

HUMAN RIGHTS REPORT CARD 2021

THE RESPECT, PROTECTION, PROMOTION AND FULFILMENT OF RIGHTS IN THE BILL OF RIGHTS DURING 2019-2020

EXECUTIVE SUMMARY

South Africa in 2021 continues to be a functioning multi-party constitutional democracy. Section 1 of the Constitution underpins South Africa's core values such as human dignity, the achievement of equality, the advancement of human rights and freedoms, non-racialism and non-sexism, supremacy of the Constitution and the Rule of Law. It also enshrines multi-party democracy as well as a government that is not only transparent and accountable but also responsive to the needs of South Africa.

The following are among the main developments that affected human rights in South Africa during 2020:

COVID-19

- *As with countries around the world, 2020 was dominated by the COVID-19 crisis. The Government's Anti-COVID-19 measures were implemented in terms of the Disaster Management Act No 57 of 2002 which gives the government extensive powers to deal with national disasters. However, government action as, far-reaching, intrusive and protracted as that taken to combat COVID-19 should have been taken as part of a State of Emergency which would have required regular consideration and oversight by the National Assembly. As it was, government was able to issue regulations that severely impacted a wide array of fundamental rights with no proper oversight by the National Assembly. Moreover, the state of disaster could be extended indefinitely for successive periods of three months.*
- *Some of the government's relief programmes were made available to recipients on the basis of their race in flagrant disregard for Section 9(3) of the Constitution.*
- *The government's COVID-19 relief programs (in particular during national lockdown) overlooked certain groups and business owners, people with disabilities, refugees and asylum seekers and many lesbian, gay, bisexual, and transgender (LGBT) people.*

Corruption

- *President Ramaphosa continued to strengthen key institutions to assist the government in its efforts to combat corruption - including the filling of 800 posts at the NPA and the establishment of a tribunal within the Special Investigating Unit to fast-track the recovery of stolen funds.*
- *The President declared that "we are determined that all those who have stolen from the people - and all those who continue to steal from the people - should face the full might of the law."*
- *The year also witnessed further revelations at the Zondo Commission of widespread and egregious corruption in government institutions and SOEs arising from allegations of state capture under President Zuma and massive abuse of state tenders.*

- On 10 November Mr Ace Magashule was charged by the NPA with 21 charges of fraud and corruption associated with the so-called Free State asbestos affair which involved irregular contracts to the value of R255 million.
- Former President Zuma continued to employ a range of tactics to avoid giving testimony to the Zondo Commission and to face charges of corruption in court.
- Pressure for the removal from office of the Public Protector, Busisiwe Mkhwebane, mounted after a number of highly critical court judgements.
- Seemingly endemic levels of total corruption and lack of institutional capacity for many governmental departments and state-owned enterprises (SOEs) affect the extent to which a number of human rights in South Africa can be realized.

Property Rights

- The government introduced a new Expropriation Bill which spells out the circumstances in which nil compensation may be paid for expropriated property;
- The government continued with its plans to amend section 25 of the Constitution to make expropriation without compensation explicitly possible.

Language Rights

- The government continued to do little or nothing to promote the development of indigenous languages and to implement its own official languages policy;
- The right to education in the language of choice at public educational institutions was further eroded by the Constitutional Court's judgement in "Gelyke Kanse and Others v Chairperson of the Senate of the University of Stellenbosch and Others."

General

- South Africa joined 66 other states in reaffirming support for the International Criminal Court.
- During 2020, South Africa continued to experience violent incidents of xenophobic violence and discrimination against non-nationals and refugees and asylum seekers - as well as other vulnerable groups - continued to face barriers to protection.
- In September 2020 President Ramaphosa pledged to bolster the government's efforts against gender-based violence (GBV) after several high-profile incidents of femicide.
- South Africa's media continued to play a pivotal role in ensuring accountability and creating a transparent state.
- The judiciary continued to strike down state (and other) actions and/or conduct which is unconstitutional and the South African courts are largely delivering on their constitutional mandate of administering justice in the Republic.

KEY TRENDS

[1] Rule of Law - Section 1 and section 9 of the Constitution: Former President Jacob Zuma and his refusal to comply with an order of the Constitutional Court and the Zondo Commission of Enquiry

Mr Zuma made it clear he will not comply with a Constitutional Court order and summons to appear before the Commission and would "rather face jail time".

One of the founding values of the South African Constitution is 'supremacy of the Constitution and the rule of law' and section 9(1) of the Bill of Rights determines that 'everyone is equal before the law'. Mr Zuma's conduct not only amounts to contempt of the Commission but also shows a clear disregard for the rule of law, the Courts and the Constitution and the founding values of the Constitution.

It is imperative that Mr Zuma is dealt with decisively by the Commission, the relevant authorities and the courts. Failure to do so would set a dangerous precedent that would undermine not only the rule of law and President Ramaphosa's efforts to restore integrity in government, but also the judiciary and its' mandate of administering justice.

[2] Property Rights – Section 25 of the Constitution: The 2020 Expropriation Bill and Amendment of the Constitution

The Expropriation Bill is currently before Parliament and public participation on the Bill has been extended to 28 February 2021. The Bill contains worrying and unconstitutional sections that will dilute the property rights of all South Africans.

Although the Bill has undergone many reviews and amendments through the years it remains contentious for a number of reasons. The following is of particular concern:

- The Bill lists five circumstances under which 'nil compensation' (zero) could be paid when property is expropriated;*
- This list, in terms of the Bill, is not exhaustive and could presumably be extended to include any number of other circumstances in which nil compensation might be paid for expropriated property;*
- In its current form it offers government almost extensive and undefined powers to expropriate virtually any form of property - this includes intangible property such as copyrighted and patented property;*
- The Bill lacks clear definition in a number of areas and provides very little in terms of oversight opportunity by experts to ensure fairness to ordinary South Africans;*
- The Bill also provides no clear definition of a proper public consultation process and no definition of what is meant by the "public interest".*

This Bill clearly poses a serious threat to property rights which are a core requirement for all free and prosperous societies. Section 25 of the Constitution (the property clause) as it is currently worded constitutes a proper framework for an effective process of land reform and it can be said that the payment of fair and equitable compensation for expropriated property is not the main impediment to land reform.

The proposed amendment of the Constitution to make EWC explicitly possible, and the adoption of the Expropriation Bill, might represent a crucial point in the history of post 1994 South Africa at which the country, decisively, turns away from the vision of genuine non-racial constitutional democracy on which our new society was founded.

[3] *The Judicial Service Commission (section 174) and Chapter 9 Institutions Supporting Constitutional Democracy (section 181 – The Office of the Public Protector)*

The Judicial Services Commission

The JSC is a constitutional body in terms of section 178 of the Constitution (read with the Judicial Service Commission Act 9 of 1994). The primary functions of the Commission are to interview candidates, and make recommendations, for appointment to the bench as well as dealing with complaints brought against the Judges. The JSC's judicial conduct committee recently rebuked Chief Justice Mogoeng Mogoeng for comments he made during 2020 on the Israeli-Palestinian conflict.

Mojapelo found that comments about the Israeli-Palestinian conflict made by Mogoeng in a webinar hosted by The Jerusalem Post amounted to “a breach of the code of conduct for judges and that Mogoeng had got himself involved in a political controversy”. According to Mojapelo “judges are to stay out of politics and are only permitted to pronounce on the legal and constitutional boundaries that may apply to those politics. When called upon to pronounce, they do so on the basis of the Constitution and the law and not on the basis of any preconceived notions - not even religion - however committed to those notions. That is what the Constitution and their oaths or affirmation bind them to”. The committee also found Mogoeng breached a number of other articles in the code, including one that precludes judges from using the prestige of their judicial office to advance their private interests. The Chief Justice has been ordered to apologize for his comments.

The expeditious manner in which the JSC investigated and concluded this matter stands in sharp contrast to the manner in which it has conducted itself when investigating complaints against other members of the judiciary - most notably judge John Hlope, who is the Judge President of the Western Cape High Court. The JSC has a constitutional mandate to determine whether any judge against whom a complaint has been lodged is guilty of gross misconduct. Laws and procedures for doing so have been carefully formulated and these should be applied “diligently and without delay”. If the code of judicial conduct is enforced against one judge, it must be applied equally to another.

In terms of section 177(3) of the Constitution, the President, may, on the advice of the JSC, suspend a judge who is the subject of a (disciplinary) procedure.

