

CENTRE FOR CONSTITUTIONAL RIGHTS HUMAN RIGHTS REPORT CARD 2015

In terms of section 7 of the Constitution, the Bill of Rights is a cornerstone of democracy and enshrines the rights of all people in South Africa. It affirms and gives effect to the constitutional values of human dignity, achievement of equality, advancement of human rights and freedoms, non-racialism and non-sexism, and is protected by the supremacy of the Constitution and the Rule of Law. These constitutional values and fundamental rights are interrelated, interdependent and indivisible and the failure to protect or fulfil one right consequently affects the realisation of another. In most such instances, the right to human dignity is almost always affected.

In terms of section 7(2) of the Constitution, the state must respect, protect, promote and fulfil the rights in the Bill of Rights. Accordingly and in terms of section 8 of the Constitution, the legislature, the executive, the judiciary and all organs of state are bound by the Bill of Rights. In principle, natural and juristic persons are also bound by the Bill of Rights, ensuring that the Bill of Rights does not only apply vertically between the state and the people, but also between people as groups and individuals. However, the growing failure within South Africa to fully appreciate and adhere to all of the aforementioned constitutional values - especially those of accountability, responsiveness and openness, but also non-racialism and non-sexism - is having a direct impact on the realisation of human rights and freedoms.

Nevertheless, on average, the people of South Africa are enjoying most of the fundamental rights enshrined in the Bill of Rights in one way or another. This includes a fairly wide enjoyment of most political and civil rights, although the same cannot be said about the realisation of socio-economic rights.

Inequality in its various manifestations, which includes persisting poverty, unemployment, access to quality basic education, health services, water and sanitation services, remains a challenge. Hence, although more communities have access to housing, electricity and water than ever before, the inability to provide these services in a sustainable manner to all people - especially at local government level - remains the primary cause of ongoing service delivery protests across the country. Similarly, the quality of basic education offered in the majority of South African schools continues to be low.

The lack of accountable, responsive and transparent government in general is of great concern. The impact on public administration and service delivery (whether due to unconstitutional conduct, corruption, wasteful expenditure or incompetence) remains one of the greatest threats to human rights and freedoms - especially the realisation of socio-economic rights. Fortunately, independent courts frequently strike down unconstitutional legislation and executive action.

Some state institutions established to support constitutional democracy - especially the Public Protector and to an extent the Human Rights Commission - are playing important roles in advancing human rights and identifying unconstitutional behaviour across the

spectrum. The latter institutions are unfortunately often publicly criticised and decried by the national executive and Parliament, seriously undermining the integrity of these constitutional entities. In turn, Parliament has, to a large extent, not performed its constitutional role of holding the national executive accountable for its actions and inactions. Instead of fulfilling its proper oversight role, it often appears as if Parliament is intent on protecting the national executive from criticism and on stifling debate on matters of importance to the electorate. Encouragingly, the media remain relatively free and objective, and civil society continues to be vociferous and engaged in the promotion of constitutional values and human rights.

Crime and violent crime are at alarming levels (the murder rate increasing for a second consecutive year to more than five times the 2013 global average of six murders per 100 000) while the South African Police Service (SAPS) in some instances continues to show an apparent disregard for human rights and a human rights culture among its members. The latter directly and negatively impacts on various rights in the Bill of Rights. The realisation of a number of fundamental rights in the Bill of Rights is not only dependent on the SAPS operating as a professional and effective service, but on its operating within the parameters of the Constitution and its Bill of Rights.

In addition, the treatment of migrants, refugees and asylum-seekers by government officials and South Africans is of ever increasing concern. This treatment ranges from incidents of foreigners being denied healthcare, to outright violent xenophobic attacks on foreigners and their property. In this regard, the government seems unwilling or unable to identify these violations against foreigners as xenophobia or to successfully prevent or prosecute these crimes.

There are serious concerns that the right to equality before the law is being subverted by improper interference by the national executive in the activities and management of the National Prosecuting Authority (NPA), the South African Revenue Service (SARS) and the Directorate of Priority Crime Investigation (DPCI) within the SAPS.

Land reform and property rights continue to generate political rhetoric with seemingly contradictory messages being communicated by the government, creating uncertainty about the future of property rights in South Africa. Land reform is a constitutional imperative, but proposed legislation aimed at land reform remains problematic. In addition, land restitution claims have been reopened - despite a backlog of claims going back to 1998, and the Department of Rural Development and Land Reform's annual budget being insufficient to cater for the new land claims. A drive by the Economic Freedom Fighters (EFF) to promote and support illegal land occupation is also of great concern.

Sadly, racial discrimination and renewed acts of racism continue to be a major dividing factor in South Africa and continue to play a determining role in access to employment, as well as the enjoyment of social, educational and economic rights. Although the Constitution requires measures to promote the achievement of equality, such measures have often

disregarded the prohibition against unfair discrimination and have benefited only a small portion of the previously disadvantaged population. The right to equality of the great majority of the population has been seriously undermined by their lack of access to quality education and to employment.

Government policies (including the notion of numerical national demographic representation across all spheres of society) are increasingly race-based. Moreover, the tone of the national and political discourse has become disturbingly and aggressively racial and intolerant in nature. This was also evident from a number of incidents of racism perpetrated by individuals.

