



**International Convention on
the Elimination
of all Forms of
Racial Discrimination**

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COMMITTEE ON THE ELIMINATION
OF RACIAL DISCRIMINATION

**REPORTS SUBMITTED BY STATES PARTIES UNDER
ARTICLE 9 OF THE CONVENTION**

Third periodic reports of States parties due in 2004

Addendum

SOUTH AFRICA* **

[2 December 2004]

* This document contains the initial to the third periodic reports of South Africa, due on 9 January 2000, 2002 and 2004 respectively, submitted in one document.

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I. INTRODUCTION

Historical background

1. South Africa was home to some of the oldest known ancestors of modern human beings, as evidenced by the archaeological findings at the Sterkfontein Caves, in the Magaliesberg, outside Johannesburg. The country later became the home of diverse indigenous communities which included communities of nomadic pastoralists, segmented kingdoms of settled mixed farmers who ploughed the land and raised livestock, communities of hunter/gatherers, as well as of highly organized city states such as *Mapungubwe* and *Thulamela*.
2. South Africa's modern history begins in the 17th century with the establishment of the Dutch settlement. The history of colonial occupation is a history of conquest, accompanied by gross violations of human rights. Dutch and British colonial powers governed South Africa in whole or in part, from 1652 to 1910. During the mid-19th century, the descendants of the original Dutch settlers by dint of military conquest seized control of vast areas of the country north of the Orange River, where they established republics independent of any European colonial power. Both in the British colonies and the two Boer Republics, the white governments established regimes of white power, wealth and privilege at the expense of the black people that were consigned to poverty and powerlessness.
3. The boundaries of present day South Africa came into being in 1910 when the white minority population declared a union of the two colonies and the two Boer Republics they had established. The "Union of South Africa" was the outcome of the Anglo-Boer War of 1899-1902. Three British Protectorates, Botswana, Lesotho and Swaziland, which later became independent states, were not incorporated into this new state. The key racist intervention was the establishment of the "Union" itself. In both the British colonies of the Cape and Natal, prior to 1910, there was a theoretically "colour blind" franchise that included all property owners. The *Act of Union*, passed by the British Parliament, as the governing colonial power in 1909, explicitly put an end to that regime and restricted the franchise to Whites only. Blacks in the Cape Province and Natal had a highly qualified franchise that debarred them from contesting parliamentary elections but permitted them to vote for White candidates. The enactment of the *Natives Land Act of 1913*, which ceded to the white minority population exclusive rights to 87 per cent of the land area of the country, gave 19th century colonial conquest and dispossession the dignity of law. The majority African population was granted access to 13 per cent of the land on the state-owned Native Reserves. The system of government was explicitly referred to as White domination and institutionalised racial discrimination was both its formal and informal aspect.
4. The majority black population was neither consulted about the formation of the Union nor did the colonial authorities heed their protests against its racially exclusive terms. Debarred from the Union's governance on grounds of their race, the black majority, comprising Africans (75 per cent), Coloureds (7 per cent) and Indians (3 per cent), naturally resisted White domination. A small, but nonetheless significant, number of white people in the country became part of the struggle. The founding of the African National Congress in 1912, as the first modern national political formation, is one of the key landmarks of the struggle waged by black and white South Africans against white domination and the violation of the human rights of black people in South Africa.

Apartheid and the struggle against it

5. The seeds of apartheid were sown well before 1910 during the days of colonial rule. It was formally declared the official state ideology and policy in 1948 when the National Party won the Whites only elections and became the government. The oppression of black people was intensified while white privilege was raised to the norm as the National Party sought to consolidate its power base and to respond to what it referred to as “the poor white problem”.

6. The key features of apartheid South Africa included the dispossession and segregation of black people, achieved mainly through the *Group Areas Act of 1951* which subjected black people to Forced **Removals** and conditions of squalor in the so called black townships where they were denied the right to own land and consequently constrained from pursuing any business opportunities. Other relevant laws included the *Bantu Authorities Act of 1951*, which institutionalised the system of indirect ruled and created a separate body of law and administration for the African people. The *Bantu Education Act of 1953* placed the education of Africans under the direct supervision of the Minister of Native Affairs with the explicit purpose of ensuring that they received an inferior education. The *Separate Amenities Act of 1953* ensured inferior separate amenities for black people. The *Abolition of Passes Act of 1953* consolidated previous laws to curtail freedom of movement for black people and introduced reference books. The *Job Reservation Act of 1956* reserved a number of occupations for white people building on the previously established White labour policy. This package of segregationist laws included the *Mixed Marriages Act of 1949* and the *Immorality Act*, which was intended to reinforce the segregationist thrust of government policy by illegalising all sexual contact across the colour line. Trapped in the poorest parts of the countryside, the towns and the cities, black people were systematically denied even the most basic services. By statute, between 1951 and the late 1960s Africans were stripped of South African citizenship. Coloureds and Indians too were relegated to the status of second or third class citizens, with no rights other than those the White minority would concede.

7. The formalization of apartheid into a state ideology resulted in an intensification of racial discrimination and racism became fully institutionalised. The struggle to achieve a non-racial democratic South Africa grew in intensity as a response. The struggle received extensive support from the international community, some of it provided directly by member states and some provided through United Nations channels.

8. The apartheid regime countered the struggle for human rights and democracy with further and intensified human rights violations that included various forms of state brutality and suppression. An event that shocked the entire international community was the massacre of unarmed demonstrators who had gathered to protest against pass laws in Sharpeville, near Johannesburg, in March 1960. This, together with the banning of the liberation movements, refusal to engage in negotiations, imprisonment of their leadership and other forms of brutality led to the adoption of armed struggle by the liberation movements. The apartheid state’s response aimed at maintaining white domination included the arrest and imprisonment of activists and the leaders of the struggle. Detention without trial became law. The torture of political detainees became standard procedure for the Security Police. Political activists were banished to live under harsh conditions or were given one-way passports to leave the country.

9. By 1976, young people in schools had also joined in the resistance. Children became victims of unprecedented police brutality that same year, when they took to the streets in peaceful protests against the inferior system of Bantu Education and the imposition of Afrikaans as a medium of instruction in African schools. The international community was shocked at the senseless killing of children and responded by increasing its support for the struggle to end white domination in South Africa.

10. The racist state also began its campaign of underhanded methods that were later uncovered by the Truth and Reconciliation Commission process. These included “disappearances” of people, murders of detainees and a number of attacks on neighbouring states seen to be supporting the liberation movement. Botswana, Mozambique, Lesotho, Angola, Zambia and Zimbabwe all fell victim. Even the UK was not spared when targets in London were bombed and specific individuals earmarked for assassination and frame-ups.

11. The strategies of co-optation and divide and rule to maintain white domination, were further refined. Pseudo independence was granted to a number of arid or underdeveloped portions of the country, which were designated as “Bantu Homelands” and “Self Governing Territories”. The segregated African suburban areas, called townships, were also given some form of self-management under handpicked black leaders. Attempts were also made to co-opt the Indian and Coloured communities into some form of limited participation in the racist system. This resulted in a political scheme called the “Tri-cameral Parliament”, a creature of the 1983 Apartheid Constitution, with chambers for Whites, for Indians and for Coloureds.

12. The liberation movement resisted the homeland system, segregated local government and the tri-cameral scheme. Various components of civil society, including a portion of the religious community and the international community became more deeply involved as well. The international isolation of the racist regime, the expulsion of South Africa from many international bodies and events, amongst them the Olympic Games, accelerated the demise of apartheid. The struggle continued and one of the key international measures that assisted was the implementation of sanctions against apartheid South Africa.

The role of the courts

13. The South African judiciary played no meaningful role to protect human rights generally and the rights of black people in particular. While at the turn of the 20th century many had hoped that the courts might prevent the new South African state ushered in by the Union of South Africa from taking away the limited franchise enjoyed by blacks in the Cape and Natal, the courts backed down from their initial attempts to restrain executive power and the Whites only parliament.

14. The courts failed to apply human rights norms when confronted with various forms of racial discrimination that grossly violated the dignity of black people. The legal profession failed even members of the bar when black advocates were refused the right to chambers used by legal practitioners in the courts. One of the victims to suffer this indignity was the late Chief Justice Ismail Mahomed. The courts refused, even when challenged, to integrate seating arrangements for black and white in the courtroom.

15. Administrative Justice and Labour Law are perhaps the only areas where the courts made limited attempts to intervene with a view to protecting human rights. In regard to Administrative Justice, some cases included detention without trial. The Labour Law cases involved unfair dismissals. On the other hand, the courts used Roman Dutch law to interpret African customary law, in the process doing a lot of damage to this system of law and the rights of African women and children in particular.

The demise of formal apartheid

16. The multi-faceted struggle intensified. The establishment of the United Democratic Front in 1983 marked the creative utilisation of legal space to compliment the armed struggle. Sanctions and other forms of pressure supplemented the efforts of the South African people. This culminated in the beginning of the process of democratisation marked by the release of Walter Sisulu and other political leaders who had been imprisoned for nearly three decades. When Nelson Mandela walked out of prison in 1990, the stage was set for formal negotiations with the leadership of the liberation movement.

17. The process was formalised into multiparty negotiations called the Convention for a Democratic South Africa (CODESA), which took place in Kempton Park, Gauteng. CODESA passed through two phases, and then gave way to the Transitional Executive Council (TEC), which oversaw the transition to the first democratic non-racial elections in 1994. The TEC was also responsible for the drafting of the Interim Constitution.

18. The *South African Interim Constitution, 1993 (Act 200 of 1993)*, brought constitutional democracy to South Africa; which served as a basis for the entrenchment, promotion and protection of human rights, including the achievement of equality.

19. In the period leading to the 1994 elections, some of the laws that enforced racial segregation, privilege and denial of basic opportunities of life and human rights to black people were repealed.

Dealing with the social legacy of legalized racism

20. When the first truly democratically elected non-racial government took office in 1994, many of the laws based on white supremacy and black inferiority, had been removed from the statute book. However, the social consequences of such laws and policies, applied over decades, continue to define the South African economic, social and cultural landscape. Gross racially defined economic and social inequalities remain part of South African life with the major part of the land of the country remaining in the hands of the White beneficiaries of the *Land Act of 1913*. All other economic and social indicators, including control of the economy and income distribution, access to jobs and other life opportunities are still racially defined. The cultural dominance of the White minority finds expression in the value system that drives the media in all its forms. Many parts of the social landscape have been affected by apartheid-engineered mind-sets.

21. The reality created by the above-mentioned policies and laws constitute major challenges for South Africa's new constitutional democracy, including the fulfilment of its obligations in terms of the **International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)** (hereafter referred to as "the Convention") and related human rights instruments such as the African Charter on Human and People's Rights and the international Bill of Rights.

22. The drafters of the Constitution were mindful of the fact that while equality is a major pillar of the new democratic order established by the Constitution, in many instances, this is a goal to be pursued while structural and systemic discrimination persists along the historical patterns as part of the social legacy of colonialism and apartheid. Among the values in the founding principles of the Constitution is "the achievement of equality". The drafters of the constitution saw the achievement of equality and the eradication of discrimination as such a priority that this is one of the issues where the Constitution provides for mandatory legislation to promote equality and to eliminate unfair discrimination; to be enacted within a three-year timeframe. This requirement has been fulfilled by the enactment of the **Promotion of Equality and Prevention of Discrimination Act, 2000 (Act 4 of 2000)**, which is discussed in detail in the body of the report. This is also the primary statute that seeks to integrate, albeit with some gaps, the Convention into South African domestic law.

23. The public service and related state delivery systems have also posed a major challenge with regard to compliance with the Convention. The democratic government inherited a fragmented public service delivery framework, including fragmented structures, laws and systems that were shaped to preserve white supremacy and privilege. These have had to be recast and streamlined in the last few years, to re-orientate them to the needs of all regardless of race. The democratic government inherited public servants and a judiciary trained within and, by and large, loyal to the apartheid state. These have had to be reoriented to align their value systems with the new Constitution and international human rights norms.

24. However, as indicated in the body of the report, some resistance to reorientation, particularly within the judiciary, has been encountered. Members of the pre-1994 judiciary were accepted without the requirement of an oath of allegiance to the new Constitution while these same people had sworn to uphold the apartheid constitution that was openly based on racism.

25. The implementation machinery has been strengthened by the establishment of State Institutions supporting democracy, many of which are established in terms of Chapter 9 of the Constitution. The key ones with particular relevance to the realization of the objectives of the Convention, include the South African Human Rights Commission, the Commission For Gender Equality, the Independent Communications Authority of South Africa, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities and the Public Protector's Office.

Structure of the report

26. Within the format required by the Convention, this report briefly outlines, the context within which compliance with the Convention must take place in South Africa. In this regard, the report draws attention to the reality of residual racism and racial discrimination in

South Africa today, as a legacy of previously institutionalised injustices. It briefly sketches the key measures that have been adopted since 1994 to eradicate existing racism and racial discrimination, while preventing future acts of this nature, in compliance with the Convention and South Africa's own Constitution. The report also deals with new challenges regarding racism and racial discrimination and responses to these.

27. The report outlines some of the key obstacles hampering the success of measures adopted in pursuit of the objectives of the Convention and related human rights instruments, while demonstrating the country's unwavering commitment to the attainment of a non-racial and human rights based democracy and the concrete steps that are being taken to overcome these obstacles. Where appropriate, the report highlights weaknesses in the measures adopted in compliance with the Convention to date and action being taken to address such weaknesses.

28. The report follows the format in the Table of Contents that is consistent with the Convention.

29. The discussion under each article deals with the policy framework through which the provisions of the Convention are implemented. In most instances, this commences with reference to the provisions of the Constitution and a brief overview of the laws of the land and administrative arrangements. Where appropriate, examples of daily occurrences of race related incidents and emerging equality jurisprudence in the South African courts are outlined thereafter. Some of the key activities of the state and civil society that seek to achieve the objectives of the Convention are also mentioned.

II. INFORMATION RELATING TO ARTICLES 1 TO 7 OF THE CONVENTION

Article 1: The concept of racial discrimination

Policy framework on the elimination of discrimination

30. South Africa's policy framework regarding the elimination of racial discrimination is articulated in the country's new Constitution and a number of statutes which have recently been passed to give effect to the Constitution. The key statutes in this regard include the *Promotion of Equality and Prevention of Unfair Discrimination Act, (Act 4 of 2000)* (hereafter referred to as the Promotion of Equality Act), which partially came into effect on 1 September, 2000, the *Employment Equity Act, (Act 55 of 1998)* which came into effect on August 9, 1999 and the *Preferential Procurement Policy Framework Act, (Act 5 of 2000)* which came into effect on 3 February 2000. The conceptualisation of equality and non-discrimination in the Constitution and the these Acts took into account the Convention and other international instruments which deal with the elimination of discrimination and the achievement of equality.

31. Section 1(a) and 1(b) of the Constitution provides as follows:

“The Republic of South Africa is one, sovereign, democratic state founded on the following values: Human dignity, the achievement of equality and the advancement of human rights and freedoms Non-racialism and non-sexism.”

The provision relating to the achievement of equality should be seen against the legacy of the pervasive structural inequality in South Africa, mainly based on race and gender, as a legacy of institutionalised discrimination under colonialism and subsequently, under apartheid. The drafters of the Constitution articulated equality as an aspirational value rather than a reality in recognition of this legacy. The emphasis on the values of non-racialism and non-sexism are also in response to the nature of the history and legacy of institutionalised discrimination in this country.

32. In line with the Convention, the national policy framework recognizes both direct and indirect discrimination as prohibited forms of discrimination that need to be eliminated. Both the Constitution and the statutes under it, also demonstrate appreciation of the fact that discrimination may be either *de facto* or *de jure*. Furthermore, discrimination is linked to the denial of equal enjoyment of all human rights and freedoms. Section 9 of the Constitution continues to state that:

- “(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designated to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3).
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

33. Virtually all the provisions that constituted *de jure* discrimination have been removed from the South African statute book. The major challenge to be confronted in compliance with the Convention is the issue of residual discrimination that is predominantly *de facto* and indirect in nature. The Constitution and the statutes and policies that seek to give effect to its provisions relating to the elimination of discrimination and the achievement of equality, collectively provide the necessary framework for responding to this specific challenge. The Constitution also addresses the challenge of combined forms of discrimination. For example, the experiences of African women tend to be compounded by the intersection between race and gender. Factors such as disability, age and marital status are also factors that deepen the discrimination suffered by victims of racial discrimination. The Constitution, statutes and policies that give effect to it, recognize and deal with the prohibition and elimination of other forms of discrimination as well as the phenomenon of discrimination experienced on the basis of combined grounds.

South African concept of unfair discrimination

34. The use of terminology with regard to discrimination is, as may be gleaned from the above, slightly different from that which underpins the Convention. The South African Constitution and the *Promotion of Equality and Employment Equity Acts*, distinguish between unfair discrimination and discrimination. The prohibited form of discrimination is that which is unfair. Despite this difference, the outcome is the same as envisaged in the Convention. What is prohibited and targeted for elimination within the South African policy framework, are illegitimate forms of distinction, exclusion, or preferences. Legitimate distinction, classification, exclusion or preference is equally allowed in South Africa, as is the case in the Convention. The considerations made to determine whether an act or circumstance constitutes unfair discrimination in South Africa, are similar to those that are used in comparative jurisdictions to determine whether or not a situation constitutes discrimination.

Approach by the courts

35. The South African courts have mainly relied on the provisions of the limitations clause in the Constitution to determine the circumstances under which forms of distinction, classification, exclusion or preferences are legitimate from those which constitute unfair discrimination. The case of **Harksen v. Lane NO and Another** (1998(1) SA 300(CC)), is instructive in this regard. The inquiry as evidenced in **Harksen**, has essentially been about the reasonableness and justifiability of any limitation to the right to equality in an open and democratic society based on human dignity, equality and freedom. Factors taken into account have included the context, nature of the right, importance and purpose of limitation, nature and extent of limitation, relationship between limitation and its purpose and the availability of less restrictive means. In view of South Africa's history of violation of human dignity, human dignity, although a right on its own, has been factored in as one of the considerations in determining whether or not an act or circumstance constitutes unfair discrimination. Again, the case of **Harksen** is instructive in this regard.

