000 fines being paid in the first four months of 2004 as compared with the 605 paid in the last six months of 2003.¹²⁰ The project, which is presently being rolled out to other district courts in KwaZulu-Natal, is primarily intended to reduce the prison population, cut costs for the accused and the state, and ensure that justice is dispensed quickly.¹²¹

10.3 *Plea Bargaining*

Simply put, plea bargaining is a process in which an accused pleads guilty to a lesser crime in return for a lesser sentence. It is not a substitution for imprisonment, but may well result in a shorter prison sentence or an alternative sentence. Although plea bargaining has existed unofficially in South Africa for a long time,¹²² it became part of the law only in 2001.¹²³ Apart from the benefit of eliminating long and costly trials, plea bargaining has the potential of reducing prison populations as well as the incidence of prisoners serving long prison sentences. In this way, plea bargaining is a useful tool for achieving more humane detention conditions.

In the beginning, public prosecutors were generally reluctant to enter into plea bargaining, mainly because they were not properly prepared beforehand on how to go about the negotiations. Its impact on imprisonment rates is therefore not yet convincingly measurable. However, plea bargaining is now used quite extensively by the NPA's special directorates on economic and commercial crimes. Until now, targeted prosecutorial training on plea bargaining has been limited. For example, the Bureau for Justice Assistance, which operates under the umbrella of the New York-based Vera Institute, conducts plea bargaining workshops at two targeted demonstration sites, Empangeni and Port Elizabeth. In the Western Cape, the Judicial Inspectorate of Prisons is working in co-operation with the

local Directorate of Public Prosecutions to develop expertise and depth in this area. The plea bargaining training programme is being driven mainly by the Justice Assistance Bureau, which operates under the umbrella of the New York-based Vera Institute.

10.4 A Dangerous Step Backwards: The Anti-Terrorism Bill

During November 2002 the Anti-Terrorism Bill was introduced in the National Assembly.¹²⁴ As a signatory to the anti-terrorism conventions of the United Nations and the African Union, South Africa was obliged to introduce measures aimed at fighting terrorism. A major problem of the Bill is its definition of terrorism, which is extraordinarily broad. It could include ordinary protest marches, political demonstrations, and some worker strikes. According to the Bill, reporting on such a matter could be construed as an act of terrorism, because a reporter could be construed as aiding and abetting 'a terrorist organisation'. Particularly reminding of the drastic process abuses committed by the police during the apartheid era is Chapter 3 of the Bill, which provides for investigative hearings. It gives the police wide powers to haul people before a hearing and to compel them to tell what they know about any 'terrorist organisation.' This was a favourite instrument used against journalists during apartheid.

The Bill has drawn severe criticism from human rights bodies, especially the 1,8 million-strong Congress of South African Trade Unions (COSATU), which sees the broad definition of 'terrorist' as posing a threat to legitimate action by workers or other social movements. Government reassurances that the legislation will not be used against normal political activity are a painful reminder of the arguments used by the apartheid authorities that the draconian security laws were not intended to be used against those who stood for 'law and order'. Given the vehemence of the protest coming from especially COSATU, an alliance partner of the ruling African National Congress, it is unlikely that the Bill will be submitted for enactment in its present extreme form.¹²⁵

11. Conclusion

The criminal justice system has changed considerably for the better since 1994. The government needs to be credited for its efforts in trying to establish the legitimacy of the administration of criminal justice. The transformation of the racial composition of the personnel within the criminal justice cluster departments has been broadly successful, most notably as regards the judiciary. Women, though, are still hugely unrepresented in key functionary positions throughout the criminal justice sector. The appointment of women to more authoritative positions needs to become a high priority. This is all the more necessary given the pervasive criminal abuse of women and children within all

levels of the South African society.

But racial and gender representativity should not become ends in themselves; they ought to be seen as constituent elements of a wider transformation programme that is strongly focused on human rights education and the sharpening of administrative skills, financial management, human resource training (enhancing communication skills), and, even more importantly, courteous and humane interaction with the public — *batho pele* (people first!). These goals cannot be attained by the government alone. NGOs working in the criminal justice sector need to be involved more widely and more incisively in policy-making, and need to oversee how policies are implemented in practice. This is vital for creating not only legitimacy in the criminal justice system, but credibility as well.

The NPA has started to tackle the issue of the treatment of women and children. This kind of initiative, which involves civilian participation, needs to be encouraged and replicated throughout the criminal justice system. Indeed, the ultimate test of criminal justice is depending more and more on how it responds to the needs of women and children, whether as complainants, victims, or accused persons.

The present approach of regarding prisons purely as criminal warehouses needs to be replaced with enlightened policies that seriously aim to attach meaning to the concept of 'corrective' punishment. Again, the protection of human rights and the notion of humane treatment need to feature prominently in all rehabilitation programmes. At present, the situation in our prisons could be described as nothing short of ghastly. Here, too, NGOs need to be afforded more scope to help offenders, whilst in prison, to become usefully reintegrated into the community. The rot that has set into prisons is to a large degree attributable to the secrecy and opaqueness enshrouding the treatment of offenders. Social scientists and criminologists need to become a greater part of prison reform initiatives. Their expertise is vital for breaking with the extremely conservative mindset that prevails amongst prison authorities.

Policing remains an area of real concern. Notwithstanding the many internal shake-ups and image-boosting exercises, the public at large remains highly sceptical about the effectiveness of the police in fighting crime. Public doubt is reinforced by repeated media reports about incidents of corruption and criminality within the ranks of the police. Civilian oversight of policing is superficial and unreliable. Public concern revolves around the scarcity and non-visibility of police in places where most crimes occur, that is, in communities ravished by poverty, unemployment, lack of transport, housing and health care. Increasing the numbers of the police will not solve the problem. Research conducted by the Centre for the Study of Violence shows that increasing police numbers merely results in training periods being cut and placing un-

trained police on patrol.¹²⁶ What is needed is more extensive involvement in police work by community-based organisations. Community police forums serve a purpose and need to be used to develop more imaginative intervention strategies aimed at curbing and preventing the occurrence of crime. The successes achieved by the police in curbing the poaching of abalone (perlemoen) in the Western Cape is in a large measure due to the help they received from local communities.

A formidable challenge that the police services are facing is how to update their skills base in the sphere of technology. Criminals will continue to resort to sophisticated technology to commit economic crimes with impunity as long as they know that the police do not have the expertise to bring them to book. This is an admission made by the Assets Forfeiture Unit, which was established to ensure that criminals do not benefit financially from their crimes.¹²⁷

Finally, victims of crime need to have accessible and tangible redress. The past decade teaches that government statements, policy documents, action plans, and workshop resolutions offer no relief unless they are implemented and are seen to work. Slogans should not be mistaken for solutions. Legislative experience over the past ten years also shows that laws are not self-executing; their enactment and implementation need to be preceded by careful forethought as regards infrastructure requirements. It makes more sense to introduce laws in stages, or to run pilot projects first and learn from them, than to enact laws without appreciating the circumstances under which they are expected to function. Equally, the community, which is repeatedly exhorted to co-operate in the fight against crime, needs to be afforded wider participation in the criminal justice process. NGOs and CBOs have been instrumental in bringing government to address key issues in the administration of criminal justice. Their continued involvement therefore needs to be treasured and promoted.

Endnotes

- 1 Quoted by Carter, G. M. *The Politics of Inequality* (1958 London) p. 89.
- 2 House of Assembly Debates (Hansard) vol 25 col 1496 (26 February 1969).
- 3 The way these courts worked in practice is described in detail by R. Monama in *Is This Justice* (1980).
- 4 For a comprehensive analysis of the political criminal law during the apartheid period, see Dugard, J. *Human Rights and the South African Legal Order* (1978 New Jersey) 205ff.
- 5 Krugel, W. F. 'The Executive and the Lower Courts' Judiciary: Eminent Separation or Status Quo in the South African Context' (1984) p. 19 *The Magistrate/Die Magistraat* 49.
- 6 Molteno Report: Final Report of the Commission set up by the Progressive Party to make recommendations on a Revised Constitution for South Africa extending Franchise Rights to all civilised subjects of the Republic Vol II (1962) p. 52.
- 7 Report of the Department of Justice 1 July 1979-30 June 1980, p. 6.

- 8 House of Assembly Debates (Hansard) 22 May 1967 Vol 22 col 6415.
- 9 Fifth and Final Report RP 78/1983 Part A vol 1 Part I Para 3.4. 227.
- 10 Ibid. Part B Vol III Part VIII Para 1.22 543.
- 11 Hugo, J. 'The Prosecutor: Cinderella in a Black Gown' (1971) 12 (2) *Codicillus* pp. 27-28.
- 12 Quoted by Higginbotham, A.L. Jr. "Racism in American and South African Courts: Similarities and Differences" (1990) p. 65 *New York University Law Review* p. 513.
- 13 See, for example, *R v Pitje* 1960 (4) SA 709 (AD).
- 14 See *State v Magwaza* (1985) (3) SA 29 (A) cited by J van der Berg "Judicial Notice or Racial Claptrap?" (1986) 103 *SALJ* 554.
- 15 See, for example, *State v Xhego* (1) PH H 76 (E) at 196.
- 16 *Radebe v Hough* 1949 (1) SA 380 at 384-385.
- 17 *R v A* 1952 (3) SA 212 (AD).
- 18 See generally Wingert, S. Priority Criminal Justice Reform Constraints in South Africa: Initial Identification of Needs to be addressed through a USAID/Ministry of Justice Bilateral Agreement (August 1999).
- 19 *State v Dlamini; State v Dladla and Others; State v Joubert; State v Schietekat* 1999 (7) BCLR 771 (CC): 774B.
- 20 Schönteich, M. *Lawyers for the People — The South African Prosecution Service* (Institute for Security Studies 2001) p. 113.
- 21 Ibid.
- 22 Ibid.
- 23 Gastrow, S. *Who's Who in South African Politics Number 5* (1995 Johannesburg) p. 68.
- 24 Ibid., p. 224.
- 25 2002/03 Survey (South African Institute of Race Relations) p. 442 (hereafter 2002/03 Survey).
- 26 CSPRI.
- 27 Ibid.
- 28 Cf Calland, R. and Masuku, T. 'Tough on Crime and Strong on Human Rights: The Challenge for us All' in Sarkin, J., Haeck, Y. and Vande Lanotte, J.(eds) *Resolving the Tension between Crime and Human Rights: An Evaluation of European and South African Issues* (2001 Antwerpen-Apeldoorn) p. 58.
- 29 Presentation by the National Director of Public Prosecutions, Bulelani Thandabantu Ngcuka, at the Black Management Forum's Annual General Meeting held at the Sandton Convention Centre, 13 October 2000.
- 30 See Naidu, E. '419' fraud schemes net R1000m in SA', *The Sunday Independent*, 7 March 2004.
- 31 Goldstein, H. *Policing a Free Society* (1977)
- 32 See, for example, Foreign Service 'Report Puts SA Justice on Trial' *Cape Argus*, 27 February 2004.
- 33 See Foster, D., Davis, D. and Sandler, D. *Detention and Torture in South Africa* (1987).
- 34 See Fernandez, L. Police Abuses of Non-political Criminal Suspects: A Survey of Practices in the Cape Peninsula Area (Institute of Criminology UCT Research Report Series 1991/ Research Report pp. 1-91.
- 35 Ex Parte: Minister of Safety and Security and Others: In Re *State v Walters and Another* 2002 (4) SA 613 (CC).
- 36 2002/03 Survey op cit 443.
- 37 At 4.
- 38 2001 (4) SA938 (CC).
- 39 Authored by Combrink, H. and Skepu, Z. *Bail in Sexual Assault Cases: Victims' Experiences* (Second Research Report 2002/03) p. 18.
- 40 See, for example, remarks by Judge Fagan, Judicial Inspector of Prisons in Joseph, N. "Report lifts lid on abuse by wardens' *Cape Argus* 26 November 2003. Similar criticism was recently voiced by Judge Johan Kriegler, former Constitutional Court judge, in his address entitled 'The State of Prosecutions in South Africa and the Challenges Ahead' delivered on 11 February on the occasion of the National Conference of the National Prosecution Authority Changing Ourselves Transforming our Organisation held at Caesars, Gauteng.

- 41 See <http://www.cirp.org/news/io107-22-03/>
- 42 'Monitoring Police Violence in South Africa' (paper presented in Mexico 2002 at the International Seminar on Indicators and Diagnosis on Human Rights: The Case of Torture <http://www.csvr.org.za/papers/papigoul.htm>)
- 43 McKenzie, K. 'Control Mechanisms to Prevent Torture' in Jean Baptiste Niyizurugero (ed) Preventing Torture in Africa (Proceedings of a joint APT-ACHPR workshop, Robben Island, 12-14 February 2002) (2003 Geneva) p. 111.
- 44 Shaw, M. 'Profitable policing? The Growth of South Africa's Private Security Industry' in Schärf, W. and Nina, D. *The Other Law: Non-State Ordering in South Africa* (2001) pp. 214-215. See also Irish, J. 'Policing for Profit: The Future of South Africa's Private Security Industry' p. 39 (1999) Institute of Security Studies Monograph Series 1.
- 45 Human Rights Watch 'The State Response to Violence on Farms' available at <http://hrw.org/reports/2001/safrica2/Safarms8.htm>
- 46 Available at http://www.irinnews.org/report.asp?ReportID=332229&SelectRegion=Southern_Africa
- 47 Ibid.
- 48 Terreblanche, C. 'Big boost for farm safety' *Mercury* 26 September 2003.
- 49 http://www.news24.com/News24/South_Africa/_0%2C%2C2_7_1442_559946%2C000.htm (accessed on 21 August 2004).
- 50 See Security Officers Amendment Act 104 of 1997; Private Security Industry Regulation Act 56 of 2001; Private Security Industry Levies Act 23 of 2002; Firearms Control Act 60 of 2000; and the Regulations promulgated under these enactments.
- 51 Berg, J. 'The Private Security Industry in South Africa: A Review of Applicable Legislation' (2003) 16 SACJ pp. 185-186.
- 52 Valiji, N., Harris, B. and Simpson, G. 'Crime Security and Fear of "The Other"' (2004) 2 SA Reconciliation Barometer 3.
- 53 Ibid.
- 54 Berg op cit 194.
- 55 Brown, S. 'Perception and Reality: Wellsprings of Privileged Discontent' (2000) 2 SA Reconciliation Barometer 8.
- 56 'South African Policing Studies in the Making' in Dixon, B. and Van der Spuy, E. *Justice Gained?: Crime and Crime Control in South Africa's Transition* (2004 Cape Town) p. 217.
- 57 Section 12 of the Constitution.
- 58 See Shearing, C. and Kempa, M. 'The Role of "Private Security" in Transitional Democracies in Shaw, M. (ed) *Crime and Policing in Transitional Societies* (2001); Kempa, M. and Shearing, C. *Microscopic and Macroscopic Responses to Inequalities in the Governance of Security: Respective Experiments in South Africa and Northern Ireland* (2002) 49 Transformation pp. 25-54; Shearing, C. with McCarthy, J. 'Crime, Rights and Order: Reflections on an Analytical Framework' (unpublished paper delivered at the International Council on Human Rights Policy, Carnegie Council on Ethics and International Affairs, New York, 21-22 October 2002).
- 59 See, for example, Sarkin, J. 'The Development of a Human Rights Culture in South Africa' (1998) 20 Human Rights Quarterly pp. 628-644.
- 60 *State v Makwanyane* 1995 (3) SA 391 (CC).
- 61 *State v Williams and Another* 1995 (7) BCLR 861 (CC).
- 62 *Coetzee v Gov't of Repub. Of S.Afr.; Matiso and Others v Commanding Officer, Port Elizabeth Prisons and Others* 1995 (10) BCLR 1382 (CC).
- 63 *Shabalala and Others v Attorney-General of Transvaal and Another* 1995 (12) BCLR 1593 (CC).
- 64 *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others* (judgment of 3 March 2004) Constitutional Court CCT03/04.
- 65 Smith, C. 'SA's sex slave trade scheme' *The Sunday Independent* 21 March 2004.
- 66 Section 35(2) (c).
- 67 See Judicial Inspectorate of Prisons Annual Report 2003/04 pp. 18-19.
- 68 Ibid. p. 23.
- 69 Project 90.
- 70 Traditional Courts and the Judicial Function of Traditional Leaders.
- 71 2000 (4) SA 757.
- 72 See also Abolition of Corporal Punishment Act, 33 of 1997.
- 73 See National Prosecuting Authority Act, 32 of 1998.
- 74 For a critique of the status of prosecutors in the past, see Fernandez, L. 'Profile of a Vague Figure: The South African Public Prosecutor' (1993) 110 SALJ pp. 115-126.
- 75 Address by the National Director of Public Prosecutions, Bulelani Ngcuka, at the Annual Dinner of the Foreign Correspondents Association of Southern Africa, 8 November 2003, Johannesburg
- 76 Address by the National Director of Public Prosecutions, Bulelani Ngcuka, on the Graduation of the Third Group of Scorpions, 2 August 2002.
- 77 Ibid.
- 78 Ibid.
- 79 Jessberger, F. and Powell, C. 'Prosecuting Pinochets in South Africa — Implementing the Rome Statute of the International Criminal Court' (2001) 14 South African Journal of Criminal Justice p. 361.
- 80 Bureau of Justice Assistance and the Vera Institute of Justice Prosecutors in the Frontline: Increasing the Effectiveness of Criminal Justice in South Africa (2003) Pretoria, p. 28.
- 81 <http://www.hrw.org/wr2k3/africall.html>
- 82 <http://www.irinnews.org/report.asp?ReportID=30303>. Submission to the Parliamentary Portfolio Committee on Justice and Constitutional Development, Parliament of South Africa, on the draft Criminal Law (Sexual Offences) Amendment Bill, 2003, from Amnesty International and Human Rights Watch (15 September 2003) available at <http://www.hrw.org/press/2003/09/sa-drafcrimelaw.htm629>
- 83 2002/03 Survey op cit 450.
- 84 Judicial Inspectorate of Prisons Annual Report 2003/04 p. 19.
- 85 Report 2002/03.
- 86 See 'South Africa is losing the crime battle despite efforts' *This Day*, 3 December 2003.
- 87 Adams, S. 'MPs shock official demanding assurances on capacity to implement Children's Bill' *Cape Times* 5 August 2004.
- 88 Van Niekerk, J. 'Children's Bill lacks skeleton, brain' *Cape Times* 6 August 2004.
- 89 Report 2002/03 pp. 24-25.
- 90 See Ibid. p. 25.
- 91 Stessens, G. 'The Administration of Criminal Law and Human Rights in Europe: The Balancing Exercise by the European Court of Human Rights' in Sarkin *et al.* op cit p. 197.
- 92 Minister of Justice and Constitutional Development, Dr Penuell Maduna, in his opening speech at the proceedings of a joint APT-ACHPR workshop held on Robben Island, South Africa, 12-14 February 2002, in Jean Baptiste Niyizurugero (ed) *Preventing Torture in Africa* (Geneva 2003) p. 53.
- 93 Joseph, N. 'Report lifts lid on abuse by wardens' *Cape Argus* 26 November 2003.
- 94 See Sloth-Nielsen p. 23.
- 95 Ibid., p. 23.
- 96 See more fully Dissel, A. 'Giving a Face to Crime: Report on the Second Phase of the Restorative Justice Initiative Victim Offender Conference Project' in Report of the Restorative Justice Initiative (April 2003) available at <http://www.csvr.org.za/papers/papdis11.htm>
- 97 Available at <http://www.pmg.org.za/bills/031201draftwhitepaper.htm> (accessed on 21 August 2004).
- 98 Ibid.
- 99 Ibid.
- 100 Available at <http://www.pmg.org.za/docs/2004/appendices/040203csvr.htm>

- 101 Benjamin, H. 'Trauma comforters on hand at Central police station 24/7' *Atlantic Sun* 11 March 2004.
- 102 Section 85(1) of the Correctional Services Act, 111 of 1998.
- 103 See Judicial Inspectorate of Prisons Annual Report for the Period 1 April 2002 to March 2003 7ff.
- 104 Ibid. p. 13.
- 105 Ibid. p. 23.
- 106 The effect is that the burden of proving that one has taken reasonable steps to verify the information is almost impossible to discharge, as happened in the against Laurence Gander and Benjamin Pogrand of then Rand Daily Mail. See *State v South African Associated Newspapers, Ltd.*, 1970 (1) SA 469 (W).
- 107 GA Res 39/46/Annex of 10 December 1984.
- 108 See Part II Article 20 of the UN Convention against Torture.
- 109 Adopted by the Council of Europe on 26 November 1987.
- 110 See, for example, Evans, M.D. and Morgan, R. *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment* (1998) p. 341.
- 111 New Partnership for African Development (NEPAD).
- 112 See Kioko, B. 'Non-compliance and Human Rights Treaties' in *Visits under Public International Law: Theory and Practice* (proceedings of an APT Workshop, Geneva, 23-24 September 1999) p. 133.
- 113 See Sections 51, 52 and 53 of the Criminal Law Amendment Act, 105 of 1977.
- 114 See, for example, *State v Boer* 2000 (2) SACR (NC) at 121ff; *State v Dlamini* 2000 (2) SACR (A) at 266; *State v Homoreda* 199 (2) SACR 319 W at 321.
- 115 *State v Toms* 1990 (2) SA 802 A at 806-807; *State v Mofokeng* 1999 (1) SACR (W) at 502, *State v Budaza* 1999 (2) SACR 491 at 502ff; *State v Montgomery* 2000 (2) SACR 318 (N) at 322ff; *State v Jansen* 1999 (2) SACR 368 (CPD).
- 116 2001 (2) SACR 358 (C).
- 117 Cf *State v Arias* 2002 (1) SACR 518 (W) at 520.
- 118 South African Law Commission (2000) *Report on Sentencing: A New Sentencing Framework*.
- 119 Naidu, B. 'Fine idea aims to keep offenders out of court' *Sunday Times* 15 August 2004.
- 120 Ibid.
- 121 Ibid.
- 122 See *North Western Dense Concrete CC v Director of Public Prosecutions* (Western Cape) 1999 (2) SACR 669 (c).
- 123 Section 2 of the Criminal Procedure Amendment Act 62 of 2001, inserted into the Criminal Procedure Act, 51 of 1977 by section 105A.
- 124 Bill 12 of 2002.
- 125 See Terreblanche, C. "Cosatu leads bid to stop terror bill" *Sunday Independent* 15 August 2004 .
- 126 See Moya, F. 'Budget falls short on policing' *Mail and Guardian* 20-26 February 2004.
- 127 See Yutar, D. and Kemp, Y. 'Conservative justice system "has to adapt"' *Cape Argus* 18 March 2004.

Political Participation

Judith February

1. Historical Context

South Africa prior to 1994 was a very different place to the constitutional democracy it is today. Civil and political rights were not entrenched for the majority of South Africans, who lived in fear and loathing of an oppressive state.

Internationally, South Africa remained a pariah state because of the flouting of human rights norms and standards.¹ In 1946, the United Nations Economic and Social Council established the Commission on Human Rights to give concrete substance to international human rights for the first time in history. This eventually led to the adoption of the Universal Declaration of Human Rights on 10 December 1948. However, South Africa did not experience this development. For many decades South Africa refused to become party to any of the recognised international human rights instruments. To illustrate this, South Africa was one of the only countries that abstained from adopting the Universal Declaration of Human Rights. In stark contrast to international human rights developments, 1948 marked the introduction of apartheid as an institutionalised legal order.²

Any overview of the first ten years of National Party (NP) rule outlines a conscious, systematic consolidation of racial legislation. The majority of South Africans were denied their civil and political rights and racial classification became the order of the day. Various legislation was enacted that breached international human rights norms and denied people their civil and political rights. These laws, such as the Group Areas Act 41 of 1950, the Reservation of Separate Amenities Act, the Bantu Education Act 47 of 1953, the Suppression of Communism Act 44 of 1950, and the Unlawful Organisations Act 34 of 1960 were implemented to provide the legal framework for apartheid or 'separate development'.

By 1959 the legal foundation for apartheid and racial domination had been laid and it was essentially up to the administrative apartheid machinery to implement the repressive legislation. Further legislation was needed to maintain the legal order of apartheid, such

as security legislation and state of emergency legislation. It was not until 1990 that the South African government indicated a willingness to change. It legalised banned political organisations, released political prisoners, terminated the state of emergency, and abolished other key elements of apartheid legislation. During the first Parliament (1994 to 1999), 789 pieces of race-based legislation were abolished.³

2. Scope of Civil and Political Rights

The final Constitution of 1996,⁴ entrenched civil and political rights as follows: freedom and security of the person (Section 12); freedom of religion, belief and opinion (Section 15); freedom of expression (Section 16); the right to assembly, demonstration, picket and petition (Section 18); freedom of association (Section 18); political rights (Section 19); the right to citizenship (Section 20); freedom of movement and residence (Section 21).

Section 19 is one of the most important sections in the Constitution. Section 19(1) encompasses the right to make political choice, which includes the right to form a political party; the right to participate in the activities of, or recruit members for, a political party; and the right to campaign for a political party or cause.

Furthermore Section 19(2) states that: 'Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution'. Section 19(3) provides:

Every adult citizen has the right:

- (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
- (b) to stand for public office and, if elected, to hold office.

In addition, the founding values of the Constitution give expression to the notion of both representative and participatory democracy. In terms of Section 1(d) of the Constitution, the democratic South African state is founded on the following values:

Universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

The civil and political rights therefore give expression to representative democracy. All rights enshrined in the Constitution must be interpreted against the backdrop of Section 1. What this means is that the South African Constitution envisages that the interaction between the voters and elected representatives is far more than merely episodic participation at election time. This serves the underlying constitutional values of legitimacy, openness, responsiveness and accountability.

The Constitution provides the framework for national, provincial and local government. At all three levels, it is envisaged that citizens will interact with their elected representatives not merely at election time, but also in the periods between elections. This notion of participatory democracy is articulated, for example, in Section 59(1) of the Constitution which states that: 'The National Assembly must facilitate public involvement in the legislative and other processes of the Assembly and its committees . . .' Chapter 6 of the Constitution, which provides for the provinces, also includes section 118(1)(a) which states that: 'A provincial legislature must: facilitate public involvement in the legislative and other processes of the legislature and its committees'; . . . Chapter 7 of the Constitution, dealing with local government, also emphasises public participation and the role of citizens in decision-making processes. In Section 152(1) the objects of local government are articulated as being, *inter alia*: '(e) . . . to encourage the involvement of communities and community organisations in the matters of local government . . .'

Any analysis of how far South Africa has progressed in the implementation of civil and political rights must include an analysis of whether the substantive nature or content of these rights has been realised. The question that must be asked after more than ten years of democracy is: what level of political participation has there been in South Africa during the past two general elections?

Since 1994, South Africa has managed to put in place the edifice of formal democracy and has successfully held two general elections as well as elections at local government level.

To facilitate the electoral process, the Independent Electoral Commission (IEC) was established in terms of Chapter 9 of the Constitution. The Constitution of South Africa places all elections and referenda in the country at all three spheres of government (national, provincial and local) under the control of the IEC, established in terms of the Electoral Commission Act 51 of 1996. The IEC prepares and oversees the election process and its outcomes.

The IEC has consistently received high performance ratings from independent monitoring groups for its preparations in the run-up to elections and the execu-

tion of its duties on election days. According to an Afrobarometer⁵ survey conducted by the Institute of Democracy in South Africa (Idasa), 97% of respondents felt that the electoral system was fully anchored in the electoral law and that the IEC was fully independent. A total of 92% indicated that the IEC was a legitimate manager of the electoral process.

One of the important indicators of the legitimacy of any electoral democracy lies in the acceptance of election results by the people. In South Africa, both the 1994 and 1999 election results were accepted, which naturally results in legitimacy of representation in legislative institutions.⁶ The IEC however also played a critical role in both elections. Its ability to maintain its constitutional autonomy, and to adhere to the electoral regulation in making sure that neither political parties nor individual citizens could influence its functions through non-democratic means, was, and remains, crucial in producing free and fair outcomes in both instances.

According to the Constitution⁷, all persons aged 18 years and over are allowed to vote in elections in all spheres of government. In terms of the law, one needs to be a South African citizen and registered as a voter. At the eleventh hour, before the April 2004 elections, a Constitutional Court challenge was brought by the National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) in respect of prisoners' right to vote. Since 1994, the law regulating the voting rights of prisoners has undergone various changes.⁸ In the 1994 elections, persons convicted and sentenced in respect of robbery with aggravating circumstances and rape, or any attempt to commit these offences were excluded from voting.⁹ In contrast, the 1998 Electoral Act made no reference to prisoners, and the implication was that all prisoners could vote. However, as the election date in 1999 grew closer, a group of prisoners who were concerned that the IEC had not taken any steps to enable them to vote in prisons brought an application before the Constitutional Court. In the case of *August and Another v Electoral Commission and Others*¹⁰ the relief sought was (a) to confirm that prisoners were entitled to vote in terms of the 1998 Electoral Act, and (b) to compel the IEC to make proper arrangements for voting in prisons.

In the *August* decision, the Constitutional Court held that in the absence of legislation preventing them from doing so, prisoners had a constitutional right to vote, and that the IEC had to make proper arrangements in order that they may exercise this right. The question as to whether legislation disqualifying prisoners or categories of prisoners from voting could be justified under Section 36 of the Constitution was not raised in the *August* case and the judgment specifically refrained from dealing with that issue. The court, however, did state that its judgment should not be read as suggesting that Parliament was prevented from disenfranchising certain categories of prisoners.

The *August* decision then triggered an amendment to the 1998 Electoral Act, contained in the Electoral Amendment Act 2003, where Parliament deprived prisoners serving a sentence of imprisonment without the option of a fine of the right to register and vote in the 2004 elections. This provision was challenged in the case of *The Minister of Home Affairs v NICRO and Others* just before the April 2004 elections.¹¹

In this case, the court held that the restriction placed on the rights of prisoners to vote as contained in Section 24B(2) of the Electoral Amendment Act 2003, was unconstitutional. The Minister of Home Affairs had advanced financial and logistical constraints as the rationale for limiting the right to vote of prisoners serving sentences of imprisonment without the option of a fine. The majority of the court found that this contention was not supported by the facts. Arrangements for registering voters had already been made at all prisons in order to accommodate awaiting-trial prisoners and those serving sentences because they had not paid the fines imposed on them. Accordingly, the court held that there was nothing to suggest that expanding these arrangements to include prisoners sentenced to imprisonment without the option of a fine would, in fact, place an undue burden on the resources of the IEC.

