

## **CENTRE FOR CONSTITUTIONAL RIGHTS HUMAN RIGHTS REPORT CARD 2012**

*The Centre for Constitutional Rights takes pleasure in presenting its fourth annual Human Rights Report Card indicating where, in our opinion, South Africa has been making progress with regard to human rights and where it has been regressing.*

*We have once again awarded the following grades for human rights in this year's report card: **A = Excellent; B = Good; C = Average; D = Poor; and E = Very Poor.** At the same time, the +, = and - signs are used to indicate whether things are getting better, staying the same or deteriorating. We have also included last year's grade for comparison.*

### **South Africa's Performance during 2011**

**South Africa is a constitutional democracy with an excellent Bill of Rights and independent courts. However, our constitution, our courts and our democratic institutions are under threat.**

South Africa is a constitutional democracy in which citizens enjoy access to the full spectrum of human rights. There are regular national, provincial and municipal elections that are overseen by an independent electoral commission. The courts function independently and overturn laws and government conduct that is unconstitutional or illegal. South Africans enjoy freedom of expression and free political activity. The media are free and the country has an active, effective and vociferous civil society.

South Africa has an exemplary bill of rights - but the degree to which people enjoy those rights varies considerably in practice.

Human Rights are supported by effective independent institutions - such as the Public Protector and the Human Rights Commission. However, other institutions that are intended to support constitutional government are ineffective or have fallen under the influence of the ruling ANC. The latter include the Judicial Service Commission, which is failing to carry out its primary mandate of nominating fit, proper and impartial candidates for judicial office. The abolition of an effective and independent investigation agency and political control of, and interference in, the National Prosecuting Authority are seriously undermining the integrity of the judicial system and efforts to combat pervasive corruption.

South Africa cannot be termed a non-racial democracy. Race continues to be a major dividing factor and continues to determine, de facto and de jure, access to employment and social, educational and economic benefits. Government policies are increasingly race-based and discriminatory. The tone of the national discourse has become disturbingly - and sometimes aggressively - racist with government condoning - or even supporting such tendencies.

### **Future trends**

Prospects for the future enjoyment of rights have deteriorated. There is now deep concern over the future role of the judiciary in the wake of aggressive criticism of the courts by government; increased pressure for the appointment of pro-government judges; and calls for a review of the powers of the Constitutional Court, accompanied by the government's recent announcement of its intention to review the court's judgments.

Prospects for freedom of expression have deteriorated as a result of the government's intention to press ahead with the adoption of Protection of State Information Bill and the establishment of a 'Media Appeals Tribunal'.

Even more seriously, there are doubts regarding the ruling ANC's commitment to important elements of the Constitution following the release of policy proposals on the "second transition" - which would apparently jettison some constitutional guarantees negotiated by non-ANC parties.

There are indications that the elements in the ANC are guided primarily by the precepts of its National Democratic Revolution ideology, rather than by the values in the Constitution. Two of the parties in the ruling tripartite alliance are committed to the establishment of a socialist (communist) state through a 'dictatorship of the proletariat' that would be fundamentally irreconcilable with the Constitution and the Bill of Rights.

### **Pointers**

Some of the factors that can be expected to affect constitutional rights during the coming year include

- Developments at the ANC's Policy Conference in June 2012 and National Conference in December 2012;
- The further development of the ANC's "second transition" approach - particularly with regard to moves to dispense with 1994 constitutional compromises;
- Further developments relating to the government's proposed review of the judgments of the constitutional court, as well as further statements elucidating its attitude toward the independence of the courts;
- The outcome of the appeal of the Judicial Service Commission against the Cape High Court's Judgment relating to the manner in which the JSC appoints judges;
- The future behaviour of the JSC and its ability to attract and propose fit, proper and impartial candidates for the judiciary;
- Further developments and discussion relating to the *Green Paper on Land Reform*;
- Further developments relating to President Zuma's Commission on the arms deal;
- Developments relating to the independence - or lack of independence - of the National Prosecuting Authority;
- The willingness of the government to adopt measures to ensure that "the Hawks" will be truly independent of political control;
- The degree to which the SA Languages Act will be brought into line with the requirements in section 6 of the Constitution;

- The progress of the raft of labour bills that were introduced into parliament in 2011;
- The implications of the adoption of the *Protection of State Information Bill* - and possible constitutional challenges;
- Further developments and proposals relating to the proposed Media Appeals Tribunal.

