

HUMAN DEVELOPMENT REPORT 2000

HUMAN DEVELOPMENT AND HUMAN RIGHTS SOUTH AFRICAN COUNTRY STUDY

By: Sandra Liebenberg
Senior Researcher and Co-ordinator
Socio-Economic Rights Project
Community Law Centre
University of the Western Cape
Private Bag X17
Belville
7353
Tel: (021) 959 2950/1
Fax: (021) 959 2411
E-mail: slieb@iafrica.com

TABLE OF CONTENTS

- 1. Introduction**
- 2. Apartheid and its legacy**
 - 2.1 Human rights violations under apartheid
 - 2.2 The legacy of apartheid
- 3. Democracy and a New Constitution**
 - 3.1 The interim Constitution
 - 3.2 The final Constitution
 - 3.3 Human rights in the final Constitution
- 4. Dealing with the Past -
The Truth and Reconciliation Commission**
- 5. South Africa and International Human Rights Law**
 - 5.1 The influence of international human rights law on the Bill of Rights
 - 5.2 Interpreting human rights in South Africa
 - 5.3 Becoming a party to human rights treaties
 - 5.4 Giving effect to international law in South Africa
 - 5.5 International conferences and programmes of action
- 6. Giving Effect to Human Rights - The Role of the State**
 - 6.1 Laws, policies and programmes
 - a) Labour
 - b) Housing
 - c) Land
 - d) The Environment
 - e) Gender Equality
 - f) Equality, access to information and just administrative action
 - g) Programmes to advance access to water and health care services
 - 6.2 The challenges of implementation
- 7. The Role of Human Rights Institutions and the Courts**
 - 7.1 Human rights institutions
 - 7.2 The Courts
- 8. The roles of Civil Society, the Media and the Private Sector**
 - 8.1 Civil society advocacy and campaigns
 - 8.2 The media
 - 8.3 The private sector
- 9. Conclusion**

NOTES

1. Note on the use of racial terminology in this paper:

In the apartheid era, all South Africans were classified in one of four population (race) groups - African, Coloured, Indian and White. The current government rejects these racist classifications, but is committed to collecting statistics on a racial basis so as to measure how far it has moved in countering the historical effects of apartheid. This paper also refers to these racial groups to reflect the relative levels of disadvantage they experienced under apartheid and its on-going legacy of poverty and inequality. African people were most disadvantaged and the white group most privileged. The generic term, 'black people' in this paper refers to the African, Coloured and Indian population groups.

2. Note on the use of boxes in this paper

The use of boxes in this paper is intended to highlight interesting cases and innovations in the area of human rights and development in South Africa.

3. References

A full reference to all sources relied on in this paper are contained in the footnotes.

1. INTRODUCTION

This study examines key human rights developments in South Africa with a particular focus on their relationship to human development in the country.

The paper's starting point is that a human rights-based approach to development has the following main elements:

- The recognition and practical application of the principle that all human rights - civil, political, economic, social and cultural rights - are “universal, indivisible and interdependent and interrelated.”¹
- The recognition that all public and private actors in society have a duty to respect and promote human rights;
- The creation of open and transparent institutions and processes for participation by civil society in the political, economic, social and cultural life of the country;
- A commitment to diversity and equality of outcomes in law, policy and practice;
- Prioritising the needs of vulnerable and disadvantaged groups, and the adoption of special measures to assist these groups to gain access to opportunities, resources and social services;²
- The creation of a range of effective mechanisms of accountability to ensure respect for human rights. These mechanisms include -
 - Political accountability through the electoral process;
 - Public accountability through the monitoring of human rights commitments by an independent media and organs of civil society;
 - Legal accountability through the courts, other independent and impartial tribunals, and institutions such as national Human Rights Commissions.

The paper describes innovative human rights institutions and practices in South Africa since the transition to democracy in 1994. The paper does not purport to be a comprehensive review of all laws, policies, programmes and human rights developments in South Africa. Rather, the examples and case studies have been selected to illustrate some of the main elements of a human rights approach to development identified above.

¹ This was affirmed by the World Conference on Human Rights in *The Vienna Declaration and Programme of Action*, June 1993, UN doc. A/Conf 157/23, Part I, para. 5.

² See General Comment No. 3 (Fifth session, 1990), UN doc. E/1991/23, *The nature of States parties obligations (art 2(1) of the International Covenant on Economic, Social and Cultural Rights)* adopted by UN Committee on Economic, Social and Cultural Rights, paras. 10 - 12.

2. APARTHEID AND ITS LEGACY

2.1 Human rights violations under apartheid

Human rights developments under the new democratic government in South Africa can only be understood and appreciated against the historical background of colonialism and apartheid. These regimes violated the full spectrum of human rights recognised in the Universal Declaration of Human Rights (1948). Apartheid policy consisted of the enforced political, economic and social segregation of people along racial lines. Whites monopolised the formal institutions of power and enjoyed extensive rights and privileges. While relative privileges were bestowed on the Coloured and Indian racial groups, the African majority was the most disadvantaged in all spheres. This segregation was enforced through a gamut of laws. The cornerstone of these laws was the Population Registration Act of 1950 which classified every person according to their ethnic or racial group. As described by the Constitutional Court,

“Race was the basic, all-pervading and inescapable criterion for participation by a person in all aspects of political, economic and social life.”³

Political rights were violated by depriving black people of the right to vote and equal participation in political institutions. The policy of separate development pursued by the apartheid government through the creation of ‘independent’ homelands deprived many African people of their citizenship rights. It eventually resulted in fourteen different administrative systems operating in the country, leading to fragmented governance, inefficiencies and corruption.

Freedom of movement and residence were violated by laws restricting the settlement of black people in urban areas (influx control policy), as well as maintaining racially segregated residential areas through legislation such as the Group Areas Act, 1966. Prof. John Dugard described the restrictions on movement under apartheid as follows:

“A vast web of statutes and subordinate legislation confine the African to his tribal homeland and release him only in the interest of the agricultural and industrial advancement of the white community. When he visits a “white area” as a migrant labourer he does so on sufferance, shackled by the chains of legislation and administrative decision.”⁴

The control of movement of African people in South Africa was enforced by the “pass system”. The pass was a reference book which Africans were obliged to carry on them at all times. It was required for lawful movement into, out of, or within specified areas. Failure to produce a pass book to a policeman on demand was a criminal offence.

In the course of controlling and suppressing opposition to apartheid policies all civil rights and freedoms such as the right to life, the right against torture and other forms of degrading treatment or punishment, the right to a fair trial and

³ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC), 1996 (10) Butterworths Constitutional Law Reports (BCLR) 1253 (CC), para. 7.

⁴ *Human Rights and the South African Legal Order*, Princeton University Press, 1978, p. 73.

freedom of speech and assembly were violated on a large scale. These took the form of killings, torture, the severe ill-treatment of political prisoners, detentions without trial, the banning of individuals and political organisations such as the African National Congress (ANC) and Pan African Congress (PAC), stringent restrictions on the media, and the prohibition of gatherings and demonstrations. As resistance to the apartheid regime, intensified, particularly from 1976⁵ onwards, the apartheid regime became increasingly repressive. It used the law to confer broad powers on the executive and powerful security apparatus. Basic civil liberties were eroded on a large scale under the States of Emergency declared during the 1980s by the apartheid government. Emergency regulations curtailed even further the limited powers of the courts to prevent and redress violations of human rights.

However, the apartheid system should not be equated solely with violations of the civil and political rights of black South Africans. The systematic violation of the economic, social and cultural rights of black South Africans was an integral part of the apartheid project. The Land Acts of 1913 and 1936 restricted the African population to some 13% of the total land area of South Africa. Black people were dispossessed of their land, and forcibly removed to over-crowded reserves. These were far from sources of employment and lacked the infrastructure and services for sustainable development. Poverty, disease and malnutrition were rife. An estimated 3.5 million people were forcibly removed from rural and urban areas, between 1960 and 1980.⁶ The reserves became pools of cheap migrant labour for white owned farms and mines. Dispossession forced successful black farmers to seek employment as farm labourers thereby becoming insecure occupiers of land or labour tenants. The migrant labour system caused untold suffering, breaking up many African families. The men lived in appalling conditions in the mining compounds and slums of the cities, while many women and children were left to eke out a precarious livelihood in the impoverished rural areas.

Black people suffered gross inequalities in access to social services, resources and economic opportunities. Black communities were deliberately underdeveloped, and lacked adequate sanitation, water and refuse removal services as well as decent housing, schools, and clinics. Racial segregation was maintained at all levels of the education system. There were enormous disparities in the per capita expenditure on the education of black and white children. Thus in 1974 - 1975, the estimated per capita expenditure on African children in primary and secondary schools was R39, compared with the amount of about R605 spent on each white child.⁷ There were large disparities in the amounts of the various social security grants payable to different racial groups, and in different geographical areas. Moreover, as one author observed,

⁵ The year of the June, 16th student uprising which started in Soweto.

⁶ *White Paper on South African Land Policy*, Department of Land Affairs, Government of South Africa, April 1977, p. 11.

⁷ John Dugard, *Human Rights and the South African Legal Order*, Princeton University Press, 1978, p. 84.

“Administrative delays, corruption and inefficiency, particularly in rural areas, were a form of covert discrimination for disenfranchised communities.”⁸

Severe restrictions were placed on the rights of black workers. Job reservation, a product of both statute and convention, reserved many of the skilled and well-paid jobs for whites. In the Western Cape Province government applied a “Coloured labour preference” policy which severely limited the employment opportunities of African work-seekers in the region, and created racial friction between African and Coloured workers. Although it was not illegal to form a trade union, the law only recognised separate trade unions for Whites and Coloureds (which included Indians). Trade unions organising all workers regardless of race were seen as political and repressed. In 1979 the law was amended to provide for the recognition of racially separate trade unions for African workers. But it was only in 1981 that non-racial trade unions were recognised. With recognition came a very limited right to strike.

The right to marry, found a family and associate with whom one chooses were violated by laws which prohibited inter-racial marriage and sexual relations.⁹ Racial discrimination pervaded all aspects of social and public life. Most public amenities, including rest rooms, toilets, post offices, elevators, restaurants, railway carriages and buses were racially segregated. Where separate facilities were established for black persons, these were inevitably of a vastly inferior standard.

Cultural rights were violated through manipulating the system of African customary law, and codifying it into a rigid system which could not adapt appropriately to social and economic changes. Rural African women were particularly disadvantaged. In a context where traditional ways of life and support systems were rapidly breaking down, they operated under a system where their personal, proprietary and contractual rights were greatly curtailed.¹⁰ Culture was also manipulated by colonial and apartheid rulers to bolster the power of certain tribal chiefs and kings in exchange for patronage and complicity in the apartheid system. Black languages were downgraded and enjoyed no official status. English and Afrikaans were the only official languages of the country. The spark that ignited the 1976 student uprising was an attempt to impose Afrikaans as the medium of instruction in African schools.

2.2 The legacy of apartheid

Apartheid left a legacy of deep poverty and inequality in the country. For a long time South Africa had the highest measurement of income inequality (Gini coefficient) in the world. Today only that of Brazil is higher. The poorest 40% of households (equivalent to 50% of the population) receive only 11% of total

⁸ H. Borat, ‘The South African social safety net: past, present and future’, vol. 12, No. 4 *Development Southern Africa*, 1995 note 4, p. 598.