The question arises in why this measure has not been invoked with regard to Judge Hlope - in the light of the fact that he has been accused of gross misconduct on numerous occasions - including the complaint against him by all the then justices of the Constitutional Court. The question may also be asked why the JSC has claimed that “it has no say in the matter” and why Hlope has indeed not been suspended?

It is essential that, as the guardian of the integrity and independence of the judiciary, the JSC's own conduct should be beyond reproach and should be exercised in a manner that is fair, impartial and consistent with the Constitution.

The Office of the Public Protector

The office of Public Protector is an instrument in terms of section 181 of the Constitution which members of the community can use to realize the promise of democracy. It is there to assist citizens to hold those in power accountable for their improper conduct. Every member of society has access to this office free of charge. The Public Protector is an independent institution with a mandate to support and strengthen constitutional democracy. A supreme administrative oversight body, the

Public Protector has the power to investigate, report on and remedy improper conduct in all state affairs. The Public Protector must be accessible to all persons and communities. Anyone can complain to the Public Protector.

Current public protector Busisiwe Mkhwebane's tenure has been riddled with a number of highly concerning developments. Following her office's investigation into a number of matters she has been found to have acted in "bad faith" and "improperly in flagrant disobedience of the Constitution" as well as "dishonest" on a number of occasions (with the South African Revenue Service) and her conduct was "inexcusable" and "reckless".

The impeachment of Public Protector (PP) Advocate Busisiwe Mkhwebane (which was delayed by litigation and the COVID-19 pandemic) is set to get under way after a panel of three legal experts found prima facie evidence that she was not competent and fit to hold office. The 119-page report of the panel, which included Justice Bess Nkabinde and Advocate Dumisa Ntsebeza, among others, was made a public document on Monday, 14 March 2021.

The motion for the impeachment was first moved by Democratic Alliance (DA) chief whip Natasha Mazzone in February 2020.

Chief among the cases that made the panel give the green light to Mkhwebane's removal was the manner in which she handled the CR17 bank statements case, Bosasa donations to President Cyril Ramaphosa campaign funds, matters related to the Absa-Bankorp case as well as the Estina dairy case.

The Legal Practice Council of South Africa has also received applications to have Mkhwebane removed from the roll of advocates.

The Public Protector should be beyond reproach. Her conduct must be exercised in a manner that is responsible, objective, fair, impartial and consistent with the Constitution and the office's mandate.

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

EQUALITY (section 9)

2019 Grade: E =

2020 Grade: E -

South African society continues to be plagued by severe poverty and inequality, making the achievement of equality a distant goal - rather than a right that should be immediately available to all South Africans. South Africa remains among one of the world's most unequal societies with a GINI coefficient, according to Stats SA, of 0,65 in 2015. According to the *World Inequality Database (Global Inequality Data 2020 Update)* South Africa is the most unequal country of the African region with an income share of top 10% households estimated at 65% for 2019/2020.

The *Global Gender Gap Index 2020* of the World Economic Forum's (WEF) *Global Gender Gap Report 2020* ranked South Africa 17/153 globally, from 19/144 in 2018. The country came in 3/33 in sub-Saharan Africa, behind Rwanda. South Africa was ranked first (together with 40 other countries) globally in health and 10th in political empowerment, up seven positions from 2018. It ranked 67th for educational attainment and 92nd for economic participation.

According to the Human Rights Watch *World Report 2020* xenophobic violence continued to colour the experience of foreign nationals who find themselves living in South Africa. This might be mitigated going forward due to the launch of the *National Action Plan (NAP) to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance (2016 - 2021)* (NAP). However accountability for xenophobic crimes remains a challenge.

A concerning development impacting on equality was the South African government's decision in 2020 to use a race-based empowerment policy to determine whether tourism businesses in South Africa qualify for coronavirus relief funding - this policy effectively barred thousands of white-owned businesses from applying for and obtaining such relief.

HUMAN DIGNITY (section 10)

2019 Grade: C -

2020 Grade: C -

Human dignity forms the foundation for the enjoyment of most other human rights. The realization of the right to dignity depends on the promotion and protection of all other rights and emphasises the interrelated, interdependent and indivisible nature of human rights. South Africa's continued daily state of extreme poverty, inequality, high crime rates (especially violent crime), growing unemployment, lack of access to essential services and crumbling government and state owned enterprise (SOE) capacity and infrastructure limits the realisation of this right.

Examples include figures from the *National Poverty Lines Report* released by Stats SA for 2019/2020 that the food poverty line in South Africa is more or less R561 per person per month (this refers to the amount of money that an individual will need to afford the minimum required daily energy

intake). This is also commonly referred to as the “extreme” poverty line and of the 7.5 million households in major metros, approximately 28% are living on less than R2 500 a month.

According to the *South African Social Security Agency (SASSA)* the number of social grants paid by government increased from approximately two million in 1994, to more than 17.8 million in 2019 going forward into 2020 (benefitting about 31% of the country’s population). Of these grants, approximately 13 million are for Children’s Grants, followed by the Old Age Grants at just above 3.5 million, with Disability Grants amounting to just over a million. For the 2018/19 financial year, the South African Government spent R163 billion on social assistance programmes, representing about 3% of the country’s GDP.

LIFE (section 11)

2019 Grade: E =

2020 Grade: E =

The right to life, as guaranteed in the Constitution, carries both a positive and negative obligation and is inextricably linked to the right to dignity. The positive obligation requires the State to put in place active measures to protect everyone from any threats to their life. The negative obligation requires the State and persons to refrain from any conduct that threatens a person’s life. Although life expectancy for both genders has improved and the infant mortality rate has declined, the fact that the murder rate has gone up by 3.3% from the previous year shows that the State’s measures are proving to be insufficient in the fight against crime - and in particular violent crime - which directly threatens this right.

According to the *Stats SA Mid-Year Population Estimates 2019*, life expectancy at birth was estimated at 61.5 years for males and 67.7 years for females. This is compared to 2018, when life expectancy was estimated at 61.1 years for males and 67.3 years for females.

The 2019 infant mortality rate (IMR) for South Africa has declined from an estimated 56.5 infant deaths per 1 000 live births in 2002, to 22.1 infant deaths per 1000 live births in 2019. Similarly, the under-five mortality rate (U5MR) declined from 79 child deaths per 1 000 live births, to 28.5 child deaths per 1 000 live births between 2002 and 2019.

According to the *Stats SA Mid-Year Population Estimates 2019*, an estimated 13.5% of the total population is HIV positive - up from 13.1% in 2018. Over a fifth of South African women in their reproductive ages (15 to 49 years) are HIV positive. HIV prevalence among the youth aged 15 to 24 has remained fairly stable over time. The total number of persons living with HIV in South Africa increased from an estimated 7.52 million in 2018, to 7.97 million by 2019/2020.

According to *AVERT*, a global HIV and AIDS monitoring charity, South Africa has made huge improvements in getting people to test for HIV in recent years and is now almost meeting the first of the 90-90-90 targets, with 87% of people aware of their status. The country has the largest ART programme in the world, which has undergone even more expansion in recent years with the implementation of ‘test and treat’ guidelines. South Africa was the first country in sub-Saharan Africa to fully approve *PrEP*, which is now being made available to people at high risk of infection.

FREEDOM AND SECURITY OF THE PERSON (section 12)

2019 Grade: D =

2020 Grade: D -

South Africa's high crime statistics - particularly violent crimes like murder, armed robbery, rape and other sexual offences as well as gender based violence against women and children - is reflective of the lack of institutional capacity of the State to protect individuals, and especially South Africa's most vulnerable populations, from violence.

South Africa continued to be plagued by widespread incidents of xenophobic harassment and attacks against foreigners by mobs during 2020. The attacks and harassment were also committed by government and law enforcement officials.

In June 2020, following protests against the murder of Tshegofatso Pule, a 28-year-old woman whose body was found dumped in Soweto, Johannesburg, President Ramaphosa acknowledged that South Africa had among the highest levels of intimate partner violence in the world.

During September 2020 three Bills (the *Sexual Offences and Related Matters Bill*, the *Criminal and Related Matters Bill* as well as the *Domestic Violence Bill*) had been introduced in Parliament to "fill the gaps that allow perpetrators of these crimes to evade justice and to give full effect to the rights of our country's women and children." Government's response to nationwide protests against GBV also included making the National Register for Sex Offenders (NRSO) public.