Following the declaration of invalidity of the relevant section of the Electoral Amendment Act, the court ultimately ordered the IEC to ensure that all prisoners entitled to vote were afforded a reasonable opportunity to register as voters for, and to vote in, the April 2004 election.¹²

3. Local Government

Local government has the responsibility of ensuring the provision of basic services such as water, electricity, sanitation and shelter. All relevant policies and associated legislation place participation and accountability at the very heart of the system of local government. Firstly, the Constitution recognises the importance of participation in ensuring sustainable, democratic and developmental local government. Consistent with the constitutional principles of participatory governance, Section 152 of the Constitution provides that municipalities must encourage the involvement of communities in the matters of local government. How this involvement takes place varies, but the local government legislation in the form of the Local Government: Municipal Systems Act, No. 32 of 2000 (Municipal Systems Act) and, the Local Government: Municipal Structures Act 117 of 1998 both promote ward committees as an option for municipalities to increase participation in decision-making at local government level.

Alongside Section 152, the White Paper on Local Government provides that municipalities should develop mechanisms to ensure citizen participation in policy initiation and formulation, and the monitoring and evaluation of decision-making and implementation on

local government matters. Section 16(1) of the Municipal Structures Act provides that a municipality must develop a culture of municipal governance that complements formal representative government by encouraging the local community to participate in the affairs of the municipality.

Lastly, Section 17 of the Municipal Systems Act provides that participation by local communities in the affairs of the municipality must take place through political structures. It also provides that the mechanisms that enable participation of communities need to take into account the special needs of the illiterate, those with disabilities, women and other disadvantaged groups.¹³ Participation in the decision-making processes of the municipality is determined to be a right of communities, residents and ratepayers. Integrated Development Planning is emphasised as a special field of public participation.

The decision on appropriate mechanisms, processes and procedures for public participation is left largely to the municipality. The only prescribed participation procedures are the receipt, processing and consideration of petitions and complaints, and the public notice of council meetings. There are no procedures prescribed for participation in the Integrated Development Planning process.

Ward committees have been established as a tool to encourage community participation for municipalities that have opted to have them. As mentioned above, they are a creation of the Municipal Structures Act. These structures are committees of not more than ten members of a ward, with a ward councillor as the chair. The role of ward committees is to facilitate participatory democracy, help build partnerships for better service delivery, and assist with problems experienced by people at the ward level.

While legislation makes it mandatory for municipalities to develop mechanisms to consult and involve communities in the affairs of the municipality and its processes, establishing ward committees is currently not mandatory for municipalities. It would, however, seem that most municipalities have chosen to establish ward committees to comply with the aspect of legislation on citizen participation.

In addition, in terms of the Municipal Systems Act, all municipalities are required to prepare Integrated Development Plans (IDPs) and the majority of municipalities have completed their IDPs. Participation in the IDP planning process is only one of several arenas of participatory interaction between local government and citizens. Other means of ensuring participatory local government are: offering people choices between services; citizen and client-oriented ways of service delivery and public administration; partnership between communities/stakeholder organisations and local authorities in implementation of projects; and giving residents the right of petition and complaint, and obliging

municipal government to respond.

Leaving the decision on the ways and means of public participation to each municipality often results in:

- completely different styles of democratic consultation and community participation with highly diverging combinations of formal representative and participatory governance within the country;
- helplessness and confusion on the side of most municipalities, which find it difficult to determine appropriate procedures of their own; and
- denying residents their right to participate, by avoiding setting minimum requirements which specify that right.

The components of developmental local government in the form of the budget and by-law process, area-based management, performance management of municipal employees, and IDP-planning, each provide opportunities for public participation at local government level. Municipalities are therefore requested to create conditions for public participation and, moreover, to encourage it.

The only prescribed tool for the promotion of public participation, however, is the dissemination of information on mechanisms and matters of public participation, on rights and duties of residents, and on municipal governance issues in general. Despite this, however, informal research by the Centre for Public Participation in KwaZulu-Natal has indicated that, in KwaZulu-Natal particularly, the issue of accountability of councillors to communities persists, with many communities still not knowing who their ward councillors are. The general perception is that councillors remain accountable to the council and their political parties, and not to the community.¹⁴

Certain constraints to optimal public participation in the sphere of local government have been identified as follows:¹⁵

- Civil society organisations (CSOs) and community-based organisations (CBOs) are often faced with the problems of insufficient funding, resources, skills and capacity in order to engage effectively and meaningfully in local government structures;
- Miscommunication with local governments is often seen as a serious impediment towards successful participation in local government structures;
- Traditional councils in rural communities often do not have sufficient female representation on their councils in which to engage with local government on a more representative basis;
- There often exists a tendency on the part of public officials to be non-co-operative with CBOs/CSOs; and
- Inadequate and inefficient information dissemination with regards to bills, policies, and issues related to communities, results in lack of meaningful and timeous public participation on key issues.

So it would appear that although structures to facilitate meaningful participation exist, their implementation at local government level has been patchy, particularly in respect of wards and IDPs. Active encouragement should therefore focus on those social groups who are not well organised and who do not have the power to articulate their interests publicly. This could mean women's groups, the aged or the youth.

South Africa's last municipal elections were held on 5 December 2000. Some 18 476 500 people registered to vote, of whom 55% were women. In order to promote voter turn-out in October 2004, the IEC launched a R46-million voter education campaign with the theme 'Vote, it's your right'. More than 1 600 field-workers were recruited and trained in voter registration. They worked with non-governmental organisations (NGOs) to conduct workshops at factories, churches, schools and traditional gatherings. On the election day, 223 712 election staff were employed at 15 002 voting stations across the country. The national voter turnout was 48% ballots cast.¹⁶

This turn-out is low and has been interpreted not only as the normalisation of post-1994 politics where the euphoria surrounding voting has lessened, but also a means by which people could indicate dissatisfaction with the slow pace of social service delivery. Many voters said that they were disillusioned with the ANC but were unable to find a 'political home' in another party. This resulted in many simply not exercising their vote.

It remains to be seen whether people will turn out in such great numbers in the next local government elections.¹⁷ This poses a particular challenge to political parties and for democracy in general. In addition, if voters feel apathetic, the question that needs to be asked is why are they feeling this way?

4. The Electoral System

One of the ways in which South Africa secured such a peaceful transition to democracy was through its choice of electoral system. The electoral system — a simple closed-list Proportional Representation (PR) system — was chosen because, it was believed, its operation would enhance the values that were imperative for peace to be established. The central values that underpin our democracy are underlined by the inclusivity which proportionality brings. These values do not, and cannot, operate in a vacuum. They are essential conduits for the realisation of representative and participatory democracy. The closed-list system can create problems as regards the accountability of elected representatives. Because the party owns the seat, a situation could arise in which elected representatives see themselves as being accountable to their party and not to the voters.

Even before 1994, the ANC had trumpeted a simple PR-list system. The reasons for this were that PR would provide all parties, no matter how small, with

representation in the national legislature proportional to their electoral support. This, it was argued, would serve the underlying values of inclusivity and the notion of representative democracy.¹⁸ While at national and provincial level citizens do not vote directly for a particular candidate but rather for a party, at local government level there is a 'mixed' system. The mix is between the list system, which is similar to the one used at national and provincial level, and the constituency-based system, which allows voters to vote directly for a candidate of their choice in a defined voting district or constituency.

In both the 1994 and 1999 national and provincial elections, there was a high voter turn-out. In the 1994 election 91% of citizens turned out to vote. This was hardly surprising given that for the majority of South Africans this marked the first time they had voted in an election. Interestingly, the voter turn-out in the 1999 national election was also high at 89,3%.¹⁹ This indeed demonstrated the enthusiasm of South Africans to make their voices heard.

The closed-list PR system has served the country well. To maintain the proportion of seats held by the parties, an anti-defection clause was included in the Constitution. Effectively what this meant was that Members of Parliament who resigned or who were expelled from their parties lost their seats. The principle is that the seat belongs to the party and not to the individual MP.

However, a controversial package of laws was passed by Parliament and included the Loss or Retention of Membership of National and Provincial Legislatures Act 22 of 2002, commonly known as 'the crossing the floor' legislation.²⁰ This allowed MPs to cross the floor to another political party without losing their seat.²¹ The main thrust of the legislation was to allow MPs to defect. However, there were certain conditions attached to such defection.

The so-called 'floor-crossing' could only happen if at least 10% of the members of a party wished to do so or if it took place during two particular window periods. The legislation became part of the largest constitutional challenge of its kind in relation to civil and political rights.

The focus fell on Items 23 and 23A of Schedule 2 of the interim Constitution as amended and kept in force by Item 6(3) of Schedule 6 of the Constitution. These clauses, in an apparent contradiction, allowed for the possibility that the legislature 'may' pass a law allowing crossing the floor. The government using this defence passed the legislation accordingly. One of the political parties represented in the National Assembly, the United Democratic Movement (UDM) challenged the constitutional validity of this package of laws. The question asked was whether the passage of such laws served to undermine the constitutional values of transparency, openness and accountability.

Small parties in particular objected to the legislation, complaining that their members were being lured away by large parties which in turn eroded the trust in elected representatives. They argued that the legislation allowing members to cross the floor without losing their seats could have the effect of substantially subverting the will of the electorate by changing the balance of power to such a degree that the election results were no longer 'in general proportional'. They argued that the Constitution demanded such 'proportionality'.

The Constitutional Court nevertheless held that the floor-crossing legislation was constitutional and that the legislation did not breach the constitutional requirements that the electoral results were to be 'in general proportional'.²² A subsequent added complication was that there was no provision in the Constitution or any other law which provided for the extension of the closed-list PR system to continue operating beyond the 1999 elections. A review of the electoral system therefore needed to take place prior to the 2004 elections to ascertain whether the closed-list PR system remained appropriate for South Africa.

The Electoral Task Team, led by Frederick Van Zyl Slabbert, was therefore given the mandate to make recommendations as to whether the electoral system should be changed for the 2004 election. The Task Team recommended that the electoral system remain the same for the 2004 election. While the Task Team accepted that the link of accountability between the voter and their elected representative was not of necessity stronger in a constituency-based system, it did express concerns about the alienation of South African voters from their elected representatives. This, they said, had a serious impact on the ability of citizens to hold their representatives to account.

The head of the Task Team, Van Zyl Slabbert, said consensus had been reached that changes to the current electoral system should be evaluated in terms of the values of fairness, inclusivity, simplicity and accountability. The majority of members of the Task Team recommended a closed-list PR system in multi-member constituencies. Any changes, if these occur, will have to be initiated by Parliament prior to the 2009 elections. As to floor-crossing, the majority view within the Task Team was that the floor-crossing legislation was both opportunistic and inappropriate and did an injustice to the principle of proportionality.²³

5. Public Participation as an Indicator of the Extent to which Civil and Political Rights are Entrenched

South Africa remains a country plagued with inequality. Nearly every analysis on the South African political situation starts by saying that we have done well to put in place the formal institutions of democracy. That South Africa has one of the finest Constitutions in the world as well as one of the finest Constitutional Courts is without question. The Constitution enshrines political

rights and, boldly, socio-economic rights. The formal, liberal framework of democracy is in place: a rights-based Constitution; a representative Parliament; independent constitutional oversight institutions; and a free and fair electoral system. As mentioned above, since 1994, there has been a wholesale reform of law and policy, creating a wide panoply of new statutory and other rights. Parliament is however often weak in its ability to oversee the implementation of new laws, and to hold the executive to account for its policy implementation (the Constitution provides both national and provincial parliaments with a dual role: to exercise oversight and to hold the executive to account: sections 55 and 114). Also, oversight and public participation mechanisms within Parliament are often not as strong as they should be.

However, there is a double dichotomy: the formal structures of democracy are often not supported by concrete action or implementation, and the ever-increasing levels of poverty are placing greater pressure on these democratic institutions to deliver. With about 20 to 28 million South Africans living in dire poverty, the danger is that the formal trappings of democracy could become irrelevant as the system becomes unable to substantially change people's lives. There have however been graphic examples of the Constitution working in the interests of the poor, such as the *Grootboom* and *Treatment Action Campaign* cases on the rights to housing and health care respectively.

Whether the constitutional aspiration of participatory democracy is met depends not only on political participation, but also largely on the levels of public participation in the legislative process. Through effective public participation, Parliament can truly fulfil its role as the articulator of the will of the people.

Sections 57(1)(b), 59(1), 70(1)(b), 72(1)a, 116(1)b and 118(1)a of the Constitution entrench the right of participation in the national and provincial legislatures and policy-making processes. Citizens therefore have the right to participate in the legislative process. The underlying notion is that the public, both the weak and unorganised as well as the organised and powerful sectors of society, should have an ongoing say in the decisions that affect their lives — especially beyond episodic participation at election time.²⁴

In this regard all legislatures have taken some steps to promote public participation, some more successfully than others. Processes to facilitate public hearings, submissions from the public, and fairly extensive public education and public outreach programmes are in place. Some provinces have passed Petitions Acts (for example, the Gauteng Petition Act 5 of 2002) that allow the public to petition the legislature through a prescribed process. Citizens who seek to influence legislation fall into three broad categories: the unorganised and weak, the weak but organised, and finally the strong and organised.²⁵ Accountability to citizens can best be gauged by assessing citizens' opportunities to

influence legislation between elections. According to Habib and Herzenberg, there is a schism between the formal rules and regulations, and implementation. They note that formally there are significant opportunities for citizens to impact on legislation. These opportunities are facilitated through the committee system in Parliament, initiatives undertaken by individual MPs to facilitate public participation through both party channels and constituency work, and Parliament's public education office.²⁶

Extensive institutional mechanisms exist for public participation in the legislature. The Constitution states, in sections 59 and 72, that Parliament must facilitate public access to, and participation in, the legislative process. In addition, several rules of Parliament give effect to this right. In terms of Rule 240, before a Draft Bill is introduced, committees must arrange their business in such a manner that interested persons and institutions have a period of at least three weeks after the draft bill has been published to comment on the proposed legislation. Rule 241 states that a draft bill can be introduced in the Assembly only if prior notice of its introduction has been given in the Government Gazette. The notice must contain an invitation to submit written representations on the draft legislation within a specified period. Finally Rule 249 states that committees must allow for an opportunity for the public to comment on a Bill. Rule 249 also states, however, that if a Bill has not been published for public comment, and the committee considers public comment on the Bill to be necessary, it may, by way of invitations, press statements, advertisements or in any other manner, invite the public to comment on the Bill. Rule 138 also allows the committee powers to receive petitions, representations and submissions, and conduct public hearings.

Despite these rules and provisions, public participation is limited. Parliament, through its Public Education Office (PEO), is also attempting to rectify the situation by facilitating people's access to Parliament in various ways. These include calling for submissions, providing meaningful information to citizens via radio, the newsletter *In Session*, and assisting committees of Parliament when there has been a call for submissions. The PEO however realises that much needs to be done and that the goal of making Parliament a true 'people's Parliament' is often constrained by the socio-economic reality in which the majority of South Africans find themselves. So, in effect, it becomes extremely difficult to provide information relating to access to Parliament, for example, to rural areas which are far from Parliament and to other such areas where extreme poverty exists.²⁷

Again, Habib and Herzenberg point out that there are other constraints to public participation. In practice, committees often do not necessarily set aside sufficient time to receive meaningful comment from civil society.²⁸ In addition, committees are inconsistent as re-

gards minute-keeping. This makes it even harder to follow up or refer to a record of submissions made to Parliament over ten years.

So, while public participation in the legislative process is one way for citizens to realise their rights, the Constitution provides other means such as through various commissions (the so-called Chapter 9 institutions) as well as participation in civic organisations, NGOs, trade unions, and social movements.

However, it is widely understood by those working in and around Parliament that the vast majority of groups participating, in terms of making submissions and attending public hearings to committees, are limited to better-resourced Non-Governmental Organisations (NGOs) and private sector or business interests. These groups are well placed to interact with the complex legislative language in Bills, can afford to travel to Parliament, and have the capacity to conduct research.²⁹

In terms of Rule 220, one language should be used in law-making, with the translation of the Bill into one other.³⁰ In practice, Parliament uses only English and Afrikaans respectively, with few exceptions. This further compounds the marginalisation of many citizens from meaningful participation in Parliament. Their lack of full and meaningful participation could mean that legislative outcomes fail to be reflective of, and responsive to, the interests of those who are poor and marginalised.³¹

To give true effect to the notion of participatory democracy as envisaged by the Constitution, public participation is crucial not only in legislatures but also through the structures which have been set up in terms of the Constitution to promote participation. In this way citizens can become true agents of change in a society in which access and 'voice' often belong only to the wealthy and powerful. Only then will democracy become more than the formal act of voting. In this way citizens become more than merely part of the system but rather co-creators of democracy alongside the state. In this way, civil and political rights will be able to gain complete content and substance. This will remain the challenge for the next ten years.

Endnotes

- 1 Titus, D (1996) *International human rights and its implementation in South Africa*, Leiden.
- 2 Ibid.
- 3 State of the Nation address by President Mbeki, Cape Town, February 2004.
- 4 The Constitution of the Republic of South Africa Act 108 of 1996.
- 5 Idasa (2002) *Afrobarometer*. Afrobarometer is an international collaborative enterprise of the Centre for Democracy and Development, Michigan State University and Idasa. For more information: www.afrobarometer.org.za.
- 6 Maseko, S. in Graham, P. & Coetzee, A. (2002) *In the balance? Debating the State of Democracy in South Africa*, Idasa, p. 28.
- 7 Section 157 of the Constitution.
- 8 Seedat, S. Memorandum on the right of prisoners to vote. The Political Information and Monitoring Service at Idasa, April 2004.
- 9 Section 16(d) of the Electoral Act of 1993.
- 10 *August and Another v Electoral Commission and Others* 1999 (3) SA 1 CC.
- 11 *Minister of Home Affairs v NICRO and Others* CCT03/04.
- 12 Ibid.
- 13 Local Government Centre Brief; Idasa 2003; www.idasa.org.za/lgc.
- 14 Hicks, Janine; Deepening democracy: Citizens' power beyond the ballot box. How effective are mechanisms for public participation? Goedgeacht Forum, September 2003.
- 15 http://www.wiram.de/toolkit/case_studies/case-studies-case-11-participation.htm.
- 16 www.iec.org.za.
- 17 At the time of writing there is uncertainty as to when the next local government elections will be held. There is speculation that they may only take place in 2005 given logistical difficulties facing the IEC at this stage.
- 18 Idasa submission to the Justice Portfolio Committee at Parliament; November 2001: 'Floor-crossing legislation'.
- 19 Friedman supra, 19ff.
- 20 The package of laws consisted of The Constitution of the RSA Amendment Act 18 of 2002; The Constitution of the RSA 2nd Amendment Act 21 of 2002 and the Local Government: Municipal Structures Amendment Act 20 of 2002.
- 21 The Loss or Retention of Membership of National and Provincial Legislatures Act 22 of 2002.
- 22 Section 1 of the Constitution.
- 23 The Slabbert Task Team on Electoral reform; 2003.
- 24 De Villiers, S. (2001) *A People's Voice*, Cape Town.
- 25 De Villiers, S. supra.
- 26 Habib, A. & Herzenberg, C. (2004) The ability of citizens to control decision-making. Unpublished paper.
- 27 Albertus, T. Manager Public Education Office, Parliament of the RSA; Parliamentary workshop, 7 July 2004.
- 28 Habib, A. & Herzenberg, C. supra.
- 29 Ibid.
- 30 De Villiers, S. supra.
- 31 Habib, A. & Herzenberg, C. supra, 7ff.

Freedom of Expression

Ahmed Motala

1. Introduction

Freedom of expression is one of the most essential features of a democratic society. This is particularly true in a country such as South Africa, which is still in the early stages of democracy after decades of censorship under apartheid rule. However, since 1994, South Africans have benefited from constitutional protection of the right to freedom of expression. Not only does freedom of expression enhance the ability of citizens to become informed about their environment, it also enables them to make more informed decisions about important issues related to voting and elections, the media, academic endeavours and artistic choice. The right to freedom of expression also affects other fundamental rights including freedom of choice, religion, conscience, association, protest and political freedom.¹

2. Historical Context of Freedom of Expression

For most of the 20th century, freedom of expression in South Africa was controlled, owned, and regulated by a minority, undemocratic government as a mechanism to protect and maintain its position. The apartheid system was sustained through an array of legislation, policies, bills, and practices that regulated the exercise of free speech and expression.²

The government created South Africa's national broadcaster, the South African Broadcasting Corporation (SABC), in the 1930s, following the model of the British Broadcasting Corporation (BBC). The Broadcasting Act 22 of 1936 allowed broadcasting only in the country's two official languages, English and Afrikaans. In 1942 African languages were broadcast for the first time.³ Although amended over the years, the Broadcasting Act remained in place until its replacement in 1976.

The broadcast media, which was already serving primarily the white community, was further transformed by President D.F. Malan to advance the interests of apartheid after the introduction of apartheid policies in 1948. The SABC became, in effect, a propaganda tool

for furthering the interests of the government and its ideology. In the apartheid era, the SABC predominantly dictated ownership of the media as the lone decision-maker in media content, broadcasting stations, distribution services and infrastructure.⁴ Although radio was transmitted in 11 languages, these broadcasts not only misinformed citizens through distorted information, they also 'served the ideology of apartheid . . . (and) reflected the ruling party's policies of separate and unequal development'.⁵

In 1976, television was only introduced after extensive parliamentary debate as government officials worried that television would 'dilute Afrikaner culture . . . introduce communist ideology into South Africa . . . and give black revolutionary ideas'.⁶ However, it became apparent to the National Party that television, like the radio, could be used to promote its apartheid agenda. Through the office of President Botha, the government controlled every aspect of the broadcasting system with 'documented cases of P. W. Botha telephoning the news office to order that an item be changed or dropped'.⁷

The Minister of the Interior passed legislation to ban publications found to be 'undesirable' for reasons such as 'obscenity, moral harmfulness, blasphemy, and causing harm'.⁸ Between 1950 and 1990 the government banned thousands of books, newspapers and other publications.

Although the print media were largely privately owned, they too became tools in the hands of the apartheid government. A combination of factors ensured that they promoted the ideals of the government and suppressed free speech and information. These included a fear of state repression, a failure to report on issues of importance to the majority of South Africans, a reliance on information provided by the authorities, and a failure to practice journalism objectively and independently. The Department of Information also secretly funded *The Citizen* newspaper to advance its disinformation campaign.

Media regulations, introduced under a series of declarations of states of emergencies starting from

June 1986, constituted a complex maze of far-reaching and extremely harsh provisions that affected thousands of foreign and national journalists and allowed the authorities almost absolute control over the media. Newspapers were banned, foreign journalists expelled from the country, journalists detained without trial, and many journalists and newspapers prosecuted under an array of criminal legislation. For political reasons and to prevent serious damage to its tarnished image, the state sought to control the media and restrict the flow of information both within the country and internationally.

What emerged in response to the prevalence of censorship was the 'struggle press' — newspapers, magazines, journals, newsletters, and pamphlets such as *New Nation*, *Weekly Mail*, *Vrye Weekblad* and *Grassroots* that used various languages to resist the political situation in the country and often received funding from international donors.⁹ These publications were often distributed in unconventional, cost-effective ways, being sold at meetings, post offices, community centres, or door-to-door.¹⁰ This resulted in the state targeting, harassing, and repressing these alternative forms of the press. Many journalists including Zwelakhe Sisulu (*New Nation*), Brian Sokutu (*Eastern Province Herald*), Themba Khumalo (*Sowetan*) and Veliswa Mhlawuli (*Grassroots*) were detained under the Internal Security Act 74 of 1982 for up to two-and-a-half years without trial.

Numerous non-governmental and civil society organisations, including the Save the Press Committee, Campaign for Open Media, and the Anti-Censorship Action Group, shaped the process leading to the reformation of the South African media and, ultimately, contributed to the entrenchment in the constitution of the right to freedom of expression.

After the release from prison of Nelson Mandela in February 1992, the ruling National Party, under the leadership of President F.W. de Klerk, commenced a process of negotiations with the African National Congress, the Pan African Congress and other political formations. During these negotiations, legislation was adopted to remove unnecessary constraints upon political debate, and legislation that restricted political expression was repealed.¹¹

Prior to the democratic elections in 1994, a new Constitution was adopted that entrenched fundamental human rights, including the right to freedom of expression.

3. The Scope of the Right of Freedom of Expression

3.1. Constitutional Framework

The interim Constitution¹² protected freedom of expression under Article 15:

- (1) Every person shall have the right to freedom of speech and expression which shall include freedom of the press and other media, and the free-

dom of artistic creativity and scientific research.

- (2) All media financed by or under the control of the state shall be regulated in a manner which ensures impartiality and the expression of diversity of opinion.

The right to freedom of expression and speech, like other fundamental rights guaranteed in Chapter 3 of the interim Constitution, was not absolute. The right was made subject to the provisions of Section 33(1), the limitation clause, which stipulated that a limitation was permissible only to the extent that it was reasonable and justifiable in an open and democratic society based on freedom and equality. In respect of rights related to free and fair political activity, the requirement of necessity was added to reasonableness.¹³

The right to freedom of expression is stipulated in Section 16 in the Bill of Rights of the Constitution of the Republic of South Africa 1996:¹⁴

- (1) Everyone has the right to freedom of expression, which includes —
 - (a) freedom of the press and other media;
 - (b) freedom to receive or impart information or ideas;
 - (c) freedom of artistic creativity; and
 - (d) academic freedom and freedom of scientific research.
- (2) The right in subsection (1) does not extend to —
 - (a) propaganda for war;
 - (b) incitement of imminent violence; or
 - (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

There are several differences between the protection afforded to freedom of expression under the interim Constitution and under the current Constitution, the most significant being the exclusion of the forms of expression enumerated in Section 16(2) from constitutional protection.¹⁵ The right in Section 16 also includes freedom of artistic creativity, academic freedom and freedom of scientific research.

In addition to the internal limitations in sub-section (2), the right is also made subject to the limitations clause in Section 36(1) of the Constitution, which requires any limitation to be reasonable and justifiable in an open, democratic society whose foundation is based on human dignity, equality, and freedom. Any determination whether a limitation is permissible under Section 36 must consider 'the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and less restrictive means to achieve the purpose'.¹⁶ Furthermore, Section 39(1) requires the courts in the interpretation of the Bill of Rights to 'promote the values that underlie an open and democratic society based on human dignity, equality and freedom'.

3.2. Regional Standards

The African Charter on Human and Peoples' Rights¹⁷ guarantees the right to freedom of expression in Article 9:

Every individual shall have the right to receive information. Every individual shall have the right to express and disseminate his opinions within the law.

Although the guarantee has inherent weaknesses that allow for its restriction through law, the African Commission on Human and Peoples' Rights, which is required to monitor the implementation of the African Charter, has established the principle that 'where it is necessary to restrict rights, the restriction should be as minimal as possible and should not undermine fundamental rights guaranteed under international law'.¹⁸

In October 2002, the African Commission on Human and Peoples' Rights adopted the Declaration of Principles on Freedom of Expression in Africa. This Declaration, which expanded and elaborated on the rights guaranteed in Article 9 of the African Charter, states that freedom of expression is important 'as an individual human right, as a cornerstone of democracy and as a means of ensuring respect for all human rights and freedoms . . .' and affirms the right as 'a fundamental and inalienable human right and an indispensable component of democracy'.¹⁹

The guarantees of freedom of expression in the African Charter are strengthened by commitments, made by African states in the Constitutive Act of the African Union and the policy document of the New Partnership for Africa's Development (NEPAD) to human rights, good governance, democracy and the rule of law.

3.3. International Standards

The Universal Declaration of Human Rights²⁰ protects freedom of expression in Article 19:

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The International Covenant on Civil and Political Rights²¹ protects the freedom of expression in Article 19:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this Article carries with it

special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights and reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Article 20 of the Covenant requires that any propaganda for war or 'advocacy of national, racial or religious hatred that constitutes discrimination, hostility or violence' be prohibited by law.

The Human Rights Committee, the body responsible for monitoring implementations of the treaty, noted in its General Comment on Article 19 that the 'exercise of the right to freedom of expression carries with it special duties and responsibilities, and for this reason certain restrictions on the right are permitted which may relate either to the interests of other persons or to those of the community as a whole'.²²

Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination²³ requires states to criminalise the dissemination of ideas based on racial superiority or hatred and the incitement of violence against any race or ethnic group.

