

**THE FW DE KLERK FOUNDATION
HUMAN RIGHTS REPORT CARD 2021**

**THE RESPECT, PROTECTION, PROMOTION AND FULFILMENT OF RIGHTS IN THE BILL OF RIGHTS
DURING 2021**

EXECUTIVE SUMMARY

INTRODUCTION

With the exception of the severe derogation of many fundamental rights by COVID regulations under the Disaster Management Act, South Africa continued to maintain basic standards of constitutional democracy during 2021.

- *Local government elections were conducted successfully throughout the country on 1 November 2021.*
- *The courts retained their independence and handed down judgements that struck down unconstitutional action and legislation and that strengthened constitutional democracy.*
- *The ANC government repeatedly expressed its determination to combat corruption and to hold those responsible for state capture to account.*
- *The Zondo Commission continued to expose the extent, depth and cost of state capture and rampant corruption.*

2021 Bill of Rights Assessment

The Human Rights Report Card grades rights in the Bill of Rights on a basis of A = excellent; B = good; C = moderate; D = poor; and E = very bad. The allocation of an = sign indicates no change in the right: a + sign denotes an expected improvement and a – sign indicates a likely deterioration of the right.

- A. *South Africa continued to perform best in terms of political rights (=); citizenship (=); and freedom of religion, belief and opinion (=).*
- B. *It did well with regard to freedom of expression (-), privacy (+) and labour relations (=).*
- C. *It performed moderately in the areas of human dignity(-); slavery, servitude and forced labour (=); freedom of trade, occupation and profession(-); freedom of association(+); property (-); housing (=); environment (=); assembly, protest, demonstration and petition(+); and access to courts (=).*
- D. *South Africa performed poorly in respect of freedom and security of the person (=); the rights of children (=); language and cultural rights (-); cultural, religious and linguistic communities (-); health care, food, water and social security (-); and the rights of arrested, detained and accused persons (=).*
- E. *The country's worst performance was in the areas of equality (-); life (=); and education (=).*

COVID had a particularly negative impact on freedom of trade, occupation and profession; freedom of association; freedom of assembly, protest, demonstration and petition; the rights of children; and education.

Threats to Human Rights in 2021

The ten principal threats to human rights in 2021 included

1. *the unsustainable conditions of poverty, inequality, unemployment, violent crime and declining social, educational and health services that constitute the lived daily experience of a majority of South Africans;*

2. *any continuation of the severe and arbitrary restrictions of a wide range of basic rights imposed under the Disaster Management Act to deal with the COVID crisis;*
3. *any repetition of the collapse of law and order experienced in KwaZulu-Natal during July, 2021;*
4. *the failure of the government to take credible steps to combat state capture and corruption;*
5. *the adoption of measures in terms of the Expropriation Bill and the Land Courts Bill that might undermine property rights;*
6. *the continued erosion of language rights resulting from the implementation of the Basic Education Laws Amendment Bill and the failure to implement the Use of Official Languages Act;*
7. *the further erosion of non-racialism through the imposition of racial employment quotas under the Employment Equity Amendment Bill;*
8. *the erosion of the freedom of expression posed by the Prevention and Combatting of Hate Crimes and Hate Speech Bill;*
9. *failure of service delivery at all levels of government – particularly with regard to education, health, housing and sanitation services; and*
10. *the unintended consequences of the adoption and implementation of the National Health Insurance Bill.*

DEVELOPMENTS DURING 2021

COVID

The gravest threat to constitutional values and rights arose from the government's response to the COVID pandemic and from its declaration of consecutive States of Disaster - rather than a constitutionally defined, limited and regulated State of Emergency. The government's actions and regulations under the State of Disaster circumvented the foundational values of the rule of law and democratic governance by effectively nullifying the authority and oversight role of parliament – and by making provision for the indefinite and arbitrary extension of the state of disaster without any parliamentary oversight or authority. Regulations promulgated under the State of Disaster severely limited fundamental rights and freedoms – including the security of the person, religion, assembly, movement, trade, occupation and profession and education.

However, the government's actions in response to COVID mirrored similar draconian limitations of basic rights in many constitutional democracies throughout the world.

Unrest in KwaZulu-Natal

Serious unrest in KwaZulu-Natal during July, 2021 revealed the complete failure of the state to foresee – or take action against - anarchic riots and protests that resulted in more than 350 deaths and 50 billion rand of damage. The riots, sparked off by the imprisonment of former President Zuma on contempt of court charges, caused widespread looting and destruction of property, economic disruption and serious inter-communal conflict.

The general failure of governance

The rights of South Africans – across the spectrum – and particularly human dignity, equality and socio-economic rights – were negatively affected by South Africa's very poor performance in a number of key areas, indicated by

- *economic growth of only 9,7% in the decade between 2012 and 2021 compared with population growth of 15%;*
- *the world's highest unemployment rate of 35,3% and 46,6% (expanded rate) - (global rate of 6,2%);*
- *the world's highest level of inequality of (0,63 on the GINI scale);*
- *the dependence of 60% of households on government transfers;*
- *the very poor quality of education. A November, 2020, international survey of the quality of*

- education, rated South Africa 75th of the 76 assessed countries;
- the continuing deterioration of infrastructure and service delivery – ESKOM, PRASA, municipalities, public health care, roads, sewage and water delivery systems...;
- the world's fourth highest rape rate of 72/100K – (global rate 12,7/100K); and
- one of the world's highest murder rates at 37/100K – (global rate 7,7/100K).

State Capture Prosecutions

Despite President Ramaphosa's commitment to combat corruption there was very little progress with the prosecution of those responsible for state capture. Most notably, former President Jacob Zuma managed, once again, to avoid effective imprisonment despite a 15-month sentence that was handed down by the Constitutional Court for contempt of court (see the Rights of Arrested, Detained and Accused Persons below....).

Non-Racialism

Government continued to implement race-based transformation policies to redress persisting inequalities between black, white, Indian and Coloured South Africans. The Employment Equity Amendment Bill will further strengthen the government's power to impose racial employment quotas.

Property Rights

The controversial 18th Constitution Amendment Bill – which was intended to make explicit the possibility of expropriation without compensation - was defeated on 7 December 2021 as a result of the EFF's decision not to support it. The government, nevertheless, continued with initiatives to promote expropriation without compensation – including the Expropriation Bill and the Land Courts Bill.

Language Rights

Language rights continued to erode as a result of the non-implementation of the Use of Official Languages Act; failure to develop indigenous languages and the erosion of the right to education in the language of choice. The viability of Afrikaans public schools was further threatened by the Basic Education Amendment Bill.

Health

Public health services continued to deteriorate. The government continued to pilot the National Health Insurance Bill through parliament despite its failure to address the continuing decline of public health delivery and the clear unaffordability of the scheme.

HUMAN RIGHTS REPORT CARD 2021

EQUALITY (section 9)

2020 Grade: E -

2021 Grade: E -

The COVID crisis further exacerbated inequality in South Africa. It led to a substantial increase in unemployment and to a situation where the poorest elements in society were the least able to deal with the challenges caused by the pandemic and the resultant lockdowns. The crisis affecting the poorest half of the population was alleviated marginally by the payment of a special COVID allowance of R350.

According to the World Inequality Data Base the top one percent of South Africans earned 21,9% of all pre-tax income in 2021 and the top 10% earned 66,5% - with only 5,2% of income going to the bottom 50% of the population. Wealth distribution was equally skewed with the top 1% owning 55% of wealth in 2021 and the top 10% - 85,7%. Unequal income distribution gives South Africa a GINI coefficient of ,63 according to the World Population Review – making it the most unequal society in the world.