⁹ The Prohibition of Mixed Marriages Act of 1949, and the Immorality Act of 1957

¹⁰ See Thandabantu Nlapo, ‘Indigenous Law and Gender in South Africa: Taking Human Rights and Cultural Diversity Seriously.’ *Third World Legal Studies*, published by the International Third World Legal Studies Association and The Valparaiso University School of Law, 1994 - 5, pp. 49 - 71.

income, while the richest 10% of households (equivalent to only 7% of the population) receive over 40% of total income. Inequality of income distribution between race groups is considerable, and accounts for 37% of total income inequality.¹¹ Poverty also has strong gender dimensions in South Africa with female-headed households having a 50% higher poverty rate than male-headed households.¹² In all of the key social indicators, including life expectancy, infant mortality, illiteracy, fertility and access to safe water, South African fares very poorly against comparable middle-income countries.¹³ A study on *Poverty and Inequality in South Africa* identifies the poverty traps set by apartheid as “an important explanation for the persistence of poverty in South Africa.” These relate to the absence of complementary assets and services “and a poverty of opportunity whereby people are unable to take full advantage of the few assets that they do have.” These conditions reproduce poverty and perpetuate inequality, particularly in the context where the South African economy is contracting.¹⁴

Redressing this legacy, and achieving human development and the realisation of all human rights remain major challenges for the democratic government in South Africa.

¹¹ *Poverty and Inequality in South Africa*, Report prepared for the Office of the Executive Deputy President and the Inter-Ministerial Committee for Poverty and Inequality, Summary Report, edited by Julian May, 13 May 1998, p. 8.

¹² *Key Indicators of Poverty in South Africa*, An analysis prepared for the Office of the Reconstruction and Development Programme (RDP) by the World Bank, based on the South Africa Living Standards and Development Survey, coordinated by the Southern Africa Labour and Development Research Unit (SALDRU) at the University of Cape Town, Ministry in the Office of the President: Reconstruction and Development Programme, October 1995, p. 4

¹³ *Ibid.*, p. 6.

¹⁴ *Poverty and Inequality in South Africa*, *supra*, p. 61.

3. DEMOCRACY AND A NEW CONSTITUTION

3.1 The interim Constitution

“This Constitution provides a historic bridge between the past of 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 opportunities for all South Africans, irrespective of colour, race, class, belief or sex.”¹⁵

The struggles of the liberation movements, the trade unions and ordinary South Africans combined with the moral and economic pressures brought to bear by the international community eventually forced the South African government to the negotiating table in the early 1990's. The Multi-Party Negotiating Process, in which 26 political groupings participated, was the main forum for negotiating what has become known as South Africa's transitional or 'interim' Constitution.¹⁶ The first democratic elections in South Africa were held on 27 April 1994 in terms of this Constitution. It also established the framework for the transitional governance of the country, pending the adoption of a final Constitution.

For the first time in South Africa's history the old system of parliamentary sovereignty was replaced by a system of constitutional democracy in which the Constitution is the supreme law of the country. All laws and conduct inconsistent with the Constitution would henceforth be of no force and effect. The interim Constitution also introduced a chapter of justiciable “fundamental rights”.¹⁷ This chapter includes the traditional civil and political rights such as the rights to vote, to a fair trial, and freedom of speech and assembly. However, it goes beyond these traditional rights and liberties by including what are relatively innovative rights for a national Constitution. Among these rights are the right of access to information (s 23); the right to administrative justice (s 24); a qualified right to the free pursuit of economic activity (s 26); the right to an environment which is not detrimental to health or well-being (s 29); the right of children to security, basic nutrition, basic health and social services (s 30(1)(c)); language and cultural rights (s 31); and educational rights (s 32). Also included are labour rights (s 27) and property rights (s 28). Important constitutional institutions were established in South Africa for the first time, including the Constitutional Court, the Human Rights Commission, and the Commission on Gender Equality.

The procedures for the adoption of the final Constitution were also prescribed in the interim Constitution. The National Assembly and Senate (the two houses of the new democratically-elected parliament) would in joint session form the Constitutional Assembly tasked with drafting and adopting a new Constitution. The interim Constitution also set the parameters for the contents of the final Constitution. Thus the final Constitution had to comply with a set of 34 'Constitutional Principles' appended to the interim Constitution.¹⁸ These principles

¹⁵ Preamble on *National Unity and Reconciliation*, Constitution of the Republic of South Africa Act 200 of 1993.

¹⁶ Constitution of the Republic of South Africa Act 200 of 1993.

¹⁷ Chapter 3.

¹⁸ Schedule 4.

were wide-ranging and included stipulations that the final Constitution contain a justiciable Bill of Rights, prohibit racial, gender and all other forms of discrimination, provide for freedom of information “so that there can be open and accountable administration at all levels of government”, protect the diversity of language and culture, and provide for national, provincial and local government powers. Before the final Constitution could come into effect, the Constitutional Court had to certify that it complied with all these principles.

3.2 The final Constitution

The final Constitution was negotiated between May 1994 and October 1996, and was adopted by an overwhelming majority of the Constitutional Assembly on 8 May 1996. The Constitutional Court certified an amended text of the new Constitution on 4 December 1996¹⁹, and it came into force on 4 February 1997.²⁰

Towards a new Constitution: The public participation programme
“You’ve made your mark, now have your say.”²¹

The Constitutional Assembly (CA) was committed to ensuring broad public participation in the drafting of the final Constitution. In the words of the former Chairperson of the CA, Mr. M.C. Ramaphosa:

“...in the end the drafting of the Constitution must not be the preserve of the 490 members of this Assembly. It must be a constitution which our people feel they own, a constitution that they know and feel belongs to them.”²²

The challenge was to effectively engage millions of ordinary people in the Constitution-drafting process, particularly the large rural population, most of whom are illiterate and do not have access to print or electronic media. There was also a need for education on the role of a constitution in laying the foundations for human rights, democracy and development in the country.

The public participation programme had a number of different elements. The main aims of the media campaign were to inform, educate, and stimulate public interest in the constitutional process, particularly among disadvantaged communities. Extensive use was made of print, radio, television, a national advertising campaign, as well as the production of in-house media. Other communication tools included a regular newsletter (*Constitutional Talk*), a telephone talk-line, and an Internet home page. Submissions were solicited from the public on all aspects of the new Constitution. Nearly 1.7 million submissions were received in response to this call.

¹⁹ Initially the Constitutional Court declined to certify the final Constitution. It was only certified after certain amendments to the text: first certification judgment: *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), 1996 (10) BCLR 1253 (CC); second certification judgment: *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa*, 1996 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC).

²⁰ The Constitution of the Republic of South Africa Act 108 of 1996 [hereafter referred to as the final Constitution or the 1996 Constitution].

²¹ One of the slogans used in the advertising campaigns which formed part of the public participation programme.

²² Quoted in: Hassen Ebrahim, *The Soul of a Nation: Constitution-making in South Africa*, Oxford University Press: Cape Town, 1998, p. 239.

Another aspect of the public participation programme was the holding of constitutional public meetings to facilitate face to face interaction between the public and members of the Constitutional Assembly. These meetings were held mainly with rural and disadvantaged communities who do not enjoy easy access to the formal media. Participants in these meetings were able to hear first hand reports on the unfolding process from their elected representatives and to present their own views on the various issues being negotiated by the CA. Workshops with civil society were organised by the Constitutional Educational Programme to assist people to participate meaningfully in the process. In addition to these public meetings, the CA ran a National Sector Public Hearing Programme. In these hearings different sectors of civil society were consulted on the constitutional themes of particular relevance to them. Themes of these hearing included: the judiciary, business, labour, children's rights, women and socio-economic rights.

Organisations in civil society also conducted effective advocacy and lobbying campaigns on various aspects of the Bill of Rights. For example, women's organisations lobbied successfully for a right in the Bill of Rights against all forms of public or private violence (s 12(1)(c)). The Reproductive Rights Alliance played a key role in ensuring the inclusion of reproductive rights and health in the Bill of Rights (s 12(2)(a) and s 27(1)(a)). The National Coalition on Gay and Lesbian Equality helped ensure that the right to equality expressly included sexual orientation as a prohibited ground of unfair discrimination (s 9(3)).

The first working draft of the Constitution was widely publicised. Over five million copies in user-friendly, tabloid form were distributed in November 1999. At the same time, a media campaign was conducted which requested submissions from the public on this draft. Approximately 250 000 submissions were received. These were studied by the constitutional experts advising the CA, and recommendations were made to members of the CA on the content and merits of the submissions.

After the adoption of the Constitution, seven million copies were produced and distributed in all eleven official languages. Distribution of the Constitution took place through schools, post offices, the police, prisons and structures of civil society. It was also accompanied by an illustrated guide, highlighting and explaining in accessible language key aspects of the Constitution. The CA had also made a deliberate decision to draft the Constitution in plain language, avoiding mystifying legal jargon. The distribution took place during 'National Constitution Week' which started on 17 March 1997 and culminated on 21 March 1997, South Africa's national Human Rights Day. During this week a range of activities took place aimed at engendering a sense of ownership of the new Constitution among all sectors of society.

The former Executive Director of the CA, Mr. Hassen Ebrahim, describes the significance of the programme in the following terms:

"...the public participation programme stands out as a monumental exercise, remaining second in effect and extent only to the April 1994 elections...By empowering civil society to participating in the constitution-making process, the Constitutional Assembly was able to add a new dimension to the concept of democracy in South Africa: that is, a participatory democracy. This set a tough

precedent for government and provided a window to what a participatory democracy could achieve.”²³

3.3 Human rights in the final Constitution

The adoption of the new Constitution represents a milestone in the history of human rights in South Africa. The preamble states that the Constitution is adopted so as to:

“Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
Improve the quality of life of all citizens and free the potential of each person; and
Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.”

The Bill of Rights is “a cornerstone of democracy in South Africa” and “affirms the democratic values of human dignity, equality and freedom.”²⁴ It integrates a full range of civil and political as well economic, social and cultural rights. It is also innovative in that it moves beyond paying lip-service to the indivisibility and interdependence of human rights. These principles are given concrete effect by subjecting the full range of rights in the Bill of Rights to judicial enforcement. No distinction is thus made between justiciable “first generation rights”, and “second generation” rights. The latter group of rights, where they are recognised in national constitutions, are usually relegated to the status of unenforceable directive principles of State policy.²⁵

The economic and social rights recognised in the Constitution include:

- labour rights (s 23);
- the right to an environment that is not harmful to health or well-being, and to have the environment protected through reasonable legislative and other measures that secure sustainable development (s 24);
- equitable access to land; security of land tenure; and restitution of property or equitable redress for property that was dispossessed after 1913 as a result of past racially discriminatory laws or practices (s 25(5) - (9));
- the right of access to adequate housing and a prohibition on the arbitrary eviction of people from their homes or the demolition of homes (s 26);
- the right of access to health care services (including reproductive health care), sufficient food and water, and social security (s 27);
- the right against the refusal of emergency medical treatment (s 27(3));

²³ Hassen Ebrahim, *The Soul of a Nation: Constitution-making in South Africa*, Oxford University Press: Cape Town, 1998, p. 242. For a full account of the public participation process, see chapter 13.

²⁴ Section 7(1).

