

# 2013

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Study to Audit and Monitor  
Compliance and Implementation of  
Protocols, Conventions and Decisions  
of the AU Member States

## South Africa



**State of the Union**

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## LIST OF ABBREVIATIONS

AC	African Commission on Human and Peoples' Rights
ACCNR	African Convention on the Conservation of Nature and Natural Resources
ACDEG	African Charter on Democracy, Elections and Governance
ACHPR	African Charter on Human and Peoples' Rights
ACPCC	African Union Convention on Preventing and Combating Corruption
ACRWC	African Charter on the Rights and Welfare of the Child
AISA	Africa Institute of South Africa
AMV	African Mining Vision
AMI	African Mining Indaba
APRM	African Peer Review Mechanism
ART	Anti-Retroviral Treatment
AU	African Union
AUC	African Union Commission
AYC	African Youth Charter
CAADP	Comprehensive Africa Agriculture Development Programme
CAT	Convention against Torture
CEDAW	Convention on the Elimination of All forms of Discrimination Against Women
CGE	Commission for Gender Equality
CPWD	Covenant on the Rights of People With Disabilities
COSATU	Congress of South African Trade Unions
CRC	Convention on the Rights of the Child
CSG	Child Support Grant
DAFF	Department of Forestry and Fisheries
DDP	Democracy Development Programme
DFID	Department of International Development
DIRCO	Department of International Relations and Cooperation
DoE	Department of Education
DoH	Department of Health
DoHA	Department of Home Affairs
DHS	Department of Human Settlements
DSD	Department of Social Development

DWAF	Department of Water Affairs and Forestry
ECOSOCC	Economic, Social and Cultural Council
FCS	Family Violence, Child Protection and Sexual Offences
GDP	Gross Domestic Product
HURISA	Human Rights Institute of South Africa
IFSNP	Integrated Food Security and Nutrition Programme
ILO	International Labour Organisation
IPID	Independent Police Investigative Directorate
LGBTI	Lesbian Gays Bisexual Transgender and intersex
Maputo Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
MDGs	Millennium Development Goals
MPAs	Marine Protected Areas
MPRDA	Mineral and Petroleum Resources Development Act, 28 of 2002
MWCPD	Ministry for Women, Children and Persons with Disabilities
NCCEMD	National Committee on Confidential Enquiries into Maternal Deaths
NHA	National Health Act
NEPAD	New Partnership for Africa's Development
NHRI	National Human Rights Institutions
NSTT	National Sanitation Task Team
OAU	Organisation of African Unity
PMTCT	Prevention of Mother-to-Child Transmission
SDF	Spatial Development Framework
SET	Science, Engineering and Technology
SRH	Sexual and Reproductive Health
STIs	Sexually Transmitted Infections
TB	Tuberculosis
TEAEC	Treaty Establishing the African Economic Community
TRALAC	Trade Law Centre
SAFIS	South Africa Forum on International Solidarity
SAHRC	South African Human Rights Commission
SAPS	South African Police Service
SOGI	Sexual Orientation and Gender Identity
SOTU	State of the Union
Trust	Southern Africa Trust

UN	United Nations
UNHRC	United Nations Human Rights Council
UNISA	University of South Africa
UNICEF	United Nations International Children's Emergency Fund
UNDP	United Nations Development Programme
WB	World Bank
WHO	World Health Organisation

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## EXECUTIVE SUMMARY

Since the establishment of the Organisation for African Unity (OAU) in 1963 and its successor, the African Union (AU), in July 2001, various instruments have been passed to guide the conduct of African states towards citizens and accelerate the process of African integration. These instruments cover a wide spectrum of policy areas from peace and security through social and human development to economic development issues. However, despite their existence, adoption and implementation across the continent remains inconsistent.

The State of the Union (SOTU) is a coalition of civil society organisations working in ten African countries to urge their governments to ratify African Union instruments and track their implementation at national level. The SOTU initiative was conceived as a strategy to strengthen the decision of the AU taken at the 13<sup>th</sup> Ordinary Session of AU Summit held in 2009 to ratify and accede to all OAU and AU treaties by July 2010. SOTU conducts bi-annual research to review country compliance and the status of implementation of selected AU instruments. The first SOTU compliance reports were published in July 2010 and were well received by the African Union Commission (AUC), member states and other stakeholders.

As a member of the SOTU coalition, the Southern Africa Trust has commissioned this study to determine South Africa's level of compliance with, and implementation of, key commitments in 16 selected AU protocols, conventions and declarations, and the impact of their implementation on citizens' quality of life. The study seeks to establish the status of ratification, domestication and implementation of these AU instruments at country level between 2010 and 2012. The report emphasises the main areas of progress or weakness and makes recommendations to improve compliance.

Overall, the report found that South Africa has an outstanding record in the ratification of African Union treaties and instruments, and that its national legislation and policies are recognised internationally for entrenching human rights values. South Africa has also contributed positively to the development of Africa's legal architecture through the adoption of the New Partnership for Africa's Development (NEPAD) and its monitoring system, the African Peer Review Mechanism. The report reflects, however, that domestication of AU treaties into South Africa's national body of law is lacking in some areas.

Furthermore, where instruments have been domesticated, there is often a gap between policy and practical implementation, especially in the areas of health, education, water and sanitation. The report also notes that South Africa has been irregular in meeting its periodic reporting obligations on three instruments: the African Charter on Human and Peoples' Rights, the Protocol on the Rights of Women in Africa, and the African Charter on the Rights and Welfare of the Child.

The instruments reviewed by this study have been grouped under several headings, which relate to human rights and governance, agriculture and conservation of nature and natural resources, health, women, children and youth. The following observations reflect the key findings and recommendations of the report in each of these areas.

## Human Rights and Democratic Governance

South Africa has ratified all treaties prioritised by this audit as well as subsequent protocols, plans of action and strategic plans aimed at universal ratification of mechanisms and compliance through domestication or implementation. South Africa's progressive legislation and six independent oversight institutions established by Chapter 9 of the Constitution widely promote respect for a culture of democracy and human rights. The lack of adequate resources, however, limits these Chapter 9 institutions from achieving maximum impact.

Growing concerns with the questionable use of force by the police, particularly in managing protest gatherings, were starkly highlighted on 16 August 2012 when 34 striking mine-workers were shot dead by police at the Lonmin platinum mine in Marikana in the North West Province. While the Independent Police Investigative Directorate (IPID) has reported that the number of deaths as a result of police action decreased to 720 incidents in the period 2011/2012, this is acknowledged as being unacceptably high.

The right of movement for foreign nationals, especially African immigrants, continues to be impeded by xenophobia and violence. Violations of the rights of foreign nationals (or those perceived as foreign nationals) include physical attacks, attacks on property and administrative barriers. Xenophobia was identified in the SAHRC 2009 and 2011 APRM Country Review Report (CRR) as one of South Africa's most serious challenges to good governance.

The media and civil society in South Africa operate with relative freedom. In 2010 the Protection of State Information Bill was introduced which seeks to regulate the classification, protection and dissemination of state information. Although multiple amendments have been made to limit the bill, it still prescribes harsh sentences for those who publish classified information even if they do so in the public interest.

Great strides have been made by the Public Protector, the Auditor-General and the Anti-Corruption Task Team in holding the perpetrators of corruption accountable, although, as noted by the 2011/2012 Auditor-General's report, poor internal controls, weak leadership, and disregard for procurement rules continue to undermine efforts to combat corruption.

With regard to statutory reporting requirements, South Africa's state report on the African Charter on Human and Peoples Rights is long overdue.

### Recommended Actions

- The South African government must comply with its treaty obligations and submit all outstanding reports on the African Charter on Human and Peoples' Rights to the African Commission on Human and Peoples' Rights. South Africa is also reminded that its initial report on the African Charter on Democracy, Elections and Governance comes due in 2014.
- The South African government should raise awareness of all AU regional instruments including the African Charter on Human and Peoples' Rights, the African Charter on Democracy, Elections and Governance, and the Convention on Combating and Preventing Corruption.
- The South African government should adequately fund national institutions to enable them to cover their wide constitutional and legislative mandates and make a relevant impact in poor communities.
- The South African Police Service, as well as the organisers of demonstrations, including civil society organisations, trade unions and municipalities, should be empowered with knowledge

on the provisions of the Regulation of Gatherings Act for proper use and enforcement in accordance with constitutional human rights.

- ☑ The South African government should ensure implementation of the Reprisals Resolution passed by the African Commission on Human and Peoples' Rights for the protection of human rights defenders.
- ☑ The activities, programmes and operations of the media are protected by the constitution. Laws proposed or enacted to debilitate their functions and to stop them from exposing malpractice in state institutions should be repealed. The South African government should use the Model Law on Information Law developed by Advocate P. Tlakula and launched at the 53<sup>rd</sup> Session of the African Commission on Human and Peoples' Rights as a guide for strengthening freedom of expression, access and dissemination of information.

## **Agriculture and Conservation of Nature and Natural Resources**

The Comprehensive Africa Agriculture Development Programme (CAADP) is a developmental plan adopted by the AU/NEPAD to eliminate hunger and reduce poverty through agriculture. The implementation of CAADP in South Africa is delayed and remains in its infancy. The Department of Agriculture has held provincial consultations and these are being used to develop the national CAADP Compact, as well as related investment plans on agriculture, food and nutrition. As South Africa is one of the architects of NEPAD and CAADP, the delay in signing the compact is of concern.

Little progress has been made in addressing the injustices of the past with regard to land ownership, where, under Apartheid, 75 per cent of people were confined to live on 13 per cent of the land. About 90 per cent of the country's agricultural output is produced by 37 000 commercial farmers, with 8.5 million people estimated to be directly or indirectly employed and earning income from this sector. Progress has been made towards promoting smallholder farmers' schemes, with the government providing a subsidy scheme mainly for historically underprivileged communities. However, civil society research institutions report the lack of proper conceptualisation of the subsidy scheme as well as a support system that is not highly functional.

South Africa has signed the AU Convention on Conservation of Nature and Natural Resources (CCNRR). While this regional instrument has not yet entered into force, following its revision in 2003, South Africa has already made progress in crafting legislation, policies and programmes for the promotion of protection and conservation of natural resources. There are challenges in the implementation of legislation and policies, including the National Environmental Management Act, especially in less well resourced townships and poor communities.