## Constitutional Rights

### 1. EQUALITY [Grade:E=] [2011 Grade: E =]

#### Equality before the law and the right to equal protection and benefit of the law

- The decision of the Supreme Court of Appeal on 1 December 2011 to set aside the appointment of Adv Menzi Simelane, as the National Director of Public Prosecutions, because he was not a fit and proper person, was an important step in restoring confidence in the independence of the National Prosecuting Authority. There are, however, still indications of political interference in the NPA, particularly with regard to the manner in which fraud and murder charges against suspended SAPS general Richard Mdluli were dropped or side-lined toward the end of last year. Accordingly, there are still serious doubts regarding the independence of the National Prosecuting Authority and its ability to exercise its functions "without fear, favour or prejudice."

#### Full and equal enjoyment of all rights and freedoms

- South Africa's GINI coefficient, which measures inequality, was .68 in 2009 on a scale where 0 equals absolute equality and 100 equals absolute inequality. This means that South Africa is one of the most unequal societies in the world - with little indication of any improvement.
- At the same time, absolute poverty has been significantly alleviated by the payment of social transfers (children's allowances, pensions and disability allowances) to an increasing number of people. According to Adcorp, 10.2 million South Africans - one in five - receive grants of one form or another, amounting to 14.9 million grants or 1.5 grants per recipient, yielding average annual transfers of R9 539 per beneficiary.

#### Freedom from unfair discrimination.

- The imposition of unconstitutional demographic representivity continues to lead to unfair racial discrimination. Employees of the Department of Correctional Services are taking the Department to the Labour Court because of its policy of prohibiting the employment or appointment of coloureds in the service in the Western Cape - because they are 'over-represented'. According the Department's employment targets the percentage of coloured employees should be reduced to 8.8% - in line with their share of national demographics.
- The imposition of demographic quotas is widespread throughout the public service -

and is a major cause of government dysfunctionality.

- The government has introduced amendments to the *Employment Equity Act* that would remove provincial demographics in the implementation of employment equity.
- Racial admission quotas applied by most universities have resulted in a situation where the race of applicants has become a major factor in gaining admission to tertiary education.

### **White Prosperity**

Despite increasing anti-white government discrimination - white South Africans have continued to prosper. Quite often this has been the unintended consequence of government policies that have led to large numbers of white workers leaving the public service and large companies to start their own businesses or to pursue professions. According to the SAIRR:

- the matric pass rate was 79% for whites compared with 63% for African pupils in 2010;
- 59% of 20-24 year-old whites are enrolled in higher education compared with just 14% of Africans in the same age group;
- the unemployment rate among whites is 6% compared with 29% among Africans;
- white per capita income is seven times higher than that of Africans;
- 71% of whites are covered by medical aid compared with only 10% of Africans; and
- 65% of the highest living standards group (LSM 10) are white compared with 19% African.

These gaps are slowly narrowing, but the data paints a picture of a white population with still many more opportunities and advantages than the vast majority of their black compatriots.

### **Gender Equality**

- According to the United Nations Development Programme assessment of 2011, South Africa had a gender inequality index of .490 - which put it in 94th position in the world.
- However, 42.7% of Members of parliament are women - one of the highest percentages in the world.

## **2. HUMAN DIGNITY [Grade: C=] [2011 Grade: C=]**

- The human dignity of many South Africans continues to be impaired by failure to make progress with the realisation of other rights and specifically the right to equality.
- Human dignity is seriously impaired by degrading levels of poverty and persistent unemployment. Real unemployment levels among black South Africans exceed 40%.
- The dignity of Afrikaans-speaking South Africans - and the speakers of seven

black indigenous languages - will be affected if their languages are *de facto* deprived of their official status by the South African Languages Bill that is currently before Parliament.

- Human dignity continues to be impaired by crime, inadequate education and poor service delivery.