²⁵ Examples include Namibia, Ireland, and India. However, in Indian constitutional law these directive principles have exerted a far-reaching influence on the interpretation of the civil and political rights (“fundamental rights”) protected in the Constitution, particularly the right to life: see B. P. Jeewan Reddy & Rajeev Dhavan, ‘The Jurisprudence of Human Rights’ in D. M. Beatty (ed) *Human Rights and Judicial Review: A Comparative Perspective*, Martinus Nijhoff Publishers: Dordrecht/Boston/London, 1994, pp. 175 - 226.

- the right of children to basic nutrition, shelter, basic health care services and social services (s 28(1)(c));
- educational rights (s 29);
- adequate accommodation, nutrition, reading material and medical treatment at State expense for persons deprived of their liberty (s 35(2)(e)).

The State's duty in relation to some of these rights is expressly qualified. For example, the sections dealing with the rights of access to housing, health care, food, water and social security, expressly state:

“The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.” (ss 26(2) and 27(2)).

This qualification is similar to article 2 of the International Covenant on Economic, Social and Cultural Rights (1966) which describes the nature of States parties' obligations in relation to the rights recognised in the Covenant.²⁶ However, other economic and social rights such as the right to basic education and the socio-economic rights of children are not subject to the same qualification and are thus more directly enforceable.

The way the socio-economic rights are framed in the Bill of Rights suggests that they should not be regarded as commodities to be dispensed by the State, free of charge to a passive citizenry. The State's primary duty is to create an enabling environment through which people can gain “access to” the various rights. An enabling environment has the following key elements:

- ensuring that resources, services and opportunities are made available without unfair discrimination;
- creating mechanisms for accessing the rights that are transparent and enable equitable participation by all social groups;
- adopting special measures to assist vulnerable and disadvantaged groups to gain access to the rights.
- refraining from erecting barriers that make it more difficult for people to access or enjoy their rights

Conceptualised in this way, the economic and social rights in the Constitution can play an important role in facilitating development that is truly people-centred and empowering.

These developmental rights are integrally linked to the civil rights in the Bill of Rights, such as the right to equality, freedom of expression, assembly and association, the right of access to information and just administrative action. Equality is a central constitutional value (s 1). Equality “includes the full and equal enjoyment of all rights and freedoms.” Legislative and other measures “designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination” may be taken in order to promote the achievement of equality (s 9(2)). Prioritising the needs of disadvantaged groups and taking special measures to expand their access to opportunities, resources and services would thus be consonant with the right to equality in the Bill of Rights.

²⁶ See General Comment No. 3 (Fifth session, 1990), UN doc. E/1991/23, *The nature of States parties obligations (art 2(1) of the International Covenant on Economic, Social and Cultural Rights)* adopted by UN Committee on Economic, Social and Cultural Rights.

The Bill of Rights gives everyone the right of access to any information held by the State; and information held by private parties that “is required for the exercise or protection of any rights.” (s 32). In addition, everyone has the right to administrative action that is “lawful, reasonable and procedurally fair, and to written reasons when their rights have been adversely affected by administrative action.” (s 33). National legislation must be enacted to give effect to these rights. These rights can also play an important role in assisting people to gain access to economic and social rights through open and fair procedures.

The possibility of obtaining a remedy through the courts for the violation of any of the rights in the Bill of Rights (including social and economic rights) is a significant safeguard. However, the courts should not be seen as the primary institution for the realisation of the rights in the Bill of Rights. All organs of State are under a duty to “respect, protect, promote and fulfil the rights in the Bill of Rights.” (s 7(2)). The executives and legislatures within the national, provincial and local spheres of government have a crucial role to play in ensuring that these rights are effectively realised through adopting and implementing effective policies, laws and programmes. The Constitution also creates a number independent institutions supporting constitutional democracy. Their role in the promotion and protection of human rights is examined in part 7.1 below.

Another innovative feature of the South African Bill of Rights is its application, not only to the State, but also to private actors such as individuals and companies. Some rights are unambiguously stated to be binding on private actors: for example, the duty not to discriminate unfairly (s 9(4)) and to provide information that is required by others for the exercise or protection of their rights (s 32(1)(b)). In determining whether, and to what extent, the other rights in the Bill of Rights are binding on private actors, regard must be had to the nature of the right and the nature of the duty imposed by that right (s 8(2)). This makes it possible to argue, for example, that a polluting industry is directly liable under the Constitution for actions that violate the right to an environment that is not harmful to health or well-being (s 24(a)).

4. DEALING WITH THE PAST - THE TRUTH AND RECONCILIATION COMMISSION

South Africa is now faced with the challenge of building on the foundations of human rights, democracy and development laid by the new Constitution. However, it was also critical to understand and deal with the human rights violations of the past. The Constitution required the adoption of mechanisms to promote national unity and reconciliation.²⁷ *The Promotion of National Unity and Reconciliation Act 34 of 1995* was adopted to give effect to this constitutional imperative. It established a Truth and Reconciliation Commission (the TRC) with the following objectives:

- 1) establishing “as complete a picture as possible of the causes, nature and extent of gross human rights violations” perpetrated between 1960 and 1994 by conducting investigations and hearings;
- 2) facilitating the granting of amnesty on condition of a full, truthful disclosure of acts with a political objective and complying with the requirements of the Act;
- 3) establishing and making known the fate of victims and restoring their human and civil dignity by granting them an opportunity to relate their own accounts of the violations they suffered, and by recommending reparation measures;
- 4) compiling a report of findings which contains recommendations of measures to prevent future violations of human rights.²⁸

The main focus of the TRC was on gross violations of civil and political rights defined as the killing, abduction, torture or severe ill-treatment of any person.²⁹ However, the Commission also had a mandate to investigate systematic patterns of abuse, and the causes, circumstances and context which led to gross violations of human rights.³⁰ As part of this mandate, the TRC investigated systemic violations of human rights under apartheid. These included public hearings on forced removals, the education system for black people, and the role of different sectors in society such as the health and legal professions, the media, and business under apartheid. Submissions to the TRC were also made by a coalition of organisations in civil society on the importance of properly investigating violations of economic, social and cultural rights under apartheid, as well as making recommendations to governmental and non-governmental bodies on the future protection of these rights in South Africa.³¹

²⁷ Postamble of the interim Constitution. These provisions were carried forward to final Constitution in item 22, schedule 6.

²⁸ Section 3(1) of the Promotion of National Unity and Reconciliation Act 34 of 1995.

²⁹ Section 1(ix) of the Promotion of National Unity and Reconciliation Act 34 of 1995.

³⁰ Section 4(a) of the Promotion of National Unity and Reconciliation Act 34 of 1995.

³¹ *Submission to the Truth and Reconciliation Commission Concerning the Relevance of Economic, Social and Cultural Rights to the Commission's Mandate*, submitted by: Community Law Centre, Development Action Group, Legal Resources Centre, Black Sash, National NGO Coalition, National Land Committee, National Literacy Cooperative, Peoples' Dialogue, Urban Sector Network, and Centre for Human Rights, 18 March 1997.

The final report of the TRC was published in October 1998 in five volumes although the process of considering amnesty applications has not yet been finalised.³²

The Commission's findings arising out of the business sector hearings are illustrative of the active involvement and the complicity of the private sector in violations of human rights and the undermining of human development under apartheid.

Key findings of the TRC arising out of the Business Sector Hearings

- Business was central to the economy that sustained the South African State during the apartheid years. Certain businesses, especially the mining industry, were involved in helping to design and implement apartheid policies. Other businesses benefited from co-operating with the security structures of the former State. Most businesses benefited from operating in a racially structured context;
- The denial of trade union rights to black workers constituted a violation of human rights. Actions taken against trade unions by the State, at times with the co-operation of certain businesses, frequently led to gross human rights violations;
- The mining industry not only benefited from migratory labour and the payment of low wages to black employees, it also failed to give sufficient attention to the health and safety concerns of its employees;
- The business sector failed, in the hearings, to take responsibility for its involvement in state security initiatives specifically designed to sustain apartheid rule. Several businesses, in turn, benefited directly from their involvement in the complex web that constituted the military industry;
- The white agricultural industry benefited from its privileged access to land. In most instances it failed to provide adequate facilities and services for employees and their dependants.³³

³² *Truth and Reconciliation Commission of South Africa Report*, Volumes 1 - 5, distributed for the Truth and Reconciliation Commission by Juta & Co Ltd, Cape Town, October 1998.

³³ Final Report, Vol. 4, Chapter 2 ('Institutional Hearings: Business and Labour'), paras. 161 - 167; and Final Report, Vol. 5, Chapter 6 ('Findings and Conclusions'), para. 156. For a full account of these hearings, see: Beth S. Lyons, 'Getting to Accountability: Business, Apartheid and Human Rights' vol. 17, no. 2, *Netherlands Quarterly of Human Rights* (June, 1999), pp. 135 - 160.

5. SOUTH AFRICA AND INTERNATIONAL HUMAN RIGHTS LAW

International human rights law has an important role to play in the development of a human rights culture in South Africa. It is applied by a range of institutions and actors in South Africa, including the courts, parliament, the South African Human Rights Commission and organisations of civil society.

5.1 The influence of international human rights law on the Bill of Rights

International human rights law substantially influenced the drafting of the Bill of Rights in the final Constitution. The influence of the International Covenant on Economic, Social and Cultural Rights (1966) and the Convention on the Rights of the Child (1989) is evident in the economic, social and cultural rights and the children's rights included in the Bill of Rights.³⁴ A major issue in the constitutional negotiations were the demands of Afrikaner groups for the inclusion of special protections in the Bill of Rights relating to language, culture and education.³⁵ Traditional leaders also sought constitutional protection for indigenous laws, customs and institutions. To acknowledge and protect the diversity of language and culture in South Africa, a right was included in the Bill of Rights guaranteeing that persons belonging to cultural, religious or linguistic communities would not be denied the right, with other member of their community, to enjoy their culture, practise their religion and use their language, and to form, join and maintain cultural, religious and linguistic associations and other organs of civil society (s 31)). This clause was modelled on article 27 of the International Covenant on Civil and Political Rights (1966).

5.2 Interpreting human rights in South Africa

The Constitution also gives international law a key role in the interpretation of the rights in the Bill of Rights. Thus a court, tribunal or forum must consider international law when interpreting the Bill of Rights (s 39(1)(b)). The Constitutional Court has held that international law in this context would include international instruments that are binding on South Africa as well as those that are not binding (e.g. decisions of the Inter-American Court of Human Rights or the European Court of Human Rights). Both may be used as tools of interpretation.³⁶ The Constitutional Court has referred extensively to international human rights instruments in the course of its judgments: for example, in considering the content and scope of -

- the right to life in its judgment on the constitutionality of the death penalty;³⁷

³⁴ The Constitutional Assembly (CA) was bound by the constitutional principle which required it to protect "all universally accepted fundamental rights, freedoms and civil liberties", by entrenched and justiciable provisions in the final Constitution (Constitutional Principle II, Schedule 4). The Technical Committee advising the CA on the Bill of Rights prepared comprehensive memoranda on the protection of civil, political, economic, social and cultural rights in international human rights treaties and instruments as well as in other national legal systems.

³⁵ The interests of these groups were represented by parties such as the National Party and The Freedom Front.

³⁶ *S v Makwanyane & another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para. 35. This pronouncement was in respect of the equivalent provision in the interim Constitution.

³⁷ *S v Makwanyane & another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC).