The UN Special Rapporteur on Freedom of Opinion and Expression²⁴ has defined the right to freedom of opinion and expression as a core right that is both a civil right and a political right, and described this right as an essential 'test right, the enjoyment of which illustrates the degree of enjoyment of all human rights enshrined in the United Nations Bill of Rights . . .'.²⁵

4. Overview of Progress Made

4.1. Legislation

Since 1994 nearly all legislation that restricted freedom of expression during the apartheid era has been repealed. For example, the Imprint Amendment Act 18 of 1994 repealed, the Newspaper Registration Act 63 of 1971 and its counterparts in the various homelands. Section 12 of the Internal Security Act 74 of 1982 was also repealed, which allowed the Minister of Law and Order to forbid the printing, publication or dissemination of information; as was Section 15 of the Act, which hindered newspaper registration. Sections 52(2) and 62 of the Internal Security Act, which restricted freedom of expression and ideas that provoked national or racial hatred, was also repealed. Also repealed was Section 6 of the Internal Security and Intimidation Amendment Act 138 of 1991. Section 47(2) of the Publications Act 42 of 1974 addressing political and hate speech was repealed by Section 1 of the Abolition of Restrictions on Free Political Activity Act 206 of 1993. The Films and Publications Act 65 of 1996, which regulates the distribution of certain publications and the distribution and

exhibition of films, was amended and repealed various previous laws including the Indecent or Obscene Photographic Matter Act 37 of 1967. In 1999 the law was amended to provide for the protection of children against mental, physical and sexual exploitation or coercion in the production of pornographic material.²⁶

Until 1993, legislation stipulated that the SABC would be state-controlled and make all decisions about broadcasting in South Africa.²⁷ Today, the key legislation outlining freedom of the media include the Broadcasting Act 4 of 1999, which is based on freedom of expression and the journalistic, creative and programming independence of broadcasters.²⁸

The Independent Broadcasting Authority (IBA) Act 153 of 1993 established the IBA as a mechanism for enforcing the Act, supervising all broadcasting, balancing public, private and community broadcasting, distributing licences and frequencies, and appointing the Board of the SABC. The Independent Communications Authority of South Africa Act 13 of 2000 merged the Independent Broadcasting Authority and the South African Telecommunications Authority into a single independent regulatory body. In 2002, controversy arose during the drafting of the Broadcasting Amendment Bill, which in its initial form put forth the idea that the SABC Board should be placed under control of the Minister of Communications. After extensive opposition to this by NGOs, however, the Bill was passed in October 2002 (Broadcasting Amendment Act 64 of 2002) with the provision that the SABC Board would instead submit its broadcasting and news editorial policies to the Independent Communications Authority of South Africa (ICASA).²⁹

In 2000, Parliament passed the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (The Equality Act), which demonstrates the close relationship between the rights of equality and freedom of expression. Section 12 prohibits the broadcasting or publishing of discriminatory information. Section 10(1) of the Equality Act includes a limitation on hate speech:

Subject to the proviso in Section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to —

- (a) be hurtful;
- (b) be harmful or to incite harm;
- (c) promote or propagate hatred.³⁰

According to the South African Human Rights Commission, there is incompatibility between Section 16 of the Constitution and Section 10 of the Equality Act in that the legislative prohibition goes beyond that contained in the Constitution.³¹ Moreover, Section 10 expands the notion of hate speech to include acts advocating hatred and inciting harm. Nevertheless, as the supreme law of the land, the conditions in the Constitution will prevail over the Equality Act.³²

The Department of Justice has produced a draft Bill criminalising hate speech, which has been circulated for comment. The objectives of the Bill are to give effect to the provisions of Section 16(2)(c) of the Constitution and Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination. However, critics question the necessity of such legislation, given the existence of the Equality Act, and also argue that the definitions in the Bill are too broad and also unjustifiably limit freedom of expression.

4.2. Judicial Decisions

With the constitutional protection of freedom of expression, legal challenges to various legislation, government policies and action, both state and private, was inevitable. These challenges provided an opportunity for the courts to determine the content of the freedom of expression provision of the Constitution and decide what limitations of the right were permissible. The Constitutional Court has determined that freedom of expression is one of 'a web of mutually supporting rights' in the Constitution. It is closely related to freedom of religion, belief and opinion (Section 15), the right to dignity (Section 10), as well as the right to freedom of association (Section 18), the right to vote and to stand for public office (Section 19), and the right to assembly (Section 17) . . . The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial.³³ The Constitutional Court has also established that the right to freedom of expression is not absolute; it is, like other rights, subject to limitation under Section 36(1) of the Constitution. 'With us the right to freedom of expression cannot be said to automatically trump the right to human dignity. The right to dignity is at least as worthy of protection as the right to freedom of expression. How these two rights are to be balanced, in principle and in any particular set of circumstances, is not a question that can or should be addressed here. What is clear though and must be stated, is that freedom of expression does not enjoy superior status in our law'.³⁴

4.2.1. Public Protests

In *South African National Defence Union v Minister of Defence*,³⁵ the Constitutional Court declared that provisions of the Defence Act 44 of 1957 that prohibited members of the armed forces participating in public protests was a violation of the right to freedom of expression. Since the prohibition curtailed the right of Defence Force members to receive and express opinions on a wide range of issues, whether in public or private gatherings, and constituted an unjustifiable limitation upon the right to freedom of expression of soldiers, it was consequently unconstitutional. Judge O'Regan stated that the right to freedom of expression

was an indispensable feature of any democratic society and central to constitutional democracy.

4.2.2. Contempt of Court

In *State v Mamabolo*³⁶, the Constitutional Court considered whether freedom of expression protects the criticism of judicial officers and whether the law of contempt of court (in the form of scandalising the court) unreasonably limits this right. Mr Mamabolo, a spokesperson for the Department of Correctional Services, had issued a statement that because a High Court judge had wrongly granted bail to Mr Eugene Terre-Blanche, he would not be released from prison. The judge ordered Mr Mamabolo and the Director-General of the Department of Correctional Services to appear before him and explain the statement. The Director-General was ultimately discharged but the appellant was convicted of contempt of court for bringing the dignity, honour and authority of the court into discredit and sentenced to a fine and suspended imprisonment. The Constitutional Court concluded that although the crime of scandalising the court did limit the right to freedom of expression, it was nevertheless justifiable in an open and democratic society to preserve confidence in the administration of justice. The court established the test that 'the offending conduct, viewed contextually, really was likely to damage the administration of justice'.³⁷ In applying this test the court found that there had been no defiance of a court order, neither did Mamabolo's public utterances constitute scandalising the court.

3.3.3. Offensive Speech

In *The Islamic Unity Convention v Independent Broadcasting Authority*³⁸ the Constitutional Court was called upon to determine whether Section 2(a) of the Code of Conduct for Broadcasting Services limited the right to freedom of expression as entrenched in Section 16 of the Constitution.³⁹ On 8 May 1998, Radio 786, a community radio station operated by the Islamic Unity Convention (IUC), broadcast a programme entitled 'Zionism and Israel: An in-depth analysis'. During the programme, in an interview, Dr Yaqub Zaki expressed views which, among other things, questioned the legitimacy of the state of Israel, asserted that Jewish people had not been not gassed in concentration camps during the Second World War but had died of infectious diseases, and stated that only a million Jews had died. The Jewish Board of Deputies complained to the IBA that the interview breached Section 2(a) of the Code. Before the IBA could hold an enquiry the IUC launched a constitutional challenge.

The court found that since the prohibition in Section 2(a) regarding the broadcast of material 'likely to prejudice relations between sections of the population' was too intrusive and made serious inroads into freedom of expression, it had to be declared unconstitutional and

invalid. The court however declared that no protection is given to the broadcasting of material that amounts to propaganda for war, the incitement of imminent violence, or the advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

The Jewish Board of Deputies resubmitted its complaint to the Broadcasting Monitoring Complaints Committee in May 2002 after the Constitutional Court's decision. The Chairperson of the BMCC was required to consider whether the broadcast by Radio 786 was 'offensive to the religious convictions or feelings of any section of the population' (i.e. the Jewish community). The ruling found that there was no attack in the broadcast on the Jewish religion or Jews and there was also no exhortation of hatred or any particular religious group or groups of individuals.⁴⁰ The Chairperson of the BMCC therefore decided not to refer the complaint to a formal hearing. This decision is now the subject of a High Court challenge.

3.3.4. Defamation

In *Khumalo v Holomisa*,⁴¹ Mr Bantu Holomisa, a well known South African politician, sued the publishers of the *Sunday World* newspaper for an article in which it was stated that he was involved in a gang of bank robbers and that he was under police investigation for this involvement. The publishers argued that it would be inconsistent with Section 16 of the Constitution to allow Mr Holomisa to recover damages for the publication of a statement that was in the public interest or a matter of political importance.

The Constitutional Court deliberated whether the common law of defamation was consistent with the rights to privacy and to freedom of expression enshrined in the Constitution. Under common law, the plaintiff does not need to assert that the defamatory material was false. The court recognised the importance of the media in a democracy and observed that the media 'have a constitutional duty to act with vigour, courage, integrity and responsibility'. However freedom of expression has to be considered in the context of the foundational constitutional value of human dignity, which the law of defamation seeks to protect. The court approved the approach adopted by the Supreme Court of Appeal in *National Media and Others v Bogoshi*⁴² that publishers could avoid being held responsible for defamatory statements if they could 'establish that the publication of a defamatory statement, albeit false, was nevertheless reasonable in all the circumstances'.⁴³ The court concluded that the common law of defamation was necessary to protect the reputation of individuals, and as the applicants had not shown the common law of defamation as currently developed to be inconsistent with the Constitution, the appeal was dismissed.

3.3.5. Sexually Explicit Expression

*Case and Another v Minister of Safety and Security and Others*⁴⁴ concerned a challenge to the constitutionality of Section 2(1) of the Indecent and Obscene Photographic Matter Act, which prohibited the possession of indecent or obscene photographic matter. Patrick and Inga Case and Stephen Roy Curtis were charged under the Act for being in possession of video cassettes that contained sexually explicit material. The majority of the court found that the provision constituted an infringement of the right to personal privacy guaranteed in Section 13 of the interim Constitution. In her minority judgment, Judge Mokgoro concurred with the majority but also held that sexually explicit material was protected by the guarantee of freedom of expression in Section 15(1) of the interim Constitution.⁴⁵ However, the judge recognised that some forms of sexually explicit material may be subject to legitimate limitations.

The applicant in *Phillips and Another v Director of Public Prosecutions and Others*⁴⁶ challenged Section 160(d) of the Liquor Act that made it an offence for a licence holder to allow any person (a) to perform an offensive, indecent or obscene act; or (b) who is not clothed or not properly clothed to perform or appear on the licensed premises where entertainment is presented. Mr Phillips was charged for allowing striptease dancing to take place on premises where liquor was sold and consumed. The court found that the prohibition applies to all entertainment of any description including theatres and other venues, and covers performances and plays irrespective of whether they are works of art or the communication of thoughts and ideas essential for positive social development. The Section therefore limits the freedom of artistic creativity and the freedom to receive and impart information and ideas protected by Section 16(1)(b) and (c) of the Constitution, as its effect is to limit the performance of all entertainment that is considered offensive, indecent or obscene. The court found the limitation on the right to freedom of expression to be unjustifiable and therefore declared the Section unconstitutional.

In *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others*⁴⁷ the Constitutional Court considered a challenge to the constitutional validity of provisions of the Films and Publications Act 65 of 1996, which prohibited the possession of child pornography. In July 2000, the police searched the residence of Mr De Reuck, a film producer, and on finding child pornography charged him under Section 27(1) of Act 65. The court had to consider whether the definition of child pornography was overbroad in regard to the materials it proscribed, and as to the persons who may import or possess such materials. Langa DCJ held that for material to constitute child pornography, the image viewed objectively and as a whole must have as its predominant purpose the stimulation of erotic rather than aesthetic feelings in its target audience. The court found that the criminali-

sation of the possession and importation of child pornography is a justifiable limitation to the right to freedom of expression as it has three legitimate objectives: protecting the dignity of children, stamping out the market for photographs made by abusing children, and preventing a reasonable risk that images will be used to harm children.

4.3 South African Human Rights Commission

The South African Human Rights Commission has the powers under the Constitution to investigate and report on the observance of human rights and to seek redress when human rights have been violated.⁴⁸ It also receives complaints of violations of the rights enshrined in the Constitution and makes determinations regarding such complaints.

In *National Party v Maharaj, Kasrils and Mokaba* (1997),⁴⁹ the commission heard that the three respondents had been reported in the media as having made negative comments that F.W. de Klerk was running death farms, that he had knowledge of apartheid atrocities, and he was described as 'n kaalkop-misdadiger wat drup van die bloed van onskuldige mense' (a bald criminal dripping with the blood of innocents). The respondents admitted to making these statements. The commission balanced De Klerk's right to dignity with the right to freedom of expression of the respondents and determined that the comments made by the respondents, although affecting De Klerk's right to dignity, were acceptable within the framework and context of freedom of expression and therefore did not constitute hate speech.

In *Viljoen v Makhaye* (1999),⁵⁰ the commission again considered the issue of hate speech. Viljoen argued that statements made by Makhaye that 'the brutality of white farmers' could result in 'killing the farmers' were inflammatory remarks falling under the category of hate speech. In its conclusions, the commission stated that even though comments made by public figures are constitutionally protected, they 'were not in the interests of nation building and human dignity'. It decided, however, that Makhaye's utterances did not lead to the incitement of violence.

One of the most recent cases of hate speech, *Freedom Front v South African Human Rights Commission*,⁵¹ was heard by an appeal panel appointed by the Chairperson of the commission, after the Freedom Front appealed an earlier decision of the commission that the slogan 'Kill the Farmer, Kill the Boer' did not constitute speech that was prohibited under Section 16(2) of the Constitution. The panel decided that 'freedom of expression was not a pre-eminent freedom ranking above all others . . . The right to dignity was at least as worthy of protection as the right to freedom of expression.' Section 16(2) of the Constitution defined the boundary beyond which the right to freedom of expression did not extend. The panel quoted with

approval the Constitutional Court's judgment in the *Islamic Unity Convention* case: 'Certain expression did not deserve constitutional protection because it had the potential to impinge adversely on the dignity of others and to cause harm'. The panel concluded that on a proper construction of Section 16(2)(c), the meaning of 'harm' could not be restricted to physical or actual harm and extended to psychological or emotional harm, but the harm had to be serious and significant. The panel decided that there must be an adequate link between the advocacy of hatred based on race, ethnicity, gender or religion, and the harm that is caused as a consequence. While the panel accepted that 'robust speech about the past, that does not amount to hate speech, is protected'.⁵² It decided that the slogan was indeed hate speech under Section 16(2)(c) of the Constitution as it amounted to the advocacy of hatred that constituted the incitement to cause harm.

In *SAHRC v SABC* (June 2002), the commission referred a complaint to the Broadcasting Complaints Commission (BCCSA) against the SABC in response to the broadcasting of the song *Amandiya* by Mbongeni Ngema. The BCCSA considered whether or not the lyrics of the song incited racial hatred because it called on 'virulent and courageous' black South Africans to recognise how 'oppressive' Indians were 'threatening' black culture and lifestyle.⁵³ The song also implied that black people were better off during apartheid under white rule than in their current position under Indian 'oppression'. In its decision, the BCCSA decided that the wording of the song could induce an incitement to harm and therefore could be considered hate speech under Section 16 of the Constitution. However the Film and Publications Board ruled that the music could be distributed to persons over the age of 18. An application in the Durban High Court by Ramesh Jethalal to have the song banned failed, but the court is yet to give reasons for its decision more than two years after the legal action was brought.

4.4 Media Diversity

Since 1994 the government has used both structural and legislative means to encourage media diversity. All newspapers are owned by private companies such as New Africa Media. A new daily, *This Day*, owned by a Nigerian company and circulating throughout the country was launched on 6 October 2003. Although several state-owned radio stations have been sold to the private sector and many community radio stations have been established, the SABC still owns and controls almost all television stations and many radio outlets. SABC has a national network of 18 radio stations, broadcasting in the 11 official languages. The three SABC free-to-air television channels and the pay-TV channel *SABC Africa* compete with *e-TV*, a privately owned commercial station that broadcasts throughout the country free of charge, and with *M-Net* and *DSTV*, which broadcast via satellite to subscribers. *DSTV*

provides access to a variety of channels including foreign news broadcasters such as *BBC World*, *Sky News* and *CNN*.

The need to support community-based media, as a mechanism for representing smaller-scale regional interests has not been missed by the government. However, these smaller media operations face difficulties in obtaining sufficient resources and financial support.⁵⁴ An independent agency, the Media Development and Diversity Agency (MDDA), which receives funding from both private media and the government, and promotes and develops diversity within the media industry has been established. Over five years, the agency will receive R10-million a year from the private sector and R7-million from the government. The MDDA will support community and small commercial media projects by providing funding after a successful application process and by appointing field workers to examine projects.⁵⁵

4.5 Direct Censorship by State Officials

Despite the constitutional guarantee of the right to freedom of expression, state officials in South Africa have also been involved in direct censoring of media personnel in the country. In August and September 2002, the World Summit on Sustainable Development (WSSD) was held in Johannesburg. During the protests prior to the WSSD, state officials targeted organisations such as the Landless Peoples Movement (LPM), even though they claimed they had complied with the Regulation of Gatherings Act. However, according to the Freedom of Expression Institute's Anti-Censorship Programme, 'the Act has been used by the police as a censorship device rather than a device to enable gatherings . . . as it gives them too much discretion as to whether to 'allow' people to exercise their constitutional right to assembly, demonstration and picket'.⁵⁶ Officials also disrupted protests and marches with numerous activists being arrested, although charges were dropped shortly thereafter.

A media officer named Ann Eveleth was also arrested under the Aliens Control Act, and authorities attempted to deport her because they viewed her as a 'threat to the security of the WSSD'. While waiting for a court ruling, she was held for seven days in solitary confinement before being released, and consequently won two court judgments against the Department of Home Affairs for what had happened.⁵⁷ Moreover, on several occasions the state used excessive force such as using stun grenades to break up a candle vigil procession, and water canon and rubber bullets to dissolve peaceful protesters at the Witwatersrand's Johannesburg College of Education. According to the organisation Reporters Without Borders, UN security officers also intervened to prevent the press conferences of several NGOs during the WSSD. After beginning to speak, the UN intervened and stopped the media event and the NGOs were told they had failed to receive UN authorisation.⁵⁸

5. Challenges

5.1 Financial

Financial challenges pose a significant problem for media at all levels. Since the 1980s, the SABC has faced increased competition and began restructuring itself financially in the early 1990s.⁵⁹ The difficulty of financially sustaining media operations has not only led to a concentration of media ownership, but also to the increasing commercialisation of the media due to the need to attract advertising.

In public broadcasting, there have also been attempts by the SABC to become more self-sufficient and less reliant on scarce state funding. The result has been that 'formats, presenting styles, languages, genres and audiences that are not considered to be commercially viable have been systematically marginalised'.⁶⁰

5.2 Media Diversity

5.2.1. Reliance on International Sources

The diversity of content that is broadcast or published within the country is also problematic due to an increasing reliance on international sources. Given the increasing financial constraints facing the industry, it is in the financial interests of owners to rely on information from one or two sources, rather than to pay for information from numerous sources. As noted by the Media Monitoring Project, 'South African media have relied almost exclusively on foreign news services. Broadcasters rely very heavily on news feeds such as CNN and Reuters, with there being very little evidence of concrete policies to diversify news sources, especially from independent media'.⁶¹

The project argues that South Africa has a 'moral obligation' to ensure that news comes from a diversified range of sources, particularly given the legacy of apartheid within the country when voices and opinions were heavily censored. Using various sources is also important to ensure that reporting is fair and objective rather than biased or partial to the views of their funders or advertisers.

A recent resolution by the UN Commission on Human Rights states that a diversity of sources of information at all levels and the free flow of information is essential for promoting 'full enjoyment of the right to freedom of opinion and expression . . . and international co-operation aimed at the development of media and information and communication facilities in all countries'.⁶²

5.2.2. Diversity within the Media Industry

Traditionally, white men dominated the media industry and there is a need to ensure that representation exists, particularly in terms of gender, race, disabilities and so on. Promoting diversity within the industry may

help the diversity of views projected to the public in the media. At the annual conference of the South African National Editors' Forum (SANEF) in June 2003, the 60 delegates who attended recognised that women are under-represented in the media, despite the fact that they comprise more than 50% of the population. The participants also stated that gender-sensitive guides for style and procedure should be written for the media industry.⁶³

5.2.3. Languages

Diversity in languages is also an issue for the media industry in South Africa. The fact that South Africa has 11 official languages makes it financially and logistically difficult for media organisations to broadcast or print programming in all of these languages. *Ilanga*, a Zulu newspaper, is the only nationwide newspaper published in an African language. A study by the Media Development and Diversity Agency showed that although South African people prefer to watch television in their home language, most programming is conducted in English. Their study found in 1996 that already broadcasting in other languages was 'difficult to implement . . . because of huge resource constraints'.⁶⁴

5.2.4. Concentration of Ownership

Financial restraints have led to an increased concentration of ownership within the media, which also restricts diversity. Media conglomerates tend to mainstream or homogenise the ideas they present in order to attract a larger audience. In addition, most of the newspapers that currently exist target their sales towards rural or marginalised communities. It is easier, more efficient, and more profitable for companies to focus on urban markets with a higher concentration of both population and wealth, to the detriment of providing quality, relevant and diverse programming. John van Zyl argues that the concentration of ownership in the South African media results in not enough information being broadcast about other African countries, little attention being given to local talent, and a neglect of quality children's programmes.⁶⁵

5.3 Protecting Journalists' Sources

Compelling journalists to reveal their sources is the result of Section 205 of the Criminal Procedure Act 51 of 1977. This legislation obliges any person, including reporters, to reveal information, including journalists' sources, after receiving a subpoena from a magistrate or judge if the information is considered necessary to the administration and maintenance of justice, law and order. Critics hold that this Act not only limits the right to freedom of expression for journalists, but it may also indirectly censor them by deterring them from printing information that is contentious, knowing they may have to reveal their sources. The Constitutional Court has

already determined that the provisions of Section 205 are not inconsistent with the Constitution.⁶⁶ The court stated that a person subpoenaed under Section 205 would have a 'just excuse' not to answer a question if the answer would infringe or threaten his or her rights enshrined in the Bill of Rights.⁶⁷

In 1996, the Director of Public Prosecutions had subpoenas issued against several journalists over their coverage of the murder of drug-lord Rashid Staggie by a riotous crowd. The prosecuting authority argued that without the media's evidence, including unpublished material, they could not obtain a conviction of the killers. When the journalists and their companies refused to comply, the police raided the newsrooms of the *SABC*, *Reuters*, *Associated Press* and *Mail & Guardian*. After four years of confrontation, the prosecuting authority agreed to accept affidavits from two journalists confirming the contents of their reports.

Negotiations between the South African National Editors' Forum, the Ministers of Safety and Security and of Justice and the National Directorate of Public Prosecutions resulted in 1999 in a Memorandum of Understanding that set several restraints on the ability of state officials to subpoena journalists. However, this has afforded little or no protection to journalists.⁶⁸

Journalists therefore continue to challenge subpoenas issued under Section 205. The Hefer Commission of Inquiry into allegations that the National Director of Public Prosecutions, Bulelani Ngcuka, had been an apartheid spy subpoenaed Ranjeni Munsamy. Ms Munsamy, then a journalist with the *Sunday Times*, had published an article in the *City Press* under an assumed name making these allegations when her newspaper refused to publish them. Judge Hefer refused her application for exemption from testifying, stating that her agreeing to testify did not necessarily include an agreement to reveal her sources.⁶⁹ In his report Judge Hefer stated:

My view was that the constitutionally guaranteed freedom of expression (including the freedom of the press and other media and the freedom to gather and disseminate information) does not entail that every journalist is in all cases entitled to refuse to testify in a court of law or a commission of inquiry or to disclose relevant information gathered in the course of his or her profession. Unless other reasons exist which justify a refusal to testify (Cf *Attorney-General, Transvaal v Kader* 1991(4) SA 727 (A)) a journalist, like any other person, is obliged to testify and is only entitled to refuse to answer specific questions against which there is a valid objection.⁷⁰

The Bloemfontein High Court dismissed the journalist's challenge against Judge Hefer's ruling.⁷¹ The court was unconvinced by the argument that a subpoena should only be issued against a journalist as a matter of last resort, when all other attempts to obtain the information had failed. In the end, Judge Hefer indi-

cated that he did not require the testimony in order to complete the inquiry. The matter has been referred to the Constitutional Court.

The African Commission's Declaration of Principles on Freedom of Expression in Africa⁷² states:

Media practitioners shall not be required to reveal confidential sources of information or to disclose other material held for journalistic purposes, except in accordance with the following principles:

- 1) the identity of the source is necessary for the investigation or prosecution of a serious crime or the defence of a person accused of a criminal offence;
- 2) the information or similar information leading to the same result cannot be obtained elsewhere;
- 3) the public interest in disclosure outweighs the harm to freedom of expression; and
- 4) disclosure has been ordered by a court, after a full hearing.

For there to be adequate protection for journalists and their sources, and to prevent journalists being forced to reveal their sources except as a matter of last resort, it is important that the above principle is incorporated into Section 205 of the Criminal Procedure Act.

5.4 Academic Freedom

During the apartheid era, academic freedom was curtailed by government pressure on individual institutions and educators to conform to state ideology. The management of historically black universities promoted government policy, endorsed the apartheid ideology, forced out liberal academics, assisted the security forces in maintaining law and order on their campuses, expelled dissident students, and excluded from the curricula subjects that were considered potentially dangerous. At least seven historically white universities were administered by Councils or Executives that supported the apartheid government and its policies. Even the four historically white universities that considered themselves liberal were susceptible to pressure from the government. For example, they were restricted in the enrolment of black students by the Extension of University Education Act 45 of 1959 or they carefully designed curricula subjects so as not to jeopardise government funding.

The right to freedom of expression in Section 16 of the Constitution includes 'academic freedom and freedom of scientific research'. The United Nations Educational, Scientific and Cultural Organisation (UNESCO) has recommended that: 'Higher education teaching personnel are entitled to the maintaining of academic freedom, that is to say, the right, without constriction by prescribed doctrine, to freedom of teaching and discussion, freedom in carrying out research and disseminating and publishing results thereof, freedom to express freely their opinion about the institution or system in which they work, freedom from institutional censorship

and freedom to participate in professional and representative academic bodies'.⁷³

The Higher Education Act 101 of 1997 states in its preamble that it is 'desirable for higher education institutions to enjoy freedom and autonomy in their relationship with the state within the context of public accountability and the national need for advanced skills and scientific knowledge'.⁷⁴ In its White Paper of 1997 the government asserts: 'The principle of academic freedom implies the absence of outside interference, censure or obstacles in the pursuit and practice of academic work. It is a precondition for critical, experimental and creative thought and therefore for the advancement of intellectual inquiry and knowledge. Academic freedom and scientific inquiry are fundamental rights protected by the Constitution.'⁷⁵ The Ministry of Education affirmed its 'commitment to academic freedom and institutional autonomy within the framework of public accountability as fundamental tenets of higher education and key conditions for a vibrant system'.⁷⁶

While during the apartheid era the threat to academic freedom was external, that is from the government, some critics argue that currently the threat is primarily internal, 'with academics becoming increasingly subordinate to administrators, who in turn are becoming intolerant of robust internal dissent'.⁷⁷ The argument is advanced that with transformation, a new management system is being established at universities that is authoritarian, which subjects individual academics to centralised control and interprets dissent and criticism as insubordination.⁷⁸ The Council on Higher Education, established under the 1997 Higher Education Act, has stated that: 'co-operative governance as implemented in South African higher education should be understood as a system of delineated powers and constraints which is hierarchical, but which also incorporates checks and balances that are designed to preserve the degree of institutional autonomy that is necessary for academic freedom in teaching and research'.⁷⁹

The challenge therefore is to ensure that universities and educators are free from both external interference and internal pressures to give effect to the constitutional principles of academic freedom and freedom of scientific research.

5.5 New Technology

New technology has the potential to expand and enhance the information, opinions, and ideas we can access. While the use of the Internet, for instance, increases the ability of citizens to become more knowledgeable and informed about their surroundings, the inability to regulate what appears on the Internet is becoming a major concern. The result is that although the Internet could be used to promote openness and awareness, it could also be used to impart information that is intolerant, racist, discriminatory, sexist, xenophobic, and so on. It can project misleading, erroneous or

negative information that directly and unfairly disadvantages people.⁸⁰ Another issue is the ease with which people of all ages can access information on the Internet, and the difficulty to regulate access, for example, by children, to information that may be harmful to them.

The government has published a draft Communications Convergence Bill⁸¹ as existing laws do not provide adequate mechanisms to regulate an environment of converged broadcasting and telecommunications technologies. The Bill provides for a new regulatory and licensing system and removes the technological distinction between broadcasting and telecommunications, which are currently governed by different laws. Critics have argued that the requirement for the licensing of all websites, including small websites in which individuals express their personal views, will inhibit freedom of expression.⁸²

5.6 Racism

In August 2001, the South African Human Rights Commission released a report of its investigation into racism in the media. The commission analysed the content of select publications over a period of time and assessed the ownership of media and the staffing in newsrooms. Its report found that 'the media can be characterised as racist institutions' given that some racial expressions and content 'could have been avoided'.⁸³ Some critics argue that a lack of black ownership also leads to an inability to understand the black markets in programming and in advertisements.⁸⁴

5.7 The Effect of Socio-Economic Conditions on Accessibility

More than ten years after the end of the apartheid era in South Africa, the socio-economic conditions in South Africa remain an enormous challenge for the government. A UNESCO assessment in July 2002 listed the illiteracy rate of people over the age of 15 to be 14,8% or 4 217 000 people in the year 2000. The majority of these people live in rural areas where the only way in which they can access information is through radio and television (when and where available), as well as through word-of-mouth and community theatre.⁸⁵ Moreover, illiteracy rates among women tend to be higher, which compounds the difficulty they have in exercising and enjoying their rights to freedom of expression.⁸⁶ The high rate of unemployment and wide income-inequality in the country also results in many forms of media being inaccessible due to cost, service cut-offs, or illiteracy.⁸⁷

The Freedom of Expression Institute (FXI) has noted that there is a direct correlation between socio-economic rights and censorship. Its research found that the increase in income inequality has also increased the number of social organisations opposing government

policies and struggling to enhance accessibility to basic services.⁸⁸ Organisations such as the LPM, the Soweto Electricity Crisis Committee, and the Treatment Action Campaign have acted more directly in their approach to bringing about change, inevitably through assembly, demonstrations and picketing. According to the FXI, it has led to an increase in the incidents of censorship and repression: 'These developments should surprise no one . . . those in positions of power have a vested interest in preventing these contradictions from being expressed.'⁸⁹

5.8 National Security

Freedom of expression in relation to national security is one of the most complex areas to campaign around, as what constitutes 'national security' is deeply controversial in South Africa.⁹⁰

After the terrorist attacks in the United States on 11 September 2001, states have adopted legislation in an attempt to prevent such occurrences in the future. Their focus has been on the collection and interception of information and intelligence. Not only have many journalists felt compelled to write about the negative elements of terrorism, their reporting also enhances the legitimacy of the state's actions against terrorism such as human rights violations and direct intervention in other countries.

