

CHAPTER 1

South Africa and the transition to democracy



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Outcomes

At the end of this chapter you will be able to:

- Understand that the Constitution and the Bill of Rights is the foundation on which South African democracy is based
- Describe the Constitution, the Bill of Rights and the Chapter 9 human rights protective mechanisms that support democracy and equality
- Understand the destructive impact that violence has on a developing democracy
- Know the new legislation and amendments introduced to support equality and prevent conflict
- Understand the need for a multidisciplinary approach to counter violence.

1.1

A new democratic South Africa equal and free from discrimination



TRANSFORMATION

These changes opened the way for negotiations representing all citizens in the country, to start transforming South Africa into a democratic state.



OUR CONSTITUTION

The Constitution affects every aspect of South African life and guarantees all people the fundamental rights of human dignity, equality and freedom.

Transition

Dramatic and profound changes took place in South Africa during 1990 and the years that followed. The African National Congress (together with the South African Communist Party, the Pan African Congress and other outlawed anti-apartheid organisations) was unbanned and recognised by the National Party, the political party governing South Africa at that time, as the most important political force in the country. Political prisoners and leaders were released from prison or allowed to return to South Africa from exile. These changes opened the way for negotiations between roleplayers, representing all citizens in the country, to start transforming South Africa and its legal and political systems into a democratic state.

The Multiparty Negotiating Forum

Representatives of various South African political parties took part in the Multiparty Negotiating Forum that drafted the interim Constitution. This interim Constitution became law on 27 April 1994, after South Africa's first democratic 'one person one vote' elections.

The representatives of political parties elected to Parliament during the 1994 elections were tasked to finalise a Constitution for South Africa. After negotiations and consultations with all interested parties, organisations and citizens, the final Constitution was adopted by Parliament during May 1996 and approved by the Constitutional Court during December 1996.

The South African Constitution is based on the 'recognition of human rights, democracy, and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex'.

The Constitution affects every aspect of South African life and guarantees all people the fundamental rights of human dignity, equality and freedom. It negates the oppressive policies of the past and emphasises equality, promotion and protection of different ethnic groups, cultures and religions in the country.

[See Chapter 2 Bill of Rights pg 35]

The Constitution, Bill of Rights, Constitutional Court and Chapter 9 Institutions

1.1.1

The Constitution and Bill of Rights

The Constitution and the Bill of Rights fundamentally changed South African law. Prior to the adoption of the interim Constitution Parliament was supreme. It could make and pass unjust laws. The Constitution, with its Bill of Rights, is now the supreme or most important law in the country. The Constitution is a set of laws that describe how the people elect representatives to government as well as the structure, the functions and power of government. The Constitution is binding on everyone, including Parliament itself.

The Bill of Rights (Chapter 2 of the Constitution) and Chapter 9 Institutions are written into the Constitution, so securing the protection of individual human rights and the rights of equality enshrined in the Constitution.

This means that people can go to court to protect their human rights as well as their legal rights.

1.1.1.1

Definition

LEGAL RIGHTS

Legal rights are usually rights (or laws) that courts protect and enforce.

Definition

HUMAN RIGHTS

Human rights are rights that people have simply because they are human.

Legal rights

Legal rights are usually rights (or laws) that have been written down and which the courts protect and enforce. These laws can be good, bad or neutral.

A good law may say that people who are injured in a motor vehicle accident by a drunken driver must receive damages (financial compensation) from the negligent driver.

A bad law may discriminate and say that married women are not allowed to sign a contract without their husband's permission.

A neutral law may say that cars must be driven on a certain side of the road.

Human rights

Human rights are rights that people have simply because they are human. Human rights are divided into three areas:

Political and Civil Rights: An example of these rights is the right to vote or to belong to a political party.

Social and Economic Rights: An example of these rights is the right to work or the right to land, housing and health care.

Cultural and Environmental Rights: An example of these rights is the right to a clean environment or to participate in various cultural or religious activities.

South African Constitution

The South African Constitution incorporates all these rights. Many people argue that only political and civil rights should be incorporated into a Constitution for if the government is financially unable to

CONTINUED

afford to provide social, economic, cultural and religious rights this will erode the whole Constitution. This is why a clause such as 'progressive realisation within the Province's available resources' is written into the KwaZulu-Natal Health Care Act when talking about providing services to communities. This clause was taken from the South African Constitution and accepts that there is a limit to State resources.

Human Rights Commission

S (184) 3 states "Each year the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill or Rights concerning housing, health care, food, water, social security, education and the environment."