- the right against inhuman or degrading punishment in the context of the criminal penalty of juvenile whipping;³⁸ and
- the right to establish educational institutions based on a common culture, language or religion.³⁹

When interpreting legislation, the courts must also prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law (s 233)).

5.3 Becoming a party to human rights treaties

South Africa has become a party to a number of key human rights treaties, particularly since the introduction of democracy in the country.

South Africa is currently a party to the following international human rights treaties:

- The International Covenant on Civil and Political Rights (1966);
- The International Convention on the Elimination of All Forms of Racial Discrimination (1966) [CERD];
- The International Convention on the Elimination of All Forms of Discrimination Against Women (1979) [CEDAW];
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984);
- The Convention on the Rights of the Child (1984)
- The African Charter on Human and Peoples' Rights (1981)

South Africa has signed but, at the date of writing, has yet to ratify the International Covenant on Economic, Social and Cultural Rights (1966).

South Africa is also a party to

- The Geneva Conventions of 1949 and their two Protocols;
- The Convention and Protocol Relating to the Status of Refugees, and the Organisation of African Unity (OAU) Convention Governing Specific Aspects of Refugee Problems in Africa;
- Various conventions adopted under the auspices of the International Labour Organisation (ILO).

South Africa has submitted its initial country reports under CEDAW, the Convention on the Rights of the Child and the African Charter on Human and Peoples' Rights. South African NGOs have also submitted shadow reports to the relevant treaty monitoring bodies. For example, an NGO shadow report focusing on violence against women in South Africa was submitted to the Committee on the Elimination of all Forms of Discrimination against Women⁴⁰, and a shadow

³⁸ *S v Williams* 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC).

³⁹ *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC). See particularly the concurring judgment of Sachs J.

⁴⁰ *NGO Shadow Report to CEDAW South Africa: Violence Against Women*, 1998, co-ordinated by the Masimanyane Women's Support Centre in East London with the participation of a number of other NGOs, 1998.

report on children's rights in South Africa was submitted to the Committee on the Rights of the Child.⁴¹ NGOs were also consulted and involved in the process of preparing government's initial reports under the abovementioned treaties.

5.4 Giving effect to international law in South Africa

The South African Constitution provides that an international agreement only becomes law in South Africa when it is enacted into law by national legislation.⁴²

Parliament has recently passed the *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000*. This legislation was passed in fulfilment of the constitutional injunction requiring the enactment of national legislation to prevent or prohibit unfair discrimination (s 9(4)). However, it is also an important vehicle to facilitate compliance with South Africa's international law obligations including treaty obligations in terms of, amongst others, the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination Against Women.⁴³

The Parliamentary Joint Standing Committee on the Improvement of the Quality Of Life and Status of Women prepared a *Report on the Government's Implementation of the Convention on the Elimination of All Forms of Discrimination Against Women and the Beijing Platform for Action* (adopted in 1995 by the Fourth World Conference on Women). This report was tabled in parliament in November 1998.⁴⁴ The report records and evaluates the progress made by various government departments in giving effect to these international commitments. It also identifies key challenges for integrating a gender analysis into the work of government departments and improving the lives of women in South Africa.

5.5 International conferences and programmes of action

South Africa has participated in a number of international conferences and the adoption of various Declarations and Programmes for Action. For example it participated in the World Summit for Social Development (1995) which adopted the *Copenhagen Declaration and Programme of Action*, and the Fourth World Conference on Women (1995) which adopted the *Beijing Declaration and Platform for Action*.

⁴¹ Prepared by The National Children's Rights Committee (NCRC).

⁴² In other words, the Constitution endorses a dualist system with regard to the domestic effect of international treaties. An exception is made for a self-executing provision of an agreement that has been approved by Parliament which becomes law in the country unless inconsistent with the Constitution or an Act of Parliament (s 231(4)). Customary international law also automatically becomes law in the country unless it is inconsistent with the Constitution or an Act of Parliament (s 232).

⁴³ This is explicitly stated to be one of the objects of the *Promotion of Equality and Prevention of Unfair Discrimination Act*: see s 2(h).

⁴⁴ Parliamentary Committee on the Improvement of the Quality of Life and Status of Women, *Report on Government's Implementation of CEDAW and the Beijing Platform for Action*, November 1998.

These international instruments provide benchmarks which can be used by State institutions to set goals and monitor progress towards those goals. For example, in terms of the Copenhagen Programme of Action, States agreed to commit 20 per cent of their national budgets to basic social programmes.⁴⁵ In 1998, the Financial and Fiscal Commission (an institution established by the Constitution) conducted a study to determine the following: how much of the national budget is being spent on basic social services (BSS); the level of this expenditure on the poor; the scope for budget restructuring in favour of BSS and the poor; and to identify strategies for improving the cost-efficiency of the delivery system of BSS. The findings and recommendations of this study were compiled in a report entitled, *Public Expenditure on Basic Social Services in South Africa*.⁴⁶ Civil society organisations can use benchmarks and studies like these to campaign for adequate budgetary allocations to meet socio-economic rights commitments.

As the new democratic government was not yet in existence, South Africa did not formally participate in the World Conference on Human Rights in 1993 which adopted *The Vienna Declaration and Programme of Action*. However, members of the present democratic government did attend the Conference as special delegates.

***South Africa's National Action Plan
for the Promotion and Protection of Human Rights***

The Vienna Programme of Action recommended that each State consider "drawing up a national action plan identifying steps whereby that State would improve the promotion and protection of human rights."⁴⁷ South Africa has responded to this call by drawing up *The National Action Plan (NAP) for the Promotion and Protection of Human Rights*.⁴⁸

This Action Plan was co-ordinated by a Steering Committee which included representatives of the SA Human Rights Commission, the Commission for Gender Equality, the national parliament, various government departments and the NGO sector. The preparation and launch of the NAP involved consultation with government departments as well as civil society organisations. It was also accompanied by a public awareness campaign conducted via the media, a telephone hotline and participatory workshops.

The NAP deals with a full range of civil, political, economic, social and cultural rights as well as the rights to development, self-determination, peace and a protected environment.

Each of these rights is addressed according to the following framework:

- Constitutional obligations
- International obligations

⁴⁵ Chapter 5, para. 88c.

⁴⁶ Financial and Fiscal Commission, *Public Expenditure on Basic Social Services in South Africa*, An FFC Report for UNICEF and UNDP, 1998. The study found that South Africa spends approximately 14% of its budget on pre-primary and primary education and primary health care. However, if a wider definition of BSS is used (e.g. including spending on social welfare and public works), expenditure exceeds the 20% target.

⁴⁷ *The Vienna Declaration and Programme of Action*, June 1993, UN doc. A/Conf 157/23, Part II, para. 71.

⁴⁸ *The National Action Plan for the Promotion and Protection of Human Rights*, December 1998, Republic of South Africa.

- What has been done:
 - Policy
 - Legislation
 - Administrative Steps Taken
- Further challenges
- Addressing the challenges
- The main institutions responsible for implementing and monitoring the right
- The available resources and budget for realising the right.

On 10 December 1998, International Human Rights Day and the 50th anniversary of *The Universal Declaration of Human Rights*, the NAP was officially launched and presented to the nation. It was also lodged with the United Nations.

The NAP is a human rights policy document which enables government to evaluate its human rights performance, set goals and priorities within achievable time frames, devise strategies and allocate resources for the promotion and enhancement of human rights in the country. It can also be used as a tool by NGOs and the media to monitor the human rights impact of government policies, legislation and programmes. As such, the NAP provides an important basis for holding government accountable for its human rights commitments.

6. GIVING EFFECT TO HUMAN RIGHTS - THE ROLE OF THE STATE

“My Government’s commitment to create a people-centred society of liberty binds us to the pursuit of the goals of freedom from want, freedom from hunger, freedom from deprivation, freedom from ignorance, freedom from suppression and freedom from fear. These freedoms are fundamental to the guarantee of human dignity. They will therefore constitute part of the centrepiece of what this Government will seek to achieve, the focal point on which our attention will be continuously focused. The things we have said constitute the true meaning, the justification and the purpose of the Reconstruction and Development Programme, without which it would lose all legitimacy.”⁴⁹

6.1 Laws, policies and programmes

Without effective policies and laws to implement the human rights commitments in the Constitution and international instruments, these rights will amount to little more than paper promises. A coherent framework of laws and policies are needed to translate broad human rights commitments into detailed and concrete programmes that have a real impact on the lives of millions of people.

Since 1994, the democratic government in South Africa has adopted a wide range of new policies and laws. The first priority was to dismantle the discriminatory edifice of apartheid laws and to create a unified administration out of the fragmented bureaucracies that were inherited from the apartheid regime. The new policies and laws also sought to implement the Government’s political commitment to a programme of reconstruction and development of South Africa society.⁵⁰

Many of these laws were adopted to give effect to the rights in the Bill of Rights. Thus the Bill of Rights serves as an important impetus for the enactment of legislation and has also influenced the content of legislation. It would be misleading to assess the impact of human rights in South Africa solely, or even primarily, on the basis of court cases. More significant has been the extent to which human rights have shaped the policy and legislative context within which development must take place.

The influence of human rights can be seen in a range of legislative and policy measures adopted to give effect to the government’s human rights commitments. Some illustrative examples of these measures in various sectors are provided below.

a) Labour

⁴⁹ Former State President of South Africa, Mr. Nelson Mandela in his Inaugural Address to a Joint Sitting of Parliament, 24 May 1994.

⁵⁰ Government’s strategy for the fundamental transformation of society is set out in the *White Paper on Reconstruction and Development*, Republic of South Africa, September 1994.

The Bill of Rights gives everyone the right to fair labour practices. It protects the right of workers to form and join trade unions and to strike, as well as the right of employers to form and join an employer's organisation (s 23).

Key pieces of legislation that give effect to this right and other rights in the Bill of Rights in an employment context include:

- *The Labour Relations Act 66 of 1995 (LRA)*: This Act establishes the ground rules for labour relations by regulating collective bargaining, strikes, lock-outs and by establishing rules and codes of good practice on fair labour practices (e.g. in relation to dismissals). It also establishes a forum, the Commission for Conciliation, Mediation and Arbitration (CCMA), for resolving labour disputes which is cheap and accessible. A specialised Labour Court and Labour Appeal Court exist for more complicated disputes involves strikes, lockouts or retrenchments. More vulnerable categories of workers that were historically excluded from labour legislation, such as farm workers and domestic workers, are included in the LRA.
- *The Basic Conditions of Employment Act 75 of 1997*: This Act is intended to create a basic floor of minimum rights for employees, for example, in relation to hours of work and different types of leave. It gives women the right to at least four months maternity leave and has provisions protecting the health of pregnant and nursing employees.
- *The Employment Equity Act 55 of 1998*: This Act prohibits unfair discrimination in the workplace and places an obligation on larger employers to adopt affirmative action plans to ensure equitable representation in the workforce of designated groups - black people, women and people with disabilities.
- *The Skills Development Act 97 of 1998*: This Act is aimed at facilitating skills training for workers. It establishes a National Training Fund as well as training authorities and boards. It will require employers to pay a levy amounting to 1% of their payroll to be used for training purposes. This legislation is particularly important in the light of the apartheid legacy of illiteracy and low educational levels. Almost 20% of South Africans aged 20 years or more have received no education, while only 6% have post-school qualifications. The racial breakdown of this statistic is particularly stark: 24% of Africans have received no education as compared to 1% of whites.⁵¹

b) Housing

In its *White Paper on a New Housing Policy and Strategy for South Africa* adopted in 1994, the government recognises housing as a basic human right. It also acknowledges its duty "to take steps and create conditions which will lead to an effective right to housing for all" and "to refrain from taking steps which promote or cause homelessness."⁵²

A range of measures have been adopted to give effect to the constitutional right of everyone to have access to adequate housing (s 26). The following legislative and policy measures illustrate this human rights-based approach to housing:

⁵¹ The People of South Africa Population Census, 1996, *Census in Brief*, Report No: 03-01-11(1996), published by Statistics South Africa, 1998, p. 37 and p. 41.