Human Rights Watch also indicates that South Africa is facing a crisis of gender-based violence - in 2020 Police Minister Bheki Cele noted that police registered over 2,300 complaints of gender-based violence between March 27 to March 31, 2020, during the lockdown implemented to reduce the spread of the coronavirus. South Africa also continues to criminalize sex work and prohibit other aspects of sex work - including criminalizing running or owning a brothel, living off of the earnings of "prostitution," and enticing a woman into "prostitution."

Slavery, Servitude and Forced labour

2019 Grade: C =

2020 Grade: C =

South Africa's international obligation to protect people from human trafficking is given effect to in the *Prevention and Combatting of Trafficking of Persons Act 13 of 2013*. This Act provides measures to protect and assist victims of trafficking. Modern day slavery essentially involves recruitment, control and use of people for their bodies and labour. In 2019, a ground-breaking judgment was handed down by the Pretoria High Court sentencing among others, a Nigerian national to six life sentences and an additional 129 years for human trafficking and related charges.

According to the United States (US) Department of State South Africa is included on a Tier 2 Watchlist - the list comprises countries whose governments do not fully meet the *Trafficking Victims Protection Act's* (TVPA) minimum standards but are making significant efforts in order to do so. These efforts include prosecuting more traffickers and training front-line responders on human trafficking.

South African law enforcement agencies increased efforts to investigate, prosecute and convict traffickers. In these investigations it is reported that authorities arrested seven Chinese nationals, four men and three women for alleged forced labour of 91 Malawians, 37 of whom were children. Traffickers exploited a total of 308 victims through forced labour.

Indications are that traffickers capitalize on South Africa's poverty epidemic and unemployment. Women who undergo trafficking come from different backgrounds of poverty and many of them are immigrants. Large numbers of women who enter South Africa are in search of economic opportunities, and they often do so without formal immigration papers.

The *Global Slavery Index* ranked South Africa 110/167 with an estimated number of 155 000 persons living in modern day slavery like conditions in the country.

This indicates that despite Government's commitment to combat this problem South Africa is still unable to adequately identify and protect victims of trafficking.

PRIVACY (section 14)

2019 Grade: C -

2020 Grade: C =

Already in 2019 the right to privacy came into the spotlight in a constitutional challenge launched by AmaBhungane Centre for Investigative Journalism relating to the *Regulation of Interception of Communications and Provision of Communication Related Information Act* (RICA).

The failure of the State to fully implement the provisions of the *Protection of Personal Information Act* 4 of 2013 (POPI Act), remains a serious failure in ensuring the personal information of people in South Africa is protected in the modern digital age. Further sections of the Act took effect from 1 July 2020 - the Act has been put into operation incrementally, with a number of sections of the Act having been implemented in April 2014 while further sections (110 and 114(4) of the Act) will only be implemented on 30 June 2021. These concern the following issues, amongst others:

- Lawful processing of personal information.
- Procedure for dealing with complaints.
- Restrictions around direct marketing via unsolicited electronic communications.
- Code of conduct issued by the Information Regulator.

According to National Prosecuting Authority statistics cybercrime prosecutions managed to achieve a 99.1% conviction rate (with 440 convictions from 444 verdict cases).

According to the South African Banking Risk Information Centre's (SABRIC) *Annual Crime Statistics* 23 466 digital and banking fraud across all platforms were recorded and these cost R262 826 888 (this is a 75.3% increase from the previous year, 2018/19, where 13 389 incidents were recorded).

FREEDOM OF RELIGION, BELIEF AND OPINION (section 15)

2019 Grade: B =

2020 Grade: B =

In general, the right is enjoyed in South Africa. The limits thereof, however, have been tested in several important cases:

In March 2019, the Gauteng High Court in Pretoria handed down judgment in *Gaum and Others v Van Rensburg NO and Others* where it overturned a decision by the Dutch Reformed Church forcing clergy who are members of the LGBTQ+ community to be celibate and barring its clergy from officiating same-sex marriages. The Court found it unfair that the church excludes members of the church from the full and equal enjoyment of all rights and freedoms that the church offers. The decision was challenged by 11 of the church's members.

In December 2019, the Constitutional Court handed down judgment in *Freedom of Religion South Africa V Minister of Justice and Constitutional Development and Others*. The matter was an appeal from the High Court which in 2017 found that the common defence of reasonable chastisement against a charge of assault was unconstitutional. The case emanates from the conviction of YG who assaulted his 13-year-old son and proffered reasonable chastisement of a child as a defence. The court said that the defence violated a child's right to not be discriminated against based on age, equal protection of the law, dignity, freedom from all forms of violence and degradation, bodily a psychological integrity. Further, where adults have recourse in a case of assault, this defence means that children do not. FORSA argued that Holy Scriptures permit, and possibly command reasonable and appropriate correction for children. Many members of the public believe this, not just Christians. FORSA further argued that loving parental chastisement for the benefit of the child in his/her best interests, gives dignity to the child. FORSA argued that the High Court should have considered the constitutional right of parents to religious freedom. The Constitutional Court held that children may still be effectively disciplined without resorting to corporal punishment. The Court said that there are less restrictive means available. The appeal was dismissed, and the Court agreed with the High Court that the common law defence of reasonable chastisement was inconsistent with the rights to dignity and the principle of the best interests of the child as enunciated in the Constitution.

In January 2020, the SANDF officially withdrew charges against charges of wilful defiance and disobeying a lawful command against Muslim major, Fatima Isaacs, who refused to remove her headscarf whilst in uniform. The SANDF previously defended its charges as its laws clearly stated that no other clothing should be worn with the official uniform. The SANDF decided to temporarily allow Muslim women to wear a head scarf underneath their berets as part of their uniform, to comply with the SANDF's dress code while reshaping the military dress policy.

FREEDOM OF EXPRESSION (section 16)

2019 Grade: B -

2020 Grade: B =

The right to freedom of expression and freedom of the press is enjoyed in South Africa. Freedom of expression and the press are constitutionally protected and generally respected in practice and South Africa features a vibrant and adversarial media landscape, including independent civic groups that help counter government efforts to encroach on freedom of expression. What could be cause

for concern is that often not all matters that constitute hate speech, or those who commit such, are treated consistently.

In 2019, the hate speech provision in the *Promotion of Equality and Prevention of Unfair Discrimination Act* (PEPUDA) was declared unconstitutional by the Supreme Court of Appeal, signalling an important Constitutional reaffirmation of the thresholds for the freedom of expression, in line with international standards.

The *John Qwelane-matter* is currently pending before the Constitutional Court and concerns the definition of hate speech as set out in the *Promotion of Equality and Prevention of Unfair Discrimination Act* (PEPUDA). Freedom of expression as a right could potentially be threatened by the *Prevention and Combating of Hate Crimes and Hate Speech Bill*.

Journalists and rights groups have expressed concern that the misuse of surveillance laws, notably the 2002 *Regulation of Interception of Communications and Provision of Communication-Related Information Act* (RICA), can enable spying on reporters.

The World Economic Forum (WEF) *Global Competitiveness Report 2019/2020* ranks South Africa 28/141 globally for press freedom, which is a drop from 2018's 26/140.

South Africa has seen an increase of divisive hate speech, particularly on various social media platforms. This increase is reflected by a number of important Court judgments, as well as investigations by the South African Human Rights Commission (SAHRC).

Judgments

In May 2019, the Equality Court handed down judgment in the *Strydom v Black First Land First* case. BLF is a well-known political party whose verbal and written statements against white South Africans made through its members in public are the root of this matter. Slogans that constituted hate speech against white people in South Africa such as their slogan "Land or Death". The complainant approached court seeking a declaration that songs like "kill the boer" and "land or death" are hate speech on the basis of race. BLF argued that there was no threat of imminent violence, thus, their utterances were not hate speech. The Court held that "Land or Death" was indeed hate speech and could be construed to incite harm against white landowners. BLF was ordered to remove "land or death" from t-shirts, their website and all official documents as well as from all social media. It was also ordered to issue an unconditional apology for using the phrase.

On 31 October 2019, the Equality Court found in favour of the EFF in *Gordhan v Malema and Another*. Minister Pravin Gordhan sought to interdict EFF leader, Julius Malema and the party from attacking him on public platforms. The Court found that while the utterances may have been a juvenile rant, they fell short of the standard of section 10(1) of the *Equality Act* which constrains speech on the grounds that are hurtful, harmful or promote or propagate hatred on a set of prohibited grounds which include race, gender and ethnic origin, which undermine human dignity.