South Africa has made significant progress in ensuring improved access to clean water and sanitation facilities as part of achieving the Millennium Development Goal on sanitation – namely to halve by 2015 the number of people without access to basic sanitation - but challenges remain, particularly at the local government level. While South Africa's policies have succeeded in achieving set numbers and targets, quality of delivery has suffered and the failure rate of the sanitation facilities that have been provided is high.

With respect to mining and minerals, South Africa holds some of the world's richest mining reserves and has hosted the international Mining Indaba consultations for 19 years. The country has attempted to bring equitable reform to the mining sector through the promulgation of legislation and policies which seek to increase the number of historically marginalised communities benefiting from the country's natural resources.

There is, however, a lack of education and awareness via community consultations, and this has resulted in limited participation in the mining sector by those communities who should benefit from broader participation in the mining sector. The sector continues to experience high levels of instability across the country in part due to the failure of employers to adequately consider the social and economic well-being of mine workers. The conflict at Lonmin's Marikana mine between workers and the mine owners, and which resulted in the killing of 34 mine-workers by the police, demonstrates the lack of progress in improving the lives and livelihoods of historically marginalised communities.

### **Recommended Actions**

- ☑ Since the CAADP compact has not yet been signed, the South African government should escalate the signing of the CAADP Compact, as well as the development and implementation of the national CAADP Compact.
- ☑ The South African government should review the concept and effectiveness of smallholder farmer's schemes through consultations, and should implement a programme for skills development and capacity building.
- ☑ South Africa should engage stakeholders, including civil society, National Human Rights Institutions (NHRIs), taxi drivers, trade unions and partners to address environmental hazards and improve health conditions in the country.
- ☑ The South African government should improve consultation processes to ensure inclusion of historically marginalised communities in mining processes for them to equitably benefit from the mining industry.
- ☑ The South African government should accelerate delivery of potable water, improve access to adequate sanitation, and eradicate the pit and bucket system in poor communities and informal settlements.

### **Health Strategy and Access to HIV/AIDS, TB and Malaria Services**

While South Africa's healthcare budget has grown, expenditure in this area has not kept up with the rise in the country's Gross Domestic Product. The overall allocation to health was only 5 per cent in the national 2011/2012 budget, falling short of the 15 per cent target set by the African Health Strategy.

Despite the implementation of a national turnaround strategy in 2009, healthcare facilities remain challenged by poor customer care, staff attitudes, patient safety, cleanliness and infection control, and erratic availability of medicines and supplies. To address this, South Africa has taken steps to better monitor the management of facilities, including a proposal to create an office of standards to track the performance of public and private health facilities.

The incidence of HIV and AIDS in South Africa has declined remarkably and life expectancy has improved, but the actual number of infected people remains very high. More HIV-positive people live in South Africa than in any other country, and South Africa has the most people in the world on the largest antiretroviral treatment programme. The challenges relating to social dimensions of sickness (poverty-health relationships) remain a serious concern, partly because of poor integration between health and other functions within government, such as employment, sustainable livelihoods, and social development.

The number of deaths due to illegal abortions has decreased by 90 per cent. However, the legalisation of termination of pregnancy through the Choice on Termination of Pregnancy Act has had limited impact in reducing the rate of illegal abortions.

### Recommended Actions

- ☑ The South African legislature should accelerate the promulgation of the National Health Amendment Bill. This will provide for the establishment of an Office of Standards Compliance to ensure that all public and private facilities are able to deliver decent, safe and quality healthcare.
- ☑ The South African government should ensure that the national health budget allocation is aligned with the African Health Strategy.
- ☑ The South African government should encourage alternative sources of sustainable finance, including health insurance systems.
- ☑ The South African government should reduce the number of illegal abortions through providing education to healthcare workers and raising public awareness in relation to the Choice on Termination of Pregnancy Act.

### Rights and Welfare of Women in Africa

South Africa has the highest incidence of rape of women in the world, with Interpol naming the country the 'rape capital of the world' in 2012. The country also has very high levels of gender-based violence, including attacks and killings of LGBTI people, rapes of children and infants, and trafficking of women.

The Department of Women, Children and People With Disabilities (DWCPD) and the Commission for Gender Equality (CGE) monitor implementation of regional instruments and other mechanisms that promote and protect the rights of women, children and people with disabilities. The DWCPD also oversees legislation and policy development, implementation of gender equality, and addresses sexual offences. Implementation of the Domestic Violence Act is ineffective due to various challenges including limited sensitisation of police personnel, stigmatisation of survivors of violence, loss of confidence in the justice system, and low levels of reporting of sexual violence by women.

The DWCPD also tackles harmful cultural practices, such as virginity testing (*Ukuhlola*), and abduction and forced marriages of young girls by older men (*Ukuthwala*). This function is strengthened by the independent role of the Commission for Gender Equality. The DWCPD is also responsible for preparing state periodic reports for submission to relevant human rights bodies.

Despite numerous challenges, the right of South African women to access democratic participatory processes is being promoted. As of 2012, women occupy 41 per cent of cabinet posts and 47 per cent of Deputy Minister positions. Women occupy 44 per cent of parliamentary seats, have 2 per cent representation in provincial legislature and 30 per cent representation at local government level, putting South Africa well on track towards achieving 50/50 women-to-men parity representation at decision-making levels. The number of female judges and police officers has increased and the post of National Police Commissioner is presently filled by a woman.

At the time of writing, the DWCPD had completed consultations with civil society, state departments and national human rights institutions and the draft state report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) was ready for presentation to Cabinet. This process will be followed by submission of the report to the Secretariat of the African Commission on Human and Peoples' Rights.

### Recommended Actions

- ☑ The government of South Africa should facilitate the forging of partnerships between the CGE, civil society and the DWCPD to design strategies to increase implementation of legislation.
- ☑ The government of South Africa should increase the budget allocation to the DWCPD and CGE for effective implementation of their mandates across the country.
- ☑ The South African government should facilitate sensitisation programmes for police and communities on laws promoting women and children's rights and enhance understanding of the Domestic Violence Act and its effective implementation.
- ☑ Civil society and national human rights institutions should undertake advocacy work to call for the repeal of all discriminatory laws that may be detrimental to the development and upliftment of women in the economic and political spheres.

### Rights and Welfare of the Child

South Africa is lagging on its periodic reporting to the African Committee of Experts on the Rights and Welfare of the Child. The Department of Women, Children and People With Disabilities submitted a draft report to Cabinet in 2013 and once approved it will be provided to the African Committee of Experts.

Although access to primary and secondary education is free and compulsory in South Africa, there is a high level of public criticism concern about the deteriorating standards and quality of public education.

Every child in South Africa enjoys the same rights, whether born in or out of wedlock. Children benefit without discrimination from legislation and policies developed for implementation by all government departments. Their right to inheritance is protected by the Constitution, the Children's Act and the Equality Act.

Despite the challenges linked to poverty levels, especially faced by schools in poor communities, South Africa is making progress with regard to attendance and retention of girl children in schools. The attendance rate of both girls and boys is over 88 per cent. However, early childhood pregnancies and harmful cultural practices, such as *Ukuthwala*, lead to many girls dropping out of school.

Child abuse is prevalent, especially in the private sphere. The Constitution and the Schools Act of 1996 prohibit corporal punishment from being administered in schools. Even so, the Eastern Cape and Limpopo provinces provide high statistics for corporal punishment in schools. The number of learners experiencing sexual assault at school has increased in all provinces with the exception of Gauteng, which recorded a significant drop from 4.4 per cent in 2008, to 0.7 per cent of learners in 2012.

### Recommended Actions

- ☑ The South African government is commended for submitting the initial state periodic report to the African Committee of Experts on the Rights and Welfare of the Child. It is recommended, that the status of reporting in the future should be improved.
- ☑ The South African government should improve access to universal education by all children in South Africa, irrespective of nationality and status, including the poor and children living with disabilities. It is further recommended that access to conducive facilities for children living with disabilities is improved.
- ☑ The South African government should support Black learners in science and mathematics subjects, as well as Black students at FET colleges and universities.

- ☑ The South African government should address the challenge of child labour which persists in the various economic markets, including agriculture, domestic work and the retail sector, particularly affecting girl children from poor communities
- ☑ The South African government should improve efforts to prosecute the perpetrators of torture, corporal punishment, harmful cultural practices and sexual violence.

## **African Youth**

Despite the elaborate legislative and policy framework that South Africa has developed in the area of youth employment and with the aim of creating sustainable livelihoods for the youth, their socio-economic condition remains a serious concern. Unemployment and poverty affects young people most, with many qualified youth failing to find jobs. Many young people take up unpaid voluntary employment and/or unskilled and low-paying jobs.

The youth also face a 50 per cent risk of contracting HIV during their lifetimes. Researchers continue to assess the main risk factors for teenagers, as well as the success of prevention programmes to date. The sexual behaviour of South African youth remains under scrutiny, with the aim of reducing the risk of HIV infection. Females aged between 15 and 24 are four times more likely to contract HIV than males of the same age. This risk is especially high among pregnant women aged between 15 and 24, as well as survivors of physical and/or intimate partner violence. On average, young females become HIV-positive about five years earlier than males.

According to African health surveys, South African adolescents have the highest reported smoking prevalence.

### **Recommended Actions**

- ☑ The South African government should popularise the African Youth Charter among officials, civil society and national human rights institutions.
- ☑ The South African government should empower the youth, especially young girls, to ensure access to their full rights, including socio-economic rights such as their right to employment, education, health, housing, water and sanitation.
- ☑ The South African government should develop, finalise, and implement a national plan of action to promote the rights of the youth and address violence against young women by ensuring protection from harmful practices such as initiation and virginity testing of girls and ensuring that those found responsible are dealt with in law.
- ☑ The South African government must provide progress reports in respect of the Expanded Public Works Programme (EPWP) for the period 2009-2012, aimed at creating 5 million jobs for the youth, and recruitment of 8,000 youth for artisan training for employment within the national and provincial branches of the Department of Public Works.

# CHAPTER ONE

## INTRODUCTION

### 1.1 Overview of the Sixteen Instruments / Protocols

Since the formation of the Organisation of African Union (OAU) on 25 May 1963, African governments have signed and/or ratified numerous charters, treaties, protocols and conventions, in addition to plans, calls, visions, statements, commitments, strategies and declarations. Many of these instruments, however, still require ratification and implementation by African Union (AU) member states. The State of the Union (SOTU) coalition was initiated by civil society organisations working in ten<sup>1</sup> African countries to urge governments to ratify African Union instruments and track their implementation at national level.