TALKING POINT

Court victory for mothers and children (mother-to-child transmission of HIV)

[Treatment Action Campaign and others, Minister of Health and others – unreported decision of the High Court under case no. 2 1182/01]

In the Pretoria High Court during December 2001 the Judge declared that the government policy of 'prohibiting the use of Nevirapine outside the pilot sites in the public health sector is not reasonable and that is an unjustifiable barrier to the progressive realisation of the right to health care.' The Judge ordered the government 'to make Nevirapine available to pregnant women with HIV who give birth in the public sector, and to their babies, in public health facilities to which the respondents' present programme for the prevention of mother-to-child transmission of HIV has not yet been extended.' The Health Minister, Manto Tshabalala-Msimang, said that the government will appeal the decision to the Constitutional Court.



1. Should socio-economic rights such as water, health and education be included in the Constitution?
2. The KwaZulu-Natal Health Care Act, when referring to providing services to the communities, talks about the 'progressive realisation within the province's available resources'. What does this mean?

1.1.1.2

The Constitutional Court

The Constitution is the basic and most important law in South Africa. It is the law against which all other South African laws are measured and if these laws conflict with the Constitution then the Constitutional Court, or one of the other South African courts, will declare these laws unconstitutional and invalid, whether they are old or new laws.

The Constitutional Court is based in Johannesburg and deals with cases when:

- Laws conflict with the Constitution
- There is a conflict between provincial and national governments
- There are appeals from lower courts in relation to Constitutional matters.

The Bill of Rights (Chapter 2 South African Constitution)

The Constitution includes a Bill of Rights that protects people from human rights violations or abuse by the state, other organisations or other people. In certain circumstances these rights can be limited, especially when rights conflict with each other.

The rights set out in the Bill of Rights are fundamental rights that all people are entitled to enjoy simply because they are human beings. These rights can be political, economic, social and environmental.

[See pg 35]

The first and perhaps most important right in the Constitution is that of 'equality'. The Constitution states that it applies to 'all laws' and binds 'the legislature, the executive, the judiciary and all organs of the state'. It also binds private persons 'if and to the extent that it is applicable, taking into account the nature of the right and the duty imposed by the right'.

Every person is guaranteed equality before the law and the equal protection of the law and unfair discrimination on the grounds of sex, gender, or pregnancy is specifically outlawed. Equality is inscribed in the constitutional principles, the preamble and in the interpretation of every fundamental right contained in Chapter 2 of the Constitution.

1.1.1.3



EQUALITY

The first and perhaps most important right in the Constitution is that of equality. The Constitution states that it applies to all laws and binds the legislature, the executive, the judiciary and all organs of the state. It also binds private persons.

Same sex partners

[National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 1999 (1) SA 6 (CC)]

This case dealt with the question of equality.

The Coalition brought a case to the Constitutional Court arguing that a section in the Aliens Control Act was unconstitutional on the grounds that it was in conflict with the equality clause in the South African Constitution as the Act discriminates against same sex partners. The Act granted permanent residence to a wife or husband or dependent child of a resident but excluded same sex or other partners.

The court in its judgments emphasised the rights to equality and dignity. Gays and lesbians have the constitutional right to enjoy family life in the same way as heterosexual (different sex) couples. The court felt that though the government was entitled to protect the traditional institution of marriage it could not do away with the constitutional rights of partners in a permanent same sex marriage.

[See pg 34]

Case Study

Disputes over whether people have these rights do not happen often. The problem arises when there is conflict between rights. The courts have to make the decision as to which right is the most important right, and which right should be enforced, in the circumstances. The South African Constitution also states that in exceptional circumstances the rights set out in the Bill of Rights can be limited.



TALKING POINT

Limitation of rights

[S 38, South African Constitution]

“The rights in the Bill of Rights may be limited ... to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors, including:

- a) The nature of the right
- b) The importance of the purpose of the limitation
- c) The nature and extent of the limitation
- d) The relationship between the limitation and its purpose
- e) Less restrictive means to achieve the purpose.”



- **When is it reasonable for the state to limit human rights?**

[See Case Study on prisoners right to vote, pg 9]

1.1.1.4

Chapter 9 institutions dealing with independent state institutions supporting constitutional democracy



INDEPENDENT BODIES

The Constitution provides for a number of independent bodies or commissions to ensure that the rights enshrined in the Constitution are protected.

The Constitution also provides for the establishment of a number of independent bodies or commissions to ensure that the rights of equality enshrined in the Constitution are protected in order to support constitutional democracy.

The most important of these Commissions and bodies are the office of the Public Protector, the Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious, and Linguistic Communities, the Commission for Gender Equality, the Auditor General, the Electoral Commission, and in terms of the South African Police Service Act 68 of 1995 – the Independent Complaints Directorate (ICD). A few of these commissions have established offices in some of the provinces (e.g. the Human Rights Commission, the Commission on Gender Equality, the Public Protector).

These bodies help many individuals and groups of people on a daily basis. However, others are disappointed with the response they received from them. South Africa is a new and growing democracy and the Commissions and bodies are newly constituted and staffed. They have limited finance and personnel to deal with the many legal and human rights abuses still prevalent in South Africa. Some of the bodies are still in the process of defining their role in protecting human rights abuses, setting up offices and establishing procedures.