Income inequality – much of it rooted in astronomically high unemployment - severely diluted the ability of most South Africans to enjoy the full spectrum of fundamental rights. These included human dignity, freedom of trade, occupation and profession, housing, health care, food, water, social security and access to information, just administrative action and the courts. It also had a particularly negative impact on children and their right to education.

Gender Equality

South Africa fared much better in terms of gender equality. According to the Global Gender Gap Report 2021 South Africa occupied 18th place in the world in terms of gender equality. South African women were in 14th place when it came to political empowerment – but only in 92nd place in respect of economic participation and opportunity. Although the ANC government attaches high importance and priority to gender equality, this is often not experienced in the lived realities of South African women – particularly those who must still contend with traditional gender hierarchies and with unacceptable levels of rape and gender violence.

Racial Discrimination

Since the Constitutional Court's 2004 judgement in *Minister of Finance v Van Heerden*, it has been generally accepted that the government may discriminate against white South Africans to address continuing inequalities arising from racial discrimination before 1994. In the view of then Deputy President Ramaphosa such discrimination will continue until these inequalities have been substantially eliminated. "Race will remain an issue until all echelons of our society are demographically representative."¹

The government's transformation policies have far-reaching implications for the rights of white South Africans in terms of

- equality before the law (section 9(1));
- non-discrimination (sections 9(3) and 9(4));

¹ Deputy President Cyril Ramaphosa, *ANC Today*, 24 February 2014

- freedom of trade, occupation and profession (section 22);
- property (section 25);
- education in the language of choice (section 29(2)); and
- participation in the culture of their choice (section 30);

On 21 February 2021, the Constitutional Court dismissed Solidarity's application to appeal against the Labour Court's judgment on 8 October 2019 which had dismissed Solidarity's application to declare some sections of the Employment Equity Act as unconstitutional. Solidarity's application had been prompted by a report of the SA Human Rights Commission on 18 July 2018 that had questioned the exclusively racial criteria applied in affirmative action decisions.

HUMAN DIGNITY (section 10)

2020 Grade: C –

2021 Grade: C –

Human dignity is 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. The continuing daily experience of many South Africans of extreme poverty, inequality, high crime rates (especially violent crime), growing unemployment, lack of access to essential services - limits the realisation of this right.

The plight of a majority of South Africans is illustrated by the fact that the country has

- the world's highest unemployment rate of 35,3% - (global rate of 6,2%);
- the world's highest level of inequality of (0,63 on the GINI scale);
- the world's fourth highest rape rate of 72/100K – (global rate 12,7/100K; and
- one of the world's highest murder rates at 37/100K – (global rate 7,7/100K).

The picture that emerges from these data is one of endemic poverty and marginal existence, dependence on state subsidies, in which half the South African population lives. In such circumstances constitutional assurances of human dignity have little meaning.

At the root of these problems lies astronomic levels of unemployment – exacerbated by COVID – and the failure to achieve rates of economic growth high enough to free South Africans from poverty.

LIFE (section 11)

2020 Grade: E =

2021 Grade: E =

The right to life is, perhaps, the most fundamental of all rights. Accordingly, one of the central roles of the state is to protect the lives of everyone who lives in South Africa. The state should carry out this role by providing effective police services to protect the lives of South Africans – and by providing a defence force to defend South Africans from foreign aggression. The state is also supposed to protect the lives of people by providing effective medical services and by assuring that they live and work in a healthy and secure environment.

COVID and AIDS (See also Health care – section 27 below)

According to Stats SA there were 176 048 more deaths during 2021 than there were during 2020. This increase of 33,8% is ascribed primarily to the COVID pandemic.

Despite the widespread availability of anti-retroviral drugs AIDS continued to be a major cause of deaths. AIDS claimed 85 154 lives during 2021 – up from 79 420 deaths in 2020. 8,23 million people - including 24% of women – and 19,5% of adults - between the ages of 15 and 49 - were HIV positive.

Murder

South Africa continued to perform very badly in protecting its people from murder. During 2021 23 327 people were murdered - giving South Africa a murder rate of 38,8/100K – the highest rate of any country in the world with a population of more than 4 million. By comparison, the world murder rate was 7,7/100K, the United States was 5/100K, the UK 1,2/100K and Japan 0,3/100K. To put things in perspective, the number of people murdered in South Africa in 2021 exceeded the combined total of the number of South Africa servicemen who lost their lives in the First and Second World Wars.

The July, 2021 Riots in KwaZulu-Natal

The failure of the state to protect the right to life was graphically illustrated by the riots that tore through KwaZulu-Natal and parts of Gauteng during July, 2021 – during which more than 350 people were killed and damage exceeding R50 billion was done to the economy. Former President Zuma's contempt of court imprisonment on 4 July 2021 sparked off the riots – but they took flame as a result of underlying unemployment, poverty and service delivery failure.

The government appeared to be incapable of either anticipating the riots or of rapidly deploying police to deal with the crisis. This led to a situation where communities had to defend themselves - with all the attendant dangers of inter-communal conflict and vigilantism.

According to President Ramaphosa – in a statement on 16 July 2021 – the riots “were nothing less than a deliberated, coordinated and well-planned attack on our democracy, intended to cripple the economy, cause social instability and severely weaken or even dislodge the democratic state.”

The Firearms Control Amendment Bill

In the light of the state's manifest inability to defend the lives and property of citizens, the government's introduction of the Firearms Control Amendment Bill in May 2021, caused widespread alarm and dismay. The Bill would have removed the ability of South Africans to obtain firearms licences for the purpose of self-defence – and would, in effect, have rendered them defenceless against armed attackers. It would, in addition, have placed such onerous restrictions on the use of firearms by private security companies that they would have been unable to provide credible protection to their clients.

The Bill would have advanced the goal expressed by Bheki Cele, the Minister of Police, in 2019 that “it would be better if one day we don't have private citizens having guns at all. It's a tall order going forward but it would be better if, one day, only the armed forces – namely police and soldiers – have access to guns.”

The Bill elicited enormous reaction during the period for public comment when the great majority of the 118 000 respondents vehemently rejected its core proposals. Cogent questions were also raised regarding the Bill's constitutionality and its impact on South Africa's R12 billion per annum hunting industry.

Fortunately, the Portfolio Committee on Police decided to hold back the Bill in November 2021 – providing an indication of the efficacy of public comments in South Africa’s open legislative process.

FREEDOM AND SECURITY OF THE PERSON (section 12)

2019 Grade: D =

2020 Grade: D =

Once again, during 2021, South Africa’s continued to experience high rates of violent crime – including murder, armed robbery, rape and other sexual offences as well as violence against women and children. This poor performance reflected the state’s lack of effective capacity to protect individuals, and especially South Africa’s most vulnerable populations, from violence.

According to the SAPS there were 20 696 attempted murders during 2021. There were 158 169 cases of assault causing grievous bodily harm and 161 269 cases of common assault. SAPS also reported 40 702 rapes during 2021 – although it is generally acknowledged that only a small proportion of rapes are ever reported to the police. Even so, according the World Population Review South Africa’s rape rate is 72,1/100K - the fourth highest in the world. The world average is 12,27/100K.

Gender based violence remained a critical issue for South African women. Despite the government’s National Strategy Against Gender-Based Violence, attacks on women escalated during COVID lockdowns. The government’s Gender-Based Violence and Femicide Command Centre recorded a dramatic increase in the number of victims in the first three weeks of the lock-down.