At a legislative level, the most recent issue relating to freedom of expression and national security is the passing of anti-terrorism laws. As stated by the Special Rapporteurs, 'some of the measures adopted by certain states in the aftermath of 11 September are a cause of concern. They have serious negative implications and may lead to more brutality and repression'. South Africa, following the American example, drafted both a Protection of Constitutional Democracy Against Terrorist and Related Activities Bill⁹¹ and an Interception and Monitoring Bill.⁹² Critics argue that these Bills were introduced in Parliament without any significant public debate on how these pieces of legislation would affect freedom of expression for South Africans.⁹³ According to the FXI, anti-terrorism legislation impacts on the rights to freedom of expression, association, belief, opinion, assembly, demonstration, and security of the person.⁹⁴ The Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004 was eventually passed. In the intervening period before the Bill was passed, the government continued to arrest, detain and deport individuals they perceived to be a security threat, often on the basis of their affiliation to certain religious groups.

5.9 Gender and the Media

While South Africa may be considered progressive as regards issues related to gender, with women constituting 18% of Members of Parliament, lack of access to the media by women, and their stereotypical portrayal

in the media, still poses serious challenges. There are limitations placed on women's access to the media on the basis of cultural and religious norms and because of societal attitudes towards women. A community radio station, Radio Islam, began broadcasting in the Johannesburg area in January 1997. The radio station's policy was not to allow women's voices on air on the grounds that Islamic law required that a woman's voice should be concealed and not heard by men who are strangers to them. The station also confined women to certain tasks such as conducting research and administrative duties. A complaint was lodged with the Independent Broadcasting Authority by a Lenasia-based organisation, YIELD, on the basis that the female members of the Moslem community were being discriminated against because they could not be heard on air. The Broadcasting Monitoring Complaints Committee of the IBA held a hearing and ruled against Radio Islam, which was instructed to make available at least three hours (to be increased to four hours by July 1998) of air time to women presenters every day. Radio Islam has since changed its policy, which now promotes gender equality.

The media also stereotypes women, often repeating and strengthening societal attitudes towards women as sex objects and temptresses. The use of gender-insensitive language, for example referring to adult women as girls, 'suggests that they are viewed with less respect and are not taken seriously as adult women, other than for sex'.⁹⁵ Advertisements in the media gratuitously show women usually scantily clad, again depicting women as sex objects in order to market products. When the media reports on gender-based violence, the woman survivor of an attack, especially sexual assault, is often portrayed as a temptress who brought the attack upon herself by her inappropriate attire. The media reinforces gender stereotypes in subtle ways. Women are considered suitable only for professions that are perceived to require the nurturing qualities of women, such as nursing. Women's views are usually sought on issues that are considered to fall within their role as mothers or wives such as the rearing of children or childbirth. The table below substantiates that the media very rarely portray women as firefighters or pilots, or seek their views on economic matters or agriculture; and sports and politics are seen as the domain of men.

The media are also accused of missing important stories through what is termed 'gender-blindness'. Stories are reported without taking into consideration the impact of events on women. For example, stories on poverty refer to 'people' being affected, yet it is a fact that women and men, girls and boys are affected by poverty in different ways, with women and children often being more affected than men.⁹⁶ The media has to incorporate a gender perspective into all areas of reporting from contemporary issues to sport. The role of the media is to challenge stereotypes and to educate the community.

Reflections on Democracy and Human Rights: A Decade of the South African Constitution (Act 108 of 1996)

	% Women Global	Global	% Men Global	Global
Who speaks				
Overall	17	18	83	82
Relationships				
Identified by family status	11	21	2	4
Occupation*				
Home makers	61	81	33	19
Politicians	9	10	89	90
Sports	8	9	90	91
Beauty contestant	88		10	
Entertainer	38		60	
Sex-worker	91		9	
Who speaks on what*				
Economics	10	17	76	83
Political stories	9	12	90	88
Disaster/War/Conflict	13		70	
Crime	15	20	75	80
Health/HIV/AIDS	25	29	66	71
Mining and Agriculture	15		79	
Human Rights	16	15	70	85
Gender Equality	46		45	
Gender Violence	39		50	
Media/Entertainment	29	35	65	65
Sports	8	12	88	88
Who creates the news				
TV reporters	38	36	62	64
TV presenters	45	56	55	44
Radio reporters	34	28	66	72
Print reporters	22	26	78	74
Who reports on what*				
Economics	20	35	54	65
Political Stories	16	26	47	74
Disaster/War/Conflict	15		35	
Crime	20	31	46	69
Health/HIV/AIDS	31	46	40	54
Mining and Agriculture	19		53	
Human Rights	23	33	47	67
Gender Equality	30		44	
Gender Violence	19		46	
Media/Entertainment	25	40	49	60
Sports	7	15	68	85

Source: Gender and Media Baseline Study 2003, Gender Links & Media Institute of Southern Africa, <http://www.genderlinks.org.za>.

6. Conclusion

In *State v Mamabolo*, Kriegler J emphasised the importance of freedom of expression in an open, democratic society considering 'our recent past of thought control, censorship and enforced conformity to governmental theories'. He stated:

It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way.⁹⁷

Protecting the right to freedom of expression is important in South Africa given its history of censorship and repression. Consolidating this right, while simultaneously balancing its restriction, will enable our society to continue to build itself in accordance with the founding principles of the Constitution. While considerable progress has been made to protect and promote the right to freedom of expression over the past decade, there are still many challenges to be addressed. One priority should be that the most marginalised in our communities are able to exercise their right to freedom of expression. The extent to which all South Africans are able to truly exercise their right to freedom of expression is a clear indicator of the level of maturity of democracy and protection of all other human rights in our society.

We live in a climate where both terrorism and counter-terrorism measures threaten freedom of expression. We must be ever vigilant that the right is not gradually eroded by legislation adopted in the name of national security.

Endnotes

- 1 International Federation of Library Associations and Institutions. 'World report: Libraries and Intellectual Freedom, South Africa.' http://www.ifla.org/faife/report/south_africa.htm.
- 2 Statutes that regulated freedom of expression included the Public Safety Act 3 of 1953; the Criminal Procedure Act 56 of 1955; the Riotous Assemblies Act 17 of 1956; the Defence Act 44 of 1957; the Police Act 7 of 1958; the Post Office Act 44 of 1958; the Correctional Services Act 8 of 1959; the Trade Marks Act 62 of 1963; the Armaments Development and Production Act 57 of 1968; the National Supplies Procurement Act 89 of 1970; the Companies Act 61 of 1973; the Petroleum Products Act 120 of 1977; the Copyright Act 98 of 1978; the National Key Points Act 102 of 1980; the Intimidation Act 72 of 1982; the Internal Security Act 74 of 1982; the Protection of Information Act 84 of 1982; the Nuclear Energy Act 92 of 1982; the Nuclear Energy Act 131 of 1993; and the Regulations of Gatherings Act 205 of 1993.
- 3 'Chapter 6: The Current Broadcasting Environment in South Africa,' Independent Broadcasting Authority Report, <http://iba.org/ch06.htm>.
- 4 The Media Development and Diversity Agency — a draft position paper, November 2000, p. 13. <http://www.gov.za/documents/2000/mdda/mddaintr.pdf>.
- 5 See n 583.
- 6 John van Zyl, 'Civil Society and Broadcasting in South Africa: Protecting the right to communicate,' UNISA Press, Communication 20(2) <http://www.unisa.ac.za/default.asp?Cmd=ViewContent&ContentID=7156>.

- 7 See n 585.
- 8 'South Africa: Banned literature and newspapers.' Beacon for Freedom of Expression. http://beaconforfreedom.org/about_database/south%20africa.html.
- 9 See n 583, at p. 14.
- 10 See n 583, at p. 14.
- 11 The Abolition of Restrictions on Free Political Activity Act 206 of 1993, which also repealed sections of the Publications Act 42 of 1974 that restricted political expression, was passed.
- 12 Constitution of the Republic of South Africa Act 200 of 1993.
- 13 Section 33(1)(bb).
- 14 The Constitution of the Republic of South Africa Act 108 of 1996.
- 15 See Marcus, G. and Spitz, D. (1998) 'Expression'. Revision Service 2. In *Constitutional Law of South Africa*. Chaskalson, M., Kentridge, J., Marcus, G., Spitz, D. and Woolman, S. (eds). Section 20 for a detailed discussion of the differences between Section 15 of the Interim Constitution and Section 16 of the current Constitution.
- 16 Section 36 (1) of the Constitution of the Republic of South Africa 1996.
- 17 Ratified by South Africa on 9 July 1996.
- 18 ACHPR 48/90, 50/91, 52/91, 89/93 Amnesty International and others/Sudan at para. 80, 13th Annual Activity Report of the African Commission on Human and Peoples' Rights 1999-2000.
- 19 Declaration of Principles on Freedom of Expression in Africa, African Commission on Human and Peoples' Rights, 32nd Session, 17-23 October 2002: Banjul, The Gambia.
- 20 Adopted by the UN General Assembly on 10 December 1948.
- 21 Ratified by South Africa on 10 December 1998.
- 22 CCPR General Comment 10, Freedom of Expression Article 19: 29/06/83 <http://www.unhchr.ch/tbs/docs.nsf/385c2add1632f4a8c12565a9004dc311/2bb2f14bf558182ac12563ed0048df17?OpenDocument>.
- 23 Adopted in 1966, and ratified by South Africa on 9 January 1999.
- 24 Established in 1993 by the UN Commission on Human Rights by resolution 1993/45.
- 25 Commission on Human Rights, Doc E/CN. 4/1995/32 14 December 1994 <http://www.unhchr.ch/Hurdidocda/Hurdidoca.nsf/TestFrame/f8f2d02f188e7d2802566ff0040676?OpenDocument>.
- 26 Films and Publications Amendment Act 34 of 1999.
- 27 Johannessen, L. and Tracy, C., 'Media Law and Practice in Southern Africa: South Africa,' November 1996, p. 25.
- 28 Broadcasting Act (No. 4 of 1999), Chapter 1, Fundamental Principles and Interpretation.
- 29 'Last-minute amendment to controversial Broadcasting Amendment Bill lessens fear of government control of state broadcaster,' International Freedom of Expression eXchange, 18 October 2002, Source: Media Institute of South Africa (MISA) <http://www.ifex.org/en/layout/set/print/content/view/full/17678/>.
- 30 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (assented to 2 February 2000).
- 31 South African Human Rights Commission, Discussion Document: Freedom of Expression, 21 November 2001, p. 4.
- 32 *Ibid.*, p. 5.
- 33 *South African National Defence Force Union v Minister of Defence* 1996 (6) BCLR 615 (CC) at para. 8.
- 34 *S v Mamabolo* 2001 (3) SA 409 (CC) at para 41.
- 35 *South African National Defence Union v Minister of Defence*, above n 613.
- 36 *S v Mamabolo* n 613 above.
- 37 *S v Mamabolo* at para 50.
- 38 *The Islamic Unity Convention v The Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC).
- 39 Section 2(a) of the Code of Conduct for Broadcasting Services states that 'Broadcasting licensees shall . . . not broadcast any material which is indecent or obscene or offensive to public morals or offensive to the religious convictions or feelings of any section of a population or likely to prejudice the safety of the state or the public order or relations between sections of the population.' Cited in *Islamic Unity Convention v Independent*

- Broadcasting Authority and Others* at para 22.
- 40 In re South African Jewish Board of Deputies and Radio 786, Ruling by the Chairman (Acting) of the BMCC, reproduced at <http://www.radio786.co.za/courtcase/BMCC Judgment — Radio 786 vs Jewish Board of Deputies — 8 November 2002.pdf>.
- 41 *Khumalo and Others v Holomisa* 2002 (8) BCLR 771 (CC).
- 42 1998 (4) SA 1196 (SCA).
- 43 *Khumalo and Others v Holomisa* at para 19.
- 44 1996(5) BCLR 609 (CC).
- 45 Case above n 622 at para 35.
- 46 2003 (4) BCLR 357 (CC).
- 47 CCT 5/03 <http://www.concourt.gov.za/files/dereuck/dereuck.pdf>.
- 48 The Constitution of the Republic of South Africa 1996, section 184(2)(a) and (b).
- 49 South African Human Rights Commission Discussion Document: Freedom of Expression, 21 November 2001, p. 11.
- 50 Above n 626 at p. 11.
- 51 *Freedom Front v South African Human Rights and Another* 2003 (11) BCLR 1283 (SAHRC).
- 52 *Freedom Front v South African Human Rights Commission and Another* at 1299.
- 53 South African Human Rights Commission, Discussion Document: Freedom of Expression, 21 November 2001, p. 12.
- 54 Mohapeloa, V., Promoting media diversity, 31 January 2003. http://www.southafrica.info/ess_info/sa_glance/constitution/media-310103.htm.
- 55 Above n 631.
- 56 Report on the cases of the Anti-Censorship Programme, Freedom of Expression Institute (FXI) http://www.fxj.org.za/acp_report.doc.
- 57 Above n 633.
- 58 'South Africa - 2003 Annual Report,' Reporters Without Borders http://www.rsf.org/print.php3?id_article=6452.
- 59 <http://docweb.pwv.gov.za/portfolios/bc/history.html>.
- 60 Freedom of Expression Institute, Annual Report and Financial Statements 2002/2003, p. 7.
- 61 'The state of freedom of expression in South Africa and beyond: FXI statement for International Press Freedom Day,' 3 May 2002. <http://www.mediareviewnet.com/The%20state%20of%20freedom%20of%20expression>.
- 62 Commission on Human Rights Doc, E/CN.4/2003/42, 23 April 2003. [http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.RES.2003.42.En?Opendocument](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.RES.2003.42.En?Opendocument).
- 63 'SA National Editors' Forum plans gender campaign, criticises Anti-Terrorism Bill,' Press Statement, 29 June 2003. http://www.sanef.org.za/default.asp?ID=81&subclick=yes&parent_id=80.
- 64 Above n 583 at p. 23.
- 65 Above n 585.
- 66 *Nel v Le Roux NO and Others* 1996(4) BCLR 592 (CC).
- 67 *Nel v Le Roux* at para 7.
- 68 Guy Berger, 'Protection of journalistic sources: between you, me and the subpoena', a paper presented at the Africa Conference on Freedom of Expression, 19-20 February 2004, Pretoria.
- 69 <http://www.pmg.org.za/bills/040120hefer.htm> at paras. 17-22.
- 70 Above n 237 at para 18.
- 71 *Munsamy v Hefer NO & Others*, 2004(5) BCLR (O) 508.
- 72 Above n 598 para XV.
- 73 United Nations Education and Scientific Cultural Organisation, Draft Recommendation concerning the Status of Higher Education Teaching Personnel. 29 C/12, 2000, Annex.
- 74 <http://www.info.gov.za/gazette/acts/1997/a101-97.pdf>.
- 75 Department of Education, Education Draft White Paper 3, A Programme for the Transformation of Higher Education, General Notice 1196 of 1997, 24 July 1997. <http://www.info.gov.za/whitepaper/1997/education3.htm>.
- 76 See n 653 above, para 3.9.
- 77 Southall, R. and Cobbing, J. From Racial Liberalism to Corporate Authoritarianism: the Shell Affair and the Assault on Academic Freedom in South Africa, <http://www.nu.ac/ccs/default.asp?3,28,11,953>.
- 78 Above n 653 at p. 22.
- 79 Council on Higher Education, Governance in South African Higher Education, May 2002, p. 40. http://www.che.ac.za/documents/d000006/Governance_Research_Report.pdf.
- 80 Above n 629.
- 81 <http://www.polity.org.za/pdf/DraftConvergenceBill.pdf>.
- 82 *The Star*, 'Trying to instil order in cyberspace', 10 February 2004.
- 83 South African Human Rights Commission, Investigation into Racism in the Media, 21 November 1999. http://www.sahrc.org.za/sahrc_introduction_to_interim_report.PDF.
- 84 See n 583 at p. 24.
- 85 Above n 583 at p. 23.
- 86 The right to freedom of opinion and expression, Commission on Human Rights resolution 2003/42, 23 April 2003.
- 87 Above n 583 at p. 23.
- 88 Jane Duncan, 'Where is the debate on civil and political rights? The state of censorship in South Africa,' Paper presented on World Press Freedom Day, University of the Witwatersrand, 3 May 2003. <http://www.ifex.org/en/layout/set/print/content/view/full/50205/>.
- 89 Above n 651.
- 90 'National security and the South African National Defence Force,' Freedom of Expression Institute (FXI). <http://fxi.org.za/sandf.htm>.
- 91 <http://www.polity.org.za/pdf/ProConDemAgaTerRelAcB12B.pdf>.
- 92 <http://www.pmg.org.za/docs/2002/appendices/021028b50b.htm>.
- 93 'The state of freedom of expression in South Africa and beyond: FXI statement for International Press Freedom Day, 3 May 2002. <http://www.mediareviewnet.com/The%20state%20of%20freedom%20of%20expression>.
- 94 Annual Report and Financial Statements 2002/03, Freedom of Expression Institute (FXI), pp. 24-25.
- 95 Gender Links, Gender and Media Baseline Study 2003, Ch. 5. <http://www.genderlinks.org.za/>.
- 96 Above n 657 at ch. 7.
- 97 Mamabolo, above n 615 at para 37.

The Right of Access to Information at Age Ten

Professor Jonathan Klaaren

1. Introduction

The aim of this chapter is to assess the right of access to information ten years after its appearance in a South African Bill of Rights. Alongside freedom of expression and of political rights, this chapter aims to critically review the extent to which we have succeeded in establishing a culture of human rights in the first decade of constitutional democracy. To do this, the paper investigates the extent to which three significant sectors in South African society have used the right of access to information to change their information practices from the late years of the apartheid regime. The first is the civil service — essentially a widely varying set of state bureaucracies. The second sector is those state organisations that specifically perform law enforcement and security functions in the South African democracy. The third sector consists of those private bodies, that hold or control large quantities of information which significantly impacts upon the everyday lives of South African residents.

The first section of this chapter assesses the apartheid context from which the right of access to information has emerged as well as the 1994 baseline state of the right of access to information in the three sets of organisations identified above. The second section assesses the developments in information practice in these three sectors from 1994 to 2004. It begins with a brief outline of the scope of the right of access to information, noting the conceptual and rights-based resources available at national and global levels. The concluding section identifies factors that appear to be impeding or encouraging change in access to information, tentatively identifying an agenda for access to information advocacy from a human rights point of view.

2. Section I: The Baseline State of Access to Information

2.1 *Civil Service*

South Africa's pre-1994 civil service was notorious for its secrecy.¹ The Truth and Reconciliation Commission (TRC) has noted that 'in apartheid South Africa, government secrecy was a way of life. . . . (Public access to state records) was a privilege to be granted by bureaucrats'.² Such pervasive bureaucratic secrecy led to a number of corruption scandals and instances of maladministration involving senior officials and cabinet officials, such as the Information Scandal of 1978-1979.³ Beyond its lack of accountability, the secretive ethos of the civil service also did not encourage public participation and contributed to an ineffective public administration.⁴

2.2 *Security and Law Enforcement*

Within the apartheid culture of state secrecy, the security establishment was the chief culprit. Before 1990, the state intelligence organisations, for instance, routinely destroyed records outside of the procedures of the then-existing Archives Act. Perhaps more significantly, the security establishment destroyed massive amounts of apartheid-era records in order to conceal human rights violations and keep information from a new democratic government.⁵ This systematic effort reached its zenith between 1990 and 1994. To cite one example, the records pertaining to the National Security Management System, a substructure of the apartheid-era State Security Council, could not be traced by the Truth and Reconciliation Commission (TRC).⁶

Law enforcement bodies such as the South African Police (SAP) also became 'more and more secretive' during the period from 1960 to 1990.⁷ Apart from the security police, members of the police engaging in ordinary criminal law enforcement functions prior to 1990 were able to operate with little meaningful disclosure of information. For instance, the common law granted a blanket privilege to all statements contained in the police docket, subject to few exceptions.⁸

2.3 *Private Bodies*

Until 1989, Credit Bureaus — private bodies holding information on the creditworthiness and other personal information of individuals - were regulated only through the common law and not through industry self-regulation.⁹ Yet the consequences of inaccurate information held by these bureaus for the majority of the population could be dire. It was only in 1995 that the practice of debt imprisonment was judged unconstitutional.¹⁰ Other private bodies such as mining companies also routinely took decisions affecting the lives of large numbers of persons without disclosing any information about those decisions. For instance, some South African companies decided to continue mining asbestos despite holding information regarding the health risks of the practice. The lack of social accountability and information disclosure of such private bodies led the Constitutional Assembly to extend the right of access to information to cover private bodies.¹¹

3. **Section II: Developments driven by the Right of Access to Information from 1994-2004**

The entrenchment of a right to information held by the state in Section 23 in the interim Constitution was the beginning of the development of South Africa's freedom of information regime. Section 23 was mandated by a specific constitutional principle agreed to at Kempton Park and covered access to all information held by the state. Section 32 in the 1996 Constitution extended the reach of the right to information held by private bodies as well, at least where it was required for the exercise or protection of other rights. In certifying the Constitution, the Constitutional Court recognised that the right of access to information was given greater weight in South Africa than elsewhere and that the right had a particular function to play in promoting good governance.⁶⁸⁸ The Constitution also required enactment of freedom of information legislation within three years, resulting in the enactment of the Promotion of Access to Information Act (PAIA) in February 2000.¹²

While this chapter will conclude by assessing the implementation of PAIA, two points regarding the conceptual basis of South Africa's freedom of information regime should be noted here. The first point is the constitutional supremacy of the presumption in favour of access to information. In part because PAIA imple-

ments a constitutional right, it comprehensively (yet narrowly) limits the public's access to information for such legitimate grounds as the privacy of individuals (Section 34) and the security interests of the state (Section 41). This underlines the intention of Parliament that the provisions of PAIA apply to requests made in terms of PAIA even to the exclusion of other laws such as the Protection of Information Act of 1982 (Section 5). Without repealing those other laws, PAIA is intended to prevail over them.

The second conceptual point is the increasing linkage of the right of access to information to the achievement of the development of socio-economic rights. Section 32 and PAIA form part of a global trend towards locating and using the right of access to information in the realm of social and economic policy.¹³ Moving beyond the traditional function of freedom of information in bolstering democratic accountability, this global trend places a rights-based understanding within government transparency initiatives and civil society campaigns for the achievement of socio-economic rights.¹⁴

Turning to post-1994 access to information developments, the picture in the civil service sector is a mixed one. The apartheid culture of presumptive secrecy has largely disappeared and the Government Communication and Information Service (GCIS) appropriately functions not as a ministry of information but rather as a government communications agency. Whether or not these trends are part of a general movement to an information society or are in response to the right of access to information, it is evident that most government departments now have websites, for instance, and in other ways also take their communications functions seriously. Post-1994 initiatives such as *Batho Pele* — although not directly inspired by the right of access to information — have partially succeeded by replacing the culture of the apartheid civil service with one that at least professes to put the people first.

Some specific areas of bureaucratic practice — such as state tendering procedures — have also seen significant change in the direction of openness and competitive tendering practices as a direct result of the constitutional right of access to information.¹⁵ Still, the principles of openness and transparency cannot be said to hold sway throughout the state bureaucracies. The grounds of privacy or confidentiality are often and incorrectly used as reasons for non-disclosure. Costly fees are often demanded for information at levels above those regulated. The performance of public bodies in producing manuals intended to facilitate access to information was 'extremely poor' according to the SA Human Rights Commission, with only 62 public bodies submitting manuals to the commission.¹⁶ Indeed, three years after the commencement of PAIA, those actually using the Act have reported problems with government offices including lengthy delays and incorrect understandings of PAIA's requirements.¹⁷

With respect to law enforcement, the right of access to information has led to some real change in the operative practices of state prosecutions. Soon after the adoption of the interim Constitution, the common law privilege granted to most documents in the police docket was successfully challenged.¹⁸ After initial High Court cases decided in terms of the right of access to information, the Constitutional Court opted for a fair trial approach but continues to read the right to fair trial together with the right of access to information 'in the broad context of a legal culture of accountability and transparency'.¹⁹

With respect to the security establishment, there is perhaps less change. Ten years on, the security establishment remains relatively untouched by the right of access to information and the principle of transparency. Due to the evasions of the National Intelligence Agency and the Department of Justice and Constitutional Development, the South African History Archive (SAHA) took nearly two years from the date of a PAIA request to establish the whereabouts in government of 34 boxes of 'sensitive' Truth and Reconciliation archived material and only received access to that material two years and eight months later.²⁰ The recent Hefer Commission was a further dramatic example where the security services insisted upon applying procedures derived from the Protection of Information Act without due regard to the constitutional right and effectively stonewalled the inquiry. Nonetheless, the South African National Defence Force (SANDF) has consistently received high marks for professionally complying with requests for access to information made in terms of PAIA.²¹ Likewise, the first PAIA judicial ruling effectively overturned a refusal of a request for information made by a failed bidder engaged in the South African post-apartheid arms deal — although the records still have not been made accessible.²² Nonetheless, there remains little movement, if any, towards proactive declassification of security records.

In the private sector, South African corporations and companies remain behind global standards in information disclosure. Lack of disclosure is of particular concern in a society such as South Africa's where diverse communities may have objections in principle to specific corporate practices — such as Moslem concerns regarding the operations of unit trusts or breweries. Moreover, minority shareholders have less information on disclosure rights in South Africa than in comparative jurisdictions.²³ In this context, a family member owning 30% of the shares in a business successfully approached the Cape High Court in early 2003 to enforce his right of access to the cash books and other financial documents of the private company so that he would know what his shares were worth.²⁴ Reflecting PAIA's conceptual application to private bodies, this case may well signal greater rights-based regulation of market-related information, as may the pending PAIA litigation against political parties in the

political 'market'. With respect to the practices of credit bureaus, Parliament chose, while enacting PAIA, to defer the issue of data protection to the South African Law Reform Commission.²⁵ That process is unlikely to result in legislation in less than two or three years. In a separate but overlapping process, the Department of Trade and Industry is investigating consumer credit law reform.²⁶ At present, there appears as yet little substantive change in the access of ordinary citizens to their personal information on creditworthiness.

4. Conclusion

The establishment of a working access to information regime (the implementation of the constitutional right) remains incomplete as of March 2004. In part, this requires further institutional steps to be taken. First, the designation of all magistrates' courts as courts with jurisdiction over the PAIA was delayed by drafting problems in the initial legislation.²⁷ More accessible than the High Courts, these courts are still not available to PAIA requesters and, three years after the commencement of the legislation, do not have any clear schedule for becoming available.²⁸ Second, the confusion and delays surrounding the regulation of, and deadlines for, the publication of manuals as required in the Act were considerable.²⁹ After several extensions, the Minister finally opted for a 30 August 2003 deadline for publication of manuals by large public companies and public bodies while exempting smaller private bodies and individuals.³⁰ The manuals issue has consumed a large portion of the limited SA Human Rights Commission's attention and available resources and has not helped increase public support for the access to information regime.³¹ The commission has wisely recommended that the exemption for manuals with respect to most private bodies be entrenched in the PAIA legislation itself. Indeed, the commission itself has begun to encourage and enhance the debate regarding the appropriate mechanisms for enforcing the right of access to information.

Beyond addressing implementation delays, there are several changes to the regime itself that are needed. Perhaps the most urgent is the need for a mechanism able to resolve disputes at an intermediate stage between internal appeals and judicial review. It seems unlikely that the designation of magistrates' courts with PAIA jurisdiction will fill this gap. One proposal for addressing this need is the establishment of an information commission.³² However, this proposal has raised questions regarding cost and principle (particularly with a view to the Law Commission's current investigation into the need for privacy and data protection legislation which appears likely to include proposing some sort of privacy or combined information and privacy commissioner). Interim proposals have suggested giving the SAHRC a mediation or recommendation function similar to the one it enjoys with respect to the Equality Act.³³

In any case, the lack of progress towards implementation does not lie exclusively with rules and laws. Two recent empirical studies have assessed both government compliance with, and citizen usage of, PAIA — what might be thought of as the supply and demand of the market for access to information.³⁴ These studies have reported findings that may not be addressed by further legislative steps. At the end of 2002, SAHA reported a low level of user requests made in terms of the Act.³⁵ On the basis of surveys conducted in 2002 and 2003, the Open Democracy Advice Centre (ODAC) reported a low level of compliance by government bodies and private bodies with PAIA.³⁶ To continue the market metaphor, regardless of whether supply-side or demand-side reforms are needed, it is clear that access to information remains more of a 'product' in a specialist boutique than a thriving mass market. Indeed, a number of questions remain to be answered regarding the Act's impact on the circulation of information, particularly given the Act's packaging — its rather legalistic tone and formidable procedures — what impact does the prospect of its use have in practice on the circulation of information? Particularly at a local government level, how do the Act and other constitutional transparency mechanisms operate to encourage local participation? Indeed, it seems likely that, at the least, the civil society sector as well as the government must do more to promote understanding of the practice of access to information.

An access to information agenda for the next ten years should probably focus on implementation. But in order to implement the right, its governmental and non-governmental advocates must point directly to the links between access to information and the achievement of other goals of a human rights culture. Civil servants must learn and be taught that access to information effectively promotes not only good governance but also the realisation of socio-economic rights. In the security and law-enforcement sector, there needs to be a shift from an information-hoarding approach to an information-sharing one. In the face of ever-changing and serious security threats, such an open but co-ordinated approach is the only effective strategy. Likewise, playing open cards with the public on crime prevention and detection will encourage citizens to participate in local and national efforts against crime. For the private sector, the right of access to information must move beyond encouraging and supplementing a well-functioning market in commercial information, as in *Davis v Clutchco*. Access to information can help ordinary citizens get off an unfair and incorrect credit blacklist as well as assist organised civil society to encourage social and environmental reporting by large national and multinational companies.