The Office of the Public Protector

1.1.1.4.1

The South African Constitution states that the Office of the Public Protector has the power to:

- Investigate any conduct in state affairs or in the public administration that is suspected to be improper and may result in impropriety or prejudice
- Report on that conduct
- Take appropriate and remedial action
- Be accessible to all persons and communities.

At present the Public Protector has a National Office in Pretoria and is opening offices in some provinces. An office was opened in Durban, KwaZulu-Natal, during May 2001.

The Human Rights Commission (HRC)

1.1.1.4.2

The South African Constitution states that the Human Rights Commission must:

- Promote respect for human rights and a culture of human rights
- Promote the protection, development and attainment of human rights
- Monitor and assess the observance of human rights.

The Commission has a National Office in Johannesburg and has established offices in some of the provinces, including KwaZulu-Natal. The Human Rights Commission has investigated complaints relating to inhumane conditions of prisoners, racism in the press and problems experienced by learners on farm schools.

The Commission for Gender Equality (CGE)

1.1.1.4.3

The South African Constitution states that the Commission for Gender Equality must:

- Promote respect for gender equality and the protection, development and attainment of gender equality
- Monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality.

At present the Commission has a National Office in Johannesburg and has established offices in some of the provinces, including KwaZulu-Natal.

1.1.1.4.4

Commission for the promotion and protection of rights of cultural, religious and linguistic communities

The primary object of the Commission is:

- To promote respect for the rights of cultural, religious and linguistic communities
- To promote and develop peace, friendship, humanity, tolerance and national unity among cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association
- To recommend the establishment or recognition of a cultural or other council or councils for community or communities in South Africa.

The Commission has the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning the rights of cultural, religious and linguistic communities.

1.1.1.4.5

The Office of the Auditor-General

The role of the Auditor-General's office is to ensure that government departments and other organs of the state spend public money properly and in accordance with ministerial guidelines.

The Auditor-General has offices in all provinces.

The duty of the Auditor-General is to report on the accounts, financial statements and financial management of:

- All national and provincial state departments and administrations
- All municipalities
- Any other institution or accounting entity required by national legislation to be audited by the Auditor-General.

1.1.1.4.6

The Independent Electoral Commission (IEC)

The Independent Electoral Commission (IEC) manages national and provincial parliamentary elections as well as local government elections. It is the function of the Commission to ensure that the elections are free and fair.



The IEC's function is to ensure that elections are free and fair.

Votes for prisoners

[August v Independent Electoral Commission 1999 (3) SA 1 (CC)]

Two prisoners wanted to cast their vote in the elections. The IEC took the view the citizens must register and vote in the area in which they were 'ordinarily resident' before being imprisoned. The IEC also alleged that they would be faced with insurmountable difficulties if prisoners were allowed to register and vote within prisons. The Constitutional Court found that the Constitution gave the right to vote to every adult citizen and Parliament could not pass laws to limit the right. The meaning of 'ordinary residence' was the prison.



- Should prisoners have the right to vote?



[See Limitation of Rights, pg 6]

The Independent Broadcasting Authority (IBA)

1.1.1.4.7

This authority must be independent and regulate broadcasting in the public interest. It must ensure fairness and diversity of views broadly representing South African society.

The South African Constitution states that these institutions are independent and subject only to the Constitution and the Law. They must be impartial and work without fear, favour or prejudice.

The Independent Complaints Directorate (ICD)

1.1.1.4.8

The ICD was established to investigate and oversee the investigation of complaints against the members of the South African Police Service (SAPS). The ICD operates independently of the SAPS even though it is a statutory body.

The ICD deals with complaints relating to:

- Deaths in police cells or police custody or as a result of police action
- The involvement of police members in criminal activities such as robbery, theft and fraud
- Forbidden police behaviour or conduct such as neglect of duties.



1.2

Violence and its impact on a developing democracy

1.2.1

A culture of violence



VIOLENCE

Violence prevents the efficient delivery of services by government departments.

The current and continued explosion of violence in South Africa affects not only the development of a human rights culture based on equality and enshrined in the South African Constitution but also prevents the efficient delivery of services by government departments such as justice, health, water, education and welfare. The lack of capacity in government to deliver these services extends the poverty of communities disadvantaged by the apartheid government and in desperate need of such services.

Violence (whether political, criminal or social) unless controlled, threatens the fabric of South African society and prohibits the development of a democratic society.

1.2.2

Political violence

The hope of a peaceful new South Africa was soon shattered after violent crime that had escalated during the 1980's, continued through until today.

During the apartheid period the white minority government oppressed black South Africans. The oppression was reflected in controlling the lives of the black majority by depriving them of access to political power, land, education, health and welfare services.

