

CIVIL RIGHTS INDEX

*A report by AfriForum Navorsing in association with
trade union Solidarity and Hurter Spies Inc.*



The *AfriForum Civil Rights Index* focuses on key events in the realisation of first-generation rights in South Africa. It was compiled by various contributors within AfriForum, trade union Solidarity and legal practitioners. The report analyses some of the most prominent events concerning the realisation of various first-generation rights in South Africa, mainly from 2017 to 2020. It uses as a guide parts of the South African Constitution.

Content

Introduction	1
AfriForum's position	1
Civil rights in the context of human rights	2
Government size	2
Methodology and analysis.....	3
Life	5
Murders and the justice system	5
The state of the public health system and hospitals	6
Conclusion	8
Dignity	9
Race relations, ethical behaviour and treatment of women and children	10
Politicians' attitudes on dignity.....	10
Conclusion	12
Freedom and security of the person.....	13
Security of the freedom.....	13
Security of the person	14
Conclusion	15
Slavery, servitude and forced labour	16
Government response	17
Conclusion	18
Privacy	19
Conclusion	22
Freedom of religion, belief and opinion.....	23
Constitutional and judicial background	23
Demographic and historical background	24
Developments	24
Conclusion	25
Freedom of expression	26
Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000	27
Conclusion	28

Assembly, demonstration, picketing and petitioning	29
Assembly and demonstration	29
Petition	29
Picketing.....	30
Legislative framework	30
Rights being realised	30
COVID-19	32
Conclusion	32
Freedom of association.....	34
Conclusion	36
Political rights.....	37
Conclusion	40
Citizenship.....	42
Department of Home Affairs.....	42
Emigration	43
Conclusion	44
Freedom of movement and residence.....	45
The state of roads	45
Immigrants	46
The lockdown and the limitation of freedom of movement.....	47
Passports and travel	48
Conclusion	49
Freedom of trade, occupation and profession	50
Economic freedom.....	50
Affirmative action and black economic empowerment	51
Businesses and the ban on the sale of alcohol and cigarettes.....	52
Conclusion	53
Property	54
Section 25	54
Property crimes in South Africa and international rights rankings.....	56
Conclusion	56
Language and culture.....	57
Conclusion	60

Access to courts	61
Legal costs, backlogs and vacancies.....	61
Conclusion	63
Arrested, detained and accused persons	64
Awaiting-trial detainees, police brutality and deaths in custody	64
COVID-19 arrests.....	65
Conclusion	66
Concluding remarks and recommendations for protecting civil rights	67

Abbreviations

ANC	African National Congress
CA	Citizenship Act 88 of 2005
CPA	Criminal Procedures Act 51 of 1977
CPR	Civil and political rights
DHA	Department of Home Affairs
DOJCD	Department Justice and Constitutional Development
DPWI	Department of Public Works and Infrastructure
EFF	Economic freedom Fighters
ICE	Independent Electoral Commission
ISS	Institute for Security Studies
IRR	Institute of Race Relations
LRA	Labour Relations Act 66 of 1995
MEC	Member of the Executive Committee
NDR	National Democratic Revolution
NEC	National Executive Committee (ANC)
NGO	Non-governmental organisation
NPA	National Prosecuting Authority
POPIA	Protection of Personal Information Act 4 of 2013
PP	Public Protector
RGA	Regulation of Gatherings Act 205 of 1993
RICA	Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002
SANDF	South African National Defence Force
SAPS	South African Police Service
SER	Socio-economic right(s)
SOE	State-owned enterprise
SU	Stellenbosch University
Unisa	University of South Africa

Introduction

A host of problems plague South Africa. Transparency International's 2020 *Corruption Perceptions Index* ranked South Africa 69th out of 180 countries on perceived levels of corruption in the public sector. South Africa lags behind two of its neighbours, namely Botswana (ranked 35th) and Namibia (ranked 57th).¹ Ethiopia, one of Africa's fastest-growing economies, achieved an 8,5% gross domestic product (GDP) growth rate in 2018. This comes, in part, due to privatisation and the selling of state-owned enterprises (SOEs) to foreign investors.² In comparison, financially troubled local SOEs, such as South African Airways (SAA) and the national power utility Eskom, continue to receive government bail-outs, with no viable recovery strategies in place.

Violent crime continues to threaten households and polarising political rhetoric often makes the headlines, in part eroding social cohesion. There seems to be a general pessimism about the direction the country is heading. A 2020 *Ipsos Pulse of the People* survey found that only about half (49%) of South Africans aged 15 and older agreed or strongly agreed that they generally felt optimistic about the country.³

There is also no clear roadmap and policy certainty available to business, civil society or the general public to supply a framework for recovery and economic growth. Although individual segments within the National Development Plan 2030 (such as curbing unemployment)⁴ is something to aspire to, it is questionable whether these goals can be reached.

AfriForum's position

It should be made clear from the outset that AfriForum neither wants nor advocates the decline of state institutions. The consequence of absolute state failure will usher in a detrimental period of economic, social and political degradation.

AfriForum believes that South Africa has not yet reached its tipping point regarding a turnaround strategy. However, the organisation is confident that if solutions are possible (and we believe they are), it is doubtful – given the track record of government thus far – that solutions will come

¹ *Corruption Perception Index 2020*. 2020. Berlin: Transparency International. Available at <https://www.transparency.org/en/cpi/2020/index/zaf>. Accessed on 16 February 2021.

² Newell, M. 2019. Top 5 fastest-growing economies in Africa. *World Finance*, 21 March. Available at <https://www.worldfinance.com/markets/top-5-fastest-growing-economies-in-africa>. Accessed on 5 February 2021.

³ Ipsos. 2020. *News & Polls. South Africans unsure of what to expect in 2020*. 17 February. Available at <https://www.ipsos.com/en-za/south-africans-unsure-what-expect-2020>. Accessed on 14 February 2020.

⁴ <https://www.gov.za/sites/default/files/Executive%20Summary-NDP%202030%20-%20Our%20future%20-%20make%20it%20work.pdf>.

from government or organs of state. Answers will more likely come through community actions and participation. AfriForum’s official charter states:⁵

AfriForum’s vision does not ask for special treatment for any community, but strongly demands that the basic civil rights that communities and individuals have at their disposal according to international declarations and the Constitution of South Africa be honoured.

This report may offer a valuable contribution towards creating awareness of civil and human rights in general in South Africa and highlighting the value of first-generation rights.

Civil rights in the context of human rights

Sometimes called *first-generation rights* or *blue rights*, civil and political rights (CPRs), along with second- and third-generation rights, form part of human rights evolution.⁶ As a cluster of rights, CPRs focus on the curbing of government power.⁷ Hence, first-generation rights refer to *political and civil rights and freedoms*, while second-generation rights emphasise *socio-economic activities* such as the right to housing. Lastly, third-generation rights place the focal point on *collective development*, such as the right to a healthy environment.⁸

Government size

The South African government’s overall cabinet size is one of the largest in the world, with more cabinet positions than India, Nigeria, the United Kingdom and Brazil, each of whom has much larger populations than South Africa.⁹ Correspondingly, there are more than 130 SOEs in South Africa. In terms of the Disaster Management Act 57 of 2002 (in response to the COVID-19 pandemic), government may implement policies to curb people’s fundamental human rights – and it has done so.

Altogether, government has a tremendous amount of power (authoritative as well as legislative) and resources at its disposal. The overreach of authority is evident by what has been commonly

⁵ AfriForum. 2019. *Civil rights charter*. Available at <https://www.afriforum.co.za/wp-content/uploads/2019/07/Civil-Rights-Charter-2019.pdf>. Accessed on 2 February 2020.

⁶ Viljoen, F. 2009. International human rights law: A short history. In *United Nation Chronicle*. Available at <https://www.un.org/en/chronicle/article/international-human-rights-law-short-history>. Accessed on 22 January 2020.

⁷ Council of Europe. 2017. *The evolution of human rights, Council for Europe*. Available at <https://www.coe.int/en/web/compass/the-evolution-of-human-rights>. Accessed on 2 February 2020.

⁸ Sarani, M.R., Sadeghi, S.M. & Ravandeh, H. 2017. The concept of “right” and its three generations. In *International Journal of Scientific Study* 5(4): 37–41. Available at http://www.ijss-sn.com/uploads/2/0/1/5/20153321/ijss-iran_jul_oa06_-_2017.pdf. Accessed on 22 January 2020.

⁹ Wasserman, H. 2019. South Africa’s cabinet remains much bigger than in other countries – here’s how we compare. *Business Insider*, 30 May. Available at <https://www.businessinsider.co.za/cabinet-size-2019-5>. Accessed on 3 March 2021.

referred to as “state capture”. However, state capture may only be part of a much larger ideological problem.

In June 2020, ahead of the ANC’s National Executive Committee (NEC), a memorandum began circulating on WhatsApp groups about how and where ANC cadres should be deployed within state entities and that deployment procedures called for the vetting of these candidates. While ANC sources confirmed the document’s authenticity to news outlets, the document’s content was later denied by a spokesperson for the ANC when confronted by the claims, calling it fake.¹⁰ Regardless of whether the document’s content was fabricated or not, it carries the undertones of the ANC’s endorsement of the National Democratic Revolution (NDR). While the NDR appears to be democratic in its name, it is incongruous with the idea of the separation of powers, since the “ANC’s cadre deployment strategy (the ANC policy of deploying party members to take control of ‘key levers of power’) involves a systematic attempt to eliminate the distinction between party and state”.¹¹ Moreover, it is incompatible with the idea of a fair democratic process.

Given government’s power, it could infringe on rights – either intentionally or unintentionally – with relative ease. Hence, the need for protected and respected CPRs.

Accordingly, it is AfriForum’s belief that self-governing communities and autonomous non-governmental organisations (NGOs) can help strengthen democratic principles because of their ability to innovate and their lack of bureaucracy.

Methodology and analysis

The methodology followed to determine the realisation of each right includes statistics, interpretation of legislation and proposed legislation, and an analysis of other relevant sources and events.

Although each right is discussed separately in this document, it is vital to bear in mind that the different rights are interdependent.

The rights analysed in this report are:

- Life

¹⁰ Du Plessis, C. 2020. ANC denies authorship of deployment memo. *Daily Maverick*, 29 June. Available at <https://www.dailymaverick.co.za/article/2020-06-29-anc-denies-authorship-of-deployment-memo/#gsc.tab=0>. Accessed on 22 January 2021.

¹¹ Myburg, J. 2019. *Why cadre deployment is a threat to constitutional democracy*. Politicsweb, 21 January. Available at <https://www.politicsweb.co.za/opinion/why-cadre-deployment-is-a-threat-to-constitutional>. Accessed on 14 February 2021.

- Dignity
- Freedom of security of persons
- Freedom from slavery, servitude and forced labour
- Privacy
- Freedom of religion, belief and opinion
- Freedom of expression
- Assembly, demonstration, picketing and petitioning
- Freedom of association
- Political rights
- Citizenship
- Freedom of movement and residence
- Freedom of trade, occupation and profession
- Property
- Language and cultural rights
- Access to courts
- Arrested, detained and accused persons

It should be remembered that an analysis of these rights in a given country is not undertaken solely on a strictly quantitative basis. Internationally, there is no consensus on the indicators that should be used to measure the realisation of human rights. Most rights are difficult to quantify, and research into rights is often regarded as subjective and qualitative. Since human rights are difficult to measure, discussing the prevailing circumstances in the country is the only means of measuring whether a specific right is realised or not. While this report focuses only on first-generation rights, it would be a mistake to assume that second- and third-generation rights are not necessary. Indeed, they are. However, the value of highlighting first-generation rights is that these rights should function to safeguard the individual and the community from excessive state intervention.

In the concluding section, suggestions are given as to how communities and individuals could help strengthen these rights.

Section 11 of the Constitution states that everyone has the right to life – the object being the protection of life (which begins at birth and ends at death), and the subject being everyone, meaning all human beings.¹² This right can be articulated as not to be killed and “not to have the quality of your life diminished in such a manner that it would be a huge impediment on this right”.¹³ The state also has an “obligation to preserve and protect the right to life.” This includes both positive and negative obligations. A positive duty would include the state taking reasonable steps to fulfil its obligation, such as protecting people from being killed. In comparison, the negative obligation would be if the state refrains from acting.¹⁴

Although the right to life is affected by a host of factors that may result in death, such as negligence and non-communicable diseases, only instances will be highlighted where the government failed (directly and indirectly) to protect this right. For this reason, the focus will be on the murder rate, the state public health system and hospitals.

Murders and the justice system

According to the South African Police Service (SAPS) crime statistics report, the murder rate has increased consistently for eight years – from 2012/13 to 2019/20 – with 21 325 murders in 2019/2020. In the same year, 73 members of the SAPS were murdered.¹⁵

South Africa clearly has an extremely high murder rate. While caution should be applied when comparing data on murder rates with the rest of the world, a murder rate of more than 100 per 100 000 people in several districts in the Western Cape and KwaZulu-Natal (based on data from 2017) could be compared to that of conflict zones in the rest of Africa and the Middle East.¹⁶

¹² Pieters, M. 2018. “Life”. In *Constitutional Law of South Africa*. Chapter 39. Available at <https://constitutionallawofsouthafrica.co.za/>. Accessed on 24 January 2021.

¹³ Skondo, S. 2018. *Human Rights Day: Your right to life*. Phatshoane Henney Inc., 19 March. Available at <https://www.phinc.co.za/NewsResources/NewsArticle.aspx?ArticleID=2353>. Accessed on 20 February 2020.

¹⁴ Serfontein, E.M. 2017. The mammoth task of realising the right to life: A South African perspective. In: Boas, A.A.V. (Ed.) 2017. *Quality of life and quality of working life*. Rejika: IntechOpen. Available at <https://www.intechopen.com/books/quality-of-life-and-quality-of-working-life/the-mammoth-task-of-realising-the-right-to-life-a-south-african-perspective>. Accessed on 20 February 2020.

¹⁵ South African Police Service. 2020. *Crime statistics: Crime situation in Republic of South Africa: Twelve (12) months (April to March 2019-20)* [Power Point Presentation]. Available at https://www.saps.gov.za/services/april_to_march_2019_20_presentation.pdf. Accessed on 27 January 2021.

¹⁶ BBC News. 2018. South Africa crime: Can the country be compared to a ‘war zone’? 18 September. Available at <https://www.bbc.com/news/world-africa-45547975>. Accessed on 21 February 2020.

Government cannot be held accountable for every murder, but a crucial part of its duties entail investigating, prosecuting and deterring criminals. This can only be achieved with an effective criminal justice system, free from political interference.

According to an article in the *Daily Maverick*, a major contributing factor for the inefficiency of the criminal justice system has been the appointment of politically “pliable” heads for the country’s security, intelligence and prosecuting services, with political infighting becoming the norm and paralysing enforcement functions.¹⁷ The Institute for Security Studies (ISS) points out that, despite vast yearly budget increases (from R63,3 billion in 2012/13 to R91,7 billion in 2018/19), the detection rate of violent crimes – including murder – has decreased by 28% during the same period.¹⁸ The ISS also mentions that public confidence in the SAPS has consistently decreased from 64,2% in 2011 to 54,2% in 2018. Moreover, it was estimated by *Rapport* in 2019 that, of almost 21 000 murders committed annually, fewer than 20% end up in court.¹⁹ However disconcerting these figures may be, it should be noted that there are numerous cases where SAPS officers go above and beyond their call of duty to help and protect the public.

The state of the public health system and hospitals

One of the focus areas in the issue of preserving life should be public health facilities. Although the percentage of people covered by medical aid schemes has slightly increased from 15,9% in 2002 to 17,1% in 2019, most people are still at the mercy of an overall poor public health system.²⁰ This is disheartening considering that the *Indigo Wellness Index* ranked South Africa in 2019 as the “unhealthiest” country out of 151 countries.²¹

Meanwhile, various state hospitals are in disarray, with poor service delivery an obstacle to adequate health care. In 2019 accusations regarding lack of proper patient care were levelled against the Minister of Health Dr Zweli Mkhize. Allegations of corruption also arose at the

¹⁷ Merten, M. 2018. Crime stats from Hell – brought to you by years of instability, political pliancy and the SAPS’s internecine battles. *Daily Maverick*, 11 September. Available at <https://www.dailymaverick.co.za/article/2018-09-11-crime-stats-from-hell-brought-to-you-by-years-of-instability-political-pliancy-and-the-sapss-internece-battles/>. Accessed on 27 January 2021.

¹⁸ Burger, J. & Mbanyele, S. 2020. *Old solutions won’t fix South Africa’s deteriorating police service*. Institute for Security Studies, 25 February. Available at <https://issafrica.org/iss-today/old-solutions-wont-fix-south-africas-deteriorating-police-service>. Accessed on 16 February 2021.

¹⁹ Versluis, J.M. & De Lange, J. 2019. Rising crime, low prosecution rates: How law enforcement in SA has all but collapsed. *City Press*, 21 October. Available at <https://city-press.news24.com/News/rising-crime-low-prosecution-rates-how-law-enforcement-in-sa-has-all-but-collapsed-20191021>. Accessed on 15 May 2020.

²⁰ Statistics South Africa. 2019. *General household survey 2019*. Pretoria: Statistics South Africa, p. 26. Available at <http://www.statssa.gov.za/publications/P0318/P03182019.pdf>. Accessed on 11 February 2021.

²¹ Global perspectives. 2019. *The Indigo Wellbeing Index*. Available at <http://global-perspectives.org.uk/volume-three/infographics/#:~:text=THE%20INDIGO%20WELLBEING%20INDEX,from%20fewer%20than%2050%20countries>. Accessed on 27 January 2021.

Gauteng Health Department to the tune of nearly R1,2 billion.²² Moreover, medical negligence claims for 2019 in Gauteng stood at R29 billion, more than half of the department's budget.²³

Furthermore, former Gauteng Premier David Makhura was allegedly involved in tender irregularities to the tune of R125 million for personal protective equipment, based on the Special Investigations Unit's (SIU) findings.²⁴ At the time of these allegations, over 4 000 people had passed away due to COVID-19 in Gauteng.

It is no secret that the Government has expressed animosity towards medical aids and private medical practitioners. The Competition Commission's report on health care released in 2019 has described the private sector as "neither efficient nor competitive", advocating for the National Health Insurance (NHI) and more regulation to solve the shortcomings of the health care industry.²⁵ Although a reasonable case can be made regarding the affordability of private medical care and adequate access to public health, the NHI is not a viable option for South Africa. Based on a 2019 study by AfriForum, it was estimated that the NHI would cost the taxpayer nearly R447 billion annually.²⁶

Apart from the service delivery, the state of affairs regarding health and safety at state-run hospitals and clinics is grossly inadequate. A 2018 nationwide oversight inspection described the state of public hospitals as a "death trap to the poor", referencing chronic shortages in staff, equipment and medicine. For example, at the Bongani Hospital in the Free State, only one qualified nurse was available to address kidney diseases in patients, and in parts of Mpumalanga, medical personnel had to pay for medical equipment themselves.²⁷ In 2019, a health and safety audit found that none of the state hospitals and clinics in Gauteng complied with the

²² Van Staden, P. 2019. *Time for clarity regarding terrible state of hospitals – FF Plus*. Politicsweb, 25 June. Available at <https://www.politicsweb.co.za/news-and-analysis/time-for-clarity-regarding-terrible-state-of-hospi>. Accessed on 3 March 2021.

²³ Maphanga, C. 2020. *Medical negligence claims in Gauteng have increased to R29bn – DA*. News24, 20 February. Available at <https://www.news24.com/news24/SouthAfrica/News/medical-negligence-claims-in-gauteng-have-increased-to-r29bn-da-20200210>. Accessed on 14 February 2021.

²⁴ Maromo, J. 2020. *Bandile Masuku fired over Covid-19 PPE tender irregularities*. IOL. Available at <https://www.iol.co.za/news/politics/bandile-masuku-fired-over-covid-19-ppe-tender-irregularities-d230bfa7-3052-562f-b10c-63a86coe31e9>. Accessed on 14 February 2021.

²⁵ GoLegal. 2019. *Health market inquiry final report released*. 9 February. Available at <https://www.golegal.co.za/healthcare-market-inquiry-report/>. Accessed on 14 February 2021.

²⁶ AfriForum. 2019. *NHI Report*. Available at <https://afriforum.co.za/wp-content/uploads/2019/09/NHI-Report-1.pdf>. Accessed on 14 February 2021.