On 24 October 2019, the Equality Court found in favour of the EFF in *South African National Editors' Forum and Others v Economic Freedom Fighters and Another*. SANEF sought to interdict the EFF and its leadership from attacking journalists online and on other platforms. The Court dismissed the argument that journalists should be considered a protected class under the *Equality Act* and said that this would amount to press exceptionalism - something society should guard against. The Court further said that unpopular, offensive or controversial views do not constitute hate speech.



On 21 August 2019, the Equality Court handed down judgment in the *Nelson Mandela Foundation Trust and Another v AfriForum NPC and Others* matter. The case concerned the gratuitous display of the apartheid flag and the Nelson Mandela Foundation argued that because apartheid was a crime against humanity, displaying the old flag represents support for that crime and is tantamount to hate speech. The Foundation further argued that its display does not serve any genuine journalistic, academic or artistic purpose in the public interest. AfriForum argued that the display of the old flag was protected under section 16 of the Constitution which protects the freedom of expression. Hate speech is prohibited by the *Equality Act*, which constrains speech on grounds that are hurtful, harmful, incite harm, promote or propagate hatred based on the listed grounds which include race and gender and inter alia, undermine human dignity. The Court held that the Old Flag must be interpreted against its history and that for the majority of South Africans, the old flag symbolises racial oppression through apartheid and the accompanying atrocities. The Court found that any gratuitous display of the Old Flag (that is, a display beyond the protection of the proviso in section 12 of the *Equality Act*), besides being racist and discriminatory, demonstrates a clear intention to be hurtful; to be harmful and incites harm; and that it promotes and propagates hatred against black people in contravention of section 10(1) of the *Equality Act*. Furthermore, displaying the Old Flag in the face of most South Africans knowing that they recoil from it also constitute harassment. Accordingly, the gratuitous display of the Old Flag constitutes prohibited hate speech, unfair discrimination and harassment.

In August 2019, Adam Catzavelos, who filmed a video while on holiday in Greece wherein he said he celebrated the fact there were no black people on the beach and used the k-word, reached a settlement with the South African Human Rights Commission (SAHRC). The agreement required him to issue an apology, participate in community service and to pay R150 000 over a period of 30 months. This is after the SAHRC took Catzavelos to the Equality Court, seeking that he pay R200 000 in damages over a period of 20 months. Further, the incident prompted the Economic Freedom Fighters (EFF) to open a case of *crimen injuria* against Catzavelos. In December 2019, he pleaded guilty to a charge of *crimen injuria* in the Randburg Magistrates Court. This follows two unsuccessful bids to have the charge withdrawn. Earlier in 2020 Catzavelos submitted representations to the National Director of Public Prosecutions to have the charges against him dropped after the Gauteng Director of Public Prosecutions denied his representations in which he requested that the charges against him be withdrawn. Sentencing is yet to take place and he may still face hate speech charges in Greece.

In November 2019, in the case of *Qwelane v South African Human Rights Commission and Another*, the Supreme Court of Appeal (SCA) overturned a High Court ruling that found former diplomat, Jon Qwelane's homophobic opinion on same-sex marriage, to be hate speech. The case is a culmination of a decade long battle that challenges the Constitutional validity of section 10 of the *Promotion of Equality and Prevention of Unfair Discrimination Act* (PEPUDA) - that it is vague and overbroad in its regulation of the freedom of expression and hate speech. In the High Court, Qwelane argued that because of his reasons, the provision should be declared unconstitutional and invalid. The Court held that his statements were indeed hate speech in terms of PEPUDA as they were hurtful, incited harm and propagated hatred and dismissed the application. Before the SCA, argued that section 10 of PEPUDA impermissibly extended far beyond the freedom of expression restriction in the Constitution. While the Constitution's prohibited grounds are gender, race, ethnicity and religion, Qwelane argued that PEPUDA's extension to include sexual orientation (among others) does not mirror the Constitution. The SCA said that the freedom of expression is a fundamental right that underpins democracies across the globe and when limiting it, caution must be exercised. The SCA held that the extension of the grounds by PEPUDA to include the LGBTQI+ community was in line

with the Constitution's requirement that the State legislate to prohibit unfair discrimination in section 9. The SCA then addressed the difference in standard for the prohibition between the Constitution and PEPUDA. It found that the former required an objective examination of the offending statements whereas PEPUDA's more subjective one leaned on the reasonable person to understand a statement to be hurtful, harmful or propagating hatred. The SCA found that the language in PEPUDA departs from what the Constitution envisaged as exceptions to the freedom of expression. Further, the SCA held that it is almost impossible to control who can be hurt by what and that the prohibition of hurtful words goes beyond the ambit of the Constitution. The appeal was upheld, section 10 of PEPUDA was declared inconsistent with the provisions of the Constitution and therefore unconstitutional and invalid. The complaint against Qwelane was dismissed. Parliament was given 18 months to remedy the defect; and section 10 was reworded to act as an *interim* provision until the amendment. At time of writing, the order of constitutional invalidity was on its way to the apex court for confirmation.

SAHRC Findings

In March 2019, the SAHRC ruled on five complaints against EFF leaders Julius Malema and Godrich Gardee, finding that none of the utterances referred to the body legally constitute hate speech. The statements referred to the commission were made during unrelated and separate occasions between 2016 and 2018. The complaints against Malema included the singing of the song "Kill the boer" and his June 2017 comments on Indians ill-treating black people in KwaZulu-Natal. The SAHRC held that "objective assessment of the statements showed that Malema was calling for the proper treatment of black people by Indians".

In July 2019, former Bosasa operations chief Angelo Agrizzi, apologised for using the k-word during a racist rant, a recording of which was heard during a hearing at the state capture commission of inquiry. Agrizzi stated that he understood the wounds of apartheid were still raw, and that it was despicable for him to have rubbed salt into the wounds. This followed the reaching of a settlement agreement between him and the South African Human Rights Commission (SAHRC). In terms of the agreement, Agrizzi was to pay R200 000 to the Barney Mokgatle Foundation as part of his apology.

In January 2020, the SAHRC announced that it had reached an agreement with Springbok rugby player Eben Etzebeth, to withdraw the review application in the High Court in Pretoria, regarding a complaint that the sportsman racially and physically abused four men in Langebaan, Cape Town. The matter is now headed to the Equality Court.

FREEDOM OF ASSEMBLY, DEMONSTRATION, PICKET AND PETITION (section 17)

2019 Grade: B =

2020 Grade: B -

The guarantee of the right to freedom of expression in South Africa has historical significance and is an important tool for the assurance of a responsive democracy. Questions around the full enjoyment, abuse and increasing politicisation of this right have been raised, particularly when it comes to the increasingly violent nature of protests as seen in Senekal in the Free State and Brackenfell in the Western Cape during 2020.

South Africa has a vibrant protest culture. Demonstrators must notify police of events ahead of time, but are rarely prohibited from gathering. Protests over the government's shortcomings in the

provision of public services are common in South Africa, and sometimes turn violent. Police have faced accusations of provoking some protest violence.

It is however concerning that freedom of assembly, demonstration, picket and petition has shown that South Africa's public order policing must be addressed. Student protests spreading across the country's campuses during March 2021 escalated sharply after police shot dead a pedestrian at a protest outside the University of the Witwatersrand in Johannesburg.

The above follows the unprecedented move by Government, in March 2020, when it imposed a ban on political gatherings (including against farm murders in South Africa) as part of a host of interventions aimed at managing the COVID-19 pandemic.

FREEDOM OF ASSOCIATION (section 18)

2019 Grade: A =

2020 Grade: A =

The right to freedom of association enables people to enjoy a number of interrelated rights. It also has a negative dimension requiring the State to refrain from restricting individuals' social relationships.

The *Refugee Amendment Act* and its Regulations which came into effect on 1 January 2020, among others, limit the rights of asylum seekers and refugees to associate with like-minded politically motivated individuals. Any participation in political activity or campaigns can only take place with the permission of the Minister of Home Affairs.

Concerns also remain about seemingly politically motivated killings in KwaZulu-Natal.

POLITICAL RIGHTS (section 19)

2019 Grade: A =

2020 Grade: A =

South Africans continue to enjoy developed political rights and free elections. A recent positive development was the signing into law the *Political Party Funding Act*. The Act regulates public and private funding of political parties and establishes funds to provide political parties represented in Parliament and legislatures with equitable and proportional funding to undertake their work. It also requires that donations be disclosed by parties and donors to the IEC.

In early 2020 the Constitutional Court also ruled the *Electoral Act* unconstitutional for not making allowance for independent candidates at provincial and national levels.