During 2021 Parliament dealt with four bills that were intended to address gender-based violence – including

- the Criminal Law Amendment Bill (Sexual offences and related matters) which makes sexual intimidation an offence; it strengthens the duty to report suspected sexual offences against children; and would require the listing of all sexual offenders in a national register;
- the Criminal and Related Matters Amendment Bill – which will make it much more difficult for sexual offenders to be granted bail and would give survivors of sexual violence – or their relatives – a greater voice when it comes to granting offenders parole;
- the National Council on Gender Based Violence and Femicide Bill which will establish a multi-sectoral, independent advisory body comprising representatives from government and civil society to coordinate and implement the National Strategic Plan on Gender-based Violence and Femicide; and
- the Domestic Violence Amendment Bill - which will extend the definition of domestic violence to victims of assault who are dating or engaged or who are involved in customary relationships. Gender-based violence in any of these relationships may in future be dealt with under the Domestic Violence Act.

SLAVERY, SERVITUDE AND FORCED LABOUR (Section 13)

2020 Grade: C =

2021 Grade: C =

South Africa observes its international obligation to protect people from human trafficking through the implementation of 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.

According to the United States (US) Department of State during 2021 South Africa remained on a Tier 2 Watchlist - comprising countries that do not fully meet the US 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.

According to the State Department's 2021 report, the South African authorities investigated 31 cases of trafficking during the reporting period – up from 24 the previous year. Most suspected traffickers were foreign nationals, particularly from Nigeria, China, and Bangladesh.

PRIVACY (section 14)

2019 Grade: C –

2020 Grade: B +

The right to privacy has improved substantially as a result of the progressive implementation of the Protection of Personal Information Act 4 of 2013 (POPI Act). Some sections of the Act have been implemented since April 2014 and others came into effect in 2020. The remaining sections of the Act (sections 110 and 114(4)) were implemented on 30 June 2021. These sections dealt with

- lawful processing of personal information;
- procedure for dealing with complaints;
- restrictions relating to direct marketing via unsolicited electronic communications; and
- a Code of Conduct.

The right to privacy was strengthened by The Constitutional Court in its judgement on 4 February 2021 in *AmaBhungane Centre for Investigative Journalism v Minister of Justice and Others (CCT 278/19)*. The Court upheld the judgement of the Gauteng High Court that the Regulation of Interception of Communications and Provision of Communications-Related Information Act (RICA) was unconstitutional insofar as the Act failed to

- provide safeguards of the independence of a judge approached for an interception order;
- notify subjects of surveillance after the termination of their surveillance;
- provide safeguards that interception directives are sought and obtained *ex parte*;
- provide procedures to ensure that data obtained from interception is managed lawfully; and to
- provide adequate safeguards where the subject of surveillance is a lawyer or journalist.

The Court gave Parliament 36 months to rectify the defects in the Act and prescribed interim measures to be followed pending the amendment of the Act.

FREEDOM OF RELIGION, BELIEF AND OPINION (section 15)

2020 Grade: B =

2021 Grade: B =

The freedom of religion, belief and opinion is generally enjoyed in South Africa.

However, in cases where the courts have found that religious practices are inconsistent with other constitutional rights – and particularly with the rights to equality and non-discrimination – they have

struck down practices based in religious doctrine. Thus, in March 2019, the Gauteng High Court in Pretoria handed down judgment in *Gaum and Others v Van Rensburg 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.

During 2021 the right of religious adherents to worship together was severely restricted by COVID regulations – however, almost invariably with the support of the religious organisations involved.

FREEDOM OF EXPRESSION (section 16)

2020 Grade: B =

2021 Grade: B -

The right to freedom of expression and freedom of the press is enjoyed in South Africa. South Africa is well served by print, TV, radio, internet and social media that express strong and often controversial views freely and without restraint.

This freedom – so essential for functioning democracies – may be threatened by the Prevention and Combatting of Hate Crimes and Hate Speech Bill which was under consideration by Parliament during 2021. Its ostensible goal is “to give effect to the Republic’s obligations in terms of the Constitution and international human rights instruments concerning racism, racial discrimination, xenophobia...”

According to the Bill any person who “intentionally publishes, propagates or advocates anything or communicates to one or more persons in a manner that could reasonably be construed to demonstrate a clear intention to be harmful or incite harm; or promote or propagate hatred” against 15 categories of people could be guilty of hate speech. “Harm” is defined as “any emotional, psychological, physical, social or economic harm”. The 15 protected categories include age, culture, race, gender, sexual orientation, religion, language and HIV status. Any person convicted of hate speech could face imprisonment for three years for a first offence and for five years for subsequent offences.

The latest version of the Bill provides an exemption from hate speech for “any *bona fide* artistic performance or expression; any academic or scientific enquiry; fair and accurate reporting or commentary in the public interest; and *bona fide* religious communication and proselytising.

However, it offers little or no protection to politicians and ordinary citizens participating in robust political debate. In effect, the Bill would create a situation where artists, academics, journalists and religious practitioners would enjoy greater rights to freedom of expression than politicians and ordinary citizens.

The Bill might be irreconcilable with the 2021 judgement in *Qwelane v. the South African Human Rights Commission* – in which it the Constitutional Court set a higher test for hate speech. It struck down the use of the word “hurtful” in section 10(1) of the Equality Act and gave Parliament 24 months to amend the Act. In the Court’s view “expressions that are merely hurtful, especially when understood in everyday parlance, are insufficient to constitute hate speech. It is well understood that the prohibition of hate speech is not aimed at merely offensive speech, but that offensive speech is protected by freedom of expression.”

The requirement set by the judgement is that hate speech must comply with the remaining criteria in Section 10(1) of the Equality Act, read conjunctively, - i.e. that it must “incite harm and promote or propagate hatred”. In addition, the Court ruled that “hate speech prohibitions ...should not extend to private communications, because that would be incongruent with the very purpose of regulating hate speech...” In terms of this view, the Bill’s definition of communication “to one or more people” – which could include private communication – might have to be reconsidered.

ASSEMBLY, DEMONSTRATION PICKET AND PETITION (SECTION 17)

2021 Grade: A

The right to assembly, demonstration, picket and petition is widely and freely practised in South Africa. However, it, also, was negatively affected by COVID regulations.

According to the South African Police Service there were 909 protests between 1 August 2020 and 31 January 2021. The Institute for Strategic Studies reported 627 protests between 1 June and 31 December 2021 – an average of 2,4 protests per day. The protests reached a peak of 188 during July 2021 – largely as a result of the unrest that swept through KwaZulu-Natal and Gauteng following the imprisonment of former President Jacob Zuma on 4 July 2021.

FREEDOM OF ASSOCIATION (section 18)

2020 Grade: A =

2021 Grade: C +

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 regulations promulgated to combat COVID had far-reaching impact on the right of people to associate with whomever they wanted. This constituted a serious breach of the right – but was generally accepted because of the need to combat the pandemic.

There is, however, no reason to suppose that the right will not be fully restored when COVID no longer poses a serious threat to public health.

POLITICAL RIGHTS (section 19)

2019 Grade: A =

2020 Grade: A =

South Africans continue to enjoy the full spectrum of political rights assured by the Constitution. Indeed, the judgement of the Constitutional Court in New Nation Movement NPC and Others v President of the Republic of South Africa and Others (CCT 110/19) on 11 June, 2021 raised the

possibility that the political rights of South Africans might be enhanced. The Court ruled that the present Electoral Act is unconstitutional because “citizens may be elected to the National Assembly (NA) and Provincial Legislatures (PLs) only through their membership of political parties.” The Court ordered the National Assembly to amend the Act within two years, in effect, to make it possible for independent candidates to stand for national and provincial elections.

The government responded in 2021 with the Electoral Act Amendment Bill which proposed minimal changes to the present electoral system – except that provinces would serve as multi-member constituencies for 200 of the National Assembly seats in which independent candidates would be able to stand for election. The number of MPs elected by each provincial constituency would be determined by the number of registered voters in the province. The remaining 200 seats would be contested as now on a proportional representation basis.