36. The *Promotion of Equality Act* articulates a comparable test that includes the exemption of acts which reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned. The definition of discrimination in the Act is comparable to the definition in article 1.1 of the Convention. The Act defines discrimination as: "Any act or omission, including a policy, law, rule, practice or condition or situation which directly and indirectly (a) imposes burdens, obligations or disadvantages from; or (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds." This must be read with section 13 which provides that discrimination on one or more of the prohibited grounds is prima facie unfair unless proven by the defendant to be fair. This provision is adapted from section 9(5) of the Constitution, which states that: "Discrimination on one or more of the prohibited grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair." Section 11 of the *Employment Equity Act*, provides similarly.

The protection of non-citizens from racial discrimination

37. The South Constitution generally recognizes the right to full enjoyment of all human rights by all, including non-citizens. However, a few of the thirty-five fundamental rights enshrined in the Constitution, are exclusively articulated as rights of citizens. These include rights, privileges and benefits as well as accompanying responsibilities of citizenship (section 19). Also included are rights relating to freedom of trade, occupation and profession (section 22). The courts have recognized legitimate limitations of equal enjoyment of human rights by non-citizens within the ambit of section 36, the limitations clause.

38. Although Nationality is not provided for as a specific prohibited ground for discrimination in the Constitution, there is broad scope for reading this ground into the existing list. Grounds used in case law to date, include ethnic or social origin, birth and nationality as a non-listed ground. The *Employment Equity Act* on the one hand, covers nationality amongst listed grounds. The *Promotion of Equality Act* on the other hand, lists nationality amongst possible additional grounds to be investigated within a year, by the Equality Review Committee.

39. In re: **Certification of the Amended Text of the Constitution of the Republic of South Africa 1996** 1997(1) BCLR 1 (CC), the Constitutional Court was called upon to rule on a provision which guaranteed “every citizen” to “choose their trade or profession freely”. The argument was that the provision excluded people who are not nationals of South Africa. However, after consideration of international instruments, including article 1(3) of ICERD, the court found that those instruments did not require equal treatment of citizens and non-citizens with regard to freedom of occupation. In other words, the Court found that the discrimination was fair in line with section 9(5) of the Constitution, especially because the exclusion does not preclude any specific nationality (in line with article 1(3) of ICERD).

40. The South African legal framework relating to citizenship has been transformed to bring it in line with the provisions of article 1(2) of the Convention. Previously, citizenship was easier to be obtained by persons of European origin while it was virtually impossible for African foreigners to obtain South African citizenship. However, residual discrimination, manifest in the practices of the police and home affairs officials reveals that non nationals of African origin are more likely to be subjected to harassment than non nationals of other continents particularly, those of European descent.

Special measures to advance certain categories of persons

41. The South African Constitution provides for the adoption of legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination. This provision is in line with article 1(4) of the Convention, which provides for special measures for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection, as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights. The South African Constitution specifically addresses itself to victims of unfair discrimination, viewing measures aimed at placing these at par with others with regard to enjoyment of human rights, as part of equality and not some condoned deviation from equality as was the approach in the 1993 Interim Constitution.

42. The *Promotion of Equality Act* provides for positive measures for the advancement of any group or persons disadvantaged by unfair discrimination on any of the grounds recognized under the Act, while prioritising victims of unfair discrimination on the grounds of race, gender and disability. This is in response to the fact that structural and systematic discrimination today primarily follows the contours of the discriminatory laws and policies under colonialism and apartheid and the relevant laws and policies discriminated mainly on the basis of one or more of these grounds.

43. On the other hand, the *Employment Equity Act* and the **White Paper on Transforming the Public Service** and **White Paper on Affirmative Action in the Public Service**, specifically single out Black People (a generic term for African, Coloured and Indian People), Women and Disabled People as target groups for positive measures for their advancement. The public service transformation policy framework also covers positive measures aimed at equalizing services between the historically privileged and the historically disadvantaged. This is articulated in **Batho Pele: White Paper on the Transformation of Public Service Delivery**. Both the policy regarding equalization of employment opportunity and services are anchored in the Constitution and more specifically s 195(1) in chapter 10 thereof, which deals with Basic values and principles governing public administration.

44. The implementation of positive measures to advance Black people, women and disabled persons in the public service, saw an increase of black people in management, to 50 per cent and women to 33 per cent with black women lagging behind their white counterparts. The targets in the **White Papers on Transforming the Public Service** and **Affirmative Action in the Public Service**, which are reviewable every three years, were 50 per cent and 30 per cent for each of these groups, respectively, by the year 2000.

Some of the indicators of systemic residual racial discrimination

45. The representation of black people in ownership, management, control and key professional positions within the private sector, has not improved dramatically since the process of democratisation began. White men who constitute about seven (7) per cent of the adult population in this country, control virtually the entire business spectrum. They also control the professional occupations as well as bodies that control the many different professions. This is the case in sectors such as finance, including insurance, engineering, science and medicine, and in the legal profession. Black people and African people in particular, are over represented in unemployment and marginal employment statistics. African people occupy virtually all low-paid and menial jobs in South Africa. For example, domestic service, with over a million workers, is exclusively an African female occupation while farm work is predominantly a black occupation. Both domestic work and farm work are poorly paid occupations with very little legal protection.

46. The **Poverty Report** referred to earlier, reveal that the majority of people who live in abject poverty are black and female. The study also found a positive correlation between poverty and vulnerability to many diseases, including HIV/AIDS and susceptibility to violence, including domestic violence, rape and murder. This study has since been followed by a world report on human development, which confirmed South Africa's status as one of the most unequal societies in the world and that this inequality has deep race and gender dimensions.

47. The position of black female-headed families is compounded. Black women head three quarters of the 50 per cent of the single parent families that live below the poverty line in South Africa. A significant portion of this problem is attributable to the exploitative migrant labour system that has been a pillar of the South African labour market policy since the discovery of minerals such as gold and diamonds. Since 1994, various legal and administrative measures have been introduced to improve the enjoyment of human rights by migrant labourers, including those from neighbouring SADC states. Major achievements in this regard lie in various measures aimed at the integration of families through flexible migration laws and moves towards provision of family housing. Migrant labourers in the country for more than five years, were also allowed to vote in South Africa's first democratic elections, without racial discrimination.

48. The provision of family housing to facilitate the unification of families of migrant labourers in South Africa, poses a major challenge because the shortage of housing and land are part of the key social distortions that the new democratic government inherited from the apartheid state. Millions of African people were rendered landless and homeless by the *Natives Land Act of 1913* and similar laws and policies, and many continue in this condition. Government's response to this challenge must be balanced against other socio-economic challenges. These include the huge apartheid foreign debt that was inherited, poor education for black people, massive illiteracy levels amongst in particular, rural African women, health challenges including the challenges presented by the HIV/AIDS pandemic and challenges relating to malnutrition and treatable diseases such as malaria, hypertension, tuberculosis and various forms of cancers, high maternal and infant mortality amongst rural African people, provision of clean water, electricity and other forms of energy to rural African communities, addressing South Africa's acute skills shortage which itself is predominantly a black problem as a legacy of deliberate underdevelopment of black people during colonialism and apartheid, and massive unemployment, particularly amongst African people.

49. The education system, one of the cornerstones of the apartheid system retains many of the racial distortions that were institutionalised by apartheid. The last six years have seen various co-ordinated attempts aimed at eradicating the legacy of apartheid. Besides subjecting African children to an ideologically inferior segregated system called Bantu Education and exclusively created with a view to preparing them for their inferior place in society, black underdevelopment was reinforced through obscene disparities in state expenditure between black and white children. By 1994 the state spent four Rand (R4) on each white child for every Rand spent on a black child.

50. Similar obscene disparities were inherited in the social security system. Virtually all the low paid menial jobs occupied by black people were for many years not covered by social security provisions, including pensions. State pensions on the other hand were distributed according to race with African people receiving a fraction of what was received by their white counterparts. A state grant for single mothers was completely not available to African women. While legislation has addressed the anomaly, the backlog has imposed a severe burden on the state fiscus.

51. The context within which the provisions relating to the prohibition and elimination of unfair discrimination operate, is that due to the legacy of the racial disparities outlined earlier, racial discrimination takes place largely as a matter of impact rather than purpose. On a day to day basis, facially neutral provisions relating to access to bank loans, to housing and to quality education, including tertiary education, discriminate on the ground of race by feeding on and perpetuating the systemic patterns of racial inequality as result of privilege and exclusion under colonialism and apartheid. For example, a bank will require some form of collateral, usually fixed property, to grant a business or study loan. Due to the accumulated disadvantages resulting from apartheid and colonialism, the majority of Black, and in particular African people, are excluded from such loan facilities by impact. White people on the other hand are able to use the social power accumulated under apartheid and colonialism to determine the rules of business, including terms of lending, according to their experiences and to meet the resultant requirements such as collateral with land and other forms of capital accumulated primarily through apartheid and colonial privileges.

52. However, the legal framework particularly as articulated in the *Promotion of Equality Act*, also seeks to respond to and provide redress to victims of blatant racist behaviour. The attitudinal issues relating to racial supremacy and inferiority have not disappeared overnight from the South African social landscape with the introduction of South Africa's progressive and non-racial Constitution. However, in mainstream social intercourse, racist sentiments are rarely expressed openly on a day-to-day basis. Discriminatory conduct usually takes subtle forms or expressions of an indirect nature. For example, the redlining of a predominantly black area by the banking industry with regard to loan facilities is a more complex issue, as the bank will argue that the risk involved in investing in such area rather than the colour of the occupants, was the basis of their decision.

Instances of overt racism

53. In rural towns and particularly in the farms and in some of the conservative companies, the situation is different. Workers and passers-by are subjected to direct, brutal and cruel forms of racism. Newspaper articles abound on murdered farm labourers or brutally assaulted and verbally abused people with the use of racist terms such as Kaffirs, Boobejan, kaffirmaid, Bosman, etc. A number of these incidents recently shocked South Africa. One involved a farmer who after disagreeing with a black person, assaulted him and tied him to his truck that moved through town until he died as he got shredded along the way. Another involves a white farmer who stripped naked and painted the whole body of an allegedly "trespassing" black person with toxic white paint and marched him off in public. A shopkeeper who alleged that a fifteen-year-old girl was shoplifting a pair of panties has since repeated this.

54. Another of these involved the assault of a petrol attendant by Eugene Tereblanche, a leader of a conservative, exclusively white political party called the AWB. Incidentally, this party unsuccessfully tried to violently disrupt the negotiations that ensured South Africa's peaceful transition to democracy. Many of these incidences remain unreported due to fear of reprisals, including further assaults and evictions, by the farm labourers.

55. Deliberations at a National Conference on Racism held in August 2000 revealed that there are more of the brutal experiences of farm labourers than the reporting suggested. Another dimension was added to the explanation regarding the under reporting. It was stated that the law enforcement agencies in the remote areas, often act in collusion with the perpetrators and suppress cases involving brutality against farm labourers. This was confirmed by the report on public hearings on racism, conducted by the South African Human Rights Commission in the various provinces, prior to the conference. It was further suggested that a possible link between the incidences of brutality against farm labourers and the murders of white farmers, an issue which has become a serious national challenge, needs to be thoroughly explored.

Policy framework for eliminating discrimination and compliance with the Convention

56. Through relevant provisions of the Constitution, particularly section 9, read with the Founding Provisions and the entire Bill of Rights, *The Promotion of Equality Act, Employment Equity Act and Preferential Procurement Policy Framework Act*, South Africa has a comprehensive national policy for the elimination of racial discrimination in all its forms. The constitutional and legislative framework is complemented by the **White Papers on Transforming the Public Service, Affirmative Action and the Reconstruction and Development Programme**.

57. *The Promotion of Equality Act* expressly provides that one of its objects is to integrate the provisions of international instruments such as ICERD, and CEDAW into domestic law. The framework uses a combination of passive and positive measures with a view to achieving de facto equality, which allows all to enjoy the same social development, regardless of race or ethnic difference. Race related forms of discrimination are prioritised both in the anti-discrimination provisions in Chapter 2 and the provisions relating to the promotion of equality in Chapter 5. The framework also provides for remedies and specialist dispute resolution mechanisms to expedite enforcement of the rights protected in the Convention and the relevant domestic laws. The extent to which full compliance with the specific provisions of the Convention is achieved, is discussed below.

Article 2: Measures to eliminate discrimination and promote equality

State condemnation and commitment to the elimination of racial discrimination

58. In the preamble of the new Constitution the people of South Africa register up-front, their abhorrence of the injustices of the past (this being the colonial and apartheid injustices) and their commitment "...to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights" and where "...every citizen is equally protected by law".

59. In line with article 2(1) of the Convention, the Constitution outlaws discrimination, be it direct or indirect on any one or a combination of grounds including, race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. Both the state and private persons are prohibited from discriminating unfairly. (Section 9 (3 and (4)). Section 9(4) further provides that National legislation must be enacted to prevent or prohibit unfair discrimination.

60. In pursuit of the provisions of section 9(4), two pieces of legislation have been passed and both pieces of legislation outlaw racial discrimination and place racial discrimination amongst the priority grounds on the basis of which discrimination is sought to be eliminated. The relevant pieces of legislation are the *Employment Equity Act* that focuses on the employment sector only and the *Promotion of Equality Act*, which outlaws discrimination in all spheres of life including the family and the private sector.

State commitment not to engage in racial discrimination

61. The commitment of the South African state to refrain from engaging in any act or practice of racial discrimination, underpins the new Constitution. The guiding principles specifically articulate the principle of non-racialism as one of the core values underpinning the democratic state of South Africa. The position regarding state action and racial discrimination is articulated much clearer in the Bill of Rights, section 9(3) therein which states:

“The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds including race ...”.

62. This commitment by the state not to engage in racial discrimination is further articulated in the *Promotion of Equality Act* mentioned earlier. Section 6 of this Act, which is part of the aspects of the Act already in operation, provides that: “Neither the state nor any person may unfairly discriminate against any person.” The Act further provides in section 5, that: “This act binds the state and all persons.”

63. The commitment by the state not to engage in racial discrimination is also articulated in other recent statutes including the *Employment Equity Act* and the *South African Schools Act, 1996 (Act 84 of 1996)* and statutes relating to health, welfare or social security, population development and communication. Many of these acts, particularly the *South African Schools Act*, contain specific provisions that seek to undo the apartheid legacy in the education system. Similar commitments are to be found in policy statements including *Batho Pele: White Paper on the Transformation of Public Service Delivery*. *The White Paper on an Integrated National Disability Strategy* also seeks to address racial discrimination in state service delivery systems.

Addressing the gap between policy and reality

64. However, there is still a gap between policy and practice when it comes to de facto equality with regard to enjoyment of government services without racial discrimination. The majority of the historically marginalised tend to be excluded from services due to various reasons, including access to information, proximity, affordability and attitudes of service providers in the employ of the state. For example, many black people, particularly the unsophisticated poor, still find many state provided services inaccessible culturally and in terms of language. This is the case with regard to court services where English and Afrikaans are the main languages used and where the conceptual framework is mainly based on the European experiences that gave birth to Roman Dutch law.

65. Black users of the justice system also frequently complain about racist attitudes of service providers, including the police, magistrates, judges and lawyers in the private profession. The racism conference referred to earlier and the public hearings preceding the conference, also heard many complaints relating to racism in the judicial system. Many of the complaints dealt with continued police brutality against black people, profiling of black people as likely suspects, discriminatory prosecutorial and sentencing practices and generally racist attitudes in the system. In response to this, the conference statement called for the acceleration of measures aimed at transforming the judicial system.

66. The military is another area where the commitment of the state against racism has not fully translated into the reality of a racism free environment. Not only has there been complaints of racism in the National Defence Force, the situation has in many instances deteriorated into violent conflict. For example, there have been at least two instances where conflict has escalated to the point where black junior officers have resorted to the use of their military weapons to kill their white superiors and other white officers. This has now occurred in two provinces.

67. Government has responded swiftly to the racial crises in the South African Defense Force. Extensive diversity awareness training is being provided to members with a view to fostering harmony and understanding. The Defence ministry also recently appointed a special commission to investigate racial discrimination. The draft report of the commission has confirmed the prevalence of racism and racial segregation in the army. Recommendations include the acceleration of positive measures to ensure effective representation of black people in the army in response to the fact that the senior leadership remains virtually white.

68. Efforts are also being made to transform the judicial system to change the mindsets so that service providers respect the dignity of all human beings and ensure equal enjoyment of all services by all regardless of race. One of the key interventions by government since 1994 has been measures to accelerate the representation of black people at all levels and in all structures, including the judiciary. Another key intervention has been ongoing reorientation of service providers through human rights education and training on diversity and social context awareness. The police, prosecutorial services and the judiciary are amongst the groups targeted. Unfortunately the reorientation efforts are being hampered by a significant section in the inherited judiciary, which is using the concept of judicial independence to avoid the professional development programmes that are aimed at human rights awareness and the transformation of the value system within the judiciary.

69. The introduction of the Constitutional Court has also made a significant contribution to the transformation of the values that underpin the judicial system in South Africa. Many of the groundbreaking cases that have given substance to the constitutional provisions relating to the prohibition of discrimination and the promotion of equality, have emerged from the Constitutional Court. A number of the cases that have grappled with the issue of racism are discussed below.

Elimination of State sponsored or supported racial discrimination by persons or organizations

70. The equality clause as articulated in section 9 of the Constitution and the limitations clause in section 36 also constitute critical measures that discourage state supported discriminatory action by organizations, state agents or persons.

71. Anti-discrimination provisions in the pieces of legislation referred to earlier, particularly the *Promotion of Equality Act, Employment Equity Act, Film and Publications Act 1996 (Act 65 of 1996)* and the *South African Schools Act* reinforce measures to prohibit and prevent state sponsored or supported discriminatory activities by persons and organizations. One of the provisions of the *South African Schools Act* is the prohibition of race-based private schools, including those that achieve exclusion through the use of language. The *Promotion of Equality Act* also tackles the problem proactively by placing a higher burden regarding the promotion of equality on recipients of state funds or service contracts. This is achieved in the hierarchy of responsibilities to promote equality that is imposed in Chapter 5 of the Act.