The Economic Freedom Fighters (EFF) has called for the 2021 local government elections to be delayed to 2024 - principally citing COVID-19 as a reason and there are concerns that this could create a constitutional crisis as the Constitution limits a term of office to five years and serves as an important safeguard to South Africa's electoral democracy.

CITIZENSHIP (section 20)

2019 Grade: B =

2020 Grade: B -

The majority of South Africans enjoy this right unencumbered. However, due to a number of gaps in law and policy, a major obstacle has been addressing the crisis of undocumented refugees and asylum seekers exposing them to arrest, detention and deportation.

A landmark judgment by the Western Cape High Court in 2019 will now make it easier for undocumented asylum seekers and refugees to be documented through family joining on their own grounds on provision of certain documents such as marriage certificates.

The issue of documentation is linked to human dignity and related rights. To have a meaningful existence in South Africa, a birth certificate, an identity document, passport or a permit is crucial to access other basic human rights like education, formal employment, social assistance and healthcare. The lack of valid documentation restricts freedom of movement and conversely increases the risk of detention and deportation.

According to *Lawyers for Human Rights (LHR)* the Department of Home Affairs had 813,343 cases of blocked identity documents in December 2020. They were blocked without notice, without communicated reasons, without an opportunity to challenge these actions, and are nearly impossible to resolve.

Another recent court case (*Centre for Child Law & Others v Minister of Basic Education & Others*) concerning the rights of undocumented children to basic education revealed that there were more than 900,000 undocumented children enrolled in public schools in South Africa, of whom more than 800,000 were South African citizens. The South African Constitution guarantees every child born in South Africa the right to a birth certificate.

In January 2020, media reports that the Department of Home Affairs (DHA) continued to ignore a Makhanda (formerly Grahamstown) High Court order from April 2019 that required the DHA to give birth certificates to 24 children where one parent was not South African. Many children exist in this shadow-state, due to the restrictive rules around birth registration in South Africa.

Statelessness is essentially an acute violation of the right to citizenship and the Department of Home Affairs often remains bureaucratic and intermittently slow in implementing and fulfilling its obligation to give effect to this right.

FREEDOM OF MOVEMENT AND RESIDENCE (section 21)

2019 Grade: C=

2020 Grade: C -

This right limits the interference of the State on the exercise of free movement of people in the country and in essence guarantees the free movement of individuals who are in South Africa lawfully.

As with citizenship (above) the issue of documentation is linked to human dignity and related rights.

To have a meaningful existence in South Africa, a birth certificate, an identity document, passport or a permit is crucial to access other basic human rights like education, formal employment, social assistance and healthcare. The lack of valid documentation restricts freedom of movement and conversely increases the risk of detention and deportation.

Without valid identity documents, parents cannot register the births of their children and the cycle of being undocumented continues, resulting in intergenerational statelessness and intergenerational deprivation of rights.

Similarly, the Department of Home Affairs often remains bureaucratic and intermittently slow in implementing and fulfilling its obligation to give effect to this right.

FREEDOM OF TRADE, OCCUPATION AND PROFESSION (section 22)

2019 Grade: C =

2020 Grade: C =

The right to freedom of trade, occupation and profession plays a vital role in guaranteeing free and unencumbered engagement in economic activity. Although there are state initiatives to empower small business enterprises, the lack of digital skills and vocational training hamper people's opportunities to engage in economic activities.

The South African Government indicated as early as August 2019 that it would pursue a renewed push to enforce what it calls 'transformation' in South Africa. Minister of Employment and Labour, Thulas Nxesi, indicated that harsher measures were to be implemented against employers who do not meet quota targets. As a result, the incoming *Employment Equity Amendment Bill* is aimed at expediting the pace of transformation and address non-compliance with the requirements of the *Employment Equity Act, 1998 (EEA)* in South Africa.

Minister of Tourism, Mmamoloko Kubayi-Ngubane indicated in 2020 and during the lockdown that race criteria will determine which businesses in the tourism sector receive state-sponsored COVID-19 relief bailouts. This relates to a R200m Tourism Relief Fund announced by Kubayi-Ngubane as a buffer for businesses in the tourism sector which have been severely affected by the national COVID-19 lockdown during 2020/21. It provides for a once-off grant of up to R50 000.00 for financially distressed businesses. The Tourism Department indicated its intention to apply "empowerment criteria" when considering pleas for a bailout, and it would be an 'exercise in aid of transformation'. The legality of this has been confirmed by the Courts.

In an important judgment, *Sakeliga v Minister of Finance*, the Supreme Court of Appeal ruled that the *Preferential Procurement Regulations* of 2017 conflicted with the *Preferential Procurement Policy Framework Act, 5 of 2000* and the Constitution and consequently declared it invalid. The court also found that the Minister of Finance who promulgated it at the time, Pravin Gordhan, acted *ultra vires*. While several types of businesses, as announced in the level three regulations, remain prohibited, all other businesses are free to operate without first obtaining some new government license from national, provincial, or local government, or any other organ of state.

The court case can be seen as positive under this right (freedom of trade, occupation and profession) to do business in South Africa. The State was, effectively, implementing a general system of business licensing in South Africa and the Court found it to be invalid and unconstitutional for

organs of State to apply pre-disqualification criteria, such as black economic empowerment requirements, to tenders in public procurement.

According to the *Quarterly Labour Force Survey (QLFS)*, there was an increase of 333 000 in the number of employed persons, an increase of 701 000 in the number of unemployed persons and a decrease of 890 000 in the number of people who are out of the labour force, in the 4th quarter of 2020 compared to the previous quarter. These changes resulted in increases in all key labour market rates. The unemployment rate increased from 30,8% in quarter 3 of 2020 to 32,5% in quarter 4 of 2020, the highest unemployment rate recorded since the start of the QLFS in 2008. The absorption rate (employment-to-population ratio) increased from 37,5% to 38,2% and the labour force participation rate increased from 54,2% to 56,6% during this period, indicating that more people are participating in the labour market.

In line with the National Development Plan 2030 there remains an urgent need to create a more empowering environment for small and medium business enterprises and it will remain crucial for the State to accelerate such initiatives and policies and remove unnecessary red tape.

LABOUR RELATIONS (section 23)

2019 Grade: C =

2020 Grade: C =

The right to fair labour practices, which encompasses various rights, is an important tool to ensure a balance in the working relationship between employers and employees.

Following on the *National Wage Act* and the *Labour Relations Amendment Act* in 2019 further positive developments in the labour sphere includes the coming into effect of new paternity leave regulations which came into effect on 1 January 2020, as well as a Constitutional Court ruling that parts of the *Compensation for Occupational Injuries and Diseases Act (COIDA)* are unconstitutional in that it excludes domestic workers employed in private households from the definition of 'employee'. The court said that this effectively denies these domestic workers compensation in the event that they contract diseases or suffer disablement, injuries, or death in the course of their employment.

Government is currently in the process of amending the COIDA to include the extension of coverage to domestic workers and the *Compensation for Occupational Injuries and Diseases Amendment Bill* calls for the change to the definition of "employee" to end the exclusion of domestic employees.

This is the first major overhaul of the act since it was passed in September 1993 (and amended in 1997).

According to the World Bank's *Global Economic Prospects (GEP)* report from January 2020, South Africa is one of the three largest economies in sub-Saharan Africa. Despite this, growth has remain slow and remained below historical. The report indicated that growth is expected to firm to 0.9 percent in 2020, before strengthening to an average of 1.4 percent in 2021-22. This is reliant on the administration's structural reform agenda gathering momentum, a decrease in policy uncertainty wanes, and that both public and private investment recover.

The South African Government indicated that it would pursue a renewed push to enforce what it calls 'transformation' in South Africa. Minister of Employment and Labour, Thulas Nxesi, indicated

that harsher measures were to be implemented against employers who do not meet quota targets. As a result, the incoming *Employment Equity Amendment Bill* is aimed at expediting the pace of transformation and address non-compliance with the requirements of the *Employment Equity Act, 1998 (EEA)* in South Africa.

What the effect of this will be on the labour dispensation of South Africa will remain to be seen.

ENVIRONMENT (section 24)

2019 Grade: C =

2020 Grade: C =

This right is generally enjoyed in South Africa. Concerns have been raised about the state of pollution in a number of South African rivers and dams. The Department of Human Settlements, Water and Sanitation released the *River EcoStatus Monitoring Programme State of Rivers Report*, according to which, in terms of ecological health, only 15% of South Africa's rivers are in a good condition.