Critics rejected the Bill because it missed the opportunity of making MPs more accountable to the electorate by introducing constituencies. They also pointed out that

- multimember constituencies based on the present provinces would be far too large to permit the type of close relationship between elected representatives and their communities that true accountability and responsiveness require.
- Independent candidates – by their very nature – generally emerge from specific communities and would probably find it difficult to compete effectively in single province-scale constituencies. They would also be at a disadvantage vis-à-vis much better resourced political parties.
- candidates would be elected if they receive a previously calculated quota of votes. However, votes for independent candidates that exceed this quota would simply be lost – while all votes cast for candidates who are members of political parties would accrue to their parties for the purposes of proportional representation. This would result in a constitutionally unacceptable situation in which votes cast for independent candidates would have less value than votes cast for members of political parties.

Local Government Elections

On 3 September 2021 the Constitutional Court, in Electoral Commission v Minister of Cooperative Governance and Traditional Affairs (CCT 245/21), set aside the Minister’s proclamation of 27 October 2021 as the date for local government elections. It authorised the Commission to establish whether it would be possible to hold a voter registration weekend in time for local government elections between 27 October and 1 November.

The Commission responded that this would be possible – but that the reopening of the registration process would necessitate the extension of the deadline for candidate nominations. The extension would make it possible for the ANC – which had failed to meet the earlier deadline – to participate in the elections.

The DA approached the Constitutional Court in Democratic Alliance in re Electoral Commission v Minister of Cooperative Governance and Others to set aside the Commission’s decision to extend the deadline for candidate nominations. On 20 September, 2021 the Court dismissed the DA’s application and the local government elections took place on 1 November with the participation of all parties – including the ANC.

CITIZENSHIP (section 20)

2020 Grade: B -

2021 Grade: A -

South Africans enjoy the right to citizenship unencumbered.

The principal problem experienced with citizenship is the delays often experienced in obtaining unabridged birth certificates and passports. According to the Home Affairs website, the waiting period for unabridged birth certificates is three to eight weeks, but many people complain of delays of many months, and a frustrating lack of response to queries. It usually takes 7 – 21 working days to obtain a passport – although South African applying for passports overseas are advised that the process might take up to six months.

FREEDOM OF MOVEMENT AND RESIDENCE (section 21)

2021 GRADE: C+

Freedom of movement was widely restricted at various times in terms of regulations issued under the Disaster Management Act. There is no reason to believe that the right will not be fully restored once the threat from COVID has abated.

During 2021 COVID regulations, issued on 18 August 2020 under the Disaster Management Act, continued to prohibit the eviction of illegal occupants of land and the demolition of their places of residence. The Western Cape High Court endorsed the prohibition of eviction during COVID in *Community of Hangberg v City of Cape Town* [2020] ZAWCHC.

FREEDOM OF TRADE, OCCUPATION AND PROFESSION (section 22)

2020 Grade: C =

2021 Grade: C -

The right to freedom of trade, occupation and profession is deeply affected by levels of economic activity and unemployment.

In the ten years between 2012 and 2021 the economy grew by only 9,7% - at an average rate of less than 1% per annum. During the same period the population grew by 15% - meaning that every year South Africans became poorer – with fewer opportunities to pursue their chosen trades, occupations and professions.

South Africa experienced devastating levels of unemployment during 2021 – which were exacerbated by COVID. The unemployment rate increased from 32,5% in the 4th quarter of 2020 to 35,3% in the 4th quarter of 2021. Only 36,5% of the population between the ages 15 and 64 were in employment (the labour absorption rate) – compared with 60%+ in most advanced economies. Moreover, one third of those designated as employed were in non-formal employment (informal, domestic and

agricultural). The expanded unemployment rate (including those no longer looking for work) stood at an unsustainable level of 46,2% - up from 42,6% in the 4th quarter of 2020.

The Government continued to recognise unemployment as one of the main challenges facing the country and announced wide-ranging programmes to address the problem. Critics charged that the principal causes of unemployment could be found in the failure of the education system to produce suitably educated and trained candidates for employment; more than 14 years of sluggish economic growth; rigid labour markets and, of course, the impact of COVID.

The Employment Equity Amendment Bill

Another factor critics identified was the impact of the government's racial transformation policies. During 2021 Parliament continued its consideration of the controversial Employment Equity Amendment Bill. The Bill will empower the Minister of Labour "to determine sectoral numerical targets for the purpose of ensuring the equitable representation of suitably qualified people from designated groups (blacks, women and persons with disabilities) at all occupational levels in the workforce". In effect, this means that the Minister will have the power to impose racial quotas on companies at all levels of employment.

In the view of critics, the Bill may seriously undermine the freedom of trade, occupation and profession of business owners. It will create an impossible situation for many employers by depriving them of the ability to appoint and promote the most suitable candidates – irrespective of their race. Critics fear that the government's goal will be to impose mathematical demographic representivity in the private sector – as it has already done in the public sector – often with disastrous consequences.

The National Health Insurance Bill

Parliament also continued its consideration of the controversial National Health Insurance Bill during 2021. Although any effective initiative to improve health care for all South Africans should be welcomed, critics fear that if the Bill is ever enacted and implemented it will have far-reaching implications for the freedom of people involved in medical insurances schemes, private hospitals and medical practices to pursue their occupations and professions in a sustainable manner.

LABOUR RELATIONS (section 23)

2020 Grade: C =

2021 Grade: B =

The rights in section 23 relating to labour relations are widely enjoyed by workers and employers.

South Africa has robust trade unions – representing 3,11 million of 14,544 million people in employment (21,1%). The largest trade union confederation was COSATU with 1,8 million members, followed by FEDUSA with 560 000 members, NACTU with 400 000 and Solidarity with 190 000. The country also has a wide range of employer organisations – including the National Employers' Association of SA; the Consolidated Employers' Organisation and the Professional Services Employers Organisation of SA. Unions, employers and government are represented on the National Economic Development and Labour Council.

As with most sectors of society, workers and employers alike were seriously affected by the COVID pandemic during 2021. The Department of Employment and Labour provided R57 billion in wage

support to 4,5 million workers who were affected by the pandemic through the Unemployment Insurance Fund's COVID-19 TERS benefit payments.

According to the Minister of Employment and Labour, Tulas Nxesi, government would, in terms of the Economic Reconstruction and Recovery Plan, play an expanded role in stimulating and supporting employment and in engaging with social partners in NEDLAC.

Parliament will also continue its consideration of amendments to the Compensation for Occupational Injuries and Disease Act (COIDA) to extend coverage to domestic workers.

The Occupational Health and Safety Bill which was also considered by Parliament will strengthen Health and Safety Committees and the right of workers to refuse to work in unsafe or unhealthy environments.

ENVIRONMENT (section 24)

2020 Grade: C =

2021 Grade: C -

This right is under pressure due to high levels of CO2 emissions and increasing water pollution.

South Africa has the 13th highest CO2 emissions in the world² – primarily because it relies on coal-fired power stations for the generation of 88% of its electricity (It is the 7th largest coal producer in the world). Renewable energy (wind, hydro and solar) contributed 6,6% of total energy production in 2018. South Africa plans to decommission 34 GW of coal-generated capacity by 2050 and to produce 20GW of renewable energy by 2030.³

In April 2021 The Daily Maverick reported that, according to government, 56% of the country's 1150 sewage treatment plants were in "in poor or critical condition" and 75% of 910 municipality wastewater treatment failed to achieve 50% compliance with minimum effluent standards.