In one sense, the aim of all rights of the Bill of Rights is to advance democracy. In this regard, the aim of the right of access to information may significantly advance the ability of citizens to participate in the South African

democracy. There are capacity demands that compliance with the right of access to information places upon the state and its agencies. And there are resource and skill constraints that must be recognised. Still, the most important change that needs to occur within the state is at a conceptual level - where, as far as possible, each official treats each citizen as an equal participant in decision-making.

South Africa is at the global cutting edge of access to information policy. Throughout Africa and the wider world, our legislation is part of a trend towards transparency, a movement driven by both private and public interests.³⁷ But South Africa's global position does not mean that we have established a working access to information regime in this territory. Over the next ten years, it is crucial that the right of access to information be implemented in order to be not only a global cutting edge but a human rights cutting edge.³⁸

Endnotes

- 1 See generally Currie, I. and Klaaren, J. (2002). *The Promotion of Access to Information Act Commentary*. Claremont: Siberlink. pp. 2-3. See also Mathews, A. (1978). *The Darker Reaches of Government: Access to Information About Public Administration in Three Societies*. Cape Town: Juta; and Merrett, C. (1994). *A Culture of Censorship: Secrecy and Intellectual Repression in South Africa*. Cape Town: David Philip.
- 2 Truth and Reconciliation Commission of South Africa. (1998). *Truth and Reconciliation Commission of South Africa Report: Volume One*. Cape Town: Truth and Reconciliation Commission. p. 207.
- 3 Baxter, L. (1984). *Administrative Law*. Cape Town: Juta.
- 4 Mureinik, E. (1993). Reconsidering Review: Participation and Accountability, in *Acta Juridica*. 35.
- 5 Truth and Reconciliation Commission of South Africa, supra note 678, pp. 215-243.
- 6 Ibid. p. 201.
- 7 Cawthra, G. (1993). *Policing South Africa*. Cape Town: David Philip. p. 2.
- 8 *R v Steyn* 1954 (1) SA 324 (A).
- 9 South African Law Reform Commission. (2003). Privacy and Data Protection. Issue Paper 24, Project 124. At 80, 83.
- 10 *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC).
- 11 Klaaren, J. (2000). The New Access to Information Regulation in South Africa. Unpublished paper.
- 12 Ex parte Chairperson of the Constitutional Assembly: In re-certification of the Constitution of the Republic of South Africa, 1996 (4) SA 744 (CC) para 85.
- 13 See generally Currie and Klaaren, supra note 677, and Klaaren, J. and Penfold, G. (2002). Access to Information. In Chaskalson *et al.* (eds). *Constitutional Law of South Africa*. Second Edition. Chapter 62. Cape Town: Juta.
- 14 Calland, R. and Tilley, A. (eds.) (2002). *The Right to Know, The Right to Live*. Cape Town: Open Democracy Advice Centre.
- 15 Ntlama, N. (2003). The Effectiveness of the Promotion of Access to Information Act 2 of 2000 for the Protection of Socio-Economic Rights. In *Stellenbosch Law Review*. 2003 (2) 273.
- 16 *Van Huyssteen NO v Minister of Environmental Affairs and Tourism* 1996 (1) SA 283 (C).
- 17 South African Human Rights Commission. (2004). PAIA Annual Report to Parliament. National Conference on PAIA. (4 February 2004). Unpublished paper.
- 18 Harris, V. (2004). Using the Promotion of Access to Information Act: The Case of the South African History Archive, in *The Right to Know: South Africa's Promotion of Administrative Justice and*

- Access to Information Acts*. pp.180-191. Cape Town: SiberInk. p. 185.
- 19 See generally Steytler, N. (1998). *Constitutional Criminal Procedure*. Durban: Butterworths. pp. 236-245.
- 20 *Shabalala v Attorney-General of the Transvaal* 1996 (1) SA 725 (CC) para 35.
- 21 Harris, supra note 694, at 186. SAHA received access to a large portion of the material on 22 January 2004 and received reasons for refusal of access to the remaining material on 23 January 2004. As of 27 January 2004, litigation in the matter was ongoing.
- 22 Harris, supra note 694, at 183.
- 23 *CCSII Systems (Pty) Ltd v Fakie and Others* NNO 2003 (2) SA 325 (T).
- 24 Business and Human Rights Resource Centre. <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/CapeGencorlawsuitsreSo.Africa>. (19 January 2004).
- 25 *Davis v Clutchco (Pty) Ltd*. 2003 JOL 11220 (C).
- 26 See Currie and Klaaren, supra note 677, pp. 10-11.
- 27 Department of Trade and Industry. (2004). Credit Law Reform. <http://www.dti.gov.za/ccrdlawreview/ccrd.htm>. (1 March 2004).
- 28 The designation by the Minister of Justice and Constitutional Development is in Government Gazette No 25142 of 27 June 2003. The Promotion of Access to Information Amendment Act 54 of 2002 enacted several technical changes to the principal Act's provisions allowing magistrates to exercise statutory powers of review.
- 29 As of 15 February 2004, the PAIA was not being used in the Magistrates' courts because the procedural rules — as required in PAIA section 79 — have not been made by the Rules Board and approved by Parliament and because of uncertainty regarding the notice designating certain magistrates' courts as PAIA courts and specific magistrates as PAIA magistrates. Communication from an official of the Department of Justice and Constitutional Development to Klaaren, J.(16 February 2004); communication from Secretary of the Rules Board to Klaaren, J. (26 February 2004).
- 30 South African Human Rights Commission. (2003). Media Release: PAIA — Exemption for Private Bodies (6 August 2003). http://sahrc.org.za/media_release_8%20_August_2003.htm. (13 January 2004).
- 31 *Government Gazette* No 25410 of 29 August 2003.
- 32 In the 2002 to 2003 reporting period, the Commission's Information Coordinator dealt with 1 571 telephone calls, 1 112 e-mails, and 2,683 instances of 'direct contact with members of the public'. South African Human Rights Commission. (2004). PAIA Annual Report to Parliament. National Conference on PAIA. (4 February 2004). Unpublished paper.
- 33 Open Democracy Advice Centre. (2003). Commissioned Research on the Feasibility of the Establishment of an Information Commissioner's Office. (14 July 2003). South African Human Rights Commission PAIA Workshop. (18 July 2003). Unpublished paper.
- 34 South African History Archive. (2003). Strengthening the Role of the South African Human Rights Commission in Relation to the Promotion of Access to Information Act. (July 2003). South African Human Rights Commission PAIA Workshop. (18 July 2003). Unpublished paper.
- 35 As of January 2004, the SAHRC had not yet finalised its most recent PAIA Report to Parliament required by PAIA Section 84 as part of the Commission's annual reporting to Parliament. This report will provide further empirical data on the level of compliance with and use of PAIA.
- 36 Harris, V. 2002. *Using the Promotion of Access to Information Act*. (December 2002). http://www.wits.ac.za/saha/natal_witness_9.doc. (13 January 2004).
- 37 Open Democracy Advice Centre. (2003). Submission on Behalf of the Open Democracy Advice Centre. (22-23 May 2003). http://www.opendemocracy.org.za/documents/PAIA_Indaba_Submission.doc.(13 January 2004).
- 38 See Banisar, D. (2003). The Freedominfo.org Global Survey. (28 September 2003). <http://freedominfo.org/survey.htm>. (13 January 2004).

Cultural, Religious and Linguistic Rights

Advocate Tseliso Thipanyane

'Tolerance is respect, acceptance and appreciation of the rich diversity of our world's cultures, our forms of expression and ways of being human. It is fostered by knowledge, openness, communication and freedom of thought, conscience and belief. Tolerance is harmony in difference.'

1. Introduction

1.1 Human Rights and Human Dignity

Human beings have and continue to group themselves into communities or societies on the basis of certain similarities such as language, appearance, culture or religion. Communities or societies that become more powerful than others in economic and political terms have had a tendency to maintain and sustain such advantage over less powerful communities or societies.

Where there are differences between powerful and weaker communities or societies, such as in language, religion, culture, appearance or even geographic location, such differences have been, and are often, used as a basis for distinction between the powerful and weaker communities or societies and sometimes, if not the general rule, the exploitation and oppression of the weaker communities or societies by the more powerful ones — the basis of racism and intolerance amongst human beings.

What is also interesting is that where there are no visible distinctions between two communities or societies, class or differences in wealth accumulation are then used as a basis for the distinction between the powerful and less powerful groups, including the continued domination and exploitation of the less powerful groups by the more powerful groups.

In this regard, Samuel P. Huntington in his book, *The Clash of Civilisations and the Remaking of World Order*, correctly observed:

The distribution of cultures in the world reflects the distribution of power. Trade may or may not follow the

flag, but culture almost always follows power. Throughout history the expansion of the power of a civilisation has usually occurred simultaneously with the flowering of its culture and has almost always involved it using that power to extend its values, practices, and institutions to other societies . . . Roman power created a near-universal civilisation within the limited confines of the Classical world. Western power in the form of European colonialism in the 19th century and American hegemony in the 20th century extended Western culture throughout much of the contemporary world.¹

On the other hand, however, the essence of human rights is to promote positive relationships amongst all human beings regardless of their differences, whether real or perceived; relationships that will foster peaceful and prosperous co-existence amongst human beings. In this regard, human dignity, a fundamental basis of human rights, is about human beings, as individuals and as a collective; who they are, how and where they live, what language they speak, what and how they eat and wear, and how they interact with one another.

On the relation between human dignity and human rights, Arthur Chaskalson, the former Chief Justice and then the President of the Constitutional Court, said in the third Bram Fischer Lecture:

Respect for human dignity is a value implicit in almost all the rights enumerated in the Universal Declaration as it must be in any order based on human rights.²

The Constitution has made this important link between human rights and human dignity. The very first section of the Constitution provides that our society is founded on 'human dignity, the achievement of equality and the advancement of human rights and freedoms.'³ The Bill of Rights, the cornerstone of our democracy, which 'enshrines the democratic values of human dignity, equality and

freedom,¹⁴ also provides human dignity as a fundamental human right.⁵

The Constitutional Court in its numerous judgments has also re-affirmed and re-emphasised the fact that human dignity constitutes the core or heart of human rights. In *Khosa v Minister of Social Development*; and *Mahlaule v Minister of Social Development*, the court stated that 'dignity and equality are founding values of the Constitution and lie at the heart of the Bill of Rights'.⁶

In *President of the Republic of South Africa and Another v Hugo*, the court held:

At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that is the goal of the Constitution should not be forgotten or overlooked.⁷

1.2 Human dignity and culture

Culture, which is also about human beings and how they conduct their lives, is thus an essential component of human rights. Alan Brudner, the Albert Abel Professor of Law at the University of Toronto, in defining culture wrote:

By culture I mean the shared ways, speech, wisdom, memory, and self-interpretation (through histories, literature, song, dance, art, etc) of families that are united in a firm disposition to live by and perpetuate those ways, to transmit the wisdom to the next generation, and to interpret in their daily lives the customs and traditions held in collective memory.⁸

R.M. Keesing defined culture as a system that underlies 'the ways in which people live'.⁹ Professor Thandabantu Nhlapo in turn defined it as 'a device, which enables us to give meaning to the world, to make statements to one another about ourselves and about the universe'.¹⁰ The Declaration on Race and Racial Prejudice described culture in the following manner:

Culture, as a product of all human beings and a common heritage of mankind, and education in its broadest sense, offers men and women increasingly effective means of adaptation, enabling them not only to affirm that they are born equal in dignity and rights, but also to recognise that they should respect the right of all groups to their own cultural identity and the development of their distinctive cultural life within the national and international contexts, it being understood that it rests with each group to decide in complete freedom on the maintenance, and, if appropriate, the adaptation or enrichment of the values which it regards as essential to its identity.¹¹

On religion and human dignity, the Constitutional Court held:

The right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person's dignity. Yet freedom of religion goes beyond protecting the inviolability of the individual conscience. For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights. It affects the believer's view of society and founds the distinction between right and wrong. It expresses itself in the affirmation and continuity of powerful traditions that have an ancient character transcending historical epochs and national boundaries.¹²

Despite the fact that culture is a human right and is meant to promote the dignity of human beings, it has, unfortunately, also been used, like many other aspects of human life and behaviour, to defeat and undermine the essence of human rights — the promotion and protection of the dignity of human beings.

This chapter, therefore, seeks to review the developments pertaining to the promotion and protection of cultural rights in the broad sense of these rights (i.e. including religion and language) during the colonial/apartheid era and during the first decade of democratic and human rights-based governance in South Africa. Challenges pertaining to the promotion and protection of these rights during the first decade of democratic governance and recommendations thereto will also be covered.

The chapter will thus be divided into three main parts. Part 1 deals with the historical background pertaining to the developments around cultural rights in South Africa during the colonial/apartheid era and the ensuing struggle for a universal enjoyment of these rights during the same period. Part 2 entails an overview of progress made during the first decade of democratic governance in South Africa towards the promotion and protection of these rights. Part 3 is an analysis of some of the challenges facing the promotion of these rights in the first and the next decade of democratic governance and how these challenges could be addressed.

2 Part 1: Historical Background

2.1 Effects of Colonisation

One dominant and lasting feature of colonisation and the apartheid system in South Africa was the subjugation of the cultures of African peoples. The cultures and

way of life of African peoples and other colonised people were referred to as barbaric, uncivilised, backwards, heathen and 'repugnant to the European sense of justice, morality and good conscience'.¹³ This cultural imperialism based on racial superiority of Europeans over Africans¹⁴ led to the dehumanisation of African peoples and other colonised peoples in the continent.¹⁵ Writing on the effects of colonisation of African peoples and their cultures, Steve Biko lamented:

One writer makes the point that in an effort to destroy completely the structures that had been built up in the African Society and to impose their imperialism with an unnerving totality the colonialists were not satisfied merely with holding a people in their grip and emptying the Native's brain of all form and content, they turned to the past of the oppressed people and distorted, disfigured and destroyed it. No longer was reference made to African culture, it became barbarism. Africa was the 'dark continent'. Religious practices and customs were referred to as superstition. The history of African Society was reduced to tribal battles and internecine wars. There was no conscious migration by the people from one place of abode to another. No, it was always flight from one tyrant who wanted to defeat the tribe not for any positive reason but merely to wipe them out of the face of this earth.

No wonder the African child learns to hate his heritage in his days at school. So negative is the image presented to him that he tends to find solace only in close identification with the white society.¹⁶

Expounding on the superiority notion of the European colonisers over African peoples and their cultures, which was used as a basis for the exploitation of the African peoples including the cross-Atlantic slavery, Adam Hochschild, in his well-known book, *King Leopold's Ghost*, wrote:

To Europeans, Africans were inferior beings: lazy, uncivilised, little better than animals. In fact, the most common way they were put to work was, like animals, as beasts of burden. In any system of terror, the functionaries must first of all see the victims as less than human, and Victorian ideas about race provide such a foundation.¹⁷

Many other writers have commented on this view.¹⁸ Amongst them was John Reader who in his book, *Africa: A Biography of the Continent*, observed that:

The colonial assumption of superior knowledge in all things was based first on the conviction of late Victorian Europe, and second on the belief that Africa had had no history or culture worthy of the name until the European colonisers accepted the 'sacred trust of civilisation'.

It was not without consequence that 'the European movement into Africa coincided with the nineteenth- and twentieth-century peak of racism and cultural chauvinism in Europe itself'. The combined achievements of commerce, Christianity, and military force had given Europe a very high opinion of itself, which even some scientific thinking was persuaded to support. Social Darwinism put Europeans at the top of the evolutionary ladder; Africans were close to the bottom, a rung or two above the inhabitants of Tierra del Fuego and Tasmania.¹⁹

Language and religion being integral parts of culture were also used as the basis of this superiority notion and its manifestations.²⁰ On the effects of colonisation and languages in general, Samuel P. Huntington wrote:

Throughout history the distribution of language in the world has reflected the distribution of power in the world. The most widely spoken languages — English, Mandarin, Spanish, French, Arabic, Russian — are or were the languages of imperial states which actively promoted use of their languages by other peoples . . . Britain and France insisted on the use of their languages in their colonies.²¹

And on the effect of colonialism on the African culture, particularly African languages, the Cultural Charter for Africa states:

Cultural domination led to the depersonalisation of the African peoples, falsified their history, systematically disparaged and combated African values, and tried to replace progressively and officially, their languages by that of the coloniser . . .²²

Writing on the impact of colonisation on African religion and the role played by Christian missionaries, Walter Rodney, in his book *How Europe Underdeveloped Africa*, said:²³

The Christian missionaries were as much part of the colonising forces as were the explorers, traders, and soldiers. There may be room for arguing whether in a given colony the missionaries brought the other colonialist forces or vice versa, but there is no doubting the fact that missionaries were agents of colonialism in the practical sense, whether or not they saw themselves in that light. The imperialist adventurer Sir Henry Johnston disliked missionaries, but he conceded in praise of them 'each mission station is an exercise in colonisation . . . In serving colonialism, the church often took up the role of arbiter of what was culturally correct. African ancestral beliefs were equated with the devil (who was black anyway), and it took a very long time before some European churchmen accepted prevailing African beliefs as constituting religion rather than mere witchcraft and magic'.

In encapsulating the net impact of colonisation of the culture of African peoples and, indeed, any colonised peoples, Frantz Fanon correctly noted:²⁴

In the colonial context the settler only ends his work of breaking the native when the latter admits loudly and intelligibly the supremacy of the white man's values.

2.2 Effects of Apartheid

The apartheid system, a refined and more advanced form of colonisation in South Africa, was an embodiment of the 'disregard and contempt for human rights resulted in barbarous acts which outraged the conscience of mankind'.²⁵ In 1973, the United Nations' International Convention on the Suppression and Punishment of the Crime of Apartheid declared the apartheid system a crime against humanity. Apartheid was based on the false belief of the superiority of Europeans over Africans and the belief that the Afrikaner nation 'had been specially created by God from members of several different Europeans brought together on the soil of South Africa to fulfil a divinely ordained role in this continent'.²⁶ This divine role entailed the oppression and exploitation of African peoples in South Africa and neighbouring regions.

Some of the policies and practices of the apartheid system declared as a crime against humanity included 'legislative and other measures calculated to prevent a racial group or groups from participation amongst others in the cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups'.²⁷

The Constitutional Court in *Dawood and Another v Minister of Home Affairs and Others* referred to this cultural imperialism in the form of apartheid as a cruel denial of the dignity of black South Africans.²⁸

Christianity played a central role in the conceptualisation and implementation of apartheid policies and practices. In its finding arising out of the Faith Communities Hearings, the Truth and Reconciliation of South Africa came to the following conclusion:

Christianity, as the dominant religion in South Africa, promoted the ideology of apartheid in a range of different ways. These included the overt promotion of biblical and theological teaching in support of apartheid, as was the case in the white Afrikaans Reformed Churches . . . The commission acknowledges, at the same time, that some within the religious communities boldly resisted apartheid and paid a heavy price for doing so. It was further noted with appreciation, that all the religious groups who appeared before the commission acknowledged their complicity with apartheid.²⁹

On the role of the apartheid state and religion, the Truth and Reconciliation Commission Report stated:

Despite the many different religious allegiances of its subjects, the apartheid state saw itself as the guardian of 'Christian civilisation' in southern Africa. From the time of arrival of the colonists in the seventeenth

century, other faith communities were barely tolerated. Using education as its weapon, the apartheid state perpetuated this. Christian National Education was imposed on non-Christian faith communities.³⁰

And on the marginalisation of other faiths, especially African Traditional Religion and Islam, the Truth and Reconciliation Commission said:

Churches willingly engaged in fomenting division in society and were paralysed by propaganda. The demonisation and dehumanisation of other faith communities were prevalent, especially in conservative and right wing Christian groups. In 1986, at the same synod where its policy of uncritical support for apartheid was beginning to be challenged, the Dutch Reformed Church proclaimed Islam a 'false religion'. The victimisation of African Traditional Religion by Christians was highlighted in the submission of Nokuzola Mndende: Africans were forced to become Christians, as baptismal certificate was a common form of identification . . . As Farid Esack observed at the hearings, the past was only partly about apartheid, security laws and so on: 'It was also about Christian triumphalism.' All non-Christian faith communities were victimised by an aggressively 'Christian' state, and *die Islamie gevaar* took its place alongside the other enemies of the state.³¹

The *Broederbond*, led predominately by Afrikaner theologians and other academics, played a leading role in the elaboration of an ideology for Afrikaner nationalism — the bedrock of apartheid.³²

2.3 Struggle Against Colonialism and Apartheid

The struggle against colonialism and apartheid in South Africa was thus a struggle for freedom and for human rights. This struggle was also for cultural rights and cultural freedoms of African peoples and other oppressed groups in South Africa. In view of the importance of culture and its link to human dignity and human rights, the oppressed people of South Africa declared in the Freedom Charter,³³ — 'The Doors of Learning and Culture Shall be Open':

The government shall discover, develop and encourage national talent
for the enhancement of our cultural life
All the cultural treasures of mankind shall be open to all . . .
The aim of education shall be to teach the youth to love their people
and their culture, to honour human brotherhood, liberty and peace.

The culmination of this struggle was the ushering in of the first democratic and non-racial government in April 1994.

3. Overview of Progress made in the First Ten Years of Democracy

3.1 Constitutional Obligations

One of the challenges that faced the new democratic and non-racial South Africa in 1994 was the legacy of apartheid and colonisation in the form of a diverse and deeply divided society in terms of race, culture, religion and language and how to overcome these divisions and tensions in order to build a truly united nation.

These divisions and challenges were indeed recognised by the Constitution of South Africa, Act 108 of 1996, one of the main products of the struggle for freedom and human rights in South Africa. One of the key features of the Preamble of the Constitution is the recognition of the diverse make-up of the South African society and a commitment to 'heal the divisions of the past' and build a united and democratic society.

The Constitution thus recognises the various languages used by the people and imposes a duty on the state to 'elevate the status' and 'advance' the use of indigenous languages that were suppressed in the past while ensuring the promotion and respect of all languages 'commonly used in South Africa'.³⁴ The Constitution also makes very key provisions pertaining to language, culture and religion. These are sections 15(1), 30 and 31:

Section 15(1) states:

Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

Section 30 provides:

Everyone has the right to use the language and to participate in the cultural life of their choice . . .

Section 31 provides:

Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community —

- (a) to enjoy their culture, practice their religion and use their language; and
- (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society. . . .

These provisions and many others are indeed a break with a past that undermined the dignity of human beings, particularly African people, and that denigrated their culture fundamental to their dignity and their worth as human beings. These provisions are also in line with Article 1 of the Declaration on Race and Racial Prejudice, which provides:

All human beings belong to a single species and are descended from a common stock. They are born equal in dignity and rights and all an integral part of humanity;

All individuals and groups have the right to be

different, to consider themselves different and to be regarded as such. However, the diversity of lifestyles and the right to be different may not, in any circumstances, serve as a pretext for racial prejudice; they may not justify either in law or in fact any discriminatory practice whatsoever, nor provide a ground for the policy of apartheid, which is the extreme form of racism;

Identity of origin in no way affects the fact that human beings can and may live differently, nor does it preclude the existence of differences based on cultural, environmental and historical diversity nor the right to maintain cultural identity.³⁵

The Constitutional Court has also expressed similar sentiments, in *Dawood and Another v Minister of Home Affairs and Others*. The court said:

The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings . . . dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected.³⁶

And in *Christian Education South Africa v Minister of Education*, the Constitutional Court observed:

[T]here are a number of other provisions designed to protect the members of communities. They underline the constitutional value of acknowledging diversity and pluralism in our society and give a particular texture to the broadly phrased right of association contained in Section 18. Taken together, they affirm the right of people to be who they are without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the 'right to be different'. In each case, space has been found for members of communities to depart from a general norm. These provisions collectively and separately acknowledge the rich tapestry constituted by civil society, indicating in particular that language, culture and religion constitute a strong weave in the overall pattern.³⁷

In order to ensure that the above constitutional provisions are implemented, the Constitution has also made provision for the establishment of constitutional bodies that will help to achieve the intended constitutional objectives or goals. Two of these bodies are the Pan South African Language Board³⁸ and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.³⁹

The constitutional mandate of the Pan South African Language Board is to promote cultural diversity and tolerance by promoting multilingualism in South Africa.

This entails, amongst other things, the promotion and creation of conditions for the development and use of all official languages in South Africa, including the Khoi, Nama and San language and sign language and to promote and ensure respect for all languages commonly used by communities in South Africa.⁴⁰

The constitutional mandate of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities is to promote and protect the rights of cultural, religious and linguistic communities in the context of 'the building of a truly united South African nation bound by a common loyalty' to South Africa and all its peoples.⁴¹ This mandate also entails the promotion and development of 'peace, friendship, humanity, tolerance and national unity among and within cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association'.⁴² Central to the mandate of the commission, however, is the obligation to 'promote the right of communities to develop their historically diminished heritage',⁴³ be it culture, religion or language.

The enabling legislation of the Commission provides that the Commission may, in order to realise its mandate, carry out the following activities amongst its other functions:⁴⁴

Conduct programmes to promote respect for and further the protection of the rights of cultural, religious and linguistic communities;

Assist in the development of strategies that facilitate the full and active participation of cultural, religious and linguistic communities in nation-building in South Africa;

Promote awareness among the youth of South Africa of the diversity of cultural, religious and linguistic communities and their rights; and

Promote appreciation for cultural, religious and linguistic diversity.⁴⁵

These two institutions can thus make significant contributions in addressing the legacy of colonisation and apartheid on the cultures, religions and languages of many South African communities that were denigrated while at the same time promoting cultural diversity and true nation-building in South Africa.

There are other statutory and non-statutory bodies that have been established to strengthen democratic governance in South Africa, amongst these are the South African Human Rights Commission,⁴⁶ the Commission for Gender Equality⁴⁷ and the National House of Traditional Leaders.⁴⁸

Other than the above measures, there are other policy, legislative, and institutional measures that have been instituted since 1994 to address the legacy of the past undemocratic regimes and thus promote cultural, religious and linguistic rights in South Africa. Some of these measures are briefly discussed.

3.2 Policy Measures

3.2.1 White Paper on Reconstruction and Development, 1994⁴⁹

The White Paper reflected the government's thinking on the issues of culture and how cultural rights will be promoted in post-apartheid South Africa through policies, laws and other measures. In this regard, the government stated in the White Paper:

The cultural diversity of our people is a major national asset. The RDP will support an arts and cultural programme which will provide access to all and draw on the capacities of young and old in all communities to give creative expression to the diversity and the promise of the future.⁵⁰

3.2.2 White Paper on Arts, Culture and Heritage: All our legacies, our common future, 1996⁵¹

This document, building on the Reconstruction and Development Programme 'sets out government policy for establishing the optimum funding arrangements and institutional frameworks for the creation, promotion and protection of South African arts, culture, heritage and the associated practitioners'.⁵²

On the challenges for transformation in the manifestation of culture in the post-apartheid South Africa, the White Paper provides:

This [White Paper] deals with one of the most emotive matters to face the new government. Cultural expression and identity stand alongside language rights and access to land as some of the most pressing issues of our times. Unsurprisingly, the dominant themes which characterise these fields have commonality with themes elsewhere: governance, access and finance are the major challenges, and it is these which we must tackle head on.⁵³

The operational principles that will guide the establishment of new structures like the National Arts Council intended to 'bring equity to the arts and culture dispensation', are some of the key features of the White Paper.⁵⁴

3.2.3 Language in Education Policy, 1997⁵⁵

This policy makes several provisions pertaining to the promotion of cultural diversity through multilingualism in South Africa. The Preamble of the policy provides:

The inherited language-in-education policy in South Africa has been fraught with tensions, contradictions and sensitivities, and underpinned by racial and linguistic discrimination. A number of these discriminatory policies have affected either the access of the learners to the education system or their success within it.

The Preamble goes on to state:

The new language in education policy is conceived of as an integral and necessary aspect of the new government's strategy of building a non-racial nation in South Africa. It is meant to facilitate communication across barriers of colour, language and region, while at the same time creating an environment in which respect for language other than one's own would be encouraged.

The main aim of this policy, therefore, is to promote and develop all official languages in South Africa and to 'develop programmes for the redress of previously disadvantaged languages'.

Language Policy for Higher Education, 2002:⁵⁶ This policy is along the same line as the Language in Education Policy above and provides for the following amongst other provisions:

The development, in the medium- to long-term, of South African languages as mediums of instruction in higher education, alongside English and Afrikaans.

The retention and strengthening of Afrikaans as a language of scholarship and science.

The encouragement of multilingualism in institutional policies and practices.

In a case for multilingualism, the policy document cites a speech made by President Thabo Mbeki on 27 August 1999, wherein he said:

... the building blocks of this nation are all our languages working together, our unique idiomatic expressions that reveal the inner meanings of our experiences. These are the foundations on which our common dream of nationhood should be built ... The nurturing of this reality depends on our willingness to learn the languages of others, so that we in practice accord all our languages the same respect. In sharing one's language with another, one does not lose possession of one's words, but agrees to share these words so as to enrich the lives of others. For it is when the borderline between one language and another is erased, when the social barriers between the speaker of one language and another are broken, that a bridge is built, connecting what were previously two separate sites into one big space for human interaction, and out of this, a new world emerges and a new nation is born.

3.2.4 Legislative Measures

In line with South Africa's constitutional objectives and numerous policy directives, including the ones above, several pieces of legislation have also been enacted by the South African Parliament in order to promote and protect cultural, religious and linguistic rights. Other than legislative measures referred to above already, some of the measures include the following:

Culture Promotion Act;⁵⁷ Cultural Institutions Act;⁵⁸ National Heritage Council Act;⁵⁹ National Education Policy Act;⁶⁰ South African Schools Act;⁶¹ National Sport and Recreation Act;⁶² South African Geographical Names Council Act;⁶³ Recognition of Customary Marriages Act;⁶⁴ Traditional Leadership and Governance Framework Act;⁶⁵ Films and Publication Act;⁶⁶ Promotion of Equality and Prevention of Unfair Discrimination Act.⁶⁷

The Cultural Promotion Act, as amended, is intended to provide for 'the preservation, development, fostering and extension of culture in South Africa' through, amongst other measures, the establishment of regional councils for cultural affairs. The National Heritage Council Act provides for the establishment of the National Heritage Council whose main function is to 'develop, promote and protect the national heritage for present and future generations' in South Africa. One of the main features of the South African Schools Act in this context is the provision for the determination of language policies in public schools without racial discrimination and the regulation of religious observances in public schools on an equitable and free and voluntary basis.