²⁷ Democratic Alliance. 2018. *#HealthcareCollapse: Public Hospitals have become a death-trap for the poor. Time for drastic action*. 14 June. Available at <https://www.da.org.za/2018/06/healthcarecollapse-public-hospitals-have-become-a-death-trap-for-the-poor-time-for-drastic-action>. Accessed on 14 February 2021.

Occupational Health and Safety Act 85 of 1993. Some of the major health and safety issues highlighted in the audit revealed roof leaks, overcrowding and faulty fire alarm systems.²⁸

The South African Medical Association (SAMA) severely criticised the government for unpreparedness in light of the warning given in September 2020 by SAMA. SAMA warned that the country was less prepared for the second wave of COVID-19 infections than it had been for the first wave, mentioning that several health employees had succumbed to the virus, with no attempt made by the Department of Health to improve personnel supplements at hospitals.²⁹

The *Sunday Times* revealed that amid the second wave of the COVID-19 pandemic, an audit of 160 hospitals found that most of those hospitals had not received urgent upgrades, such as patient oxygen-supply systems and that the government has mostly ignored the problem despite early warnings. In the same article, some of the country's most distinguished medical experts represented by the Progressive Health Forum condemned the government's refusal to provide life-saving HIV/Aids medicines, stating that there appears to be a "frantic cover-up" on the part of the government.³⁰

Conclusion

Considering the murder rate and the state of the public health system, it should be clear that the government has largely failed in its positive duty to protect and safeguard the citizens. Based on current trends, South Africans' right to life will continue to be infringed.

²⁸ Grobler, R. 2019. *All Gauteng state hospitals and clinics fail safety audit*. News24, 29 August. Available at <https://www.news24.com/SouthAfrica/News/all-gauteng-state-hospitals-and-clinics-fail-safety-audit-20190829>. Accessed on 19 February 2020.

²⁹ Ndlazi, S. 2021. Health department lambasted for lack of preparedness for Covid-19 second wave. *IOL*, 13 January. Available at <https://www.iol.co.za/pretoria-news/news/health-department-lambasted-for-lack-of-preparedness-for-covid-19-second-wave-6802d704-f156-475b-8075-197190066187>. 14 February 2021.

³⁰ Hosken, G., Ash, P., Naidoo, Y., & Singh, O. 2021. 'The second wave is overwhelming hospitals': Covid-19 bungling flagged. *TimesLIVE*, 3 January. Available at <https://www.timeslive.co.za/sunday-times/news/2021-01-03-the-second-wave-is-overwhelming-hospitals-covid-19-bungling-flagged/>. Accessed on 14 February 2021.

As a legal rule, it is often left to the courts to interpret the nature of dignity and declare whether a legal rule or action is inconsistent with a person's right to dignity.³¹ However, in an ordinary sense, dignity is about how one treats other people and expects to be treated oneself. It is perhaps best articulated by the Golden Rule principle echoed by various cultural, philosophical and religious norms: Treat others as you would like to be treated yourself.³²

Section 10 of the Constitution states:

Everyone has inherent dignity and the right to have their dignity respected and protected.

The infringement of any of the other human rights implies that the right to human dignity is also violated. Also, there exists a link between the right to dignity and a decent standard of living.³³ Moreover, poor living conditions impair an individual's functioning, affecting a person's dignity and self-respect and alienating and marginalising communities. Therefore, one's socio-economic circumstances and socio-economic rights (SERs) should be taken into consideration when addressing dignity.

However, as SERs are often viewed as concurrent to the right to dignity, the risk of this viewpoint is that, with current economic growth levels and dismal public finances, the financial resources required to implement SERs will not comprehensively materialise any time soon. To clarify: Research conducted by the Fiscal Cliff Study Group reported to Parliament that the country is on the brink of a "fiscal cliff" in that civil service remuneration, social grants, and debt-service costs are consuming nearly all of the government revenue.³⁴ Apart from declining revenue, mismanagement of available public finances is also a serious problem. By one estimation, the amount of money (adjusted for inflation) that has been squandered in SOE bail-outs and public corruption since the start of ANC rule is equivalent to what was used in rebuilding Western

³¹ Fagan, A. 2015. *Human dignity in South African law*. In: Düwell, M., Braarvig, J., Bronswold, R. & Mieth, D. (Eds.). *The Cambridge Handbook of Human Dignity*. Cambridge: Cambridge University Press, pp. 401-405. Available at <https://www.cambridge.org/core/books/cambridge-handbook-of-human-dignity/human-dignity-in-south-african-law/91DE2A9953D168F3D6BAA102DB85491B>. Accessed on 16 May 2020.

³² Puka, B. *Internet encyclopedia of philosophy*. Available at <https://iep.utm.edu/goldrule/>. Accessed on 3 March 2021.

³³ Frye, I., Wright, G., Noble, M., Barnes, H., Jele, J., Masekesa, F., Zembe-Mkabile, W. & McLennan, D. 2018. Decent standard of living index. SASPRI, p. 5. Available at <http://spii.org.za/wp-content/uploads/2018/11/DSL-Report-SD-v3.doc.pdf>. Accessed on 24 February 2020.

³⁴ Finance Standing Committee. 2020. Report of the Standing Committee on Finance on the 2020 revised and proposed fiscal framework. Parliamentary Monitoring Group. Available at <https://pmg.org.za/taled-committee-report/4393/>. Accessed on 13 February 2021.

Europe through the Marshall Plan after the Second World War.³⁵ Given the financial limitations mentioned above, it would be beneficial to consider other factors outside of financial dependency for the right to dignity to be realised, such as ethical treatment.

Race relations, ethical behaviour and treatment of women and children

While there is no doubt that sporadic incidents of racial tension do flare up periodically between all racial and cultural groups, a positive aspect regarding ethical treatment is that overall, there seem to be good relations between people from diverse backgrounds. The findings of the AfroBarometer published in 2019, which assessed historical data on African tolerance of ethnic, national and religious differences, show that about 70% of South Africans expressed tolerance towards one another on various levels.³⁶ The *Reasons for Hope* report, published by the Institute of Race Relations in 2019, shows that overall more than 57% of respondents thought race relations had improved since 1994.³⁷ A 2020 survey conducted by AfriForum Navorsing seems to echo these findings: About 90% of respondents answered “yes” when asked whether people from different races need one another for South Africa to be successful.³⁸

Although these findings seem promising, statistics on the cruel treatment of women and children still paint a grim picture. Regarding the rape of women, an AfriForum report on serial rape revealed that the government failed in its commitments to protect people from violent crime.³⁹ What is more disheartening is that, at face value, there is no indication that crimes against women and children are decreasing.

Politicians' attitudes on dignity

Often used as a scapegoating mechanism for South Africa's social ills, political hostility towards minority groups is still widespread. Instances of crude themes that appeared during the period under review include comments made by the Gauteng MEC for Sport and Recreation, who threatened staff with losing their jobs if ANC campaign promises were not met, and that white

³⁵ Gumede, W. 2019. Lacklustre ANC leaders cannot stop the rot alone. *TimesLIVE*, 1 December. Available at <https://www.timeslive.co.za/sunday-times/opinion-and-analysis/2019-12-01-lacklustre-anc-leaders-cannot-stop-the-rot-alone/>. Accessed on 24 February 2021.

³⁶ Howard, B. 2020. 'All in this together': Africans tolerant on ethnic, religious, national, but not sexual differences. In *AfroBarometer Dispatch* 362:1–20. Available at https://afrobarometer.org/sites/default/files/publications/Dispatches/ab_r7_dispatchno362_pap17_tolerance_in_afrika_2.pdf. Accessed on 14 January 2021.

³⁷ Jeffery, A. 2019. *Unite the middle – Reasons for hope* 2019. South African Institute of Race Relations. Available at <https://irr.org.za/reports/occasional-reports/files/reasons-for-hope-report-final.pdf>. Accessed on 24 February 2021.

³⁸ AfriForum Navorsing. 2020. *AfriForum-lede se profiel vir 2020*. Unpublished survey, p. 18. Available on request.

³⁹ AfriForum. 2020. *Serial rape in South Africa*. Available at <https://afriforum.co.za/wp-content/uploads/2020/12/20201203-Ernst-vZ-Serial-rape-in-South-Africa-ENG.pdf>. Accessed on 24 February 2021.

and Indian women should be thankful for working at the department.⁴⁰ In the Nelson Mandela Bay Municipality, the ANC Branch Secretary allegedly used a derogatory term for the coloured community when he referred to a former staff member.⁴¹ In another incident, the mayor of Matjhabeng Local Municipality in the Free State referred to coloured members of the South African Defence Force as “Boesmans”, and insinuated that they should be subjected to assault.⁴² At the same time, racism and chauvinism within the ruling party have become endemic to such a degree that the ANC Deputy Secretary-General Jessie Duarte had to address ANC members’ attitude towards voters and non-African members, describing the ANC’s behaviour as “tribally chauvinistic” and “racist”.⁴³

Similarly, in the wake of the 2019 xenophobic attacks – mostly against African foreigners – Julius Malema, leader of the EFF (officially the third-largest political party in parliament) was quoted as saying that “our anger is directed at the wrong people ... the owners of our wealth is white monopoly capital”.⁴⁴ Later in 2020, in an address to EFF members at Mamusa Local Municipality, Malema echoed this theme and stated that “white people committed genocide, white people took your land, white people raped our people, white people continue to attack black people”.⁴⁵ Racially charged sentiments like these border on hate speech. Also, radical expressions are not just directed against white and Afrikaans-speaking people, but also towards other communities. During the 2018 Zondo Commission into State Capture, Malema said that “Pravin [Gordan, Minister of Public Enterprises] is a dog of white monopoly capital. We must hit the dog until the owner comes out”. However, the court ruled that these utterances did not slur the race or ethnicity of Gordan.⁴⁶

⁴⁰ eNCA. 2019. *ANC embarrassed by MEC Mazibuko’s ‘racist remarks’*. 14 March. Available at <https://www.enca.com/news/anc-embarrassed-mec-mazibukos-racist-remarks>. Accessed on 14 January 2021.

⁴¹ *HeraldLive*. 2020. *ANC must send strong message on racist remarks*. 13 December. Available at <https://www.heraldive.co.za/weekend-post/your-weekend/2020-12-13-anc-must-send-strong-message-on-racist-remarks/>. Accessed on 14 January 2021.

⁴² Werner, G. 2020. *Dear Mr President, all racists should be treated equally*. *Mail & Guardian*, 18 August. Available at <https://mg.co.za/opinion/2020-08-18-dear-mr-president-all-racists-should-be-treated-equally/>. Accessed on 14 February 2021.

⁴³ Sidimba, L. 2019. *The ANC is racist and tribalistic, says gatvol Jessie Duarte*. *IOL*, 23 November. Available at <https://www.iol.co.za/news/politics/the-anc-is-racist-and-tribalistic-says-gatvol-jessie-duarte-37806623>. Accessed on 14 February 2021.

⁴⁴ Brennan, D. 2019. *South African Firebrand Party leader calls for xenophobic anger to be directed at wealthy whites*. *Newsweek*, 4 October. Available at <https://www.newsweek.com/south-africa-xenophobic-violence-wealthy-whites-racism-land-seizures-1457595>. Accessed on 14 February 2021.

⁴⁵ *Politicsweb*. 2020. *Why are you not attacking the white man?* 20 February. Available at <https://www.politicsweb.co.za/opinion/why-are-you-not-attacking-the-white-man>. Accessed on 25 February 2021.

⁴⁶ *Gordhan v Malema and Another* (EQJHB 5/2019) [2019] ZAEQC 5; 2020 (1) SA 587 (GJ); [2020] 1 All SA 417 (GJ) (31 October 2019).

Conclusion

As was mentioned, dignity is difficult to quantify. A recent study of the various causes of violence once again emphasises the importance of developing healthy family relations in curbing violence,⁴⁷ and by implication nurturing the development of human dignity. From a legal perspective, there are numerous examples where courts in South Africa adhere to the principles of dignity when judgments are delivered. Based on the findings of opinion polls, the social fabric between South Africans appears to be largely intact, with some reservations.

However, government officials' and politicians' racially tinted statements should be taken seriously and adequately remedied since they infringe on the dignity of the individuals and groups concerned and undermine social cohesion within society.

⁴⁷ Roman, N.V. 2019. *Violence in South Africa: the search for root causes*. The Conversation, 4 November. Available at <https://theconversation.com/violence-in-south-africa-the-search-for-root-causes-123940>. Accessed on 24 February 2021.

Freedom and security of the person

Daniël Eloff

Already in 1923, the Supreme Court of the United States famously stated in *Meyer v Nebraska*⁴⁸ that liberty includes

not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children and to worship God according to the dictates of his own conscience and generally to enjoy those privileges long recognised as essential to the pursuit of happiness by free men.

Security of the freedom

The question of what constitutes freedom or liberty has given rise to numerous philosophical and jurisprudential debates. Although the Constitution does not offer a definition for the word *freedom*, it has become clear through years of legal precedent and societal acceptance that it includes the freedoms of worship, speech, association, thought and the right to privacy. These freedoms constitute a subset of the broader overarching concept of freedom. But the concept may go farther and constitute the point of entry for freedoms not expressly stated in Chapter 2 of the Constitution, such as the freedom to contract or the right to bear arms.

Section 12 of the Constitution quite deliberately draws a distinction between the right to freedom and security of the person (section 12(1)) on the one hand, and the right to bodily and psychological integrity (section 12(2)) on the other, which in conjunction offer protection for every person's somatic existence as well as their mental wellbeing through the due process entitlements of criminal law and procedure.⁴⁹ The language used in section 12 clearly provides for much wider protection than merely the right not to be detained. Section 12 therefore denotes more than mere freedom from bodily restraint and encompasses those rights and privileges which have long been recognised as being essential to the individual's pursuit of the good life.

Our courts have long held that "any deprivation of freedom has always been regarded as prima facie unlawful".⁵⁰ Our courts have moved beyond the procedural core of the right to freedom to

⁴⁸ *Meyer v. Nebraska* 262 U.S. 390 (1923).

⁴⁹ Section 12 of the Constitution of the Republic of South Africa 1996.

⁵⁰ *Minister of Safety and Security v Sekhoto and Antoher* (2011 (1) SACR 315 (SCA); [2011] 2 All SA 157 (SCA); 2011 (5) SA 367 (SCA)) [2010] ZASCA 141; 131/10 (19 November 2010) at para 16.

also include human dignity so as to provide meaningful content to the right to freedom.⁵¹ The right to freedom therefore applies in tandem with the right to the security of the person.

Security of the person

The concept of *security*, as used in section 12, has been sparsely touched upon in our courts. In foreign jurisdictions such as Canada, courts have generally opted to define the concept of *security* as what is encompassed by the physical and mental integrity of the person in a broad sense. Our own Constitutional Court has extended this definition to include the human dignity of an individual.

Section 12, like many other enshrined human rights contained in Chapter 2, has a measure of horizontal application guaranteeing people freedom from all forms of violence, including violence from the state or other/private actors.

There is arguably not a more seminal and simultaneously illustrative court case regarding the rights enshrined in section 12 of the Constitution than the matter of *Khosa and Others v Minister of Defence and Military Defence and Military Veterans and Others*.⁵² This case concerned torture and brutality committed against civilians by members of the South African security forces, in the course of a nationwide joint operation to enforce unprecedented restrictions on civilian movement and activity, imposed by government to combat the spread of the COVID-19 pandemic. On Good Friday, 10 April 2020, two uniformed female members of the South African National Defence Force (SANDF) entered the home of Mr Khosa carrying *sjamboks*. Mr Khosa and his friends had allegedly contravened lockdown regulations, and as a consequence, they were beaten and assaulted by the SANDF members. As a result, Mr Khosa passed away due to his injuries.

What happened to Mr Khosa and his friends and family was undoubtedly a gross violation of their right to freedom from all forms of violence, freedom from cruel and inhuman treatment, and the right to bodily and psychological integrity. The judgment by Fabricius J held as follows:⁵³

It is clear from section 12(1)(c),(d) and (e) of the Constitution [...] that State brutality is juridically regarded as an especially egregious form of harm. State brutality, when it takes the form of torture, cruel or inhuman treatment or punishment, is legally distinctive for two definitional reasons, as it was explained in the Founding Affidavit:

⁵¹ *De Lange v Smuts NO and Others* (CCT26/97) [1998] ZACC 6; 1998 (3) SA 785; 1998 (7) BCLR 779 (28 May 1998).

⁵² *Khosa and Others v Minister of Defence and Military Defence and Military Veterans and Others* (21512/2020) 2020 (7) BCLR 816 (GP).

⁵³ *Ibid.*, at para 55.

1. It is committed by a ‘public official’, when people clothed with public authority, in whom the public are entitled and expected to repose their trust [...]
2. It is committed for ‘purposes’ ulterior to legitimate law enforcement.

Moreover, during these times of crisis, the Court reconfirmed that emergencies and crises do not circumvent the vertical obligation placed on the state to protect and uphold the rights enshrined in the Constitution:⁵⁴

Sections 12(1)(d) and (e) of the Constitution guarantee ‘everyone the right not to be tortured in any way, not to be punished in a cruel, inhuman or degrading way’. This ‘everyone’ includes the late Mr Khosa, his partner Ms Monthsha and his brother-in-law Mr Muvhango. It however also includes all civilians who will be exposed for the remainder of the state of disaster to intense policing by armed members of the South African Police Service, Metropolitan Police Department, as well as some 76 000 armed members of the South African National Defence Force.

The right to freedom and security of the person is a right that is intertwined with the fundamental rights to life, dignity, and equality. The 2020 COVID-19 national lockdown brought about by the regulations issued in terms of the Disaster Management Act 57 of 2002 were wide-ranging and entailed swift limitations of numerous rights contained in the Constitution. It is amid these inhibiting lockdown regulations that South Africa has witnessed a gross violation, albeit not necessarily unique and infrequent, of the right to freedom and security of the person.

Conclusion

Although the judgment in *Khosa and Others v Minister of Defence and Military Defence and Military Veterans and Others* resolutely and indubitably reconfirmed the importance of section 12 of the Constitution, the fact of the matter remains that section 12 of the Constitution is merely a promise etched into our Constitution when arbitrary deprivation of freedom, violence, inhuman treatment and the threat to bodily and psychological integrity are still the order of the day for many South Africans.

⁵⁴ *Khosa and Others v Minister of Defence and Military Defence and Military Veterans and Others* (21512/2020) 2020 (7) BCLR 816 (GP), at para 127.

Slavery, servitude and forced labour

Connie Mulder

The *Universal Declaration of Human Rights* defines freedom from slavery, servitude and forced labour as an absolute right under section 4.⁵⁵

Although slavery has officially been abolished in legislation in every country in the world, practices like slavery still exist in several countries and regions of the world. Additionally, the practice of slavery has found a new avenue in the form of human trafficking. Human trafficking is notoriously difficult to monitor, with only about 0,4% of victims ever identified.⁵⁶

Current statistics show that the majority of human trafficking is done for sexual exploitation, with the primary victims being women and girls.⁵⁷ However – as reporting within countries improves – a rise in human trafficking for forced labour can be seen, with boys and men being trafficked in higher numbers than before.⁵⁸

Unfortunately, Africa does not have a good track record, as it is the region with the second-highest number of people estimated to be enslaved today, after Asia and the Pacific. It is estimated that 9,2 million (i.e. 23%) of the almost 40 million people in slavery worldwide reside in Africa.⁵⁹

For South Africa, the human trafficking situation in Sub-Saharan Africa throws a new light on ensuring that the right to freedom from slavery, indentured servitude and forced labour are respected, given the fact that Sub-Saharan Africa is seen as a hotspot for detecting global patterns of trafficking.⁶⁰ The prevalence of modern slavery is estimated at about 5,4 victims for every 1 000 people in the world, with estimates for Africa being significantly higher at 7,6 victims for every 1 000 people.⁶¹

⁵⁵ United Nations. 1948. *Universal Declaration of Human Rights*. Available at https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf. Accessed on 3 March 2020.

⁵⁶ CaseAct. *What is human trafficking?* Available at <http://www.caseact.org/wp-content/uploads/2012/07/Prop-35-Human-Trafficking-Fact-Sheet.pdf>. Accessed on 3 March 2020.

⁵⁷ Free the Slaves. 2018. *Trafficking and slavery fact sheet*. Available at <https://www.freetheslaves.net/wp-content/uploads/2018/04/Trafficking-ans-Slavery-Fact-Sheet-April-2018.pdf>. Accessed on 3 March 2020.