72. Another area of achievement with regard to the elimination of state sponsored or supported racial discrimination, has been in progress regarding the recognition of Customary Law, Religious Laws and the institution of Traditional Leadership. The key provisions in this regard lie in sections 15, 211 and 212 of the Constitution. Progress has also been made with regard to recognition of African languages and the diversity of cultures in this country as provided for in the Constitution (ss 31 and 185).

73. From an administrative point of view a significant measure of success has been achieved with regard to eliminating, state sponsored or supported racial discrimination through the work of the **Truth and Reconciliation Commission**, the **Land Claims Court** and measures aimed at eradicating racist inspired police brutality. Although the truth and reconciliation process has been dealing with racist atrocities committed by the security forces during apartheid, the openness of the process has brought some lessons for police conduct in the present and the future.

74. The strengthening of administrative measures for enhancing police accountability have also played a role in reducing racist actions by state agents. One of the key measures in this regard, is the establishment of the **Independent Investigation Directorate (IDC)**. The directorate investigates complaints relating to police conduct. Many of the complaints have involved police corruption, brutality and discrimination particularly on the grounds of race and gender. In broadcasting, the **Independent Broadcasting Authority (IBA)** referred to earlier in the report has played a major role in the elimination of discriminatory broadcasting, particularly discrimination on the ground of race. Welfare officers have also adopted administrative measures to eliminate discrimination.

75. Constitutional, legislative and administrative measures aimed at protecting the rights of the child, mainly implemented under the **National Programme of Action on Children (NPA)**, have had a positive effect on the treatment of black children in the justice system. In the past, many under aged children filled crowded prisons for reasons in many instances that did not warrant their being thrown in jail. Measures aimed at balancing justice with protecting the best

interest of the child, have protected many children from going to jail, particularly those accused of minor offences such as pilfering minor food items in shops. Many of these children are now being diverted to rehabilitative programmes or sent to places of safety that are more child friendly and focused on rehabilitation rather than punishment. However, these initiatives are still at an infancy stage and they have not covered all the children in need.

76. Generally, there are still significant gaps between policy and practice. For example, complaints regarding police collusion in cases of the brutal racist acts by farmers persist and so do complaints regarding racist prosecutorial, sentencing and parole trends. Complaints regarding police brutality and the racial character of such also persist. Racially exclusive schools persist and some of the racially integrated schools continue to propagate in a subtle manner, ideas of racial superiority and inferiority. A significant number of these schools is riddled with interracial conflict between children, a problem that government and the South African Human Rights Commission is addressing through awareness raising programmes and conflict resolution interventions. There are also limitations regarding the accessibility, responsiveness and effectiveness of the administrative achievements discussed in the above. The challenge for government over the next few years is to reduce the gap between policy and practice.

Review of governmental policies and laws to eliminate racial discrimination

77. Since the commencement of democratic government in 1994, South African statutes as well as common law and customary law principles have been reviewed to align them with the new Constitution and to eliminate all provisions which directly or indirectly undermine the realization of the values that underpin the new Constitution, including the values of non-racialism and the achievement of equality. This process is not complete particularly in respect of the challenge of identifying provisions that discriminate by impact rather than by design. Nevertheless, a lot of ground has been covered. Laws that have been reviewed or introduced under this process include the following:

South African Schools Act 84 of 1996

Abolishes segregation in education and provides for measures aimed at addressing the legacy of institutionalised racism in the education system.

Recognition of Customary Marriages Act 120 of 1998

Provides for the full recognition of customary marriages and places them at par with marriages entered into under civil law, for all intents and purposes. The Act also abolishes the minority status conferred on women married under customary law, by the ***Black Administration Act of 1927***, as amended. Previously, the law viewed customary marriages, as “unions” and spouses there under had limited rights. Black women were particularly disadvantaged as customary law was interpreted to deny them the right to own immovable property, enter into contracts unassisted and to inherit from members of their family, including husbands and fathers.

Amendment of Customary Law of Succession Bill 1998

Reforms customary law of succession as articulated in the *Black Administration Act*, to ensure that black women and black children born out of wedlock and those children who do not qualify as “eldest male child”, enjoy equal inheritance rights as children covered by the *Intestate Succession Act*. This Bill has been returned to the South African Law Commission for further consultation.

Abolition of Certain Racially Based Land Measures Act 108 of 1991

Repeals and amends certain laws so as to abolish certain restrictions based on race membership, on the acquisition and utilization of rights to land and phases out related racially based institutions and regulations.

National Water Act 36 of 1998

Provides for the management of the nation’s water resources so as to bring about sustainable use of water for the benefit of all users without racial discrimination, as was the case under the apartheid based *Water Act of 1956*.

Divorce Courts Amendment Act 65 of 1997

Abolishes the former Black Divorce Courts and provides for the deracialisation of the Black Divorce Courts to pave the way for non racial unified family courts that provide swift and affordable justice with regard to family matters, including maintenance domestic violence and custody matters.

Basic Conditions of Employment Act 75 of 1997

Extend employment rights to historically marginalised and predominantly black employees such as domestic workers and farm workers.

Public Service Act 103 of 1994

Abolishes provisions that perpetuate the social consequences of past legalized injustices. This includes a system of seniority that ensured that old civil servants were prioritised for promotions in a context where black people were excluded by law and practice from management and most professional posts in the public service in what was regarded as mainstream South Africa.

Justice Laws Rationalization Act 18 of 1996

Integrates courts that were historically divided along racial lines and unifies justice laws applied throughout the whole of South Africa, including the former pseudo independent states.

Local Government Transition Act 209 of 1993

Deracializes local government and reforms provisions that perpetuate the social consequences of previously legalized injustices. The Act also provides for redemarcation of boundaries to eliminate racial segregation.

78. There is recognition of the fact that a lot still needs to be done with regard to auditing laws for possible direct or indirect racial discrimination. The remaining aspects of the ***Black Administration Act*** constitute one of the areas that have been prioritized by government. This forms part of an on going project of the South African Law Commission, which is referred to as the **Project on the Harmonization of Indigenous Law and the Common Law**. Government has specifically directed the South African Law Commission to conduct an investigation under a project referred to as “**Purification of Statutes**” to review with a view to updating all laws and aligning them with the new Constitution. Racial discrimination whether by design or impact, forms part of this investigation.

Measures to eliminate discrimination by private persons, groups or organizations

79. Having in mind the reality of “private apartheid”, the Constitution qualifies some of the rights by making them subject to the rest of its provisions. In some instances the Constitution specifically excludes discriminatory forms of behavior from the scope of relevant rights. For example, the right to freedom as enshrined in s 16, is limited by a provision similar to the hate speech provision in this Convention, which states that: “This right does not extend to: (a) propaganda for war; (b) incitement of imminent violence; or (c) advocacy of hatred that is based on race, ethnicity, gender or religion and that constitute incitement to cause harm.” Rights relating to freedom of religion, belief and opinion are also qualified by the other provisions in the Constitution, including section 9, the equality clause.

80. The ***Promotion of Equality Act*** is much more elaborate in its provisions regarding the prohibition of discrimination by private organizations and groups. To ensure that non-juristic persons do not escape its reach, the Act defines persons in a very broad way. According to section 1 (xviii) of the Act, “person includes a juristic person, a non juristic entity, a group or a category of persons”. The Act also imposes positive obligations on all persons to eliminate discrimination and promote equality.

81. The Act identifies racial discrimination as a priority both for the prohibition and elimination of discrimination and the promotion of equality and provides a specific section on the prohibition of unfair discrimination on the ground of race (s7) with specific examples on prohibited practices that constitute direct or indirect discrimination on the ground of race. Many of the examples are adapted from this Convention. Examples include the propagation of ideas on racial superiority or inferiority, hate speech and racial harassment.

82. The Act also provides a schedule containing an illustrative list of practices that may constitute discrimination in various sectors. The non exhaustive list of sectors includes; Labour & Employment, Education, Health Care Services and Benefits, Housing, Accommodation, Land & Property, Insurance Services, Pensions, Partnerships, Professions & Bodies, Provision of Goods & Facilities, Clubs, Sports and Associations. Many of the examples are based on experiences relating to the historical legacy of racial discrimination in South Africa.

83. The *Employment Equity Act* also provides for the elimination of racial discrimination by the state and private persons or organizations. Similar provisions exist in sectoral laws relating to health, including medical schemes, labour relations and education. For example, the *Labour Relations Act of 1995* prohibits the recognition of racially exclusive workers and employer's organizations. Social Security Laws such as the *Workers Compensation Act* have also been amended to address the discriminatory impact of excluding farm workers and other historically disadvantaged groups of workers.

84. The *Promotion of Equality Act* is a new piece of legislation whose impact is yet to be felt. The other pieces of legislation are fairly new. The main achievement to date has been the significant reduction of de jure discrimination in employment, education, accommodation, sports, hospitality industry, broadcasting and the delivery of state services including health and welfare services. However, the persistence of de facto residual racial discrimination in these and other sectors remains a major challenge. As indicated earlier, national statistics indicate that the racial patterns that obtained in these sectors during the apartheid era remain virtually unaltered.

85. The main achievement of the Constitution has been that of making a value statement about South Africa's collective rejection of racial and all other forms of discrimination and commitment to the achievement of equality. The practical value is an ongoing process that is hampered by the limitations on direct application of the Constitution, including the exclusive nature of constitutional litigation.

Measures to encourage racial integration and to discourage segregation

86. The Constitution provides a broad framework for building a racially integrated South Africa and eliminating residual racial segregation. Following the Constitution, blatant provisions or acts that foster racial segregation have reduced drastically. Job reservation in the mines is one of the last vestiges of overt segregation to have been eliminated in recent years. Another area where overt segregation has significantly disappeared is access to hospitals and clinics, purchase and rental of accommodation, sports, recreation and court services. There are instances here and there, particularly in the sector of rental of accommodation, where overt forms of exclusion of black people persist.

87. However, de facto segregation persists on a significant scale in all spheres of South African life. For example, residential patterns continue along the contours of the now abolished *Group Areas Act*. With the exception of soccer and boxing, mainstream sports teams are virtually white and this is attested to by the predominantly white South African Olympic Team that recently went to Australia and the composition of the National Rugby, Cricket, Tennis and Netball Teams. There are still clubs that exclude black people mainly through provisions that are facially neutral. The legal profession including the judiciary remains mainly white and male, particularly at the level of control, despite the removal of de jure racial discrimination.

88. In addition to sector based laws and policies that seek to eliminate segregation in all sectors, the *Promotion of Equality Act* provides a framework for strengthening measures to eliminate racial segregation and engender racial harmony and integration. This is achieved through provisions that discourage racially exclusive public activities without unduly limiting freedoms guaranteed in the Universal Declaration of Human rights and South Africa's own Bill

of Rights. Relevant provisions include provisions relating to membership of clubs, sporting organizations, professional associations and partnerships. They also cover housing and rental of accommodation. The sectoral laws in education, health, social development and sports, mentioned earlier, also provide a framework for racial desegregation.

89. A recently developed *National Youth Service Bill* is another instrument that seeks to promote racial integration, friendship and a collective national identity amongst the young people of South Africa. The proposed Act provides a framework for initiating a National Youth Service Corps that will involve young people in various nation building activities which promote an appreciation and acceptance of cultural diversity, skills development and a reduction of unemployment amongst young people, particularly those from historically disadvantaged backgrounds.

90. A process of redemarcation of local government boundaries has made a significant contribution to racial integration. Magisterial districts and the seats of High Courts are also being reviewed to eliminate apartheid boundaries and integrate services. Services such as maintenance have already been integrated to a large extent although complaints regarding racist attitudes persist. Admittedly, more still needs to be done with regard to changing mindsets to embrace the humanity of all.

91. Various administrative measures have to date, been implemented by both the state and private entities, to achieve desegregation and promote friendship and harmony across race, ethnicity, social origin and colour. Sports activities have been encouraged as a nation building exercise by both government and civil society. Cultural activities, including music and broadcasting are also increasingly utilized to promote a collective national identity. Various awareness-raising programmes have been initiated in the education system with a view to teaching learners about human rights and encouraging them to accept and value diversity. National constitutional week has been consistently used over the years, to put a national spotlight on such programmes.

92. Some of the measures outlined in the above have also sought to heal the ethnic divisions that were reinforced by colonial and apartheid policies and practices. Such policies and practices included segregated residential areas and the balkanization of the country along ethnic lines into pseudo independent black states while promoting the perception of white ethnic groups as a single “white nation” and ethnic based and stereotypical television and radio programmes. Evidence particularly from the hearings under the Truth and Reconciliation Commission, attests to state sponsored armed ethnic conflict and fuelling ethnic tensions through propaganda falsely characterizing as ethnic conflict, forms of conflict that were not ethnic based.

93. Measures that promote racial integration have also dealt, albeit in a limited sense, with efforts to integrate immigrants, including refugees of African origin in the country. Non-nationals from the rest of Africa particularly from the North, including refugees, have been historically discriminated by law on a racial basis, under apartheid. While the law no longer discriminates on a racial basis, residual discriminatory attitudes and behavior persists among ordinary citizens and law enforcement agents. The South African Human Rights Commission and other organs of civil society have played a significant role in attempts to integrate this group. One of the significant interventions has been a campaign referred to as the “**Roll Back Xenophobia Campaign**” and resultant declaration.

Positive measures to promote full and equal enjoyment of all human rights by all

94. The Constitution, as indicated earlier, treats the adoption of positive measures to protect and advance persons or categories of persons disadvantaged by unfair discrimination as an integral part of equality. Furthermore, the Constitution follows the Convention's approach which links equality and discrimination and further provides for legislative and other measures to facilitate de facto equal enjoyment of all human rights by those who still bear the consequences of unfair discrimination (9(2)). The Constitution also provides for the possibility of legislation on a Preferential Procurement Policy Framework to protect and advance the same groups (s217). Constitutional provisions on social-economic rights are critical for ensuring de facto enjoyment of human rights by the same disadvantaged groups.

95. The *Promotion of Equality Act* provides the most comprehensive statement on the promotion of equality in all spheres of life prioritizing the achievement of equality in the sectors referred to earlier and with respect to the grounds of race gender and disability. These provisions are in line with article 1(4) of the Convention.

96. The Act provides that all persons, non-governmental organizations, community-based organizations and traditional institutions must promote equality in their relationships with other bodies and in their public activities. Any person who contracts with the state or exercises public power must promote equality by adopting and enforcing equality plans and codes of practice in their day to day activities. In addition to this, all companies, close corporations, partnerships, clubs, sports organizations, corporate entities and associations, where appropriate, will be required in terms of regulations to prepare and abide by equality plans and prescribed codes of practice.

97. The Act specifies, as one of the special measures to promote equality, that if it is proved in the prosecution of any offence that unfair discrimination on the grounds of race, gender or disability played a part in the commission of the offence, it must be regarded as an aggravating circumstances for the purposes of sentence.

98. The *Employment Equity Act* provides for positive measures referred to as affirmative action measures, aimed at equalizing opportunities for Black people (African, Coloureds and Indians), women and persons with disabilities. Specific provisions include the requirement of auditing the work environment for opportunity barriers particularly affecting designated groups and implementing employment equity plans to eliminate discrimination and advance the designated groups. Reports have to be submitted to the Department of Labour in this regard. The Act also provides for a **Commission on Employment Equity** to assist the minister in monitoring the implementation of the Act.

99. The *Preferential Procurement Policy Framework Act* gives effect to section 217 of the Constitution by providing a framework for the implementation of a procurement policy that provides "... for categories of preference in the allocation of contracts and the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination".

100. Other Laws that deal with the active elimination of discrimination and equalization of opportunities with regard to the enjoyment, without racial distinction, of human rights in the social, economic and cultural spheres of life, include the following:

Pan South African Language Board Act 59 of 1995

Provides for the recognition, implementation and furtherance of multilingualism in South Africa and for the development of previously marginalized languages.

Culture Promotion Amendment Act 59 of 1998

Makes provision for the preservation, development, fostering and extension of culture in South Africa by planning, organizing, co-ordinating and providing facilities for the utilization of leisure and for non-formal education. The ***Cultural Institutions Act 119 of 1998*** makes provision for the payment of subsidies to certain cultural institutions.

The National Empowerment Fund Act 105 of 1998

Provides for the establishment of a trust for the promotion and facilitation of ownership of income generating assets by historically disadvantaged persons. The Act also establishes structures and mechanisms to redress the inequalities brought about by apartheid by facilitating the broader economic ownership by historically disadvantaged persons. This Act is not yet in operation.

101. Public service policies that seek to eliminate racial inequality and discrimination include, as indicated earlier, the White papers on the **Reconstruction and Development Programme (RDP)**, **Transformation of the Public Service (TPS)**, **Transformation of Public Service Delivery (TPSD)** which provide for various administrative measures aimed at inspiring proactive measures to eliminate discrimination and promote de facto enjoyment of human rights in the various sectors of life. Collectively, these white papers provide the policy framework for the active equalization on the basis, in particular, of race, gender and disability, of employment opportunities and the enjoyment of public services.

102. Another area that has been emphasized in administrative measures is the area of intensive training programmes for law enforcement officers. As indicated earlier, success has been limited due to limited resources that have made it impossible to subject all service providers to extensive training and the fact that the process of attitudinal change takes a long time. The ***Promotion of Equality Act*** makes training and various aspects relating to suitability a precondition for service in the specialist **Equality Courts** established to deal with matters under the Act. The Act also provides for the training of all those who will deal with the Act, including those not involved in the Equality Courts.

103. Government policy has also sought to level the playing field on a racial basis, with regard to access to finance, particularly with a view to promoting black entrepreneurship and job creation amongst those disadvantaged by unfair discrimination. An example in this regard is Khula, a finance assistance entity that seeks to support emerging disadvantaged entrepreneurs. Attempts have been made to encourage land ownership and farming among black people, including women, and access to finance for various purposes, including housing. A notable intervention by government with regard to discouraging racial discrimination in the financing of housing is a housing initiative called **SERVCON Housing Solutions**. The initiative seeks to facilitate the elimination of the historical backlog in loan repayment by members of

disadvantaged communities. Social housing is also being considered and government has just approved rental housing. Many of these initiatives are discussed in more detail under article 5.