While sports and recreation are one of the unifying cultural activities amongst nations and within societies, this was not the case under apartheid and colonialism in South Africa, where black people were generally excluded from engaging in sporting activities with fellow white South Africans. Sports and recreation facilities for many black people were in poor condition if not non-existent for most sporting codes. The National Sport and Recreation Act seeks to address this by providing for measures to correct these imbalances and thus promote 'equity and democracy in sport and recreation'.⁶⁸ This will be done by amongst other things, 'instituting necessary affirmative action controls which will ensure that national teams reflect all parties involved in the process' and giving priority to neglected rural areas in terms of the development and the delivery of sport and recreation.⁶⁹

During the apartheid and colonial era, there were many names given to geographical places that were derogatory, especially to black peoples, names such as 'kaffirspruit', 'kaffirfontein', 'boesman-dam' and so forth and names based on persons that were largely behind the oppression of black people such as Verwoerd and Malan are examples of this phenomenon.⁷⁰ The enactment of the South African Geographic Names Council Act will thus make a significant contribution in the removal of these names and the standardisation of geographic names in line with current constitutional norms and values.

The Recognition of Customary Marriages Act is also an important development in addressing the disregard of African customary law marriages during the apartheid and colonial era.⁷¹ African customary law marriages are now, through this statute, recognised as

fully-fledged marriages. What is controversial about the Act though, amongst a few other provisions, is the recognition of polygamous marriages that is seen in many quarters as being inconsistent with the prevailing constitutional norms and standards, especially provisions pertaining to gender equality whilst at the same time not availing the same provision to women.⁷² However, such polygamous marriages can now only take place upon the approval of a court of law.⁷³ On the other hand, the provision that a customary marriage is 'a marriage in community of property and of profit and loss between the spouses' could also be regarded as an unacceptable intrusion into customary law, especially the issue of property in the context of communal ownership and inheritance and succession.⁷⁴

The Traditional Leadership and Governance Act in accordance with the constitutional recognition and provision for traditional leadership rule and customary law, provides for the recognition of traditional communities and a 'national framework and norms and standards that define the place and role of traditional leadership within the system of democratic governance'.

One of the main features of the Films and Publications Act is the criminalisation under certain circumstances of the distribution of any publication known to, amongst other things, advocate 'hatred that is based on race, ethnicity, gender or religion and which constitutes incitement to cause harm'.⁷⁵ The Promotion of Equality and Prevention of Unfair Discrimination Act also, though in a very broad manner, prohibits the publication, propagation, advocacy and communication of words that could be regarded as promoting or propagating hatred against a person on the basis of ethnicity, religion, culture, or language, amongst other grounds.⁷⁶

Other than laws passed by Parliament, there is also the South African Languages Bill,⁷⁷ which once enacted and implemented will make a significant contribution to the promotion of cultural diversity. The main objective of the Bill in terms of its Preamble is to:

[P]rovide for an enabling framework for promoting South Africa's linguistic diversity and encouraging respect for language rights within the framework of building and consolidating a united, democratic South African nation, taking into account the broad acceptance of linguistic diversity, social justice, the principle of equal access to public services and programmes, respect for language rights, the establishment of language services at all levels of government, the powers and functions of such services, and matters therewith.⁷⁸

This Bill is one of the most advanced pieces of draft legislation in the context of multilingualism. One of the objects of this Act is 'to enable all South Africans to use the official languages of their choice as a matter of right within the contexts specified in this Act with a view to ensuring equal access to government services and

programmes, and to knowledge and information.' Linked to this and other provisions of the Bill are the guiding principles that inform the Bill, some of these are:

The promotion and accommodation of linguistic diversity must be pursued in accordance with the provisions of the Constitution and relevant international law.

The marginalisation of the indigenous languages and South African Sign Language/s must be progressively eliminated.

The learning of South African languages, especially the indigenous languages, must be encouraged.⁷⁹

On language policy, the Bill provides that 'all official language shall be used equitably and enjoy parity of esteem'. The Bill also provides that the national government 'must not use less than four languages for any given purpose provided for in Section 7(b) of the Bill. This measure will apply to legislative, executive and judicial functions of government'.⁸⁰ However, not much progress has been made since the Bill was drafted and presented to Cabinet in 2000 — the Bill has yet to be tabled in Parliament.

South Africa has also ratified several regional and international human rights treaties that provide for the promotion and protection of human rights, among them: The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),⁸¹ The International Convention on the Elimination of All Forms of Racial Discrimination (CERD),⁸² The African Charter on Human and Peoples' Rights,⁸³ and The International Covenant on Civil and Political Rights.⁸⁴

3.3 Institutional Measures

The constitutional bodies referred to above have, in their different ways in terms of their mandates, played an important role in the promotion and protection of cultural, religious and linguistic rights and will continue to do so in the future. Of note in this regard are the two national consultative conferences that the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities is required to hold during its term of five years.⁸⁵ The purpose of these conferences, which comprises of delegates from cultural, religious and linguistic communities amongst many other delegates, includes:

The evaluation of progress in South Africa with regard to (a) the promotion of respect for and the furthering of the protection of the rights of cultural, religious and linguistic groups and (b) the furthering of peace, friendship, humanity, tolerance and national unity among and within cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association; and promoting appreciation for cultural, religious and linguistic diversity.

The first consultative conference convened by this commission was in November-December 2004 and was attended by over 500 delegates from all over the country and from government and civil society sectors. These consultative conferences will certainly play an important role in helping to realise the constitutional objectives of nation-building and the promotion of cultural diversity.

The South African Law Reform Commission, previously known as the South African Law Commission,⁸⁶ has also played an important role in the promotion of cultural diversity in South Africa. Two examples of note are the Commission's two reports on The Harmonisation of the Common Law and the Indigenous Law⁸⁷ and Islamic Marriages and Related Matters.⁸⁸ The Commission's recommendations on the Customary Marriages certainly influenced the enactment of the Extension of Customary Law Marriage Act discussed above.⁸⁹ One of the Commission's recommendations in this regard stated:

In order to remove the anomalies created by many years of discrimination, customary marriages, both existing and future unions, must now be fully recognised. To do so will comply with sections 9, 15, 30 and 31 of the Constitution, provisions which suggest that the same effect should be given to African cultural institutions as to those of the Western tradition.

The Commission's Report on Islamic Marriages and Related Matters provides for the recognition of Moslem marriages and to the effect produced a draft Bill, the Muslim Marriages Bill. This is a positive development in the promotion of cultural diversity as before the *Amod v Multilateral Motor Vehicle Accidents Fund*⁹⁰ of 1999, Moslem marriages were not recognised by the law and the court as they were regarded as 'null and void *ab initio*, and contrary to public policy'.⁹¹ However, there has since been no meaningful development as there is no Bill that has been tabled before Parliament by the Department of Justice and Constitutional Development.

Other than constitutional bodies, other statutory bodies and relevant organs of civil society have played an important role in the promotion and protection of cultural diversity in South Africa. The public broadcaster, the South African Broadcasting Corporation, and the South African Council of Churches are some of the institutions that have made significant contributions in this regard. According to its mission statement, the South African Council of Churches is working to achieve 'moral reconstruction' in South Africa and the Council focuses on issues of justice and reconciliation amongst other issues.⁹² In its programme, Proclaiming Reconciliation, the Council states:

South Africa is plagued by a history of alienation, which is manifested in economic, gender, and race, ethnic, religious and political differences. This minis-

try seeks to create a climate of acceptance and tolerance, truth, justice and forgiveness throughout the nation.⁹³

With the previous role played by Christianity in providing a theoretical basis for colonialism and apartheid and the resultant divisions and the marginalisation of certain cultures, religions and languages in the name of Christianity, the South African Council of Churches, as the main representative of Christian organisations in South Africa, has an important role and moral responsibility towards the promotion of cultural diversity in South Africa.

3.4 *The Judiciary*

Notwithstanding the role the judiciary played under the apartheid regime, the post-apartheid judiciary has played a central role in the consolidation of the fledgling South African democracy and the promotion and protection of cultural diversity within a human rights framework provided by the Constitution. The Constitutional Court, despite some of its questionable or controversial judgments such as *Prince v The Law Society of the Cape of Good Hope*⁹⁴ and *Bhe and Others v Magistrate, Khayelitsha and Others; Sibisi v Sithole and Others; SA Human Rights Commission and Another v President of the RSA and Another*,⁹⁵ has passed several judgments emphasising the need for the promotion and protection of cultural diversity in South Africa.⁹⁶ In the *Prince* judgment the Constitutional Court said:

Our society is diverse. It is comprised of men and women of different cultural, social, religious and linguistic backgrounds. Our Constitution recognises this diversity. This is apparent in the recognition of the different languages; the prohibition of discrimination on the grounds of, amongst other things, religion, ethnic and social origin; and the recognition of freedom of religion and worship. The protection of diversity is the hallmark of a free and open society.⁹⁷

On religious rights, the Constitutional Court in *State v Lawrence, State v Nigel, State v Solberg*⁹⁸ said:

South Africa is an open and democratic society with a non-sectarian state that guarantees freedom of worship; is respectful of and accommodatory towards, rather than hostile to or walled-off from, religion; acknowledges the multi-faith and multi-belief nature of the country; does not favour one religious creed or doctrinal creed or doctrinal; truth above another; accepts the intensely personal nature of individual conscience and affirms the intrinsically voluntary and non-coerced character of belief; respects the rights of non-believers; and does not impose orthodoxies of thought or require conformity of conduct in terms of any particular world view.⁹⁹

On the balancing of cultural rights and other provisions of the Bill of Rights, the Constitutional Court said:

The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the state should, whenever possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law.¹⁰⁰

The above decision of the Constitutional Court is also an important contribution in the development of international human rights law. In this regard, the UNESCO Universal Declaration on Cultural Diversity provides:

The defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples. No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor limit their scope.¹⁰¹

3.5 Challenges for the Promotion and Protection of Cultural, Religious and Linguistic Rights

Notwithstanding the above-mentioned commendable measures and many others instituted to address the legacy of colonisation and apartheid and the fact that South Africa has done relatively well in the promotion and protection of cultural diversity in the first decade of its democratic governance, there is still a long way to go towards the building of a true South African nation. There are two main challenges in this regard, these being the effective implementation of many of the measures instituted by the state towards the promotion and protection of cultural diversity and the divisions or subtle hostilities that still characterise many of the various South African communities and that influence their attitude towards each other.

3.6 Policy and Legislative Measures

On measures largely instituted by the state, there is still much room for improvement in the implementation of the measures, notwithstanding the impressive progress made so far. There are still some gaps and lapses in the implementation of some of the measures instituted, especially at the level of civil servants.¹⁰²

Other than the issue of resource constraints, capacity could be cited as one of the explanations for these gaps and lapses. One of the major factors behind this situation is the lack of a proper conceptual understanding of the importance and role of cultural diversity in the consolidation of democracy and the advancement of the South African society at large. This results in issues of cultural diversity taking a back seat and being regarded as soft issues or low priority issues.

As a result, ten years into the post-apartheid South Africa, the colonial and apartheid hegemony in terms of language, religion and culture is still weighing heavily on the necks of the formerly oppressed members of the South African community, with both English and Afrikaans as languages and cultures having an unhealthy dominance. The inadequate usage of African languages in many public and private sectors is of great concern and indeed a threat to the promotion of cultural diversity in South Africa.¹⁰³ Expressing similar concerns, the Ministerial Committee appointed by the Ministry of Education in September 2003 to advise on the development of indigenous African languages¹⁰⁴ as a medium of instruction in higher education, stated as follows in its report:

Emanating from our deliberations is our strong view that a crisis is looming in South Africa regarding the preservation, maintenance and associated identity of our indigenous African languages. The strong preference for English instead of African languages in all the formal sectors of society, both private and public, continues unabated in general social practice. Even in institutions of higher learning that are the focus of this current project, investment — both human and financial — in the teaching and study of African languages shows a declining trend. Departments of African Languages are closing down because student numbers have fallen drastically. The future of the indigenous African languages as mediums of instruction is bleak unless a long-range plan is devised that could be implemented as a concerted effort over the next two to three decades.¹⁰⁵

There is also a need to explore the possibility of according an 'official language status' to the Khoi, Nama and San Languages in terms of Section 6(1) of the Constitution. These indigenous languages which are threatened with extinction, are currently not accorded this status and the reasons for this situation, save for some speculation, are unknown to the writer.

3.7 Constitutional and Statutory Bodies

Constitutional and other statutory bodies tasked with the promotion and protection of cultural diversity have generally not fully grasped the importance of cultural diversity in the promotion and protection of human rights and, as a result, there has been insufficient co-ordination of efforts and collaborations amongst these bodies. These bodies also account to different

Parliamentary committees that also appear not to have proper communication channels. For example, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, one of the key institutions in the promotion of cultural diversity accounts to Parliament through the Portfolio Committee on Provincial and Local Government and not to the most appropriate Portfolio Committee on Arts and Culture. There are also overlaps in the mandates and operations of these bodies that need to be addressed more effectively and decisively as these overlaps negatively affect the effectiveness of these bodies in promoting cultural diversity.

The role, which these institutions themselves are playing in the promotion and protection of cultural diversity within their own structures, is also a matter of concern. How many of them are adequately promoting, for example, multilingualism, how many of them have their policies and other important documents and reports in African languages?

These institutions must also play a more effective role in ensuring that the promotion and protection of human rights is not undermined under the guise of cultural diversity as there are indeed many cultural practices that are in conflict with human rights norms and values.¹⁰⁶

3.8 *The Judiciary*

While the judiciary has played an important role in giving a proper human rights context in the promotion and protection of cultural diversity, the judiciary in some instances seems to still be suffering from an apartheid and colonial hang-over and has a tendency to look at African cultures from a Western or European perspective — a perspective that generally has no proper understanding of African cultures and values. The *Prince* and *Bhe* judgments and the dissenting judgments of some of the judges of the Constitutional Court therein are a reflection of this concern.¹⁰⁷

3.9 *South African Communities*

As far as the attitudes between the different South African communities which retards progress towards true nation-building and undermines the promotion of cultural diversity, one probable explanation for this is that the impact and damage of the past apartheid and colonial policies on cultural diversity in South Africa has not been fully grasped by the majority of the people of South Africa. There is also a high degree of a denial by all communities of the real extent of the impact of these policies. The result is the continuation of cultural, religious and linguistic fortresses or 'laagers' amongst many South Africans which does not augur well for nation-building. Rugby is still largely a white sport and soccer, which has its largest following amongst Europeans in Europe, has almost negligent support amongst South Africans of European descent. It is

almost seen as a black sport.

An example of language fortresses concerns public schools where some parents, still resist multilingualism by abusing the powers of the school governing bodies to determine single, usually Afrikaans, language policies in schools, thereby excluding other learners, especially African learners.

Section 6(2) of the South African Schools Act¹⁰⁸ provides that the 'governing body of a public school may determine the language policy of the school subject to the Constitution, this Act and any applicable provincial law'. This provision is therefore used by some of these parents, with a total disregard of the provisions and the spirit of the Constitution towards the promotion of multilingualism in South Africa. Attempts by the state to address this phenomenon have always failed. One case in point is that of *The Governing Body of Mikro Primary School and Another v The Western Cape Minister of Education and Others*.¹⁰⁹ The order of the court in this matter included the following:

The decision of the second respondent (the head: Education, Western Cape Education Department), set out in his letter to the principal of the second applicant (Mikro Primary School) dated the 2nd December, 2004, to direct the latter to admit certain pupils to the second applicant, and to have them taught in the medium of English, is set aside.¹¹⁰

The first and second respondents are prohibited and restrained from compelling or attempting the second applicant or its principal to admit pupils for instruction in the medium of English otherwise than in compliance with the second applicant's language policy, and with the applicable provisions of the South African Schools Act, No 84 of 1996, of the Norms and Standards determined in terms of Section 6(1) of that Act, and of any other legislation which may be applicable.¹¹¹

The first and second respondents are ordered to place the 21 minor children presently attending the second applicant, whose parents are the third respondents, at another suitable school or schools on a permanent basis as soon as may be reasonably practicable.¹¹²

While it could be argued that the state should have challenged the language policy of the school and not impose its own language policy on the school by forcing the school to accept 21 learners to be taught in English, which was not part of the school's language policy, the fact of the matter is that the school in question had enough space to accommodate the 21 learners and a suitable arrangement in line with the provisions and the spirit of the Constitution towards cultural diversity and nation-building would have been reached between the school governing body and the state — a lost opportunity indeed.

What is also a matter of concern about this case are some of the views of Judge Thring. In the judgment, the honourable Judge says:

The second respondent acted as if the school's language policy did not exist, or that it counted for nothing. It is contended by the first and second respondents that the applicants will suffer no prejudice because pupils at the school who have chosen to be taught in Afrikaans may continue to receive their tuition in that language. I disagree. Where the governing body of a school has elected to have a single language as its medium of instruction, the introduction of a second language of tuition must inevitably have a profound influence on the *modus vivendi*, the customs, traditions and almost every aspect of the atmosphere which pervades the school. It is not difficult to think of examples to illustrate this. To name a few: at school assemblies at a parallel-medium school, staff and pupils must presumably be addressed in both languages, and proceedings must be conducted in both; the same applies to meetings at the school which are attended by parents; notices on the school notice board or boards will likewise have to be in both languages; correspondence between the school and parents will have to be conducted either in both languages or selectively, depending on the particular parent's language of choice; the same applies to school reports; in the present case the school motto, which presently reads '*Werk en Skep*', may have to be scrapped and replaced with one which caters for both languages, or, perhaps, even with one in a third language, such as Latin; the first applicant's constitution will have to be in both languages, and the same will presumably apply to such things as the school song, if it has one. The list is almost endless. I am not suggesting that any of these things are undesirable in themselves; I have no doubt that many parallel and dual-medium schools function perfectly satisfactorily in such bilingual milieu: however, I do say that these aspects will, of necessity, be very different in a dual or parallel medium school from what they are in a single-medium school.¹¹³

The Judge goes on to agree with the views of Prof R. Malherbe in his article, 'The Constitutional Framework for Pursuing Equal Opportunities in Education', where the professor says:

The indiscriminate targeting of Afrikaans-medium schools and educational institutions to become dual or parallel medium institutions presently undertaken by the state, as well as the neglect of indigenous languages in education, deny the multilingual reality of South Africa and violate the languages rights guaranteed by the Constitution. This is an example of the values of human dignity and freedom being sacrificed for the sake of a view which equals equality to uniformity, instead of the three values being

applied in harmony to enhance the equal worth of people.¹¹⁴

The judge's views or sentiments on this matter, from the perspective of the promotion of cultural diversity, are, with due respect, not acceptable to the writer. One also wonders what aspect of Prof. Malherbe's article does the Judge agree with: 'the indiscriminate targeting of Afrikaans-medium public schools and public educational institutions' in order to force them to 'become dual or parallel medium institutions'?¹¹⁵

What this case and many others show is the need for all South Africans to come out of the cultural and linguistic fortresses and embrace the new South Africa and its vision of multiculturalism in the context and framework of the Bill of Rights.

4. Recommendations and Conclusion

4.1 Recommendations

The Universal Declaration of Cultural Diversity¹¹⁶ states in its Preamble:

[T]he respect for the diversity of cultures, tolerance, dialogue and co-operation, in a climate of mutual trust and understanding are among the best guarantees of international peace and security.

In support of this provision, Article 1 of the same Declaration provides:

Culture takes diverse forms across time and space. This diversity is embodied in the uniqueness and plurality of the identities of the groups and societies making up humankind. As a source of exchange, innovation and creativity, cultural diversity is necessary for humankind as biodiversity is for nature. In this sense, it is the common heritage of humanity and should be recognised and affirmed for the benefit of present and future generations.

Article 4 of the Charter makes the following provisions:

The defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples. No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor limit their scope.

On the need for the promotion of cultural diversity, the UNDP's Human Development Report 2004: Cultural Liberty in Today's Diverse World, stated:

Cultural diversity is here to stay — and to grow. States need to find ways of forging national unity amid this diversity. The world, ever more interdependent economically, cannot function unless people respect diversity and build unity through common bonds of humanity.¹¹⁷

South Africa with its legacy of apartheid and colonisation characterised by the denial of human rights desperately needs to promote and protect cultural diversity more than most countries if it is to enjoy peace, stability and meaning and sustainable development. Fortunately, as shown above, South Africa is on the right path in terms of its constitutional objectives. Commenting on this, the former Chief Justice, Arthur Chaskalson, said in *Alexkor Ltd and Another v Richtersveld Community and Others*:

The Constitution offers a vision of the future. A society in which there will be social justice and respect for human rights, a society in which the basic needs of all our people will be met, in which we will live together in harmony, showing respect for one another.¹¹⁸

The challenge, therefore, especially for the second decade of democratic governance in South Africa, is how to translate these constitutional imperatives into reality and achieve true national unity.

As discussed above, the main challenge in this regard is to ensure a more effective implementation of the numerous policy, legislative and institutional measures that have been instituted to promote and protect cultural, religious and linguistic rights and to also work towards changing the attitudes of ordinary South Africans and getting them to play a more positive and active role in promoting and protecting cultural diversity in South Africa.

In so doing, however, no culture should unduly and unfairly dominate other cultures while at the same time ensuring that the practice of culture does not undermine the core and shared human rights values that underpin our new society.

However, the road to a South African society that tolerates and promotes cultural diversity is going to be a long and winding one with many pitfalls and snares. Some of the pitfalls and challenges that need to be addressed are the issue of gender rights and culture and religion. Nevertheless, the Constitution is very clear on this, that cultural rights may not be exercised in a manner inconsistent with any provision of the Bill of Rights.¹¹⁹ In this regard, the former Chief Justice, Arthur Chaskalson, in his Third Bram Fischer Lecture, said: 'Freedom does not mean total freedom. In a democratic society freedom can never be absolute. It must be exercised with due regard to the legitimate interests of other members of the society, and the countervailing claims of other constitutional values.'¹²⁰

Some of the specific recommendations that should be considered for the promotion and protection of cultural diversity in the second decade of democratic governance in South Africa include the following:

(a) Ratification and Promotion of Relevant International Human Rights Instruments. These include: The UNESCO Universal Declaration on Cultural Diversity which must be promoted and made

known to the people of South Africa;¹²¹ The International Covenant on Economic, Social and Cultural Rights; The Cultural Charter for Africa should be ratified and promoted in South Africa¹²²

(b) Recognition and celebration of key national and international events on culture.

The recognition and celebration of key national and international human rights days is one effective and far-reaching way in which cultural diversity could be promoted especially amongst ordinary South Africans. Two of the relevant days are 21 May, the World Day for Cultural Diversity for Dialogue and Development; and 25 May, Africa Day.

May 21 was proclaimed by the UN General Assembly in 2003 as the World Day for Cultural Diversity for Dialogue and Development. The proclamation was to underline the fact that 'tolerance and respect for cultural diversity and universal promotion and protection of human rights, including the right to development, are mutually supportive', and the recognition that 'tolerance and respect for cultural diversity effectively promote and are supported by, *inter alia*, the empowerment of women'.¹²³ The view of UNESCO on this day and in calling 'for Member States as well as civil society to celebrate this day by involving as many actors and partners as possible' was that this day will 'provide us with an opportunity to deepen understanding of the values of Cultural Diversity and to learn to live together better'.¹²⁴

May 25, Africa Day (also referred to as Africa Unity Day and Africa Liberation Day), is the day on which the Charter of the Organisation of African Unity was signed in Addis Ababa, Ethiopia, 1963. The two main purposes for the signing of the Charter and the establishment of the Organisation of African Unity were to 'promote the unity and solidarity of African States and to co-ordinate and intensify their co-operation and efforts to achieve a better life for the peoples of Africa'.¹²⁵ Africa Day thus signifies an important event in the liberation of Africa and its culture from the shackles of colonialism.

The celebration of these days will go a long way in promoting national unity through the respect for cultural, religious and linguistic diversity in South Africa as well as encouraging the 'rehabilitation, restoration, preservation and promotion of the African cultural heritage'.¹²⁶

(c) Effective Implementation of Policy and Legislative Measures

The numerous policy and legislative measures adopted by the state to address the legacy of the past must be effectively implemented. The same applies to the promotional aspects of the Promotion of Equality and Prevention of Unfair Discrimination Act enacted in February 2000.

(d) Enactment of Outstanding Bills

The Language Bill and the Marriages Bill should be adopted and effected as soon as possible. Similar provisions should also be made for other cultural and

religious groups in the recognition of their marriages within the context of human rights and equality.

(e) Effective Monitoring of Cultural, Religious and Linguistic Rights

Notwithstanding the fact that the Commission for the Promotion for the Rights of Cultural, Religious and Linguistic Communities has been in operation since January 2004, there is still no discernable comprehensive monitoring system on the progress South Africa has made, or is making, in promoting and protecting cultural diversity. Such a monitoring system needs to be in place as soon as possible and should also take into account the work currently done by other constitutional bodies whose mandate includes issues pertaining to culture, religion and language rights — this will make a significant contribution in the promotion of cultural diversity in South Africa.

(f) The Judiciary

While the judiciary, especially the Constitutional Court, has played and will continue to play an important role in the promotion of cultural diversity in the context of the Bill of Rights of the Constitution, it needs to be more sensitive in handling indigenous law and other non-Western cultures. In this regard, the position of Judge Ngcobo in the *Bhe and Others* judgment should be noted and strongly considered by the Constitutional Court and the rest of the judiciary in making decisions on indigenous law. The Judge said, in his dissenting judgment and in response to the majority decision of the Constitutional Court:

Ours is not the only country that has a pluralist legal system in the sense of common, statutory and indigenous law. Other African countries that face the same problem have opted not for replacing indigenous law with common law or statutory laws. Instead, they have accepted that indigenous law is part of their laws and have sought to regulate the circumstances where it is applicable. In my view this approach reflects recognition of the constitutional right of those communities that live by and are governed by indigenous law. It is a recognition of our diversity, which is an important feature of our constitutional democracy.¹²⁷

Judge Ngcobo went on to say:

It seems to me therefore that the answer lies somewhere other than in the application of the Intestate Succession Act only. It lies in flexibility and willingness to examine the applicability of indigenous law in the concrete setting of social conditions presented by each particular case. It lies in accommodating different systems of law in order to ensure that the most vulnerable are treated fairly. The choice of law mechanism must be informed by the need to: (a) respect the right of communities to observe cultures and customs which they hold dear; (b) preserve indigenous law subject to the Constitution; and (c) protect vulnerable members of the family. Indigenous

law is part of our law. It must therefore be respected and accorded a place in our legal system. It must not be allowed to stagnate as in the past or disappear.¹²⁸

5. Conclusion

Professor O.P. Dwivedi, in his paper, 'The Challenges of Cultural Diversity for Good Governance', wrote:

The world of the 21st century is going to be a world of cultural diversity and poly-ethnicity instead of the world of cultural homogeneity and dominance or cultural exclusion and coercion. The prevailing historical and ethnocultural demography of our world has minimised the possibility of a worldwide monocultural society, be it based on the Western or non-Western culture. Nevertheless, the globalisation of the culture of governance should be watched carefully, so that no one single nation or culture acts as a global missionary and assumes the role of a moral leader to dictate its own values . . . The time has come for the world of the 21st century to learn to live with, accept, celebrate and operationalise its own diversity.¹²⁹

As South Africa and its peoples embark on a very difficult but crucial process in the next decade of democratic governance of addressing the legacy of the past and in building a truly united nation that promotes and protects cultural diversity, a new patriotism is essential if this exercise is to succeed. On this new patriotism, Thabo Mbeki, then Deputy President of South Africa, said South Africa needed a patriotism:

. . . which is imbued by love and respect for the fellow citizen, regardless of race, colour, gender or age and a recognition of our common humanity which says to all that we are, after all, one nation, bonded together by the variety of cultures, with none superior or inferior to the other. A nation cannot be, if any of these cultures is absent . . .¹³⁰

With this patriotism, South Africa will be on course towards cultural diversity and thus true nation-building, peace and prosperity. South Africa thus has a very important challenge in the next decade, not just for itself and its peoples but for the whole world — to show that it is possible for different cultural, religious and linguistic groups to live at peace with one another; that there is no need for one group to dominate another group and; thus avoid the much expected and anticipated clash of civilisations so often talked about all over the world.

In this way, South Africa will also have succeeded in overcoming the adverse effects of colonialism on the cultures, religions and languages of many of its peoples. However, it is going to be a 'long walk to freedom' and the struggle for the dignity of a true and appropriate African identity must continue.