Impact of violence

Violence became for most communities in South Africa, the accepted method of resolving conflicts. This violence, together with the influence of the strong patriarchal systems that exist in most cultures and religions in South Africa, was extended to, and used against, vulnerable groups in society, such as women and children. The aged, the disabled, refugees and migrants were also targets of violence. No single group escaped the violence of apartheid, neither the oppressors nor oppressed. South Africa developed into a violent society, the repercussions of which are still being felt today, many years after the creation of a democratic state in 1994.

The oppression of the apartheid era caused communities to lose respect not only for investigative and enforcement agencies such as the South African Police, but also for the law of South Africa. This was because the laws made during this period often ignored the basic and fundamental rights of people, rights that are now set out in the Bill of Rights.



No single group escaped the violence of apartheid, neither the oppressors nor the oppressed.

Members of the police force were used to suppress the black people of South Africa rather than preventing crimes and protecting communities from the ravages of crime. 80% of police resources were allocated to white areas and 20% to black areas.

The people who fought against this system were silenced and controlled through violent means such as imprisonment, detention without trial, torture, exile and assassination.

The lack of a protective police force led to the communities developing their own form of policing through street committees, trade unions and people's courts, some of which were fair and effective and others, which degenerated into 'kangaroo courts', were as brutal as the oppressive South African Police and South African Defence Force had been.

Social and economic conditions

The economic exploitation and social segregation of apartheid resulted in high levels of poverty for black South Africans. The desperate moving of rural people to the cities, overcrowding, the break down of traditional society, and the acceptance of violence as the method of resolving conflict increased the already growing violence. Poverty in the rural areas as well as the political violence there led many people to move closer to the towns where many new settlements soon developed. These settlements were not serviced in that there was no water, electricity, roads, health clinics, schools or effective police services. Resources were scarce, life harsh and conflict was resolved through violence.



COMMUNITY POLICING

The lack of a protective police force led to community policing.

1.2.3

Creating a human rights culture

One of the biggest challenges facing the new government, apart from dealing with crime and delivery of services, was, and still is, the creation of a human rights culture in an otherwise violent society.

Legislation

Since the transfer of power from the apartheid state and the emergence of a new South African democracy in 1994 the government has introduced a comprehensive and impressive collection of new laws, based on new government policies, to right the wrongs of the past and to replace the culture of violence with a human rights culture.

Training and education

New legislation promoting a human rights culture, requiring the education and training of members of communities and institutions on the importance of a human rights culture, and the creation of a credible police force, supported by the community – all of which recognise and enforce the rights in the Constitution and Bill of Rights – will go a long way towards controlling violence and allowing the economy to develop and grow sufficiently to alleviate poverty.

New and altered laws cannot alone undo the harm to South African society caused by the apartheid government. Communities, as well as public and private institutions and organisations need training and education in managing conflict in a non-violent way. They need to learn what their rights are, how to protect these rights and how to lobby and monitor government effectively. This will ensure that government delivers effective services in respect of health, water, welfare, education and justice. [See Advocacy and lobbying, pg 46-47]

Training communities in conflict resolution also includes training them in resolving conflict not only in the political or economic area but also in the social sphere such as in the family or in the school playground. [See Domestic violence, pgs 167-174]

Erosion of human rights

Many people, both in government and in communities, continue to demand that harsh laws limiting individual and human rights be retained or re-introduced because of the continued high levels of crime and violence in South Africa. These groups argue that the limiting of such rights will assist in controlling crime and violence. Examples of this is the call to reintroduce the death sentence or to make bail difficult to obtain by suspects arrested by the police.

However, destroying or disregarding such rights only weakens and undermines generally the human rights fought for – for so long – by anti-apartheid forces and enshrined in the Constitution and Bill of Rights.



MANAGING CONFLICT

- *New and altered laws cannot alone undo the harm caused by apartheid*
- *Communities and organisations need training and education in managing conflict in a non-violent way*

It is difficult to convert a violent culture to a human rights culture. A human rights culture can be achieved through a determined government policy backed by efficient and caring police services and government departments and extensive programmes in education and training in all sections of society.

Minimum sentences

The United Nations official for Judicial Independence criticised the minimum sentence provisions (for crimes such as murder, rape, robbery and indecent assault) of the 1997 Criminal Law Amendment Act because they 'impinged on the international standards of judicial independence'. A high court judge found the section unconstitutional and referred the matter to the Constitutional Court. The Constitutional Court has reserved judgment.

[*Sunday Times*: 25 April 2001]



- Do you think that the Constitutional Court should find the section providing for minimum sentences unconstitutional? If so, why? If not, why not?



A multifaceted society protected by the South African Constitution

1.2.5

There was concern during the multiparty negotiations about the protection of the rights of ethnic, religious and linguistic groupings. South Africa was moving from a society based for many decades on racial discrimination. As a result of the debate on these issues the Constitution protects ethnic, religious and linguistic minorities.