This 2013 SOTU Report for South Africa provides an overview of South Africa's progress between the years 2010 and 2012 in complying with selected sections of 16 AU treaties and regimes, as listed below. The 16 instruments range in theme from governance, political, social and economic rights, to peace and security and development.

1. African Charter on Human and Peoples' Rights in Africa (1981)
2. African Charter on Democracy, Elections and Governance (2007)
3. The Treaty Establishing the African Economic Community (1991)
4. Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament
5. African Union Convention on Preventing and Combating Corruption (2003)
6. NEPAD Comprehensive African Agricultural Development Plan (2003)
7. African Convention on the Conservation of Nature and Natural Resources
8. Africa Health Strategy 2007-2015 (2007)
9. Abuja Call for Accelerated Action Towards Universal Access to HIV/AIDS, Tuberculosis and Malaria by 2010 (2006)
10. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003)
11. Maputo Plan of Action for Implementing the Continental Sexual and Reproductive Health and Rights Policy Framework 2007-2010 (2006)
12. African Youth Charter (2006)
13. African Charter on the Rights and Welfare of the Child (1990)
14. Revised African Convention to the Conservation of Nature and Natural Resources
15. African Mining Vision (2009)
16. Sharm El-Sheikh Commitments for Accelerating the Achievement of Water and Sanitation Goals in Africa (2008).

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<sup>1</sup> Cameroon, Egypt, Ghana, Kenya, Malawi, Mozambique, Nigeria, Rwanda, Senegal and South Africa.



The objective of this Report is to assess the extent to which South Africa has complied with these continental governance instruments, including rules and regimes to which it is a signatory. While the Report does not provide an exhaustive analysis of South Africa's progress under each instrument specified, it offers a substantive synthesis of the country's compliance with selected sections and articles.<sup>2</sup> The findings of this Report will be incorporated into a comprehensive SOTU Report summarising the status of each of the ten countries.

This Report is significant for the AU and the African people in general, and for South Africa in particular. Firstly, as it is released in the year when Africa commemorates 50 years of the OAU/AU, the report is relevant for the AU and its organs<sup>3</sup> as it aids them in assessing member states' compliance with AU instruments. Secondly, by identifying areas of progress, or lack thereof, and by recommending actions that are required to accelerate compliance, the Report contributes to strengthening the performance of the AU through its member states. Thirdly, the Report assists AU member states to learn from one another in ensuring compliance with, and implementation of, AU instruments.<sup>4</sup> Additionally, for the people of South Africa, this Report raises awareness about the role of the AU and its instruments, the obligations and performance of their country's leaders, as well as their own duties as citizens.

## **1.2 Methodology of the Report**

The authors of the Report employed various participatory methods of data collection and insight generation useful for obtaining the views of various stakeholders in a study of this nature. Multiple civil society consultations were conducted by the Human Rights Institute of South Africa. These participatory mechanisms were complemented by documentary study and literature review, targeting mainly official policy documents, reports and academic publications relevant to the purpose of the study, including an extensive literature review conducted by the Southern Africa Trust and Professor Andre Mbatha Mangu of the University of South Africa (UNISA). These were crucial steps for establishing the context, understanding the agency of various stakeholders and for clarifying the meaning of data collected.

The report was informed and reviewed by a research reference and advisory group established by the Southern Africa Trust, consisting of civil society experts from the Human Rights Institute of South Africa, the Institute for Global Dialogue, the Southern Africa Trust, the Democracy Development Programme, the Trade Law Centre and the Africa Institute of South Africa. A draft report was then presented to a broader grouping of representatives from South African civil society, academia, political parties and government during a validation meeting on 25 November 2013. Comment from this meeting was incorporated into the final version of report.

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<sup>2</sup> The study assesses the performance of South Africa based upon guidelines and terms of reference provided by the SOTU coalition indicating specific articles and provisions for study of selected treaties and plans of actions. The guidelines are provided in the annexure of the report.

<sup>3</sup> Organs of the AU, particularly the Assembly of the Union, the Executive Council, the Pan African Parliament (PAP), the African Union Commission, the Economic, Social and Cultural Council (ECOSOCC), the African Commission on Human and Peoples' Rights, and the African Court on Human and Peoples' Rights.

<sup>4</sup> Cheruyiot Faith & Mary Wandia. *Study to audit and monitor implementation of Protocols, Conventions, Declarations and Best Practice Standard by African Union Member States, Methodology Workshop Report 2.*

### **1.2.1. Literature review**

The literature review focused on OAU/AU treaties, protocols, conventions, legislation, policy documents, judicial decisions, and academic and official publications. The aim was to identify AU treaties and regimes ratified by South Africa and the steps taken to implement these administratively and through legislation and policy, as well as the overall country context.

Researchers perused annual reports of national institutions such as the South African Commission for Gender Equality; the South African Human Rights Commission; the National Youth Development Agency; the Commission for the Promotion and Protection of the Rights of Cultural, Religion and Linguistic Communities; the Independent Police Investigative Directorate; the National Planning Commission; the Ministry of Women, Children and People With Disabilities; the Department of Justice and Constitutional Development; the Department of Social Services; the South African Police Service; the International Labour Organisation (ILO); the United Nations Children's Fund (UNICEF); and the United Nations High Commission for Refugees (UNHCR), among others. Information published by implementing agencies and the judiciary also assisted in evaluating the extent of implementation.

Additionally, reports of inter-governmental agencies offered researchers a wealth of objective information that assisted in understanding South Africa's domestic performance on these treaties and regimes.

Finally, researchers reviewed and drew on the findings of reports by South African and international civil society organisations which critically assess South Africa's performance in the key thematic areas.

### **1.2.2. Interviews, Focus Groups and Workshops**

Key stakeholder interviews were undertaken with role-players in state agencies charged with the implementation of AU instruments; with civil society organisations working with issues of gender, women, legal frameworks, LGBTI and children; as well as faith-based organisations and academics. The Research Reference Group members provided useful data and 20 key informants were approached for interviews. Key informant interviews involved the administration of semi-structured face-to-face interviews to a pre-determined sample of questionnaires.<sup>5</sup> The stakeholder interviews were conducted from 1 to 15 October 2013.

Focus groups, workshops and advocacy meetings convened by HURISA with civil society formations also contributed to this Report and included the following meetings:

1. A Seminar on BRICS for Women and Youth Living in Rural Areas on March 25 2013;
2. CSO consultation on the African Charter on Human and Peoples' Rights and Maputo Protocol on 20 January 2012 & 24-25 June 2013 respectively;
3. Orientation for deepening understanding on the Maputo Protocol on 31 October 2013;
4. Commission for Gender Equality hosting of the Permanent Secretary for Women Affairs, Gender and Community Development in Zimbabwe on 4 October 2013; a Media Briefing

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<sup>5</sup> Questionnaire developed for interviews is attached in this report.

to mark the 10<sup>th</sup> Anniversary of the Maputo Protocol on 10 and 17 October 2013; and a side event hosted in collaboration with People Opposing Women Abuse on 23 October 2013.

### 1.3 Structure of the Report

The Report comprises seven chapters. The first is an introductory chapter that highlights the objectives and scope of the report, its relevance, significance, methodology and structure. This is followed by five thematic chapters on Human Rights and Governance; Agriculture and Conservation of Nature and Natural Resources; Health Strategy and Access to HIV/AIDS, TB and Malaria Services; Rights of Women in Africa; Rights and Welfare of the Child; and the African Youth Charter. The Report concludes with a summary of the findings of the report.

**Map of South Africa**



## CHAPTER TWO

### HUMAN RIGHTS AND DEMOCRATIC GOVERNANCE

#### 2.1 Introduction

This section of the Report assesses South Africa's progress against selected sections of provisions of the African Charter on Human and Peoples' Rights (1981); the African Charter on Democracy, Elections and Governance (2007);<sup>6</sup> the Treaty Establishing the African Economic Community (1991); and the African Union Convention on Preventing and Combating Corruption (2003). Some provisions of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003) are also considered here.

**Table 1: Legal Instruments for Human Rights and Democratic Governance**

<b>Legal Instruments</b>	<b>ACHPR</b>	<b>TEAEC</b>	<b>ACDEG</b>	<b>CPCC</b>
Legal nature	Treaty	Treaty	Treaty	Treaty
Date of adoption	21 June 1981	03 June 1991	30 January 2007	11 July 2003
Date of entry into force	21 October 1986	12 May 1994	15 February 2012	05 August 2006
Date of signature by SA	09 July 1996	10 October 1997	01 February 2010	16 March 2004
Date of ratification	09 July 1996	31 May 2001	24 December 2010	11 November 2005
Date of deposit of instrument	09 July 1996	25 June 2001	24 January 2011	07 December 2005

Source: Professor Mangu, HURISA (May – October 2013)

#### 2.2 Integration of Human and Peoples' Rights in Domestic Law

The enactment of the South African Constitution in 1996<sup>7</sup> established six "Chapter 9" institutions to support and strengthen democracy and the protection of fundamental rights and freedoms as enshrined in the ACHPR and related instruments.<sup>8</sup> These are the South African Human Rights Commission (SAHRC); the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; the Commission for Gender Equality; the Office of the Public Protector (PP); the Office of the Auditor-General (AG); and the Independent Electoral Commission. These Chapter 9 institutions have made tremendous strides towards improving access to justice, protecting democratic governance in the interests of the people, and ensuring free and fair elections in the

<sup>6</sup> Articles 6 & 12 of the African Charter on Human and Peoples' Rights, the Charter on Democracy, Elections and Governance and the Charter on Preventing and Combating Corruption.

<sup>7</sup> Constitution of the Republic of South Africa, Number 108 of 1996.

<sup>8</sup> Ibid, Chapter 9.

choice of leaders in South Africa. It must be noted, however, that inadequate support for these institutions by the South African government has limited their potential impact.

Reports by the South African Human Rights Commission in 2011 and 2012 reveal that South Africa has been inconsistent in fulfilling its reporting obligations to the ACHPR, the African Charter on the Rights and Welfare of the Child (ARWC), the Protocol on the Rights of Women in Africa (Maputo Protocol) and several other international human rights instruments.<sup>9</sup> Additionally, the Protocol to the ACHPR on the Establishment of an African Court on Human and Peoples' Rights is without doubt amongst the most important AU human rights instruments after the ACHPR itself. This was signed by South Africa on 9 June 1999, ratified and deposited as an instrument of ratification on 3 July 2002. However, it has thus far not made the declaration<sup>10</sup> that gives individuals and organisations *locus standi* before the African Court on Human and Peoples' Rights.