### **3. LIFE [Grade: E+] [2011 Grade: E=]**

- Prospects for enjoyment of the right of life are improving because of the successful impact of antiretroviral drugs on HIV/AIDS deaths. Progress is also being made in reducing the murder rate. Nevertheless, overall deaths from AIDS and murder are still unacceptably high.
- The number of murders declined from 16 834 in 2009/10 to 15 940 in 2010/11. This gives South Africa a murder rate of 31.9 per 100 000 - one of the highest in the world. This is, however, a considerable improvement on the 66.9/100 000 rate in 1995 and the 37/100 000 rate in 2008/2009.
- More than 145 000 people were murdered in South Africa between 2003/04 and 2010/11. This is twelve times the number of South Africans who died in the six years of World War II and six times the number of South Africans who were killed in political violence between 1960 and 1994.
- 5.7 million South Africans have HIV/AIDS - the highest number in the world - with approximately 1 000 new infections per day.
- South Africa has the largest antiretroviral programmes in the world. The number of people receiving antiretroviral treatment increased significantly from 923,000 in February 2010 to 1.4 million in May 2011. The programme has helped reduce AIDS deaths from 257 000 in 2004 to 190 000 in 2010. Nevertheless, new infection rates remain high.
- The number of deaths in police custody declined by 7% between 2010 and 2011 from 860 to 797.

### **4. FREEDOM AND SECURITY OF THE PERSON [Grade: D=] [2011 Grade: D=]**

- The very high continuing incidence of assault, sexual offences and child abuse seriously undermine the right to freedom and security of the person.
- South Africa has one of the highest rape rates in the world. The official statistic of 138.5 sexual offences per 100 000 people seriously underestimates the actual rate, since in surveys, one in three men admit to having raped a woman.

### **5. SLAVERY, SERVITUDE AND FORCED LABOUR [Grade: A=] [2011 Grade: A=]**

There are few instances of slavery, servitude or forced labour, apart from instances of the so-called "white slave trade".

### **6. PRIVACY [Grade: B=] [2011 Grade: B=]**

The privacy of citizens is generally respected. Sufficient legislative safeguards exist with regard to state interception of written, telephonic and electronic communication.

#### **7. FREEDOM OF RELIGION, BELIEF AND OPINION [Grade: A=] [2011 Grade: A=]**

Freedom of religion, belief and opinion is widely enjoyed by citizens and organisations.

#### **8. FREEDOM OF EXPRESSION [Grade: C-] [2011 Grade: C-]**

- There is general freedom of expression within the limits set by the Constitution.
- The government's effective control over the public broadcaster has inhibited the right to freedom of expression.
- Support for the "shoot the farmer" song by the ruling ANC and its failure to condemn statements by Mr Julius Malema for calling white South Africans criminals and urging that their land should be seized without compensation is irreconcilable with accepted interpretations of the freedom of expression.
- Although the proposed *Protection of State Information Bill* has been significantly improved, the continuing absence of a public interest defence and the draconian sentences provided for in the legislation, will inhibit investigative journalism and undermine public access to information on government activities
- Proposals for a Media Appeals Tribunal will also have to be carefully scrutinised to determine the degree to which they might undermine freedom of the media.

#### **9. FREEDOM OF ASSEMBLY, DEMONSTRATION, PICKET AND PETITION [Grade: B=] [2011 Grade: B=]**

This right is generally enjoyed, although certain strikes and demonstrations have turned violent, infringing the rights of others.

#### **10. FREEDOM OF ASSOCIATION [GRADE: A =] [2011 GRADE: A=]**

This right is universally and freely enjoyed.

#### **11. POLITICAL RIGHTS [Grade: C-] [2011 Grade: C-]**

- South Africa is a fully-fledged constitutional democracy enjoying universal adult franchise, a national common voters' roll, regular elections and a multiparty system of democratic government.
- However, effective control of both the legislature and the executive lies in the hands of those who control the majority party. The ruling party applies a policy of cadre deployment which gives it control over all government leaders, including the country's President.
- There is little accountability of members of parliament to the voters who theoretically elected them. MPs are instead accountable to the ruling party because in terms of section 47 (c)(3) of the Constitution, they stand to lose their seats in

parliament if they lose their membership of the party that included them in their election lists.