104. Other administrative measures have been adopted to promote de facto equal enjoyment of human rights regardless of race in various facets of social, economic and cultural spheres of life. Interventions have included the promotion of historically marginalized languages and religions, encouraging racial inclusiveness in sport, access to finance and business ownership. Many of the relevant measures are private sector initiatives. One of these initiatives has been the establishment of a **Black Empowerment Commission** that is in the process of finalizing its report. Another is an initiative of the former President of South Africa, Mr Nelson Mandela, which involves encouraging business to donate large amounts of monies to rehabilitate schools, hospitals and other facilities in the communities that were severely underdeveloped under apartheid.

105. Activities relating to the promotion of an African renaissance, are also contributing to the achievement of racial equality. Relevant issues include the encouragement and recognition of black excellence, development of black languages, encouragement of literature by black people and general promotion of a positive perception of the African continent.

Equality and anti-discrimination jurisprudence

106. South African courts have since the introduction of the Interim Constitution in 1993, been grappling with the challenge of holding the state and private actors accountable with regard to upholding the right to equality, including the right not to be discriminated against on the ground of race. The work of the courts has been largely about interpreting the equality clause in the Constitution. In the field of employment, the challenge has included the implementation of the anti-discrimination provisions of the *Labour Relations Act* and subsequently the *Employment Equity Act*.

107. One of the key challenges facing the courts has been the balancing of the anti-discrimination provisions with the provisions relating to special positive measures to ensure adequate protection and advancement of members of groups who were disadvantaged by unfair discrimination. Many of these cases have centered around claims of white people, particularly white men, regarding their right not to be discriminated on the ground of race versus the constitutional and statutory provisions relating to the duty to adopt special measures to promote real or de facto enjoyment of life opportunities by members of the communities and groups which continue to suffer the social consequences of the race discriminatory exclusions and burdens imposed on them under colonialism and apartheid.

108. By and large, the courts have approached their challenge in a manner that is consistent with the provisions of this Convention and the Constitution. Examples in this regard include the following cases:

Pretoria City Council v. Walker 1998(2) SA 363 (CC)

The respondent withheld payment from the applicant by reason that the applicant had violated his constitutional right to equality in s8 of the Constitution. The applicant charged different rates for the consumption of water and electricity and this amounted to

discrimination based on race. The residents of townships (overwhelmingly black people) paid a flat rate and residents in historically white municipalities paid a tariff for the actual consumption measured by a meter. The Constitutional Court ruled that the differential debt recovery measures were not taken because the inhabitants of old Pretoria were white. These were transitional measures implemented to reconstruct the city of Pretoria. This could not be achieved without acknowledging the reality of the grossly inferior services that the black townships received as well as the lack of infrastructure. Objectively viewed, these measures did not impact unfairly on the white community, nor did they affect their dignity and sense of self-worth.

Amod v. Multilateral Motor Vehicle Accidents Fund 1999 (4) SA 1319 (SCA)

This case is currently on appeal before the Constitutional Court. It involves the Constitutional right of a widow of a Muslim marriage, to equality of treatment with persons married under civil or common law. The woman claimed damages for loss of support arising from the death of her husband in a motor vehicle accident. The Multilateral Motor Vehicle Fund refused to pay on the ground that she was not married under common law. The high court ruled against her. The Supreme Court of Appeal ruled in her favour, thus recognising equality in religions and forms of marriage that tend to follow racial lines.

Eskom v. Heimstra No and Others (1999) 20 ILJ 2362(LC)

The Labour Court ruled that it was not unfair discrimination to appoint a qualified and experienced black woman (“Coloured”), to a senior position of vending controller instead of an equally qualified and experienced white woman. The white woman had scored higher points in the interview. However, the employer justified the preference for the black woman on the consideration that black women were underrepresented.

Correctional Services v. Van Vuuren (1999) 20 ILJ 2297 (LAC)

The Labour Appeal Court ruled that the decision of the Commissioner for Correctional Services to appoint a qualified black man who was among the four persons recommended by the interviewing panel instead of a white woman who was also among the four, was not unfair discrimination because such decision fell within the policy of affirmative action that is directed at redressing the imbalances created by colonial and apartheid racism and racial discrimination in the public service.

109. Unfortunately, jurisprudence in the High Courts and the lower courts has not been very consistent and it takes quite some time for matters to reach the Constitutional Court. Furthermore, due to issues of affordability and the complex nature of constitutional litigation, many badly decided cases never reach the Constitutional Court. Some of the decisions have not been consistent with the vision behind this Convention, particularly with regard to ensuring the de facto equal enjoyment of human rights and freedoms regardless of race alone or in combination with other grounds. Some of the cases that provide cause for concern include the following:

Mthembu v. Letsela 2000(3) SA 867(SCA)

Deals with a decision where at first instance and on review the court decided that a woman, who had been involved in a customary union with the deceased, could not inherit and that her daughter was illegitimate and that she too could not inherit. The case also raises the racism of contempt of customary law which is manifest in the fact that judges and other persons who have to decide customary law cases need not have studied such law at any stage of their education.

Public Servants Association of South Africa and Others v. Minister of Justice and Others 1997(3) SA 925

The decision in this case is in direct contradiction with the labour court decision in the Correctional Services case. Confronted with similar facts to the Correctional Services case, the High Court ruled that it was unfair discrimination not to promote white applicants for positions in the offices of the State Attorney, in order to free posts for blacks that were seriously underrepresented.

Such inconsistencies in the rulings by the courts do cause inconsistencies in the implementation of policies conceived to redress racial imbalances, both in the public and private sectors. However, the *Promotion of Equality Act* has potential to address some of these gaps.

Article 3: Prevention, prohibition and eradication of racial segregation and apartheid

Formal abolition of apartheid and related segregation

110. The Interim Constitution of the South Africa abolished the pseudo independent states that were created under apartheid as part of the so-called principle of separate development. The country was integrated into a single democratic state, restoring citizenship to all South Africans. The new Constitution that was adopted in 1996, confirms that South Africa is one sovereign democratic state and that “there is common South African citizenship”. Under this Constitution, African people exercised the universal franchise for the very first time in South Africa.

111. The new constitutional dispensation brought an end to a constitutional order that for years had denied black people citizenship, the franchise and other basic human rights for years. While the segregation and denial of basic human rights to black people had been a feature of colonial South Africa, the perfection of the system of institutionalised segregation and degradation that was to be later crystallized under the concept of apartheid in 1948, began to take shape in 1910 when a union of South Africa was constituted exclusively by white parties that had gathered to bring an end to the Anglo-Boer war.

112. The triumph of the South African people who fought relentlessly against segregation was made possible through the international solidarity that was mobilized under article 3 of the Convention and related international instruments. This reporting exercise provides once more, an opportunity for South Africans to express their appreciation for the international solidarity that helped dismantle the apartheid state.

Continuing challenges: the social legacy of apartheid

113. As indicated earlier, virtually all laws that directly create or enforce segregation have been abolished. The review with a view to repealing or incorporating the remaining aspects of the *Black Administration Act* constitutes one of the few remaining challenges with regard to cleaning up apartheid statutes. Another challenge of this nature lies in the restructuring of the courts. Government convened the National Colloquium referred above, with a view to deliberating on the acceleration of transformation of the judicial system with a particular focus on the restructuring of courts to ensure responsiveness and effectiveness and to do away with the last structural vestiges of apartheid.

114. The key challenge facing South Africa today with regard to compliance with article 3 is the persistence of systemic socio-economic and cultural patterns of racial inequality and accumulated disadvantages on the one hand and accumulated social power on the other. Not surprisingly, these patterns resemble the patterns of legalized injustices during apartheid and manifest themselves in the control of the South African economy, employment opportunities, ownership of property including land, access to finance, and social services such as health, education, housing, nutrition, clean water, energy and justice related services.

115. The social legacy of apartheid also includes residual attitudes relating to white supremacy and black inferiority that persist amongst both victims and perpetrators of racism. An unhealthy number of white people continue to believe that they are entitled to superior treatment and black people to inferior treatment by virtue of their colour. Such attitudes also afflict law enforcement agents and other public service providers, including the judiciary. While many black people resist behavior that is informed by such attitudes often resulting in racial conflict, some have internalised the idea that there is a superior place for white people in society and an inferior place for themselves and people like them. State sponsored civil society awareness programmes mentioned elsewhere in this report, primarily seek to eliminate this psychological and cultural legacy of apartheid and colonialism.

116. Many of the legislative, policy and administrative measures dealt with under article two are part of the policy framework to eliminate segregation and the rest of the social legacy of apartheid. The *Promotion of Equality Act* provides the most comprehensive policy framework for eliminating all forms of racial segregation and other aspects of the social legacy of apartheid. The process however, will take time. It has also become clear that South Africa needs a clear policy framework for levelling the playing field in the economy. The *Preferential Procurement Policy Framework Act*, which was supposed to address an aspect of economic empowerment, is not very clear on the issue. A weakness that government is looking at addressing is to concretely link the distribution of state contracts, to compliance with the Provisions of *The Promotion of Equality and Employment Equity Acts*. This is partly addressed in s53 of the *Employment Equity Act*.

Article 4: Measures to eliminate all propaganda and organizations which are based on theories of racial supremacy

117. As a State Party to the Convention, and given the racist and racialist past of the South African society, the new democratic government has taken concrete legislative, judicial and other policy measures to give effect to the obligations under Article 4 of the Convention.

118. Section 16 of the Constitution provides for freedom of expression. However, in international human rights law and South Africa's domestic law, no right or freedom is absolute or ranks above other rights or freedoms. This approach is in accordance with par 5 Part 1 of the Vienna Declaration and Programme of Action which reads as follows: "*All human rights are universal, indivisible and inter-dependent. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis*". Under section 36 of our Constitution, the rights and freedoms in the Bill of Rights can be limited by laws of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

119. The obligations under Article 4 are met in part by the special limitation put on the freedom of expression in our Bill of Rights. Section 16(2) of the Constitution states that freedom of expression does not extend to:

- “(a) propaganda for war;
- (1) incitement of imminent violence; or
- (2) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm”.

120. The above constitutional provisions are reinforced by the provisions under section 7 of the ***Promotion of Equality and the Prevention of Unfair Discrimination Act, (No. 4 of 2000)*** which provides that:

“No person may unfairly discriminate against any person on the ground of race, including:

- (1) The dissemination of any propaganda or idea, which propounds the racial superiority or inferiority of any person, including incitement to, or participation in, any form of violence;
- (2) The engagement in any activity which is intended to promote, or has the effect of promoting exclusivity based on race;
- (3) The exclusion of persons of a particular race group under any rule or practice that appears to be legitimate but which is actually aimed at maintaining exclusive control by a particular race group;
- (4) The provision or continued provision of inferior services to any racial group, compared to those of another racial group;
- (5) The denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons.”

121. Furthermore, racist hate speech is prohibited under section 10 of the ***Promotion of Equality Act***. The section declares that no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds that includes race, against

any person, that is intended to be hurtful, harmful or inciting harm or intended to promote or propagate hatred. The Act provides for civil remedies for victims of racist hate speech. However, section 10(2), read with section 21(2)(n) of the Act, requires the courts or clerks of court, where appropriate, to refer any case dealing with the publication, advocacy, propagation or communication of hate speech to the National Director of Public Prosecutions for the institution of criminal proceedings in terms of the common law or relevant legislation. The Act also provides for the treatment of racially motivated crimes as aggravating circumstances for the purposes of sentencing.

122. Paragraph 29 of the recently adopted “**A South African Millennium Statement on Racism and Programme of Action**” adopted by the National Conference on Racism, Sandton, Johannesburg, 30 August to 2 September, 2000, states clearly that with the promulgation of the new Equality Act, *the criminal justice system be equipped to enforce provisions to prevent and punish racist offences and that officials in the justice system be trained in race sensitivity and racism awareness*. Such training has commenced and will be extended to the whole judiciary, the prosecuting authorities, the police and other role players in the justice system.

123. In addition to the provisions in the *Constitution* and the *Promotion of Equality Act* described above, the *Regulation of Gatherings Act, 1993 (Act 205 of 1993)*, provides that no person present at or participating in a gathering or demonstration shall by way of a banner, placard, speech or singing or in any other manner incite hatred of other persons or any group of other persons on account of differences in culture, race, sex, language or religion. Any person who contravenes or fails to comply with this provision shall be guilty of an offence and on conviction shall be liable to a fine not exceeding R20 000 or to imprisonment for a period not exceeding one year or to both the fine and the imprisonment.

124. Laws regulating the film and publications industries also cover propaganda and advocacy of racism and racial discrimination. Section 29 of the *Films and Publications Act, 1996 (Act 65 of 1996)* provides as follows:

“(1) Any person who knowingly distributes a publication which, judged within context:

- (a) amounts to propaganda for war;
- (b) incites to imminent violence; or
- (c) advocates hatred that is based on race, ethnicity, gender or religion, and which constitutes incitement to cause harm,

shall be guilty of an offence.

(2) Any person who knowingly broadcasts, exhibits in public or distributes a film which, judged within context:

- (a) amounts to propaganda for war;
- (b) incites to imminent violence; or

(c) advocates hatred that is based on race, ethnicity, gender or religion, and which constitutes incitement to cause harm,

shall be guilty of an offence.

(3) Any person who knowingly presents an entertainment or play in public that, judged within context:

(a) amounts to propaganda for war;

(b) incites to imminent violence; or

(c) advocates hatred that is based on race, ethnicity, gender or religion, and which constitutes incitement to cause harm,

shall be guilty of an offence.

(4) Subsections (1), (2) and (3) shall not apply to:

(a) A bona fide scientific, documentary, dramatic, artistic, literary or religious publication, film, entertainment or play, or any part thereof which, judged within context, is of such nature;

(b) A publication, film, entertainment or play which amounts to a bona fide discussion, argument or opinion on a matter pertaining to religion, belief or conscience; or

(c) A publication, film, entertainment or play which amounts to a bona fide discussion, argument or opinion on a matter of public interest.”

125. Any person found guilty of contravening this section may be sentenced to a fine or to imprisonment for a period not exceeding five years, or where the court convicting such a person finds that aggravating factors are predominant, both a fine and imprisonment will be imposed.

126. The Parliamentary *Ad Hoc* Joint Committee that finalised the drafting of the ***Promotion of Equality Act*** passed a special resolution in January 2000 which has a bearing on racist hate speech. The resolution requested the Minister for Justice and Constitutional Development to give special consideration to the following:

- Tabling legislation in Parliament, which deals with the criminalisation of hate speech;
- Such measures must be consistent with section 16 of the Constitution and the Convention and Elimination of all forms of Racial Discrimination;
- In addition for such legislation, needless to say, to create offences relating to hate speech. The Equality Review Committee appointed by the Minister on 1 September 2000 under authority of the Equality Act will make recommendations to the Minister in this regard.

127. The enactment of new laws directed at fulfilling the obligations under Article 4 of ICERD have not, as is to be expected, had the effect of eliminating all forms of racial discrimination or racist practices in society. The impact of the legislation will take time to be felt. The National Conference on Racism was convened precisely to give impetus to effective implementation of the laws, and to mobilize the society to ensure that this task is accomplished.

128. Some examples of incidents of racism or perceived racism may be apt at this point. There is still a perception that some law enforcement officials, mainly those inherited from the past, still dispense justice impartially and along racial lines. A White presiding officer gave Nicholas Steyn, a White farmer who killed a six-month-old Black baby, Thobile Angeline Zwane, in April 1998 a mere suspended sentence. The White judge, who passed this very lenient sentence not commensurate with the gravity of the offence, appears to have meted out racial injustice.

129. But there are also numerous cases in which justice is seen to be done; for example, in June 1999 two criminals received long sentences for racially motivated killings. Pieter Henning and Johan Dundee (Whites) were sentenced to a total of 60 years for killing Mandlenkosi Mabaso and Sipho Mkhize (Blacks). The murders were a result of Mkhize calling Henning by his first name. The sentences sent a clear message that racial offences would be severely punished in the future.

130. The criminal acts of racist violence in above two cases arose on farms. Racially based social class inequalities on the farms are a breeding ground for continued racial violence and inhuman treatment of Blacks by Whites. Recently, the press has been quite active in exposing racist violence on farms. (See for example: N Nxusani, 'Pig's life for families: Farm workers pay for resisting eviction order', **Sowetan** 12 May 2000 and K Nkosi, 'Man to appear after worker dragged to death behind bakkie', P Molwedi, 'Man painted silver suffers kidney ailment', all in **the Star** 28 August 2000). All the exposed criminal activities have led to prosecution. Parliament has also enacted laws that make it a criminal offence to evict occupiers who are not landowners without an authority of an order of a competent court. (An example is s 23 of the *Extension of Security of Tenure Act, No. 62 of 1997*). This legislation in effect amends the notorious *Trespass Act, No. 6 of 1959*, to ensure that people who are legitimate occupiers of land are not treated as criminal trespassers as was the case during apartheid. The South African Human Rights Commission has also initiated investigations into racism on farms and made recommendations (SAHRC, **Investigation into Alleged Violations of Farm Workers' Human Rights in Messina/Tshipise District** (Johannesburg, 1998)) that the law enforcement agencies have incorporated into the strategies for combating the problem. Dealing firmly and effectively with criminal violence motivated by racism is a priority of the Government.

131. There have also been incidents of criminal racist violence in some schools and in a few military bases. The SAHRC has investigated allegations of racism, lack of integration and poor treatment of black students at three universities. The Commission heard allegations that lectures were in Afrikaans and non-Afrikaans speaking black students found difficulty in understanding the lectures. This results in more blacks students failing exams as compared to whites. In some cases student residences in lower, higher and tertiary education institutions have been found to be segregated along racial lines. In all these cases, the institutions concerned have undertaken to address the problems.

Article 5: Measures to promote equality and non-discrimination in the enjoyment of civil and political rights and economic, political and cultural rights and freedoms

132. Since 1994, the new democratic government has undertaken concrete legislative, judicial and policy measures directed at prohibiting and eliminating racial discrimination in all its forms and to guarantee to everyone, without distinction as to race, colour, or national and ethnic origin, the right to equality before the law. The Constitution has an extensive provision that in many respects goes beyond the minimum requirements of the general provision under Article 15 of the Convention. The Provisions of section 9 of the Constitution, outlined earlier in this report, are instructive in this regard.