⁵⁸ Migration Data Portal. 2021. *Human trafficking*. 26 February. Available at <https://migrationdataportal.org/themes/human-trafficking>. Accessed on 16 March 2021.

⁵⁹ Free the Slaves. 2018. *Trafficking and slavery fact sheet*. Available at <https://www.freetheslaves.net/wp-content/uploads/2018/04/Trafficking-ans-Slavery-Fact-Sheet-April-2018.pdf>. Accessed on 3 March 2020.

⁶⁰ Rickard, C. 2019. *Human trafficking reports show Sub-Sahara Africa a global player*. AfricanLII, 18 July. Available at <https://africanlii.org/article/20190718/human-trafficking-reports-show-sub-saharan-africa-global-player>. Accessed on 3 March 2020.

⁶¹ Walk Free. 2018. *Global slavery index: Regional findings*. Available at <https://www.globalslaveryindex.org/2018/findings/regional-analysis/regional-findings/>. Accessed on 3 March 2020.

Government response

To actualise the freedom from slavery, forced labour and indentured servitude, the South African government enacted the Prevention and Combating of Trafficking in Persons Act 7 of 2013. Following this law, South Africa convicted ten persons for human trafficking in 2014 and 2015.⁶² According to the United States Department of State Trafficking in Persons Report, there were 377 victims of trafficking in 2019. The report also mentions that the efforts of South African authorities to eliminate human trafficking do not fully comply with the set minimum standards, one of the reasons being that South African authorities showed mixed efforts regarding victim protection.⁶³ However, the State Department cites that the Directorate of Priority Crime Investigation had 24 cases of potential trafficking under investigation, compared to the 36 during the previous reported year.

The *Global Slavery Index* measures several metrics to determine a country's readiness to deal with modern-day slavery. The South African government performs quite well in this index in terms of the region of Africa, scoring a B ranking for government response, in contrast to Africa's average CC ranking.⁶⁴ However, this still lags behind the average ranking for Europe and Central Asia (both a BB ranking) and matches the average ranking of the Americas (both a B ranking).⁶⁵

The *Global Slavery Index* rates South Africa's government response to modern-day slavery at 5/10 – which means there is still significant room for improvement.⁶⁶

Anecdotal evidence suggests that the prevalence of human trafficking in South Africa is much higher than reported; for example, the case where a South African hospital pleaded guilty to 109 counts of illegal organ transplants.⁶⁷ South Africa has very limited information on human trafficking, and the indicators that are measured unfortunately show an increase in the past couple of years.⁶⁸

⁶² UN Office on Drugs and Crime. 2018. *Global Trafficking in Persons Report 2018: Sub-Saharan Africa*. Available at https://www.unodc.org/documents/data-and-analysis/glotip/2018/GLOTIP_2018_SUB-SAHARAN_AFRICA.pdf. Accessed on 15 February 2021.

⁶³ US Department of State. 2020. *Trafficking in Person Report: 20th edition*, pp. 453-454. Available at <https://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete-062420-FINAL.pdf>. Accessed on 12 February 2021.

⁶⁴ Walk Free. 2018. *Global slavery index: Regional findings*. Available at <https://www.globalslaveryindex.org/2018/findings/regional-analysis/regional-findings/>. Accessed on 3 March 2020.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ Allain, J. 2011. Trafficking of persons for the removal of organs and the admission of guilt of a South African hospital. In *Medical Law Review* 19(1): 117–122. Available at <https://www.semanticscholar.org/paper/Trafficking-of-persons-for-the-removal-of-organs-of-Allain/18f40068bc3fecb6a79bfe6ee690419bd447cc47>. Accessed on 3 March 2020.

⁶⁸ Van der Watt, M. 2015. Human trafficking in South Africa: an elusive statistical nightmare. *The Conversation*, 16 July. Available at <https://theconversation.com/human-trafficking-in-south-africa-an-elusive-statistical-nightmare-43949>. Accessed on 3 February 2021.

The effect of this can be seen in the eruption of xenophobic violence in Pretoria in 2019, with anger directed at Nigerian nationals. Naledi Pandor, the Minister of Foreign Affairs, stated at the time that Nigerian nationals are involved in drug and human trafficking – which would indicate a possibly bigger problem at grassroots level than statistics show.⁶⁹

An equally significant aspect concerning forced labour and indentured servitude is that of South Africa's partnership and trade relations with other countries. While the South African government cannot be accused of deliberately infringing on this right, it has neither strongly denounced nor criticised countries that have violated international labour practices, including China, a country notorious for circumnavigating international labour laws. A study by the African think tank Opinor implicated China in a host of labour violations in Africa, including the suspected use of child labour in the Democratic Republic of the Congo, as well as substandard working conditions for African labourers on building projects in their host countries.⁷⁰

Conclusion

The right to freedom from slavery, indentured servitude and forced labour is one that is not under massive threat in South Africa; however, government's response in this regard could be better, given the fact that the legislation does not seem to find traction in practice. Grassroots level South Africans are sensing an upsurge in human trafficking, especially by foreign nationals.

⁶⁹ Asadu, C. SA minister: Many Nigerians in our country are drug traffickers. *The Cable*, 5 September 2019. Available at <https://www.thecable.ng/sa-minister-many-nigerians-in-our-country-are-drug-traffickers>. Accessed on 3 March 2020.

⁷⁰ Opinor. 2020. China in Africa: What the US should know about Africa's turn to China. Available at <https://www.opinor.org/wp-content/uploads/2020/06/Report-China-in-Africa.pdf>. Accessed on 13 February 2021.

In South African law, the right to privacy is protected in terms of common law and section 14 of the Constitution. In both instances, the right to privacy is limited, and to prove an infringement will most probably be difficult.⁷¹

The Protection of Personal Information Act 4 of 2013 (POPIA) is the primary instrument regulating data protection in South Africa. The Act has commenced in July 2020, and all organisations have to comply from 1 July 2021.⁷²

The information that taxpayers share with the South African Revenue Service (SARS) is very secure, as was demonstrated when Busisiwe Mkhwebane, the Public Protector, subpoenaed Edward Kieswetter, SARS Commissioner, to order him to disclose confidential information about former President Jacob Zuma's tax affairs to her office.⁷³

The main communications surveillance law is the Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002 (RICA). Its aim is to regulate the interception of communications and related processes, including setting up a system for law enforcement to apply for judicial authorisation for the interception of communications.⁷⁴

Lawyers for the amaBhungane Centre for Investigative Journalism and journalist Sam Sole told the Constitutional Court in 2020 that the RICA violates the right to privacy in a number of areas – and is therefore unconstitutional. In 2020 they sought to confirm an order by the Northern Gauteng High Court in Pretoria in September 2019 that the RICA was unconstitutional in that it failed to contain adequate safeguards to protect the rights to privacy, access to courts, freedom of expression and the media, and legal privilege. Steven Budlender SC, for amaBhungane and Sole, said that without safeguards that protect the right to privacy of civilians, RICA is unconstitutional. Budlender also

⁷¹ Michalsons. 2018. Data privacy or data protection in South Africa. 28 January. Available at <https://www.michalsons.com/blog/data-privacy-in-south-africa/150>. Accessed on 10 February 2021.

⁷² Michalsons. *Protection of Personal Information Act summary*. Available at <https://www.michalsons.com/focus-areas/privacy-and-data-protection/protection-of-personal-information-act-popia>. Accessed on 3 March 2021.

⁷³ Visser, A. 2020. *SARS, the Public Protector and the matter of taxpayer privacy*. Moneyweb, 24 January. Available at <https://www.moneyweb.co.za/mymoney/moneyweb-tax/sars-the-public-protector-and-the-matter-of-taxpayer-privacy/>. Accessed on 14 February 2021.

⁷⁴ Privacyinternational.org. 2019. *State of privacy South Africa*. 26 January. Available at <https://privacyinternational.org/state-privacy/1010/state-privacy-south-africa>. Accessed on 26 February 2020.

stated that the RICA's failure to order that subjects who are under surveillance be informed that they were under surveillance further rendered the RICA unconstitutional.⁷⁵

The Right2Know Campaign said in a statement:⁷⁶

RICA's requirement that telecommunication users' metadata – information about when, where, how and with whom they communicate – be stored for years is a massive and systemic violation of the rights of all South Africans who use digital communication.

The [s]tate has asserted that it has the power to mandate telecommunications providers to store metadata about South Africans' phone calls, SMSes [sic], emails and internet activity for up to five years.

These include the location from which those communications were made and the subject lines of emails which often indicate the content of the message. Regarding service provider transparency, the Right2Know Campaign brought legal action in 2018 against three major South African network operators – MTN, Cell C and Telkom – after they had refused requests in terms of the Promotion of Access to Information Act 2 of 2002 to provide a breakdown of how many warrants they had received regarding RICA.⁷⁷

In 2017, an investigation by *Daily Maverick* revealed that law enforcement agents frequently used section 205 of the Criminal Procedure Act 51 of 1977 to access call data records in an alarming number of cases.⁷⁸ Section 205 of this Act allows law enforcement officials to bypass the RICA judge to get access to phone records.⁷⁹

In 2017, *Business Day* reported seeing a directive from Fikile Mbalula, the then Minister of Police, to Major-General King Ngcobo, acting Head of Crime Intelligence, that instructed him to increase “data-mining” of South African citizens and residents.⁸⁰ Mbalula has since been relieved of his position as minister, but investigative reports suggest that data-mining is still in operation.

⁷⁵ Mabuza, E. 2020. Right to privacy under scrutiny as ConCourt hears RICA case. *HeraldLive*, 26 February. Available at <https://www.heraldlive.co.za/news/2020-02-26-right-to-privacy-under-scrutiny-as-concourt-hears-rica-case/>. Accessed on 10 February 2021.

⁷⁶ Odendaal, N. 2020. R2K to picket over RICA privacy failure. *Engineering News*, 19 February. Available at https://www.engineeringnews.co.za/article/r2k-to-picket-over-rica-privacy-failure-2020-02-19/rep_id:4136. Accessed on 26 February 2020.

⁷⁷ Privacyinternational.org. 2019. *State of Privacy South Africa*. 26 January. Available at <https://privacyinternational.org/state-privacy/1010/state-privacy-south-africa>. Accessed on 26 February 2020.

⁷⁸ Swart, H. 2017. Op-Ed: Big Brother is watching your phone call records. *Daily Maverick*, 10 May. Available at <https://www.dailymaverick.co.za/article/2017-05-10-op-ed-big-brother-is-watching-your-phone-call-records/#.WfCPVEzMXTY>. Accessed on 26 February 2020.

⁷⁹ Right2Know. 2018. *Spooked: Surveillance of journalists in South Africa*. Available at <https://www.r2k.org.za/wp-content/uploads/R2K-Surveillance-of-Journalists-Report-2018-web.pdf>. Accessed on 10 February 2021.

⁸⁰ Hofstatter, S. 2017. Mbalulua tightens his grip on the police intelligence unit. *Pressreader*, 21 September. Available at <https://www.pressreader.com/south-africa/business-day/20170921/281479276594616>. Accessed on 10 February 2021.

Investigative journalist Heidi Swart has concluded that a social media analytics tool called Media Sonar is sold in the South African private sector and may be in use by government agencies.⁸¹

In 2018 the Right2Know Campaign published a report on case studies of journalists who appear to have been surveilled.⁸² The report analyses 10 cases of journalists being surveilled by entities ranging from the State Security Agency and members of Crime Intelligence, to private investigators hired by those who were being investigated for corruption. Right2Know concludes in their 2018 report that RICA has failed in a myriad of ways to protect journalists' communications, as well as the communications of the general public. Therefore RICA – rather than fighting crime – has been largely abused by government officials and those under investigation for corruption to violate the privacy of those who threaten their power.

It was estimated in 2016 that data breaches had cost South Africa an overall total amount of R28,6 million.⁸³ However, currently, data breaches in South Africa often go unreported. In 2015, it was reported that only five data breaches were registered in South Africa. This was expected to change significantly as the POPIA was implemented, since responsible parties would then have been required by law to disclose information about data breaches if they occur.⁸⁴ To this date, no conclusive data or exact numbers are available in this regard.

Privacy concerns also emerged during the COVID-19 pandemic. Keeping with the regulations – and all subsequent amendments thereto – in terms of the Disaster Management Act 57 of 2002, the Information Regulator, established in terms of the POPIA, issued a guidance note on the processing of personal information of data subjects in the management and containment of COVID-19 in 2020:⁸⁵

The Guidance Note outlines the conditions for the lawful processing of personal information in order to detect, contain and prevent the spread of COVID-19. The Guidance Note also confirms that a responsible party is not required to obtain the consent of a data subject prior to the processing of personal information in the context of COVID-19.

⁸¹ Swart, H. 2018. Government surveillance of social media is rife. Guess who's selling your data? *Daily Maverick*, 25 April. Available at <https://www.dailymaverick.co.za/article/2018-04-25-government-surveillance-of-social-media-is-rife-guess-whos-selling-your-data/>. Accessed on 27 February 2020.

⁸² Right2Know. 2018. *Spooked: Surveillance of journalists in South Africa*. Available at <https://www.r2k.org.za/wp-content/uploads/R2K-Surveillance-of-Journalists-Report-2018-web.pdf>. Accessed on 10 February 2021.

⁸³ *Ibid.*

⁸⁴ Privacyinternational.org. 2019. *State of Privacy South Africa*. 26 January. Available at <https://privacyinternational.org/state-privacy/1010/state-privacy-south-africa>. Accessed on 26 February 2020.

⁸⁵ Lovell, H. 2020. South Africa. Personal information and COVID-19. Information Regulator publishes guidance note. *Lexology*, 7 May. Available at <https://www.lexology.com/library/detail.aspx?g=4eff2fd4-f98e-42ac-b772-3593a74c9dfo>. Accessed on 3 September 2020.

Conclusion

It is clear from the above-mentioned breaches of privacy on many facets of South African citizens' lives that the privacy situation in the country is not sufficiently secure, and that many violations have taken and are taking place. An encouraging sign, however, is the sustained pushback against these violations from civil society organisations.

Freedom of religion, belief and opinion

Morné Malan

Constitutional and judicial background

The fundamental freedoms relating to religion, belief and opinion are most directly governed by the principles of section 15 of the Constitution.⁸⁶ They are further indirectly legally entrenched in the provisions of other rights such as the right to equality,⁸⁷ the right to freedom of association,⁸⁸ human dignity⁸⁹ and freedom of expression.⁹⁰ Sections 185 and 186 of the Constitution also provide for the establishment of a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, tasked primarily with the objective “to promote respect for the rights of cultural, religious and linguistic communities.”⁹¹ Finally, the South African Human Rights Commission handles matters relating to, among others, unfair discrimination⁹² in the Equality Court.

Likewise, courts in South Africa adopted and have repeatedly affirmed⁹³ the doctrine of entanglement⁹⁴ within South Africa, which indicates the reluctance on the part of courts⁹⁵ to get involved in matters relating to “doctrinal disputes of a religious character”.⁹⁶

⁸⁶ The Constitution of the Republic of South Africa, 1996.

⁸⁷ Section 9 of the Constitution of the Republic of South Africa, 1996.

⁸⁸ Section 31 of the Constitution of the Republic of South Africa, 1996.

⁸⁹ Section 10 of the Constitution of the Republic of South Africa, 1996.

⁹⁰ Section 16 of the Constitution of the Republic of South Africa, 1996.

⁹¹ Section 185(1)(a) of the Constitution of the Republic of South Africa, 1996.

⁹² These include discrimination on the basis of religion, belief and opinion.

⁹³ See for example:

- *Singh v Ramparsad and Others* 2007 (3) SA 445 (D) at para 50;
- *De Lange v Presiding Bishop, Methodist Church of Southern Africa and Another* 2015 (1) SA 106 (SCA) at para 39;
- *Prince v President, Cape Law Society, and Others* 2002 (2) SA 794 (CC) at para 42.

⁹⁴ This was defined in *Gaum and Others v Van Rensburg NO and Others* (40819/17) [2019] ZAGPPHC 52; [2019] 2 All SA 722 (GP) as follows: “The doctrine of entanglement entails a reluctance of the court to become involved in doctrinal disputes of a religious character.”

⁹⁵ The Constitutional Court has held that the right to and accordingly, constitutional protection for religious freedom even extends to beliefs that are “bizarre, illogical or irrational” in *Prince v President, Cape Law Society and others* 2001 (2) SA 388 (CC).

⁹⁶ *Taylor v Kurtstag NO and Others* 2005 (1) SA 362 (W) at para 39 and in which the court accepts that individuals who voluntarily commit themselves to a religious association’s rules and decision-making bodies should be prepared to accept the outcome of fair hearings conducted by those bodies.

Demographic and historical background

Statistics South Africa has stopped measuring religious affiliation since its 2015 *General Household Survey*; however, at that point the survey indicated the following regarding South Africa's religious demographic profile:

- Christian: 86%
- Ancestral, tribal, animist, or other traditional African religions: 5,4%
- Muslim: 1,9%
- Other: 1,5%
- Nothing in particular: 5,2%

According to research conducted by the Pew Research Centre,⁹⁷ South Africa ranks among the very lowest with regard to the level of government restrictions on religious activities, although it scores only moderately well in terms of “social hostilities” between various religious groups. Overall, South Africa is in the top three globally when analysing both metrics and comparing them to the world's 25 most populous countries.

Developments

Religion has not been the subject of much litigation in South Africa, and this may be indicative of general tolerance towards the religions of others in the country. Yet, the following can be noted from a few prominent cases relating to religion:

- There has been very little indication that the so-called OGOD-case⁹⁸ of 2017 has led to any infringement on religious freedom in South Africa, as some feared. The case primarily dealt with the obligation of state agents (in this case public schools) to refrain from privileging certain religions to the detriment of others and can – if anything – be seen as a net positive for religious freedom in general.
- One of the more prominent cases on religion in 2019 was the case *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others*.⁹⁹ However, despite the name of the applicant in this matter, the case was only tangentially related to

⁹⁷ Pew Research Centre. 2019. *A closer look at how religious restrictions have risen around the world*. 15 July. Available at <https://www.pewforum.org/2019/07/15/a-closer-look-at-how-religious-restrictions-have-risen-around-the-world/>. Accessed on 24 February 2020.

⁹⁸ *Organisasie vir Godsdienste-Onderrig en Demokrasie v Laerskool Randhart and Others* (29847/2014) [2017] ZAGPJHC 160; [2017] 3 All SA 943 (GJ); 2017 (6) SA 129 (GJ).

⁹⁹ *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* (CCT320/17) [2019] ZACC 34; 2019 (11) BCLR 1321 (CC); 2020 (1) SA 1 (CC); 2020 (1) SACR 113 (CC).

religion. The primary topic related to corporal punishment for children – a case which the applicant lost.

- Another case which warrants mention is *Gaum and Others v Van Rensburg NO and Others*.¹⁰⁰ Here it was found that the church (and other religious organisations) – while not subject to the Promotion of Administrative Justice Act 2 of 2000 – do still have an obligation to respect common law in so far as they must respect their own procedures and prescripts according to their internal policy documents, such as the *Kerkorde* (English: *church order*) in the case of the Dutch Reformed Church, when reviewing certain decisions within their leadership.¹⁰¹

With regard to the impact of COVID-19, it must be emphasised that religious organisations were generally afforded certain permissions that were not broadly granted to other institutions, such as “non-essential business” or other spheres of society. Churches and other religious organisations were allowed to partially reopen, subject to certain provisions, in level 3 of the nationwide lockdown.¹⁰² Moreover, there has been little – if any – public opposition by religious institutions to any of the restrictions imposed on them during lockdown, with most declining even the allowance made to partially reopen and instead opting to continue making use of technology and video broadcasts.

Conclusion

In conclusion, Henrico¹⁰³ is correct in noting that “religious freedom in South Africa is one of the few rights which has not been blighted with a history of either intervention on the part of the state or restrictions in terms of its expression”.

Despite some of Henrico’s misgivings and his laudable scepticism of government encroachment upon religious freedoms, South Africa has generally continued its commendable tradition of protecting citizen’s rights to freedom of religion, belief and opinion. Viewed particularly from a global perspective, South Africa remains a rather forceful proponent of religious freedom when contrasted with most other countries.