In January 2020, Department of Defence announced that the SA Army Engineer Formation would be ending its involvement in the Vaal river clean-up, with Gauteng-based East Rand Water Company (ERWAT) moving in, at the end of January 2020. The project commenced in October 2018 and was intended to end in October 2019 but was later extended to January 31, 2020. More than 500 members of the SANDF's regular and reserve units took part in this project on a rotational basis. Over the period the SANDF was deployed, it managed to unblock a sewage system that was clogged up resulting in spillage, and a total of seven pump stations are now operational with another 24 pump stations functioning, but still requiring some attention.

The *Carbon Tax Act* which aims to curb industries' carbon dioxide (CO₂) emissions, came into effect on 1 June 2019, and the draft *Climate Change Bill* which aims to provide a coordinated and integrated response to climate change and its impacts, was also introduced.

South Africa's main electricity utility, Eskom, remains predominantly carbon-based. In June 2019, a study entitled "*Air Quality Impacts and Health Effects Due to Large Stationary Source Emissions in And Around South Africa's Mpumalanga Highveld Priority Area (HPA)*" was released by Gray Sky Solutions. The study found that air pollution caused by 12 Eskom power stations, Sasol Synfuels chemical facility, and the NatRef refinery had harmful effects on the health of residents, causing hundreds of early deaths. The three worst offenders were Lethabo Power Station, Kendal Power Station and Kriel Power Station. The study found that if the facilities were required to comply with the minimum emissions standards that will go into effect in 2020 (2020 MES), this would reduce early deaths by 60%, preventing between 182 and 388 early deaths in and around the HPA every year.

PROPERTY (section 25)

2019 Grade: D -

2020 Grade: D =

The debate on the proposed amendment to section 25 of the Constitution continued to dominate the political and social landscape in from 2020 going into 2021. In December 2019, the *Ad Hoc*

Committee to initiate and introduce legislation amending section 25 of the Constitution published the draft *Constitution Eighteenth Amendment Bill* for comment. Corruption remained alarmingly persistent in the land reform arena, effectively infringing upon the constitutionally enshrined rights of people who were previously dispossessed. It is also concerning that the land claims settled in the period under review were less than those in the previous period.

The *Expropriation Bill* is currently before Parliament. The Bill contains worrying and unconstitutional sections that will dilute the property rights of all South Africans - not just landowners or farmers, but of all property owners - including more than 8 million black South Africans who own their own homes.

A number of critical concerns have been raised about the constitutionality of a wide array of issues in the Bill and at the time of writing Parliament has invited commentators to deliver verbal presentations on the Bill.

Although the Bill has undergone many reviews and amendments through the years it remains contentious for a number of reasons and mainly for the following concerns:

- It lists five circumstances under which 'nil compensation' (zero) could be paid when property is expropriated;
- This list, in terms of the Bill, is not exhaustive and could presumably be extended to include any number of other circumstances in which nil compensation might be paid for expropriated property;
- In its current form it offers government almost extensive and undefined powers to expropriate virtually any form of property - this includes intangible property such as copyrighted and patented property;
- The Bill lacks clear definition in a number of areas and provides very little in terms of oversight opportunity by experts to ensure fairness to ordinary South Africans;
- The Bill also provides no clear definition of a proper public consultation process and no definition of what is meant by the "public interest".

The Expropriation Bill poses a serious threat to property rights which are a core requirement for all free and prosperous societies. Section 25 of the Constitution (the property clause) as it is currently worded constitutes a proper framework for an effective process of land reform. The payment of fair and equitable compensation for expropriated property is not the main impediment to land reform. Rather, it is - in the view of the High-Level Panel chaired by former President Motlanthe - the inefficiency, corruption and lack of resources of the responsible government departments.

EWC, and if the *Expropriation Bill* is adopted, might represent a crucial point in the history of post 1994 South Africa at which the country, decisively, turns away from the vision of genuine non-racial constitutional democracy on which our new society was founded.

At the time of writing Justice and Correctional Services Minister Ronald also published the *Land Court Bill* in "seeking to ensure stronger judicial oversight over claims".

According to Lamola "the bill seeks to ensure stronger judicial oversight over claims, and this must lead to better settlements, reduce the scope for corruption and avert the bundling of claims into dysfunctional mega-claims that lead to conflict".

HOUSING (section 26)

2019 Grade: B -

2020 Grade: B =

The State has a constitutional duty to ensure that everyone has access to adequate housing. The right is qualified by resource availability, but the State is obliged to take active steps in promoting the right by providing access thereto. Access to housing, however, remains a complicated issue and it appears that the State's housing projects are not contributing to the reduction of the percentage of households in informal dwellings.

In 2019, the Department of Housing and Human Settlements indicated that it would deliver 470,000 housing units, 300,000 service sites, 30,000 social housing units and upgrade 1,500 informal settlements. On its own figures it only managed to develop 126 informal settlement upgrading plans and the total housing backlog across the country is estimated at 2.6 million units. The department indicated in its *Annual Report 2018/2019* more than 4.7 million housing opportunities were provided for millions of South Africans through various housing programmes.

The same report states that R11.3 billion of the Urban Settlements Development Grant (USDG) was disbursed to metropolitan municipalities and used as a supplementary capital grant to deliver human settlement infrastructure like bulk sewer, electricity and roads. It must be noted that provinces reported that they are reluctant to build houses due to contests over the correct, legitimate and qualifying beneficiaries.

The department has also indicated a new policy from December 2020 onwards that it will no longer support new housing projects except for those benefitting elderly people, military veterans, people living with disabilities and child-headed households, effectively ending South Africa's policy of providing free houses for the poor.

According to Human Settlements Minister Lindiwe Sisulu the new strategy "will still involve government support for medium and high-density developments, and existing contracts will be honoured. Other than that, though, the housing subsidy programme has been deemed financially unsustainable in light of the COVID-19 pandemic's impact - and contracts to build new housing projects have been frozen".

On a larger scale the State's failure to address maladministration, corruption and effective service delivery directly impacts on the State's ability to give access to this right, impacting on the most vulnerable in South African society.

HEALTHCARE, FOOD, WATER AND SOCIAL SECURITY (section 27)

2019 Grade: C -

2020 Grade: C =

Health

During 2019 the *National Health Insurance Bill (NHI)* was introduced in the National Assembly. The Bill envisions the establishment of the NHI Fund - a health financing system serving as the "single purchaser and payer of health care services" - to effectively achieve Universal Health Coverage (UHC) and give effect to the State's constitutional duty to provide access to healthcare services. The rationality of the proposed measures as set out in the *NHI Bill* have been directly questioned, since

no detail has been provided to the public on the costing of the NHI, coupled with lack of information on healthcare service benefits to be provided. The only public information on NHI expenditure currently available is that referred to in the NHI white papers, which references 2010 process. The public therefore has no means to test whether the proposed measures are rationally related to the information.

The COVID-19 pandemic still dominates world events and in South Africa. According to the South African Department of Health, in March 2020, South Africa has had 9 556 404 COVID-19 tests conducted, 1 533 961 positive test cases, 1 459 894 recoveries, 51 724 deaths and 177 275 vaccines have been administered.

The COVID-19 pandemic has highlighted a number of challenges facing public procurement in South Africa, and in particular obtaining COVID-19 vaccines. The Auditor-General's reports on COVID-19 related procurement and media coverage have flagged lack of due diligence, corruption and mismanagement on a wide scale throughout the procurement process with many government officials involved in COVID-19 tender fraud. On 5 February 2021, Health Minister Zweli Mkhize stated that government would procure vaccines centrally and "then supply both the private and the public sector for distribution".

At the time of writing a major area of uncertainty relates to the terms of a number of identified supply contracts in terms of which the government will acquire vaccines and it remains unclear whether any contracts have actually been signed, apart from the widely reported agreement to obtain the *AstraZeneca* vaccine (COVAX initiative) as well as an agreement for 9 million Johnson & Johnson vaccines.

Food

South Africa remains a food-secure country and it is reported that 59% of children in South Africa were recorded as living below the upper-bound poverty line is an alarming statistic requiring urgent State attention. According to Oxfam International More than half the population are at risk of hunger and 26% of South Africa's population regularly experiences hunger, with an additional 28.3% at risk of hunger. Food insecurity affects formal and informal settlements in both rural and urban areas.

According to Statistics SA, South Africa is currently food secure at national level although the country is food insecure at household level as not all households have access to adequate food. Almost 20% of South African households had inadequate or severe inadequate access to food and this further varied by province, population group of household head and by household size.