Article 5 (a) of ICERD: The right to equal treatment before the tribunals and all other organs administering justice

133. Section 9(1) of the Constitution guarantees every one equal protection and benefit of the law. This is reinforced by s 34 of the Constitution which states: “*Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum*”. Further constitutional guarantees are to a “just administrative action” (s 34), the special rights of arrested, detained or accused persons (s 35) and the right of anyone whose rights and freedoms are infringed or threatened to approach the courts (s38). In respect of just administrative action, special legislation has been enacted for this purpose in the form of the **Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000)**. A problematic exception to the general constitutional guarantees described under paragraph 81 above, but which is not based on distinctions proscribed under Article 15, is with regard to amnesty from criminal prosecution or civil liability granted under a statutory authority to former perpetrators of human rights violations where they satisfy two principal conditions: that the violations were politically motivated and that the perpetrator discloses the whole truth. This exception has been challenged in the courts. The Constitutional Court however found that the said legislation was in conformity with the constitutional guarantees of access to justice. (**AZAPO and Others v. President of the Republic of South Africa and Others** 1996 (8) BCLR 1015 (CC)).

134. It is apt to point out that the judicial authority of the Republic of South Africa is vested in the courts. It is a constitutional imperative that the courts are independent, impartial and subject only to the Constitution and the law. No person or organ of state may interfere with the functioning of the courts and an order or decision issued by a court binds all persons to whom and organs of state to which it applies (s 165 of the Constitution).

135. To assist the indigent to have access to the courts, the **Legal Aid Act, No. 22 of 1969** that was primarily applied to Whites has been amended and is now applicable to everyone without distinction on the grounds prohibited under Article 15. (**Legal Aid Amendment Act, No. 20 of 1996**). However, due to resource constraints, not all those who need or require legal aid are able to access the same. The Legal Aid Board is currently reviewing the whole system so as to make it more efficient and cost-effective. The expensive judicare model for the provision of state-assisted legal aid is being replaced by a new model based on salaried professionals, the integrated justice centres model, that was adopted at the National Legal Aid Forum in January 1998.

Article 5 (b): The right to security of persons and protection by the state against violence or bodily harm whether inflicted by government officials or by any individual, group or institution

136. Constitutional compliance with the above is expressed under section 12 of the Constitution that provides as follows:

“(1) Everyone has the right to freedom and security of the person, which includes the right:

- (a) not to be deprived of freedom arbitrarily or without just cause;
- (b) not to be detained without trial;
- (c) to be free from all forms of violence from either public or private sources;
- (d) not to be tortured in any way; and
- (e) not to be treated or punished in a cruel, inhuman and degrading way.

(2) Everyone has the right to bodily and psychological integrity, which includes the right:

- (a) to make decisions concerning reproduction;
- (b) to security in and control over their body; and
- (c) not to be subjected to medical or scientific experiments without their informed consent.”

137. Details of South Africa’s other efforts to comply with the obligations under Article 15(b) are fully discussed in a draft Report on the **Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)** which is to be submitted soon. It is important to point out that the right to security of persons and protection by the state against violence or bodily harm, including the protection against torture and other cruel, inhuman and degrading treatment informed the Constitutional Court’s historic decision to abolish capital punishment (**S v. Makwanyane** 1995 (7) SA 391 (CC)). It also informed the same court’s decision to outlaw juvenile whipping in the case of **S v. Williams** 1995 (7) BCLR 861 (CC). Parliament followed the latter decision by enacting the **Abolition of Corporal Punishment Act, No. 33 of 1997**. The Government has also established the Independent Complaints Directorate within the Department of Safety and Security to investigate any acts of violence against any one by the police. The guaranteed rights of arrested, detained or accused persons in section 35 of the Constitution further reinforces the right to security of the person and protection against any form of violence by law enforcement officials. In the area of gender-based violence, the **Domestic Violence Act, No. 116 of 1998** came into force on 15 December 1999. The Constitutional Court recently made an important decision upholding the constitutionality of interdicts against perpetrators of domestic violence, thus enhancing the protection of victims or potential victims of domestic violence. (**S v. Baloyi (Minister of Justice and Another Intervening)** 2000 (2) SA 425 (CC)).

Article 5 (b): Political rights, in particular the rights to participate in elections to vote and stand for election on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service

138. Multi-party democracy, based on regular elections, universal adult suffrage and a common voters roll, is enshrined in the Constitution as one of the founding core values (s 1(c) of the Constitution). This should not be surprising given that the exclusion of the Black majority from equal political participation with the White minority was one of the central features of colonial and apartheid regimes before 1994. The core constitutional value is reinforced by another provision (s 236) that enjoins the Government of the day to provide funds for viable political parties to enable them to participate in the elections meaningfully. In August 2000, 44 political parties registered to participate in general municipal elections.

139. In line with accepted international norms and best practices, only citizens enjoy political rights of forming or joining political parties. Only citizens have the right to vote in local and national elections (s 19 of the Constitution).

140. The elections are managed by an independent constitutional body, the Independent Electoral Commission (ss 190-191 of the Constitution). The *Electoral Commission Act, 1996 (Act 51 of 1996)*, came into operation in October 1996. The independence of this body was affirmed in a recent Constitutional Court judgment (*New National Party of South Africa v. Government of the Republic of South Africa* 1999 (3) SA 191 (CC)). Thus, elections and referendums in the country at all three tiers of government (national, provincial and local) are entrusted to a manifestly independent and impartial Electoral Commission, which was appointed in 1997. The Independent Electoral Commission (IEC) oversees the free and fair participation of every registered voter in the election, either to vote or to stand for election. South Africa's second democratic general election was held in May 1999. South Africa is a developing country with a significant number of people who can neither read nor write. This creates an obstacle to the full understanding of the electoral process. The IEC and organs of civil society are addressing this issue through hands-on "voter education" initiatives.

141. The Public Service maintains integrity and accountability in performing its duties at all times and loyally executes policies aimed at advancing the delivery of services to everyone. Public servants are expected to serve the public impartially and are not allowed to discriminate unfairly against any member of the public. After a wide consultation process a Code of Conduct, setting ethical standards for public servants, was launched in June 1997. Contravention of the Code is dealt with as misconduct. Public servants are also required to redirect services to address service inequality experienced by those who were historically marginalized under apartheid.

Article 5 (d): Other civil rights, in particular: (i) the right to freedom of movement and residence within the border of the state and (ii) the right to leave any country, including one's own and to return to one's country

142. Once again, apartheid South Africa's track record of respecting the freedom of movement of citizens and residents is eminently unimpressive. This freedom was violated under, for instance, the *Black Land Act, 1913 (Act 27 of 1913)*, *The Group Areas Act, 1966 (Act 36*

of 1966), the Development Trust and Land Act, 1936 (Act 18 of 1936), and the Black Administration Act, 1927 (Act 38 of 1927). Passports were also refused on numerous occasions. For example, in 1988 alone, 210 people were refused passports. Serious efforts have been made since 1994 to repeal all these laws and to replace them with new laws in line with the new constitutional democratic values and principles.

143. Rights relating to the freedom of movement are guaranteed in section 21 of the Constitution. Section 21 read as follows:

- “(1) Everyone has the right to freedom of movement.
- (2) Everyone has the right to leave the Republic.
- (3) Every citizen has the right to enter, to remain in and to reside in the Republic.
- (4) Every citizen has the right to a passport.”

144. However, some non-citizens do not enjoy adequate freedom of movement due to isolated incidents of criminal intimidation of non-nationals; the expression of xenophobia. As already reported the problem of xenophobia was raised at the National Conference on Racism, and a national campaign to address this problem has been initiated.

145. The issue of xenophobia has become a problem in South Africa within recent years, for a number of reasons. Many refugees seek to apply for asylum in South Africa, having fled their home countries due to intractable civil conflicts compounded by the destruction of the economies and infrastructures in some African countries, which have affected the economic viability of remaining in their countries or origin. Many millions of economic migrants have entered South Africa due to lack of economic opportunities, and even starvation, in their own countries. These migrants and refugees are different from our local population, often speak none of the local indigenous languages, speak English with foreign accents and are easily distinguishable among South Africans. The problems being experienced in this regard in South Africa are fairly typical, in their causes, of the experience in other countries of destination, most of which are developed countries with economies capable of absorbing fairly large numbers of foreign workers (the USA, Canada and many states of the European Union).

146. However, in South Africa xenophobic reaction to the perception that foreign migrants are responsible for crime and that they are taking jobs away from our citizens or obtaining access to scarce social services, has lead to a number of reports of discrimination against persons merely because they are foreigners, irrespective of their legal status as documented or undocumented migrants in this country, or as *bona fide* refugees. In certain cases the so-called “makwere-kwere” have been necklaced, or have had their houses torched and been driven out of communities, because of suspicion within the local community that they were criminals. Some have been thrown to their deaths from trains, while police dogs savaged three illegal Mozambicans as part of an illegal “training” exercise.

147. As a mark of the seriousness it attaches to this issue, the South African Government in 2001 hosted and chaired the Third World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance. The Durban Declaration and Plan of Action contain numerous references to the unacceptable practice of xenophobia and steps required of Governments, international organisations and the public to prevent it.

148. Recognising the dangers that violent acts of xenophobia constitute for the stability of our society, the Roll Back Xenophobia campaign was launched as a cooperative partnership between Government, The Human Rights Commission and the National Consortium on Refugee Affairs in late 1998. It has conducted a number of projects, including an advocacy campaign to raise awareness of the plight and rights of migrants among civil servants/social services providers, the police and immigration authorities. Seminars and training workshops have been held to educate the media on these issues, and a campaign of radio and television programmes was conducted to educate the public and promote awareness of the importance of preventing xenophobia. The President has spoken out publicly against xenophobia against African migrants.

149. A certain degree of success has been achieved in that the media now reports much more objectively on migrants *vis-à-vis* crime, on the abovementioned reasons for the presence in the country of large numbers of migrants, and on the fact that the Constitution prohibits violations of the basic civil and political rights of all persons, irrespective of their legitimate or illegal status in the country, or their national or ethnic origin. Many members of the media now regularly use the HRC as a source of information on migrants and their rights. However, despite this success, much more still needs to be done to continue to educate some of the media, and particularly the general public, as major misperceptions continue to exist.

150. The issue of xenophobia was one of the major items on the agenda on the international conference that was held in Cape Town in July 1999 to launch the new legislation on migration control. The ***Immigration Bill*** has some of the first provisions in the world that create a statutory function specifically dedicated to fighting, countering and deterring xenophobia. This function is placed in the Department of Home Affairs because it is essential that the fight against xenophobia be interiorised where the possibility for xenophobic conduct within government is greatest. The fight against xenophobia is anchored in an Immigration Board that comprises of all the relevant government departments represented at the highest level of interdepartmental coordination. The Board also comprises vast segments of civil society, whose inputs will be invaluable in dealing with xenophobia. This function will be exercised under the control of the Human Rights Commission.

151. The ***Immigration Bill*** seeks, inter alia, to prevent xenophobia both within Government and at the community level, through education campaigns. The Department of Home Affairs is training its immigration officers regarding the rights and treatment of migrants and refugees, and is involving them in the campaign to educate the public in this regard. In addition the SAPS and the SANDF include modules on the rights of migrants, refugees and internally displaced persons, in their regular training courses. The Departments of Home Affairs and Education have collaboratively compiled guidelines on the treatment of children of asylum seekers, to prevent discrimination against them, particularly in schools; while the Department of Home Affairs and SAPS are working with Lawyers for Human Rights to facilitate weekly visits by a legal officer to Lindela Detention Centre to ensure that the rights of detained undocumented migrants are not violated.

152. In spite of progress achieved, much more work needs to be done in training government officials and educating the public as reports continue to surface of discrimination by government officials against migrants and refugees. Areas of concern include ignorance on the part of government officials as regards the rights of migrants to access various services and treatment (especially bona fide refugees and documented migrants); unwarranted violence and discrimination against migrants on the basis of their different ethnic or national status; alleged corruption in attempts to access social services such as education, housing, health care; the level of poverty and the poor nutritional status of migrant children in schools.

153. The *Refugees Act of 1998* provides for the reception into South Africa of asylum seekers and recognition of refugees. The Prohibition of Hate Speech Bill that will shortly be submitted to the Minister of Justice seeks to criminalise hate speech based on race and ethnicity. South Africa has recently ratified the 1998 Rome statute that, among other things, provide for punishment of severe acts of xenophobia.

154. At the United Nations level South Africa has strongly supported language in resolutions, which protect the rights of refugees and migrants and condemns acts of xenophobia and discrimination against these groups.

155. **Progress to date includes:**

- South Africa hosted and chaired the Third World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in Durban in 2001, which adopted an international Declaration and Plan of Action condemning xenophobia (inter alia) and recommending steps to prevent it.
- The President has spoken out publicly against xenophobia against African immigrants.
- Part of the *Immigration Bill* declares that xenophobia should be prevented and countered both within Government and at the community level and that education programmes on the rights of foreigners, illegal foreigners and refugees should be conducted in this regard.
- The strategy of DHA in the implementation of the Immigration Act is to involve DHA officials in educating the public about the rights of refugees and migrants.
- The *Refugees Act of 1998* provides for the reception in to South Africa of asylum seekers and recognition of refugees.
- The *Prohibition of Hate Speech Bill* will go before Parliament in the near future and will criminalise hate speech based on race and ethnicity, inter alia.
- A Bill incorporating the provisions of the **Rome Statute** creating the **International Criminal Court (1998)** is being drafted, and will incorporate certain provisions designed to punish serious crimes including genocide and severe effects of xenophobia and unfair discrimination aimed at ethnic groups.

- The **Roll Back Xenophobia** campaign was launched in late 1998 and is ongoing, with the support of Government. The **National Consortium on Refugee Affairs** was set up to promote the campaign and a number of projects have been launched by the South African Human Rights Commission to give effect to the campaign, inter alia, an advocacy campaign to raise awareness among and educate civil servants, especially social, education and health services providers, immigration officials and the SAPS, the general public and the media on the human rights of refugees and both legal and undocumented migrants, the unfairness of xenophobia and its effects on the lives of victims. Communities are encouraged to be tolerant of refugees and migrants.
- A series of television and radio programmes and media workshops and seminars by the HRC, the United Nations High Commissioner for Refugees and Lawyers for Human Rights (LHR) has had a positive effect, especially on the way in which migrant issues are covered in the media, for example in crime reporting, conditions in countries of origin, the effects of xenophobic acts, etc. The media now regularly contact the HRC as an information source on refugee and migrant issues.
- South African delegations to sessions of international organisations, including the WCAR, the United Nations General Assembly, the United Nations Commission on Human Rights, and the governing bodies of the United Nations High Commissioner Refugees, the International Organisation for Migration and the International Committee of the Red Cross strongly support the inclusion of language in resolutions condemning xenophobia and recommending corrective programmes.
- South Africa is a party to the 1951 United Nations Convention on the Status of Refugees, its additional Protocol, and the 1969 OAU Convention on Refugees, and strives to respect its obligations in terms of these instruments.
- Training modules in human rights, including the rights of migrants, refugees and internally displaced persons, are included in the regular training modules of the Department of Home Affairs (DHA), the SAPS and the SANDF. DHA has compiled policy guidelines on the treatment of children of asylum seekers to prevent discrimination against them at school.
- The Department of Education is working to include modules on the prevention of xenophobia into schools curricula. Creative writing competitions focusing on preventing xenophobia, and sponsored by the private sector, are being conducted.
- SAPS and DHA are working with LHR and have arranged regular weekly visits by a legal officer to Lindela detention center to ensure that detainees are treated in accordance with national laws and international commitments.
- South Africa is a party to a number of ILO Conventions which protect the rights of migrant and local workers alike, and which prevent discrimination against migrants.

156. **Challenges include:**

- Huge numbers of undocumented migrants place strains on available finite resources for provision of social services to all, creating competition with South African citizens for scarce resources/social services such as housing, education, health care etc, leading to xenophobic outbreaks.
- The economy is not presently able to generate enough new jobs for our own citizens.
- Poor and declining economies, competition for scarce resources and protracted civil conflicts in some countries to our North create circumstances that encourage illegal migration of economic migrants (the so-called “push-factor”). The potential famine in 6 SADC countries could exacerbate this problem.
- NEPAD projects and peace initiatives should address some of the above challenges.
- The challenge is to balance the rights of citizens to social services and a crime-free environment, against the Constitutional prohibition against discrimination against/violation of the human rights of anybody, citizen or not, on the grounds of ethnic origin or nationality.
- The procedure for the adoption of various Bills dealing with xenophobia could be expedited as a priority of Parliament.
- Despite the ongoing media programmes and seminars, there remains a great deal of misinformation/ignorance within the general public, and some media, or xenophobia-related issues, such as crime, leading to incidents such as the burning of the dwellings of 50 Zimbabwean families at Zandspruit and their expulsion from the community; the necklacing of foreigners suspected of being criminals in Ivory Park; and continued negative stereotyping by references to “makwere’kwere”.
- Despite the training programmes, abuses of migrants by some officials continue to occur, e.g. the attack on 3 illegal Mozambicans by police and their dogs; and incidences of violent treatment at Lindela which are still under investigation.
- An ongoing failure by the public, the media, employers and service providers to distinguish between legal migrants/*bona fide* refugees, and undocumented migrants.
- Recurrent reports of discrimination against migrants and refugees by service providers, coupled with a lack of readily available information providing guidance to migrants and refugees as to their rights and who to approach for assistance. A possible one-stop center providing advice, guidance and legal assistance to asylum seekers is needed.
- Reports of corruption among service providers for refugees and migrants.

- Recurrent illegal employment of undocumented migrants under shocking employment conditions, illegal trafficking and their physical and sexual abuse.
- Insufficient financial and human resources available to the Roll Back Xenophobia Campaign.
- Insufficient information for students on how and where to access grants for education, and insufficient funding for this.