Numerous clauses in the Bill of Rights ensure the protection of the diverse cultural and religious groups that are part of the South African population.

The clauses in the Bill of Rights that ensure this protection are:

- Equality (Section 9)
- Freedom of Religion, Belief and Opinion (Section 15)
- Freedom of Expression (Section 16)
- Freedom of Association (Section 18)
- Freedom to make political choices (Section 19)
- Freedom to use the language and to participate in the cultural life of their choice (Section 30)
- Persons belonging to a cultural, religious, or linguistic community may not be denied the right to enjoy their culture,



MINORITIES

The Constitution protects ethnic, religious and linguistic minorities.

practice their religion and use their language (Section 31).

These rights are protected by:

- Their entrenchment in the Constitution
- The establishment of Chapter 9 Institutions by the Constitution [See pgs 6-9]
- The courts, including the Constitutional Court. [See pg 41. Also see separation of powers amongst the legislature, executive and judiciary, pgs 31-32]

1.3

Legislation supporting equality and preventing violent conflict

1.3.1

Aims of the constitution



AIMS

The South African Constitution aims to:

- Heal the divisions of the past
- Lay the foundations for a democratic and open society
- Improve the quality of life of all citizens and
- Build a united and democratic South Africa.

The preamble or introduction to the South African Constitution reads:

“We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to:

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

The following are a few examples of new laws and changes to law that will help bring about the vision set out in the preamble of the South African Constitution. The vision is to promote equality, provide affirmative action for disadvantaged groups, control violence and potential conflict, and allow equal opportunity to access land, employment, health, water, welfare, housing, education, security and an improved quality of life.

1.3.2

Employment Equity Act 55 of 1998

The Employment Equity Act addresses inequalities arising from past



Affirmative action aims to achieve the positive advancement of previously disadvantaged people.

discrimination relating mainly to race and gender. This important Act promotes equality in the workplace, ending discrimination and requiring affirmative action for those groups who were previously disadvantaged. The Act “allows for the positive advancement of black people (defined as Africans, Coloureds and Indians), women and the disabled”.



EQUALITY

This important Act promotes equality in the workplace, ending discrimination and requiring affirmative action for the previously disadvantaged.

Definition

AFFIRMATIVE ACTION

Affirmative Action is a short-term measure to bring about equality by helping and supporting people who were discriminated against.

DESIGNATED EMPLOYER

A person or organisation that employs 50 or more workers or earns over a set amount of money annually. [Chapter 1, Section 1, Definitions]

Protection against discrimination

The Act places a duty on designated employers to stop discrimination in the workplace by:

- Stating that employers cannot discriminate on the following grounds – race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth
- Ensuring that *designated employers* must develop and implement affirmative action policies
- Requiring that employers work closely with unions and workers in developing and putting into place affirmative action plans
- Listing what should be included in these plans such as details of *affirmative action* plans, objectives, and targets of such plans, procedures to deal with disputes, and staff responsible for monitoring and implementing the affirmative action plans.



SKILLS

The main focus of the Act is to provide entrance to the labour market and access to training and education for previously disadvantaged people.

1.3.3

The main aim of the Employment Equity Act is to ensure equality in South Africa by:

- Prohibiting unfair discrimination in the workplace
- Encouraging employment equity programmes that will develop a workforce representative of the South African population.

Skills Development Act 56 of 1998

The main focus of the Act is to provide entrance to the labour market and access to training and education for previously disadvantaged people.

The intention of the Skills Development Act is to develop plans to develop and improve the skills of the South African workforce.

The Act attempts to eliminate discrimination and promote affirmative action.



One of the purposes of the Skills Development Act is to improve the employment prospects of persons previously disadvantaged by unfair discrimination and to redress those disadvantages through training and education.

Promoting skills development

The purpose of the Skills Development Act is to:

Develop the skills of the South African workforce to:

- improve the quality of life of workers
- improve productivity in the workplace and the competitiveness of employers
- promote self-employment
- improve the delivery of social services
- increase the levels of investment in education and training and improve the return on that investment.

Encourage employers to:

- use the workplace as an active learning environment
- provide employees with the opportunities to acquire new skills
- provide opportunities for new entrants to the labour market to gain work experience
- employ persons who find it difficult to be employed e.g. the disabled
- encourage workers to participate in learnership and other training programmes
- improve the employment prospects of persons previously disadvantaged by unfair discrimination and to redress those disadvantages through training and education
- ensure the quality of education and training in and for the workplace.

Assist:

- work-seekers to find work
- retrenched workers to re-enter the labour market
- employers to find qualified employees
- to provide and regulate employment services.

The Skills Development Act establishes a number of institutions to implement the process. These are the National Skills Authority, the National Skills Fund, the Skills Development levy-grant scheme, sector education and training authorities, labour centres and a Skills Development Planning Unit.