According to Statistics SA, the percentage of people that experienced hunger decreased from 29,3% in 2002 to 11,3% in 2018 - compared to 10.4% in 2017. The percentage of households who were vulnerable to hunger reflects the same pattern as experienced by persons as it declined from 24,2% in 2002 to 9,7% in 2018.

According to the annual *South African Child Gauge 2019*, South Africa has very high rates of child poverty. In 2018, 59% of children lived below the upper-bound poverty line (11.6 million children).

Water & Sanitation

Access to water and basic sanitation remains a key concern for an overwhelming number of households in the country. The Department of Water and Sanitation states that more than 3 million people do not have access to basic water supply services, and an astronomical R33 billion more each year for the next 10 years is needed to achieve water security.

Statistics SA indicate that the percentage of households with access to an improved source of water increased by less than four percentage points between 2002 and 2018 (growing from 84,4% to 88,2%). The increases were much more notable in Eastern Cape (+17,8 percentage points) and KwaZulu-Natal (+10,0 percentage points).

It is further reported that despite these improvements access to water declined in five provinces between 2002 and 2019/2020. The largest decline was observed in Mpumalanga (-5,3 percentage points), Limpopo (-3,8 percentage points) and Free State (-3,7 percentage points). An estimated 44,9% of households had access to piped water in their dwellings in 2019. A further 28,5% accessed water on site while 12,2% relied on communal taps and 2,5% relied on neighbours' taps. Although generally households' access to water improved, 3,1% of households still had to fetch water from rivers, streams, stagnant water pools, dams, wells and springs in 2019.

Social Security

The State has a constitutional duty to provide social assistance to people who are unable to support themselves, within the State's available resources. For the period under review, the State spent more than R163 billion on social assistance programmes, but challenges in paying these vulnerable beneficiaries remains a persisting problem.

Unfortunately the biggest government contributor to poverty alleviation remains the providing and expansion of social grants. According to the *SASSA Annual Report 2018/19*, more than 17.8 million social grants were issued by the end of March 2019 (for the reporting period). These grants benefit about 31% of the South African population. The majority of the grants - about 13 million - are children grants, followed by the old age grants at just above 3.5 million and the disability grants amounting to just over a million.

According to *BusinessTech* it is anticipated that the seven social grant categories in South Africa will increase by between 4 and 4.7%. going into the 2021/22 financial year. In this regard, old age and disability grants will increase to R1,890 from R1,860 (1.6%). Both persons over the age of 75 and war veterans will both now receive R1,910 from the current R1,880 (1.6%).

CHILDREN (section 28)

2019 Grade: C =

2020 Grade: C -

South Africa has advanced legislative measures to protect children from harm giving effect to its constitutional duty. Under the period of review, there has been an alarming increase of crimes against children compared to previous years and South African child homicide rates are significantly higher than the global average.

According to SAPS 2019/2020 statistics the police have recorded 943 murders and over 24,000 sexual offences against children. In 2020, 71 less children were murdered than between 2018/2019. The data shows that rape was at the top of sexual offences - 22,070 children were sexually abused between April 2019 and March 2020. The figure has dropped by 2,317 compared to the preceding year. Specific contact crimes *decrease* are indicated as murder by 71; sexual offenses by 2,317; attempted murder showed a reduction of 47; assault grievous bodily harm declined 309; and common assault by 137". Meanwhile, over 10,000 children were victims of common assault – with 7,050 cases of grievous bodily harm reported.

As can be gauged, these numbers remain unacceptable high.

The *KidsRights Index* is an annual global index, which ranks how countries adhere to and are equipped to improve children's rights. It comprises a ranking for all UN Member States that have ratified the *UN Convention on the Rights of the Child* (CRC) and for which sufficient data is available (181 countries). In 2019, South Africa ranked 102 on the index. The decrease, by one, of the countries surveyed, means South Africa did not move from its 103/182 in the previous period. The Index considers five categories, namely: the right to life, the right to health, the right to education, the right to protection, as well as an enabling environment for child rights. The Index says that South Africa needs to bring its domestic legislation more in line with the *UN CRC*.

Stats SA indicates that child hunger remains a challenge in South Africa. More than half a million households with children aged five years or younger experienced hunger. Northern Cape and KwaZulu-Natal had the highest proportion of households that experienced hunger.

The *State of the South African Child* report by the Nelson Mandela Children's Fund found that 14% of South African children go to bed hungry every night, and 27% of children under the age of three experience stunted growth due to a lack of nutrients and vitamins. This is higher than countries with a similar income level, according to the *World Bank's Human Capital Index (HCI)*, which measures the knowledge, skills, and health that people gain throughout their lives to enable them to realise their full potential as productive members of society. The HCI ranks countries on the probability of a child's survival to age five, a child's expected years of schooling, harmonised test scores as a measure of quality of learning, adult survival rate, and the proportion of children who are not stunted. South Africa ranks at number 126 out of 157 countries on the list.

EDUCATION (section 29)

2019 Grade: E =

2020 Grade: E =

The right to education is an unqualified and immediately enforceable right against the State in relation to basic education. Despite efforts by the State to break down learning barriers, there are still significant challenges for the access to education for a large contingent of children of school going age.

Amnesty International indicates that the South African education system, characterised by crumbling infrastructure, overcrowded classrooms and relatively poor educational outcomes, is perpetuating inequality and as a result failing too many of its children, with the poor hardest hit.

It is reported that 71% of South African teachers work in schools with over 30% of socio-economically disadvantaged students. Problems are further compounded by the multiple languages that exist in the country with 60% of teachers working in schools with more than 10% of students whose first language is not the language of instruction.

Amnesty International further reports that South Africa has one of the most unequal school systems in the world, with the widest gap between the test scores of the top 20% of schools and the rest. Children in the top 200 schools achieve more distinctions in maths than children in the next 6,600 schools combined. More than three quarters of children aged 9 cannot read for meaning - in some provinces this is as high as 91% (Limpopo) and 85% (Eastern Cape). Of 100 learners that start school, 50-60 will make it to matric, 40-50 will pass matric, and only 14 will go to university.

It is further reported that out of 23,471 public schools 19% only had illegal pit latrines for sanitation with another 37 schools having no sanitation facilities at all; 86% had no laboratory; 77% had no library; 72% had no internet access and 42% had no sports facilities. 239 schools lacked any electricity. 56% of South African head teachers report that a shortage of physical infrastructure (compared to an OECD average of 26%) is hindering their school's capacity to provide quality instruction. 70% report a shortage of library materials.

Amnesty International indicates that many of the shortcomings are in breach of not just the government's international human rights obligations but its own Minimum Norms and Standards for educational facilities. In 2013 the government enacted these binding regulations requiring the government to ensure that by November 2016 all schools have access to water, sanitation and electricity; all plain (unimproved and unventilated) pit latrines are replaced with safe and adequate sanitation; and schools built from inappropriate materials, such as mud and asbestos, are to be replaced. Yet as the government's own statistics show it has not met these targets. The repeated failure of government - both at the national and provincial level - to meet its own targets with respect to infrastructure upgrades is not just a question of institutional accountability. It has consequences for the life chances of thousands of young people who have the right to a better life regardless of their status or circumstances.

Although a positive development relating to higher education was the signing into law of the *National Qualifications Framework Amendment Act* in August 2019 (which provides for the verification of all qualifications and aims at limiting corruption) higher education in South Africa also remains severely challenged in a number of respects - most recently evidenced by violent student protests at tertiary institutions around the country following the inability of the National Student Financial Aid Scheme (NSFAS) to assist students with financial aid for tertiary studies.

NSFAS is responsible for an estimated budget of about R40-billion annually and funds poor and working-class students. NSFAS is a critical institution, but has not been running efficiently. Funds have reportedly been disbursed by trial and error, often leaving students frustrated, and the organization has been marked by inefficiency, maladministration and poor performance (including a reported backlog of more than 80 000 unresolved bursary applications dating back to 2017).

The NSFAS 2018/2019 annual report indicated that the NSFAS was in a chronic state of maladministration with extremely poor achievements against legislated mandate and key performance indicators and that "the scheme was failing in its sole mandate of funding students". It is reported that since 2018, numbers of students had gone up to eight months without having received their allowances - which ultimately sparked protests across the country.

LANGUAGE AND CULTURE (section 30)

2019 Grade: D -

2020 Grade: D =

The State is required to take active measures to promote and elevate the use of indigenous languages in South Africa, in terms of section 6 of the Constitution. The right to language and culture guarantees everyone the right to use the language and participate in the cultural life of their choice. Although there are some positive developments regarding the promotion of multilingualism, lack of political will hampers this goal.