Article 5 (d) (iii): The right to nationality

157. The re-incorporation of the former Bantustans, the so-called TBVC States and “self governing territories”, into one undivided South Africa resulted in the genuine restoration of the rights and dignity of persons unlawfully deprived of their nationality in pursuance of apartheid racism. Section 3 of the Constitution provides as follows:

- “(1) There is a common South African citizenship.
- (2) All citizens are:
 - (1) equally entitled to the rights, privileges and benefits of citizenship; and
 - (2) equally subject to the duties and responsibilities of citizenship.
- (3) national legislation must provide for the acquisition, loss and restoration of citizenship.”

158. *The South African Citizenship Act, 1995 (Act 88 of 1995)*, provides for the acquisition, loss and resumption of citizenship. The above is reinforced by the guarantee against deprivation of citizenship (s 20 of the Constitution).

159. In practice, this means that all South African nationals are entitled to passports and may travel on South African passports with the full knowledge that the South African Government will use its international diplomatic resources to ensure their protection. During the apartheid regime, the majority of Black South Africans were confined to the so-called “independent” TBVC states and deprived of South African citizenship.

Article 5 (d) (iv): The right to marriage and choice of spouse

160. Except for the recognition of marital status as one of listed grounds on which unfair discrimination is prohibited, choice of spouse and family life do not feature expressly in the Bill of Rights in the Constitution. However, the Courts have interpreted other clauses in the Bill of rights, including those of equality, human dignity, pregnancy and sexual orientation, to give concrete recognition to the rights of marriage and choice of spouse. The most recent Constitutional Court decision in this regard involved the issue as to whether foreigners married to South African citizens ought to enjoy rights regarding the processing of residence permits

above those enjoyed by ordinary foreigners. The Court affirmed that foreigners who are married to South African citizens are entitled to such special rights (**Dawood & Another, Shalabi & Another, Thomas & Another v Minister of Home Affairs & Another** 2000 (8) BCLR 837 (CC)).

161. As a general rule anyone, regardless of race, ethnic origin or nationality, who has attained the age of 18 years and above is free to choose a spouse and to enter into a marriage. In other words, the constitutional age of majority is 18 years (s 28(3) of the Constitution). There are instances, however, where traditional institutions may prevent certain persons, such as black loyalty from either entering into marriage or marry a spouse of their choice. Such practices may be challenged in the courts under the equality clause.

Article 5 (d) (v): The right to own property alone as well as in association with others

162. The property clause is contained in section 25 of the Constitution. The section deals with protection against arbitrary deprivation of property; just and equitable compensation in the event of expropriation for public purposes; and land reform for purposes of affording equitable access to land and other resources, strengthening tenure security and facilitating restitution to individuals and communities that were affected by racist laws and practices regarding land and property ownership in the past.

163. The Department of Land Affairs has the responsibility of developing and implementing a policy of land reform in order to effectively address the injustices of forced removals, historical imbalances in access to land and the lack of tenure security. The Policy was developed in 1997 and the principal provisions cover:

- (1) Restitution for those who lost their land as a result of racially discriminatory laws;
- (2) Redistribution of productive land to those who were previously disadvantaged, especially poorer people, and women in particular; and
- (3) Land tenure reform, which aims to bring all people occupying land under a unitary, legally validated system of landholding.

(Department of Land Affairs, Pretoria, April 1997: **White Paper on South African Land Policy**)

164. Several pieces of legislation have been enacted to give practical expression and meaning to the above constitutional and policy principles and directives. Among them are the following:

- *Restitution of Land Rights Act, 1994 (Act 22 of 1994);*
- *Land Reform (Labour Tenants) Act 1996 (Act 3 of 1996);*
- *Communal Property Associations Act 1996 (Act 28 of 1996);*
- *Extension of Security of Tenure Act 1997 (Act 62 of 1997); and*
- *Housing Act 1997 (Act 107 of 1997).*

165. Land and property ownership and use is critical in determining social power relations in society. It is no wonder then that the exclusion of the majority Black people from any reasonable ownership, control and use of land was one of the pillars of the colonial and apartheid system of racial domination. It is a central policy of the Government to reverse these injustices of the past.

166. Among the institutions created to speed-up the process of transformation and de-racialisation of land and property ownership, control and use, is the Commission on the Restitution of Land Rights. Its task is to investigate and mediate land claim disputes. Various measures have been taken by the Commission to assist with the more rapid settlement of land claims. Initially, it was the policy to provide direct access to the Land Claims Court for virtually all claimants of land. This has proven to be time-consuming and slow. The current policy, which has speeded up the settlement of claims, is for the Commission to settle the claims directly, except where major disputes that require judicial intervention are involved. The Department of Justice and Constitutional Development has an agreement with the United Nations Development Programme (UNDP), which, inter alia, is aimed at empowering the Commission to deal with the claims.

Article 5 (d) (vi): The right to inherit

167. The right to inherit is not expressly provided for in the Constitution. However cases regarding racial, gender and other forms of discrimination have been dealt with fairly satisfactorily within the existing Bill of Rights. Section 9 on equality and the right against unfair discrimination, has been the basis of inheritance claims involving discrimination up until now.

168. Statutory provisions relating to inheritance fall within the few remaining laws that were based on apartheid. White intestate estates and the estates of the rest of the population other than African people are governed by the *Intestate Succession Act of 1986* while Black intestate estates fall under the *Black Administration Act*. Some black testate estates fall under the *Administration of Estates Act, no 66 of 1965* together with those of white and other estates while most black testate estates fall under the *Black Administration Act*. The attendant racial and gender problems are documented earlier in the report.

169. Government has been involved in an extensive exercise seeking to bring an end to this anomaly. A bill went to parliament in 1998 and was returned for further consultations as traditional leaders alleged that their structures had not been adequately consulted. More extensive consultation has since taken place and an amended bill is in the process of submission for consideration.

170. Measures in the pipeline, also seek to integrate services racially. Up until now most black estates were dealt with by magistrates because under apartheid they were given jurisdiction over the *Black Administration Act* while the Master of the Supreme Court dealt with the estates in terms of the general laws governing the administration of estates. At the end of 2000 the Constitutional Court ruled that the different and unequal application of laws in this regard are unconstitutional (see **Moseneke and Others v The Master of the High Court and Others** 2001(2) SA 18(CC)).

Article 5 (d) (vii): The right to freedom of thought, conscience and religion

171. Section 15 of the Constitution guarantees “freedom of conscience, religion, belief and opinion”. It further provides that “religious observance may be conducted at state or state-aided institutions under rules established by the appropriate authority for that purpose provided that such religious observance are conducted on an equitable basis and attendance at them is free and voluntary”.

172. The previous apartheid government purported to rule in the name of Christianity. Its racist policies and practices told a different story. Black people were singled out for legally sanctioned discriminatory treatment. Those who opposed these policies and practices in the name of Christianity were ruthlessly suppressed. The Noble Peace Prize winner, Bishop Desmond Tutu, and other staunch opponents of apartheid were victimised for their cause, some tortured and others lost their lives.

173. While it is estimated that the majority of the population in South Africa profess the Christian faith, there are many other religions, some documented and some not. Other major religious groups include Hindus, Muslims and Jews and a variety of indigenous religions and belief systems. However, managing diversity is a challenge even in matters of religion. For example, there is currently a difficult case before the Constitutional Court that pits the constitutional right to freedom of religion (for a Rastafarian), against criminalised acts of being in possession of or smoking marijuana (by the Rastafarian). The case is in its last and final appeal since the Supreme Court of Appeal had previously decided the matter. (**Prince v. The President of the Law Society of the Cape of Good Hope** 2000 (7) BCLR 823 (SCA)).

174. Blasphemy remains a common-law criminal offence. Section 47(2)(b) of the *Publications Act, 1974 (Act 47 of 1974)*, provides the mechanism for the banning of material as “undesirable” when it or any part of it, is blasphemous or offensive to the religious convictions or feelings of a section of the population.

Article 5 (d) (viii): The right to freedom of opinion and expression

175. There are several provisions in the Constitution that give expression to the right to freedom of opinion and expression. Aspects that cover legitimate limitations to freedom of expression in order to meet the obligations under Article 4 in ICERD are covered above in paragraphs 2-10 and are therefore not repeated here. The remaining parts of section 16 of the Constitution state as follows:

“16(1) Everyone has the right to freedom of expression, which includes:

- (a) freedom of the press and the media;
- (b) freedom to receive or impart information or ideas;
- (c) freedom of artistic creativity; and
- (d) academic freedom and freedom of scientific research.”

176. To the extent that freedom of expression is closely linked to right of access to information section 32 of the Constitution is of relevance. The section provides as follows:

“32(1) Everyone has the right of access to:

- (a) any information held by the state; and
- (b) any information that is held by another person and that is required for the exercise or protection of any rights.”

However, the right is, as indicated earlier in the report, limited by amongst other things, prohibition of hate speech, a practice that is common among people who are deeply racist. The *Promotion of Equality Act* contains similar provisions that seek to ensure that freedom of expression is not abused to harm the human rights of others.

177. National legislation was recently enacted to give effect to the above constitutional requirement. The legislation is the *Promotion of Access to Information Act 2 of 2000*. Among the objects of the Act are: the promotion of transparency and accountability in public and private institutions; the protection of certain security-related information held by public bodies; and the protection of privileged confidential professional information. The promotion of access to information is further realised through the public and private broadcasting institutions, the print and electronic media. The public broadcaster is monitored by an independent constitutional institution, the Independent Communications Authority of South Africa (ICASA), appointed through a public competitive and transparent process as regulated under the *Communications Authority Act 13 of 2000*.

178. Freedom of opinion is interdependent on the freedom of expression, the right to information and the right to freedom of conscience, thought and belief. Section 15 (1) of the Constitution recognises this fundamental right in providing that: “*Everyone has the right to freedom of conscience, religion, thought, belief and opinion.*”

Article 5 (d) (ix): The right to freedom of peaceful assembly and association

179. Two separate but inter-related provisions (sections) in the South African Bill of Rights recognise and guarantee these rights:

“17. Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.

18. Everyone has the right to freedom of association.”

It can be seen from the wording in these sections that the South African Bill of Rights recognises the existence of a bundle of rights in the right to peaceful assembly. Thus political, industrial and other forms of peaceful assembly are constitutionally protected. The inherent limitation here is contained in the terms “peaceful” and “unarmed”. The courts have up-held the constitutionality of such limitations where demonstrations and protest have been violent and resulted in damage to property and injury to individuals. (**Acting Superintendent-General of**

Education of KwaZulu-Natal v Ngubo 1996 (3) BCLR 369 (N)). It is important to point out that this right was won through bitter and costly struggles during the liberation struggle against colonialism and apartheid.

Economic, social and cultural rights

180. As indicated earlier, the South African Constitutional framework gives equal consideration to economic social and cultural rights as the other human rights. Rights protected, include the right to food and basic rights for the child. Given the economic, social and cultural legacy of apartheid, failure to address equal enjoyment without racial discrimination of economic and social rights would undermine any efforts at equalising enjoyment of the other human rights. The South African Human Rights Commission has been given the task of monitoring the implementation of economic and social rights and to report to parliament regularly. Courts are also beginning to challenge the justiciability of socio-economic rights.

Article 5 (e) (i): The right to work and related rights

181. The Constitution provides for a set of rights relating to Freedom of Trade, Occupation and Profession whose substance is comparable to the provisions of Article 5 (e) (i) of the Convention. The relevant provisions in s 22 which is part of the Bill of Rights, state that:

“Every citizen has the right to chose their trade, occupation or profession freely. The practice of trade, occupation, or profession may be regulated by law.”

182. The provision excludes all non-citizens from this right. This is based on the reality of South Africa’s status as a developing country with massive levels of unemployment amongst citizens.

183. A number of pieces of legislation have been enacted or reviewed to elaborate on and give effect to the constitutionally protected rights that are internationally associated with the right to work. The cumulative effect of these pieces of legislation and related administrative measures is to provide for a progressive realisation of the right to work. The key instruments in this regard include the following:

Labour Relations Act 58 of 1995

Provides for, inter alia, stringent provisions which protect workers from unfair dismissals in instances of incapacity, misconduct, retrenchment and strikes.

However, workers have expressed concern regarding perceived weaknesses in provisions relating to the protection of workers against unfair labour practices with respect to retrenchment. The Act also protects workers, including prospective employees, from discriminatory recruitment practices. It also provides for the enforcement of labour and employment rights under the rubric of “unfair labour practice”. Special expedited dispute resolution mechanisms that include an accessible mechanism referred to as the Commission on Conciliation, Mediation and Arbitration (CCMA), are provided under the Act. As the name suggests, the CCMA offers dispute resolution services that include conciliation, mediation and arbitration. The mechanism is fairly affordable to all, including domestic workers.

Basic Conditions of Employment Act 75 of 1997

Provides for minimum protected employment standards relating to hours of work, sick leave, annual leave, maternity and parental leave, compassionate leave, setting up of minimum wages, etc. This Act was recently extended to historically marginalised occupations where black people, particularly black women, predominate. These include domestic workers, farm workers and part time workers.

Unemployment Insurance Act of 1956 as amended

Provides social security protection against unemployment by insulating workers against the risk of loss of earnings during unemployment and maternity leave. It was recently extended to farm workers and attempts are being made to extend it to domestic and other historically marginalized workers. Domestic work provides jobs to nearly a million black women. The target workers have generally been mainly low-income earners and due to the legacy of legalized racial discrimination, the beneficiaries are predominantly black.

The Compensation For Occupational Injuries and Disease Amendment Act, 100 of 1993

Provides for financial support and compensation for workers who in the course of their employment, sustain injuries or sustain work related diseases that result in medical expenses and/or incapacity.

Skills Development Act of 1998

Provides for a framework for investment in the upgrading of skills as part of the strategy to deal with the country's human development deficiencies. The human development deficiencies particularly affect black people as a legacy of deliberate underdevelopment under apartheid and colonialism.

Employment Equity Act of 1998

Provides for the elimination of all forms of discrimination and promotion of equality in employment opportunities, giving priority to race, gender and disability. In addition to provisions relating to the prohibition of unfair discrimination in all employment related practices, the Act compels employers to audit their environment for discriminatory practices whether direct or indirect and to adopt measures summarised in an Employment Equity Plan to eliminate such discrimination and to advance the designated groups that include black people, women and disabled people. The Act also deals with narrowing the wage gap, which has racial implications because the majority of the lowest paid are black people.

Promotion of Equality Act and Prevention of Unfair Discrimination Act of 2000

Similar provisions to the *Employment Equity Act* for Employees and Employers and Employment issues not covered by the *Employment Equity Act*. These include the South African National Defence Force, Intelligence Services and providers of outsourced services. The Act also covers equal pay for equal work.

184. Viewed collectively, the above framework enables South Africa to comply at least on a de jure basis with its obligations in terms of Article 5 (e) (i) of the Convention, which provides for the right to work, free choice of employment, to just and favourable conditions of work, protection against unemployment, equal pay for equal work, just and favourable remuneration.

185. However, there still exists a considerable gap with regard to the de facto realisation of the rights enshrined in the South African constitutional and statutory framework. One of the key challenges is the problem of unemployment. Another serious impediment lies in legal literacy or rights awareness and the capacity to enforce those rights. Workers such as farm workers are particularly vulnerable to unfair labour practices despite the legal provisions.

186. Other factors that pose serious impediments to de facto equal enjoyment, without racial discrimination, of rights related to work, include racially skewed distribution of skills, under-absorption of skilled persons from historically marginalised groups due to prejudicial attitudes and various manifestations of the accumulated social power that is in the hands of the historically privileged and the concomitant accumulated disadvantages on the part of the historically marginalised.

Article 5 (e) (ii): The right to form and join trade unions

187. Section 23(3) of the Constitution guarantees that workers shall have the right to form and join trade unions. This right is also articulated in the *Labour Relations Act* where elaborate provisions are made to give content to the right to join and form trade unions. The only constraining factor in the *Labour Relations Act* is that race exclusive unions are not allowed. This is in compliance with the provisions of the Convention.

188. During the apartheid years, black workers were initially not allowed to form or join trade unions. Later after they had illegally done so, they were allowed to form their own segregated unions but not to join or merge with white unions. This has left a legacy of a union movement that retains historical characteristics of apartheid. For example, although there have been visible strides with regard to racial integration in the labour movement, most historically black unions remain predominantly so and the same applies to historically white unions. The trade union federations exhibit the same characteristics. The Federation of Democratic Unions of South Africa (FEDUSA) remains predominantly white while the Congress of South African Unions (COSATU) and the National Council of Trade Unions (NACTU) remain predominantly black.

189. The unions and the federations have taken significant visible steps to integrate their membership along racial lines. Government has also adopted various administrative measures to encourage equal enjoyment of rights relating to the right to join trade unions and to encourage racial integration. The National Development and Labour Council (NEDLAC) constitute one of

the measures encouraging cross federation and racial cooperation. The Department of Labour also funded the establishment of DITSELA, a labour support organisation that is a collaborative venture between COSATU and FEDUSA. Government also supports, although not financially, the European Union funded South African Labour Development Trust, which is a capacity building initiative that brings the three federations together.

190. New law, particularly the *Labour Relations Act*, and policies have seen to an end of the privileges that were given to historically white unions under the guise of majoritarianism, which strengthened them so that the new historically black unions, could not succeed. At a practical level however, some of these continue to exist undetected and often under new guises such as the payment of agency fees by non unionised civil servants, including senior managers, to the historically white Public Service Staff Association (PSA).

191. However, there are still some practical challenges regarding racism and racial discrimination in the trade union movement. The overt problems relate to the former exclusive white unions which still seek to protect white privilege. Subtle problems include the skills and resource inequalities between unions, which are racial in character. One of the interventions by government to address the skills problem is the funding provided to labour service organisations that provide training to unions, provided by the Department of labour. Racist attitudes are addressed through amongst other interventions, diversity awareness training under the *Employment Equity Act*.

Article 5 (e) (iii): The right to housing

192. The right of access to adequate housing is recognized and guaranteed in the Constitution. Section 26 of the Constitution reads in full as follows:

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

There is an additional provision in section 28 that guarantees *the right to shelter* for children under the age of 18 years.