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

The purpose of this Act is to enforce the Equality Clause in the Bill of Rights and the South African Constitution.

The Act aims to:

- Prevent and prohibit unfair discrimination and harassment on the grounds of race, gender and disability
- Promote equality and eliminate unfair discrimination
- Prevent and prohibit hate speech (i.e. speech that is hurtful, harmful or incites harm, and promotes hatred).

The Act sets out several examples of discrimination in terms of race, gender and disability

Examples of discrimination given in the Act:

- Race discrimination is the provision or continued provision of inferior services to any racial group
- Gender discrimination is the system of preventing women from inheriting family property
- Disability discrimination is denying a person who has a disability any support necessary to function in society.

Basic Conditions of Employment Act 75 of 1997 (BCEA)

The BCEA lays down basic minimum conditions of employment and gives effect to the right to fair labour practices as set out in the Bill of Rights in the South African Constitution.

The Act takes precedence over other agreements and covers a broad range of issues such as acceptable working hours, working breaks, annual and paid sick leave, overtime, termination of employment, maternity leave, family responsibility leave and other basic rights.

The new BCEA improves the minimum conditions of workers and establishes the Employment Conditions Commission to advise the Minister and labour inspectorate on mediation disputes which arise in terms of the Act.

An example of the recognition of the importance of family life and responsibility is the section relating to 'family responsibilities' in terms of workers.

1.3.4



DISCRIMINATION

The Act aims to prevent unfair discrimination and harassment on the grounds of race, gender and disability, promote equality and prohibit hate speech.

1.3.5



EMPLOYMENT

The BCEA lays down basic minimum conditions of employment and gives effect to the right to fair labour practices as set out in the Bill of Rights.

The BCEA recognises 'family responsibility leave'. Employees who have worked for certain periods of time are entitled to three days responsibility leave if the employee's child is born or adopted (including the partner of a pregnant women), when the employee's child is ill, and when a spouse (husband or wife) or life partner, parent, adoptive parent, grandchild, child, adopted child, or brother or sister dies.



A pregnant employee may begin maternity leave at any time from four weeks before the expected birth and no employee may work for six weeks after the birth.

Maternity benefits

Maternity employment conditions are also greatly improved under this Act, ensuring greater protection for mother and child. The Act stipulates that a pregnant employee may begin maternity leave at any time from four weeks before the expected birth of the child (unless otherwise agreed). No employee may work for six weeks after the birth (unless a medical practitioner certifies she is fit to do so). Pregnant employees are not permitted to perform work that is hazardous to her baby. Many of these provisions are extended to parents adopting children. Unfortunately the employment benefit (payment during maternity leave) falls under the Unemployment Insurance Act and this has not improved, allowing only for a benefit of 45% of the pregnant employee's salary to be paid to her as if she was unemployed.

1.3.6

The Labour Relations Act 66 of 1995

The Labour Relations Act of 1995 regulates the relationship between employers and workers (employees) and protects the rights of employees against potential abuse by their employers.

The purpose of the Act is:

- To give effect to the fundamental rights in the Constitution
- To protect employees from being unfairly dismissed and to provide remedies for such dismissals
- To advance economic development, social justice, labour peace and the democratisation of the workplace
- To provide a framework in which employees and workers can negotiate on issues of common interest
- To promote orderly and collective bargaining, worker participation in decision-making in the workplace and the effective resolving of disputes. [See Alternative dispute resolution, pgs 48-49]



LABOUR RELATIONS

This Act regulates the relationship between employers and workers (employees) and protects the rights of employees against potential abuse by their employers.

Domestic Violence Act 1998

The function of the Act is to implement the Constitution and in particular the right to equality and to freedom and security of the person. Violence against women prevents women from taking their rightful and equal place in society. The purpose of the Act is:

- To give the victims of domestic violence the maximum protection for domestic abuse that the law can provide
- To ensure that the different bodies of the state (justice, police, welfare, health) support the provisions of the Act, showing the government's commitment to eliminating domestic violence.

The Act covers:

- The role of the police and prosecuting authority
- Court processes in applying for a warrant of arrest and protection order from the courts
- The seizure of arms and dangerous weapons.

The Act provides a cheap and effective legal process in the magistrate's court to protect victims of domestic violence. [See How to obtain a protection order, pg 173. See Civil and criminal trials, pgs 42-43 and 120-125]

Aged Persons Act of 1967

The Act largely covers the registration, management and subsidies of homes for the aged.

A significant addition to the Aged Persons Act, by a 1998 amendment, is the addition of Section 6A, the notification of abuse of aged persons.

This is another recognition of the violence and abuse suffered by vulnerable groups and the attempt by government to eradicate violence.

Responsibility of medical personnel

[S6A: Notification of abuse of aged persons]

"Every registered dentist, medical practitioner, nurse or social worker or any other person who examines, attends to or deals with an aged person and suspects that that aged person

- Has been abused
- Suffers from any injury

shall immediately notify the Director-General: Welfare or the relevant officer."