According to the Stats SA 2021 General Household Survey 60,5% of households had rubbish removed once a week – up from 56,1% in 2002; 64,9% had access to flush toilets; 46,6% of households had piped water in their dwellings – up from 40,4% in 2002.

PROPERTY (section 25)

2020 Grade: E

2021 Grade: C -

Property rights are still generally respected and upheld in South Africa. There are, however, grave concerns regarding the Expropriation Bill and other legislation that would affect property rights.

The main development regarding property rights during 2021 was the defeat of the Constitution 18th Amendment Bill on 7 December 2021.

² <https://worldpopulationreview.com/country-rankings/carbon-footprint-by-country>

³ https://en.wikipedia.org/wiki/Energy_in_South_Africa

The Bill would have made provision for the explicit payment of nil compensation for the expropriation of “land and any improvements thereon ... for the purposes of land reform”. It called for the adoption of legislation “to set out the circumstances where the amount of compensation is nil” and declared that “the land is the common heritage of all citizens that the state must safeguard for future generations”. In an attempt to assuage the Economic Freedom Fighters (EFF), it added that “the state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable state custodianship of certain land in order for citizens to gain access to land on an equitable basis.”

This did not, however, go far enough to satisfy the EFF which demanded, the total nationalisation of all land under the guise of state custodianship. It insisted that land was “a natural resource and the common heritage, which belongs to the people as a whole, under the custodianship of the democratic state.”

Accordingly, the EFF refused to support the constitutional amendment which, as a result, failed to achieve the two-thirds majority necessary for adoption. However, the defeat of the constitutional amendment in no way signalled an end to the ANC’s determination to achieve expropriation without compensation (EWC). President Ramaphosa announced in January 2022 that the Government was committed to EWC by finalising legislation such as the Expropriation Bill and the Land Court Bill. Throughout 2021 it continued to pilot the proposed Expropriation Bill and the Land Court Bill through the legislative process.

The Expropriation Bill

In the view of critics, the Bill continues to pose a potentially fatal threat to property rights of all South Africans. The Bill is intended to deal with the expropriation of *all* forms of property – and not just land. The inclusion of the words “*including but not limited to*” in the list of the circumstances under which nil compensation may be paid is open-ended and unacceptable in terms of the rule of law. It raises the possibility that further circumstances in which nil compensation may be paid – could be included at a later stage.

The circumstances in which nil compensation may be paid are vague, open to interpretation and fall far short of the requirement in section 25 of the Constitution that compensation “must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected.” The Bill’s vague definition of “expropriation” has raised fears that the state may take custodianship – rather than ownership – of expropriated property in which case no compensation would be payable.

The Land Court Bill

The Bill will establish Land Courts and a Land Appeal Court that will, *inter alia*, have the task of deciding “just and equitable” compensation required by section 25 of the Constitution.

- The Bill will oust the jurisdiction of other courts, including High Courts and the Supreme Court of Appeal, to adjudicate on matters that will be assigned to the Land Courts. Excising the authority of the SCA would, however, require the amendment of section 168(3) of the Constitution. Only the Constitutional Court would be superior to the Land Appeal Court – and then, possibly, only on constitutional questions.
- Land Court judges may be assisted by assessors with the power to overrule them on any question of fact – such as the amount of compensation (if any) that would be payable for expropriated land. Judges would remain the final arbiters only on questions of law.

- With a view to resolving land expropriations with “ease and speed”, Land Courts will be able to refer disputes to arbitrators of their choice. Parties that reject arbitration might face punitive cost orders.
- Critics fear that the government will have the final say in the appointment of assessors and judges of Land Courts and the Land Appeal Court – and that this will, in the words of the Minister of Justice, Ronald Lamola, in April, 2021, be “a game changer” in facilitating EWC. The provisions and intentions of the Bill might, however, be irreconcilable with the rule of law – which is a foundational value in section 1 of the Constitution .

HOUSING (section 26)

2020 Grade: B =

2021 Grade: B =

The State has a constitutional duty to “take reasonable legislative and other steps, within its available resources, to achieve the progressive realisation” of the right to housing. In 2021 63,5% of households lived in their own fully paid off homes⁴, while another 7,7% owned homes that were not fully paid off. This gives South Africa a high home ownership rate of 71,2% – when compared with other countries – about the same as the EU 69,8% and more than the USA 65,4% and the UK 65%. Only 17,7% of households rented their accommodation and 11,1% occupied rent-free accommodation.⁵

In 2020 84% of households lived in formal houses; 4,3% lived in traditional dwellings and 11,4% lived in informal dwellings.

According to the Department of Housing and Human Settlements 71,3% of the population will be urbanised by 2030. However, the Department’s home building programme is falling far short of meeting the rapidly increasing demand for housing: between 2014 and 2019 it provided only 13 968 new homes – far fewer than its target of 27 000 homes for this period. The Department’s budget for 2020-2021 was R28 billion.

There are few reliable statistics on homelessness in South Africa – but estimates in 2020 suggested that there were 14 000 homeless people in Cape Town and 15 000 in Johannesburg⁶. Observers agree that these numbers would have increased significantly as a result of the impact of COVID during 2021.

In 2021 the National Homeless Network issues the National Homeless Manifesto which identified the following five priorities for local governments:

1. Shelter
2. Access to healthcare
3. Access to sanitation and ablution facilities
4. Equal treatment by local law and security forces, and
5. Increasing opportunity

⁴ Stats SA General Household Survey 2020 (2 December 2021), p.31

⁵ Stats SA General Household Survey 2020 (2 December 2021) loc. cit.

⁶ Daily Maverick, 10 October 2021

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

2020 Grade: C =

2021 Grade: C -

HEALTHCARE

COVID

The COVID pandemic continued to dominate the world and South Africa during 2021. The government played the leading role in combatting the threat to the lives of South Africans from the COVID pandemic. The lockdown, facemasks, social distancing and vaccinations mandated by the state were at least as effective as those adopted by most other governments.

The pandemic placed almost unbearable strains on South Africa's already dysfunctional public health sector. The COVID-related restrictions had serious unintended consequences – including a significant decline in access to routine health services. This resulted in sharply reduced access to routine health services – including a decline of up to 50% in HIV and tuberculosis testing during the first 150 days of the pandemic.⁷

According to Statista⁸ there were just over 60 000 COVID deaths between 1 January 2021 and 24 October 2021. By that date, there had been a total of 88 925 COVID deaths. However, StatsSA reported that there were 176 048 more deaths during 2021 than there were during 2020. This increase of 33,8% is ascribed primarily to the COVID pandemic. This led to a significant (and almost incredible) reduction in life expectancy 62,4 years to 59,3 years for males and from 68,4 years to 64,6 years for females between 2020 and 2021.⁹

According to Stats SA there were 85 154 AIDS deaths in 2021 – up from 79 420 in 2020. It should be noted that the number of AIDS deaths exceeds Statista's estimates of COVID deaths during the same period.

During 2021 deep concerns remained regarding the impact on fundamental human rights of COVID regulations promulgated under the Disaster Management Act. This was despite the dismissal of the Freedom Front Plus's challenge to the Act in July 2020 by Judge Mlambo of the Gauteng North High Court in *Freedom Front Plus v President of the Republic of South African and Others (ZAGPHC 266 – 2020)*. Judge Mlambo ruled that the Act was consistent with constitutional governance - even though it excluded any oversight role for parliament – because, according to Judge Mlambo - the courts had the ability to ensure that rights and power were not abused during the state of disaster.