¹⁰⁰ *Gaum and Others v Van Rensburg NO and Others* (40819/17) [2019] ZAGPPHC 52; [2019] 2 All SA 722 (GP)

¹⁰¹ It should be noted that, although the decision proper (the *ratio decidendi*) emphasised the administrative aspect of the case, significant comments were made alongside the judgment (*obiter dicta*) relating to the obligation placed on religious communities to prove that beliefs, where they infringe on the constitutional rights of members, must be clear and strongly held. A belief which infringes on rights without representing a strongly held religious belief within the community or over which the community’s convictions are ambiguous, can be subject to review in certain circumstances.

¹⁰² Republic of South Africa. 2020. *Regulations and guidelines*. Available at <https://www.gov.za/covid-19/resources/regulations-and-guidelines-coronavirus-covid-19#>. Accessed on 13 February 2021.

¹⁰³ Henrico, R. 2019. Proselytising the Regulation of Religious Bodies in South Africa: Suppressing Religious Freedom? In *Potchefstroom Electronic Law Journal* (22):1–27. DOI: <http://dx.doi.org/10.17159/1727-3781/2019/v22i0a5315>. Accessed on 16 March 2021.

Freedom of expression

Adv. Mark Oppenheimer – Counsel for AfriForum

[Freedom of expression] lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.

– Justice Kate O’Regan¹⁰⁴

Freedom of expression is the cornerstone of a functioning democratic state. It gives people the opportunity to be exposed to differing viewpoints to make informed and legitimate decisions about their political and private lives.¹⁰⁵

Allowing the free dissemination of beliefs, opinions and other forms of expression brings immense benefits. It allows for intellectual, cultural, and scientific progress while provoking discussion and aiding the search for truth. Since we are fallible, we cannot know with certainty that a particular opinion is false. When we suppress opinions that are believed to be false, we risk missing out on the truth.¹⁰⁶ By stifling beliefs that are different from our own we lose the opportunity to “challenge, reconsider and perhaps reaffirm” our own views.¹⁰⁷

If citizens are under the impression that the media they are exposed to has gone through a filtering process to remove all inappropriate forms of expression, then they are less likely to be critical of the material that they consume. Societies that allow for a broad selection of opinions create an environment that strengthens people’s analytical skills and trains them to question the views that are presented to them.¹⁰⁸

In her seminal paper on the dangers of suppressing racist speech, Denise Meyerson wrote:¹⁰⁹

[to] drive an evil view underground can actually increase its strength; whereas to debate it out in the open is more likely to bring home its abhorrent nature. It is precisely those ... who, after all, believe

¹⁰⁴ *South African National Defence Union v Minister of Defence* (CCT27/98) [1999] ZACC 7; 1999 (4) SA 469; 1999 (6) BCLR 615 (26 May 1999) at para 7.

¹⁰⁵ Currie, I. & De Waal, J. 2001. *The Bill of Rights Handbook*. Sixth edition. Cape Town: Juta, p. 310.

¹⁰⁶ Meyerson, D. 1997. *Rights Limited: Freedom of Expression, Religion and the South African Constitution*. First edition. Juta, p. 78.

¹⁰⁷ Wolff, J. 2015. *An Introduction to Political Philosophy*. Third Edition. Oxford: Oxford University Press, p. 118.

¹⁰⁸ Strossen, N. 2000. *Defending Pornography: Free Speech, Sex and the Fight for Women’s Rights*. New York and London. NYU Press, p. 263.

¹⁰⁹ Meyerson, D. 1990. No platform for racists: what should the view of those on the left be? *South African Journal on Human Rights*, 6(3), 394-398. Available at <https://researchers.mq.edu.au/en/publications/no-platform-for-racists-what-should-the-view-of-those-on-the-left>. Accessed on 24 February 2021.

there is a truth about the awfulness of racism, who should be optimistic about the power of debate and argument to demonstrate that truth. They came to their views by reason, and since they do not believe themselves to be intellectually superior, should trust in reason rather than the police force as the better weapon against falsehood. It is only too easy for censorship laws to be put to different uses from those originally intended, and if we are happy for them to be deployed in one way, we make it much easier for them to be deployed in other, more frightening, ways later. And a final consideration here is that, to the extent that racial animosities will continue to plague us, it is better to let them be played out at the level of words rather than to bottle them up, thereby not only increasing their virulence, but also making more likely a more dangerous kind of discharge. Forced, as we are, to weigh up evils here, we should therefore conclude that tolerance is more beneficial than costly.

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

The hate speech section of this Act states the following:

No person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to – (a) be hurtful; (b) be harmful or to incite harm; (c) promote or propagate hatred, provided that *bona fide* engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution, is not precluded by this section.

Courts have struggled to interpret the Act, which has caused much uncertainty about what counts as genuine hate speech. In the case of Penny Sparrow, who referred to black beach-goers as monkeys, it was held that merely hurtful speech was enough. In the case of Velaphi Khumalo, who said, “I want to cleanse this country of all white people. We must act as Hitler did to the Jews ... white people in South Africa deserve to be hacked and killed like Jews”, it was held that hate speech must be hurtful, incite harm and promote hatred.¹¹⁰

In August 2019, the Equality Court held that any display of the previous South African flag – including private displays in people’s homes – would constitute hate speech in terms of the Act.¹¹¹ Immediately after the ruling, there were calls for parts of the former national anthem *Die Stem* to be removed from the current national anthem, and for the Israeli flag to be banned. The case is currently on appeal.

¹¹⁰ *South African Human Rights Commission v Khumalo* (EQ6-2016; EQ1-2018) [2018] ZAGPJHC 528; 2019 (1) SA 289 (GJ); [2019] 1 All SA 254 (GJ) (5 October 2018).

¹¹¹ *Nelson Mandela Foundation Trust and Another v AfriForum NPC and Others* (EQ02/2018) [2019] ZAEQC 2; [2019] 4 All SA 237 (EqC); 2019 (10) BCLR 1245 (EqC); 2019 (6) SA 327 (GJ) (21 August 2019).

In a separate case in November 2019, the Supreme Court of Appeal held that the hate speech provisions in the Act were unconstitutional. The matter has been referred to the Constitutional Court for confirmation. In the interim, the Court has held that “No person may advocate hatred that is based on race, ethnicity, gender, religion or sexual orientation and that constitutes incitement to cause harm”.¹¹²

In March 2020, directions were made by the Minister of Cooperative Governance and Traditional Affairs in terms of section 27(2) of the Disaster Management Act 57 of 2002. The directions state that it is an offence to intentionally misrepresent that someone is infected with the coronavirus:¹¹³

It is an offence to publish any statement with the intention to deceive any other person about COVID-19, the COVID-19 infection status of any person, or any measure taken by the Government to address COVID-19. An offender can be fined and/or imprisoned for up to six months.

Conclusion

It remains to be seen how the Constitutional Court will determine the correct line between freedom of expression and genuine hate speech.

¹¹² *Qwelane v South African Human Rights Commission and Another* (686/2018) [2019] ZASCA 167; [2020] 1 All SA 325 (SCA); 2020 (2) SA 124 (SCA); 2020 (3) BCLR 334 (SCA) (29 November 2019).

¹¹³ Oppenheimer, M. 2020. *What are my rights?* Available at <https://afriforum.co.za/en/corona-covid-19/what-are-my-rights/>. Accessed on 10 February 2021.

Assembly, demonstration, picketing and petitioning

Johan Kruger

Section 17 of the Constitution enshrines the right to assemble, demonstrate, picket and present petitions peacefully and unarmed. Protests and mass assemblies have, especially in recent decades, formed an important part of political engagement and continue to constitute a platform for dialogue and for the raising of grievances and demands. The right to freedom of assembly and peaceful demonstration provides an important mechanism for minority or side-lined groups to communicate through a collective formation with those powers who often stifle or stonewall their voices and demands. Currie and De Waal¹¹⁴ rightly state that freedom of assembly counters feelings of helplessness and isolation and furthers accountability and responsiveness.

Assembly and demonstration

The difference between an assembly and a demonstration is often not quite clear, but generally speaking demonstrations are associated with some form of support or opposition for a moral or political position. Assemblies are gatherings that may or may not have a political content. The only definition of *demonstration* is to be found in the Regulation of Gatherings Act 205 of 1993 (RGA), which defines *demonstration* as any “demonstration by one or more persons but not more than 15 persons, for or against any person, cause, action or failure to take action”. A *gathering*, on the other hand, is defined as “any assembly, concourse or procession of more than 15 persons in or on any public road as defined in the Road Traffic Act [...], or any public place or premises wholly or partly open to the air”. The number of people is therefore the yardstick in terms of which the RGA defines or distinguishes between demonstrations and gatherings.

Petition

Petitions are cost-effective ways to table concerns, especially for citizens who lack the necessary funding. A petition will typically be an attempt to secure an audience with a particular department or government official or to showcase support for a cause. A good example is the surge in online petitions in the first six months of 2020. The online petition platform *change.org*'s Global Digital Public Engagement site reported that South Africa recorded the most online petitions out of 25 countries that were assessed.¹¹⁵

¹¹⁴ Currie, I. & De Waal, J. *The Bill of Rights handbook*. Fifth edition. Cape Town: Juta, p. 397.

¹¹⁵ Ellis, M. 2020. *South Africa the top country for digital activism – Change.org*. Memeburn, 28 August. Available at <https://memeburn.com/2020/08/south-africa-the-top-country-for-digital-activism-change-org/>. Accessed on 14 February 2021.

Picketing

The constitutional right to picket is explicated in section 69 of the Labour Relations Act 66 of 1995 (LRA). It is used by a registered trade union to authorise a picket by its members and supporters for the purposes of peacefully demonstrating in support of any protected strike or in opposition to any lockout.

Legislative framework

The RGA regulates the holding of public gatherings and demonstration at certain places. Picketing is regulated by the LRA and is often used by organised labour to convey a certain message or demand and to give effect to the powerplay between organised labour and management.

Rights being realised

A criticism that has been raised against the RGA and its effectiveness is that its provisions are often abused by local authorities. A paper by Simon Delaney¹¹⁶ of an investigating into the legal parameters that govern protests and gatherings articulated several shortcomings of the RGA that are often misused by the state. These include using delay tactics by exploiting the permission-seeking requirement by the protesters, confusing the issue regarding the legality of the intended protest, consequently causing frustration for groups wanting to assemble, which in turn leads to spontaneous gatherings that sometimes turn hostile. Second, it has been reported that municipalities have prohibited gathering on grounds that are not recognised by the RGA, such as requiring that grievances are first formally presented to government before resorting to protests. Delaney points out that further frustration with the process is that, in some cases, gatherings were prohibited because there were no officials to accept memorandums from the protesters or that the South African Police Service (SAPS) does not have the ability or resources to police more than one gathering on the same day. Third, many municipalities unfairly fine protesters as a condition for the acquisition of “permission” to protest. This – coupled with the administrative steps and the burden of having to apply for permission at a specific municipality, and then the waiting period for approval – often discourages groups from following this procedure; they may then rather resort to spontaneous and illegal demonstrations or assemblies.

¹¹⁶ Delaney, S. 2016. *The right to freedom of assembly, demonstration, picket and petition within the parameters of South African law*. Available at <http://www.fhr-mirror.org.za/files/3815/1247/0494/Protest.pdf>. Accessed on 24 February 2021.

Protests in South Africa are often associated with violence and damage to private and public property. Public protests, particularly when coupled with violence, increasingly seem to be the only effective means of political participation, according to the Institute for Security Studies (ISS).¹¹⁷ The ISS Protest and Public Violence Monitor recorded an average of 2,9 protests per day for 2019.¹¹⁸

Communities are often frustrated by the lack of response and accountability of those having to ensure service delivery. Municipal IQ data, which tracks municipal service delivery protests, recorded 237 incidents in 2018 and 218 incidents for 2019.¹¹⁹ Formal channels of communication, such as letters, have in many instances been exhausted, and the continued failure to respond leads to the eruption of violence. When a frustrated community gathers without permission to register their grievance, they are met by the SAPS, which often sparks violent incidents like stone-throwing or damage to property. Also, violent protests often result in answers being given or promises being made. This unfortunately strengthens the thinking that violence is the only way to elicit a response, thereby naturally leading to more violent protests.

In *The South African Transport and Allied Workers Union and Others v Garvas and Others*,¹²⁰ the Constitutional Court dealt among others with the question of whether a union under whose auspices a gathering or demonstration was held and which then degenerated into a riot causing damage to others, could be held liable in terms of the RGA. The court ruled that members of the public who suffer damages from protesters have the right to recoup their losses from whoever hosted the protest – whether damages were caused by members of the organisation or not.

There is no *onus* on persons suing these organisations to prove that damages were caused by members of the protesting organisation. The mere fact that damages were incurred during the march is enough in the way of proof for anyone to be able to claim damages from the organisers.¹²¹ In terms of the issue of whether the law unjustifiably limits the right to freedom of assembly, the Court held that the RGA does not negate the right to freedom of assembly, but

¹¹⁷ Lancaster, L. & Mulaudzi, G. 2017. *Is protest the only way to achieve change?* Institute for Security Studies. Available at <https://issafrica.org/iss-today/is-protest-the-only-way-to-achieve-change>. Accessed on 20 April 2020.

¹¹⁸ Lancaster, L. & Mulaudzi, G. 2020. *Rising protests are a warning sign for South Africa's government.* Institute for Security Studies. Available at <https://issafrica.org/iss-today/rising-protests-are-a-warning-sign-for-south-africas-government>. Accessed on 24 February 2021.

¹¹⁹ Gerber, J. 2020. *Fewer service delivery protests in 2019 than previous year, says data collecting organisation.* News24, 1 February. Available at <https://www.news24.com/news24/SouthAfrica/News/fewer-service-delivery-protests-in-2019-than-previous-year-says-data-collecting-organisation-20200201>. Accessed on 14 February 2021.

¹²⁰ *The South African Transport and Allied Workers Union and Others v Garvas and Others* 2013 (1) SA 83 (CC). Also see: *South African Transport and Allied Workers Union and Another v Garvas and Others* (CCT 112/11) [2012] ZACC 13; 2012 (8) BCLR 840 (CC); [2012] 10 BLLR 959 (CC); (2012) 33 ILJ 1593 (CC); 2013 (1) SA 83 (CC) (13 June 2012).

¹²¹ Delaney, S. 2016. *The right to freedom of assembly, demonstration, picket and petition within the parameters of South African law.* Available at <http://www.fhr-mirror.org.za/files/3815/1247/0494/Protest.pdf>. Accessed on 24 February 2021.

merely subjects the exercise of that right to strict conditions, in a way designed to moderate or prevent damage to property or injury to people.

The Constitutional Court judgment, delivered in November 2018, in the case of *Mlungwana and Others vs The State and Another*,¹²² represents a significant step forward in protecting the right to freedom of assembly. The Constitutional Court ruled against the RGA, which permitted criminal penalties – including fines and up to one year’s imprisonment – for failure to give proper notice to the authorities of a planned gathering of 15 or more people. The judgment is only the second reached by a top national court to conclude that criminal sanctions for protests that do not pose a danger to the public are disproportionate and therefore unconstitutional.¹²³

COVID-19

Government’s declaration of a state of disaster following the COVID-19 pandemic resulted in various regulations being published during several stages of lockdown. These regulations, prohibiting certain forms of assembly and gathering and limiting the number of participants if allowed, naturally infringed upon section 17 rights.

Aside from the question as to whether these regulatory impediments were rational during all stages of lockdown, it could in all likelihood be argued that the limitation of section 17 rights during the COVID-19 pandemic are generally fair in view of the necessity to curb the spread of the virus and to ensure that the right to life is realised as far as possible in the circumstances.

Conclusion

The rights contained in section 17 of the Constitution must be jealously guarded and continuously realised. For these rights to fully come into effect, care must be taken that arbitrary decisions by decision-makers and cumbersome administrative processes do not limit these rights. This sort of conduct poses a threat to section 17 rights and often causes frustration and violence in circumstances where it could have been prevented by rational administrative action. The Constitutional Court in *Mlungwana and Others vs The State and Another* expanded the rights by its judgment by finding that criminal sanctions for protests that are not dangerous are disproportionate.

¹²² *Mlungwana and Others v S and Another* (CCT32/18) [2018] ZACC 45; 2019 (1) BCLR 88 (CC); 2019 (1) SACR 429 (CC) (19 November 2018).

¹²³ Coliver, S. 2018. *Case watch: South Africa’s Constitutional Court strikes down restrictive protest law*. Open Society Foundation. Available at <https://www.justiceinitiative.org/voices/case-watch-south-africa-s-constitutional-court-strikes-down-restrictive-protest-law>. Accessed on 24 February 2021.

The finding in *The South African Transport and Allied Workers Union and Others v Garvas and Others* was reasonable for the circumstances in South Africa, but does limit the rights contained in section 17 in the sense that it serves an important purpose and reasonably balances the conflicting rights of organisers, potential participants and often vulnerable and helpless victims of a gathering or demonstration which degenerates into violence.

Freedom of association

Adv. Ben Coetzee Bester

Section 18 of the Constitution provides that everyone has the right to freedom of association. The primary value of the freedom of association can best be expressed in terms of the consequences of its absence, i.e. without freedom of association, the political rulers find no opposition to their policies, not because none exists, but because such opposition can find no form of actualisation.¹²⁴

It is challenging to index the progressive development and/or deterioration – as the case may be – of the right to freedom of association in isolation. This is because freedom of association is closely related to various other civil and political rights. This was reconfirmed by the Supreme Court of Appeal during the course of 2019 in the following terms:¹²⁵

[F]reedom of expression is one of a ‘web of mutually supporting rights’ in the Constitution. It is closely related to freedom of religion, belief and opinion (s 15), the right to dignity (s 10), as well as the right to freedom of association (s 18), the right to vote and to stand for public office (s 19), and the right to assembly (s 17) . . . The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial.

Seen in this light, it is no surprise that the right to freedom of association, even in an international legal context,¹²⁶ encapsulates the right of the individual to establish and participate in all manner of civil society associations or voluntary organisations. Accordingly, any encroachments on the powers, form and/or functions of civil society, in general, should therefore be considered a deterioration of the right to freedom of association. In turn, any improvement in the role of civil society in the public sphere or more legal “space” won, should be regarded as progressive development in the fulfilment of the right of freedom of association.

In this regard, it is encouraging to note that in the 2017 national report submitted by the South African government to the United Nations Human Rights Council (as part of the Human Rights

¹²⁴ Cheadle, M.H. & Davis, D. 2005. *South African Constitutional Law: The Bill of Rights*. Second edition. Durban: LexisNexis Butterworths, at 13.1.

¹²⁵ *Qwelane v South African Human Rights Commission and Another* (686/2018) [2019] ZASCA 167; [2020] 1 All SA 325 (SCA) (29 November 2019), at para 41.

¹²⁶ Moeckli, M., Shah, S. & Harris, D. 2016. *International Human Rights Law*. Second Edition. Oxford University Press, p. 231.

Council's working group on the Universal Periodic Review), the South African government recognised that¹²⁷

[C]ivil society is an important stakeholder in its quest to deepen democracy in South Africa. Defined as operating outside of the State and independent of the market, civil society is often referred to as the third sector. Civil society organisations (CSOs) are varied in their character and in their purpose. However, there is a common thread that holds them together, which is that they exist in public life to promote public good. In fact, the strength of a country's civil society is often used as a measure to determine the strength of its democracy – this is also true of South Africa, which has dynamic and vibrant civil society organisations across various sectors.

In addition, it is a positive reflection on the right to freedom of association that, according to Freedom House's *Freedom in the World 2019* report, "South Africa hosts a vibrant civil society. Non-governmental organisations (NGOs) can register and operate freely, and lawmakers regularly accept input from NGOs on pending legislation".¹²⁸ That being said, a national Ipsos survey commissioned by Parliament, that aimed to measure citizens' understanding of Parliament, reported that 14% of respondents answered in the affirmative to the question "Do you know how to participate in the activities of Parliament for the 2019/2020 budget year?" against a target of 11%. Also, participations who use various platforms in the parliamentary processes were recorded at 7,2% against a target of 6% for the same year under review.¹²⁹ While Parliament achieved its targets, the percentages still constitute a very small number of the population.

Moreover, it is disconcerting that a recent Afrobarometer report indicated that between 2008 and 2018 there was a 7% decline in South Africa for the view that a person should be able to join any organisation whether or not the government approves of it.¹³⁰ This is particularly concerning in light of the recent Constitutional Court decision of *New Nation Movement NPC and Others v President of the Republic of South Africa and Others*,¹³¹ in which the Constitutional Court confirmed that the right to freedom of association has both a positive and a negative element, namely

¹²⁷ United Nations General Assembly. 2017. *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21*. Review at para 81. Available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/090/40/PDF/G1709040.pdf?OpenElement>. Accessed on 2 March 2021.