Endnotes

- * Tseliso Thipanyane, BSc., LL.B., and LL.M. Advocate of the High Court of Lesotho and South Africa. Former head of the Research and Documentation Department of the South African Human Rights Commission and former Corporate Affairs Officer of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. Currently the Executive Director of the Secretariat of African National Institutions for the Promotion and Protection of Human Rights.
- * Article 1.1 of the Declaration of Principles on Tolerance. Adopted by acclamation by the UNESCO General Conference on 16 November 1995.
- 1 Huntington, S.P. (1997) *The Clash of Civilisations And The Remaking of World Order*, London: Touchstone Books, p. 91.
 - 2 Chaskalson, A. 'The Third Bram Fischer Lecture: Human Dignity As A Foundational Value of our Constitutional Order,' (2000) 16 *South African Journal On Human Rights*, pp. 195-205, pp. 197-198.
 - 3 Section 1 of the Constitution of the Republic of South Africa, Act 108 of 1996 as amended (hereinafter, the Constitution).
 - 4 See section 7 (1) of the Constitution, *ibid*.
 - 5 Section 10 of the Constitution, *ibid*, provides that, 'everyone has inherent dignity and the right to have their dignity respected and protected.'
 - 6 *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) BCLR 569 (CC), para 85.
 - 7 *President of the Republic of South Africa and Another v Hugo* 1997(4) SA 1 (CC); 1997 (6) BCLR 708(CC) para 41-3. In *Hoffmann v South African Airways* 2001(1) SA 1 (CC); 2000(11) BCLR 1211(CC), para 27, the court also held, 'at the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in society, must be accorded equal dignity.'
 - 8 Brudner, A. 'The Liberal Duty to Recognise Cultures', (2003) 8 *Review of Constitutional Studies*, p 140.
 - 9 Cited in Thandabantu Nhlapo 'The African Customary Law of Marriage and the Rights Conundrum' in Mahmood Mamdani (ed), *Beyond Rights Talk and Culture Talk: Comparative Essays on the Politics of Rights and Culture*, Cape Town: David Phillip Publishers, 2000, p. 139.
 - 10 *Ibid*, p. 139.
 - 11 Article 5(1) of the Declaration on Race and Racial Prejudice .
 - 12 Per Sachs J in *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), para 36.
 - 13 See Sebastian Poulter, *Legal Dualism in Lesotho*, Morija: Morija Printing Press, 1979, p. 19.
 - 14 Article 2(1) of the Declaration on Race, above n 10, provides: 'Any theory which involves the claim that racial or ethnic groups are inherently superior or inferior, thus implying that some would be entitled to dominate or eliminate others, presumed to be inferior, or which bases value judgments on racial differentiation, has no scientific foundation and is contrary to the moral and ethical principles of humanity.'
 - 15 In the same vein, Professor Thandabantu Nhlapo in 'The African Customary Law of Marriage and the Rights Conundrum' above n 8 at pp. 142-3, said: 'History abounds with examples of misunderstanding arising from the juxtaposition of peoples with not merely different, but divergent, cultures. In Africa the problem has tended to be that from the earliest contact with Europeans the two cultural blocs involved in the contact have never enjoyed a position of equality. The Europeans, believing in the unquestionable superiority of their own moral, religious, political and legal institutions, lost no time in suppressing various aspects of African culture by law and by force. This was to set in motion a process of 'othering' of African institutions that remains relatively intact to the present.'
 - 16 Steve Biko, *I Write What I Like*, Randburg: Ravan Press, 1996, p. 29.
 - 17 Adam Hochschild, *King Leopold's Ghost*, London: Papermac, 1998, p. 121.
 - 18 See for example, Joseph Harris, *Africans and their History* (2nd ed), New York: Meridian, 1998, pp. 8-9 and 227-8. See also, Frantz Fanon, *The Wretched of the Earth*, London: Penguin Books, 1967.
 - 19 John Reader, *Africa: A Biography of the Continent*, London: Penguin Books, 1998, p. 606.
 - 20 In his concluding views, Stephen Pete states; 'it may be said that for more than three centuries from the arrival of the first European settlers until the demise of apartheid during the 1990s, the history of South Africa was characterised by religious intolerance, which formed part of an overall pattern of colonial domination and racial oppression.' Stephen Pete, 'The Dignity of Difference: Freedom of Religion in Post-Apartheid South Africa, in Max du Plessis and Stephen Pete (eds), *Constitutional Democracy in South Africa 1994-2004: Essays in Honour of the Howard College School of Law*, Durban: LexisNexis Butterworths, 2004, p. 137.
 - 21 Huntington, S.P. above n 1, pp. 62-3.
 - 22 Preamble of the Cultural Charter for Africa. Adopted by the OAU on 5 July 1976 in Port Louis, Mauritius and came into force on 19 September 1990. Also writing on the impact of colonialism in Africa, Professor A Adu Boahen said: 'The Europeans who moved into Africa during this period, especially between 1900 and 1945 — missionaries, traders, administrators, settlers, engineers and miners alike - were generally filled with the spirit of cultural and racial superiority of the day. They therefore condemned everything African — African music, art, dance, name, religion, marriage, systems of inheritance, etc. To be admitted into a church, an African had not only to be baptised but had to change his name and renounce all the above. Colonialism therefore caused cultural stagnation if not degeneration in Africa.' A Adu Boahen, 'Colonialism in Africa: its impact and significance', in A Adu Boahen (ed), *General History of Africa: Vol VII Africa under Colonial Domination 1880-1935* (abridged edition), London: United Nations Educational, Scientific and Cultural Organisation and James Currey Ltd, 1990, p. 336.
 - 23 Walter Rodney, *How Europe Underdeveloped Africa*, Washington, D.C.: Howard University Press, 1982, pp. 252-3. Walter Rodney, does, however, p. 253, acknowledge some of the positive roles played by some missionaries, in opposing some inhumane cultural practices like the killing of twins by some African peoples.
 - 24 Frantz Fanon, above n 18, pp. 33-4.
 - 25 See Article 1 of the International Convention on the Suppression and Punishment of the Crime of Apartheid. Adopted by General Assembly Resolution 3068 (XXVIII) of 30 November 1973 and entered into force on 18 July 1976.
 - 26 JD Omer-Cooper, *History of Southern Africa* (2nd ed), London: James Currey, 1994, p. 176.
 - 27 See Article II of the International Convention on the Suppression and Punishment of the Crime of Apartheid.
 - 28 *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) and 2000 (8) BCLR 837, para 35.
 - 29 'Truth and Reconciliation Commission of South Africa Report — Volume Four' Truth and Reconciliation 1998, distributed by Juta: Kenwyn, Cape Town, para 119, p. 91.
 - 30 *Ibid* para 73, p. 77.
 - 31 *Ibid*, paras 77-78, p. 78.
 - 32 For more discussion of the role of the Broederbond in the apartheid system, see JD Omer-Cooper, above n 26, pp. 176-177 and 195.
 - 33 The Freedom Charter, adopted at the Congress of the People, Kliptown, on 26 June 1955.
 - 34 Section 6 of the Constitution.
 - 35 Above n 11.
 - 36 Above n 29, para 35.
 - 37 *Christian Education South Africa v Minister of Education* 2000 (4) SA 757(CC); 2000 (10) BCLR 1051(CC), para 24. In *Prince*

- v President of the Law Society of the Cape of Good Hope & Others* 2002 (3) BCLR 231(CC), para 79, the court said: 'In a constitutional democracy like ours that recognises and tolerates diverse religious faiths, tolerance of diversity must be demonstrated by accommodating the practices of all faiths, if this can be done without undermining the legitimate government interest.'
- 38 Established in terms of Section 6(5) of the Constitution.
- 39 Established in terms of Section 181(1) (c) of the Constitution.
- 40 See Section 6(5) of the Constitution and Section 3 of the Pan South African Language Board Act 59 of 1995 as amended.
- 41 See Section 185 of the Constitution and the Preamble of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, Act 19 of 2002.
- 42 Section 4(b) of the Commission's enabling legislation, *ibid*.
- 43 Section 4(d) *ibid*.
- 44 Section 5 (1) of the CRL Commission Act.
- 45 Section 25 (e) of the CRL Commission Act.
- 46 Established in terms of Section 181(1) (b) of the Constitution and its enabling legislation, the South African Human Rights Commission Act 54 of 1994.
- 47 Established in terms of Section 181(1) (d) of the Constitution and its enabling legislation, the Commission on Gender Equality Act 39 of 1996.
- 48 See Sections 211 and 212 of the Constitution and the Council of Traditional Leaders Act 10 of 1997 as amended. Some of the functions of the National House of Traditional Leaders, formerly known as the Council of Traditional Leaders, is to 'promote the role of traditional leadership within a democratic constitutional dispensation', and to advise the government and make recommendations on 'customary law and the customs of communities observing a system of customary law.' The House can thus play an important role in enhancing the relevant and appropriate customs of African people that were denigrated under the apartheid and colonial regimes in South Africa.
- 49 Gazette 16085, Notice 1954 of 1994, 23 November 1994.
- 50 Paragraph 1.4.6 of Chapter 1, *ibid*.
- 51 Developed by the then Department of Arts, Culture, Science And Technology, 4 June 1996 at www.dac.gov.za/legislation_policies/white_papers/white_paer_on_arts_culture
- 52 Para 1 of Chapter one of the White paper, *ibid*.
- 53 Paragraph 11 of Chapter 1, *ibid*.
- 54 Paragraph 9 of Chapter 1 and Chapter 4, *ibid*.
- 55 Developed by the Ministry of Education, 14 July 1997 at <http://www.education.gov.za/content/documents/284.pdf>
- 56 Developed by the Ministry of Education, November 2002 at www.education.gov.za/content/documents/67.pdf
- 57 Act 35 of 1983 as amended (amended by the Culture Promotion Amendment Act 59 of 1998).
- 58 Act 119 of 1998 as amended (amended by the Cultural Laws Second Amendment Act 69 of 2001).
- 59 Act 11 of 1999 as amended (amended by the Cultural Laws Second Amendment Act 69 of 2001).
- 60 Act 27 of 1996.
- 61 Act 84 of 1996.
- 62 Act 110 of 1998.
- 63 Act 118 of 1998.
- 64 Act 120 of 1998.
- 65 Act 41 of 2003.
- 66 Act 65 of 1996.
- 67 Act 4 of 2000.
- 68 See the Preamble of the Act, above n 63.
- 69 See Sections 4(2)(h) and 9(2) (v) of the Act, *ibid*.
- 70 There are apparently thousands of such names to be changed including those not necessarily derogative but simply inappropriate and insensitive. Free State has 1 920 to change, Kwazulu Natal, 7 833, Northern Cape 9 137, North West 2 386, Eastern Cape 16 301, Gauteng 431, Mpumalanga 2 438, Limpopo 5 229 and Western Cape 11 086. See Chiara Carter, 'How I love you, my dear Tshwane', *The Sunday Independent*, 13 March 2005 at www.sundayindependent.co.za/index.php?fArticleId=244518&fSectionId=1041
- 71 In this regard, Section 1(1) of the Law of Evidence Amendment Act 45 of 1988 stated:
Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy or natural justice: Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles,' Cited by Marius Pieterse, 'Killing it softly: Customary law in the new Constitutional Order,' (2000) 33 *De Jure* p. 35.
- 72 See Section 7(6) of the Recognition of Customary Act, above n 65, and Marius Pieterse, *ibid*, p. 41.
- 73 See Sections 7(6)-7(9) of the Act, *ibid*. However, Article 6 of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa provides: 'States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that: (c) monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected.' South Africa ratified the Protocol on 17/12/2004. It could be argued that the provisions of Sections 7(6)-7(9) of the Recognition of Customary Marriages Act are intended to encourage monogamy. On the other hand, see Marius Pieterse's article, above n 72, p. 41.
- 74 For possible consequences of this provision see Mthokoa Mamashela, 'New Families, New Property, New Laws: The Practical Effects of the Recognition of Customary Marriages Act', (2004) Vol 20 *South African Journal on Human Rights*, p. 636. See also, Marius Pieterse, above n 72, pp. 43, 49 and 53.
- 75 See Section 29 of the Act, the same applies to the distribution, broadcasting or exhibition of a film of the same nature. This also includes the presentation of an entertainment or play in public which would have the same effect.
- 76 See Section 10 of the Act.
- 77 Dated 17 May 2000 and found at www.dac.gov.za/legislation_policies/bills/sa_language_bill.doc
- 78 Section 2(c) of the Bill, *ibid*.
- 79 Section 3(1) of the Bill, *ibid*.
- 80 Section 5 of the Bill, *ibid*.
- 81 Ratified on 14 January 1996.
- 82 Ratified on 10 December 1998.
- 83 Ratified in 1996.
- 84 Ratified on 10 March 1999.
- 85 See Section 24 of the Commission's Act, above n 42.
- 86 The Judicial Matters Amendment Act 2002 amended the South African Law Commission Act 19 of 1973 in order to rename the commission as the South African Law Reform Commission.
- 87 Project 90, The Harmonisation of the Common Law and the Indigenous Law-Report on Customary Marriages August 1998 at www.doj.gov.za/salrc/reports/r_prj90_cstm_1998aug.pdf
- 88 Project 59, Islamic Marriages and Related Matters Report, July 2003 at www.doj.gov.za/salrc/reports/r_prj59_2003jul.pdf
- 89 See Marius Pieterse's article, above n 72, p. 41.
- 90 1999 (4) SA 1319 (SCA). The court, however, only recognised Moslem marriages for purposes of the duty of support.
- 91 Islamic Marriages and Related Matters Report, above n 90, p. 5.
- 92 See, www.sacc.org.za
- 93 At www.sacc.org.za/programmes.html
- 93 Above n 38. For some discussion of the judgment and related ones, see Stephen Pete's article, above n 20, pp. 149-152.
- 94 2005(1) BCLR (CC) 1. (decided on 15 October 2004).
- 96 See judgments of the Constitutional Court referred to above.
- 97 Above n 38, para 49.
- 98 1997(4) SA 1176 (CC).
- 99 *Ibid*, para 148.

- 100 *Christian Education South Africa v Minister of Education*, above n 38, para 35.
- 101 Article 4 of the UNESCO Declaration on Cultural Diversity. Adopted by the 31st Session of the General Conference of UNESCO, Paris, 2 November 2001.
- 102 Highlighting this issue, the Constitutional Court in the *Bhe and Others* judgment, above n 97, said at para 114: 'The court was urged not to defer to the legislature to make the necessary reforms because of the delays experienced so far in producing appropriate legislation. This was an invitation to the court to make a definitive order that would solve the problem once and for all. That there have been delays is true and that is a concern this court cannot ignore. The first proposal by the Law Reform Commission for legislation in this field was made more than six years ago. According to the Minister, the need for broad consultation before any Bill was finalised has been the cause of the delays. Moreover, he was unable to give any guarantee as to when the Bill would become law.'
- 103 On this issue, the Pan South African Language Board in its draft discussion document on the promotion of multilingualism said: 'Colonisation brought with it various mechanisms to keep the conquered communities suppressed. One of the tools of power is language. People cannot share power if they do not have access to the languages used by those in power. In Africa, the indigenous languages have seldom been used to challenge the colonial or neo-colonial power effectively. Along with colonisation, Western thinking, science and technology has become highly prized. The indigenous knowledge, science, medicine and local economies have, in the process, lost status and become hidden. They are hidden in the local languages, which were excluded from high-level functions by the colonial and neo-colonial rulers of the continent. Ironically, high status has been given to those who use an international language, even when they are monolingual, whereas multilingual speakers of African languages have received little recognition for their communicative gifts and considerable knowledge. The native speakers of the international languages in Africa have thus, in general, not understood the need to learn local languages.' See PANSALB, PANSALB's Position on the Promotion of Multilingualism in South Africa: A Draft Discussion Document, Pretoria, February 1998, p. 8.
- 104 Refers in this context to the nine official languages in Section 6 (1) of the Constitution.
- 105 The Development of Indigenous African Languages As Mediums of Instruction in Higher Education: Report compiled by the Ministerial Committee appointed by the Ministry of Education in September 2003, para 6 of the Executive Summary and found at www.education.gov.za/content/documents/632.pdf (accessed on 16/05/2005).
- 106 Notwithstanding the laws in place, the many deaths and injuries of initiates during African Initiation ceremonies is a matter of concern. Having said so, other religions and cultures like Islam and the Jewish religion amongst others should also be looked into in the context of their adherence to human rights values and norms of the Constitution.
- 107 In the *Bhe and Others* judgment above, while the court laudably declares the rule of male primogeniture as applicable to customary law to the inheritance of property 'inconsistent with the Constitution and invalid to the extent that it excludes or hinders women and extra-marital children from inheriting property' (para 136), the court, save for the dissenting judgment of Judge Ngcobo, does not comply with its obligation in terms of Section 39 (2) of the Constitution to develop customary law in the context of the person(s) who inherits and the responsibilities therein. The view of the court in para 109 of the judgment to the effect that there was 'insufficient evidence and material to enable the court to develop customary law is not satisfactory in view of its far-reaching decision on a crucial component of customary law. This ruling can lead to a situation where those who inherit under the now changed inheritance law are not meeting their inherent obligations. The other danger, though more of the responsibility of the executive branch of government than the judiciary, is to have the ruling of the court simply being ignored by practitioners of customary laws (See Marius Pieterse's Article, above n 72, pp. 40 and 53). What is also interesting about the judgment is that the decision of the court on unconstitutionality of the male primogeniture rule does not apply to traditional leaders (para 94). This creates a situation where in village X there will be two customary laws on inheritance, one for commoners and one for traditional leaders — the sooner this anomaly is corrected the better. However, in fairness to the court, its order also includes a provision for any person to approach it for purposes of varying the order 'in the event of serious administrative or practical problems being experienced'. Furthermore, the court did provide an opportunity for the Chairperson of the National House of Traditional Leaders to advise the court in its deliberations and decision on the matter and this did not happen (para 4). At para 106 of the judgment, the court said: 'The question of polygynous marriages and whether or not the order by this court should accommodate them must also be considered. These are complex issues and that is why it is regrettable that the opportunity given to the Chairperson of the House of Traditional Leaders by the Chief Justice to provide their view did not receive a positive response.' The court also held (para 116) that its order 'should be regarded by the legislature as an interim measure' and that it would be 'undesirable if the order were to be regarded as a permanent fixture of the customary law on succession.'
- 108 Act 84 of 1996.
- 109 Unreported Judgment of the High Court of South Africa (Cape of Good Hope Provincial Division). Case No. 332/2005. Judgment delivered on 18 February 2005.
- 110 Page 58, *ibid*.
- 111 *Ibid*.
- 112 *Ibid*.
- 113 *Ibid*, pp. 24-25.
- 114 *Ibid*, p. 26. Article published in *Perspectives in Education*, Pretoria: University of Pretoria, 2004, pp14-15.
- 115 The state has appealed against the judgment and the Supreme Court of Appeal has reserved judgment on the appeal regarded as a test case on 'language policy in schools' see Legal Brief Today, 24 May 2005.
- 116 Adopted by the 31st Session of the General Conference of UNESCO, Paris, 2 November 2001.
- 117 UNDP, Human Development Report 2004: Cultural liberty in today's diverse world, New York: UNDP, 2004, p. 16.
- 118 *Alexkor Ltd and Another v Richtersveld Community and Others* 2003 (12) BCLR 1301 (CC), p. 205.
- 119 See sections 30 and 31(2) of the Constitution.
- 120 Above n 2, p. 202.
- 121 See above n 106. The Preamble to the Main Lines of An Action Plan for the Implementation of the UNSECO Universal Declaration on Cultural Diversity states that: 'Member States commit themselves to take appropriate steps to disseminate widely the 'Declaration' and to encourage its effective application . . .
- 122 Adopted by the OAU on 5 July 1976 in Port Louis, Mauritius and came into force on 19 September 1990.
- 123 UN General Assembly Resolution 'Culture and development' A/res/57/249 of 20 February 2003.
- 124 UNESCO 'World Day for Cultural Diversity for Dialogue and Development 2004: what is our duty?' at http://portal.unesco.org/culture/admin/ev.php?URL_12508&URL_DO=DO_TOP
- 125 Article II of the Charter of the Organisation of African Unity.
- 126 Article 1(b) of the Cultural Charter for Africa, *ibid*.
- 127 *Bhe and Others*, above n 97, para 235.
- 128 *Bhe and Others*, *ibid*, para 236.
- 129 O.P. Dwivedi, 'The Challenge of Cultural Diversity for Good Governance', presented at the United Nations Expert Group Meeting on Managing Diversity in the Civil Service held at the United Nations Headquarters, New York, 3-4 May 2001. The writer has a hard copy of the paper.

130 Thabo Mbeki, *Africa: The Time Has Come*, Cape Town and Johannesburg: Tafelberg Publishers and Mafube Publishing, 1998, pp. 259-60. Speech made at the launch of Business Arts South Africa on 3 February 1997.

Conclusion

Professor Cathi Albertyn

1. Introduction

In 1994, the new ANC-led democratic government inherited a deeply unequal society. While race had been the primary determinant of access to power, opportunities and resources; gender, class and other fault-lines of difference had created a complex matrix of social and economic inequalities within and across racial groups. The ANC inherited a state that had been structured to maintain white privilege and a racially divided political, economic and social system. South African society, too, had been deeply affected by its unjust past. The new government thus faced the twin challenges of state and societal transformation as it sought to translate the political democracy achieved in April 1994 into a more substantive democracy.

This review has reflected on the progress made in transforming South Africa and in achieving human rights for all. Although it largely focused on the state, it also looked at the role of civil society and non-state actors in promoting and protecting human rights. We are all accountable under the Bill of Rights. A decade after the achievement of political freedom, we are probably more sanguine about the possibilities of transformation than we were in 1994. We have come to realise that transformation is often an uneven and incremental process, and that it will take decades to address the legacy that was inflicted on South Africa for centuries. While we recognise the successes, we also seek to understand the shortcomings and failures in the belief that it is important to scrutinise our progress and to learn from the successes and failures of the past ten years. We do so not to praise or condemn, but to ensure that we are better equipped, as a country, to go forward into the next ten years.

The review has sought to understand the possibilities and constraints created by our history and by our current global and national context (Chapter One), and then to analyse South Africa's progress in the promotion, protection and fulfilment of human rights in the first ten years of democracy (Chapters Two to Twelve). Each of these chapters has described the past; identified the relevant rights; described what has been done;

analysed the progress, successes, obstacles and constraints; and identified some strategies for change and challenges for the next ten years.

This conclusion summarises the key themes and findings of the review and sets out the main human rights challenges for the next ten years.

2. The Constitutional Vision of a Society Based on Human Rights and Social Justice

One of the difficulties of assessing progress is to identify the measure of progress. Should it be qualitative or quantitative? Should it look to the past or to the future? Should we measure progress by the constitutional vision of a participatory and substantive democracy in which all persons enjoy human rights, or by the reality of people's lives? This review has tried to understand the present, while remaining cognisant of the constraints of the past and mindful of the vision of the future. Ultimately, as a society concerned with human rights and social justice, we should measure the gap between vision and reality — but we should do so mindful of local and global conditions. Ten years into democracy, we should also be more aware of the actual possibilities of progress than we were in 1994. We note, at the end of this chapter, the importance of establishing realistic benchmarks for progress in promoting human rights over the next ten years.

However, it is the constitutional vision of social justice and human rights that provides the most important roadmap of progress. The 1993 Constitution consciously described itself as a historic bridge between a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development of opportunities for all South Africans, irrespective of colour, race, class, belief or sex (Afterword, Act 200 of 1993).

The 1996 Constitution aspires to the 'establishment of a society based on democratic values, social justice and fundamental human rights . . . which will improve

the quality of life of all citizens and free the potential of all persons' (Preamble, Act 108 of 1996).

The creation of a constitutional democracy binds all institutions of the state to the rules, norms and values of the Constitution, and places human rights at the centre of the new democracy. Thus, the 1996 Constitution describes the Bill of Rights as the 'cornerstone of our democracy' which 'enshrines the rights of all people' and 'affirms the democratic values of human dignity, equality and freedom' (Section 7(1)). The idea of human rights contained in this Constitution promotes the indivisibility of all human rights, and the role of human rights in securing political and civic equality, as well as social and economic equality. For many South Africans, the Constitution and its Bill of Rights irrevocably commit the state to the fundamental political, social and economic transformation of our society. Human rights provide both a measure of progress and the tools that may be used to claim that vision.

In general terms, we suggest that transformation requires a complete reconstruction of the state and society, including a redistribution of power and resources along egalitarian lines. The challenge of achieving equality within this transformation project involves the eradication of systemic forms of domination and material disadvantage based on race, gender, class and other grounds of inequality. It also entails the development of opportunities that will allow people to realise their full human potential within positive social relationships.¹

Transformation entails political freedom, the eradication of poverty and inequality, and the unleashing of the potential of each person. It means that all South Africans should fully enjoy their human rights. However, transformation is also a contested term. It has different meanings and has been understood differently in different contexts. This review suggests that, to some extent, there is a contested rights project in South Africa. For example, differences have been expressed over the nature and pace of change, over the meaning of empowerment and the role of economic policy. New struggles have emerged over the meaning and implementation of human rights. Such contestation, if open and transparent, is a positive feature of democracy. It is important that this debate takes place, and is permitted to take place, as it enshrines an important measure of participation and accountability in both government and civil society.

3. A Decade of Progress

This review shows that great progress has been made in moving away from our undemocratic, unequal and oppressive past. Each chapter has documented major successes in the establishment of policy frameworks, laws and institutional mechanisms for the delivery of rights to all South Africans. Indeed, much of the first ten years has been spent in developing new policies and laws, and in the internal restructuring of the state and its institutions. In addition, the establishment of the

Constitutional Court and six Chapter Nine institutions to strengthen constitutional democracy was aimed at enhancing South Africa's capacity to protect and promote human rights. This review has thus set out some of the tangible benefits that have accrued to many South Africans. These include:

3.1 Democracy

The advent of democracy and a society based on human rights is a significant achievement for all South Africans.

3.2 Dismantling the Policy and Legislative Legacy of the Past

An important part of the past ten years has been to dismantle the plethora of laws, regulations and by-laws that regulated all aspects of life under apartheid.

3.3 Political Freedom

The chapters on political and civil rights describe a society in which there is a strong substantive sense of political freedom and participation in public life (Chapters Two and Four; and Nine to Twelve).

3.4 Enhanced Access to Social and Economic Rights

The review sets out the manner and extent to which access to these rights has been 'deracialised' and expanded to include all South Africans. Thus access to health care has expanded, as has access to education, social grants, housing, water and sanitation, as well as labour rights.

3.5 Cultural and Religious Diversity

The review sets out the formal and substantive recognition of cultural, linguistic and religious diversity in South Africa (Chapter Twelve).

3.6 Gender Equality

Chapter Two points to some of the important advances made towards gender equality in South Africa.

3.7 Economic Empowerment

Various chapters describe some of the advances made in terms of economic empowerment.

3.8 Regional and International Leadership

Since joining the international community, South Africa has become a visible role player in regional and international affairs. The end of apartheid, the Truth and Reconciliation Commission (TRC) process, and their achievement of a stable and peaceful transition to democracy have provided inspiration for regions experiencing similarly difficult situations. However, the re-

view also notes the partial or tentative nature of these benefits, indicating that much more needs to be done to ensure that they are widely enjoyed and are sustainable. For example, aspects of political freedom still need to be expanded and defended (see section 7 below); many social and economic benefits remain dependent upon the ability of the state to deliver and/or the beneficiary to pay a minimum amount (see Chapter Five, on socio-economic rights); economic empowerment gains remain limited in the face of deep inequalities (Chapters Two and Four); and some achievements in terms of gender equality or cultural diversity are more formal than substantive.

In general, the review notes the development of regulatory frameworks (policies and laws) as a positive advance, entrenching rights and providing inclusion at a formal level. Many chapters thus demonstrate significant progress in policies and laws, often suggesting that the real obstacles lie in the implementation and enforcement of rights. While this is often the case, the review also suggests that gaps remain in the policy and legal framework; and some policies and laws may require revision in order to meet their stated goals. Certain decisions rendered by the Constitutional Court have set the standards and pointed to the direction for policy and legislative interventions.

4. Policy and Legislative Gaps

This review has pointed to some important policy and legislative gaps in the provision of rights. These include the following:

4.1 Women's Rights

The review highlights some gaps here. In the area of women's rights, there are the issues of customary inheritance (women are still not equal) and communal land (concerns have been expressed over the powers of traditional leaders) and equality. In addition, one may note the following gaps: sexual assault laws (planned changes have not yet taken place and are being diluted by Parliament); co-habitation (vulnerable parties, usually women, remain unprotected in these relationships); and trafficking (policy development remains at an early stage in the South African Law Reform Commission).

4.2 Children's Rights Remain Underdeveloped

The review has suggested some problems in relation to children in need (AIDS orphans, child prostitutes and homeless children) and children in the criminal justice system. Others include trafficking and sexual exploitation.

4.3 Policy on Poverty

One of the gaps often pointed to is the failure of the state to develop an over-arching anti-poverty policy.

While the Integrated Sustainable Rural Development Programme (ISRDP) and the Urban Renewal Programme provide fairly sophisticated strategies, the glue of a broad policy remains absent.

4.4 International Commitments

An important gap at the international level is the failure to ratify, among others, the Covenant on Economic, Social and Cultural Rights (1966). Although there has been a shift to emphasise 'delivery' of rights, the task of continuing to develop an effective, rights-based regulatory framework will remain important in the next ten years.

5. Implementing and Enforcing Rights

It is well documented in this review, and in the government's *Ten Year Review*,² that much of the problem of rights lies in their implementation and enforcement. Here questions of budgetary allocation, human resources and institutional capacity emerge as key problems. In some instances, political will has been questionable.

Some of the chapters point to questions of financial resources. For example, Chapter Eight on the criminal justice system points to the problem of financial resources in the courts and the need to develop their infrastructure. A shortage of resources has also impacted on the ability of the state to implement important laws such as the Promotion of Equality and Prevention of Unfair Discrimination Act.

The review also identifies a range of human resource problems (skills, attitudes, capacity). These affect service delivery by the state (pensions, health care, education, policing of crimes of violence against women and children, etc). They also affect the ability of the government to spend budgetary allocations. The chapter on the criminal justice system notes the capacity problems of the South African Police Service through the loss of personnel, and the need to instil a human rights ethos in the police and correctional services.

In some areas, such as HIV/AIDS, the question of political will remains an important question-mark over the government's capacity to act. The long and bruising court battle over the provision of anti-retroviral therapy to people living with HIV/AIDS and particularly pregnant mothers to reduce HIV transmission to their babies is an example of this.

Other implementation problems relate to institutional capacity. In many areas of service delivery (health, social grants, food), it is clear that provincial and local governments often lack the capacity to provide efficient and effective services. The magistrates' courts have not necessarily been equipped to deal with new laws such as the Promotion of Equality and Prevention of Unfair Discrimination Act, or the Promotion of Access to Information Act (Chapter Eleven, Conclusion).

Indeed, within the state as a whole, much of the past ten years has been spent on internal restructuring to ensure that government departments, the courts and other institutions are able to serve all South Africans. Inter-government integration has been a particular challenge, both vertically and horizontally. The ability to work across departments in clusters requires careful inter-departmental planning and is critical to addressing cross-cutting issues such as gender, poverty, HIV/AIDS and children. It is also important in the justice sector as a whole. Local government capacity has been a particular problem in developmental work.