The ACHPR and the Treaty Establishing the African Economic Community (TEAEC) remain largely unknown by the majority of the South African people, including state officials, legal practitioners and human rights activists. South Africa has not prioritised its duties to promote and ensure through teaching, education and publication the promotion of the rights and freedoms in the ACHPR as required by its Article 25. Human rights NGOs, which were expected to enhance the awareness of the ACHPR and the TEAEC, have thus far had minimal impact partly because of resource constraints.

### **2.2.1 The Right to Liberty and to the Security of the Person**

Article 6 of ACHPR states that, "every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained".

While the South African Constitution protects citizens against arbitrary arrest and torture, during 2008/2009 and 2009/2010 at least 1,092 people were reported to have lost their lives as a result of the use of force by the police, the highest number since the late 1990s.<sup>11</sup> The Independent Police Investigative Directorate (IPID) reported that the number of deaths as a result of police action decreased to 720 incidents in the year 2011/2012. The IPID acknowledged, however, that this was still unacceptably high.<sup>12</sup> In 2009, the former National Police Commissioner Bheki Cele was criticised in the media and by civil society following statements he made directing the police to "shoot to kill" when faced with deadly force.<sup>13</sup> In October 2012 Section 49 of the Criminal Procedures Act was amended to broaden the grounds on which the police can use deadly force when apprehending suspected criminals.<sup>14</sup> Growing concerns with the questionable use of force by police were starkly highlighted on 16 August 2012 when 34 striking mine-workers were

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<sup>9</sup> The last periodic report on the African Charter was submitted in 2005, which was a combination of two outstanding reports. Currently the 2005, 2007, 2009, 2011 and 2013 reports are outstanding. Periodic reports on both Protocols of Children and Women's Rights in Africa are also outstanding.

<sup>10</sup> This declaration is required under Article 34(6) of the ACHPR.

<sup>11</sup> David Bruce (2011). Beyond Section 49: Control and the Use of Lethal Force. *South Africa Crime Quarterly*, No 36, June 2011. Institute for Security Studies.

<sup>12</sup> Independent Police Investigative Directorate (2013). *Media Statement: Deaths in Police Custody and Deaths as a Result of Police Action for 2011/12*. 1 March 2013.

[http://www.ipid.gov.za/media\\_statements/06032013.asp](http://www.ipid.gov.za/media_statements/06032013.asp)

<sup>13</sup> "Police Must Shoot to Kill, Worry Later – Cele". *IOL News*. 1 August 2009. <http://www.iol.co.za/news/south-africa/police-must-shoot-to-kill-worry-later-cele-1.453587>

<sup>14</sup> Criminal Procedures Amendment Act of 2010.

shot dead by police at the Lonmin mine in Marikana. The conduct of the police remains the focus of the ongoing Farlam Commission of Inquiry established by South Africa's President Zuma to investigate the incident.

### 2.2.2 Freedom of Movement and Residence within the Borders of a State

Article 12 of the ACHPR states that, "every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law". Article 43 of the TEAEC also commits South Africa to adopt measures at the state, bilateral and regional levels to progressively achieve the free movement of persons and enjoyment of the right of residence across the African Economic Community.

Freedom of movement in South Africa is guaranteed by Chapter 2 of the Constitution under Section 26(1) of the Bill of Rights. Due to prevailing domestic laws and regulations, however, immigrants and asylum seekers are not accorded full enjoyment of political, economic and social rights, such as the right to enter, reside, and choose their trade, occupation or profession freely, with the exception of those granted permanent residency. Recognised asylum seekers are entitled to seek employment and study as upheld in a Constitutional Court decision.<sup>15</sup> The 2011-2012 closures of Refugee Reception Offices in major metropolitan centres in the country, reducing the number to only four in Cape Town, Durban, Musina and Pretoria, has served to undermine the ability of asylum seekers to access asylum services, and constitutes a violation of the South African Refugees Act. The Department of Home Affairs has appealed court orders obtained by refugee rights organisations directing them to revoke the closure of offices.<sup>16</sup>

The right of movement for foreign nationals, especially African immigrants, continues to be impeded by growing xenophobia and violence, which led to the unprecedented xenophobic violence that swept through South Africa between May and July 2008.<sup>17</sup> Violations of the rights of foreign nationals (or those perceived as foreign nationals) have included physical attacks, attacks on property and administrative barriers, and remain a matter of serious concern.<sup>18</sup> Cases of arbitrary arrest and detention, especially those involving foreign nationals and refugees, are regularly reported. Identity controls by police officers are often accompanied by requests for bribes, extortion of money or goods, and verbal or physical abuse. Migrants also run the risk of being arbitrarily arrested and detained, including for longer periods than authorised by law.<sup>19</sup> Xenophobia was identified

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<sup>15</sup> Minister of Home Affairs and Others v Watchenuka and Another 2004 (4) SA (326) (SCA) (28 November 2003) ruled that prohibition to seek employment and study by asylum seekers is unlawful; everyone has inherent dignity and the right to have their dignity respected and protected.

<sup>16</sup> Consortium for Refugees and Migrants in South Africa (2012). *Statement: Home Affairs must stop discrimination! CoRMSA challenges government inconsistencies*. 12 October 2012. <http://www.cormsa.org.za/?s=refugee+reception+office>

<sup>17</sup> The Human Rights Institute of South Africa (HURISA) lobbied the African Commission on Human and Peoples' Rights to adopt Resolution 131 on the Situation of Migrants in South Africa passed during the 43<sup>rd</sup> Ordinary Session held in the Kingdom of Swaziland, from 7-22 May 2008. The resolution condemned the attacks and violence against non-nationals and called South Africa to prosecute the perpetrators of these crimes, protect the right to life and properties of non-nationals. The Commission had sought authorisation from South Africa for the Special Rapporteur to conduct a fact-finding mission in the country.

<sup>18</sup> Consortium for Refugees and Migrants in South Africa (CoRMSA) (2013). *Statement: No justice for victims of xenophobia, five years after 2008 attacks*. 13 March 2013. <http://www.cormsa.org.za/2013/05/13/no-justice-for-victims-of-xenophobia-five-years-after-2008-attacks/#more-1443>

<sup>19</sup> Lawyers for Human Rights (2010). *Joint Submission to the European Union on the occasion of the South African Human Rights Dialogue*. 9 September 2010. <http://www.lhr.org.za/policy/joint-submission-european-union-occasion-south-african-human-rights-dialogue>

in the SAHRC 2009 Report and the 2011 APRM Country Review Report (CRR) as one of South Africa's most serious challenges to good governance.<sup>20</sup>

## **2.3 Democracy, Elections and Governance**

The African Charter on Democracy, Elections and Governance (ACDEG) aims to promote democracy, free and fair elections and good governance. It states that democratic elections should be conducted: (a) freely and fairly; (b) under democratic constitutions and in compliance with supportive legal instruments; (c) under a system of separation of powers that ensures, in particular, the independence of the judiciary; (d) at regular intervals, as provided for in national constitutions; and (e) by impartial, all-inclusive competent accountable electoral institutions staffed by well-trained personnel and equipped with adequate logistics.

A number of rights protected by the ACDEG are enshrined in South Africa's 1996 Constitution. The Constitution provides that South Africa is a democratic state based on the principle of the separation of powers. The Bill of Rights enshrines the rights of all people in the country, including women, children, people from ethnic, racial or religious minorities, migrants, people with disabilities and other marginalised and vulnerable social groups. The rights to freedom of expression, assembly and association, freedom of the media, and the right to access government information are protected. Although the government has popularised the ACDEG among its officials through meetings and seminars before ratification, the treaty remains largely unknown to ordinary citizens. The same is true for civil society organisations, notwithstanding the fact that the Electoral Institute for the Sustainability of Democracy in Africa (EISA), which was invited by the AU to assist in the drafting of the ACDEG, is based in South Africa.<sup>21</sup> The Institute for Democracy in Africa (IDASA), another South Africa-based organisation also played an important role in South Africa including collaborating with regional NGOs in raising awareness on the ACDEG<sup>22</sup> and advocating for its ratification.

### **2.3.1 Democracy, Rule of Law and Human Rights**

The ACDEG emphasises that free and fair elections should be conducted under democratic and legitimate constitutions that guarantee constitutional transfer of power. South Africa's 1996 Constitution was the result of widespread consultation, and endorsed by a free and fair referendum. The supremacy of the Constitution is one of the fundamental values of the Republic. Chapter 5 of the Constitution provides for the election and removal of the President by the National Assembly, and limits the president's term of office to two five-year terms. Since the promulgation of the existing democratic Constitution, no South African President has attempted to amend the Constitution to obtain a third term.

The African National Congress (ANC) as the ruling party maintains a strong majority in the national legislature and eight of the nine provincial legislatures. Only one province, the Western Cape, and a few municipalities are led by the opposition Democratic Alliance (DA).

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<sup>20</sup> South African Human Rights Commission Annual Report 2009: 180, 191; APRM CRR opcit 286-287.

<sup>21</sup> <http://www.eisa.org.za/EISA/aucharter.htm> (accessed on 11 March 2013).

<sup>22</sup> Mangu, AMB (2012). "Civil Society and the Promotion of the African Charter on Democracy, Elections, and Governance", paper read at the Regional Workshop on "Civil Society and the African Charter on Democracy, Elections and Governance", Pretoria, South Africa, 17-18 May 2012.

### 2.3.2 The Culture of Democracy and Peace

The ACDEG commits state parties to safeguard the freedoms of expression, assembly and association, and ensure equal participation by all citizens. The South African Constitution protects these freedoms in Sections 16, 17 and 18. South Africa has a free and independent media as well as an active and vocal civil society that operates without interference from government. In recent years, however, both media and civil society have expressed concern over attempts by government to limit these rights.

The Regulation of Gatherings Act No. 205 of 1993 protects the right to hold peaceful assemblies, protests, pickets and presentation of petitions. However, implementation of the Act remains a challenge as the constitutional right to hold demonstrations, protest and picket is restrained by police discretion to authorise marches. This differs little from the Apartheid era where marches were prohibited and police had the power to authorise marches. The South African Police Service reported 10,748 peaceful gatherings in the period 2010-2011, and a further 1,214 violent protests involving the arrest of 3,543 people. A 2011 report by the Centre for the Study of Violence and Reconciliation notes that the police in South Africa play a vital role in determining whether a protest turns violent, since early intervention can prevent further violence, while over-zealous police action can escalate confrontation.<sup>23</sup> Police action during protests has led to civilian deaths in a number of widely reported cases, particularly the death of community activist Andries Tatane during a service delivery protest in April 2011 in Ficksburg, Free State Province, and the widely publicised deaths of 34 striking miners in Marikana in the North West Province in August 2012.