⁵² Para. 4.4.2.

- *The Housing Act 107 of 1997*: The purpose of this statute is to give effect to the constitutional right of access to adequate housing by facilitating a sustainable housing development process. It sets out the duties of the national, provincial and local spheres of government in promoting housing development, as well as the principles that must guide them in this process. These guiding principles include -
 - giving priority to the needs of the poor;
 - encouraging and supporting individuals and communities to fulfil their own housing needs by assisting them in accessing land, services and technical assistance;
 - preventing unfair discrimination in the housing development process; and
 - promoting the special housing needs of the disabled, marginalised women and other disadvantaged groups.
- *The National Housing Subsidy Scheme*: This scheme is one of the key measures that Government has adopted to assist poor people to purchase a serviced site and to build their own home or improve the quality of their housing.
- *The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998*: This Act seeks to give effect to the constitutional right against being evicted from one's home without a court order made after considering all the relevant circumstances (s 26(3)). It stipulates fair procedures for eviction proceedings such as written and effective notice. A court may only grant an eviction order if it is of the opinion that it is "just and equitable to do so, after considering all relevant circumstances". Relevant circumstances include the availability of alternative accommodation, and the rights and needs of the elderly, children, disabled persons and households headed by women.⁵³

c) Land

The land rights in the Constitution require government to institute three programmes of land reform: *restitution* for those who lost land through racial discrimination; *redistribution* to promote equitable access to land; and *tenure reform* for those whose rights in land are insecure as a result of past racial discrimination (s 25(5) - (9)). The three key elements of the land reform programme adopted by government - restitution, redistribution and tenure reform - address each of these constitutional requirements. As the former Director-General of the Department of Land Affairs, Mr. Geoff Budlender has observed:

"The land reform programme of the government started on the premise that, wherever possible, it should be rights-based. The intention was to create a platform of land rights. By anyone's standards, a pretty full suite of programmes and laws has been instituted with legally enforceable rights as the foundation and bedrock."⁵⁴

In the area of land restitution, the major piece of legislation adopted is the *Restitution of Land Rights Act 22 of 1994*. This Act establishes the legal framework and mechanisms for giving effect to the constitutional right to

⁵³ Section 4.

⁵⁴ 'Socio-Economic Rights in South Africa: Facing the challenges of implementation' vol. 1, no. 4, March 1999, *ESR Review*, a quarterly publication by the Community Law Centre (University of the Western Cape) and the Centre for Human Rights (University of Pretoria), p. 15.

restitution of land or equitable redress (e.g. alternative land, compensation) for persons who were dispossessed of their land after 1913 through racially discriminatory laws or practices. Claims for restitution are dealt with through two main institutions created under the Act: the Commission for Restitution of Land Rights and the Land Claims Court.

Government's land redistribution programme aims to provide the poor with land for residential and productive purposes in order to improve their livelihoods. It is intended to assist emergent farmers, the urban and rural poor, farm workers, and labour tenants. The *White Paper on South African Land Policy* states that redistribution projects will give priority to the marginalised and to women in need.⁵⁵ The programme consists chiefly of a number of grants to assist poor individuals and groups to acquire land from willing sellers, including the State. The Settlement/Land Acquisition Grant can be used to purchase land, enhance tenure rights, make investments in infrastructure, home improvements and farm capital. The Department of Land Affairs also provides facilitation services, as well as training and capacity-building programmes aimed at assisting grant applicants to participate effectively in the land reform programme. *The Communal Property Associations Act 28 of 1996* establishes a new form of legal entity through which members of disadvantaged communities can collectively acquire, hold and manage property in terms of a written constitution. The constitution of a Communal Property Association (CPA) must be consistent with the Act: for example, it must provide equal rights for women and democratic decision-making processes.

Finally, the land tenure programme is aimed at building a unitary, non-racial system of land rights for all South Africans which is consistent with the Constitution's commitment to human rights and equality.⁵⁶ To give effect to this commitment, parliament has passed the *Land Reform (Labour Tenants) Act 3 of 1996* which protects labour tenants and their families from arbitrary evictions, and promotes their acquisition of secure land rights. Another key piece of legislation is the *Extension of Security of Tenure Act 62 of 1997*. This Act recognises that many people are vulnerable to unfair evictions because they do not have secure tenure of their homes and the land that they occupy. It sets out the circumstances and procedures under which evictions can take place. The courts are required to consider whether it is just and equitable to grant an eviction order, having regard to all relevant circumstances. The right of residence of certain categories of people enjoy protected status, and cannot be terminated unless they have committed a serious breach of their duties as occupiers. These people are occupiers who have lived on land belonging to the owner for 10 years and have either:

- reached the age of 60 years; or
- are employees or former employees of the owner or person in change, and are unable to work because of ill-health, injury or disability.⁵⁷

d) The Environment

⁵⁵ *White Paper on South African Land Policy*, Department of Land Affairs, April 1997, p 45.

⁵⁶ *White Paper on South African Land Policy*, Department of Land Affairs, April 1997, xii.

⁵⁷ Section 8(4).

The National Environmental Management Act 107 of 1998 is important legislation, providing remedies for preventing or redressing acts that undermine the constitutional right to an environment that is not harmful to people's health or well-being (s 24). It also promotes access to information and public participation in developments that affect the environment.⁵⁸

The Act sets out 20 environmental principles which must guide the government in relation to all activities that may significantly affect the environment.⁵⁹ These principles can assist people in obtaining remedies in the courts or through alternative dispute resolution mechanisms such as mediation or arbitration.

Key environmental principles:

- Environmental management must put people and their needs first, and must serve their interests fairly;
- Development must be socially, environmentally and economically sustainable. In this regard, a range of factors must be considered before a development can proceed;
- Environmental justice must be pursued so that there is not unfair discrimination in the way that negative environmental impacts are distributed;
- There should be equitable access to environmental resources, benefits and services to meet basic human needs. Special measures may be taken to ensure access for persons disadvantaged by unfair discrimination;
- Environmental decision-making must involve public participation, particularly by vulnerable and disadvantaged groups;
- Decisions must take account of the interests, needs and values of all interested and affected parties. This includes recognising all forms of knowledge, including traditional and ordinary knowledge.
- The polluter must pay for the costs of remedying pollution, environmental degradation and adverse health impacts.

e) Gender Equality

A number of laws, policies and programmes have been adopted to promote gender equality. This is not only an important political priority of the government, but also a key constitutional value and right. These range from legislation providing for the lawful termination of pregnancy (*Choice on Termination of Pregnancy Act 92 of 1996*), new domestic violence legislation (*Domestic Violence Act 116 of 1998*), the introduction of a child support grant payable to the primary care givers of impoverished children under the age of 7 years, and a presidential lead programme to provide free health care at all State clinics and hospitals to pregnant women and children under 6 years.⁶⁰

⁵⁸ Government has produced the following user-friendly guide to the National Environmental Management Act (NEMA): *A User Guide to the National Environmental Management Act, Guide 1: Your right to take action to prevent environmental damage in terms of NEMA*, written by Angela Andrews, Legal Resources Centre, published by the Department of Environmental Affairs and Tourism, 1999.

⁵⁹ Section 2.

⁶⁰ A useful resource on women's rights in South Africa is: *Making Women's Rights Real*, a resource manual on women, gender, human rights and the law, published by the Gender Manual Consortium, first edition, June 1999.

The Recognition of Customary Marriages Act 120 of 1998 is critical to the autonomy, status and proprietary rights of women married according to African customary law. Formerly these marriages were not legally recognised because they are potentially polygamous. Women in these marriages had the status of minors. This meant that they could not acquire property, enter into contracts or litigate in their own name. The Act recognises customary marriages for all purposes, thus respecting the cultural rights of persons who choose to live according to traditional systems of law. A wife in a customary marriage has, on the basis of equality with her husband, and subject to the matrimonial system governing the marriage, full status and capacity. This includes the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights that she might have at customary law. Monogamous customary marriages entered into after the commencement of the Act will be deemed to be in community of property, unless the spouses exclude this proprietary regime through an ante-nuptial contract. In the case of polygamous customary marriages, the courts are required to ensure that there is an equitable distribution of property between all the parties to the marriage. These provisions ensure that women in customary marriages now have an equitable share in the marital property.

f) Equality, access to information and just administrative action

The Constitution imposes duties on the State to enact national legislation to give effect to the right against unfair discrimination (particularly by the private sector), the right of access to information, and the right to just administrative action.⁶¹ In fulfilment of these obligations, Parliament has recently passed the following important Acts: the *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000*, the *Promotion of Access to Information Act 2 of 2000*, and the *Promotion of Administrative Justice Act 3 of 2000*. These three statutes have the potential to be powerful tools for civil society to challenge discrimination, and demand transparency, accountability and participation in development processes (see part 5.4 above).

g) Programmes to advance access to water and health care services

A number of government departments have adopted innovative programmes that integrate human rights values in their efforts to expand access to basic social services.

In 1994, an estimated 12 - 14 million people in South Africa did not have access to safe water, and over 20 million were without adequate sanitation.⁶² Water policy and legislation are based on the notion that access to water is a basic human right, and seek actively to promote the values enshrined in the Bill of Rights.⁶³ This approach is evident in the two major water laws, the *Water Services Act 108 of 1997* and the *National Water Act 36 of 1998*.

The Department of Water Affairs and Forestry runs a Community Water Supply and Sanitation Programme (CWSS) which aims to provide disadvantaged

⁶¹ Sections 9(4), 32 and 33 read with item 23, Schedule 6 of the 1996 Constitution.

⁶² *White Paper on Water Policy*, Department of Water Affairs and Forestry, April 1997, para. 2.2.3.

⁶³ This approach is evident in the two major water laws, the *Water Services Act 108 of 1997* and the *National Water Act 36 of 1998*.

communities with access to a basic water supply “by means of an integrated and sustainable people-driven programme.”⁶⁴ This includes providing job opportunities and developing the skills and capacity of disadvantaged communities. The BOTT Project (Build, Operate, Train and Transfer) consists of partnerships with private sector implementing agencies to build the necessary infrastructure for the programme. It incorporates a community empowerment element involving the use of local labour, training and capacity-building.

Another innovative programme is the *Working for Water Programme* (WWP).

The Working for Water Programme

This programme uses labour-intensive methods to clear invasive, alien vegetation. One of its main elements is a public works employment programme. It thus seeks to achieve the objectives of conserving water resources and rehabilitating degraded land through contributing to poverty reduction. The programme’s employment policy targets women, youth and disabled people. One of its aims is to build the capacity of organised community groups through entering into contracts, where possible, with community development trusts and co-operatives.