193. Several national and provincial pieces of legislation have been enacted to facilitate the progressive realisation of the right as directed by the Constitution. Other pieces of national legislation also protect everyone from arbitrary eviction without an order of court as directed in the above provision of the Constitution. Among these are:

- *Housing Act 1997 (Act 107 of 1997);*
- *Rental Housing Act 1999 (Act 50 of 1999);*
- *Extension of Security of tenure Act 1997 (Act 62 of 1997);*

- *Land Reform (Labour Tenants) Act 1996 (Act 3 of 1996);*
- *Interim protection of Informal land Rights Act 1996 (Act 31 of 1996);*
- *Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 1998 (Act 19 of 1998);*
- *Housing Consumer Protection Measures Act 1998 (Act 95 of 1998); and*
- *Home Loan and Mortgage Disclosure Act 2000 (Act 63 of 2000).*

194. It is still early to judge the full impact of the above and other related pieces of legislation. Nonetheless, it can be pointed out that the legacies of apartheid still weigh heavily in the area of housing. The Government has in place a housing subsidy of up to R16 000,00 to low-income families to assist them to access housing. Unfortunately, the negative impact of unfavourable economic conditions manifest in retrenchments, has led to inability on the part of many low-income families to pay-off bank loans. A Government and private sector joint effort has been initiated to try and mitigate these negative impacts. Providing ownership title to township residents who were denied security of tenure by the apartheid regime, is part of the government's strategy to meet its obligations through:

- Government providing security of tenure through ownership and rental options.
- Expenditure priorities in respect of special housing programmes have been approved for the promotion of marginalised women in construction and for persons with disabilities.
- National Norms and Standards in respect of permanent residential structures to protect the interest of subsidy beneficiaries as far as quality is concerned and to regularize the standards of the houses.

195. As far as the provision of shelter to families with children is concerned, the Constitutional Court has just made a ruling in which it took cognisance of the Government's limited resources while urging that families with children ought to be given priority in accessing shelter. (**Grootboom and Others v Oosternberg Municipality and Others** 2000(11) BCLR 1169 (CC)).

196. The following bodies and delivery mechanisms have been established to give momentum to the housing programmes of the Department of Housing:

- Discount Benefit Scheme;
- Mortgage Indemnity Fund;
- National Home Builders Registration Council;
- National Housing Finance Corporation;

- National Urban Reconstruction and Housing Agency;
- Servcon Housing Solutions;
- Peoples’ Housing Partnership Trust;
- Housing Information System (NOMVULA); and
- Social Housing Foundation.

Article 5 (e) (iv): The right to public health and medical care, social security and social services

197. The South African Bill of Rights recognises several public health and health care rights. Section 27 provides as follows:

- “(1) Everyone has the right to have access to:
- (a) health care services, including reproductive health care;
 - (b) no one may be refused emergency medical treatment.”

Other provisions in the Bill of Rights, notably section 24 that guarantees the right of everyone “to an environment that is not harmful to health or well-being” and section 28 that guarantees children the right to “basic health care services”, reinforce the above provisions.

198. The above constitutional provisions are given meaning by a number of detailed statistics and policies. Among these is the principal *Health Act, No. 63 of 1977*. The health-care delivery system in South Africa is in the process of undergoing far-reaching restructuring and change. Access to basic services is becoming a reality for the large historically disadvantaged section of the population. The Government is committed to providing basic health care as a fundamental right. The universal health-care plan includes free medical service at public primary health-care facilities. The services provided are immunisation, endemic disease prevention, maternity care, chronic diseases, diseases of older persons, rehabilitation, accident and emergency services and family planning.

199. Some 40 per cent of all South Africans live in poverty and 75 per cent of these live in rural areas where they are deprived of access to health services. *The Medical, Dental and Supplementary Health Services Professions Act, 1997 (Act 89 of 1997)*, provides for the introduction of compulsory community service of one year in 217 designated hospitals, in particular rural areas, for newly qualified doctors and dentists. HIV and Aids have resulted in many fatalities. Government in partnership with all sectors of our society is conducting a vigorous awareness campaign, including preventative measures. The President has engaged medical scientists in the country and far a field to investigate a more coherent and appropriate manner of dealing with the problem in the context of the poverty-stricken African realities.

200. Despite the best of efforts, limited resources make it extremely difficult to meet the treaty and constitutional obligations satisfactorily. In one of the most difficult cases, the Constitutional Court was hard-pressed to rule that chronic illnesses that require expensive medical technological treatment may not qualify as emergency medical care, otherwise the scarce resources directed at primary health care would suffer. (**Soobramoney v Minister of Health, KwaZulu Natal** 1997(12) BCLR (CC)).

201. The Constitution guarantees the right to access social security to everyone without distinction. Section 27 dealing with health care, food, water and social security provides the following with regard to social security and social services:

- “(1) Every one has the right to have access to:
- (a) sufficient food and water; and
 - (b) social security, including, if they are unable to support themselves and their dependants, appropriate assistance ...”

202. Legislation giving effect to this right is split between labour and social development legislation. Labour legislation includes the *Unemployment Insurance Act* and *Compensation for Injuries and Diseases Acts* briefly discussed earlier in the report.

203. Social development legislation and policy have over the last few years, undergone extensive transformation aimed at shedding racial discrimination which pervaded the entire system. For example, old age pensions and disability grants between black and white people have been equalized. So has state support given to old age homes and centres that care for disabled people? The White Paper on Social Security and the White Paper guided the transformation **on the Reconstruction and Development Programme (RDP)**.

204. The key statute responsible for social security and assistance is the *Social Assistance Act of 1992 as amended*. The Act regulates grants given to the aged, war veterans, disabled people, maintenance, foster-children, single care and social relief.

205. The child support grant underwent fundamental change recently. It was initially not available to African mothers. Given the fact that these constitute a far bigger group than the recipient under apartheid, government had to reduce the amount per child, to be able to support all the affected families regardless of race.

206. Social security and support is also provided to terminally ill people who are unable to support themselves. This has been extended to persons with AIDS. While this covers all regardless of race, it is critical for eradicating racial discrimination in that the majority of those who are destitute due to the intersection between poverty and HIV/AIDS are black people. This again is due to the socio-economic consequences of apartheid.

207. Government is presently engaged in a process of overhauling the entire social support system with a view to ensuring that there is comprehensive social security. Draft policy developed by the Department of Social Development is in the process of being submitted to public consultations. This includes public hearings in October 2000, a month that was declared a social development month.

208. Population development policies have also been overhauled to align these with South Africa's constitutional ideals. This has also involved the elimination of provisions and practices that are based on racism and operate to perpetuate racial discrimination.

209. Social assistance extends to assistance with regard to health and education for those who cannot afford it. Again, in view of the legacy of racially skewed income and access to other resources, this arrangement operates to minimize indirect racial discrimination with regard to access to basic necessities of life.

210. South Africa also has an extensive network of Non Governmental Organisations (NGOs) which provide various forms of social assistance. These include, voluntary welfare organisations, religious organisations, Community Based Organisations (CBOs) and informal family and community networks. Although social security and assistance take the largest chunk of the government's budget and there has been significant progress with regard to closing the race gap with regard to access to social security and services, there are many problems still to be addressed. Many of these relate to information flow particularly to rural communities. Problems including verification of documents such as identity documents and birth certificates as well as corruption in the bureaucracy, have hampered progress. However, government is addressing all of these. The key interventions include automation and anti-corruption strategies.

211. The preamble to the Draft National Health Bill notes specifically that the legislation intends to redress "socio-economic injustices, imbalance and inequities of health services of the past". One of the main aims of the legislation, therefore, will be to redress racial inequities.

Article 5 (e) (v): The right to education and training

212. The Constitution guarantees a bundle of rights concerning the right to education and training. Section 29 guarantees:

- That every person shall have the right to basic education and equal access to educational institutions;
- The right to be instructed in the official or other language of one's choice, where practicable;
- The right to establish independent educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race; and
- The possibility of public subsidy to independent private educational institutions.

213. Denial of quality and racism-free education to the majority of the population was one of the principal ideologies and strategies of colonialism and apartheid. It is the subjection of the Black majority to inferior and racist "Bantu Education" that led to the historic student protests and resistance of 1976 onwards. *The Bantu Education Act 1953 (Act 47 of 1953)* has since been removed from the statute books. To commemorate the sacrifice of the youth to liberate the education system, June 16 is declared a National Youth Day in South Africa.

214. Due to limited resources, the courts have correctly interpreted some of these provisions in a reasonable manner, for example, the right to learn in a language of one's choice does not mean that the state has a positive obligation to establish schools for every cultural, linguistic and religious group. (**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)).

215. The constitutional commitment to ensure that basic education is realized, is incorporated in the *South African Schools Act, 1996 (Act 84 of 1996)* which provides for the following:

- Compulsory education between the ages of 7 and 15 years of age, or pupils reaching the 9th grade, whichever occurs first;
- Two categories of schools, namely public schools and independent schools;
- Conditions of admission of pupils to public schools;
- Governance and management of public schools;
- Funding for public schools.

As expressed in the recently adopted policy document on “**Values, Education and Democracy**” (Department of Education, 2000), the Government is committed to promoting democratic values that recognise diversity and tolerance within the education system.

216. The process of review and renewal in the South African education system began in August 1995. The new South African curriculum “Curriculum 2005” places emphasis on a shift from the traditional content-driven approach to outcomes-based education. The outcomes-based curriculum is based on a structure that begins by recognising the critical skills, knowledge and values that are important for all South Africans to acquire. Pupils in school progress from preschool, through a series of grades from Grade 1 to grade 9 in the General Education and Training (GET) Band and grades 10, 11 and 12 in the Further Education and Training (FET) Band. In the GET Band there are three broad phases: Foundation, Intermediate and Senior. Assessment at school will take place at the end of each GET phase. At the FET level, assessment occurs at the end of each grade. The first year of a child's schooling will be grade reception (grade O) followed by grades 1-12.

217. The establishment of Adult Basic Education and Training (as proposed in the RDP policy document introduced a system of part-time classes by education departments to promote literacy and numeracy among adults who never had any formal schooling or who attended school for only a short period.

218. Given the short period of constitutional democracy in South Africa, it is not surprising that isolated cases of unofficial racist incidents, policies and intentions continue to manifest themselves. Where these occur, firm measures, including the use of the courts, are and will continue to be taken. For example, the courts rejected the argument of school authorities and parents who tried to use religion, culture and language as a cover for racist policy of exclusion

of Black children from enrolling in a predominantly Afrikaner language school (**Matukane v. Laerskool Portgietersrus** 1996 (3) SA 223 (CC)). The South African Human Rights Commission has also made several interventions whenever incidents of racism occur in educational institutions at all levels.

Article 5 (e)(vi): The right to equal participation in cultural activities

219. South Africa is a culturally diverse society. The Preamble to the Constitution states that “*we, the people of South Africa, ... believe that South Africa belongs to all who live in it, united in our diversity*”. This is followed by several provisions that guarantee rights and freedoms associated with culture such as languages (section 6), language and culture (section 30) and cultural, religious and linguistic communities (section 31). The other constitutional provisions of relevance to participation in cultural activities are expressed under the traditional leaders, traditional institutions and customary laws (sections 211-212).

220. The Department of Arts, Culture, Science and Technology is responsible for the promotion and protection of culture. It has established the Culture Trust for purposes of promoting culture development projects. The Cultural Industries Growth Strategy was established to conduct studies into each of the cultural industries and to gain a sense of the scale of the industry’s growth. Other cultural organisations include the African Cultural Heritage Trust, Fuba Academy, the Arts and Culture Management Programme and the Ikapa Arts Trust. There is a Bill on the establishment of the **Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities**. This will be an independent constitutional body (section 185 of the Constitution). There is, however, constitutional a basis for limiting the use or abuse of culture to undermine other recognized rights and freedoms guaranteed in the Constitution. The court decision cited under paragraph 267, above, is a case in point.

Article 5 (f): The right to access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafes, theatres and parks

221. In South Africa’s house of past horrors, the *Separate Amenities Act No 49 of 1953*, now repealed, clearly stands out as a monument of shame. It required whites and non-whites to use separate public facilities. As if this was not enough, such facilities, where they existed, were vastly of unequal standards. In the late 1960’s the governing National Party needed to arrest over 600 000 people annually to hold on to the pass laws, in spite of the mass protests and defiance campaigns of the 1950s and 1960s, including the Sharpeville revolt of 1960.

222. Since the April 1994 elections and the establishment of constitutional democracy, all South Africans have access to all public places, as well as all public transport, hotels, restaurants, cafes, theatres and parks. The sports area is still problematic, but it is steadily improving. Nonetheless, there are some few incidents reported in the media where some white owners of pubs, hotels and restaurants, do not allow access to blacks, in violation of the clear provisions of the law. The non-discrimination and the equality clause in the Bill of Rights (section 9) is the principal legal instrument for combating discrimination based on race in these areas. The enforcement of the *Promotion of Equality Act*, will be decisive in discouraging direct and indirect forms of unfair discrimination in transport, hotels, restaurants, cafes, theatres, parks and other places and services.

Article 6: Provision of effective protection and remedies, including adequate reparation and satisfaction, through competent tribunals and other State institutions

223. It is the view of the Government of the Republic of South Africa that rights and freedoms may be guaranteed in any legal instrument. However, the real test lies in the mechanisms and instruments of enforcement, and the adequacy and effectiveness of the remedies available to those whose rights and freedoms may be threatened or violated. Section 38 of the Constitution, which deals with the enforcement of rights, reads as follows:

“Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:

- (a) Anyone acting in their own interest;
- (b) Anyone acting on behalf of another person who cannot act in their own name;
- (c) Anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) Anyone acting in the public interest; and
- (e) An association acting in the interest of its members.”

224. The above provisions are to be read with the following other constitutional provisions:

- (i) The guarantee of access to courts or, where appropriate, other independent and impartial tribunals or forum (section 34);
- (ii) The right to administrative action that is lawful, reasonable and procedurally fair (section 33); and
- (iii) The rights of access to courts and legal representation for arrested, detained, accused persons and children (sections 35 and 28).

225. Judicial authority is vested in judiciary, which has a constitutional guarantee of independence (section 165 of the Constitution). Judges are appointed through the Judicial Services Commission and the Magistrates Commission and enjoy security of tenure (sections 174-178 of the Constitution). Where the enforcement of rights requires criminal prosecution of the violators, this is done through the authority of the independent Office of the National Director of Public Prosecutions (section 179).

226. The *Promotion of Equality Act* envisages the eventual transformation of all the courts into “Equality Courts” for purposes of enforcing the Act, which has the elimination of racism and unfair discrimination as some of its primary objectives. (Section 16 read with section 31 of the Act). In addition, there are a number of specialised statutory dispute resolution courts; tribunals and forums open to victims of racism and racial discrimination. Among them are:

- The Commission for Conciliation, Mediation and Arbitration (CCMA), Labour Court and Labour Appeal Court (established under the *Labour Relations Act, No. 66 of 1995*);
- The South African Human Rights Commission;
- The Commission on Gender Equality; the Land Claims Court (established under the *Restitution of land Rights Act, No. 22 of 1994*);
- The Truth and Reconciliation Commission (established under the *Promotion of National Unity and Reconciliation Act, No. 34 of 1995*).

227. The provision of legal assistance and representation is critical to access to courts. In this regard, the *Legal Aid Act, No. 22 of 1969* (as amended by *Act No. 20 of 1996* and extended to everyone within the Republic), establishes an independent Board to manage public legal assistance programmes. The limited resources, however, means that many deserving cases may not get the required assistance when needed. But race does not play a role in the determination of those that may be assisted or not assisted within the available resources. Efforts are under way to improve on the system of delivery of legal aid through the “Justice Centres Model”.

Article 7: Measures adopted in the field of teaching, education, culture and information to combat prejudices that lead to racial discrimination and to promote understanding, tolerance and friendship while propagating the purposes and principles of the Convention and other relevant international instruments

General

228. The constitution making process which brought about the present constitutional dispensation was the most extensive government activity that began to deal with the challenge of combating prejudices which lead to racial discrimination while fostering understanding, tolerance, acceptance and friendship among groups as well as propagating the purposes and principles of the United Nations Charter, Universal Declaration of Human Rights, this Convention and other relevant international instruments.

229. Since then there has been fairly extensive awareness raising activities on discrimination particularly on the ground of race and on human rights values in general. The truth and reconciliation process under the Truth and Reconciliation Commission (TRC), the process of developing the country’s **National Programme of Action on the implementation of the Convention on the Right of the Child (NPA)**, the process of developing the **National Action**

Plan to improve the Protection and Promotion of Human Rights (NAP) and the process leading to the **National Conference on Racism** and the Conference itself contributed to raising awareness on equality and non-discrimination.

230. Some of the law making processes have also had significant public awareness and service provider reorientation programmes which have had the effect of enhancing the realization of the purpose and principles underpinning this Convention and related human rights instruments. The process of developing the *Promotion of Equality Act* is one of these.

Education and teaching

231. Education was one of the pillars of apartheid. The formal education system was systematically restructured during the apartheid years, to serve as an instrument of preparing black people for their assumed inferior role in society and for their white counterparts to accept or take part in white domination and control. Informal education opportunities particularly the electronic media were also utilized effectively to inculcate the racist values that underpinned the apartheid system. Vocational training also served to reinforce apartheid values and resultant discriminatory behaviour.

232. Not surprisingly, in the process of building a new nation based on the values of the equal worth of human beings and the equal entitlement of all human beings to dignity and other universal human rights, South Africa has invested a lot towards turning the education system from one of the pillars of apartheid to one of the key building blocks of the non-racial and non-sexist society that is envisioned in the Constitution.

233. The Education Values initiative referred to earlier, is one of the key initiatives that have emerged as instruments to use the education system to undo residual prejudicial attitudes and resultant behavior that constitute the social and psychological legacy of colonialism and apartheid. The initiative also seeks to contribute to the development of a culture of human rights, a phenomenon that was lacking under apartheid. One of the key interventions under the Education Values initiative is the integration of human rights education including education relating to racism and sexism, in the school curriculum.