### 2.3.3 Democratic Institutions

The ACDEG commits state parties to empower the judiciary to uphold the constitution and hear appeals on electoral matters. South Africa's courts, including tribunals and forums, execute their functions independently and with impartiality. Mechanisms are in place for litigants to challenge the competence and impartiality of the judiciary. Rights to justice in administrative action of the government are protected as well as the right for individuals to access the courts. The Public Protector and the South African Human Rights Commission effectively and independently protect human rights. There are concerns, however, that some critical institutions have been rendered ineffective as a result of political interference, in particular the Judicial Services Commission and the National Prosecuting Authority.<sup>24</sup> Following a series of high profile Constitutional Court judgments against the state, politicians and senior government officials have been openly hostile towards the judiciary, including calling for a judicial review, which has been interpreted by civil society as an effort to curtail the power of the courts.<sup>25</sup>

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<sup>23</sup> Gould Chandre (2012). *Public Protest and Violence: What We Need to Know*. Institute for Security Studies. 26 September 2012.

<http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=329283&sn=Marketingweb+de+tail> ; South African Police Service. *Crime Statistics Overview 2011/2012 Presentation*.

[http://www.saps.gov.za/statistics/reports/crimestats/2012/downloads/crime\\_statistics\\_presentation.pdf](http://www.saps.gov.za/statistics/reports/crimestats/2012/downloads/crime_statistics_presentation.pdf) ; The Centre for the Study of Violence and Reconciliation. *The Smoke that Calls*. July 2011.

<http://www.csvr.org.za/docs/thesmokethatcalls.pdf>

<sup>24</sup> Centre for Constitutional Rights (2012). *Human Rights Report Card 2012*. [http://us-cdn.creamermedia.co.za/assets/articles/attachments/43963\\_13\\_03\\_21\\_hrrc.pdf](http://us-cdn.creamermedia.co.za/assets/articles/attachments/43963_13_03_21_hrrc.pdf)

<sup>25</sup> Tamukamoyo Hamadziripi (2012). *Double Speak About Judicial Reform In South Africa Raises Alarm Bells*. Institute for Security Studies. 23 March 2012. <http://www.issafrica.org/iss-today/double-speak-about-judicial-reform-in-south-africa-raises-alarm-bells>



### 2.3.4 Democratic Elections

The ACDEG addresses effective electoral administration and voter registration and participation. Competitive, transparent, peaceful, free and fair elections at the municipal, provincial and national levels are held regularly in South Africa under the supervision of the Independent Electoral Commission that is independent and impartial and often hailed as the continent's model electoral body. The Electoral Institute for the Sustainability of Democracy in Africa, following their observer mission to South Africa for the April 2009 national and provincial elections, concluded that the polls were conducted in a peaceful, transparent and efficient manner.<sup>26</sup>

### 2.3.5 Political, Economic and Social Governance

The ACDEG directs state parties to promote gender balance and equality in the governance and development processes, as well as in public and private institutions. The extent of women's participation in government in South Africa is one of the highest on the African continent. In 2005 South Africa appointed its first woman Deputy President. Diplomatic appointments of women have increased significantly. In 2001, only 8 women, constituting 17.4 per cent of the total number, were serving as heads of missions abroad. This number increased to 24.2 per cent in 2005. In 2008 women accounted for 36 per cent of appointed ambassadors, high commissioners and general consuls.

Economic inequality undermines the ability of citizens to participate fully in the democratic process. Article 31 of the ACDEG recognises the importance of providing healthcare, education and employment in securing active citizenship.<sup>27</sup> In the 2012 SAHRC annual report, its Chairperson Advocate Mushwana emphasised that, "Notwithstanding the progress that has been attained within our country, we are living in a time when inequality has increased. Food insecurity affects over 1.4 million South Africans and yet we are not a poor country".<sup>28</sup> More recently, commemorating International Women's Day, SAHRC Deputy Chairperson Pregs Govender noted high levels of poverty, inequality, unemployment and violence particularly affecting women and girls.<sup>29</sup>

According to the Human Rights Card published by the Centre for Constitutional Rights in March 2013, the quality of basic education and public health services was unacceptably poor and efforts to address problems and realise socio-economic rights were increasingly being eroded by corruption in the public service.<sup>30</sup> Poor delivery of services at municipal and provincial levels is also seen to have contributed to increasing the number of service delivery protests across the country.<sup>31</sup>

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<sup>26</sup> Electoral Institute for the Sustainability of Democracy in Africa (2009). *EISA Election Observer Mission Report South Africa: National and Provincial Elections*. 22 April 2009.  
<http://www.eisa.org.za/PDF/sou2009eom.pdf>

<sup>27</sup> In a population of 50.5 million, 12.7 million South African have jobs, 13.8 million receive social welfare grants and only five million pay taxes. HURISA presentation. Oxfam: South African Role in the Region, 16 September 2013.

<sup>28</sup> Mushwana, M. L (2012). "Statement by the Chairperson", *16<sup>th</sup> SAHRC Annual Report 2012*, iii.  
<http://www.sahrc.org.za/home/21/files/SAHRC%202012%2012%20Sept.pdf>

<sup>29</sup> <http://www.sahrc.org.za/home> (accessed on 10 March 2013).

<sup>30</sup> Centre for Constitutional Rights (2012). *Human Rights Report Card 2012*.

<sup>31</sup> Gould, Chandré (2012).

## 2.4 Preventing and Combating Corruption

The African Union Convention on Preventing and Combating Corruption represents regional consensus on the prevention and criminalisation of corruption. The Convention covers bribery (domestic or foreign), diversion of property by public officials, trading in influence, illicit enrichment, money laundering, and concealment of property. This section of the report assesses the existence of enabling legislation, the effectiveness of laws and initiatives, and the role of the media and civil society in reporting on corruption.

South Africa is a state party to the CPCC as well as the SADC Protocol against Corruption<sup>32</sup> and the UN Convention Against Corruption.<sup>33</sup> While the CPCC is not mentioned explicitly in anti-corruption campaigns by either government or civil society, various initiatives embody its principles.<sup>34</sup>

### 2.4.1 Enabling Legislation for Combating Corruption and Abuse of Office

Article 5 of the Convention directs member states to adopt legislation, authorities and control mechanisms to prevent corruption. South Africa has established constitutional and legislative bodies, passed several pieces of legislation and adopted several Codes of Ethics and strategies. Constitutional legislative bodies and frameworks include the Public Protector, the Auditor-General and the Director of Public Prosecutions. Anti-corruption legislation includes the following:

1. Executive Members Ethics Act (1998)
2. Public Finance Management Act (1999)
3. Protected Disclosure Act (2000)
4. Promotion of Access to Information Act (2000)
5. Financial Intelligence Centre Act (2001)
6. Prevention and Combating of Corruption Activities Act (2004).

The Parliamentary Code of Ethics (1997) protects legislators from conflict of interest through the system of financial disclosure, while the Code of Ethics (2000) requires public officers, including the President, to declare their assets. The tripartite National Anti-Corruption Forum was launched in 2001, the Comprehensive Public Service Anti-Corruption Strategy was approved by cabinet in 2002, and an Anti-Corruption Task Team was established in 2010.

Despite the existence of strong and far-reaching legislation, corruption remains pervasive in both the public and private sectors in South Africa. In the Transparency International Corruption Index released in December 2012, South Africa dropped from 64<sup>th</sup> position the previous year to 69<sup>th</sup> out of 176 countries.<sup>35</sup> Corruption Watch, a non-governmental organisation launched in January 2012 on the initiative of office bearers of the Congress of South Africa Trade Unions, reported that it received 945 reports of alleged corruption in

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<sup>32</sup> Adopted in Malawi on the 14<sup>th</sup> August 2001.

<sup>33</sup> Adopted by the General Assembly on the 31<sup>st</sup> October 2003.

<sup>34</sup> The Prevention and Combating of Corrupt Activities Act (PCCAA) was adopted in 2004. Following this, the National Anti-Corruption Forum was established. The Public Protector's competency to handle offences under Chapter 2 of the PCCAA strengthens the CPCC.

<sup>35</sup> Transparency International (2012). *Corruption Perceptions Index 2012*.  
<http://www.transparency.org/cpi2012/results>

the first nine months of its operation. Reports related to a wide range of incidents involving traffic police, departments of health and education, hospitals and clinics, housing, motor vehicle licensing and municipalities.<sup>36</sup>

Various government ministers have made public statements regarding the need to fight corruption. In his budget speech delivered in the National Assembly in February 2013, Finance Minister Pravin Gordhan warned that the South African Revenue Service would monitor the lifestyles of those who control state tender budgets and a chief state procurement officer would be appointed.<sup>37</sup> In a statement made on 5 March 2013, Public Service and Administration Minister Lindiwe Sisulu held that her department was amending the Public Service Act to transform its anti-corruption unit into an anti-corruption bureau. She added that the current system did not have enough “muscle and power” to be effective since it did not have the necessary investigative capacity and powers. Minister Sisulu announced a range of new and revived initiatives such as prohibitions on civil servants to conduct business with the state, an enforced post-employment cooling off period for civil servants, the establishment of anti-corruption and *Batho Pele* (“people first”) hotlines, a school of government for civil servants, and an office of super-director-general in the Department which would enable oversight of all directors-general.<sup>38</sup>

Despite these efforts, consistent public reports and high profile cases demonstrate little progress being made in effectively fighting the scourge. Willie Hofmeyr, then head of the Special Investigating Unit, told South Africa’s Parliament in October 2011 that between R25-billion and R30-billion of government’s annual procurement budget was lost to corruption, incompetence and negligence.<sup>39</sup> Two years later, in March 2013, the Auditor-General’s 2011/2012 audit found R24.8 billion had been lost through wasteful state expenditure by provincial departments and entities, particularly in the North West, KwaZulu-Natal and Free State Provinces. The Auditor-General noted general stagnation since the 2010/2011 report, and identified poor internal controls, weak leadership and a disregard for procurement rules as major contributors towards the poor audit outcomes.<sup>40</sup> Like xenophobia, poverty and unemployment, the civil society report on the implementation of the African Peer Review Mechanism put corruption in “red” and considered it an area where no progress or very little progress had been made. There appears to be little evidence of this deficiency being addressed by government in the near future.<sup>41</sup>

## 2.4.2 Civil Society and Media

Civil society and the media in South Africa are actively involved in documenting and reporting cases of corruption in government and the private sector. While reports may

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<sup>36</sup> Rauch, Janine and Johannes Liezemarie (2012). *Citizens Reporting Corruption in South Africa*. Corruption Watch.  
[http://www.corruptionwatch.org.za/sites/default/files/citizens%20reporting%20corruption%20in%20south%20africa%20\(2\).pdf](http://www.corruptionwatch.org.za/sites/default/files/citizens%20reporting%20corruption%20in%20south%20africa%20(2).pdf)

<sup>37</sup> Ibid.