The relevant officer could be a social worker of a child welfare agency or the local department of welfare.

A dentist, medical practitioner, nurse or social worker or any other person who notifies the Director-General or relevant officer of such

1.3.7



DOMESTIC VIOLENCE

Violence against women prevents women from taking their rightful and equal place in society. The Domestic Violence Act provides the maximum protection that the law can provide for all members of the family.

1.3.8



AGED PERSONS

This Act has been amended in recognition of violence against the aged.

abuse and has acted in good faith may not be held liable for any legal action (e.g. defamation).

Any dentist, medical practitioner, nurse or social worker or any other person who does not report such abuse is guilty of committing a criminal offence and may be fined and/or imprisoned for up to five years. Similarly, a person convicted of (a criminal offence) abusing an aged person will also be sentenced to a period of up to five years and/or a fine.



1.3.9

HEALTH & SAFETY

This Act imposes rights and duties on employers and employees.

The Occupational Health and Safety Act 85 of 1996

This Act imposes rights and duties on both employers and employees. It imposes duties on employers to ensure a reasonable safe and healthy working environment by providing protective equipment, training and education and adequate supervision.

Employees, in turn, must obey health and safety rules and report any unsafe or unhealthy situations to the relevant person.



1.3.10

COMPENSATION

This Act sets out the terms of compensation.

Compensation for Occupational Injuries and Diseases Act of 1993

The intention of the Occupational Health and Safety Act is to ensure that the workplace is safe but the Compensation for Occupational Injuries and Diseases Act sets out the terms in which employees are compensated for injuries or diseases contacted in the work environment. The Act provides for lump sum payments and benefits for temporary or total disablement as well as death benefits.



TALKING POINT

Workplace injury

[Jooste v Score Supermarkets Trading (Pty) Ltd 1999 (2) SA1 (CC)]

The High Court decided that Section 35(1) of the Compensation for Occupational Injuries and Diseases Act was unconstitutional in that it denied an employee injured in the workplace the right to claim general damages for pain and suffering. The employee argued that differential treatment should not be allowed. The claim was confined to financial loss. The applicant appealed to the Constitutional Court. The Constitutional Court set aside the High Court decision stating that in the circumstances differential treatment was allowed.



1. Do you think the decision of the Constitutional Court was right?
2. Do you think if unfair discrimination were argued (that non-employees are allowed to claim for pain and suffering and not employees) the Constitutional Court would have found differently?

Other laws promoting equality and negating violence

New laws negating violence and promoting equality, a human rights culture and access to rights prohibited during the past are too numerous to mention. Some of these are:

- The Child Care Act [See pgs 191-192]
- Abolition of Corporal Punishment Act, 1997, abolishes any legislation allowing corporal punishment
- Criminal Law Amendment Act, 1997, sets aside the death sentence
- Judicial Matters Amendment Act, 1998, forbids military and paramilitary training unless performed for or by the SANDF, the SAPS, certain officials of Correctional Services, certain traffic officers, and certain people acting in terms of the Security officers Act
- Witness Protection Act, 1998, extends the definition of witness to persons outside the scope of criminal cases
- Refugee Act, 1998, incorporates the government's obligations in terms of international conventions into South African law. A major challenge to South Africa is dealing with the growing number of undocumented migrants entering the country
- Prevention of Organised Crime Act, 1998, give the SAPS and the Department of Justice powers (such as seizing assets used to commit crimes or which are the proceeds of crime) to deal effectively with organised crime
- Special Tribunals Act, 1996, deals with corruption within the criminal justice system.

There are also a number of discussion papers and draft laws that may in the future become new laws. These are:

- The Sexual Offences Bill
- Decriminalising Prostitution
- Victim Compensation.



New laws aim to negate violence and promote equality, a human rights culture and access to rights prohibited during the past.

1.4

A multi-disciplinary approach to dealing with violence

1.4.1

National Crime Prevention Strategy

The Government, during May 1996, introduced the National Crime Prevention Strategy (NCPS). The need for a multidisciplinary approach was recognised and the departments of Correctional Services, Defence, Intelligence, Justice, Safety and Security and Welfare were included in the NCPS. The NCPS places the rights and needs of victims as the centre to its approach.

The NCPS National Programme on Victim Empowerment plans to:

- Use the criminal justice system as a source of relief and support for victims
- Improve access of vulnerable groups like women and children and victims in general to the criminal justice process
- Redesign the criminal justice process to reduce blockages and unnecessary time delays
- Create a more meaningful role for victims in the criminal justice process
- Improve service delivery by the criminal justice system through increased accessibility and sensitivity to the needs of victims
- Create a restorative justice system by providing compensation for victims who suffer loss through crime.



CRIME PREVENTION

The NCPS places the rights and needs of victims as the centre to its approach.