FUTURE TRENDS

The judiciary continues to play its core role in the administration of justice. Although the lower courts have been criticised for undue delays in deciding cases and settling matters, the higher courts have emphasised the importance of judicial review of executive authority, not just in terms of the *Promotion of Administrative Justice Act* but also as an incidence of the Rule of Law. The Office of the Chief Justice has been established as a separate entity from the Department of Justice and Constitutional Development, arguably enhancing the independence of the judiciary.

The judiciary in general - and especially the Constitutional Court - is expected to continue to strike down legislation and executive acts not meeting constitutional muster. Nevertheless, concern remains over the future independence of the judiciary in the wake of criticism of the courts by the government, especially in relation to judicial review of government actions and decisions.

Political interference and the apparent politicisation of the criminal justice system and the security services is a growing concern. It will be of particular importance to ensure effective scrutiny and oversight of the intelligence structures - which will be difficult given the secrecy surrounding the work of these structures, the Inspector General of Intelligence (IGI) and Parliament's Joint Standing Committee on Intelligence (JSCI). In fact, it is likely that these structures will increase secrecy and further limit public scrutiny. It is also likely that law enforcement agencies and intelligence structures may be deployed against legitimate political party interests and critics of the government (apparently also including the Public Protector) given statements by the presiding officers in Parliament and members of Cabinet that certain opposition party actions (even in Parliament) constituted "threats" to national security.

Unless effectively addressed by way of the draft White Papers on the Police and Safety and Security (as well as legislation to that effect), the lack of an apparent human rights culture within the SAPS will increase the likelihood of more incidents of police brutality.

Gender equality and violence against women and children remain a great concern. The government's inability to effectively prevent, suppress and prosecute these crimes is

exacerbated by a patriarchal society and very high rate of violence and sexual offences in general.

Although the right to education is enjoyed in principle, with rising matric pass rates year on year, only one-eighth of the learners who have started school since 1994 have emerged from the system with a university entrance matric. In the absence of successful intervention by government, and a tendency to measure educational success by a rising matric pass rate (based on three subjects at 40% and three at 30%), the great majority of South African children will for all practical purposes, continue to be denied their right to decent basic education.

Government has announced its intention of accelerating the land reform process but has promised to deal with it within the framework of the Constitution. Nevertheless, land reform, illegal land occupation and property rights in general will remain high up on the agenda for the foreseeable future.

More than 30 service delivery protests every day - a fifth of which are violent - reflect the growing frustration at the lack of access to basic services and high unemployment rates. In the run-up to the local government elections in 2016, these protests are likely to continue and even increase.

Effective implementation of the National Development Plan (NDP) will have a positive effect on the realisation of a number of human rights. The NDP, however, does not enjoy the support of all within the governing party and its alliance partners and may face great difficulty in being implemented in full.

KEY DRIVERS

Some of the factors and drivers that can be expected to affect human rights in 2015 include:

- The ability of Parliament to ensure effective oversight over the national executive - thus ensuring accountability, responsiveness and openness;
- The continuing independence and integrity of the courts and particularly of the Constitutional Court;
- The effectiveness, independence and integrity of Chapter 9 institutions - especially the Public Protector, the Human Rights Commission, the Independent Electoral Commission and the Auditor-General;
- The influence of civil society and public participation in democratic processes, including legislative processes and public discourse;
- The impact of an increasingly racialised political and national discourse;
- The state of reconciliation, and individual convictions and perceptions of unity in diversity, non-racialism and levels of tolerance;



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- The ability of the government to effectively address socio-economic rights such as health, education and housing;
- The impact of a failing basic education system on the achievement of equality in the long run;
- The impact of an economic downturn, low predicted growth-rate, poorly performing public enterprises, and energy crisis on the economy and socio-economic rights;
- The impact of immigration and visa regulations hostile to tourism;
- The future behaviour of the Judicial Services Commission (JSC) and its ability to attract and propose fit, proper and impartial candidates for the judiciary;
- The impact of the *Protection of State Information Bill* and acts of intimidation towards journalists and others on freedom of expression;
- The impact of political interference on key state institutions including the NPA, SARS, SAPS and the ability of the NPA and the criminal justice system to act without fear, favour or prejudice;
- The impact of the deployment of law enforcement agencies and intelligence structures by the state to stifle legitimate opposition party political interests, and to further, in a partisan manner, political interests of the governing alliance;
- The impact of police brutality in the absence of firm leadership and an entrenched culture of human rights within SAPS - and the findings of the Marikana Commission of Inquiry into the Marikana-shootings;
- The impact of crime on a variety of human rights, society and the economy;
- The impact of new legislation and policies potentially weakening property rights, and growing unease in key sectors of the economy such as agriculture and mining, given the prevalence of violent strikes and uncertain property rights;
- The impact of continued cadre deployment, resulting in ineffective public administration including the public service, organs of state and public enterprises, rendering them unable to deliver on their mandates such as producing sufficient energy or clean water; and
- The impact of South Africa's high murder rate and prevalence of HIV/AIDS on the right to life.

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