<sup>38</sup> Booysen op cit 14.

<sup>39</sup> Corruption Watch. *Economic Impact of Corruption*. <http://www.corruptionwatch.org.za/content/economic-implications>

<sup>40</sup> Auditor-General South Africa. *Consolidated General Report on National and Provincial Audit Outcomes. 2011/2012*; “25 Billion Down the Drain”. *City Press*. 17 March 2013.

<http://www.citypress.co.za/politics/r25%E2%80%89billion-down-the-drain/>

<sup>41</sup> Implementing the APRM, Views from Civil Society, South Africa Report, SAIIA, CPS, AfriMAP, OSISA, OSF-SA, June 2011, 8, 29-30, 57-58.

attract the dissatisfaction of implicated politicians or state officials in the form of denials, accusations or threats,<sup>42</sup> both the media and civil society operate with relative freedom.

South African citizens and the media have a legal right to access state information as set out in the Promotion of Access to Information Act of 2000.<sup>43</sup> However, in 2010 the Protection of State Information Bill was introduced which seeks to regulate the classification, protection and dissemination of state information. Although multiple amendments have been made to limit the bill, it still prescribes harsh sentences for those who publish classified information even if they are doing so in the public interest.<sup>44</sup> At the time of writing, the bill has been passed by the National Assembly and awaits the approval of the President. Media and civil society have called for greater protection for whistleblowers, activists and the journalists who could be potentially charged under the bill for publishing evidence of government maladministration and corruption.<sup>45</sup>

### **2.4.3 Confiscation and Seizure of the Proceeds and Instrumentalities of Corruption**

Article 16 of the CPCC directs state parties to adopt measures to confiscate and repatriate the proceeds of corruption.

In 2010, South Africa set up an Anti-Corruption Task Team mandated to investigate criminal cases involving the seizure of more than R5 million. During a media briefing in February 2013, then Minister of Justice and Constitutional Development Jeff Radebe reported that since the establishment of the Anti-Corruption Task Team (ACTT) the criminal assets of 59 persons to the value of R816 million had been frozen, and nearly R78 million was forfeited and returned to the state. The ACTT, working with the Department of Rural Development and Land Reform, had also recovered eight farms valued at R133 million.<sup>46</sup>

## **2.5 Summary of Findings**

- South Africa is committed to a human rights dispensation as demonstrated in the constitutional and legislative frameworks as well as ratification of democratic and human rights instruments, such as the African Charter on Human and Peoples' Rights, the African Charter on Democracy, Elections and Governance, and the Convention on Combating and Preventing Corruption. However, these treaties are not domesticated in South Africa as there is no specific legislation which gives effect to provisions of these African Union instruments.

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<sup>42</sup> South African National Editors Forum. *SANEF Expresses Outrage at Reports that Journalists are Under Threat*. 19 January 2010.

[http://www.sanef.org.za/news/entry/sanef\\_expresses\\_outrage\\_at\\_reports\\_that\\_journalists\\_are\\_under\\_threat/](http://www.sanef.org.za/news/entry/sanef_expresses_outrage_at_reports_that_journalists_are_under_threat/)

<sup>43</sup> Promotion of Access to Information Act of 2000. Available at

<http://www.info.gov.za/view/DownloadFileAction?id=68186>

<sup>44</sup> Protection of State Information Bill 2010. Available at [http://www.r2k.org.za/wp-content/uploads/Protection-of-State-Information-Bill-POSIB\\_bill06D-2010.pdf](http://www.r2k.org.za/wp-content/uploads/Protection-of-State-Information-Bill-POSIB_bill06D-2010.pdf).

<sup>45</sup> Right to Know Campaign (2013). *Petition the President: Stop the Secrecy Bill*. 29 April 2013.

<http://www.r2k.org.za/2013/04/29/president-stop-secrecy-bill/>

<sup>46</sup> Crime Prevention, Safety and Security Cluster (JCPS). Post-State of the Nation Address media briefing by Minister of Justice and Constitutional Development Jeff Radebe. South African Government Information. 24 February 2013. <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=34427&tid=99366>

- The South African government is not fully complying with its duty to popularise the African Charter on Human and Peoples' Rights through education, teaching and research as required under Article 25.
- The South African government is not regularly submitting periodic reports to the African Commission on Human and Peoples' Rights to show progress and developments in the implementation of the Charter in South Africa.
- National institutions are not provided with sufficient resources to enable them to promote and execute all basic fundamental rights in the Bill of Rights as provided by the Constitution and legislation under which these were established.
- High poverty levels are more widespread in historically marginalised communities, affecting mostly women, children and youth. These communities often face delays in the delivery of basic necessities such as water and sanitation. While freedom of assembly and expression is protected in South Africa, the questionable use of force by police in managing gatherings has led to the deaths of protesters and strikers in multiple high profile cases.
- Despite progressive legislation promoting the rights of both citizens and non-nationals, the right of movement for foreign nationals, especially African immigrants, continues to be impeded by growing levels of xenophobia and violence. Violations of the rights of foreign nationals (or those perceived as foreign nationals) include physical attacks, attacks on property and administrative barriers.
- Corruption has increased within state departments, despite rigorous legislation, policy and programmes to identify and address corruption. While the AU Convention on Combating and Preventing Corruption is among the instruments ratified by South Africa to curb corruption, there is a lack of information about the CCPC at the domestic level.
- There are efforts to silence civil society, including human rights defenders and the media, through the enactment of laws and policies designed to discourage them from functioning as whistleblowers.

## **2.6 Recommended Actions**

- ☑ The South African government must comply with its treaty obligations and submit all outstanding reports on the African Charter on Human and Peoples' Rights to the African Commission on Human and Peoples' Rights.
- ☑ The South African government should raise awareness of all AU regional instruments including the African Charter on Human and Peoples' Rights; the African Charter on Democracy, Elections and Governance; and the Convention on Combating and Preventing Corruption.
- ☑ The South African government should adequately fund national institutions to enable them to fully meet their wide constitutional and legislative mandates and make an impact in poor communities.
- ☑ The South African Police Service, as well as organisers of demonstrations, including civil society organisations, trade unions and municipalities, should be empowered with knowledge on the provisions of the Regulation of Gatherings Act for proper use and enforcement in accordance with constitutional human rights.
- ☑ The South African government should ensure implementation of the Reprisals Resolution passed by the African Commission on Human and Peoples' Rights for the protection of human rights defenders.

- ☑ Civil society organisations' activities and programmes, as well as operations of the media, are protected by the constitution. Laws created to undermine their functions and to stop them from exposing malpractice in state institutions should be repealed. The South African government should use the Model Law on Information Law developed by Advocate Tlakula and launched at the 53<sup>rd</sup> Session of the African Commission on Human and Peoples' Rights as a guide for strengthening freedom of expression, access to, and dissemination of, information.

## CHAPTER THREE

### AGRICULTURE AND CONSERVATION OF NATURE AND NATURAL RESOURCES

#### 3.1 Introduction

This section of the Report analyses South Africa's implementation of the New Partnership for Africa's Development (NEPAD) Comprehensive Africa Agricultural Development Plan (CAADP) of July 2003, the African Convention on the Conservation of Nature and Natural Resources (2003), the African Mining Vision of February 2009 and the Sharm El-Sheikh Commitments for Accelerating the Achievement of Water and Sanitation Goals in Africa of July 2008.

**Table 2: Legal Instruments for Agriculture and Natural Resources**

Legal Instrument	CAADP	African Convention on the Conservation of Nature & Natural Resources <sup>47</sup>	AMV	Sharm el-Sheikh Commitments
Legal nature	Not a treaty	Treaty	Not a treaty	Not a treaty
Date of adoption	July 2003	15 September 1968	October 2008	30 June-1 July 2008
Date of entry into force	NA	16 June 1969	NA	NA
Date of signature by SA	No	18 April 2012	NA	NA
Date of ratification	NA	No	NA	NA
Date of deposit of instrument	NA	No	NA	NA

#### 3.2 The Comprehensive Africa Agriculture Development Programme (CAADP)

The Comprehensive Africa Agriculture Development Programme (CAADP) was adopted by the AU's New Partnership for Africa's Development (AU/NEPAD) in July 2003. The overall goal of CAADP is to "help African countries reach a higher path of economic growth through agriculture-led development, which eliminates hunger, reduces poverty and food insecurity, and enables expansion of exports." CAADP is a growth-oriented agriculture development agenda, aimed at increasing agriculture growth rates to six per cent per year to generate the wealth needed for rural communities and households in Africa to prosper. To achieve this goal, CAADP focuses its interventions on the basis of four key pillars to achieve measurable outcomes:

- Pillar 1: Extending the area under sustainable land management and reliable water control systems

<sup>47</sup> This Convention was revised in July 2003.

- Pillar 2: Improving rural infrastructure and trade-related capacities for market access
- Pillar 3: Increasing food supply, reducing hunger, and improving responses to food emergency crises
- Pillar 4: Improving agriculture research, technology dissemination and adoption.

As one of the architects of NEPAD, South Africa contributed to the drafting of the CAADP but has not yet signed the CAADP Compact. The Department of Agriculture, Fisheries and Forestry (DAFF), NEPAD and FAO jointly hosted a seminar on CAADP on 20 October 2011 in Pretoria to promote awareness of the programme and develop a plan of action for South Africa, including the establishment of a CAADP Country Team.<sup>48</sup> Since then, provincial consultations have been held in eight of the country's nine provinces, identifying provincial priorities and establishing provincial CAADP teams. The contributions from the consultations are currently being used to develop the national CAADP Compact, as well as related investment plans on agriculture, food and nutrition.<sup>49</sup>

Although South Africa is not yet fully implementing CAADP, this report attempts to assess national progress based on national budgetary allocations, the levels of food security, and the extent of participation in agriculture.