Critics charged that governance could not be regarded as constitutional if the legislature was prevented from exercising its oversight role over regulations that seriously limited fundamental rights. The affected rights included the rights to freedom and security of the person; freedom of assembly; freedom of association; freedom of movement and residence; freedom of trade, occupation and profession; and the right to education. Critics claimed that the powers exercised by the government

⁷ "The Conversation", 12 November 2021 - <https://theconversation.com/south-africas-health-system-is-on-its-knees-the-budget-offers-no-relief-171747>

⁸ <https://www.statista.com/statistics/1194890/cumulative-number-of-covid-19-deaths-in-south-africa/>

⁹ Stats SA, Mid-Year Population Estimates, 2021, p.13

in terms of the Disaster Management Act could not exceed those available to the state in terms of a State of Emergency.

Afriforum NPC v Minister of Tourism and Others

On 22 September 2021, the Supreme Court of Appeal upheld Afriforum's appeals against the decision of the Minister of Tourism to make grants from the Tourism Relief Fund only to companies that complied with the requisite Broad-Based Black Economic Empowerment criteria. The SCA ruled that the grants had been made under the Disaster Management Act – and not the BBB-EE Act. The point was, however, moot since the whole of the R200 million fund had already been paid out to BBB-EE compliant companies.

Unequal Health Care

COVID highlighted South Africa's deeply divided health system – characterised by an increasingly dysfunctional public sector that cares for between 65% - 80% of the population and a private sector that caters to the 16% of the population covered by private medical insurance and 10% -15% who pay for private medical care from their own resources.

The national health budget for 2021-2022 was R248,8 billion – representing a little more than 4% of GDP – which is low by international standards. By contrast, the private sector spends slightly more - 4,2% of GDP – on the +/- 25% - 30% of the population to which it provides medical service.

The level of care in the private medical sector is world class – while that in the public sector – despite some islands of excellence - is beset by poor management, inadequate maintenance, under-staffing, corruption and theft.

The Government's response to this situation is the proposed National Health Insurance system.

The National Health Insurance Bill (NHI) continued to make its way through the legislative process during 2021. Under the proposed scheme

- the NHI would be the core purchaser and provider of medical services and medicines to people living in South Africa;
- registered health care users would be entitled to free medical care and medicine from accredited service providers;
- health service providers would decide on treatment and referrals to specialists and would be reimbursed by the NHI; and
- the NHI would decide annually what payment rates would be applicable to health care service providers.

Critics charged that the NHI was irrational because

- there were grave doubts, shared by the Treasury, regarding its affordability – with some estimates of its annual cost exceeding R450 billion;
- the state had failed the pre-implementation requirement of addressing the serious and growing inadequacies in public health care delivery;
- most NHI pilot studies had ended in failure; and
- the scheme would threaten the viability of existing medical insurance schemes, private hospitals and medical practitioners. A poll conducted by Solidarity had indicated that 43% of doctors would consider emigration if the scheme were adopted.

FOOD

South Africa has thus far been regarded as one of the few food secure countries in Africa and has made good progress in improving food availability. According to Stats SA 79,4% of South Africans had adequate access to food, 12,8% had inadequate access to food, and for 7.8%, access to food was severely inadequate.¹⁰

Nevertheless, the percentage of South Africans who experienced hunger decreased from 29,3 % in 2002 to 11,6% in 2020 – up by ,5% since 2019 – probably due to the effects of COVID. The percentage of people with limited access to food (those who were forced to make changes to their diet by the cost of food) decreased from 29,1% in 2010 to 22,8% in 2020 – up by 3,3% over the previous year – probably also due to COVID.

WATER

In 2020 only 46,6% of South African households had piped water in their dwellings – an improvement of only 4,2% since 2002. Another 28,3% of households had piped water on site or in their yards – up by only 0,7% since 2002. The percentage of households with piped water in their dwellings and on site decreased slightly by ,3% and ,2% respectively since the previous year. The remaining quarter of the population relied on communal taps (12,5%) and neighbours, rivers, streams, wells, boreholes and dams.¹¹

During 2021 extreme concern was expressed over the deterioration of municipal water treatment plants. Afriforum reported that it had tested the wastewater treatment plants of 142 towns from May to August 2021 and had found that 122 failed to comply with minimum standards.

Sanitation

According to the latest Stats SA General Household Survey 64,9% of South African households had flush toilets in 2020 and 18,3% made use of pit latrines with ventilation pipes. 14,1% used pit toilets without ventilation pipes.

SOCIAL SECURITY

The plight of the poorest section of the population is alleviated by government grants. According to Stats SA the bottom 60% of the population depend more on government grants for their survival than they do on income derived from employment. In 2021, these grants included monthly payments of R1 910 for those over the age of 75 and war veterans; R1 890 for pensioners over the age of 60 and the disabled; and a child support grant of R460. These payments have been supplemented with a special Social Relief of Distress (SRD) payment of R350 per month to assist South Africans suffering from the impact of COVID19.

According to SASSA, at the end of August, 2021, 18 559 537 social grants were paid to 11 516 128 recipients – which means that many recipients receive more than one grant. During the same month SASSA reported that it had received 12 261 895 applications for the COVID SRD grant. The total amount budgeted for social grants in 2021-22 was R 335 billion (5,4% of GDP).

The amounts of the various state grants compare with the 2020/21 food poverty line of R620 per person per month and an upper bound poverty line of R1 335.

¹⁰ Stats SA General Household Survey, 2020, p.53

¹¹ Stats SA General Household Survey, 2020, p.33

CHILDREN (section 28)

2020 Grade: D =

2021 Grade: D -

During 2021 the COVID crisis presented South African children with serious challenges and diminished the protection that they are supposed to enjoy under section 28 of the Constitution.

UNICEF reported that children in South Africa faced “an increased risk of abuse and violence, as a result of the broad ranging impact of COVID. The alarm has been raised after Childline South Africa reported a more than 36.8% increase in calls for help during August, 2020, compared with the same month in 2019. This data coincides with reports from healthcare facilities of a consistent and concerning number of severe injuries among child abuse referrals”.

Apart from the increased threat of domestic violence, COVID restrictions seriously disrupted education and the normal development and socialisation of children. It is, however, expected that the situation will improve once the COVID threat has passed.

Despite advanced child protection legislation, the actual circumstances in which South African children live often fall far short of the assurances provided by the Constitution.

Only 34,2% of South African children live with both parents; 41,7% lived with their mothers and 4,4% with their fathers. 19,7% live with neither parent.¹²

The KidsRights Index is an annual global index, which ranks countries in terms of their compliance with the UN Convention on the Rights of the Child (CRC) and for which sufficient data is available (181 countries). In 2021, South Africa ranked 97 on the index – an improvement of five places since 2019. It was in 121st position for health; 133 in respect for the protection of children’s lives; 77th place for education; 95th place for protection and 63rd place for environment.

In *Centre for Child Law v Director-General: Department of Home Affairs and Others (CCT102/20)*, the Constitutional Court upheld the Eastern Cape High Court’s declaration that section 10 of the Births and Deaths Registration Act of 1992 was invalid and ordered the excision of the section from the Act.

The problem arose because section 10 of the Act had made provision for the naming of children born out of wedlock that had created insurmountable difficulties for fathers who could not, for one or other reason, obtain the permission of mothers to pass their names to their children.

EDUCATION (section 29)

2019 Grade: E =

2020 Grade: E -

The right to education is an unqualified and immediately enforceable right.

South Africa budgeted R272,3 billion (4,4% of GDP) for basic education during 2021/22. This represents expenditure of R19 450 for each of the 14 million children in the public school system. The budget for post-school education and training was an additional R 119,6 billion (1,95% of GDP) –

¹² Stats SA General Household Survey, 2020, p.10

meaning that total provision for public education represented 19,4% of the budget – by far the largest component. Total expenditure on public education amounted to 6,35% of GDP – which was considerably higher than the world average of 3,66% (2019).