In February 2020, during his SONA address, the President indicated that South African Sign Language (SASL) is set to become South Africa's 12th official language.

For the period under review, the use of Afrikaans at tertiary education institutions remains a contentious issue.

The position of Afrikaans at the University of Stellenbosch (SU) was further eroded by the Constitutional Court's judgment in the *Gelyke Kanse and Others v Chairperson of the Senate of the University of Stellenbosch and Others* - matter. The Court found that SU's process when adopting the 2016 Policy had been thorough, exhaustive, inclusive and properly deliberative. SU introduced the Policy to facilitate equitable access to its campus, its teaching and learning opportunities by black students who did not speak Afrikaans. Further, that SU's decision-making structures when introducing the policy, considered racial equity, access and inclusivity, and determined that a downward adjustment of Afrikaans, without eliminating it was warranted. SU also determined that the cost of avoiding down-adjustment of Afrikaans was too high. Finally, the Court held that the predominance of the English language poses the risk of jeopardising South Africa's entire indigenous linguistic heritage because much of global history "seems relentlessly hostile to minority languages, including Afrikaans, which is the mother-tongue of some seven million on a planet inhabited by seven billion people", but this could not become SU's burden. The contentious policy has therefore, remained in place.

According to the *Pan South African Language Board (PanSALB) 2018-19 Annual Report*, PanSALB released the report that emanated from public hearings on *Multilingualism and the Use of Official Languages by National Government Departments* according to the Provisions of the Use of Official Languages. The report found that most National Department and Entities do not comply with the Act or take the execution of the PanSALB language mandate seriously; they ignore the mandatory responsibility to monitor their compliance to the *Use of Official Language Act*.

The same report states that the Board received and monitored 25 complaints of linguistic human rights. Only 4 were resolved to capacity constraints - with no established, dedicated tribunal or incumbent body responsible for the issues. The Board indicated that the tribunal will be reconstituted urgently to deal with these cases.

PanSALB indicated that it has also produced a South African Sign Language Communication Charter.

CULTURAL, RELIGIOUS AND LINGUISTIC COMMUNITIES (SECTION 31)

2019 Grade: C=

2020 Grade: C =

South Africa is a nation where cultural, linguistic and religious minorities generally enjoy and practice their diversity. The CRL Rights Commission is tasked with ensuring the protection and advancement of these communities. Although this right is constitutionally protected, the practical implementation thereof can be questioned.

In December 2020, Nathi Mthethwa, the Minister of Sport, Art and Culture, confirmed that the government plans to make the teaching of “authentic prescribed history” compulsory at schools and that it would move “apartheid and colonial era statues, symbols and monuments” to “cultural nation-building parks”. He said that offensive statues would be moved after consultation with the communities in which they were situated. However - and despite such consultations - “what is important, is that we decide that the statues of supporters of apartheid and colonialism should not stand in our prominent public spaces. They should rather go to the proposed nation-building parks, because we do not believe, as other people say, that they belong in the dustbin of history.”

ACCESS TO INFORMATION (section 32)

2019 Grade: D =

2020 Grade: D =

This right is regulated primarily via the *Promotion to Access to Information Act of 2000* (PAIA) and stipulates that everyone has the right to access to any information held by the State, as well as information held by a private actor that is required to protect or exercise other rights. Access to information is important for transparency and accountability, fundamental buttresses to our democracy. A positive development under the period of review was the passing of the *Promotion of Access to Information Amendment Bill* by Parliament.

The *Freedom House Freedom on the Net 2019/2020* report states that South Africa is a free country with general freedom for its internet users. The country was given a score of 72 where 0 is the least free and 100 is free. This is a marked increase from the 2019 report where although the country was still free, it scored 25/100. The same report states that all over the world, social media has been used to facilitate the dissemination of propaganda and disinformation during election periods. Domestic actors interfered online in 26 out of 30 countries that held elections or referendums in the reporting period. South Africa was not exempt from this during the build up to and during the elections in 2019. The report notes that in South Africa, which is a free country internet-wise, informational tactics were used by parties to manipulate discussions online. Informational tactics involve “the coordinated use of hyper-partisan commentators, bots, group admins, or news sites to disseminate false or misleading content, often with the backing of the State or a political party apparatus”.

The report also states that the South Africa is the freest in terms of internet freedom in sub-Saharan Africa. The report makes a number of recommendations to assist nations improve internet freedom including the promulgation of robust data privacy legislation and addressing the use of bots on social media sites.

JUST ADMINISTRATIVE ACTION (section 33)

2019 Grade: C =

2020 Grade: C =

This right guarantees access to administrative action - on the part of State functionaries and the courts - that is lawful, reasonable and procedurally fair. South Africa's most often remain the last port of call in this instance. While this right is on average, enjoyed, the process may not be easily accessible to the majority of South Africans due to lack of knowledge of the procedures to be followed when seeking administrative justice, as well as funds to approach the judiciary and relate justice structures.

ACCESS TO COURTS (section 34)

2019 Grade: B -

2020 Grade: B =

The right to access to courts in South Africa remains directly impacted by a person's economic circumstances and financial wellbeing.

At the time of writing, Justice and Correctional Services Minister Ronald Lamola also published the *Land Court Bill* in "seeking to ensure stronger judicial oversight over claims".

According to Lamola, during March 2020 "the bill seeks to ensure stronger judicial oversight over claims, and this must lead to better settlements, reduce the scope for corruption and avert the bundling of claims into dysfunctional mega-claims that lead to conflict". Lamola has indicated that part and parcel of the Bill will be to extend the mandate of Legal Aid South Africa in order that applicants/litigants can be assisted in proceedings before the Court.

The South African Legal Practice Council (LPC) introduced certain draft amendments to the LPC's draft code for legal practitioners in terms of *pro bono* hours. Previously, legal practitioners (attorneys and advocates) were required to do 24 mandatory hours of *pro bono* service *per annum*. The draft code has now suggested 200 hours.

Although criticised by some members of the profession (their biggest concern was the significantly increased number of *pro bono* - free of charge - hours lawyers must work annually to be in good standing with the LPC) that this cannot be economically sustainable, especially for smaller firms or sole practitioners, the measure can be seen as a positive step insofar as making access to legal services more readily available.

ARRESTED, DETAINED AND ACCUSED PERSONS (section 35)

2019 Grade: D -

2020 Grade: D =

This right requires all affected individuals to be treated with human dignity and in accordance with due process despite their relationship with the law.

According to the Independent Police Investigative Directorate (Ipid) 424 deaths resulting from police action were reported for the 2019/2020 period and indicates only a marginal decrease from

2018/2019 when 440 people died “as a result of police action”.

With the killing of Collins Khosa and Nathaniel Julius fresh in the minds of all South Africans there has been increased attention to police violence and use of excessive force by law enforcement officials in South Africa - in particular the often-brutal enforcement of the COVID-19 lockdown and Regulations in that regard.

According to the Ipid 2019/2020 Annual Report:

A total of 5 640 cases were reported to the IPID during the reporting period. Of this figure, 3 820 were assault cases, 684 were cases of complaints of discharge of an official firearm(s), 392 were cases of deaths as a result of police action followed by 237 cases of death in police custody.

Further numbers from the 2019/2020 Report indicate the following:

- Deaths in police custody: 237;
- Deaths as a result of police action: 392;
- Complaints of discharge of an official firearm(s): 684;
- Rape by police officer: 120;
- Rape in police custody: 11;
- Torture: 216;
- Assault: 3 820;
- Corruption: 84;
- Other criminal matters and misconduct: 18.

The above is to be compared with the *IPID Annual Report 2018/19 findings:*

- 214 deaths in police custody, up from 201 in the previous period;
- 393 deaths as a result of police action, down from 436 in the previous period;
- 770 complaints of the discharge of an official firearm, up from 677 in the previous period;
- 124 rapes by a police officer, up from 105 in the previous period;
- 13 rapes in police custody, up from nine in the previous period;
- 270 cases of torture, up from 217 in the previous period;
- 3 835 cases of assault, up from 3 661 in the previous period;
- 108 cases of corruption, down from 124 in the previous period;
- 207 disciplinary convictions, and
- 66 cases of non-compliance with section 29 of the *IPID Act*, which compels police to report alleged crimes to the IPID within 48 hours. This is down from 69 in the previous period.