### **3.2.1 National Budgetary Allocations**

The implementation of the CAADP is primarily the responsibility of the government, particularly the Department of Agriculture. The Maputo Declaration committed the AU Member states to dedicate at least ten per cent of national annual budgets to agriculture (until 2008). Although this period has ended, the ten per cent goal is frequently cited. As the four pillars overlap, the Department of Agriculture also works with other ministerial departments. Since 2010, the national budget allocations for these departments have increased as demonstrated in Table 3 below. While these figures are informative, compliance with CAADP also requires the development of an integrated investment plan involving agricultural development, research, extension and food security.

In order to inform the development of a CAADP-compliant investment plan, the South African government plans to release a study in 2014 which assesses the quantity, quality and composition of financial resources allocated and expended in the agriculture sector. The study, led by the Department of Agriculture, Forestry and Fisheries, focuses on the budgets and expenditure of national and provincial governments, specifically in the agriculture sector.<sup>50</sup>

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<sup>48</sup> Communiqué of the South Africa Stakeholders Seminar on CAADP. 20 October 2011.

[http://www.nda.agric.za/doaDev/CAADP/docs/Communique\\_of\\_Stakeholders\\_Seminar-20Oct2011.pdf](http://www.nda.agric.za/doaDev/CAADP/docs/Communique_of_Stakeholders_Seminar-20Oct2011.pdf)

<sup>49</sup> Status Report on CAADP Implementation in South Africa. 4 December 2013.

<http://www.scoop.int/t/agriculture-food-security-and-nutrition-in-africa/p/4012106887/2013/12/04/status-report-on-caadp-implementation-in-south-africa>

<sup>50</sup> Ibid.



**Table 3: Financial Resources Allocated and Expended in the Agriculture Sector**

<b>Financial Year</b>	<b>2009-2010 Total Budget R 399 643 150</b>	<b>2010-2011 Total Budget R 441 517 932</b>	<b>2011-2012 Total Budget R 499 480 936</b>	<b>2012-2013 Total Budget R 543 629 518</b>
Total Budget for the Department of Agriculture, Forestry and Fisheries	R 2 792 758	R 3 657 984	R 4 719 741	R 5 798 772
Total Budget for the Department of Land Affairs/Rural Development and Land Reform	R 6 099 058			
Total Budget for the Department of Water	R 7 983 827	R 7 996 592	R 8 936 228	R 8 812 661
Total Budget for the Department of Transport	R 23 734 829	R 25 086 282	R 35 084 013	R 38 828 962
Total Budget for the Department of Trade and Industry	R 6 344 192	R 6 150 108	R 6 786 896	R 9 092 055
Total Budget for the Department of Public Works	R 5 298 000	R 6 446 325	R 7 619 256	R 7 993 796
Total Budget for the Department of Science and Technology	R 4 234 111	R 4 615 541	R 4 404 618	R 4 955 930
Total Budget for the Department of Education	R 21 287 171 Basic Education + Higher Education and Training	R 6 166 200 (BE) R 23 720 698 (HET)	R 13 460 134 (BE) R 28 228 589 (HET)	R 16 343 678 (BE) R 31 500 357 (HET)
Total Budget for the Department of Health	R 17 068 094	R 21 496 985	R 25 731 554	R 27 557 018
Total Budget for the Department of Environmental Affairs (EA) and Tourism (TOUR)	R 3 480 783 EA plus TOUR	R 2 607 794 (EA) R 1 151 836 (TOUR)	R 2 846 063 (EA) R 1 242 876 (TOUR)	R 4 512 161 (EA) R 1 387 321 (TOUR)
Total Budget for the Department of Social Development	R 86 408 338	R 95 929 061	R 104 732 897	R 112 216 761
Total Budget for the Department of Mineral and Energy/Energy and Mineral Resources	R 4 647 196 Energy (EN) plus Mineral Resources (MR)	R 5 535 380 (EN) R 1 030 016 (MR)	R 6 089 902 (EN) R 1 038 212 (MR)	R 5 805 903 (EN) R 1 169 062 (MR)

Source: Appropriation Acts No 16 of 2009, No 3 of 2010, No 11 of 2011, and No 7 of 2012.

### 3.2.2 Food Security

Pillar three of CAADP directs states to direct their efforts towards increasing food supply, reducing hunger, and improving responses to food emergency crises. South Africa is a net exporter of agricultural commodities and has a high per capita income. Despite this, about 14 per cent of the population is thought to be vulnerable to food insecurity and 25 per cent of children under the age of six are estimated to have had their development stunted by malnutrition. Disparities in food security in South Africa are often related to issues of geographic location, gender and race.<sup>51</sup> Food security at the household level has been negatively affected by the general global economic decline of the past years<sup>52</sup> resulting in steep food and fuel prices, high energy costs and increasing interest rates.<sup>53</sup>

The government has set up numerous programmes including the Integrated Food Security and Nutrition Programme (IFSNP) and the Integrated Food Security Strategy with the aim of achieving physical, social and economic access to safe and nutritious food. Complementing this, the Zero Hunger Campaign was introduced in 2010 focusing primarily on increasing production, particularly among smallholder farmers.<sup>54</sup> While these programmes have been found to be beneficial, studies indicate that they need to be implemented more effectively to further alleviate food insecurity.<sup>55</sup>

### 3.2.3 Participation in Agriculture

Primary agriculture contributes about three per cent to South Africa's gross domestic product (GDP) and provides 7 per cent of formal employment. Overall, the agro-industrial sector comprises approximately 12 per cent of Gross Domestic Product (GDP).<sup>56</sup> In South Africa, 8.5 million people are estimated to depend directly or indirectly on agriculture for their employment and income.<sup>57</sup> The number of people employed in the commercial farming sector decreased by 5.1 per cent from 866,455 employees in 2010 to 821,967 employees in 2011. The decrease in 'full-time' and 'casual and seasonal' employees were 6.0 per cent and 4.2 per cent respectively.<sup>58</sup>

The 1913 Land Act declared it illegal for black native South Africans to acquire land outside scheduled native reserves which covered only a small fraction of the country. This historical legacy has left South Africa's agricultural sector divided. The commercial farming sector, comprising an estimated 37,000 members, currently produces 90 per cent of the country's agricultural output. Subsistence and smallholder farming, conducted primarily by the 25 million people living in South Africa's rural areas, produce 10 per cent of agricultural output.<sup>59</sup> While the commercial sector is generally strong and financially self-

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<sup>51</sup> Koch Josee (2011). *The Food Security Policy Context in South Africa*. International Policy Centre for Inclusive Growth. April 2011. <http://www.ipc-undp.org/pub/IPCCountryStudy21.pdf>

<sup>52</sup> South Africa Yearbook - 2011/2012. Agriculture, Forestry and Fisheries. [http://www.gcis.gov.za/sites/www.gcis.gov.za/files/docs/resourcecentre/yearbook/2011/08\\_Agriculture.pdf](http://www.gcis.gov.za/sites/www.gcis.gov.za/files/docs/resourcecentre/yearbook/2011/08_Agriculture.pdf)

<sup>53</sup> Labadarios Demetre et al (2011). Food Security in South Africa: A Review of National Surveys. *Bulletin of the World Health Organization 2011*. <http://www.who.int/bulletin/volumes/89/12/11-089243/en/>

<sup>54</sup> South Africa Yearbook - 2011/2012. Agriculture, Forestry and Fisheries.

<sup>55</sup> Labadarios, Demetre et al (2011). Food Security in South Africa: A Review of National Surveys. *Bulletin of the World Health Organization 2011*.

<sup>56</sup> South Africa Government Information. *Agriculture*. <http://www.info.gov.za/aboutsa/agriculture.htm>

<sup>57</sup> South Africa Yearbook - 2011/2012. Agriculture, Forestry and Fisheries.

<sup>58</sup> Statistics South Africa (2012). Agricultural Survey 2011. 28 November 2012.

[http://www.statssa.gov.za/agriculture/Documents/Surveys/2011\\_Survey.pdf](http://www.statssa.gov.za/agriculture/Documents/Surveys/2011_Survey.pdf)

<sup>59</sup> Address by President Jacob Zuma at the African Farmers Association of South Africa's gala dinner. 22 October 2012. <http://www.thepresidency.gov.za/pebble.asp?reid=7058>; Smallholder Farmers Need More

sufficient, the latter relies heavily on government support for survival.<sup>60</sup> The amount of support available to smallholder farmers has steadily increased over the years, but the support systems are criticised as being uneven, sometimes poorly conceptualised and do not attain the scale necessary to have a substantial impact.<sup>61</sup> Recognising this, the Department of Agriculture has pledged to increase support to smallholder farmers from a baseline of 200,000 to 250,000 by 2014 to increase their access to markets, finances, infrastructure support, training and production inputs. The Department of Agriculture is also in the process of compiling a Strategic Plan for Smallholder Producers which specifically seeks to address tenure insecurity and lack of functional land rental arrangements; lack of alignment amongst producer support programmes; lack of accessible markets and high transactions costs; lack of marketing skills among producers; and lack of access to finance.<sup>62</sup>

### **3.3 The African Convention on the Conservation of Nature and Natural Resources**

The 1968 Convention on the Conservation of Nature and Natural Resources sets out a framework for the protection of the environment and the sustainable use of natural resources. It deals with soil, water, flora and fauna resources, species, and conservation areas that need to be protected. It also regulates the traffic in specimens and trophies. This Convention was revised in July 2003 but has not come into force a decade later. This raises the question of whether AU member states take it seriously.<sup>63</sup>

When the 1968 Convention was adopted and entered into force, South Africa was not yet a democracy and was thus considered a pariah state by the OAU. Accordingly, it was not entitled to become a party to this Convention. Following the revision of the Convention in 2003, South Africa became a signatory on 18 April 2012 in Addis Ababa, and the Portfolio Committee on Water and Environmental Affairs recommended that South Africa should proceed with the ratification.<sup>64</sup> While not yet bound by this Convention, South Africa has passed several pieces of legislation and adopted policies and programmes to promote the conservation of nature and natural resources. Between 2003 and 2007, Parliament passed at least ten Acts in this area.<sup>65</sup>

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Support. 22 October 2012. <http://www.southafrica.info/business/economy/development/agriculture-231012.htm#.UbeRXpw8CSo>

<sup>60</sup>Joemat-Pettersson, T. (2013). "Collaboration in agriculture will assure our food security", *The Sunday Independent*, March 17 2013.