Despite this expenditure, South Africa fared very badly with regard to basic reading and maths skills - compared even with the performance of some of the poorest African countries. According to a 2020 survey on the quality of education, South Africa was ranked 75th out of the 76 countries assessed.¹³

Education, like so many other aspects of South African society, is also characterised by inequality. Only 20% of public schools are properly functional. There is an enormous gap between the results they achieve and outcomes in the bottom 80% of schools. Children in the top 200 schools achieve more distinctions in maths than children in the next 6,600 schools combined.

Of the 1 258 000 children who entered grade 1 in 2012, 897 163 (71,3%) wrote matric in 2021; 45,5% passed matric (76,4% of candidates); and 22% achieved a university entrance pass. However, it is possible to pass matric with 40% in two of six subjects and 30% in three others.

Only 20% of the country's 23 471 public schools are properly functional. 19% of public schools had only illegal pit latrines for sanitation; 86% had no laboratory; 77% had no library; 72% had no internet access and 42% had no sports facilities. 239 schools lacked any electricity.

This was despite, government regulations, promulgated in 2013, that required all schools to have access to water, sanitation and electricity; and adequate sanitation by November 2016. Yet, as the government's own statistics show, these targets have not yet been met.

The Impact of COVID

COVID had a very detrimental impact on the education of most school children during 2021.

- According to a National Income Dynamic Study/Corona Virus Rapid Mobile Survey published on 9 July 2021¹⁴, "as much as a year of learning may have been lost by learners in grades 1 – 9."
- There was an increase of 650 000 – 750 000 aged 7 – 17 years old in the number of children not attending school in May, 2021.
- Many parents were worried about the lack of access to school feeding caused by COVID. Nevertheless, 84% of children continued to receive school meals.
- It is estimated that 2 283 teachers died of COVID between March 2020 and 27 May 2021. However, this represented only 0,57% of South Africa's 401 327 teachers.
- Children from less advantaged families and rural children suffered a greater education loss than children of more affluent families – and particularly families with access to the internet and remote learning.
- According to UNICEF "being out of school not only leads to learning but mental distress, exposure to violence and abuse, missed school-based meals and reduced development of social skills."¹⁵

The Right to Education in the Language of Choice

The right to education in the language of choice at university level continued to erode during 2021 – to the point where Afrikaans is now (a diminishing) language of tuition only at the University of Stellenbosch and the Potchefstroom campus of North West University. This followed the judgements of the Constitutional Court in *University of the Free State v Afriforum and Solidarity* in 2017 and *Gelyke Kanse and Others v Chairperson of the Senate of the University of Stellenbosch* in 2019.

¹³ Michael Workman, *Daily Maverick*, 26 November 2020

¹⁴ The Impact of COVID-19 in Education – More than a Year of Disruption", National Income Dynamics Study – Corona Virus Rapid Mobile Survey, 9 July, 2021

¹⁵ "Learners in South Africa up to one school years behind where they should be", UNICEF Press Release, 22 July 2021

It became clear during 2021 that the right to education in the language of choice at school level – particularly in Afrikaans – is also in jeopardy. The threat arises from the proposed introduction of the Basic Education Laws Amendment Bill.

The Bill will empower provincial education department heads to overrule School Governing Bodies' ability to determine admissions and language policies.

- It will require admissions policies based on “equality” and “equity” - although these terms are not defined. It will also enable provincial education heads to determine what space and resources are available at schools for the admission of additional learners – and whether there are other schools nearby with the capacity to admit prospective learners.
- The Bill will also give provincial education heads the ability to overrule SGBs' power to determine schools' language policies - also on the basis of “equality and equity” - and the need for schools to make effective use of classroom spaces and resources.

The evident intention is to force remaining single-medium Afrikaans schools to provide dual-medium education in English and Afrikaans. Experience has shown that dual medium education quickly leads to the extinction or severe dilution of Afrikaans. The intention is that SGBs will in future be able to appeal against decisions of provincial education heads only to MECs for Education – rather than to the courts.

The Bill is seen as a means of overturning the 2018 judgement of the Pretoria High Court in the *Overvaal* case - which struck down Gauteng Education MEC, Mr Panisa Lusufi's – order to the Overvaal High School to admit 55 English-speaking students into its 2018 Grade 8 class. Mr Lusufi complained that the school's language policy was “the very essence of racism” and vowed to appeal the judgement “all the way to the Constitutional Court.”

LANGUAGE AND CULTURE (section 30)

2019 Grade: D -

2020 Grade: D =

Section 30 of the Constitution assures South Africans' rights to use the language and participate in the cultural life of their choice.

Language rights are strongly entrenched – not only in the Bill of Rights – but also in section 6 of the Constitution which recognises South Africa's eleven official languages (soon to be supplemented with sign language as a twelfth official language). Section 6 also requires the government to

- take active measures to promote and elevate the use of indigenous languages;
- use at least two official languages at the national and provincial levels;
- adopt legislation to regulate and monitor the use of official languages; and to
- ensure that all official languages must enjoy parity of esteem and must be treated equitably.

The 2021 Annual Report of the Pan-South African Languages Board (PANSALB) pointed to the government's continuing failure to promote indigenous languages: “...the diminishing use of indigenous languages continues to pose a threat to preserving our languages...”

It also highlighted the failure of government departments and institutions to comply with the 2011 Use of Official Use Languages Act: “... the Board continues to be met with hurdles in its efforts to hold

government departments accountable; many government departments remain unresponsive to attempts employed by the institution for the submission of departmental annual reports on the Use of Official Languages Act.”

PANSALB reported on the progress that it was making in its efforts to preserve the endangered N/uu language and in developing the first draft of the Nama Spelling and Orthography Rules with a view to standardising the Nama language.

The right to use the Afrikaans language

The erosion of the right to education in Afrikaans is dealt with under Education above.

In March, 2021, there were disturbing reports¹⁶ that some students had been prohibited from speaking Afrikaans – even in private conversations – at the University of Stellenbosch. According to the reports:

- female students alleged that they had been threatened with punishment if they spoke with one another in Afrikaans in their residences;
- 17 out of 18 students surveyed at the University’s Tygerberg Campus reported that they had been “spoken to” because they had used Afrikaans in their residence;
- students at the Minerva residence said they had been warned that they would be excluded from the residence’s welcoming programme if they used Afrikaans in informal spaces;
- some students had been threatened when they had asked for Afrikaans to be used in dual language classes; and
- students said that they had reported these problems to the university authorities without much reaction.

In a statement on 10 March, 2021 the University described the charges as “misconceptions and untruths”. However, it did not deny that they had occurred. It reported that the allegations were “still being investigated” - but that if they had occurred “it would be due to an incorrect application of the (University’s English-dominant) 2016 Language policy – and would not be “condoned” by the University.

CULTURAL, RELIGIOUS AND LINGUISTIC COMMUNITIES (SECTION 31)

2019 Grade: C=

2020 Grade: C -

The right of South Africans to practise their religion and use their language is generally enjoyed in South Africa – as is their right to join and maintain cultural, religious and linguistic associations and other organs of civil society.

There were no further developments in the erosion of the right of white South Africans to enjoy their culture during 2021. Concerns had arisen as a result of

- the 2016 judgement of the Constitutional Court in *City of Tshwane Metropolitan Municipality v AfriForum* which according to judges Cameron and Froneman, implied that any reliance by white South Africans, particularly white Afrikaner people, on a cultural tradition founded in history, finds no recognition in the Constitution, because that history is inevitably rooted in oppression;”

¹⁶ *RAPPORT* newspaper, 14 March 2021

- the 2019 decision of the Johannesburg Equality Court to ban the flying of the old South African flag – because its display “amounted to hate speech;” and
- Minister Mthethwa’s announcement in 2020 that the government had decided to move “apartheid and colonial era statues, symbols and monuments” to “cultural nation-building parks”.