- The South African Communist Party, a registered political party, continues to hold more than 70 seats in the National Assembly under the aegis of the ANC without having contested any election in its own name.
- Free political activity is threatened by the fact that two of the partners in the ruling tripartite alliance, the South African Communist Party and COSATU are committed to the establishment of a communist state under the rule of the dictatorship of the proletariat.
- The SACP is also committed to securing power through non-electoral means - primarily by infiltrating and increasing its control of the ruling ANC.
- Any such developments would destroy free political activity as well as South Africa's human rights-based constitutional democracy.

#### **12. CITIZENSHIP [Grade: A=] [2011 Grade: B=]**

Citizenship rights are generally acknowledged and enjoyed.

#### **13. FREEDOM OF MOVEMENT AND RESIDENCE [Grade: A=] [2011 Grade: A=]**

This right is freely enjoyed.

#### **14. FREEDOM OF TRADE, OCCUPATION AND PROFESSION [Grade: D-] [2011 Grade: D-]**

- Although the freedom is formally available, high unemployment of 35.9% effectively deprives millions of South Africans of this right.
- Unbalanced affirmative action increasingly prevents some South Africans from practising the trade, occupation or profession of their choice.
- The proposed raft of labour Bills - the *Basic Conditions of Employment Act Amendment Bill*, *Labour Relations Amendment Bill*, *Employment Equity Amendment Bill* and the *Employment Services Bill*, will seriously impact on the right of people to choose to work for labour brokers or pursue other forms of atypical or temporary employment.
- The ban on labour broking under these bills will also infringe the right of labour brokers to pursue occupations of their choice and would lead to the loss of an estimated 500 000 workers.

#### **15. LABOUR RELATIONS [Grade: B-] [2011 Grade: A-]**

This right is generally enjoyed. However, there is a growing perception that the balance in labour relations has swung so strongly against employers and that their rights are being increasingly compromised.

- The four draft Labour Bills still before parliament propose far more rigid labour laws.
- Relations between employers and trade unions are often very negative. In 2011



South African lost 12 million days to strikes compared with 2.9 million workdays in 2009.

- According to the World Economic Forum's *Global Competitiveness Report* for 2011 pay and productivity of workers was 130th out of 142 countries surveyed. Co-operation in labour-employer relations and the flexibility of labour wage determination were in 138th position and hiring and firing practices were in the 139th position.

#### **16. ENVIRONMENT [Grade: C=] [2011 Grade: C-]**

- According to the UNDP South Africa's environmental performance index of 50.8 is just a little worse than the world average index of 54.4.
- South Africa is dependent of fossil fuels for 87.2% of its energy requirements compared with a world average of 72.3%.
- Carbon dioxide emissions of 8.8 tons per capita were twice the world average.

#### **17. PROPERTY [Grade: C-] [2011 Grade: C-]**

- Property rights are increasingly under threat.
- The effective expropriation of some mineral rights has seriously undermined property rights.
- The *Green Paper on Land Reform* that was released in 2011 proposes that freehold property rights of South Africans should be limited and that foreign ownership of property should be seriously restricted.
- The ANC's policy discussion paper on "the second transition" raises the possibility that the ANC might be contemplating further moves to redistribute property in line with its National Democratic Revolution ideology.
- According to the ANC's Strategy and Tactics documents "a critical element of the programme for national emancipation should be the elimination of apartheid property relations" including "the de-racialisation of ownership and control of wealth, including land."
- These concerns are exacerbated by increasingly vociferous calls for the nationalisation of mines and the expropriation of land.
- The fact that government pays only 60% of market value in land restitution claims also constitutes de facto deprivation of property.

#### **18. HOUSING [Grade: B+] [2011 Grade: B+]**

- By 2010/2011 the government had built more than 3 million houses and another 930 000 were in the planning stage. 76.2% of South African households lived in formal dwellings, 13.5% were still in informal dwellings and 10.4% were in traditional dwellings. Nevertheless, there remains an unacceptably large backlog of 2 million homes. Problems continue to exist with housing lists.
- The poor quality of workmanship in many of the RDP houses undermines the right



to access to adequate housing.