¹²⁸ Freedom House. 2019. *Freedom in the World 2019. South Africa*. Available at <https://freedomhouse.org/country/south-africa/freedom-world/2019>. Accessed on 3 March 2020.

¹²⁹ Parliament of the Republic of South Africa. 2020. *Annual report 2019/2020*, p. 53. Available at <https://www.parliament.gov.za/storage/app/media/BusinessPubs/AnnualReport2019-2020.pdf>. Accessed on 27 January 2021.

¹³⁰ Logan, C. & Penar, P. 2019. Are Africans' freedoms slipping away? In *Afrobarometer Policy Paper (55)*. Available at http://afrobarometer.org/sites/default/files/publications/Policy%20papers/ab_r7_policypaper055_are_freedoms_slipping_away_in_africa_1.pdf. Accessed on 14 February 2021.

¹³¹ *New Nation Movement NPC and Others v President of the Republic of South Africa and 2020 (6) SA 257 (CC)*.

“... choosing to associate is an exercise of the right to freedom of association. Choosing to dissociate from that which you earlier associated with is also an exercise of that right. Choosing not to associate at all too is an exercise of the right ...”

Conclusion

It is difficult to index the right to freedom of association in isolation. Ultimately, the indexing of the right to freedom of association should be considered together with the indexing of other civil and political rights covered in this index (such as the right to freedom of religion, belief and opinion as well as the right to freedom of expression).

Political rights

Dr Eugene Brink

South Africa held its sixth national elections in May 2019 and all registered voters over the age of 18 were eligible to vote. The right to vote and the obligation to hold free, fair and regular elections are enshrined in the Constitution and other relevant pieces of legislation.

As a civil rights organisation, AfriForum's personnel and volunteers had observed the elections in some of the provinces – especially in Gauteng. There were several complaints raised on social media and with AfriForum's observers about the improper stamping of ballot papers, although such instances were not witnessed first-hand by said observers. Some polling stations did not have the required amount of ballot papers and this forced registered voters at those stations to cast their votes at other polling stations. However, there were no known instances of registered and willing voters not being able to vote at all or being prevented from voting.

The observer group Association for Free Research and International Cooperation said the elections were highly professional and commended the Independent Electoral Committee (IEC) on a job well done.¹³² Opposition parties, political groupings and other observers did not object in any substantive way to the election results.

South Africa's political rights are still a cut above the rest of Sub-Saharan Africa, but some prominent warnings about backsliding have been sounded over the last few years. Freedom House's *Freedom in the World 2019* report still rates the country as "free", with a score of 79 out of 100 (0 being least free and 100 being most free).¹³³ Its score on political rights is an admirable 2 out of 7 (0 being most free and 7 being least free). The country scored 100% for its electoral process, the fairness and fair implementation of its electoral framework, and the election of the current national legislative representatives. Moreover, it scored well (13 out of 16) on the issues of participation and pluralism, which include the right to form and participate in a political party or political grouping such as a civil society organisation. There is no known hindrance to such participation and support.

¹³² Nqolga, R. 2019. Observer group praises 'highly professional' SA elections. EWN, 1 January. Available at <https://ewn.co.za/2019/05/09/observer-group-praises-highly-professional-sa-elections>. Accessed on 14 February 2021.

¹³³ Freedom House. 2019. *Freedom in the World 2019. South Africa*. Available at <https://freedomhouse.org/country/south-africa/freedom-world/2019>. Accessed on 14 February 2020.

However, there have been a number of reservations about the country's gradually worsening position on political rights. For instance, Freedom House notes the following in its latest summary on Sub-Saharan Africa:¹³⁴

Recent years have seen backsliding among the top performers, such as South Africa.

Some challenges have arisen from the lack of safeguards against corruption. Freedom House has given South Africa a score of only 2 out of 4 for safeguards against official corruption. The first sentence explaining this score, captures this predicament perfectly:¹³⁵

Comprehensive anticorruption laws and several agencies tasked with combating corruption exist, but enforcement has been inadequate.

Although President Cyril Ramaphosa has made some notable changes such as appointing a new head of the National Prosecuting Authority and firing some bad apples such as Tom Moyane, former commissioner of the South African Revenue Service (SARS), not much else has been done to curb the scourge of corruption. Corrupt officials need to be not only fired, but also prosecuted. Moreover, the office of the Public Protector (PP) has been sullied and shrouded in controversy following a string of adverse court findings against the current PP, Adv. Busisiwe Mkhwebane.

Fierce but fair criticism has been levelled against her for soft-peddalling or ignoring high-profile corruption cases involving controversial figures in the ruling party, while focusing on less relevant ones. Her most recent humiliating court defeat was, ironically enough, against SARS in respect of gaining access to confidential taxpayer information. Judge Peter Mabuse ordered Mkhwebane to personally pay 15% of SARS Commissioner Edward Kieswetter's legal costs while her office must pay the balance.¹³⁶ Judge Mabuse also had some exceptionally scathing words for the PP. He said she *yet again* acted in "bad faith" and "improperly in flagrant disobedience of the Constitution". Moreover, he said she was "dishonest" in her dealings with SARS and that she was "reckless" and her conduct "inexcusable".¹³⁷ Prior to this, she also received heavy blows in court relating to the Estina, Absa/Bankorp and Reserve Bank cases. For instance, in July 2019 the Constitutional Court agreed with the North Gauteng High Court that her entire investigation into the

¹³⁴ Freedom House. 2019. *Sub-Saharan Africa programs*. Available at <https://freedomhouse.org/programs/sub-saharan-africa>. Accessed on 14 February 2020.

¹³⁵ Freedom House. 2019. *Freedom in the World 2019. South Africa*. Available at <https://freedomhouse.org/country/south-africa/freedom-world/2019>. Accessed on 14 February 2020.

¹³⁶ Van Wyk, P. 2020. Busisiwe Mkhwebane acted "improperly in flagrant disobedience of the Constitution", says Pretoria High Court. *Daily Maverick*, 24 March. Available at <https://www.dailymaverick.co.za/article/2020-03-24-busisiwe-mkhwebane-acted-improperly-in-flagrant-disobedience-of-the-constitution-says-pretoria-high-court/>. Accessed on 24 February 2021.

¹³⁷ *Ibid.*

Absa/Bankorp affair was flawed and contained a “number of falsehoods”.¹³⁸ The High Court stated that she was not honest during her investigation. The apex court subsequently upheld the personal costs order in this matter against the PP.

In the Fund for Peace’s *Fragile States Index 2019*, South Africa is among the 20 long-term most-worsened countries.¹³⁹ The country is also in the “elevated warning” category and holds the same aggregate score (71,1) as China. With scores of 6,5 out of 10 (the higher the score, the worse the rating) for state legitimacy and 6,7 for public services, the country is in dangerous territory. It did, however, score 4,2 for human rights and the rule of law – an improvement compared to the other two political indicators, but still of relative concern.

Although not an election year, 2020 saw the advent of the COVID-19 threat. President Cyril Ramaphosa declared a national state of disaster and instituted a lockdown in March. South Africa’s lockdown was widely criticised by the public and international role players alike and became the subject of many legal battles. The United Nations Human Rights Office highlighted the “heavy handed” and “highly militarised” law enforcement response to COVID-19 in countries such as South Africa and Sri Lanka.¹⁴⁰ Among other infractions, it decried the “disproportionate use of force by security officers” in South Africa to enforce the lockdown restrictions. Michelle Bachelet, the United Nations High Commissioner for Human Rights, emphasised that emergency powers “should not be a weapon government can wield to quash dissent, control the population, and even perpetuate their time in power”.

Despite a ban on large gatherings in 2020, a spike in demonstrations was recorded and the lockdown and its consequences seemed to have spurred these activities. The Institute for Security Studies stated that a total of 511 protests were recorded during the lockdown period of 27 March to 31 July 2020.¹⁴¹ After a lull in protests before 2019, the number of protests began rising steadily and then steeply. Whereas there were 42 demonstrations – an average of nearly two per day – between 1 and 26 March, this increased to 169 events in June and 232 in July as the restrictions were gradually eased. These figures equate, respectively, to six per day in June and

¹³⁸ Niselow, T. 2019. *ConCourt upholds cost order against Mkhwebane, rules she was ‘not honest’ in Absa investigation*. News24, 22 July. Available at <https://www.news24.com/fin24/economy/breaking-concourt-uhpholds-cost-order-against-mkhwebane-rules-she-was-not-honest-in-absa-investigation-20190722>. Accessed on 24 February 2021.

¹³⁹ Fund for Peace. 2019. *Fragile state index annual report 2019*. Available at <https://fundforpeace.org/wp-content/uploads/2019/04/9511904-fragilestatesindex.pdf>. Accessed on 20 February 2020.

¹⁴⁰ Karrim, A. 2020. *Covid-19: UN Human Rights Office concerned by excessive force, death reports during SA lockdown*. News24, 28 April. Available at <https://www.news24.com/news24/southafrica/news/un-human-rights-office-highlights-toxic-lockdown-culture-in-sa-20200428>. Accessed on 24 February 2021.

¹⁴¹ Lancaster, L. & Mulaudzi, G. 2020. *Rising protests are a warning sign for South Africa’s government*. Institute for Security Studies. Available at <https://issafrica.org/iss-today/rising-protests-are-a-warning-sign-for-south-africas-government>. Accessed on 24 February 2021.

eight per day in July. The July figure was also the highest ever recorded in a single month since January 2013.

Not surprisingly, the leading causes of these demonstrations include the policing of the lockdown restrictions and crime (14%), followed by labour-related concerns (13%) and electricity supply problems.¹⁴² More than three in five protests (62%) were peaceful, with no need for intervention by the South African Police Service (SAPS). However, some non-violent events were met with disproportionate use of force by the SAPS. For instance, Cape Town restaurant workers picketing lockdown restrictions were dispersed by the SAPS, who deployed water cannons and stun grenades.

These demonstrations highlight some interesting patterns and trends. They increased during a time when government attempted to curb such and other activities. Their reasons highlighted some of the long-standing and often contradictory societal problems and reactions thereto: Law-abiding citizens feeling unsafe due to crime during a lockdown but being harassed by SAPS officers who should be protecting them.

Conclusion

If the sole measure of political rights is the holding of free and fair elections, South Africa's scores are still relatively good. Even so, the fact that the IEC is beholden to and dependent on government, and by implication the ANC, for its financing and other needs remains a long-standing problem. South Africa is still a beacon of electoral freedom on a continent wracked by dictators, rigged elections, and tenuous democracy, but this should not be accepted as a *fait accompli*. Apart from the Western Cape and a few municipalities throughout the country, the ANC has not had to cede power and the toughest test in respect of political rights will be when such a moment arrives.

Another challenge is the threat that state failure poses to stability and political rights. In many countries, state fragility has led to autocratic behaviour and a curb on political freedoms. In some cases, the converse has been true. There is a proven link between countries with a high degree of state fragility (including corruption, among others) and them being highly autocratic or typified as so-called "illiberal democracies". The latter take the form of countries that hold ritualistic (and often rigged) elections but lack additional civil and political liberties. This means that protests and other forms of political expression (and perhaps even eventually elections, too) as a reaction to increasingly poor service delivery, disastrous economic performance and growing

¹⁴² Lancaster, L. & Mulaudzi, G. 2020. *Rising protests are a warning sign for South Africa's government*. Institute for Security Studies. Available at <https://issafrica.org/iss-today/rising-protests-are-a-warning-sign-for-south-african-government>. Accessed on 7 September 2020.

authoritarianism are legally prohibited and met with force. The rulers suppress legitimate political dissent to stay in power. The year 2020 and even previous years have exhibited signs of this, and it is not inconceivable that South Africa, much like its neighbour to the north, could gradually or even suddenly backslide into such an abyss. At the time of writing, the South African government has lifted most restrictions pertaining to the COVID-19 pandemic, but not the national state of disaster, and cling to a residual clutch of measures that impair citizens' freedom.

The Citizenship Act 88 of 1995 (CA) and the various amendments made by the Citizenship Amendment Act 7 of 2010, along with section 10 of the Constitution regulate South African citizenship. Besides legislation, citizenship also needs to be assessed in the context of emigration, the state of affairs at the Department of Home Affairs and nationality in relation to how much value people place on their citizenship. The right to citizenship is not absolute since it is subject to certain limitations and over the years, legislation regarding access to South African citizenship have become more restricted.¹⁴³ The Minister of Home Affairs, for example, can revoke citizenship if he or she is satisfied that it is in the public interest or interests of the country.¹⁴⁴ Moreover, citizenship is forfeited when an individual also acquires citizenship of another country without applying and receiving permission for the retention of the South African citizenship first before applying for foreign citizenship.¹⁴⁵ People unwittingly losing their citizenship often form lobby groups to object against this loss of citizenship status, but to date, this issue has not been resolved, and the CA has not been amended in this regard.

Department of Home Affairs

The right to citizenship is controlled by the Department of Home Affairs (DHA). It is the administrative mandate of the department to administer South Africans' official identity and status as citizens. It is also the only department that has the authority to issue passports, identity documents, and birth and death certificates.¹⁴⁶ Unfortunately, the department has often been at the centre of numerous scandals involving fraud, corruption and mismanagement.¹⁴⁷ Various DHA employees have been arrested and convicted throughout 2019 and 2020. In the Eastern Cape¹⁴⁸ and

¹⁴³ Hobden, C. 2019. *How South Africa has squeezed options for migrants over 25 years*. The Conversation, 15 December. Available at <https://theconversation.com/how-south-africa-has-squeezed-options-for-migrants-over-25-years-128257>. Accessed on 24 February 2021.

¹⁴⁴ Hobden, C. 2018. *Report on Citizenship Law: South Africa*, p. 10. Available at https://cadmus.eui.eu/bitstream/handle/1814/51447/GLOBALCIT_CR_2018_01.pdf?sequence=1&isAllowed=y. Accessed on 24 February 2020.

¹⁴⁵ Edwards, C. 2019. *Worried you've lost SA citizenship? It's now easy to check through a Determination process*. *The South African*, 25 November. Available at <https://www.thesouthafrican.com/lifestyle/move-to/worried-youve-lost-sa-citizenship-its-now-easy-to-check-through-a-determination-process/>. Accessed on 24 February 2020.

¹⁴⁶ Department of Home Affairs. 2019. *Annual report 2018/2029*, p. 20. Available at <https://drive.google.com/file/d/1reufgcuHkKkVPhFH3oUHJNSP2Oaq4h8/view>. Accessed on 24 February 2021.

¹⁴⁷ Solidarity Research Institute. 2015. *8. Home Affairs*. 15 September. Available at <https://solidariteit.co.za/en/8-home-affairs/>. Accessed on 2 February 2020.

¹⁴⁸ Sicetsha, A. 2019. *EC Home Affairs officials jailed for extorting undocumented detainees*. *The South African*, 15 August. Available at <https://www.thesouthafrican.com/news/home-affairs-eastern-cape-officials-jailed-extortion/>. Accessed on 2 February 2020.

Northern Cape, DHA officials were convicted of extortion, bribery and corruption.¹⁴⁹ Numerous arrests involving the fraudulent issuing of documents have also been made in other provinces, including KwaZulu-Natal¹⁵⁰ as well as the Western Cape¹⁵¹ – confirming that corruption occurs all over the country and is not limited to one location only. Furthermore, civil claims against the department regarding the lack of service delivery have passed the R2 billion mark, according to the DHA's director-general.¹⁵² In 2020 in an appeal for clarification of an order of constitutional invalidity, the Constitutional Court handed down its decision that certain sections of the CA were unconstitutional and invalid because of failure to recognise descent-acquired citizenship.¹⁵³ During the trial, it was revealed that the DHA was confronted by more than 8 000 court cases.¹⁵⁴

Having considered the above, it is also reasonable to mention the accomplishments of the department. The DHA has annulled more than 1 000 fraudulent marriages during the 2018/2019 financial year.¹⁵⁵ It should also be noted that the onus is on people to collect their documentation after it has been issued by branches. By August 2019, the DHA Minister said that nearly 400 000 uncollected identity documents are seriously hampering service delivery.¹⁵⁶

Emigration

As of yet, data collection dedicated to emigration is challenging to obtain, with no agency collecting information on all types of emigration.¹⁵⁷ Evidence from various sources suggests, however, that over the past couple of years, the country has seen an exodus of people. The First

¹⁴⁹ Sictsha, A. 2019. Home Affairs immigration officer gets jail time for corruption at Vioolsdrift border. *The South African*, 19 November. Available at <https://www.thesouthafrican.com/news/home-affairs-immigration-officer-jail-time-corruption-vioolsdrift-border/>. Accessed on 2 February 2020.

¹⁵⁰ Biyela, K. 2019. Two KZN home affairs officials arrested for fraud. *News24*, 15 April. Available at <https://www.news24.com/SouthAfrica/News/two-kzn-home-affairs-officials-arrested-for-fraud-20190415>. Accessed on 2 February 2020.

¹⁵¹ IOL. 2019. Home Affairs official, 8 foreign nationals arrested for corruption and forgery. 26 May. Available at <https://www.iol.co.za/news/south-africa/western-cape/home-affairs-official-8-foreign-nationals-arrested-for-corruption-and-forgery-24117327>. Accessed on 2 February 2020.

¹⁵² Naki, K. 2019. Home affairs facing more than R2 bn in lawsuits. *The Citizen*, 11 November. Available at <https://citizen.co.za/news/south-africa/government/2202679/home-affairs-facing-more-than-r2bn-in-lawsuits/>. Accessed on 24 February 2021.

¹⁵³ *Chisuse and Others v Director-General, Department of Home Affairs and Another* (CCT155/19) [2020] ZACC 20; 2020 (10) BCLR 1173 (CC); 2020 (6) SA 14 (CC) (22 July 2020).

¹⁵⁴ Ellis, E. 2020. Citizenship case reveals chaos at Home Affairs as it battles 8,000. *Daily Maverick*, 14 February. <https://www.dailymaverick.co.za/article/2020-02-14-citizenship-case-reveals-chaos-at-home-affairs-as-it-battles-8000-lawsuits/>. Accessed on 24 February 2021.

¹⁵⁵ Kubheka, T. 2019. Motsoaledi: Home Affairs annulled over 1, 000 Fraudulent Marriage in 2018/2019. *EWN*, n.d. Available at <https://ewn.co.za/2019/08/30/home-affairs-dept-annuls-over-1-000-fraudulent-marriages-in-2018-2019>. Accessed on 19 February 2020.

¹⁵⁶ Maqhina, M. 2019. Nearly 400 000 ID's uncollected. *The Star Late Edition*, 7 August. Available at <https://www.pressreader.com/south-africa/the-star-south-africa-late-edition/20190807/281835760324992>. Accessed on 24 February 2021.

¹⁵⁷ Buckham, D. 2019. Are skilled, white South Africans really emigrating at an accelerating rate? *Daily Maverick*, 1 October. Available at <https://www.dailymaverick.co.za/article/2019-10-01-are-skilled-white-south-africans-really-emigrating-at-an-ccelerating-rate/>. Accessed on 24 February 2021.

National Bank's Estate Agents Survey showed that for the first quarter of 2019, property sales relating to emigration stood at 14,4% – an increase of 10% when compared to the last quarter of 2018.¹⁵⁸ Immigration data from the United Kingdom's Office for National Statistics suggests that there was an increase of 2 000 South Africans that have emigrated to the UK from the end of 2018 to 2019.¹⁵⁹ At the same time, an estimated 229 000 South African-born persons were living in the UK by the end of June 2020.¹⁶⁰ Reasons for leaving the country vary, but high crime rates, frustration and fear caused by failing infrastructure, and lack of practical study, business and employment opportunities are generally mentioned as among the main reasons.