Getting implementation right is the key message of the second Mbeki government and was forcefully expressed in the President's State of the Nation Address of 10 May 2004. The address set targets and benchmarks for delivery in key areas, and anticipated significant progress in the delivery of rights over the next five years.³

6. Reviewing the Regulatory Framework

This review suggests that, in some instances, it might be important to go beyond the questions of legislative/policy gaps or the weak implementation of rights to interrogate the more difficult question of whether the policy or legislative approach of the government remains appropriate. Some examples of this are the following.

The section on the right to education raises the question of whether the fees exemptions policy is the best approach to providing affordable schooling to all South Africans (Chapter Five, Section 8).

The section on social security questions whether the government's current approach to social security and sustainable development is appropriate to the high levels of poverty in this country (Chapter Five, Section 7).

Housing policy is becoming an area of review, as it is realised that a 'pay-as-you-go' approach excludes many poorer people from access to housing (Chapter Five, Section 3).

A particular challenge is the design of macro-economic policies that support broader development by providing sufficient resources for redistributive programmes and by ensuring interest and exchange rates at levels that will stimulate domestic production and investment (Chapter Four).

This review does not necessarily question the initial policy choice. Rather, it asks whether, in the context of what we now know, the policy or law still remains appropriate. It will be important for the government's monitoring and evaluation processes to allow reflection on and re-evaluation of its policies and laws. It is also important that there is ample opportunity for the government and civil society to continue to engage over the appropriateness of policies and law, as well as the means of implementation.

In this, the constitutional vision of human rights must remain a standard. Policy review can never be an excuse to diminish rights. This review expresses some concern in this regard, for example, the 'crime control' aspects of criminal justice, such as mandatory minimum sentences (Criminal Justice System, Chapter 8).

7. Political and Civil Rights

Political freedom in the achievement of the right to vote was a watershed in South Africa's history. Similarly, the onset of democracy brought a positive climate of human rights and political tolerance that was absent in the old South Africa.

South Africa's constitutional democracy anticipates an active civil society, free to organise and express opinions in the task of engaging the state. Freedom of association and expression make genuinely representative politics workable and participatory politics possible. Fundamental to the democratic exercise of these freedoms is the principle of equality. All should be equally free and able to organise into groups, to express opinions, and to engage in democratic debate on issues of mutual interest or concern. This does not merely require a state that refrains from interfering in political and civic activity; it requires a state that acts to create space and to nurture an enabling climate for these activities to take place. The South African Constitution establishes a state that is accountable and responsive to its citizens. It also envisages a state that actively nurtures democracy through the establishment of institutions and processes, and the enforcement of rules and practices that encourage the democratic participation of civil society, especially the poor and marginalised.

Not surprisingly, it is in the ongoing enjoyment of these political and civil rights that South Africans report the most progress and a much greater political freedom.⁴ The chapters on civil rights describe progress in terms of political rights and participation and the expansion of freedom of expression and association (Part Six).

However, these chapters also suggest two worrying issues. The first is that poverty is a key fault-line in the ability to exercise political freedom. Also, there is concern that oppositional voices, especially those on the 'left', are being marginalised and silenced through a number of mechanisms.

7.1 Political Freedom and the Poor

The review suggests that poverty prevents many people from exercising their political and civil rights. For example, poverty may prevent South Africans from getting identity documents, which in turn prevents them from exercising their right to vote. In addition, poverty may prevent people from accessing information that may assist them in gaining access to their rights. In general, the review suggests that poverty can be a

formidable barrier to political participation, as poor communities, or the poor within broader communities, are not able to express their interests or access the structures that would permit this. They are thus often effectively excluded from intervening in policy processes.

7.2 Forms of Silencing Oppositional Voices

The past ten years have witnessed new alignments in civil society and new rights struggles, especially around 'bread and butter' issues. Chapter One refers to the new 'social movements' that have sought to organise the poor or take up issues on behalf of the poor. The treatment of people living with HIV and AIDS has also become a significant base for political mobilisation. As these movements and organisations take up positions that are oppositional to, and often on the 'left' of, the state, the state seems to have become less tolerant. Thus the review suggests several examples of oppositional voices being silenced through ideological and repressive means.

The chapters on freedom of expression and political participation provide several examples of legislation and police/security force action that indicate that the state is willing to use repressive means against some forms of peaceful opposition. The response to the protests at the World Summit for Sustainable Development (WSSD), the apparently systematic refusal of permission for marches by certain organisations, and the arrest and torture of Landless People's Movement activists on election day in 2004, are all cause for concern. In addition, the wide ambit of the Protection of Constitutional Democracy against Terrorism and Related Activities Bill suggests that repressive means may be used against legitimate opposition, while the Draft Hate Speech Bill suggests impermissible invasions into freedom of expression.

The year 1994 represented a single enormous stride towards political freedom. However, if we are to build a truly participatory democracy we must vigorously expand and defend a political culture that protects the political and civil rights of all.

8. Social and Economic Rights

Poverty is a formidable threat to the fabric of South African society. Mindful of the deep social and economic cleavages of the past, the Constitutional Assembly included justiciable social and economic rights in the 1996 Constitution. The comprehensive inclusion of these rights is a world first. The Constitutional Court has now handed down several judgments on these rights, most of which are internationally lauded as being at the cutting edge of human rights jurisprudence.

This review has considered what has been done to reverse the legacy of the past and to progressively realise these rights for all South Africans. It has mentioned the need to address the problems of implemen-

tation and for ongoing policy evaluation (Sections 3 and 4 above). In this section we raise two additional questions about socio-economic rights, namely the role of non-state actors; and the role of courts.

8.1 The Role of Non-State Actors

Many social and economic rights are delivered by non-state actors. For instance, pharmaceutical companies are important in delivering access to health care; banks in the delivery of housing; insurance companies in the delivery of private forms of social security; and the private sector in the delivery of jobs. There has undoubtedly been progress in the regulation of these industries/institutions by the government, and in attempts by the institutions themselves to address the needs of the poor. However, significant barriers remain in the hands of these non-state actors. In this regard, the provisions of Chapter 5 of the Equality Act could provide an important opportunity to identify and remove the discriminatory barriers that remain in these sectors and those that impede the full enjoyment of social and economic rights.

The issue of human rights and corporations/institutions remains a new and relatively undeveloped area of human rights, in South Africa and internationally. On 20 April 2004, the UN Commission on Human Rights voted to put the private sector on its agenda for the first time. The UN High Commissioner for Human Rights has been requested to compile a report on companies' human rights responsibilities, in full consultation with stakeholders. This could provide a further opportunity for advocacy in South Africa.

There is some evidence of the delivery of rights being impeded or prevented by other non-state actors, namely by communities themselves. An example of this is the occupation of houses on a municipal waiting list, thus effectively jumping the waiting list. Another example would be where older women and men in communities actively stigmatise and castigate younger women for becoming pregnant so as to access a state child-care grant. This is discussed in more detail in the final section of this conclusion (Section 13.3).

8.2 The Role of the Courts

The role of the courts in adjudicating socio-economic rights has not been without controversy over the past ten years. The Constitutional Court has crafted a careful jurisprudence that enables civil society to hold the government accountable to good governance, and to taking account of the plight of the poor.⁵ This is a positive achievement of the past ten years.

The 'policy' role of the court has generated some problems. Although the government has consistently refrained from active opposition to court judgments, there has been evidence of resistance to the courts' role.⁶ Perhaps of more concern, however, are the examples of the government's failure to act on court orders (*Grootboom*, *Eastern Cape Pensions* cases).

This suggests that the court judgments on socio-economic rights cannot be a substitute for civil society activity that continues to ensure that the government delivers on its rights commitments. The Treatment Action Campaign's constant vigilance on the issue of anti-retroviral drugs is a case in point.

9. Access to Justice

The review also highlights the problem of accessing human rights in and through the courts. It notes the following difficulties:

Access to the courts is a particular problem for poor and disadvantaged groups, who are unable to claim rights;

Problems are experienced in implementing and enforcing judgments, hence they can remain paper victories;

The rights of arrested and accused persons are not always recognised.

9.1 Access to Courts

Most key human rights cases are not taken up by disadvantaged groups and there are still few examples of the courts being used to advance the rights of the poor.

9.2 Problems in Implementing and Enforcing Judgments

There remains a gap between the progressive jurisprudence in many judgments and the reality on the ground. Huge problems are experienced in the enforcement of rights. These are linked to the problems of implementation listed in Section 5 above.

9.3 The Rights of Defendants

The section on criminal justice discussed the rights of accused persons and defendants. The South African Police Service must maintain the highest professional and ethical standards and human rights must inform their actions throughout in dealing with accused persons as well as interacting with victims of crime.

10. New and Old Fault-Lines

Ten years is a short time. As this review demonstrates, despite the progress achieved, South Africa has still not been able to impact significantly on many of the key social and economic fault-lines of our society, nor have we been able to prevent the emergence of new and significant human rights challenges.

10.1 Race, Class and Gender Still Influence Human Rights

Race, gender and class remain significant barriers to the enjoyment of rights. Although the chapters on socio-economic rights have demonstrated much

progress in policies, laws and programmes to address poverty and inequality, the embedded inequalities of the past — fundamentally those of race, but also those of gender and class, as well as urban/rural location — still haunt the South African landscape. The end of apartheid has meant that the growth of a black middle-class has blurred some of the racial boundaries of inequality. However, poverty remains overwhelmingly an issue of race. Thus race (compounded by gender and class) has continued to structure the substantive enjoyment of rights.

10.2 Poverty Prevents Rights

Many of the chapters demonstrate that socio-economic status or poverty prevents the enjoyment of all rights, both civil and political (rights of political participation, access to information and freedom of expression), as well as social and economic rights. Largely aligned with race and gender, class is a major determinant of the ability to enjoy rights.

10.3 Gender-Based Violence Prevents Realisation of Rights

High levels of gender-based violence structure women's access to human rights, including their rights to dignity, equality, freedom and security of the person, life and education.

11. 'New' Human Rights Vulnerabilities

The past ten years have also seen the emergence of 'new' inequalities that shape the enjoyment of human rights. Most significant are people living with HIV and AIDS, legal and illegal immigrants, and children.

11.1 HIV and AIDS

During the 1990s, HIV and AIDS emerged as the major human rights challenge to the new government. By the end of 2001, the Department of Health estimated that about 4,74 million people — or 1 in 9 South Africans — were HIV-positive.⁷ Research has drawn attention to how HIV tracks the inequalities of our society, with women being particularly vulnerable to being infected and affected by HIV and AIDS. Poor human rights and inequalities structure vulnerability to infection. Once HIV-positive or living with AIDS, people become, in turn, more vulnerable to rights violations. While the government has made some progress, its failure to respond strongly to the epidemic in the mid-1990s and to develop preventive (such as prevention of mother-to-child transmission) and treatment programmes in the later years have been among the most significant governance and human rights failures of the first ten years. Promoting and protecting the human rights of people living with and affected by HIV and AIDS is one of the major human rights challenges of the next ten years.

11.2 Nationality and Citizenship

The advent of South Africa's democracy has also seen a new fault-line emerge in our society between citizens and foreign nationals (both legally resident and undocumented). Xenophobia within the state and within society has become a new and major human rights concern. Among society as a whole, it manifests itself in discriminatory attitudes towards people of different nationality or ethnic origin, and also involves physical violence. State officials demonstrate discriminatory attitudes across many sectors, for example, in policing policy, housing policy, and immigration policy. Given its history and its position as a key role player in regional and international life, South Africa must demonstrate solidarity and compassion with those who are forced to flee their countries of origin.

11.3 Children

Children are a particularly vulnerable group in South Africa and bear the brunt of its high levels of poverty, gender-based violence and HIV/AIDS.

11.4 Disability

Despite the constitutional and legal recognition of disability, disabled people remain an invisible group in our society.

12. Equality

New and old lines of inclusion and exclusion have both shifted and entrenched people's ability to access their human rights. In Chapter Two, this review introduced the idea of formal versus substantive democracy, demonstrating that, at a formal level, South Africa's democracy has continued to consolidate, while 'at the substantive level it continues to be a highly unequal and impoverished society'. This inequality is cast in racial, class and gender terms and is demonstrated and exacerbated by high levels of poverty, violence and HIV/AIDS.

Although 'equality' has been at the centre of South Africa's transformative project in the past ten years, it has not necessarily been understood in ways that encompass the reality of the social and economic inequalities of people's lives. Conceptually and practically, 'equality' has largely been understood in terms of race, gender and disability — and it has often been a project of accommodation rather than transformation. Driven by the racial inequalities of the past, its project has been to include where there was previously exclusion. However, it has not necessarily been transformative in the sense of fundamentally changing social and economic inequalities.

The area of affirmative action and black empowerment has generated much debate. Affirmative action policies have been criticised for targeting an elite and for perpetuating rather than transforming the economic

order. Its redistributive effects thus far have been said to be limited and have not addressed the needs of the poor.

In the courts, South Africa has developed a rhetorically progressive equality jurisprudence. However, the courts have also maintained an ability to limit the reach of equality to exclude redistributive measures and controversial issues (such as sex-workers). In general, the jurisprudence has not necessarily been transformative in its impact.

This has perhaps been compounded by the fact that 'equality' has seen an emphasis on individuals going to court to claim their rights, rather than a more proactive strategy of undoing discriminatory barriers. The promotional aspects of equality have thus been limited and there has been little attempt to identify and engage systemic obstacles.

In the future the equality project perhaps needs to be both more visionary and more practical. A common positive vision on equality needs to be developed within government at the same time as plans are developed, targets are set, and progress is monitored and evaluated effectively.

13. Human Rights Challenges

A number of challenges emerge from the review:

13.1 Human Rights and Governance

Much of the effective implementation of human rights lies in effective governance. This means identifying the problems of implementation and then addressing them in a consistent and measured way.

The Human Rights National Action Plan also needs to be monitored effectively and implemented along the guidelines set out in the United Nations Decade for Human Rights Education (1995-2004).

13.2 The Private Sector

The next decade needs to look at the role of human rights in the private sector.

13.3 Building a Culture of Human Rights and Democracy

There is often a huge gap between rights language and popular views on the ground. This is most visible in the way in which human rights are equated with 'controversial' issues such as prisoners' rights, criminals' rights, the death penalty, affirmative action and abortion. It is also visible in the lack of resonance that many communities express with human rights. Here, people are so concerned with their daily survival that the Constitution is little more than an abstract promise, and rights are meaningless. For many people, democracy and rights have not taken root in their lives — either as a tool to effect change or as a set of norms that governs their lives.

Building a human rights culture across all communities remains an ongoing and critical challenge for South Africa — both within government and civil society.

Within government, this involves ongoing capacity-building as well as the development of a human rights ethos. This needs to be articulated at all levels of government, and especially by its leaders. The development of a human rights culture requires active political leadership, especially where human rights norms are seen to be contrary to the sentiment of 'the majority' or to constitute an obstacle to a more efficient and just government. The government's consistent stance on the death penalty is a sterling example of such leadership.

Within civil society, existing and emerging struggles on human rights are vital to developing this culture of human rights. By finding a public voice through the medium of rights, individuals and communities come to understand rights and democracy as positive.

13.4 Enhancing Rights-Based Strategies by Civil Society

Enhancing the capacity of civil society to engage in rights struggles is therefore a critical component of building democracy and achieving social justice. It is perhaps especially important in a context where the ruling party has such a significant majority. An active civil society plays a crucial role in maintaining democratic debate and in holding government accountable to the Constitution.

While civil society has successfully engaged rights strategies, especially around policy development and law reform, it has not yet fully harnessed all the possibilities of political and legal rights struggles. For example, civil society organisations have not yet fully exploited the possibilities of social and economic rights, or of the promotion of the Equality and Prevention of Unfair Discrimination Act. The complex issues of implementation also require a particularly robust and nuanced approach that uses both violations and promotional aspects of rights — and that balances protest and engagement — to hold the government accountable. Many of the cross-cutting rights issues of violence, poverty and HIV/AIDS require civil society to work outside its silos and form different alliances.

Civil society also has an important role to educate and raise awareness on all rights. A particular chal-

lenge is how to build this into all its rights work.

13.5 Giving Poor Communities a Voice

This review has suggested that the interests of the poor have not always been addressed by laws and policies. Where structures and mechanisms are in place, poor and marginalised groups are often unable to access these. Clearly, many of these structures of consultation and inclusion are still evolving, and are facing generic problems such as local level capacity.

Civil society organisations have a significant role to play in fostering the inclusion of poor and marginalised groups. Ensuring that these groups have a voice, and that their interests are included in policy development and implementation, are perhaps some of the most significant human rights challenges of the next decade.

13.6 Still in Process

South Africa is still building a human rights society. For real transformation at individual and community levels, it is important to deal with the social and economic legacies of the past and to engage in the creation of the new society. It is also important to address questions of culture and diversity, language and religion.

13.7 Measuring this Progress

Finally, it is important to measure progress over the next ten years in terms of human rights standards. Human rights benchmarks and indicators need to be developed and monitored.

Endnotes

- 1 Albertyn, C. and Goldblatt, B. (1998) 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' 14 SAJHR, p. 248. See also Klare, K. 'Legal Culture and Transformative Constitutionalism' (1998) 14 SAJHR.
- 2 GCIS, *Ten Years of Freedom: South Africa 1994-2004*. <http://www.gcis.gov.za/docs/publications/10years.htm>
- 3 <http://www.info.gov.za/speeches/sotn2004.htm>
- 4 Idasa Democracy Barometer.
- 5 *Grootboom* set out a number of governance criteria that had to be followed, as well as a single substantive criterion that the plight of the most marginalised had to be considered.
- 6 See, for example, the Minister of Health's initial remarks on the *Treatment Action Campaign* judgment.
- 7 Department of Health, 2002

EPILOGUE

After the ending of apartheid and the dawning of the new constitutional democratic order, South Africa went through a succession of fundamental changes in all spheres of government and public administration. The spate of qualitatively new policies and legislative interventions required a complete reorientation of the way in which policies were formulated and implemented; laws were interpreted and applied; and institutions operated. Central to these developments has been the Constitution of South Africa of 1996 and the key role played by the judiciary, particularly the Constitutional Court, in ensuring the supremacy of the Constitution and the rule of law. The standards set by the Constitutional Court and the jurisprudence that has emerged from its decisions and those of other courts have been admirable and authoritatively cited in other jurisdictions and in the works of scholars and practitioners. However, the pace of transformation of the judiciary remains slow and allegations of racism within the judiciary itself have surfaced. It is hoped that the new Chief Justice, Pius Langa, will continue to build on the foundation left by his predecessor, Justice Arthur Chaskalson, and accelerate the pace of transformation and also uphold the independence of the judiciary.

Since this review was completed, a number of developments have taken place on the political front. The local government elections were held in March 2006, the second since the advent of multi-party democracy. Developments at the local government level serve as a barometer of the degree of democratisation of the country; citizens' participation and involvement in the process; and, more importantly, whether their expectations have been met. Poor local government administration that is not committed to *batho pele*; poor service delivery; inadequate or inexistent social infrastructure; and growing corruption among local government officials were among the problems raised during the political campaign trails and at *imbizos* held by President Thabo Mbeki during his visits to various municipalities. The same concerns were also expressed during a series of strikes and mass protests on a wide range of issues. If an enduring democracy is to be firmly anchored at this level of government, meaningful attempts have to be made to address poverty and unemployment; to fast-track service delivery; and to evolve more democratic and participatory structures in which people are involved and their views heard. The volatile situation that resulted from people's dissatisfaction over the way certain cross-border municipalities had been demarcated only shows how fragile democracy can be if the process of engagement and consultation is flawed or not vigorously and consistently pursued.

As outlined in the various chapters of the review on socio-economic rights, remarkable progress has been made by the post-apartheid government in providing many communities with clean water and sanitation; housing; social grants; health services; and education. The promises made by the government at the time of the multi-party elections and the expectations held among the people that the newly won freedom and democracy would redress overnight the effects of apartheid continue to pose a serious challenge to the government's programme and efforts towards social service delivery.

There was a significant increase in the budget allocation to the social service sectors in the current financial year (2006/2007), particularly for education and health. Other measures of note include the introduction of 'no-fee schools' in poor communities; the requirement that schools offer a local language, where hitherto English and Afrikaans had been preferred; and the goal to eradicate the bucket-system for latrines by the end of 2007. Social grants have also been increased for children and the aged; people with disabilities; and those living with HIV/AIDS. However, without taking sufficient measures to mobilise and harness people as power and resources, and without meaningful programmes to create skills for self-sufficiency and self-reliance, a perpetual state of dependence on social grants will be created, for which the taxpayer will always bear the burden.

The roll-out of anti-retroviral treatment for AIDS has begun, albeit at a slow pace and mainly in urban and peri-urban centres. Inadequate capacity and insufficiently trained staff are among the obstacles that are cited, but the government's own commitment and policies have also come into the spotlight. South Africa is still experiencing high HIV infection rates and therefore the long-term impact of AIDS may have dire consequences in the social, political and economic spheres.

The pace of land reform and land redistribution has been painstakingly slow and, at times, plagued by an ambivalent and indecisive approach as to how it should be done. Many of the claims settled so far appear to be in urban or peri-urban areas and involve individuals, while the settlement of many rural claims, which involve whole communities or groups of people, has been relatively few. It is evident that the willing-seller willing-buyer principle is not working, but the government has been shy to invoke the property clause in the Constitution. If South Africa is to eradicate poverty and address a range of issues that confront the rural areas, the land issue must be revisited. Land, which is an abundant resource that can be readily accessed, should be made available, particularly to those who were hitherto dispossessed. The rise of the Landless

People's Movement and the sentiments expressed over the sale of land to foreigners point out the need for clear and decisive government intervention.

South African economic growth measured in GDP has been remarkably high, and the rand has strengthened considerably over other major foreign currencies. While the government's policy, underlined by Growth, Employment and Redistribution (GEAR), was partly seen as being responsible for restructuring and worker lay-offs, the government has unveiled the Accelerated and Shared Growth Initiative of South Africa (ASGISA), as a set of interventions intended to catalyse and accelerate shared growth and development. The search for a viable economic policy and the introduction of ASGISA may trigger a RPD vs GEAR debate, in which issues of social justice and income differentiation are likely to emerge. There is also growing discontent that the Black Economic Empowerment (BEE) initiative is only benefiting a few, particularly those who have used their influence and connections within the ruling party and the government to advance their private businesses.

The next decade is undoubtedly one in which to consolidate democracy and address the gaps and problems that have been identified during the first phase of implementation. Apart from issues of poverty, social justice and social service delivery, the challenge that South Africa is likely to encounter is managing its diverse racial, ethnic, cultural, religious and linguistic diversity in a manner that will allow all its citizens a sense of belonging and pride of being South Africans.

This requires respect for diversity and tolerance towards one another, and a spirit of giving and sharing. Racism, whether manifested in open or subtle form, must be faced upfront. By defeating apartheid and setting up a society driven by democratic values and human rights, South Africa has set itself up as an admirable model for Africa and the world. It should not, therefore, be allowed to fall prey to the past.

Professor Nasila Rembe
Editor
March 2006

AUTHORS

Chapter	Title	Name	Biography
1	South Africa 1994-2004	Dr Chris Landsberg AND Shaun Mackay	Chris Landsberg is the Executive Director of the Centre for Policy Studies at the University of the Witwatersrand. He is responsible for the overall direction of the Centre, its strategic niche and profile, and outreach. He is an African policy analyst with a specialist interest in democratic governance, democratisation and peace and security in Africa. AND Shaun Mackay is a Manager at the Centre for Policy Studies. He manages and co-ordinates the day-to-day activities of the Centre. He is a political scientist with interest in constitutional issues and democratisation.
2	Promoting Equality through Administrative Measures	Thuli Madonsela	Thuli Madonsela joined the GRP (Gender Research Project) in 1993. In 1995 Thuli joined the Department of Justice as Chief Director of Transformation and Equity
3	Protecting the Right to Equality through the Constitutional Court	Prof. Ronald Louw	The late Ronald Louw was the Head of the Law School at the University of KwaZulu-Natal. He was a law lecturer and became associate professor of law at the University of KwaZulu-Natal.
4	The Challenge of Employment and Equity at the Work Place	Dr. Neva Makgetla	Neva Makgetla is the Head of Policy Unit at COSATU. She completed her B.A. (Hons) at Harvard University, and her Ph.D. in Economics in Berlin, with a dissertation on international financial flows and development.
5	Socio-Economic Rights and the Distribution of Government Services	Dr. Neva Makgetla AND Robin Autry	Neva Makgetla is the Head of Policy Unit at COSATU. She completed her B.A. (Hons) at Harvard University, and her Ph.D. in Economics in Berlin, with a dissertation on international financial flows and development.
6	Land	Karin Lehman	
7	Housing	Prof. Pierre de Vos	Pierre de Vos teaches Constitutional Law at the University of the Western Cape. He holds degrees from the University of Stellenbosch (BCom, LLB, LLM), Columbia University (LLM) and the University of the Western Cape (LLD). He has published widely in the fields of social and economic rights, sexual orientation and the law, and equality law. He is the Chairperson of the Board of the Aids Legal Network (ALN), an NGO involved in the promotion of a human rights based approach to HIV/AIDS issues.
8	Health	Prof. Charles Ngwena	Charles Ngwena LLB, LLM (Wales), Barrister-at Law is a Professor in the Department of Constitutional Law of the Faculty of Law of the University of the Free State. Prior to joining the University of the Free State in 2002, he taught law at Cardiff Law School (University of Wales), the University of Swaziland and Vista University. He has taught, researched and published widely on issues at the intersection between human rights, ethics and health care, including HIV/AIDS and reproductive and sexual health.

Chapter	Title	Name	Biography
9	Food	Danie Brand	Danie Brand (BLC LLB (Pretoria), LLM (Emory)) is a Senior Lecturer in the Department of Public Law and a Research Associate of the Centre for Human Rights at the University of Pretoria, South Africa. His area of research interest is socio-economic rights, in particular the right to food.
10	Water	Tim Mosdell	Tim Mosdell has masters degrees in Political Studies and Business Administration. He has fifteen years' research and consulting experience in the fields of development studies, public policy and public sector management. Since joining Palmer Development Group in 2000 he has worked extensively in the water sector, conducted a major evaluation of Treasury's <i>Special Poverty Relief Allocation</i> , consulted in the municipal restructuring field, developed knowledge management methodologies, and has contributed to strategic responses to urban poverty.
11	Social Security	Nick de Villiers	Legal Resources Centre
12	Education	Faranaaz Verieva	Faranaaz Verieva is currently the Programme Head of the Education Law Project at the Centre for Applied Legal Studies (CALS) at Wits. She has a BA LLB from the University of the Witwatersrand (Wits) and a LLM in human rights and constitutional practice from the Centre for Human Rights.
13	The Right to Development	Prof. Shadrack Gutto	Shadrack B. O. Gutto is the Director of the Centre for African Renaissance Studies at the UNISA. He holds the following degrees: LLB (Hons) (Nairobi, Kenya), M.A.L.D. (Fletcher School of Law and Diplomacy/Tufts, USA), PG Diploma in International and Comparative Human Rights Law (Strasbourg, France), Ph D (Lund, Sweden). Prof Gutto has published widely in local and international legal and political economy professional and academic journals and has authored or edited numerous books and monographs
14	Environment	Prof. Loretta Feris	Loretta Feris is Associate Professor of Law at the University of Pretoria and research associate at the Centre for Human Rights at the University of Pretoria. Prior to her position at the University of Pretoria she was based at American University's Washington College of Law first as an international fellow and later as assistant-director of the International Legal Studies Program. During this time she lectured and conducted research in the areas of International Trade and Development, Intellectual Property Rights and the Environment, Trade and Environment and Global Environmental Governance. She remains an adjunct faculty member of this institution.
15	Criminal Justice System	Prof. Lovell Fernandez	Lovell Fernandez BA LLB (UWC) LLM (CJ) (NYU) PhD (Wits) is a Professor of Law and Deputy Dean in the Faculty of Law University of the Western Cape. He has previously held positions at the Centre for Applied Legal Studies (Wits), Institute of Criminology (UCT), Planning Unit (Department of Justice). He has published extensively in the field of criminal justice and transitional justice.

Chapter	Title	Name	Biography
16	Political Participation	Judith February	Judith February is the Manager of the Political Information and Monitoring Service-South Africa at IDASA. She studied law at the University of Cape Town where she obtained her BA and her LIB degrees in 1991 and 1993 respectively. She was admitted as an attorney in 1996 and practised law in Cape Town until 2000. Her focus at IDASA includes corruption and its impact on governance, Parliamentary oversight, Constitutional law monitoring, institutional design and general political analysis.
17	Freedom of Expression	Ahmed Motala	Ahmed Motala , currently Executive Director of the Centre for the Study of Violence and Reconciliation in Johannesburg, is a human rights lawyer and activist who has worked over the past 17 years on an array of human rights and development issues at the national, continental and international level.
18	Access to information	Prof. Jonathan Klaaren	Jonathan E Klaaren is the Director of the Mandela Institute, School Of Law, University of the Witwatersrand, where he is responsible for fundraising, professional legal education, research in law of the global economy, and international relations and partnerships. He teaches in international trade, constitutional law, administrative law, conflicts of law, and refugees and migration law.
19	Promoting and Protecting Cultural, Religious and Linguistic Rights	Adv. Tseliso Thipanyane	Tseliso Thipanyane is currently the Deputy Chief Executive Officer (Operations) of the South African Human Rights Commission responsible for the Commission's provincial offices and the Commission's research, education and training programmes.
20	Conclusion	Prof. Cathi Albertyn	Cathi Albertyn is a professor of law and the director of the Centre for Applied Legal Studies, a research, advocacy and legal services institute based at the University of the Witwatersrand. Cathi is a human rights and constitutional lawyer with a particular specialisation in gender equality and social justice. She has written extensively in the areas of women's rights and equality.