#### **19. HEALTH CARE [Grade: D+] [2010 Grade: D-]**

- The government has announced that it intends to introduce a National Health Insurance system in terms of which all South Africans will eventually enjoy free medical cover. It is still not clear how the scheme will be funded and how it will work.
- South Africa spends approximately 8.5% of GDP on health services. Public health expenditure accounts for 4.6% of GDP and private health expenditure the remainder.
- Private health care, which is enjoyed by 16% of the population, is generally of high world standard, but public health care is relatively poor, despite increases in expenditure. Service in many clinics and state hospitals remains unsatisfactory and there is a dire shortage of nurses.
- The most serious health threat remains HIV/AIDS which also has a negative impact on tuberculosis rates and infant mortality. Between 2009 and 2010 the number of people with HIV/AIDS increased from 5.7 million to 5.8 million people.

#### **20. FOOD, WELFARE AND SOCIAL SECURITY [Grade: B=] [2011 Grade: B-]**

- The Government has succeeded in providing access to electricity water and sanitary services to more than 73% of the population.
- The number of social grants paid by the government increased 14.1 million in 2009/2010 to 14.9 million in 2010/2011. However, because each grant recipient receives on average 1.5 grants the total number of recipients is 10.2 million - or approximately 20% of the population. According to Adcorp, the average grant is R9 535 per recipient.
- There are serious concerns that precipitate land reform could negatively affect South Africa's ability to produce sufficient food for the population. There is currently little movement on the 13 000 farms that have been gazetted for the land claims. Because of uncertainty, banks are hesitant to provide financing for production purposes.
- The fact that more than 90% of the 5.9 million hectares of land that the state has bought for emerging farmers is no longer productive poses a threat to our food security.

#### **21. CHILDREN [Grade: D=] [2010 Grade: D=]**

- The ample children's rights guaranteed by the Constitution are largely unavailable in practice to millions of children.
- Child abuse is widespread. 24 405 assaults were reported to the SAPS in 2010/11.
- Only 28% of black children had both parents in their homes. 50% of coloured children, 80% of white children and 83% of Indian children had both parents at



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home.

- During 2010/2011 906 children were murdered - 6.1 % fewer than the preceding year.
- There was a 2.6% increase in sexual offences against children during 2010/11 involving 28 128 cases.
- An estimated 63 000 children were infected with HIV in 2011 primarily as a result of mother to child transmission. The infant mortality rate has decreased from 56.9 deaths per 1000 infants in 2001 to 37.9 per 1000 infants in 2011.
- There are 1.9 million AIDS orphans - that is children who have lost one or both parents as a result of AIDS.
- More than 66% of children drop out of school without a matriculation certificate.
- 74% of young people between the ages of 18 and 24 are unemployed.

## **22. EDUCATION [Grade: E+] [2011 Grade: E+]**

- Poor education continues to be one of the greatest challenges confronting society.
- Of the 1 055 397 who entered the public school system in 2000 only 496 593 (47%) wrote the matric exam in 2011. Of the original intake only 348 117 (33%) passed the matric examination.
- However, most matrics had little value, since the exam can be passed by attaining 40% in three subjects and 30% in three others.
- According to figures quoted in the National Planning Commission's Diagnostic Report, 20% of teachers in black schools are absent on Mondays and Fridays. On average teachers in black schools spend only 3.5 hours per day teaching, compared with 6.5 hours per day in the former model C schools.
- South African children fare very badly in international literacy and numeracy tests, even when compared with results in the poorest African states.
- The *Global Competitiveness Report* revealed that South Africa is ranked 133rd out of 142 countries in so far as the quality of our education system is concerned. The quality of our maths and science education places us 138th.
- However, government - particularly in the National Development Plan - has shown new determination to take practical steps to address the problems in education.

## **23. THE RIGHT TO EDUCATION IN THE LANGUAGE OF ONE'S CHOICE [Grade C-]**

- The right to education in the language of one's choice is under severe pressure as a result of recent court judgments that have limited the right of school governing bodies to determine language policy and to decide when schools are full.
- Failure to provide black children with education in their mother-tongue during the first 6 - 7 years of schooling is one of the main causes of subsequent education failure.
- Afrikaans is under great pressure at three of the four remaining universities that still provide Afrikaans-language tuition.
- It is feared that this right might be one of the rights that the ANC plans to dispense

with during its proposed "second transition."