In terms of nationality, the *Quality of Nationality Index* published by Henley & Partners, which evaluates the worth and ranking of nationalities worldwide, ranked South Africa 85th overall among 159 countries measured, based on 2018 statistics. According to the *Quality of Nationality Index*, South Africa has gradually moved from a “low quality” tier in 2014 to a “medium quality” nationality in 2018.¹⁶¹

Conclusion

South Africa's citizenship is sufficiently protected. However, the main contributing factor with regarded citizenship is the bureaucratic red tape, as well as the failures of the DHA, which hampers the enjoyment of this right. Also, no economy can function without a skilled labour force, and the exodus of South Africans emigrating due to unfavourable conditions should be a matter of great concern and even an embarrassment for the government. Also, the fact that no official programme exists to stay in touch with expats, which means that there is no official encouragement for them to employ their skills and experience in favour of South Africa abroad and no incentive to return either. In fact, current amendments to income tax legislation rather encourage South Africans to emigrate before the amendments came into effect.¹⁶²

¹⁵⁸ Fourie, J. 2019. *Why South Africans are emigrating and what to do about it*. 20 June, Fin24. Available at <https://www.fin24.com/Finweek/Opinion/why-south-africans-are-emigrating-and-what-to-do-about-it-20190620>. Accessed on 24 February 2021.

¹⁵⁹ BusinessTech. 2019. *Here's how many South Africans have moved to the UK*. 1 December. Available at <https://businesstech.co.za/news/lifestyle/358293/heres-how-many-south-africans-have-moved-to-the-uk/>. Accessed on 24 February 2020.

¹⁶⁰ Office of National Statistics. 2020 *Population of the UK by country of birth and nationality*. Available at <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/datasets/populationoftheunitedkingdombycountryofbirthandnationality>. Accessed on 14 February 2021.

¹⁶¹ Quality of Nationality Index. 2018. Henley & Partners Ltd. Available at <https://www.nationalityindex.com/worldmap/ZAF#>. Accessed on 14 February 2021.

¹⁶² Smith, C. 2020. *How tax law amendments will impact financial emigration and access to retirement savings*. Fin24, 19 December. Available at <https://www.news24.com/fin24/money/how-tax-law-amendments-will-impact-financial-emigration-and-access-to-retirement-savings-20201218>. Accessed on 2 March 2021.

Freedom of movement and residence

Johan Nortjé

During certain periods in South African history, freedom of movement was restricted. Section 21 of the Constitution states that everyone (including non-citizens) has the right to freedom of movement, reside anywhere and leave the country. Furthermore, citizens also have a right to enter and remain within the territorial borders. Moreover, citizens are entitled to a passport.¹⁶³ However, a sensible limitation is placed on this right, in that one cannot trespass on others' private property. As a rule, before March 2020, this right was legally enjoyed. From 2019 to 2020, more than 40 million travellers (27% of whom were South African citizens) passed through South Africa's ports of entry.¹⁶⁴

Given the broad context of freedom of movement, the condition of roads, border control, passport status and citizenship will be highlighted. The last theme is essential since the liberty of movement is not just tied to citizenship. It is essential for economic activity. The limitation of this right has had grave consequences for an already troubled financial sector.

The state of roads

Due to an unreliable and deteriorating public transport system, many people are dependent on private transport, with more than 60% of households using minibus taxis to commute, and at least 30% of households owning more than one vehicle.¹⁶⁵ This has a substantial private cost for commuters. According to the National Automobile Dealers' Association, a significant portion (up to 42%) of the purchase price of a vehicle (estimated at R450 000) is collected by the government in the form of tax such as customs duties, while tax collected for CO₂ emission is not necessarily used for sponsorship of environmental programmes.¹⁶⁶ Despite the private purchasing cost of vehicles, poor road conditions and lack of upkeep is costing taxpayers millions of Rands each year.¹⁶⁷ A study on the road maintenance backlog published by the University of Cape Town

¹⁶³ Klaaren, J. 2018. Freedom of movement and residence. In *Constitutional Law of South Africa*. Available at <https://constitutionallawofsouthafrica.co.za/wp-content/uploads/2018/10/Chap66.pdf>. Accessed on 24 January 2021.

¹⁶⁴ Department of Home Affairs. 2020. *Annual report 2019/2020*, p. 13. Available at <http://www.dha.gov.za/index.php/about-us/annual-reports>. Accessed on 24 February 2021.

¹⁶⁵ Helena, W. 2019. *The SA minibus taxi industry is absolutely massive – here's everything you need to know*. Business Insider SA, 18 May. Available at <https://www.businessinsider.co.za/how-big-is-south-african-taxi-industry-2019-5>. Accessed on 19 February 2021.

¹⁶⁶ BusinessTech. 2021. *These major tax changes could make cars much cheaper in South Africa*. 31 January. Available at <https://businesstech.co.za/news/motoring/463896/these-major-tax-changes-could-make-cars-much-cheaper-in-south-africa/>. Accessed on 24 February 2021.

¹⁶⁷ Liedtke, S. 2019. *Lack of road maintenance could cost South Africa millions of rands – SARF president*. Engineering News, 4 April. Available at https://www.engineeringnews.co.za/article/lack-of-road-maintenance-could-cost-south-africa-millions-of-rands-sarf-president-2019-04-04/rep_id:4136. Accessed on 19 February 2020.

School of Economics in 2019 calculated that the provincial road maintenance backlog stood at an estimated R150 billion, while the municipal road maintenance backlog was estimated at R242 billion.¹⁶⁸

Immigrants

Immigrants make up a significant part of the economic activity in creating jobs, business opportunities and servicing local consumers' needs.¹⁶⁹ However, social attitudes towards refugees and cross-border migrants are still hostile, resulting in harassment and xenophobic attacks.¹⁷⁰ According to data from Xenowatch, there were 68 incidents of xenophobic attacks in 2019 (from January to September) – one of the highest since 2008.¹⁷¹ It was noted in a survey conducted on anti-immigrant sentiment and released by the Human Sciences Research Council in 2020 that adverse opinions were prevalent among significant representatives of a sample population living in provinces with high densities of migrants.¹⁷² While many factors contribute to xenophobia, according to an article published by the Helen Suzman Foundation, insufficient border control, border security, and migration policy also aggravate this phenomenon.¹⁷³

The above-mentioned article highlights findings on the state of borders: poor training of border staff (most officers of the South African Police Service felt that they had received insufficient training), the absence of technology and infrastructure to monitor and intercept illegal crossings (such as power failures and broken fences), and poor cooperation between departments are the key issues that promote border challenges. Border management must oversee 58 laws governing border management by seven separate departments, each with differing command structures.¹⁷⁴ Very little progress has been made on border control issues during 2020. A joint invitation by the Special Investigations Unit and the Department of Public Works and Infrastructure (DPWI) at the Beitbridge border post in Limpopo revealed that following flawed emergency and irregular procurement as well as acts of fraud by service providers in constructing a border fence at

¹⁶⁸ Arnoldi, M. 2019. *South Africa's road maintenance backlog*. 10 July. Available at <https://www.news.uct.ac.za/article/-2019-07-10-south-africas-road-maintenance-backlog>. Accessed on 19 February 2021.

¹⁶⁹ Washinyira, T. 2015. *How immigrants contribute to the SA economy*. GroundUp, 17 June. Available at https://www.groundup.org.za/article/how-immigrants-contribute-sa-economy_3043/. Accessed on 19 February 2021

¹⁷⁰ Gordon, S. 2020. *Study sheds light on how South Africa can best tackle prejudice against migrants*. The Conversation, 2 November. Available at <https://theconversation.com/study-sheds-light-on-how-south-africa-can-best-tackle-prejudice-against-migrants-148812>. Accessed on 16 February 2021.

¹⁷¹ Xenowatch. *Factsheet: 1. 2019. Incidents of xenophobic violence in South Africa: January – September 2019*. Available at http://www.xenowatch.ac.za/wp-content/uploads/2019/10/Factsheet-1-Xenophobic-violence-incidents-in-SA_-Jan-Sept-2019.pdf. Accessed on 24 February 2021.

¹⁷² Gordon, S. 2020. *Study sheds light on how South Africa can best tackle prejudice against migrants*. The Conversation, 2 November. Available at <https://theconversation.com/study-sheds-light-on-how-south-africa-can-best-tackle-prejudice-against-migrants-148812>. Accessed on 16 February 2021.

¹⁷³ Van Lennep, T. 2019. *Migration IV: The state of South African's borders*. 18 September. Available at <https://hsf.org.za/publications/hsf-briefs/the-state-of-south-africa2019s-borders>. Accessed on 15 February 2021.

¹⁷⁴ *Ibid.*

Beitbridge, it was overpriced by R14,3 million.¹⁷⁵ Furthermore, the Standing Committee on Public Accounts stated that “the border fence does not meet the prescribed requirements”.¹⁷⁶ Simultaneously, the DPWI reported that the country’s border presented a national security threat, with virtually no fences between the South African border and Lesotho or Swaziland.¹⁷⁷

The lockdown and the limitation of freedom of movement

By far the most visible and severe limitations on the right to movement were those pertaining to the national lockdown in terms of section 27(5) of the Disaster Management Act 57 of 2002 in response to the COVID-19 pandemic. The initial restriction of movement began on 27 March 2020. Since then, South Africa has moved between levels 5 and 1 (with level 5 limiting freedom most).¹⁷⁸ Provisions in the regulations limiting movement arguably played a key role in delaying the spread of the virus, and gave health workers time to prepare for an influx of patients.¹⁷⁹ It is essential, however, not to overemphasise government’s justification of the limitations of movement.

Much of these regulations were a disproportionate response to the pandemic, with some of the world’s sternest measurement.¹⁸⁰ Dr Nkosazana Dlamini-Zuma, Minister of Cooperative Government and Traditional Affairs, issued a regulation that anyone who tested positive for COVID-19 was to be placed under compulsory state quarantine, which was described by AfriForum as “unconstitutional, illegal and irrational”.¹⁸¹ The Northern Gauteng High Court later also ruled that regulations imposed by the government were unconstitutional and invalid.¹⁸²

As noted, economic growth is dependent on the movement of goods and services, and the economic consequences of the lockdown have been devastating. Statistics South Africa reported

¹⁷⁵ Parliamentary Monitoring Group. 2020. *Beitbridge border fence findings; with Minister, SIU, Treasury*. 25 August. Available at <https://pmg.org.za/committee-meeting/30925/>. Accessed on 14 February 2021.

¹⁷⁶ Parliamentary Monitoring Group. 2020. *Beitbridge border fence oversight visit: Public Works Minister & stakeholders*. 6 October. Available at <https://pmg.org.za/committee-meeting/31125/>. Accessed on 14 February 2021.

¹⁷⁷ *BusinessTech*. 2020. South Africa’s borders are completely exposed – ‘We are not safe’. 15 October. Available at <https://businesstech.co.za/news/government/440793/south-africas-borders-are-completely-exposed-we-are-not-safe/>. Accessed on 24 February 2021.

¹⁷⁸ Republic of South Africa. 2020. *Regulations and guidelines*. Available at <https://www.gov.za/covid-19/resources/regulations-and-guidelines-coronavirus-covid-19#>. Accessed on 13 February 2021.

¹⁷⁹ Investec. 2020. *Is SA’s healthcare system prepared for Covid-19?* 8 June. Available at https://www.investec.com/en_za/focus/beyond-wealth/is-south-africas-healthcare-system-prepared-for-covid-19.html. Accessed on 14 February 2021.

¹⁸⁰ BBC. 2020. SA court rules lockdown restrictions ‘irrational’. 3 June. Available at <https://www.bbc.com/news/world-africa-52904043>. Accessed on 14 February 2021.

¹⁸¹ Bester, C. 2020. *AfriForum in court over NDZ’s irrational quarantine regulations*. Politicsweb, 17 May. Available at <https://www.politicsweb.co.za/politics/in-court-over-dlaminizumas-irrational-regulations->. Accessed on 14 February 2021.

¹⁸² *De Beer and Others v Minister of Cooperative Governance and Traditional Affairs* (21542/2020) [2020] ZAGPPHC 184; 2020 (11) BCLR 1349 (GP) (2 June 2020).

that 2,2 million jobs were shed during the second quarter (April to June) of 2020¹⁸³ – a higher number than the population of the city of Johannesburg. At the time, not a single minister or deputy minister lost their job due to the lockdown.

Passports and travel

According to the Department of Home Affairs, the South African passport is currently among the most secured in the world.¹⁸⁴ Perhaps the problem over the past few years of fake and compromised passport and feeder documents that were universally used for travel by designated terrorist groups such as al-Qaeda, had been addressed. The use of such passports have been linked to attacks on the 7/7 bombing in London.¹⁸⁵

Over the past decade, South Africa has weakened in the *Henley & Partners Passport Index* (which measures freedom of travel), from 47th in 2010 to 56th in 2020.¹⁸⁶ South Africans have visa-free access to most non-Western and developing nations. Considering that South Africa desperately needs foreign investment, visas are still required for 7 out of 10 of the country's main import partners, thus placing roaming burdens on local businesses wanting to travel to these nations. It is also important to bear in mind the difficulties that arise due to the cost of travel. According to *The Economist*, the Rand is one of the world's most undervalued currencies; it should theoretically be trading in the range of 5,67 to 5,71 against the US dollar.¹⁸⁷ The International Monetary Fund Africa department stated that political uncertainty is probably the most influential factor in depressing the value of the Rand.¹⁸⁸

Although various government officials have made valiant efforts to repatriate citizens stranded abroad because of global travel restrictions, actually the Department of International Relations and Cooperation is responsible for assisting South Africans who are in distress abroad.¹⁸⁹ However, overseas passport applications are still fraught with months of delays, which remains a

¹⁸³ Statistics South Africa. 2020. SA economy sheds 2,2 million jobs in Q2 but unemployment levels drop. Available at <http://www.statssa.gov.za/?p=13633>. on 14 February 2021.

¹⁸⁴ Department of Home Affairs. 2020. *Annual report 2019/2020*, p. 13. Available at <http://www.dha.gov.za/index.php/about-us/annual-reports>. Accessed on 24 February 2021.

¹⁸⁵ Botha, A. 2011. *Why al-Qa'eda seems to prefer South African passports*. Institute for Security Studies, 14 June. Available at <https://issafrica.org/iss-today/why-al-qaeda-seems-to-prefer-south-african-passports>. Accessed on 14 February 2021.

¹⁸⁶ *Henley Passport Index*. 2020. Available at <https://www.henleypassportindex.com/passport>. Accessed on 19 February 2020.

¹⁸⁷ *The Economist*. 2021. The Big Mac index. 12 January. Available at <https://www.economist.com/big-mac-index>. Accessed on 14 February 2021.

¹⁸⁸ Mayeda, A. 2019. *South Africa's rand held back by political uncertainty, IMF says*. Bloomberg, 12 April. Available at <https://www.bloomberg.com/news/articles/2019-04-12/south-africa-s-rand-held-back-by-political-uncertainty-imf-says>. Accessed on 14 February 2021.

¹⁸⁹ Department of International Relations and Cooperation. 2020. *Newsletter on the repatriation of South African citizens*. Available at http://www.dirco.gov.za/repatriation_newsletters/2020/repatriation-newsletter01_19-april-2020.pdf. Accessed on 14 February 2021.

growing problem. At the time, South Africans could apply for an emergency document to return to their country, but many South African missions abroad hampered the process severely.¹⁹⁰

Conclusion

From the above observations, it is clear that the right to freedom of movement is severely infringed on, and that the regulations of the national lockdown have most notably restricted this right. Conditions such as adequate transport and effective border control policies have already prior to the lockdown fostered an environment that makes it difficult for people to enjoy this right to its full extent.

¹⁹⁰ Nicolson, G. 2020. The catch 22 of trying to get an emergency SA document: yes we will help you but you will have to find us first. *Daily Maverick*, 28 August. Available at <https://www.dailymaverick.co.za/article/2020-08-28-the-catch-22-of-trying-to-get-an-emergency-sa-document-yes-we-will-help-you-but-you-will-have-to-find-us-first/>. Accessed on 14 February 2021.

Freedom of trade, occupation and profession

Connie Mulder

Economic freedom forms the basis of any prosperous society, with an extremely close correlation between the economic freedom of a country and the wealth of its citizens. In South Africa, section 22 of the Constitution guarantees South African Citizens the freedom of trade, occupation and profession.

This is understood to imply that South African citizens have the right to pursue the trade or occupation of their choice; however, there is a qualifying criterion attached to this right specifically. Section 22 states that the practice of a trade, occupation and profession may be regulated by law. In theory this qualifying criterion is to avoid a trade or occupation from contravening the Bill of Rights. As an example: you do not have the right to pursue a trade as a professional assassin, despite section 22. This right is therefore not an absolute right but may be limited by government legislation.

When considering the status of this right one has to consider government limitations on trade, occupation and profession to ascertain whether this right is under threat.

Economic freedom

Freedom to pursue the trade, occupation or profession of your choice is intricately linked to economic freedom in the country you reside in. A country that is not economically free will limit these choices in a *de facto* manner. A good example would be a judiciary that does not enforce contracts; this would limit the trade you engage in, since you cannot rely on the framework of a working judiciary and law and order to protect your interests.

According to the Heritage Foundation's *Index of Economic Freedom*, South Africa ranked 102nd out of 169 countries evaluated in 2019, with a description of "mostly unfree".¹⁹¹ However, what is of concern is that South Africa has consistently weakened with regard to the *Index of Economic Freedom*, with a particularly sharp decline from 2018 to 2019, as can be seen in the graph below:

¹⁹¹ The Heritage Foundation. 2020. *Country rankings: South Africa* [2020]. Available at <https://www.heritage.org/index/ranking>. Accessed on 14 February 2021.

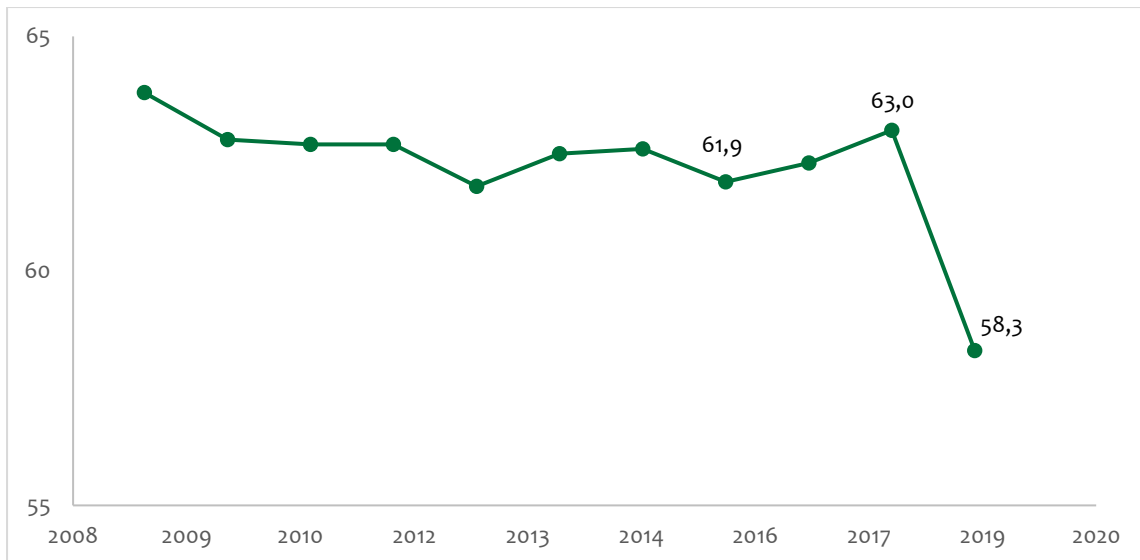


Figure 1: South African economic freedom: Overall score (2009–2019)¹⁹²

This sharp decline is primarily led by a collapse of the scores for *judicial effectiveness*, *government integrity*, *property rights* and *business freedom*.¹⁹³ One of the indicators, which speaks volumes, is South Africa’s score for *freedom from corruption*, which fell from 51 in 2009 to 40 in 2019.¹⁹⁴ In layman’s terms, the government’s inability to ensure that the law is upheld regarding corruption has impacted on the economic freedom of the average South African, and has subsequently had an impact on the freedom of trade, occupation and profession of the average South African.

Affirmative action and black economic empowerment

Although South Africa has significant challenges outside the legislative framework that impact on economic freedom (Government inefficiency and corruption), the South African government also follows policies that purposely limit the economic freedom of certain sectors of the population.

The implementation of the Affirmative Action policy have led to cases where Affirmative Action targets have been transformed into absolutely race-based quotas. Two examples of this is the case *South African Police Service v Solidarity obo Barnard*,¹⁹⁵ and *Solidarity and Others v Department of Correctional Services and Others*.¹⁹⁶

¹⁹² The Heritage Foundation. 2020. *Exploring the data* [2020]. Available at <https://www.heritage.org/index/explore?view=by-region-country-year&u=637194267838892388>. Accessed on 1 March 2021.