The programme also includes an education and training element conducted in partnership with the Department of Labour and a number of NGOs. This ranges from business skills (e.g. completing tender documents and project management), environmental management skills to providing life-skills training to youth in communities and AIDS education. Although the employment opportunities provided by the programme are temporary, the experience and skills training gained by participants can assist them in taking advantage of other income-generating opportunities.

A human rights approach to the provision of health care services was recently endorsed by the adoption of a *National Patients’ Rights Charter* by the Ministry of Health.

The National Patients’ Rights Charter

On 2 November 1999, the Minister of Health, Dr. Manto Tshabalala-Msimang, launched the above Charter as “a common standard” for achieving the realisation of the right of access to health care services enshrined in section 27 of the Constitution. In her speech the Minister encouraged patients and health workers to view the Charter “as a tool to assist in changing our health system into a caring and compassionate health care delivery system.”⁶⁵

The patients’ rights recognised in the Charter include: participation in health decision-making; access to health care services; the right to information, confidentiality, privacy and informed consent; the right to complain about health services, to have those complaints properly investigated, and to receive a full

⁶⁴ Department of Water Affairs and Forestry, RDP 4 Business Plan, 1997.

⁶⁵ Speech of the Minister of Health, Dr. Manto Tshabalala-Msimang, at the launch of the *National Patients’ Rights Charter* at the Etwatwa Community Health Centre, Benoni on 2 November 1999.

response. It also sets out the “responsibilities of the patient” which include the duty to take care of his or her health, to respect the rights of other patients and health care providers, and to comply with prescribed treatment and/or rehabilitation procedures.

The Charter provides an officially sanctioned baseline standard against which to monitor and evaluate all health programmes in the health sector. It can be used as a tool of accountability by patients, health workers, broader civil society and institutions such as the South African Human Rights Commission.

The National Patients’ Rights Charter adopted by government was preceded by an NGO campaign entitled “Health Rights are Human Rights” run by the National Progressive Primary Health Care Network (NPPHC). This campaign involved promoting awareness of health rights and seeking the views of the public on the contents of a Health Rights Charter. It culminated in the adoption of the *South African Health Rights Charter* in 1997.⁶⁶

6.2 The challenges of implementation

Despite the positive legislative framework described above, there are large backlogs in a number of social sectors. For example, the 1996 census found that less than half the households in the country (45%) have a tap inside their dwelling.⁶⁷ The unemployment rate is also high at 34% for the country as a whole. It is particularly high for African women (52%) and African men (34%) compared to 4.6% for the white population group.⁶⁸ There is a large gap between the rights enshrined in the new Constitution and laws, and the daily realities of people’s lives. It is a key challenge of the new government and all sectors of society to close this gap.

The factors that impede the realisation of these rights and human development are complex and varied. They include:

- Budgetary constraints. For example, the Minister of Water Affairs and Forestry was reported as saying that budget constraints meant that it would not be possible to erase the backlog of seven-and-a-half million rural people without access to a dependable water supply by 2007, as originally planned.⁶⁹
- A lack of capacity, particularly at local government level, to ensure the effective delivery of services;
- Insufficient co-ordination of poverty-reduction programmes between various government departments and the three spheres of government - national, provincial and local ;
- In certain instances, an over-reliance on time-consuming and overly bureaucratic legal processes for accessing subsidies, grants and other resources;
- A lack of awareness and knowledge among communities of their rights and how to enforce them;

⁶⁶ *The South African Health Rights Charter: Your Passport to Health Rights*, National Progressive Primary Health Care Network (NPPHC).

⁶⁷ The People of South Africa Population Census, 1996, *Census in Brief*, Report No: 03-01-11(1996), published by Statistics South Africa, 1998, p. 77.

⁶⁸ *Ibid.*, pp. 46 - 47.

⁶⁹ ‘Budget constraints halt plans’, *Business Day*, 14 September 1999.

- Inadequate support to communities to enable them to make optimum use of available resources and other opportunities;
- The unacceptably high levels of violent crime, particularly violence against women.⁷⁰
- The AIDS epidemic which has serious implications for the labour market, and is placing South Africa's social security systems under increasing strain.

The trade union movement and a number of NGOs have criticised the macro-economic policy adopted in 1996 by Government known as *GEAR* (Growth, Employment and Redistribution). The trade union federation, COSATU (Congress of South African Trade Unions) has argued that the budget deficit targets in *GEAR* places unrealistic constraints on social spending. It is argued that these constraints will inhibit the State's ability to achieve the redistribution needed to redress the legacy of the past.⁷¹

The government is in the process of enacting legislation that will provide a unified framework for the effective functioning of local government. This draft legislation, the *Municipal Systems Bill*, requires municipalities to conduct their affairs in accordance with the principle of participatory governance. Public accountability and participation are considered essential for the long-term sustainability of municipalities. The Bill obliges councils to promote development and to move progressively towards ensuring universal access to quality services that are affordable to all. A system of municipal planning is instituted through the tool of Integrated Development Plans (IDPs). These plans must identify developmental objectives and priorities, the activities and resources to achieve these resources and specify time frames. This Bill, together with other legislation,⁷² creates an enabling framework for local government in South Africa which is geared towards more effective service delivery and participatory developmental processes. Building the capacity of local government and putting these principles into effect are essential to meeting the challenge of making human rights real in the lives of ordinary people in South Africa.

⁷⁰ Between 1994 and 1996, the number of reported rapes per 100 000 of the population increased from 105,3 to 119, 5. This method of reporting underestimates the danger to individual women and girls in that the male population is far less likely to be raped and, in terms of the legal definition used for these statistics, cannot be raped. Even with increased reporting, the majority of rapes go unreported: see *Women and Men in South Africa*, written by Debbie Budlender, published by Central Statistics, Pretoria, 1998, figure 36.

⁷¹ 'Sharpening Budget Reform: for the effective implementation of the RDP', Congress of South African Trade Unions, 1997, unpublished paper presented to the ANC Policy Conference in November 1998.

⁷² *The Municipal Demarcation Act 27 of 1998 and the Municipal Structures Act 117 of 1998.*

7. THE ROLE OF HUMAN RIGHTS INSTITUTIONS AND THE COURTS

7.1 Human rights institutions

The Constitution requires the establishment of a number of independent institutions described as “State institutions supporting constitutional democracy”.⁷³ These include the Public Protector, Human Rights Commission, Commission for Gender Equality, and Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.⁷⁴

The South African Human Rights Commission and the Commission for Gender Equality are particularly relevant to the promotion and protection of human rights in South Africa. They have powers to monitor, investigate, receive complaints from the public, research, educate, make recommendations and report on human rights and issues concerning gender equality.⁷⁵

These Commissions play an important role in protecting and promoting human rights in South Africa, particularly through the following activities:

- Assisting disadvantaged complainants to obtain remedies for violations of their rights through conducting investigations, alternative dispute resolution mechanisms such as negotiation or mediation, or taking cases to court;
- Monitoring, assessing and making recommendations on the observance of human rights by both the public and private sector;
- Promoting human rights awareness and education, for example, through publications, workshops and campaigns.

The South African Human Rights Commission is given a special mandate under the Constitution to monitor the realisation of social and economic rights in South Africa.

The mandate of the SA Human Rights Commission to monitor social and economic rights

Each year, the Commission must require relevant organs of state to provide it with “information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.”⁷⁶

Over the period 1997 - 1998, the Commission conducted its first annual cycle of requesting information from relevant organs of State in terms of this provision.

⁷³ Chapter 9 of the 1996 Constitution.

⁷⁴ At the date of writing all these institutions, with the exception of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, have been established and are operational.

⁷⁵ Details concerning the composition, powers and functions of these institutions are set out in the *Human Right Commission Act 54 of 1994* and the *Commission on Gender Equality Act 39 of 1996*.

⁷⁶ Section 184(3) of the 1996 Constitution.

The protocols (questionnaires) distributed to organs of State were designed at to solicit baseline information on the following:

- The impact of past laws and policies on the realisation of socio-economic rights;
- The understanding by various organs of State of their constitutional obligations relating to economic and social rights;
- Groups identified as vulnerable and in need of special assistance to gain access to economic and social rights;
- The measures taken by respective government departments to respect, protect, promote and fulfil these rights;
- The information-gathering systems put in place by government departments to track the progressive realisation of the rights;
- The existence of a coherent plan of action to achieve the progressive realisation of the rights which incorporates clear goals, benchmarks and time-frames.

In addition to gathering information from organs of State, the Commission oversaw a survey conducted by a specialist NGO on public perceptions regarding the realisation of economic and social rights in South Africa. This study was designed to supplement the information provided by government departments by presenting the perspectives of people on the ground, NGOs and activists working with disadvantaged communities. The study found that generally respondents were not happy with the rate of delivery of social services, although levels of satisfaction varied:

“While there is a sense that developments are taking place, it is patchy, poorly co-ordinated, and it does not seem to reach the most needy groups equally. Rural areas and informal settlements are particularly disadvantaged in this respect.”⁷⁷

Another key finding was that “knowledge of the socio-economic clauses in the Bill of Rights as *rights*, rather than *demands* to be advanced and met in the political process, is poorly spread.” This indicated a need for an information dissemination campaign to educate the public (especially disadvantaged communities) about their rights, and about the mechanisms to access them. A series of campaigns focusing on the various economic and social rights in the Constitution could “be an effective course of action to popularise notions of rights, apply pressure on government to realise them, and educate people on how to claim them.”⁷⁸

In March 1999, the Commission tabled a report in Parliament on the outcome of the first monitoring cycle. This report evaluated the responses received from the various organs of State and made recommendations relating to the realisation of economic and social rights. It also made recommendations concerning the duty of organs of state within the national, provincial and local spheres of government to report to the Commission. The Commission made the following important observation on the reporting process:

“Many organs of state linked the realisation of socio-economic rights to the achievement of sustained economic development in the regions. However, we must note that although economic growth may facilitate the progressive realisation of socio-economic rights, it does not automatically guarantee their realisation. All relevant organs of State have an obligation to adopt a clear plan of

⁷⁷ Community Agency for Social Enquiry (CASE), *Economic and Social Rights: CASE Report*, Volume VI of the Report of the SA Human Rights Commission to Parliament, 1999, vii.

⁷⁸ *Ibid.*

action combined with deliberate strategies for improving and advancing access to these rights for everyone under their jurisdiction. Also, the provincial governments should review their progress in an on-going and systematic fashion and should adopt appropriate measures to remove obstacles that prevent the fulfilment of these rights.”⁷⁹

As part of this report, the Commission also tabled the study on public perceptions and the report entitled, *Poverty and Human Rights*, on the *National Speak Out on Poverty Hearings* (see part 8.1 below).⁸⁰

The Commission has recently completed its second annual monitoring cycle. There is a greater focus on the outcomes of the measures adopted by the various organs of state in the questionnaires distributed to them. This will assist the Commission to assess the effectiveness of these measures more accurately. The monitoring process provides a valuable opportunity for the Commission to develop concrete benchmarks that can be used in assessing whether the State is fulfilling its obligations in relation to economic and social rights.

Finally, although the Commission has worked closely with a number of NGO partners in the monitoring process, there is scope for broadening public participation in the process. In particular, the Commission needs to develop creative methods for involving disadvantaged communities in setting benchmarks for the progressive realisation of economic and social rights, and evaluating the impact of policies, legislation and programmes.