#### **24. LANGUAGE AND CULTURE [Grade: D-] [2011 Grade: D+]**

- In 2010, in *Lourens vs the President*, regarding the failure of the government to adopt legislation to give effect to the language provisions in section 6 of the Constitution, the Pretoria High Court found that the government had failed to monitor the use of official languages through the adoption of legislative and other measures. The Court ordered the responsible minister to adopt the necessary legislation within two years of the judgment.
- The government recently produced the *South African Languages Bill* in response to the court's order - but it fails completely to meet the requirements in section 6 of the Constitution.
- The outlook for language rights has deteriorated since the introduction of the *South African Languages Bill*. The Bill would require government departments to use two black languages and one previously advantaged language, either English or Afrikaans. Since English is the *lingua franca* this means, in practice, that Afrikaans and seven black languages would no longer be used by government.
- English remains the *de facto* single official language.
- Little has been done to comply with the requirement in section 6(2) of the Constitution that "the State must take practical and positive measures to elevate the status and advance the use of black indigenous languages."
- Afrikaans education, both at schools and at universities, is under pressure.

#### **25. CULTURAL, RELIGIOUS AND LINGUISTIC COMMUNITIES [Grade: B-] [2011 Grade: B=]**

- According to the *Green Paper on Land Reform* "all anti-colonial struggles are, at the core, about two things: repossession of land lost through force or deceit; and, restoring the centrality of indigenous culture." The statement, which has been repeated several times by the Minister of Land Reform and Rural Development, implies that indigenous cultures are "central" and therefore superior to other cultures.
- The government shows little interest in wanting to help preserve the cultural assets of minorities.
- There are fears that cultural rights might also be negatively affected by the ANC's proposed "second transition".

#### **26. ACCESS TO INFORMATION [Grade: D-] [2011 Grade: D-]**

- Although the right is granted by the Constitution, it is often difficult or impossible to obtain relevant information from the state.
- The proposed *Protection of State Information Bill* will seriously limit access to information from organs of the State, including government departments and parastatals.

## **27. JUST ADMINISTRATIVE ACTION [Grade: C=] [2011 Grade: C-]**

The decline in service delivery and standards, particularly in some of the poorer provinces, has made it difficult for some people to claim their right to just administrative action. Fortunately, the courts generally uphold this right when they are approached.

## **28. ACCESS TO THE COURTS [Grade: B=] [2011 Grade: C=]**

- The courts are theoretically accessible. However, many citizens who do not have the resources to appoint lawyers find it difficult to press their claims unless they are assisted by legal resource centres or legal aid.
- The unacceptably high backlog at the Courts and delays further deprives people of this right, as does the dysfunctional criminal justice system, which often results in cases being thrown out.
- Individuals and civil society organisations have been able to apply to the courts for redress in a number of high-profile cases:
  - In *Glenister vs the President*, in March 2011, the Constitutional Court found that the legislation in terms of which the government had established the Directorate of Priority Crime Investigation (the 'Hawks') was unconstitutional because it had failed to secure an adequate degree of independence for the unit. The Court gave Parliament 18 months to remedy the defect.
  - On 29 July 2011, the Constitutional Court, in a case brought by a number of civil society organisations against the President, thwarted President Zuma's wish to extend the term of Chief Justice Sandile Ngcobo.
  - On 30 September 2011, the Cape High Court found in favour of the Cape Bar Council in its case against the Judicial Service Commission regarding its failure to appoint suitable judges to the Cape Bench earlier in the year. The Court declared the JSC's proceedings unlawful and invalid and directed the JSC to consider afresh the applications of candidates who were not selected earlier in the year.

## **29. ARRESTED, DETAINED AND ACCUSED PERSONS [Grade: D=] [2011 Grade: D-]**

- South Africa's prisons continue to be seriously overcrowded.
- Overcrowding continues to result in gangsterism and contributes towards the high level of recidivism.
- Awaiting trial prisoners are subjected to unacceptable delays due to the collapsed criminal justice system.

[2012-03-21]