On 13 May 2021, the Minister of Sports, Arts and Culture, Nathi Mthethwa, reported to parliament that South Africa’s creative and cultural industries had suffered a negative impact of R53 billion as a result of the COVID pandemic and the accompanying lockdowns. He announced relief interventions for CCI institutions amounting to more than R130 million. The Department also dispersed R404 million as part of the Presidential Stimulus Package and managed to create more than 40 000 jobs.

Minister Mthethwa commended Cricket South Africa’s interim Board and Member’s Council on their historic agreement to transform cricket. “What we have been dealing with in the past six months in particular is, on the one hand conservative thinking that seeks to maintain the status quo, and on the other hand progressive transformative voices. Our choice is clear: transformation is sacrosanct. Transformation is our agenda.”

The Promotion of Equality and the Prohibition on Unfair Discrimination Bill (X-2021), which was tabled by the Minister of Justice and Correctional Services in March, 2021, might have far-reaching implications for “organs of civil society” that enjoy protection under section 31. It would give the Minister who is responsible for the portfolio in which NGOs operate the power to issue regulations and codes of practice dealing with the elimination of discrimination and promotion of equality in NGOs.

ACCESS TO INFORMATION (section 32)

2019 Grade: D =

2021 Grade: C =

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.

South Africa improved its score in 2020/2021 Freedom House Freedom on the Net report from 72 to 73 where 0 is the least free and 100 is free. It was categorised as the only “free” country in Africa in terms of access to the internet – and as only one of three countries in the world that improved their scores during 2021.

JUST ADMINISTRATIVE ACTION (section 33)

2019 Grade: C =

2020 Grade: C =

The right to just administrative action is given effect by the Promotion of Just Administrative Action Act (PAJA) of 2000. The Act defines administrative action as a decision by an organ of state when exercising or performing a public function that adversely affects rights – and that is not specifically excluded from the definition of administrative action.

The Act requires that an administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

Although the Act provides exemplary assurances of just administrative action, the protection that it offers is not, in practice, easily accessible to most South Africans due to a lack of knowledge of its provisions as well as the bureaucratic and financial hurdles that may be encountered.

As with so many other developments during 2021, the COVID pandemic and regulations promulgated under the Disaster Management Act severely interrupted the right to just administrative action.

ACCESS TO COURTS (section 34)

2019 Grade: B –

2020 Grade: B -

Legal Aid South Africa facilitates access to the courts by making legal aid available to indigent persons at state expense. Its role is to provide legal aid to those who cannot afford their own legal representation – including vulnerable groups such as women, children and the rural poor.

Access to the courts – and particularly the Supreme Court of Appeal – on matters related to land, might be adversely affected by the adoption of the Land Courts Bill which is dealt with in greater detail under section 25 (Property Rights) above.

However, the right to access to courts in South Africa remains directly impacted by a potential litigant's economic circumstances and social position. Litigation usually requires financial resources far beyond the capacity of most South Africans – particularly when it is directed against the state and large companies. According to a survey conducted by law students of the University of Cape Town in 2020 access to justice is impeded by a number of factors, including socio-economic inequalities, systemic inefficiencies caused by poor administration at the courts and an unmet demand for legal services.

In May, 2021 lawyers complained that the Legal Practice Council's plans to increase the number of *pro bono* hours from 24 to 200 per annum would be unaffordable for most practices – and particularly for small law firms. It would, in effect, require them to allocate three of their monthly 22 working days to *pro bono* work.

ARRESTED, DETAINED AND ACCUSED PERSONS (section 35)

2019 Grade: D –

2020 Grade: D =

Section 34 of the Constitution assures the rights of people who are arrested, detained or accused of crimes. These rights include the rights to remain silent, to be brought before a court within 48 hours; to legal counsel; to humane conditions of detention; and to a fair trial.

The Treatment of Arrested Persons

One of the responsibilities of the Independent Police Investigative Directorate (IPID) is to investigate charges of misconduct by the police that may affect these rights. According to its 2020/2021 Annual Report IPID dealt with 6 122 cases during the reporting period – up from 5 640 cases the previous year. These included the following statistics for 2020/21 compared with 2019/20

- 217 deaths in police custody – down from 237;
- 353 deaths as a result of police action – down from 392;
- 80 rapes by police officers – down from 120;
- 15 rapes in police custody – up from 11;
- 256 cases involving torture – up from 216;
- 4 228 cases of assault - up from 3 820; and
- 66 cases of corruption down from 84.

The Right to a Fair Trial without Unreasonable Delay

The Department of Correctional Services reported in its 2020/21 Annual Report that detainees waited an average of 176 days before their trials. There were 47 882 pre-trial prisoners – comprising 34% of the total.

Conditions of Detention Consistent with Human Dignity

According to the 2020/21 Annual Report of the Judicial Inspectorate for Correctional Services (JICS) COVID also had a negative impact on inmates of South African prisons – particularly with regard to family visits and rehabilitation and education programmes. The COVID-related early release of 19 000 prisoners in 2020 lowered overcrowding to 23% compared with 32% the previous year.

The JICS reported that the Department of Correctional Services (DCS) was not carrying out its peremptory obligation to report on the use of force, segregation and mechanical restraints because of the breakdown of the Department's electronic information systems since 2016. As a result "... JICS, a watchdog, does not know what is happening behind bars..." Unsettling trends were evident in 2020/21 including

- a doubling of the use of force against inmates from 336 cases in 2019/20 to 694 case;
- a sharp rise in deaths caused by the use of force; sexual violence and
- the clear physical decay of prisons.

According to the JICS the general despondency and misery within correctional facilities was apparent from the signal number of hunger strikes, attempted suicides and suicides.

On a more positive note the JICS reported that a draft JICS Bill is being prepared that will strengthen its independence and require the DCS to comply with its reporting obligations.

The Imprisonment of Former President Jacob Zuma for Contempt of Court

Former President Jacob Zuma continued to use every legal device available to him to avoid standing

trial for his alleged involvement in state capture and corruption.

On 28 January 2021 the Constitutional Court, in Zondo Commission v Zuma (CCT 295/20), ordered Mr Zuma to obey all summonses and directives lawfully issued by the Commission and to give evidence before the Commission when so required.

After Mr Zuma refused to comply with the CC's order, the Court sentenced him to 15 months imprisonment. On 29 June the Court ordered him to present himself to the SAPS by 4 July – upon which Mr Zuma applied to the Court for a rescission order against its previous decision in the case.

Mr Zuma's imprisonment sparked off unprecedented rioting and looting – primarily in KwaZulu-Natal - that resulted in the deaths of more than 350 people and damage to property exceeding R50 billion.

On 17 September 2021 The Constitutional Court dismissed Mr Zuma's rescission application and insisted that "...litigation must at some time come to an end".

Less than two months after commencing his prison sentence, Mr Zuma was granted medical parole by his old colleague and supporter, Mr Arthur Fraser, then the Commissioner of Correctional Services – against the advice of the Medical Parole Advisory Board. The Democratic Alliance, Afriforum and the Helen Suzman Foundation applied to the Pretoria High Court to have Fraser's decision set aside.

On 15 December 2021 the Court "reviewed, declared unlawful and set aside" Fraser's decision. Mr Zuma immediately appealed the Pretoria High Court's decision and at the time of writing (May, 2022) had not returned to prison to complete his sentence.