7.2 The Courts

The courts have an important role to play in providing redress for violations of human rights. The Constitution has created a number of different courts, including Magistrates' Courts, High Courts the Supreme Court of Appeal and the Constitutional Court. The Constitutional Court is the highest court for deciding constitutional matters.

The Bill of Rights confers legal standing on a wide range of persons to approach a court for appropriate relief when human rights are infringed or threatened. These include anyone acting on behalf of other persons who cannot act in their own name, anyone acting as a member of, or in the interest of, a group or class of persons, and anyone acting in the public interest.⁸¹ The courts are also given broad remedial powers in constitutional matters. When deciding a constitutional matter within its jurisdiction, a court must declare invalid any law or conduct that is inconsistent with the Constitution, and may make any order that is “just and equitable.”⁸²

As noted above, the jurisdiction of the courts to enforce human rights extends to all the rights in the Bill of Rights - civil, political, economic, social and cultural rights. Thus far the Constitutional Court has delivered a number of important

⁷⁹ South African Human Rights Commission, *Economic and Social Rights Report: Baseline Information: 1997 - 1998*, Volume I, 1999, p. 79.

⁸⁰ South African National NGO Coalition (SANGOCO)'s Report on *Poverty and Human Rights*, Volume V of the Report of the SA Human Rights Commission to Parliament, 1999.

⁸¹ Section 38 of the 1996 Constitution.

⁸² Section 172(1) of the 1996 Constitution.

judgments in relation to civil and political rights, including the rights of arrested, detained and accused persons, political rights such as the right to vote, and the right to equality. For example:

- It has ruled that the death penalty violates the right to life⁸³, and that juvenile whipping as a criminal penalty constitutes cruel, inhuman and degrading punishment.⁸⁴
- It has placed a duty on the Electoral Commission to ensure that prisoners enjoy the right to vote⁸⁵
- It has declared legal prohibitions on consensual sodomy invalid on the basis that they constitute unfair discrimination on the ground of sexual orientation as well as an invasion of the rights of privacy and dignity of gay persons.⁸⁶

In the field of economic and social rights, the Court has refused to order the provincial health authorities to provide expensive dialysis treatment to a dying man. However, it held in this judgment that government is under an obligation to show that it has acted rationally and in good faith in making budgetary and policy decisions that affect people's access to these rights.⁸⁷ The High Courts are also playing a key role in protecting people against arbitrary and unfair evictions from their homes.⁸⁸ In a recent groundbreaking judgment, the High Court (Cape Provincial Division) ruled that the appropriate organ or department of State was obliged in terms of section 28(1)(c) of the Constitution to provide shelter to homeless children.⁸⁹ The Court also declared that the parents were entitled to be accommodated with their children in the aforesaid shelter. The applicants were squatters who had been evicted from private land they were unlawfully occupying. Following the eviction, they camped on a sportsfield in the area. However, could not erect adequate shelters as most of their building materials had been destroyed during the eviction. The judgment refrains from being prescriptive about the exact means by which the relevant organs of State should discharge their constitutional obligations. However, the Court indicated that "tents, portable latrines and a regular supply of water (albeit transported) would constitute the bare minimum." The State appealed this judgment to the Constitutional Court. At the date of writing, judgment in this key test case on the enforceability of socio-economic rights has not yet been handed down by the Constitutional Court.

⁸³ *S v Makwanyane & another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC).

⁸⁴ *S v Williams* 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC).

⁸⁵ *August and Another v Electoral Commission and others* 1999(4) BCLR 363 (CC).

⁸⁶ *National Coalition for Gay and Lesbian Equality and the South African Human Rights Commission v The Minister of Justice and others* 1998 (12) BCLR 1517 (CC).

⁸⁷ *Soobramoney v Minister of Health, KwaZulu-Natal* 1997 (12) BCLR 1696 (CC). Also see the article by Constitutional Court judge, Justice Kate O'Regan, 'Introducing Socio-Economic Rights' vol. 1, no. 4, March 1999, *ESR Review* a quarterly publication by the Community Law Centre (University of the Western Cape) and the Centre for Human Rights (University of Pretoria), p. 2.

⁸⁸ See, for example: *Ross v South Peninsula Municipality High Court* (Cape of Good Hope Provincial Division), Case No. A 741/98 (3 September 1999), unreported at the date of writing; *Cape Killarney Property Investments (Pty) Ltd v F Mahamba & 2nd to 543rd Respondents*, High Court (Cape of Good Hope Provincial Division), Case No. 7318/99 (1 October 99), unreported at the date of writing.

⁸⁹ *Grootboom and others v Oostenberg Municipality and others* (all three levels of government - national, provincial and local - were cited as co-respondents) 2000 (3) BCLR 277 (C). In terms of s 28(1)(c) every child has the right "to basic nutrition, shelter, basic health care services and social services."

Access to legal assistance for poor communities, especially in rural areas, is a major challenge. The State-funded legal aid system, based on the *judicare* system, is facing serious budgetary constraints. Initiatives are currently underway to reform the system, but in the meantime there is a serious lack of access to legal representation in a range of cases, including those critical to the land reform process.⁹⁰

⁹⁰ Mbongeni Zondi, 'New legal aid tariffs leave the poor in the lurch', *Reconstruct*, supplement to the *Sunday Independent* newspaper, 14 November 1999.

8. THE ROLES OF CIVIL SOCIETY, THE MEDIA AND THE PRIVATE SECTOR

8.1 Civil society advocacy and campaigns

In the new democratic era, many NGOs are focusing on reconstruction, development and human rights. A number of innovative campaigns involving human rights awareness, community mobilisation, advocacy and lobbying have been conducted by NGOs in a range of fields.

Some examples include:

a) The Reproductive Rights Alliance successfully campaigned to include a right to “make decisions concerning reproduction” in the final Constitution and to ensure the passing of pro-choice legislation. It is now involved in monitoring the implementation of this legislation and promoting awareness of reproductive rights among South African communities.⁹¹

b) Many organisations have been involved in campaigns to highlight the prevalence and causes of violence against women in South African society, law reform initiatives, providing counselling and support services, and lobbying for improved policing, medical and social services in cases of rape and domestic violence.

c) The Treatment Action Campaign (TAC) mobilises a broad range of constituencies (e.g. the health sector, labour movement, the religious sector, business, youth and women) - to campaign for:

- affordable and quality treatment for people with HIV/AIDS;
- treatment awareness and literacy among people with HIV/AIDS;
- openness about HIV/AIDS and appropriate prevention strategies;
- free anti-retroviral drugs for pregnant women and rape survivors;
- the reduction of the costs of appropriate drugs by pharmaceutical companies and other bodies both in South Africa and other poor countries;
- a better and friendly health care system for all.

One of the activities organised by TAC was a country-wide “Fast to Save Lives” held on 21 March 1999 - Human Rights Day. 50 000 signatures were collected in support of the call for access to appropriate treatment for HIV/AIDS.

d) A number of organisations concerned with rural development have formed a Rural Development Initiative. At a Convention held in Bloemfontein on 25 April 1999, a *Rural People’s Charter* was adopted. The Charter highlights critical issues facing rural people ranging from the need for an integrated approach to rural economic development, clean water, dignity and freedom for women, education, land and support for emerging farmers, security for farm workers, sustainable environmental management, combating crime and violence, comprehensive health care for all, building the capacity of rural local government, and improved access to land. This Charter is intended as a basis for co-ordinating and building support around these issues as well advocacy and lobbying for improving the quality of life in rural areas. A key challenge will be to

⁹¹ Section 12(2) of the 1996 Constitution; *The Choice on Termination of Pregnancy Act 92 of 1996*.

ensure the direct involvement of rural people in the making of policies that affect their lives.

e) A number of NGOs have also formed networks and alliances to conduct advocacy, lobbying and public education around key pieces of legislation that affect a range of sectors. These include legislation giving effect to the constitutional rights to equality, access to information, and administrative justice (see part 6.1(f) above). A range of organisations working in the fields of disability rights, gender equality, labour, socio-economic rights and HIV/AIDS formed an Equality Alliance to conduct joint advocacy and lobbying around the passage of the *Promotion of Equality and Prevention of Unfair Discrimination Bill*. The aim of these efforts was to ensure that the legislation provides powerful and effective mechanisms for promoting equality and preventing unfair discrimination in both the public and private sector (see part 5.4 and 6.1(f) above).

f) Certain NGOs are directly involved in the provision of services relating to human rights and development. For example, the Legal Resources Centre and the Women's Legal Centre undertake public interest litigation free of charge on behalf of disadvantaged groups.

The *National Speak Out on Poverty Hearings* was a major campaign co-ordinated by the South African National NGO Coalition (SANGOCO) to highlight the plight of poor people in South Africa.

The National Speak Out on Poverty Hearings
“Together we ended apartheid, together we can end poverty”
“It’s time to listen to the experiences and ideas of the poor and their advocates.”

Between 31 March and 19 June 1998, the South African National NGO Coalition (SANGOCO), the South African Human Rights Commission and the Commission on Gender Equality jointly convened a series of 10 hearings on poverty in South Africa. The purpose of these hearings was to hear and document direct testimony from poor and disadvantaged communities on the impact of apartheid policies on their quality of life; the main obstacles they currently experience in gaining access to resources, services and opportunities; and the coping and survival strategies they employ.

Each hearing was presided over by a panel of commissioners drawn from the Human Rights Commission and Gender Commission, as well as persons in leadership positions in civil society. Over 10 000 people participated by attending the hearings, mobilising communities or making submissions. Nearly 600 people presented oral evidence over the 35 days of the hearings.

At the conclusion of the hearings, a statement of commitment was adopted by the partners in the process. This *National Poverty Commitment* recommends actions to be taken by a range of role players towards eradicating poverty. They are directed to the public, government officials, politicians, the private sector, civil society (e.g. NGOs, religious institutions, labour etc.), the media, and bodies responsible for monitoring these commitments (e.g. the SA Human Rights Commission, and the Commission for Gender Equality).

SANGOCO also produced two reports on the hearings: *The People's Voices*⁹² and *Poverty and Human Rights*.⁹³

Some of the key recommendations contained in the report on *Poverty and Human Rights* are:

- Increasing human rights awareness and educational programmes and campaigns;
- Improving access to legal services;
- Adopting integrated strategies to improve access to economic and social rights;
- Improving the responsiveness of government to the needs of disadvantaged communities;
- Strengthening the role of government in ensuring that everyone has access to basic social services;
- Encouraging the private sector to play a more active role in achieving an equitable distribution of resources and opportunities in society;
- Removing the legal, administrative, financial and gender-based obstacles that impede people's access to human rights.⁹⁴

The report on *The People's Voices* concludes with the following observations:

"Many of the stories recorded showed great resourcefulness. But they also showed that resourcefulness is not enough. Many people clearly wanted to be independent...However, in a situation of extreme poverty it was difficult, if not impossible, for people to pull themselves up by their bootstraps without an enabling environment. One thing that was clear was that many people are willing to do something and the resourcefulness and energy. But they need assistance, whether in the form of jobs, resources, access to markets, training or something else. What was also clear was that one "*recipe*" or form of assistance will not be the solution of the problems. Assistance needs to be tailored to the particular needs of individuals and households...The opportunity to end poverty is not yet lost but the clock is ticking fast. Let us not push the poor to the point where they tear apart our hard-won democracy. Let us ensure that people enjoy freedom from poverty, as well as political freedom."⁹⁵

One of the vehicles for taking forward the recommendations of the Poverty Hearings is *The War on Poverty Forum*, a partnership between the South African National NGO Coalition (SANGOCO), the Department of Welfare, United Nations Development Programme (UNDP), Homeless People's Federation, the Congress of South African Trade Unions (COSATU), and the South African Council of Churches (SACC). The Forum had drafted a *National Programme of Action for the Eradication of Poverty*.