234. Prior to the Education Values initiative, there have been other interventions that sought to use the education system as a vehicle to inculcate a culture of human rights, including the eradication of racial prejudice and related conduct. Many of these initiatives have been undertaken interdepartmentally as part of the NPA and NAP processes. Some took place as part of continuing efforts to popularize the Constitution. Some of these are part of an on going collaborative process between the Department of Education and the South African Human Rights Commission, which seeks to respond to the disturbing levels of racist inspired conflict in some of the newly integrated schools. Some of the key activities of this nature, have included:

- Human Rights Week;
- Constitutional week;
- Children's Week;

- Visit to schools by court officials;
- Various publications on Children’s Human Rights and Responsibilities, including the right not to be discriminated on the grounds of race, gender, disability or any other ground or combination thereof. These include:
 - Law Talk for Children;
 - Busi Goes to Court;
 - Various pamphlets, posters and summaries of instruments such as the CRC and the Constitution.

235. The curriculum has also been changed, including the manner in which the history of South Africa is narrated and analysed. Until very recently, the emphasis of history lessons and relevant textbooks was on Europe and the perspective of the early white settler communities. The history was not only one sided but distorted, divisive and racist. For example, children were taught about “people” and “natives”, implying that the Africans, who, prior to colonialism, occupied the areas that now constitute South Africa, were not people. History lessons also referred to “natives” as part of a cluster of dangers together with snakes and wild animals, that confronted the “people” meaning the white settlers as they penetrated the interior.

236. However, the process of change is very slow. One of the key obstacles is the mindset of many of the teachers who were socialized under apartheid racist values and who now have to impart new values that are anathema to what for all these years they considered to be the truth. This is being addressed through various initiatives, including initiatives relating to the implementation of the *Schools Act*, referred to earlier. Re-education of service providers and public education under the *Promotion of Equality Act* also provides space for addressing this challenge.

237. Some effort has also been made to inculcate human rights education in tertiary and continued education. Initiatives have also included programmes that seek to pair Historically Black Universities (HBUs) with Historically White Universities (HWUs) to build bridges across races and to share skills and knowledge. However, progress in this area has up until now, been sporadic. A holistic framework is likely to develop from an initiative driven by the Council For Higher Education, which seeks to transform tertiary education. The initiative is currently under way, led by the Department of Education.

238. Some of the initiatives that seek to inculcate new values in the education system, also target parents, thus extending the reach of human rights and anti-racism values beyond school going children.

239. Education as an instrument of changing values has also been used to transform the attitudes of other service providers, particularly in the public service. One of the vehicles under which related initiatives have taken place, is **the Batho Pele Initiative** referred to earlier. In reorienting service providers to place people first, values relating to equality and democracy,

have also been inculcated amongst service providers. The success of this initiative is still limited because not everyone has been reached and the fact that values take time to shift and that even with those who have been reached, repetition of relevant messages is critical before a visible shift in behaviour occurs.

240. Many government departments now incorporate human rights education, including equality related education embracing the issue of racial discrimination, in their vocational education programmes. Examples in this regard include:

- South African Police Services Human Rights Training Programme, including relevant publications as part of training package entitled “Human Rights and Policing”;
- Human Rights and Constitutional Litigation Programmed for Judicial Officers, Prosecutors and other state lawyers presented by Justice College;
- Human Rights Education Programmes presented by Justice College to other state officials, including Welfare Officers;
- **Batho Pele** related training activities presented to government service providers by the South African Public Management Institute (SAMDI) and various government departments and related publications, which include Customer Service Charters/Statements released by the Departments of Home Affairs, Health and Justice (Draft);
- Judicial Education for Equality Court Personnel, including the Judges.

241. Education has also been used extensively, since the inception of the constitutional democracy in 1994, to raise public awareness on human rights values including the value of equality and non-discrimination on the ground of race. This takes various forms that include, workshops/seminars, public functions, pamphlets, t-shirts, posters, small booklets, TV and radio programmes and adverts as well as articles in the print media.

242. The processes relating to the Truth and Reconciliation Commission, NAP, and Equality legislation, constitute examples of vehicles that have been employed to achieve human rights awareness amongst the general population. At the end of the NAP process a permanent forum to monitor its implementation, was established. This forum, which is called the National Consultative Forum on Human Rights, has continued where the NAP process left off, with regard to public education of human rights, including the elimination of discrimination and the achievement of equality.

243. National institutions such as the Human Rights Commission, Commission on Gender Equality, Commission on Employment Equity and the National Youth Commission, have played key roles in these processes. The South African Communication services have also played a central role in collaboration with communication units in the various government departments and provinces. Some local government structures have also initiated human rights related public education and awareness initiatives incorporating values such as non-racialism and non-sexism.

244. Collaborative ventures with civil society on public education and awareness have been a central pillar of this country's strategy with regard to promoting a human rights culture, including the realization of article 7 of this Convention. Many of the measures referred to above and below, have been collaborative ventures with NGOs and CBOs. Some of the key activities in this regard, include an annual human rights event on 10 December organized by NIPILAR that includes recognizing and presenting an award to an outstanding champion of human rights. There is also a national 16 days of activism on gender violence organized annually with NGOs between November, 25 and December, 10 which integrates other human rights issues including the issue of the intersection between race and gender. Another activity involves a TV drama entitled Justice For All which is a collaborative venture between the Department of Justice & Constitutional Development and an NGO called Lawyers for Human Rights.

245. In the run up to the national conference on racism and in preparation for the third world conference, various NGOs have organized conferences and workshops to discuss racism and racial discrimination and to agree on strategies to combat it. Government has participated in many of these.

Culture

246. Since colonialism, mainstream South African culture has been informed by racist colonial and apartheid values. The beliefs and lifestyles of black people were projected as backward and unworthy of universal appreciation. While African traditional institutions were reasonably preserved, these were distorted in order to serve the interest of apartheid.

247. Traditional leaders for example, ceased to derive their powers from patronage and were instead appointed and often dismissed by the state. The State President even appointed himself in terms of the *Black Administration Act*, as the Paramount Chief of All Chiefs. While aspects of customary law and related traditions were allowed to continue, these were reinterpreted using received Roman Dutch and English law concepts, resulting in severe distortions. Amongst these distortions is the exclusion of black women from inheritance and ownership of property and importation of notions such as illegitimacy and marital power into customary law with grave detrimental consequences to affected communities.

248. Apartheid was also anathema to the development of a national culture. As indicated earlier, the main premise was white supremacy and black inferiority. Flowing from these were policies that fostered white privilege while taking away basic human rights, including human dignity from black people.

249. The Constitution creates a framework for both the development of a culture of human rights and nurturing all cultural variations in the country while aligning these with the Constitution. One of the key points of departure is the nurturing of a culture that sees one nation regardless of race and colour. The differences in culture are now viewed as part of South Africa's rich heritage and are not viewed in a hierarchical manner. To realise this new vision the Constitution has the various provisions on culture that were discussed earlier in this report.

250. On the basis of the new constitutional framework, various measures have been adopted with a view to transforming culture into an instrument for cultivating a culture of human rights and generally to realise the objectives of this Convention. Many of these initiatives relate to the use of the various languages, art, music and religion, to build bridges across colour. Many of the relevant activities have taken place under the NAP, National Conference on Racism and the other processes referred to earlier.

251. Government has also initiated dialogue with minority indigenous communities such as the Khoisan, regarding their rightful place in society, including the preservation and promotion of their language and culture. Practical programmes have been set up at state expense, to give effect to legislative provisions in this regard. These include the establishment of a national Griqua Forum and National Khoisan Council. The Khoisan Council is to assist in a research process undertaken in cooperation with Khoisan communities regarding their future.

252. Activities relating to the promotion of indigenous culture and fostering an appreciation of cultural diversity as a national heritage have included promotion of information about evidence of pre-colonial civilization in South Africa. One of the activities in this regard, involves an old site of civilization in the Northern Province called *Mapungubwe*. Hidden during apartheid at the University of Pretoria, this archaeological discovery, including gold and other interesting artifacts, is now being brought to the nation's attention with a view to instilling collective pride at the nation's heritage.

253. Activities relating to violence against women, particularly processes relating to the development and implementation of the **Prevention and Eradication of Violence Against Women and Children: Addendum to the SAC Declaration on Gender and Development**, have, over the years, always integrated multicultural activities such as music and drama.

254. It has become customary to use national key dates such as Heritage Day on 26 September, Presidential Inauguration days and other parliamentary activities, to celebrate the richness of cultural diversity while building friendship and understanding between the different cultural groups that constitute the South African nation.

255. Tourism related cultural activities are also viewed as significant contributors to the promotion of cultural understanding. However, weaknesses in some of these activities are that the so-called ancient cultures are often reified and fossilized by commercial greed. The resulting problems include exploitation and a jaundiced view of the present real lifestyles of affected communities.

256. Sport activities are also used as means to promote a sense of collective identity. This has had limited success due to the fact that as black people were excluded from professional mainstream sport, including representation of the country in the Olympics, sports teams are not yet satisfactorily integrated in terms of race. Sports personalities have also been encouraged to act as human rights ambassadors. The NAP process started this approach and it included having human rights activities promoted through major national games particularly soccer, which incidentally, is the most racially integrated professional sport.

257. The gap between reality and the vision is however, still wide. One of the key obstacles is the fact that the historical consequences regarding the ability to influence mainstream culture play themselves out in the social power that remains largely in white hands. There is also the question of the limited budget within which government must finance nation building and human rights promoting cultural activities. Residual suspicions and prejudices that express themselves in activities such as seeking cultural exclusivity, also present obstacles to initiatives aimed at using culture to promote the purposes and principles of this Convention and related human rights instruments.

Information

258. One of the pillars of apartheid was the use of information to propagate racist attitudes. The print and electronic media were used extensively in this regard. The concept of an open and democratic society is one of the values that underpin the new constitutional democracy. Information is also seen as one of the key strategies for nurturing the society envisaged in the new Constitution. Information is also viewed and accordingly used as a strategy for transforming the South African society to align its value system with the Convention and other international human rights instruments that deal with the eradication of racism and related forms of prejudice and discrimination.

259. The use of information is linked to the activities outlined above which deal with public education and awareness raising and the training aimed at reorientation of service providers. The electronic and print media have been used extensively to propagate information as envisaged in article 7 of the Convention.

260. Key role players in the information activities have included the South African Human Rights Commission, South African Law Commission, Government Information Services (GCIS), information units in government departments and civil society role players, including the South African Broadcasting Corporation (SABC), Human Rights NGOs and NGOs dealing with gender issues, particularly issues relating to diversity awareness, managing diversity, social context education for service providers and the promotion of human rights, including socioeconomic rights.

261. Information campaigns relating to the NAP and the National Conference on Racism and activities in preparation for the Third World Conference Against Racism have contributed significantly to the country's use of information in compliance with the Convention and other relevant international instruments. Media used in this regard included:

- Radio programmes including talk shows;
- TV programmes including talk shows;
- A postal message sponsored by the South African Post office;
- Newspaper articles and promotional materials that included posters, pamphlets, bags and T-shirts;

- Conference publications, including a report on the provincial hearings on racism and papers on the history and consequences of racism;
- The internet;
- A pocket-sized booklet on the National Action Plan on Human Rights.

262. An extensive communication campaign has been initiated in compliance with the provisions of and to support the implementation of the *Promotion of Equality Act*. Relevant activities include a summary of the Act in poster and pamphlet form, a newspaper insert and the use of the electronic media, particularly the radio, to popularize the Act.

263. In line with the Convention, the Act provides for its translation into the 12 official languages of the country, sign language included. Other statutes, amongst them the *Employment Equity Act*, have also been translated into all or some of the twelve official languages. The Constitution was also translated into all official languages. Some of the Acts and policy documents have also been translated into brail.

264. At the level of civil society, various NGOs have been using publications such as posters, pamphlets, journals and electronic media, to inculcate human rights values including values relating to the eradication of racial and other forms of discrimination and the promotion of interracial, understanding, tolerance, acceptance and friendship. The Race and Gender Unit at the University of Cape Town that works very closely with the Department of Justice, is one of the NGOs that regularly produce materials dealing with race and gender prejudice.

The Truth and Reconciliation Process

265. The Truth and Reconciliation Commission, which has been referred to earlier in this report, has contributed significantly towards building some understanding across racial lines. In some way, the process has allowed those who were affected either as victims or perpetrators by apartheid brutality, to begin to see their experiences from a new perspective. In many instances both victims and perpetrators of state sponsored and other apartheid brutalities, have shed tears and embraced each other as they recall the horrid dehumanizing incidences that they were involved in.

266. The public hearings and behind the scenes conciliatory activities under the Truth and Reconciliation Commission have in many instances, allowed victims and perpetrators to come to terms with the past while building new and positive relationships across race.

267. However, it would be dishonest to suggest that the Truth and Reconciliation Process has achieved absolute success in addressing the consequences of apartheid brutalities, including those that are social and psychological in nature. For example, there are those victims who felt that the ordinary criminal justice processes would have done better with regard to ensuring full accountability by perpetrators and reparation for victims. There is also the fact that the state does not have adequate resources to deal satisfactorily with appropriate reparation.

Emerging initiatives on restorative justice

268. Restorative justice was one of the core values underpinning the traditional justice system that prevailed before the received adversarial justice system that accompanied colonialism. Aspects of restorative justice have survived over the years in informal dispute resolution practices, particularly in rural villages and traditional courts. The residual practices are strong in disputes relating to the conduct of children. The essence of the justice system is to restore as far as possible, the status quo that obtained prior to the activity complained of.

269. Attempts are now underway to incorporate, without undermining rights with regard to fair trial, aspects of restorative justice in the mainstream justice system. This started with experiments in the juvenile justice system.

270. From the point of view of compliance with the Convention, activities relating to restorative justice have, as experienced in the Truth and Reconciliation Process, a potential to bring people in conflict together. It allows perpetrators to come face to face with the victim and take responsibility for their actions. It enhances the possibility of each understanding where the other party comes from and the achievement of lasting solutions and improved relations.

271. The new labour relations framework emphasizes informal dispute resolution measures at the primary levels of dispute resolution. This involves conciliation, mediation and arbitration. Disputes under the *Employment Equity Act* are resolved in the labour relations framework. Some of these often arise from or involve racial and related forms of discrimination.

272. A *Victim Charter* that integrates the principles of restorative justice in the justice system, is in the process of finalization by government.

International measures

273. The new constitutional dispensation that transforms South Africa into a non-racial constitutional democracy has brought an end to South Africa's pariah status in the international community. This liberation was achieved, in part; due to international support provided in compliance with this Convention and related instruments. The new South Africa is fully committed to supporting international efforts that seek, in compliance with this Convention, to eradicate racial and related forms of discrimination and to promote tolerance, understanding, acceptance, peace and friendship amongst groups and nations.

274. In addition to the official policies and activities for promoting the values of non-racism, the work of South Africa's first democratically elected president, Mr Nelson Mandela, during and after his term of office, speaks for itself in this regard.

275. The present government has also relentlessly pursued initiatives to bring peace in different countries and between different countries as well as to bring the so-called "North" and "South" together. Examples of bridge building initiatives at the international level, include the following:

- Involvement of South African mediators in the Irish conflict;

- Diplomatic intervention to help normalize the situation in Zimbabwe;
- Participation of South African judges and prosecutors in the ad hoc tribunals in the former Yugoslavia and Rwanda;
- Active participation in the development of the International Criminal Court statute and implementation process;
- Hosting of various international and regional conferences, including NAM, CMJA, SADC and the Third World Conference on Racism, Xenophobia and Related Intolerance.

276. South Africa is also playing an active role in initiatives that seek to realise an African renaissance. Government has sponsored conferences in this regard, including one that looked at democracy and governance. South Africa has also played a critical role in conceptualizing and marketing the plan for the recovery of the African continent as envisaged in the African Renaissance.

Measures dealing with the intersection between race and gender

277. In all the activities that seek to use education, information, culture and related activities to eradicate racial prejudice and promote tolerance, understanding, friendship and acceptance of the equal worth of all human beings regardless of difference, South Africa always pays attention to the intersection between race and gender as well as other grounds of discrimination.

278. The gender question is very critical because the apartheid system specifically utilized the intersection as part of its strategy to subjugate black people. The migrant labour system, pass laws and slave wages and conditions for domestic and farm workers, were essential elements of this strategy.

279. The eradication of the social and psychological consequences thereof require the prioritization of the intersection between race and gender within all strategies that seek to achieve the objectives of this Convention in the context of South Africa. The *Promotion of Equality Act* and *Employment Equity Act*, are some of the examples that demonstrate South Africa's serious consideration of the intersection between race and gender.

III. CONCLUSION

280. This report endeavours to achieve two key objectives. It seeks to provide a baseline report focusing on the social reality which is a legacy of colonialism and apartheid and which provides the context within which South Africa's compliance with its obligations in terms of the *International Convention on the Elimination of All Forms of Racial Discrimination*, has to take place. It also briefly outlines the key policy interventions that have been adopted by the new democratic government to implement the Convention and the country's Constitutional promises on human rights and in so doing, dismantle the racial legacy of colonialism and apartheid. The report also touches on emerging challenges such as HIV/AIDS, poverty and Xenophobia that form part of the South African context for compliance.

281. The report also provides some insight into the constraints under which the compliance measures are being implemented, the key ones being limits on the state budget and the obscene racial disparities in resources including income, human development, distribution of land and other forms of capital or resources. Poverty and disease are also major constraining factors. The inherited public service delivery systems and residual racist attitudes amongst a significant number of South Africans, also pose a major constraint.

282. The reference to the legacy and the constraints are not intended as excuses for inaction. They are to be viewed as parameters within which progress over the next few years has to be seen. As indicated in many parts of the report, compliance measures with regard to the Convention and related Human Rights instruments, also seek to limit the environmental constraints referred to in the above. In this regard, concrete strategies are underway to deal with poverty and disease, transformation of public service delivery, racist mindsets and other constraining factors that are largely due to structural defects inherited from the old order.

283. The Constitution of this country and the policies that have been implemented to support and give effect to it, provide a firm foundation for South Africa to effectively pursue its obligations under the Convention and related international obligations. The challenge ahead is to implement the Constitution and policies relentlessly. South Africa has indicated over the last few years since the onset of democratic governance, that it is committed to pursue this challenge with vigor. The international community has also been supportive of South Africa's efforts and South Africa has reason to believe that such support will continue.