¹⁹³ The Heritage Foundation. 2020. *Index of economic freedom: South Africa* [2020]. Available at <https://www.heritage.org/index/country/southafrica>. Accessed on 1 March 2021.

¹⁹⁴ The Global Economy.com. 2020. *Freedom from corruption – country rankings*. The Global Economy.com. Available at https://www.theglobaleconomy.com/rankings/herit_corruption/. Accessed on 29 May 2020.

¹⁹⁵ *South African Police Service v Solidarity obo Barnard* (CCT 01/14) [2014] ZACC 23; 2014 (6) SA 123 (CC); [2014] 11 BLLR 1025 (CC); 2014 (10) BCLR 1195 (CC); (2014) 35 ILJ 2981 (CC) (2 September 2014).

¹⁹⁶ *Solidarity and Others v Department of Correctional Services and Others* (CCT 78/15) [2016] ZACC 18; (2016) 37 ILJ 1995 (CC); 2016 (5) SA 594 (CC); [2016] 10 BLLR 959 (CC); 2016 (10) BCLR 1349 (CC) (15 July 2016).

In *South African Police Service v Solidarity obo Barnard*, the Constitutional Court held that a white woman could be denied a position that she qualifies for, because her race was overrepresented when measured against affirmative action targets. This would be a direct limitation on the right to freedom of trade, occupation and profession, since government legislation is in effect denying a person the freedom to pursue a specific occupation if their race group is overrepresented.

Another example is South African Airways' cadet programme that excluded white males from participating based solely on their race and gender.¹⁹⁷ The courts overturned this policy eventually, but only after a lengthy appeal process in which lower courts found it to be lawful.

Several judgments have found that absolute exclusion on race or gender is not protected under the qualifying criterion of section 22, which states that government may regulate the practice of a trade, occupation or profession.^{198, 199} Despite these legal judgments, there are still instances of affirmative action targets transforming into rigid race-based quotas under the South African government.²⁰⁰

The government, through the implementation of lockdown levels in terms of the Disaster Management Act 57 of 2002, has infringed on various segments as to the right of freedom of trade.

In 2020 trade union Solidarity approached the Constitutional Court in a bid to declare the application of the R200 million Tourism Equity Fund by the Department of Tourism unlawful. In that, the broad-based black economic empowerment code of good practice applied only to black tourism operations. This follows after the North Gauteng High Court had ruled against Solidarity and AfriForum in the matter. In essence, the relief fund is based on racial criteria.²⁰¹

Businesses and the ban on the sale of alcohol and cigarettes

The various levels of lockdown regulate the sale of alcohol and cigarettes and also dictate which sectors of the economy are considered essential.²⁰² As a consequence, various economic sectors have been devastated, most notably those of tourism, and the liquor and restaurant industries.

¹⁹⁷ IOL. 2017. Solidarity wins appeal over SAA excluding white males from cadet programme. 19 September. Available at <https://www.iol.co.za/business-report/solidarity-wins-appeal-over-saa-excluding-white-males-from-cadet-programme-11274934>. Accessed on 29 May 2020.

¹⁹⁸ Solidarity. 2016. *Supreme Court of Appeal finds state is committing unfair racial discrimination racial quotas unconstitutional and irrational*. 4 December. Available at <https://solidariteit.co.za/en/supreme-court-appeal-finds-state-committing-unfair-racial-discrimination-racial-quotas-unconstitutional-irrational/>. Accessed on 29 May 2020.

¹⁹⁹ Business Rescue Exchange. *SCA finds racial quotas for liquidators unlawful*. Available at <https://www.brexchange.co.za/racial-quotas-liquidators-unlawful/>. Accessed on 29 May 2020.

²⁰⁰ Sport24. 2019. *SA's sporting racial quotas challenged in court*. 3 March. Available at <https://www.sport24.co.za/Rugby/sas-sporting-racial-quotas-challenged-in-court-20190306>. Accessed on 29 May 2020.

²⁰¹ Khumalo, S. 2020. *Court dismisses Solidarity challenge to 'unlawful' coronavirus fund*. Fin24, 30 April. Available at <https://www.news24.com/fin24/Economy/South-Africa/court-dismisses-solidarity-case-against-tourism-sector-covid-19-fund-20200430>. Accessed on 24 February 2021.

²⁰² Republic of South Africa. 2020. *Regulations and guidelines*. Available at <https://www.gov.za/covid-19/resources/regulations-and-guidelines-coronavirus-covid-19#>. Accessed on 13 February 2021.

According to South African Breweries, an estimated 165 000 jobs were lost because of the restrictions placed on the sale of liquor.²⁰³ Furthermore, the banning of the sale of cigarettes had created an unprecedented illegal cigarette market.²⁰⁴

Conclusion

The right to freedom to trade, occupation and profession in South Africa is under constant threat of decline in economic freedom due to government inability and corruption, but also due to government policies aimed at limiting the economic activity of certain race groups. Because economic freedom is so crucial to wealth creation, government should rather promote economic freedom by ensuring that criminal activity by government officials is punished and by ensuring that policies promote freedom to trade, occupation and profession.

²⁰³ Mavuso, B. 2021. *Lockdown: Devastating economic consequences are avoidable*. Moneyweb, 18 January. Available at <https://www.moneyweb.co.za/moneyweb-opinion/soapbox/lockdown-devastating-economic-consequences-are-avoidable/>. Accessed on 14 February 2021.

²⁰⁴ British American Tobacco South Africa. 2020. *The South African illicit trade*. Available at http://www.batsa.co.za/group/sites/BAT_A2ELAD.nsf/vwPagesWebLive/DOALBKMH. Accessed on 24 February 2021.

It is a well-known fact that by securing property rights, a country also, for the most part, secures its future. Property rights are intertwined with economic development, and the protection thereof historically leads to wealth creation, while unjust tampering with these rights has been correlated with economic decline.

Section 25

Section 25 deals with all forms of property. The term *property* in section 25 of the Constitution is defined very broadly by the Constitutional Court as anything that includes immovables and movables, corporeals and incorporeals, real and personal rights, intellectual property rights, shares, contractual rights and claims with monetary value, and the like. But in light of the ad hoc committee having called on the public to comment on the amendment of Section 25 of the Constitution of the Republic of South Africa to make way to expropriate land without compensation, we will therefore focus our discussion on property in the form of land.

Section 25 gives the government the opportunity to redress injustices of the past. Four statutes were put in place to fulfil this Constitutional promise:

- The Restitution of Land Rights Act 22 of 1994
- The Extension of Security of Tenure Act 62 of 1997
- The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998
- The Land Reform Act 3 of 1996

In two separate judgments in 2019, the Constitutional Court expressed its discontent with government that despite constitutional rights, these rights have not realised:²⁰⁵

The continued delay in the proper processing of land claims is having a debilitating effect on the land reform project. An expeditious land restitution process will not only increase the number of claims settled, but could also contribute to a wider, more striking consciousness that centres on the constitutional values of equality and dignity, and give rise to ideals of social justice, identity, the stimulation of economic activity, the promotion of gender equality and a contribution towards the development of rural livelihoods.

²⁰⁵ *Speaker of the National Assembly and Another v Land Access Movement of South Africa and Others* [2019] ZACC 10, para 66.

If the government can only expedite the process, as Justice Mhlantla said, there would be no need to amend our Constitution:²⁰⁶

In this, the Department has jeopardised not only the rights of land claimants, but the constitutional security and future of all. ... The Department's failure to practically manage and expedite land reform measures in accordance with constitutional and statutory promises has profoundly exacerbated the intensity and bitterness of our national debate about land reform. It is not the Constitution, nor the courts, nor the laws of the country that are at fault in this. It is the institutional incapacity of the Department to do what the statute and the Constitution require of it that lies at the heart of this colossal crisis.

Justice Cameron further held that²⁰⁷

[a]ll this shows is that the mythical spell must be broken. And the impasse must be resolved. And it can be done, with cooperation, goodwill, humility and respect – and without necessarily adversarial combat.

If one looks closely at sections 25(3)(a) to (e), it can – if just and equitable in the circumstances – be possible to expropriate without compensation. Section 25(8) further states:

No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

And with this amendment the uncertainty will burn further than just property in the form of land but burn to property in all forms as set out Constitution defines it.

An equally significant development in terms of property rights was the introduction of the Expropriation Bill (B23-2020) (EB). The EB seeks to amend the current Expropriation Act 63 of 1975 (EA), although – according to policy experts – the EA in its current form contradicts the Constitution.²⁰⁸ The new EB outlines various worrisome sections under which land could be expropriated so that “it may be just and equitable for nil compensation to be paid.”²⁰⁹ Various non-

²⁰⁶ *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another* [2019] ZACC 30, para 41.

²⁰⁷ *Ibid.*, para 46.

²⁰⁸ Jeffery, A. 2020. Alternative effort by the IRR fills the many gaps in the expropriation bill. *Business Day*, 25 October. Available at <https://www.businesslive.co.za/bd/opinion/2020-10-25-alternative-effort-by-the-irr-fills-the-many-gaps-in-the-expropriation-bill/>. Accessed on 24 February 2021.

²⁰⁹ Institute of Race Relations. 2021. *Protect your property rights, stop expropriation. Sign the form below to endorse the IRR's submission to Parliament. #KillTheBill #StopEWC*. Available at <https://irr.org.za/campaigns/kill-the-bill-stop-ewc>. Accessed on 24 February 2021.

governmental and civil rights organisations – including AfriForum and the Institute of Race Relations – warned about the economic ramifications if the Bill were to be adopted in its current form.

By way of illustration: “[T]he circumstances in which ‘nil’ compensation may be paid for land are expressly ‘not limited’ to those set out in the Bill,” and this may leave millions of South African homeowners vulnerable to excessive state intervention.²¹⁰

Property crimes in South Africa and international rights rankings

A favourable development over the past ten years has been an overall steady decline in the number of reported cases of malicious property damage. While there had been a spike in the number of cases from 111 492 in 2017/2018 to 113 089 in 2018/19, the percentage continues to drop, with a 4,1% decrease in 2019/2020.²¹¹

South Africa scored 58,4 on the 2020 *Economic Freedom Index* division on property rights (placing it on a par with the rest of the world), which points to a sharp decline when compared to the 2018 score of 67,7. The report stated that “the progressive politicisation of economic decision-making is a threat to the private sector and long-term development”.²¹²

Conclusion

Property rights in South Africa are continuously infringed on through government policies and legislation. Because of the above-mentioned legislation, local and international investors may be hesitant to invest in South Africa since these Acts and proposed legislation give rise to concerns about the future of property rights in the country.

²¹⁰ Institute of Race Relations. 2021. *Protect your property rights, stop expropriation. Sign the form below to endorse the IRR’s submission to Parliament. #KillTheBill #StopEWC*. Available at <https://irr.org.za/campaigns/kill-the-bill-stop-ewc>. Accessed on 24 February 2021.

²¹¹ South African Police Service. 2020. *Crime statistics: Crime situation in Republic of South Africa: Twelve (12) months (April to March 2019-20)* [Power Point Presentation], p. 90. Available at https://www.saps.gov.za/services/april_to_march_2019_20_presentation.pdf. Accessed on 27 January 2021.

²¹² The Heritage Foundation. 2020 *Index of Economic Freedom: South Africa*. Available at <https://www.heritage.org/index/country/southafrica?version=1331>. Accessed on 14 May 2021.

Freedom to enjoyment one's language and culture is essential for ensuring human dignity and promoting positive social interaction. The Constitution recognises 11 official languages in South Africa. In addition, constitutional bodies such as the Pan-South African Language Board and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities were established in order to ensure the realisation of the rights of these language groups. However, these bodies are struggling to fulfil their legal duties due to, among other issues, budget deficits, a lack of enforcement powers and mismanagement.²¹³

The promotion of language rights is often met with disapproval by representatives of national, provincial and local authorities, and proponents of such rights are then accused of fostering unhealthy attitudes of nationalism and segregation. English is increasingly being promoted by the state as South Africa's "lingua franca" and the implementation of legislation such as the Use of Official Languages Act 12 of 2012 lags far behind.

Some key events regarding language and culture during 2019 are highlighted below in chronological order:

- The University of Pretoria confirmed in January 2019 that English would henceforth be the sole primary language used at all of its campuses. Students who registered before 2019 would still be given the option to be instructed in Afrikaans, but the newly registered students would have to attend English-only classes. Opposition against this decision – from among others the civil rights organisation AfriForum and Tito Mboweni, Minister of Finance – was simply disregarded, as were subsequent allegations that students who had registered before 2019 did not receive the promised continued Afrikaans instruction.²¹⁴
- In September 2019, a media report on the Solidarity Movement's construction of a new, completely privately funded campus for its existing vocational training facility, Sol-Tech,

²¹³ See:

- Monama, T. 2018. Cash struggles hamper CRL's work. *IOL*, 30 October. Available at <https://www.iol.co.za/the-star/news/cash-struggles-hamper-crls-work-17696190>. Accessed on 24 February 2020.
- Koza, N. 2019. *CRL Rights Commission wants existing language policies properly utilised*. 702, 19 November. Available at <http://www.702.co.za/articles/367368/crl-rights-commission-wants-exisitng-language-policies-properly-utilised>. Accessed on 24 February 2021.
- Rickard, C. N.d. *PanSALB fiasco home-grown graft in any language*. Legalbrief, n.d. Available at <https://legalbrief.co.za/diary/a-matter-of-justice/story/pansalb-fiasco-home-grown-graft-in-any-language-2/print/>. Accessed on 24 February 2020.

²¹⁴ News24. 2019. *Tito Mboweni: We will regret phasing out Afrikaans at Tuks*. 25 January. Available at: <https://www.news24.com/SouthAfrica/News/tito-mboweni-we-will-regret-phasing-out-afrikaans-at-tuks-20190125>. Accessed on 24 February 2020.

sparked a Twitter attack by Panyaza Lesufi, Gauteng MEC of Education. The medium of instruction at this private sector facility – which complies with all official registration requirements and has been teaching students of all races for 12 years – is Afrikaans.²¹⁵ The choice for this medium of instruction is in line with the South African Constitution’s guarantee of access to education in the student’s language of preference. Despite the Constitution’s clear explanation, tweets by Mr Lesufi included:²¹⁶

I just hate racism when I see one! A race based institution in a non racial society won’t succeed. Please don’t remind us about apartheid.

He even ironically described the institution, which he erroneously called a university, as a “disgrace to the Constitution”.²¹⁷ He was not officially reprimanded for the outbursts.

- On 10 October 2019, the Constitutional Court ruled in the case in which lobby group Gelyke Kanse asked that the language policy of the Stellenbosch University (SU), which favours English as sole language of instruction at the institution, be set aside, due to its being unconstitutional.^{218, 219} In a majority ruling, 10 of the 12 Constitutional Court justices found that the use of Afrikaans at SU is too expensive and SU had therefore provided appropriate justification for its scaling down of Afrikaans. The judgment was considered to be a “death blow” to Afrikaans by some,²²⁰ while controversy also ensued about the fact that the judgment had been written by Justice Edwin Cameron, who had been nominated for and elected as Chancellor of the SU, while the Constitutional Court was still hearing the case.
- In 2017, the management of the University of South Africa (Unisa) unilaterally ceased the use of Afrikaans as a medium of instruction, opting for English as sole primary language of instruction.²²¹ A case by AfriForum against the implementation of this monolingual language

²¹⁵ Buys, P. 2019. *Lesufi vs Afrikaans*. 2 October. Politicsweb, 2 October. Available at <https://www.politicsweb.co.za/opinion/lesufi-vs-afrikaans>. Accessed on 24 February 2020.

²¹⁶ Lesufi, P. 2019. [Twitter]. 15 September. Available at <https://twitter.com/lesufi/status/1173115030356811776>. Accessed on 16 March 2021.

²¹⁷ *The Citizen*. 2019. Lesufi calls Afrikaans university a ‘disgrace’ to the constitution. 23 October. Available at <https://citizen.co.za/news/south-africa/education/2182801/lesufi-calls-afrikaans-university-a-disgrace-to-the-constitution/>. Accessed on 24 February 2020.

²¹⁸ Politicsweb. 2019. *The SU, Gelyke Kanse and ConCourt controversy: A timeline*. 6 November. Available at <https://www.politicsweb.co.za/documents/the-su-gelyke-kanse-and-concourt-controversy-a-tim>. Accessed on 24 February 2020.

²¹⁹ Snijman, L. 2019. Stellenbosch University rocked by disputes over language policy. *Daily Maverick*, 13 December. Available at <https://www.dailymaverick.co.za/article/2019-12-13-stellenbosch-university-rocked-by-disputes-over-language-policy/>. Accessed on 24 February 2020.

²²⁰ Eloff, T. 2019. *Has the ConCourt issued a death blow to Afrikaans?* Politicsweb, 29 October. Available at <https://www.politicsweb.co.za/politicsweb/page/en/news-and-analysis/the-constitutional-court-and-gelyke-kanse-what-hap>. Accessed on 24 February 2020.

²²¹ eNCA. 2016. AfriForum takes Unisa language policy fight to High Court. 25 July. Available at <http://www.enca.com/south-africa/afriforum-takes-unisa-language-policy-fight-to-high-court>. Accessed on 24 February 2020.

policy was unsuccessful. AfriForum’s appeal against this ruling was heard in the South African Supreme Court of Appeal on 27 November 2019. Judgment was reserved,²²² and was only finalised in 2020 when the Supreme Court of Appeal ruling reinstated Afrikaans.²²³ According to this ruling, courses available in Afrikaans prior to the introduction of the English-only policy, had to be made available again in Afrikaans. However, Unisa has appealed the ruling and the English-only status quo is therefore maintained until the appeal can be heard.

- In December 2019, Eastern Cape High Court Judge Murray Louw ruled against an application by the movement Keep Grahamstown Grahamstown, for the retention of the former name of this city. This followed after Nathi Mthethwa, Minister for Arts and Culture, had decided in 2018 that the name of the city should be changed to Makhanda, due to the “offensive nature” of the name Grahamstown.²²⁴ This case once again highlighted the contentious issue of place name changes based on ideological activism by politicians in South Africa.
- In Gauteng, the online school placement system caused chaos, both because of dysfunctionality and as it did not provide parents with an opportunity to select the preferred language of tuition for their children.²²⁵ This added to concerns that the Department of Education was attempting to extend its control over school governance, thereby eroding the role of school governing bodies by means of amended legislation.²²⁶ Organisations like AfriForum also experienced an increase in appeals for assistance by school governing bodies of single-medium Afrikaans schools, or parallel-medium Afrikaans/English schools, who were

²²² AfriForum. 2019. *Judgment reserved in AfriForum appeal case on Afrikaans at Unisa*. 27 November. Available at <https://www.afriforum.co.za/en/judgment-reserved-in-afriforums-appeal-case-on-afrikaans-at-unisa/>. Accessed on 24 February 2020.

²²³ Grobler, R. 2020. *Unisa ruling ‘enormous victory for Afrikaans’ – AfriForum*. News24, 3 July. Available at <https://www.news24.com/news24/southafrica/news/unisa-ruling-enormous-victory-for-afrikaans-afriforum-20200703>. Accessed on 16 March 2021.

²²⁴ Etheridge, J. 2019. *Makhanda to stay: Court rules proper process followed for Grahamstown name change*. News24, 11 December. Available at <https://www.news24.com/SouthAfrica/News/makhanda-to-stay-court-rules-proper-process-followed-for-grahamstown-name-change-20191211>. Accessed on 24 February 2020.

²²⁵ See:

- Mabuza, E. 2019. AfriForum steps up campaign to oust ‘disdainful, polarising’ Panyaza Lesufi. *TimesLIVE*, 20 November. Available at <https://www.timeslive.co.za/news/south-africa/2019-11-20-afriforum-steps-up-campaign-to-oust-disdainful-polarising-panyaza-lesufi/>. Accessed on 24 February 2020.
- Johannes, LA. 2019. *School admission nightmare continues to trouble Gauteng parents*. Parent24, 13 November. Available at <https://www.parent24.com/Learn/Learning-difficulties/school-admission-nightmare-continues-to-trouble-gauteng-parents-20191106>. Accessed on 24 February 2020.
- *The Citizen*. 2020. Online registration system aims to destroy schools’ Afrikaans character – FF+. 14 January. Available at <https://citizen.co.za/news/south-africa/education/2228471/online-registration-system-aims-to-destroy-schools-afrikaans-character-ff/>. Accessed on 24 February 2020.