The key challenge for civil society is to translate the insights and information gained through the Poverty Hearings into concrete strategies and campaigns that

⁹² *The People's Voices*, National Speak Out on Poverty Hearings, March-June 1998, written and compiled by Debbie Budlender, Community Agency for Social Enquiry (CASE), produced by the South African NGO Coalition (SANGOCO), July 1998.

⁹³ *Poverty and Human Rights*, National Speak Out on Poverty Hearings, March-June 1998, written and compiled by Sandra Liebenberg and Karrisha Pillay, Socio-Economic Rights Project, Community Law Centre (University of the Western Cape), produced by the South African NGO Coalition (SANGOCO), July 1998.

⁹⁴ *Poverty and Human Rights*, supra, pp. 45 - 47.

⁹⁵ *The People's Voices*, supra, pp. 86 - 87.

will make a meaningful contribution to the realisation of human rights and development for all in South Africa.

8.2 The media

The media in South Africa operates in an environment where freedom of expression and of the press and other media is constitutionally guaranteed. This right to freedom of expression does not extend to: war propaganda; the incitement of imminent violence; or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.⁹⁶

The media has a critical role to play in exposing human rights violations and in disseminating information and raising awareness on issues relating to human rights and development. In the *National Poverty Commitment* adopted after the Poverty Hearings, the media was called on “to ensure the fight against poverty becomes the nation’s priority by providing regular and prime space for disseminating information about poverty eradication programmes through both print and electronic media.” (see part 8.1 above). An example of such coverage is found in *Reconstruct*, an innovative supplement to *The Sunday Independent* newspaper. It provides weekly coverage of initiatives, development projects and campaigns conducted by civil society organisations.

In the context of widespread illiteracy in South Africa, community radio has a critical role to play in disseminating information to disadvantaged communities, particularly in marginalised rural areas. There are a number of community radio stations on air broadcasting on a range of issues relating to human rights and development such as HIV/AIDS, violence against women, children’s rights and education and training initiatives. Government together with the National Community Radio Forum (NCRF) and the Independent Media Diversity Trust (IMDT) plans to concentrate on funding and capacity building to promote the expansion of community radio stations.⁹⁷

A key challenge is to ensure the diversification of the media in South Africa, particularly in relation to race, gender, disability, religion, culture and language. In the words of a recent editorial in *Reconstruct*:

“Media diversity in a multicultural, multilingual and multidenominational South Africa forms part of the basis for the democratic transition that began five years ago. Diversity does not only mean increasing the range of mediums or providing a variety of mediums to a variety of communities. It also means giving men, women, youth, the disabled and all ethnic groups a chance to participate in the media. And it means ensuring that their representation in newspapers and on radio and television does not succumb to stereotypes.”⁹⁸

The SA Human Rights Commission is currently in the process of conducting an investigation into the handling of race and racism in the media. Part of this

⁹⁶ Section 16 of the 1996 Constitution.

⁹⁷ Caroline Hooper-Box, ‘Community radio set to play more of a role’, *Reconstruct* supplement to *The Sunday Independent* newspaper, 31 October 1999, p.1.

⁹⁸ Editorial, ‘Participation is also part of media diversity’ *Reconstruct* supplement to *The Sunday Independent* newspaper, 31 October 1999, p. 6.

investigation concerns racial stereotyping in reporting. Women's organisations have also expressed concern about gender stereotyping in the media.⁹⁹

8.3 The private sector

During the *National Speak Out on Poverty Hearings*, there were accounts of people receiving money or other assistance from private sector companies. However, many of the stories were also about "how the private sector had destroyed livelihoods through retrenchments, and through damaging the health of workers and the communities in which their farms, mines and factories operated." There were also complaints about a lack of responsiveness from the companies concerned to community appeals to address these problems.¹⁰⁰

The key recommendations addressed to the private sector in the *National Poverty Commitment* adopted after the Poverty Hearings were to:

- establish a poverty eradication fund to which a percentage of profits will be contributed;
- establish partnerships with government to decentralise activity and prioritise investment and job creation in rural areas;
- invest in environmentally friendly production methods;
- encourage partnership with local communities and government around poverty eradication programmes;
- establish partnerships with NGOs and CBOs to implement tenders awarded;
- contribute a percentage of the cost of all land sold or purchased as a voluntary development tax to meet the needs of the homeless.¹⁰¹

Many businesses in South Africa are demonstrating an increasing awareness of their responsibilities both in relation to their own workforce and to society at large. The responsibilities of the corporate sector to their own workforce include: respecting their labour rights; advancing employment equity through affirmative action measures to redress past disadvantage; staff training and capacity building; and the adoption of strategic action plans in conjunction with trade unions to combat HIV/AIDS in the workplace. The transformation of the corporate sector is a high priority in the South African context where, due to apartheid educational policies and labour market discrimination, black people are underrepresented in managerial, professional and technical occupations.¹⁰² A number of corporations have implemented affirmative actions policies and are

⁹⁹ Sue Howell, 'Research finds that media coverage of rape is stereotypical, with women portrayed as victims, not survivors, in sensationalist reporting' *Reconstruct* supplement to *The Sunday Independent* newspaper, 31 October 1999, pp. 6 - 7.

¹⁰⁰ *The People's Voices*, National Speak Out on Poverty Hearings, March-June 1998, written and compiled by Debbie Budlender, Community Agency for Social Enquiry (CASE), produced by the South African NGO Coalition (SANGOCO), July 1998, p. 83.

¹⁰¹ *Ibid.*, p. 85.

¹⁰² 12% of African people who are employed fall into the occupational categories of legislators, senior officials, managers, professionals and technicians as compared to 41% of the white population group: The People of South Africa Population Census, 1996, *Census in Brief*, Report No: 03-01-11(1996), published by Statistics South Africa, 1998, p. 52. Many of the African people in these categories are at management level in the public sector, rather than the private sector.

running special advancement programmes for their employees.¹⁰³ The *Employment Equity Act 55 of 1998* will impose a legal obligation on larger businesses to adopt and implement employment equity plans in order to achieve a diverse workforce broadly representative of the South African population (see part 6.1(a) above).

The private sector clearly also has a broader responsibility to the society in which it functions. This includes adopting production methods that respect the environmental rights in the Constitution and promoting community development.

In recent years, a number of investment funds have been established in South Africa that are orientated towards social responsibility. Through socially responsible investment portfolios, pension funds can make a contribution towards growth and development in South Africa. The aim of these funds is to participate in the development of disadvantaged communities through investment in infrastructure, job creation, service provision and economic empowerment.¹⁰⁴ The trade union movement has published its own list of socially responsible companies as part of its Community Growth Fund, a union-run unit trust that invests only in companies that meet its criteria. These criteria include job creation through innovation and expansion plans, worker training and skills development, equity through affirmative action, the promotion of sound environmental practices, and open and effective corporate governance. A recent survey estimated that businesses in South Africa spent more than R4 billion (the approximate size of the budget of a medium sized government department in 1997/8) on total corporate social investment in 1997/1998.¹⁰⁵

Corporations are also demonstrating an awareness that corporate responsibility is not just about charity or cash hand-outs, but about investing responsibly in sustainable community development projects. Projects range from sponsoring mobile health clinics, the building and improvement of schools, early childhood development, housing programmes, educational initiatives, AIDS awareness and education, arts and culture, facilitating access to development finance and credit, and supporting emerging small and medium enterprises. The *Mail and Guardian* newspaper together the South African Grantmakers' Association recognises innovative corporate social investments through its annual *Investing in the Future Awards*. The intention of these awards is to further ethical and professional practice in corporate funding and investments. Key elements in judging these awards are the sustainability of projects and how stakeholders from the government, the communities involved, businesses and other organisations work together.¹⁰⁶

¹⁰³ L. Schlemmer, 'Corporate Business in a Wider Role: Brief results of two CDE (Centre for Development and Enterprise) surveys on resource flows from business to society in South Africa' No. 4, *CDE Focus*, June 1999, pp. 2 - 4.

¹⁰⁴ Simon Segal, 'Investing in upliftment', *Investing in the Future: Special focus on corporate social responsibility*, supplement to the *Mail & Guardian* newspaper, 27 March to 2 April 1998, p. 4.

¹⁰⁵ L. Schlemmer, 'Corporate Business in a Wider Role: Brief results of two CDE (Centre for Development and Enterprise) surveys on resource flows from business to society in South Africa' No. 4, *CDE Focus*, June 1999, pp. 4 - 6.

¹⁰⁶ Mail & Guardian reporter, '10 years of investment' *Investing in the Future*, supplement to the *Mail & Guardian* newspaper, 27 August to 2 September 1999, p. 3.

One of the issues that corporate responsibility managers face is drawing a distinction between the role of government and the role of the private sector in development initiatives. It is clearly not sustainable nor desirable for the private sector to take over the responsibilities of government in the provision of basic social services. However, the private sector has an important role to play in supplementing the work of government, and contributing to the development process. The social investment manager of a major corporate group in South Africa describes their current philosophy on corporate responsibility in the following terms:

“Development of society can be compared to a duck’s foot. The government provides the bones, but business and NGOs provide the webbing. Without the webbing, the duck can’t swim.”¹⁰⁷

¹⁰⁷ Margie Keeton of Tshikululu Social Investments quoted in an article by Ann Eveleth, ‘A return on social investment’ *Investing in the Future*, supplement to the *Mail & Guardian* newspaper, 3 to 11 March 1999, p. 10.

9. CONCLUSION

Democracy and the new Constitution have provided a framework of values and institutions for the protection and advancement of human rights and development in South Africa. The South African Constitution endorses a holistic vision of human rights which includes civil and political as well as economic, social and cultural rights.

A range of policy and legislative measures have been taken to translate constitutional rights and values into concrete programmes. A number of independent institutions have been established to monitor the implementation of human rights commitments, to assist the victims of human rights violations to obtain redress, and to promote human rights awareness. Organisations of civil society are playing an important role in highlighting and responding to the human rights and developmental issues faced on a daily basis by disadvantaged communities.

The new order of constitutional democracy has represented a bridge away from the culture of authority to a culture of justification - "a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force of its command."¹⁰⁸ At the same time, it commits the State and all sectors of society to overcoming the political, economic and social subordination and exclusion of the most vulnerable and disadvantaged groups in our society.

While a good start has been made, there is still much hard work to be done before this commitment is fulfilled. The wide gap between the constitutional promises and the lived realities of millions of poor South Africans remains a constant challenge. The Constitution and new laws have provided the government and society as a whole with a number of effective tools with which to meet the challenge. Each sector of society has an important role to play, and must use these tools in a concerted effort to create a better life for all.

¹⁰⁸ Etienne Mureinik, 'A bridge to where? Introducing the interim Bill of Rights' vol. 10, part I, *South African Journal on Human Rights* (1994), pp. 31 - 48 at p. 32.