1.4.2

The Department of Health

The Department of Health was not party to the National Crime Prevention Strategy but nevertheless has an important role to play in responding to violent crime in South Africa as it affects health.

The National and Provincial Departments of Health are involved in numerous projects relating to the treatment of victims of crime. However, the main achievement by the Department of Health since the 1994 elections is revolutionising and decentralising the health care system by introducing the District Health System based on the principles of primary health care.

The primary health care system is founded on community involvement; health care delivery at a national, provincial, district and local level; co-operation between public sectors and NGOs; and the offering of a comprehensive and holistic approach, with an



ACHIEVEMENTS

The main achievement since the 1994 elections is revolutionising and decentralising the health care system by introducing the District Health Care System based on the principles of primary health care.

emphasis on prevention, to health care. [See Chapter 3, the Health System]

The Department of Health has two important functions in relation to victims or survivors of violence. The first is to give the patient the medical treatment needed to recover from the ordeal. The second is to collect, preserve, interpret and present in court medico-legal evidence to ensure the conviction and imprisonment of perpetrators of crime.

Non-government organisations (NGOs) and trade unions

NGOs, with their close links with, and understanding of, communities, are in a position to support development in communities and alleviate poverty. They also have a fundamental role in promoting, protecting and enforcing human rights. They are independent of government and their key function is to monitor and persuade government to deliver. They are also an important link between the community and the government. [See Advocacy, lobbying, citizen participation, pgs 45-48]

Many of the established large trade unions, whose membership were in the forefront of the struggle to obtain trade union and political rights, have established financially successful investments arms. These trade unions have used the profits for social welfare programmes to improve the quality of life of their membership. These programmes provide support to the membership for schooling for their children at all levels of education, as well as for health care projects and housing, training and education and community projects.

Community and citizen participation

Community and citizen participation are the key to true democracy and the control of violence. [See pg 45]

1.4.3



NGOs & TRADE UNIONS

Their close links with and understanding of communities, enable NGOs to support development in communities and alleviate poverty.

1.4.4



TALKING POINT

Trial of four police

A Member of Parliament, Mbeki Mkize, was shot and killed by members of the South African Police Services (the Ulundi Public Order Policing Unit) in the Mahlabathini area of northern KwaZulu-Natal. Inspector Buthelezi said in a statement to the court that a shot went off, shooting Bheki Mkize, while he (Inspector Buthelezi) was trying to take his rifle from him. A forensic pathologist (expert) testified that in his opinion Bheki Mkize was shot through the open palm of his right hand while apparently shielding his face in a 'defensive' manner. He described the wound as a contact wound.

[*The Mercury*: 27 April 2001]

Judicial delays slammed

A judgement in the High Court during April 2001 effectively stopped prosecutions for alleged crimes which took place before 1990. This was decided on the basis that it is prejudicial to the accused and interferes with their constitutional right to a fair trial. The judge qualified the ruling by adding that his decision would not apply when the delay in arrest or serving of summons was caused by the actions of the accused.

[*Daily News*: 25 April 2001]

Umlazi Court disgusting

The toilets are not working and in some of the court rooms the hinges of the doors are hanging loose. At the entrance of the court street vendors are selling their fruit, cooked food and other items. A small fire at the main gate is kept burning to roast maize and braai meat. ... The cause of the problem is two fold – firstly the Department of Public Works does not properly upkeep the courts and people sitting at the entrances selling food make this worse.

[*Daily News*: 26 April 2001]



1. **Is violence increasing in South Africa, and if so, why?**
2. **Does the Constitution and new laws protect the criminal or perpetrator rather than the victim or survivor?**
3. **Is the criminal justice system working? If not, why not?**
4. **How can the criminal justice system be improved to provide protection for all the citizens of South Africa?**
5. **Do citizens have a role to play in making the criminal justice system work? If so, how?**

1.5

Conclusion



South Africa is still in the process of moving from a violent, oppressed society to an open democracy.

South Africa is still in the process of moving from a violent, oppressed society to an open democracy.

South African society, due to the past, is a society sensitive to inequality and discrimination in terms of 'race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth'.

The increasing violence can destroy our fledgling democracy. Violence obstructs economic growth and prevents government delivery of welfare, water, education, health, employment and other services, designed to alleviate poverty and suffering.

In order to control growing crime, and the violence that accompanies it, government must:

- Promote and enforce equality
- Uproot discrimination and inequality
- Promote, affirm and assist men, women and children previously disadvantaged
- Develop an effective, efficient and professional police force
- Promote a human rights culture.

This is largely being done through legal mechanisms such as the implementation of the Constitution and the extraordinary number of new laws enacted since the new democratic South Africa emerged in 1994. Government departments have also developed policies and engaged in numerous projects and campaigns to entrench the new democracy.



SENSITIVITY

Due to its past, South Africa is a society sensitive to inequality and discrimination.