²²⁶ See:

- Van Heerden, S. 2019. *Wysiging aan Skolewet tydens Kersvakansie bekend gemaak*. Maroela Media, 21 December. Available at <https://maroelamedia.co.za/nuus/sa-nuus/wysiging-aan-skolewet-tydens-kersvakansie-bekendgemaak/>. Accessed on 24 February 2020.
- Du Plessis, C. 2019. *Onderwys: Departement stel wetsontwerp stil-stil bekend*. 20 December, Netwerk24. Available at <https://www.netwerk24.com/Nuus/Onderwys/onderwys-departement-stel-wetsontwerp-stil-stil-bekend-20191220-2>. Accessed on 24 February 2020.

being pressurised by provincial education departments to become single-medium English schools.

- The priority programme for the Incremental Introduction of African Languages in South African schools, which had been announced in 2017 and was supposed to be rolled out between 2017 and 2019, has met with limited success to date due to a lack of teachers who are skilled in the tuition of indigenous languages.²²⁷

Apart from the above-mentioned events, English-only service delivery by key role players in many sectors, from the South African National Blood Service²²⁸ to the National Museum in Bloemfontein,²²⁹ has come under attack, highlighting the need for multilingual service delivery in the country.

Conclusion

From the above, it is clear that language rights are still being disregarded to a large extent in South Africa and that both the Constitution and the judiciary offer little protection in this regard; in fact, activists who promote these rights are often vilified and stereotyped.

²²⁷ Baily, A. 2017. Incremental Introduction of African Languages. In *African Languages*. Available at <https://www.isasa.org/incremental-introduction-of-african-languages/>. Accessed on 24 February 2020.

²²⁸ Toerien, H. 2019. *Nuuskommentaar: As Afrikaans nie goed genoeg nie, is my bloed goed genoeg?* Maroela Media, 1 August. Available at <https://maroelamedia.co.za/nuus/nuuskomentaar/nuuskomentaar-as-afrikaans-nie-goed-genoeneg-is-nie-is-my-bloed-goed-genoeneg/>. Accessed on 24 February 2020.

²²⁹ Gericke, M. 2019. *Vrystaters kwaad oor Afrikaans by Museum verdwyn*. 1 October, Netwerk24. Available at <https://www.netwerk24.com/Nuus/Algemeen/vrystaters-kwaad-oor-afrikaans-by-museum-verdwyn-20190930>. Accessed on 24 February 2020.

Access to courts

By Johan Nortjé

A prerequisite for other rights in the Bill of Rights is the right to access courts, as stated in section 34 of the Constitution. Without section 34 it would be pointless to have the robust safeguards and assurances given by other constitutional rights.²³⁰ Section 34 states that

everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court.

In fulfilling the enjoyment of this right, South Africa has several courts operating throughout the country, including the Constitutional Court, the Supreme Court of Appeal, high courts in all the provinces and 763 magistrates' courts, as well as a host of other specialised courts such as the Sexual Offences Court. In addition, there are an estimated 27 223 practising attorneys and 6 669 candidate attorneys who serve people in need of legal aid.²³¹

Legal costs, backlogs and vacancies

A point often overlooked is that rights require investment of resources, capital and lawyers to maintain the legal infrastructure of a country.²³² Indeed, the matter remains that many people cannot afford the costs associated with legal proceedings. A 60-minute consultation with a legal practitioner would cost the average person a week's savings, and consequently, the majority of people represent themselves in courts.²³³ The logistical burden of access to courts must also be factored in. Since most courts are situated in metropolitan regions, poor people in rural areas will be able to access courts only with great difficulty and expense.

A positive driver is that 82% of people surveyed by Statistics South Africa felt that they were treated fairly by court officials.²³⁴

²³⁰ Brickhill, J & Friedman, A. 2018. Access to Court. In *Constitutional Law of South Africa*. Chapter 59. Available at <https://constitutionallawofsouthafrica.co.za/wp-content/uploads/2018/10/Chap59.pdf>. Accessed on 24 January 2021.

²³¹ Law society of South Africa. 2019. *Statistics for the attorneys' profession*. Available at <https://www.lssa.org.za/about-us/about-the-attorneys-profession/statistics-for-the-attorneys-profession/>. Accessed on 18 February 2020.

²³² Office of the High Commissioner of United Nations Human Rights. 2021. *Are economic, social and cultural rights fundamentally different from civil and political rights?* Available at <https://www.ohchr.org/EN/Issues/ESCR/Pages/AreESCRfundamentallydifferentfromcivilandpoliticalrights.aspx>. Accessed on 24 February 2021.

²³³ South African Human Rights Commission. 2019. *High Court ruling recognises access to justice as a fundamental human right*. 15 February. Available at <https://www.sahrc.org.za/index.php/sahrc-media/opinion-pieces/item/1770-high-court-ruling-recognises-access-to-justice-as-a-fundamental-human-right>. Accessed on 28 April 2020.

²³⁴ Statistics South Africa. 2019. *Governance, public safety and justice survey 2018/19*, p. 48. Available at <http://www.statssa.gov.za/publications/P0340/P03402019.pdf>. Accessed on 24 January 2021.

No system of courts can function properly without addressing court backlogs, well-trained personnel, adequate premises and trust by the public that the courts will be effective and procedurally fair. Given these issues, there are some concerning trends.

The South African Judiciary recently stated that courts were understaffed by security personnel compared to other state organs and acutely underfunded.²³⁵ Moreover, according to the Department of Justice and Constitutional Development's (DOJCD) annual report 2019, irregular expenses increased by R1,147 billion for the year under review, compared to the previous year.²³⁶ The DOJCD reported 35 new cases of irregular expenditure to the value of R543,56 million, and five cases valued at R968 million are under investigation for possible fraud for the 2020 financial year.²³⁷ There is also the question of backlogs and vacancy rates. For the same year, the backlog for criminal prosecutions peaked at 57 049, significantly more than the target of 48 223. According to *TimesLIVE*, the Masters of the High Court were in disarray due to the backlog of cases. In the same article, a spokesperson for the Fiduciary Institute of Southern Africa reported that it could be considered a "miracle" if on any given day 3 of 15 nationwide offices functioned normally.²³⁸

In October 2019, Adv. Shamila Batohi, National Director of Public Prosecutions at the National Prosecuting Authority (NPA), informed the parliamentary Standing Committee on Public Accounts that there were around 700 prosecuting vacancies, while recruitment has been suspended since 2015. Coupled with the overall weakening of state institutions, this hampered the NPA's effectiveness in prosecuting crimes.²³⁹ This sentiment of the vacancy rate is echoed by NPS staff. In a staff survey report, 32% of members of the NPA felt that the best way to improve services to crime victims would be to appoint more prosecutors.²⁴⁰

Another significant factor regarding access to courts is the ability of civil society organisations, businesses and community groups to challenge ideas that are not ideologically aligned with those of the ANC government. Government has vast amounts of financial resources through revenue

²³⁵ The South African Judiciary. 2019. *Annual report 2018/2019*, p. 26. Available at https://www.judiciary.org.za/images/Annual-Reports/Judiciary_Annual_Report_2018_-_19.pdf. Accessed on 24 February 2021.

²³⁶ Department of Justice and Constitutional Development. 2019. *2018/2019 annual report*, p. 26. Available at <https://www.justice.gov.za/reportfiles/anr2018-19.pdf>. Accessed on 24 February 2021.

²³⁷ Department of Justice and Constitutional Development. 2020. *Annual report 2019/2020*, p. 21-22. Available at <https://www.justice.gov.za/reportfiles/anr2019-20.pdf>. Accessed on 24 February 2021.

²³⁸ Shoba, S. & Groundup. 2019. Masters of the high court in disarray: thousands of cases can't be finalised. *TimesLIVE*, 12 September. Available at <https://www.timeslive.co.za/news/south-africa/2019-09-12-masters-of-the-high-court-in-disarray-thousands-of-cases-cant-be-finalised/>. Accessed on 24 February 2021.

²³⁹ Parliamentary Monitoring Group. 2019. *SIU investigations into municipalities; NPA on SIU-referred cases*, 19 October. Available at <https://pmg.org.za/committee-meeting/29081/>. Accessed on 24 February 2021.

²⁴⁰ Lancaster, L., Roberts, M. & Mbanyele, S. *NPA staff survey: Report*, p. 38. Available at <https://www.npa.gov.za/sites/default/files/u41/NPA%20Staff%20Survey-Report%202019.pdf>. Accessed 12 April 2020.

collection at its disposal, compared to civic organisations, which are dependent on voluntary financial donations or membership to challenge court cases. Therefore, organisations have to be selective about the cases they take on.

Finally, compared to Africa, South Africa's status regarding access to courts could be viewed as unremarkable. The World Justice Projects' *Rule of Law Index 2020* gave South Africa a rating of 0,61 – just above average – for its adherence to Civil Justice. The category measures, among others, delays in court proceedings and enforcement of court verdicts, and South Africa is ranked behind other African countries such as Namibia, Mauritius, Rwanda, and on a par with Botswana.²⁴¹

Conclusion

Access to courts largely depends on a person's geographical location and the means to access the court hearings of a particular case, whether it be the financial costs or logistical challenges. Also, no court system can function without the necessary human resources and investment in the judicial system. On the whole, full access to court is not guaranteed, which will delay justice administration.

²⁴¹ World Justice Project. 2020. *Rule of Law Index 2020*, p. 28. Available at https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_o.pdf. Accessed on 24 January 2021.

Arrested, detained and accused persons

Andrea Muller

Arrested, detained and accused persons' rights are protected under section 35 of the Constitution of the Republic of South Africa. This section covers everything with regard to the person's rights from the moment the arrest was made and deals with the criminal trial and the fairness thereof.

With respect to certain limitations, the rights of arrested, detained and accused persons are listed under non-derogable rights in the Constitution. This means that this right cannot be compromised, reduced or suspended.

Section 35 of the Constitution states that every person that is arrested for committing an alleged criminal act has the right to remain silent, to be informed of this right and the consequences of not remaining silent. No person may be compelled to make any confession or admit to anything that could be used as evidence against them. Arrested persons also have the right to be brought before a court as soon as reasonably possible, but no later than 48 hours after the arrest, or the end of the first court day after the expiry of the 48 hours if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day.

Also, no person may be compelled to confess to anything or admit to any actions that could be used as evidence against them. They must be charged and informed why they are being detained or be released. Detained persons have the right to be informed, in a language they understand, why they are being detained and they may challenge the lawfulness of this detention. They also have the right to be presumed innocent and must be given enough time to prepare a defence and to have a public trial before an ordinary court.²⁴²

Awaiting-trial detainees, police brutality and deaths in custody

Nevertheless, and despite all these provisions, South African prisons are plagued by a host of problems, including overcrowding (the country has the highest incarcerated populace on the continent), inadequate reporting to the Judicial Inspectorate for Correctional Services, as well as the poor state of prison facilities.²⁴³ Moreover, there has been a steady increase by more than 10%

²⁴² Mzamo, M. 2018. *Human Rights Day: The rights of arrested, detained and accused persons*. Phatshoane Henney Inc., 20 March. Available at <https://www.phinc.co.za/NewsResources/NewsArticle.aspx?ArticleID=2361>. Accessed on 24 February 2021.

²⁴³ Wits Justice Project. 2020. *Still no dignity for SA prisoners*. 24 November. Available at <https://www.witsjusticeproject.co.za/investigative-journalism/still-no-dignity-for-sa-prisoners>. Accessed on 24 January 2021.

in the number of remanded detainees over a period of three years, from 42 721 in 2018/19 to 47 233 in 2019/20.²⁴⁴ There is also the question of brutality by the South African Police Service (SAPS). In 2018/19, there were 214 deaths in SAPS and Municipal Police Service custody, 393 deaths because of police actions and 13 incidents of rape in custody, while 2019/2020 saw an 11% increase in the total number of deaths in custody.²⁴⁵ This is of great concern, as South African citizens rely on the SAPS to protect them and keep them safe.

Section 12 of the Constitution determines that every person has the right to freedom. This includes not being detained without trial and not being deprived of freedom arbitrarily or without just cause. Because arrests infringe so fundamentally on a person's human rights, arrests are carefully defined in criminal procedure law. The Criminal Procedure Act 51 of 1977 (CPA) has a strict set of guidelines stating when a person may be arrested. The CPA states that an SAPS officer has the right to arrest you if:

- There is a warrant for your arrest.
- You are caught committing a crime.
- There is reasonable suspicion that you have committed a Schedule 1 crime or are on your way to commit such a crime.

Even with all these laws in place, there is still a staggering number of unlawful arrests taking place in South Africa. Over the last few years, there have been many cases of unlawful arrests. Some of these incidents have led to civil claims against the SAPS. The SAPS has paid R1,5 billion to victims of misconduct by the SAPS over the last few years, with most of these cases being the result of unlawful arrest and detentions.²⁴⁶

COVID-19 arrests

The year 2020 saw a staggering number of people arrested for contravening the COVID-19 regulations put in place by the government in terms of the Disaster Management Act 57 of 2002. 292 252 people have been arrested since August 2020,²⁴⁷ with over 150 000 criminal records for

²⁴⁴ Department of Correctional Services. 2020. *Annual report 2019/2020*, p. 19. Available at <http://www.dcs.gov.za/wp-content/uploads/2020/11/DCS-Annual-Report-TABLING-FINAL.pdf>. Accessed on 24 February 2021.

²⁴⁵ Independent Police Investigative Directorate. *Annual report 2019/2020*, p. 40. Available at http://www.ipid.gov.za/sites/default/files/documents/IPID%202019_20%20Annual%20Report.pdf. Accessed on 24 February 2021.

²⁴⁶ Naidu, E. 2020. Big payouts, little sanction in SAPS wrongful arrest cases. *IOL*. 18 October. Available at <https://www.iol.co.za/sundayindependent/news/big-payouts-little-sanction-in-saps-wrongful-arrest-cases-09b45ef6-df6c-44bb-a5f0-360a92a7450e>. Accessed on 29 April 2020.

²⁴⁷ Institute for Security Studies. 2020. *SA crime reductions during COVID-19 lockdown may be short lived*. 14 August. Available at <https://issafrica.org/crimehub/analysis/press-releases/sa-crime-reductions-during-covid-19-lockdown-may-be-short-lived>. Accessed on 24 January 2021.

people who were in breach of these aid regulations.²⁴⁸ Furthermore, Bheki Cele, Minister of Police, called on the SAPS to arrest anyone for not wearing facemasks and for non-compliance with COVID-19 safety protocols.²⁴⁹ Although government is considering to remove some of these records, the fact is that using arrests as a deterrent tactic in this context will create an administrative burden on an already struggling justice system.

South Africa's Constitution is recognised around the world for its Bill of Rights. That being said, it often seems that South Africa has not been successful at translating these rights into a reality.²⁵⁰ The SAPS states that one of its core responsibilities includes creating a safe and secure environment for all the people of South Africa.²⁵¹ However, this seems to exclude arrested, detained or accused persons.

Conclusion

Any criminal justice system that aims to be fair and just should be able to find a balance between the power of the SAPS when interacting with the general public during their policing duties, and the rights of the citizens.

²⁴⁸ Naidu, E. 2020. Criminal records for admission of guilt offences to be expunged, says Minister. *IOL*, 1 November. Available at <https://www.iol.co.za/sundayindependent/news/criminal-records-for-admission-of-guilt-offences-to-be-expunged-says-minister-9687f55b-10bd-4f96-8ff0-67501e96e0fo>. Accessed on 24 January 2021.

²⁴⁹ *TimesLIVE*. 2020. 'Arrest them!': Cele tells police to crack whip on those flouting Covid-19 rules. 10 December. Available at <https://www.timeslive.co.za/politics/2020-12-10-arrest-them-cele-tells-police-to-crack-whip-on-those-flouting-covid-19-rules/>. Accessed on 24 January 2021.

²⁵⁰ Liebenberg, S. 2017. *South Africa has a model Bill of Rights. But it doesn't feel that way*. *The Conversation*, 16 March. Available at <http://theconversation.com/south-africa-has-a-model-bill-of-rights-but-it-doesnt-feel-that-way-74457>. Accessed on 24 February 2021.

²⁵¹ South African Police Service. 2020. *The SAPS pays tribute to those who died as a result of their duties during 2018-04-01 to 2019-03-31*. Available at <https://www.saps.gov.za/about/about.php>. Accessed on 24 February 2021.

Concluding remarks and recommendations for protecting civil rights

The *Civil Rights Index* is aimed at examining and highlighting the realisation of civil and political rights (CPRs) in South Africa. This index holds that, in general, most of the rights under examination are neither fully protected nor respected.

- Anecdotal evidence from the reports suggests that the government expands current legislation and creates new legislation to deal with challenges such as administrative and bureaucratic corruption.
- Although limited, in some instances, the government does reasonably well in protecting and aspiring to protect individual rights, such as the right to citizenship.
- Thus far, increased government power (legislative and authoritative) has become the norm based on the general pattern.
- The government is abusing security agencies to enforce laws and regulations regarding minor offences.
- Policies such as the National Democracy Revolution is at odds with the notion of the separations of powers.
- Resources are allocated to fight petty offences, such as securing beaches, while there are major backlogs in the investigation of serious crimes such as murder.
- Afrikaans language rights are eroded at various institutions. This will affect the language rights of various other communities.

As previously mentioned, AfriForum believes that the protection and preservation of CPRs can be realised through community mobilisation. Civil society has already filled gaps left by the state's failure to comply with service delivery, challenging undemocratic laws. There are numerous examples of non-governmental organisations (NGOs) that uphold and safeguard people's rights: Organisations such as the Treatment Action Campaign have, for example, campaign for treatment of and access to HIV/Aids medicine, while crime prevention organisations (like the National Institute for Crime Prevention and the Reintegration of Offenders) fill in where the state's ability to provide safety support is lacking.²⁵²

Reporting of human rights violations and petitioning can be done on several platforms by using various mechanisms such as the United Nations Office for Human Rights. When specific rights are

²⁵² Gumede, W. 2018. *Policy brief 28: How civil society has strengthened democracy in South Africa*. Democracy Works Foundation, 8 May. Available at <https://democracyworks.org.za/policy-brief-28-how-civil-society-has-strengthened-democracy-in-south-africa/>. Accessed on 21 January 2021.

violated, individuals and communities can claim these rights in various ways. Below is a list of avenues people can turn to when these rights are infringed on.

The right to life

Join AfriForum and trade union Solidarity – both take on cases to protect the right to life, such as the case in which these two organisations took on the government to provide clarity regarding the purchasing and distribution of COVID-19 vaccinations in South Africa.²⁵³

Dignity

Report unethical treatment to an NGO of your choice. Practise self-care by seeking mental health aid and treat all people with respect.

Security of persons

Join a neighbourhood watch group or one of AfriForum's community safety operations.

Freedom of expression and the right to privacy

Do not be afraid to voice your opinion on issues that you feel enthusiastic about. However, remember that unverified information damages the credibility of causes.

Be responsible when you share any information via social media.

Slavery, servitude and forced labour, and access to courts

Join the trade union Solidarity, which advocates for, among other things, employees' right to dignity in the workplace as well as strengthening trades through the Solidarity Occupational Guilds community.

Make submissions to Parliament on causes that would affect the rights of workers in general.

Property rights

AfriForum Business Network supports local business transactions in Afrikaans.

²⁵³ Letter by Hurter Spies Inc. *Solidarity & AfriForum // Minister of Health – Procurement and Rollout of SARS-COV-2 Vaccine*. 13 January 2021. Available at <https://solidariteit.co.za/wp-content/uploads/2021/01/Letter-to-Minister-of-Health-dated-13-January-2021.pdf>. Accessed on 3 March 2021.

Assembly, demonstration, picketing and petitioning, political rights and movement

Signing a petition on the AfriForum or Solidarity websites will help strengthen the organisations' causes. Petitions against increasing taxes could help overburdened taxpayers.

Avoid gatherings that you suspect will turn violent.

Freedom of religion, belief and opinion, and freedom of association and language rights

Respectfully demand service in your mother tongue.

Support AfriForum and Solidarity campaigns for the protection of language and cultural rights. The focus is mainly on protecting minority rights.

Join voluntary associations of your choice or Solidarity Helping Hand, which supports a host of schemes such as the “stop hunger” campaign.

Rights of an arrested person

Familiarise yourself with your rights when arrested. Or visit AfriForum Community Safety Division for more information: <https://afriforum.co.za/en/afriforum-government-exploits-police-and-defence-force-to-violate-human-rights-during-lockdown/>.