<sup>61</sup> Michael Aliber & Ruth Hall (2013). *Support for Smallholder Farmers in South Africa: Challenges of Scale and Strategy*. Presentation at HSRC Seminar Series on Sustainable Rural Development in South Africa. Institute for Poverty, Land and Agrarian Studies, University of the Western Cape. 25 February 2013. <http://www.hsrc.ac.za/uploads/pageContent/2950/DSAspecialissueALIBER.pdf>

<sup>62</sup> Southern Africa Food Lab. *Supporting Small Scale Farmers*. <http://www.southernafricafoodlab.org/innovation-groups/small-scale/>

<sup>63</sup> C Heyns & M Killander (2006). *Compendium of Key Human Rights Documents of the African Union*, 2<sup>nd</sup> edition, Pretoria University Press, Pretoria, 2006, 74.

<sup>64</sup> Report of the Portfolio Committee on Water and Environmental Affairs on the African Convention on the Conservation of Nature and Natural Resources of 2003, in terms of Section 231 (2) of the Constitution of 1996. <http://www.pmg.org.za/files/doc/2012/comreports/121122pcwaterreport.htm>

<sup>65</sup> See, for instance, Environment Conservation Amendment Act of 2003; National Environmental Management Amendment of 2003; National Environment Management: Air Quality Act of 2004; National Environment Act: Protected Areas Amendment Act of 2004; National Environmental Management: Biodiversity Act No. 10 of 2004; National Environmental Management Act of 2008; National Environmental Management: Protected Areas Amendment Act of 2009; National Environmental Laws Amendment Act of 2009; Forestry Laws Amendment Act of 2005 (amending National Forests Act of 1998); and Astronomy Geographic Advantage Act of 2007.

### **3.3.1 National Authorities**

Article 21 of the Convention on the Conservation of Nature and Natural Resources directs state parties to establish or designate a national authority to implement its provisions and/or establish co-ordinating machinery.

The National Environmental Management Act (107 of 1998) is South Africa's legal framework for environmental management. The Act is founded on a number of modern principles including sustainable development, inter-generational equity, ecosystem-based management, integration, precaution; the polluter-pays principle, and the human right to a decent environment. Protected areas are established under the National Environmental Management: Protected Areas Act (57 of 2003) and the Marine Living Resources Act (18 of 1998) which also provides for fisheries regulation.<sup>66</sup> The Department of Agriculture, Forestry and Fisheries, the Department of Water Affairs, and the Department of Environmental Affairs are involved in the formulation and implementation of policies in these areas.

Several governmental departments are involved in the conservation of nature and natural resources, including the Departments of Agriculture, Education, Transport, Land Affairs/Rural Development and Land Reform, Water Affairs and Forestry and the Department of Science and Technology. The allocations for these departments in the national budget are continuously being increased.<sup>67</sup>

### **3.3.2 Sustainable Development and Natural Resources**

Article 14 of the African Convention on the Conservation of Nature and Natural Resources directs state parties to treat conservation of the environment and natural resources as an integral part of national and local development planning.

The South African cabinet approved a Sustainable Development National Action Plan and Strategy in November 2011. The strategy aims to integrate principles of sustainability into policies, legislation, strategies and action plans across all spheres of government. The implementation of the strategy is co-ordinated by a national committee on sustainable development based within the Department of Environmental Affairs. This strategy builds on the 2008 National Framework for Sustainable Development.<sup>68</sup>

### **3.3.3 Land and Soil**

Article Six of the Convention on the Conservation of Nature and Natural Resources directs state parties to take measures to conserve and prevent degradation of the soil, and to develop appropriate land use plans and national policy.

Land use in South Africa has been characterised by the legacy of Apartheid policies that confined 75 per cent of people to live on 13 per cent of the land. This overcrowding has led to severe erosion of the land in some areas of the country, leading to more intensive overuse by subsistence farmers and further degradation. On commercial farms,

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<sup>66</sup> Marine Conservation Agreements: A Practitioner's Guide. Country and State Analyses – South Africa. [http://www.mcatoolkit.org/Country\\_Analyses/South\\_Africa.html](http://www.mcatoolkit.org/Country_Analyses/South_Africa.html)

<sup>67</sup> See section 3.1.1 of this Report.

<sup>68</sup> Department of Environmental Affairs (2012). *National Strategy for Sustainable Development Could Lead to Policy Change*. 7 February 2012. <http://www.sabinetlaw.co.za/environmental-affairs-and-water/articles/national-strategy-sustainable-development-could-lead-policy>

overstocking, mono-cropping, and the ploughing of marginal lands unsuitable for cultivation has also led to soil erosion and desertification.<sup>69</sup> Soil erosion is seen to be one of South Africa's most significant environmental problems, affecting 70 per cent of the country's surface.<sup>70</sup> The Department of Agriculture and the Water Research Commission have supported numerous research projects into the extent of soil erosion in South Africa. The Department of Agriculture also implements the National Land Care Programme focusing on land resource management through the promotion of sustainable use practices in an effort to reduce soil and land degradation.<sup>71</sup> Critics, however, question the actual impact the programme has made in slowing soil erosion.<sup>72</sup>

In relation to land use and development planning, South Africa's law makes municipalities responsible for decision-making, so long as they consult and comply with extensive provincial and national legislation. Decisions are based on comprehensive technical assessments conducted by municipal land use planning officials.<sup>73</sup> Municipalities are obliged to conduct a bottom-up process where the needs of the population are incorporated into an Integrated Development Plan which is then complemented by a technically informed Spatial Development Framework (SDF). In the larger metropolitan areas, conservation maps clearly inform the planning process whereas their use in smaller areas is less consistent. However, illegal land use changes have been reported as prevalent in many municipalities and the enforcement of legal regulations is rare unless a member of the public raises a concern.<sup>74</sup>

### 3.3.4 Water

Article Seven of the Convention on the Conservation of Nature and Natural Resources provides guidance on the management of water use, its availability, conservation and measures to prevent pollution.

South Africa is considered a dry country, averaging 450 mm per annum, which is significantly below the global average of 860 mm. South Africa's available water per capita sits at 1,000 cubic meters per person per year, lower than neighbouring countries that can draw from higher annual rainfall and lower populations. Calculations of run-off, yield and water use indicate that South Africa has enough water to meet the nation's needs in the immediate future,<sup>75</sup> but how long the supply will last is a subject of intense national debate and study. Some predictions indicate that South Africa may require 17.7-billion cubic metres (in comparison to the total current supply of 15-billion cubic metres).<sup>76</sup> South Africa has achieved universal access to a clean water source in urban

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<sup>69</sup> <http://www.botany.uwc.ac.za/envfacts/facts/erosion.htm>

<sup>70</sup> Le Roux, J.J. et al (2007). Monitoring soil erosion in South Africa at a regional scale: review and recommendations. *South African Journal of Science* 103, July/August 2007. [http://repository.up.ac.za/bitstream/handle/2263/5782/LeRoux\\_Monitoringper%20per%20cent282007per%20per%20cent29.pdf?sequence=1](http://repository.up.ac.za/bitstream/handle/2263/5782/LeRoux_Monitoringper%20per%20cent282007per%20per%20cent29.pdf?sequence=1)

<sup>71</sup> South African Government Information. Land Care Programme Summary. <http://www.info.gov.za/aboutgovt/programmes/agriculture/landcare.html>

<sup>72</sup> Erosion is the Cancer of Agriculture. Interview with Lehman Lindeque, President of the International Erosion Control Association, South Africa. *Farmers Weekly*. 18 October 2010. <http://www.farmersweekly.co.za/article.aspx?id=5335&h=Erosion,-the-cancer-of-agriculture>

<sup>73</sup> Wilhelm-Rechmann, Angelika & Cowling, Richard M (2013). Local land-use planning and the role of conservation: An example analysing opportunities. *South African Journal of Science*. March-April 2013. [http://www.sajs.co.za/sites/default/files/publications/pdf/Willhelm-Rechmann1\\_Research%20art.pdf](http://www.sajs.co.za/sites/default/files/publications/pdf/Willhelm-Rechmann1_Research%20art.pdf)

<sup>74</sup> Ibid.

<sup>75</sup> CSIR (2010). *A CSIR Perspective on Water in South Africa 2010*. Report compiled by Suzan Oelofse and Wilma Strydom. [http://www.csir.co.za/nre/docs/CSIR%20Perspective%20on%20Water\\_2010.PDF](http://www.csir.co.za/nre/docs/CSIR%20Perspective%20on%20Water_2010.PDF)

<sup>76</sup> Creamer Media (2012). *Water 2012: A Review of South Africa's Water Sector*.

areas, and in rural areas the share of those with access increased from 66 per cent to 79 per cent from 1990 to 2010.<sup>77</sup> According to the 2011 census, the number of households with access to piped (tap) water in South Africa rose from 80.4 per cent in 1996 to 91.3 per cent in 2011.<sup>78</sup>

As the population increases, however, water resources come under increasing pressure. According to a 2010 report by the Council for Scientific and Industrial Research (CSIR), the quality of the country's water has been on a steady decline owing to increased pollution caused by industry, urbanisation, deforestation, mining, agriculture and power generation, with the situation being exacerbated by outdated and inadequate water treatment and sewage treatment plant infrastructure and unskilled operators.<sup>79</sup>

Water is monitored and regulated by the country's Department of Water Affairs (DWA). Recognising the challenges in drinking water quality and waste water treatment, the DWA introduced the Blue Drop and Green Drop systems in 2008. The 2011 Blue Drop Report shows that the quality of South Africa's drinking water improved over the previous three years.<sup>80</sup> The 2011 Green Drop report, however, showed a negative trend in wastewater treatment services, with the number of systems that scored more than 50 per cent dropping from 49 per cent in 2009 to 44 per cent in 2011. The report highlighted a lack of human capacity and maintenance of treatment systems.<sup>81</sup> In response, the South African government introduced a National Water Resource Strategy in 2012,<sup>82</sup> and has consistently increased spending on water infrastructure. In the 2012 medium term National Budget Review, government allocated over R75 billion to water infrastructure, quality management, resource planning and support to local government.<sup>83</sup>

### **3.3.5 Sharm El-Sheikh Commitments for Accelerating the Achievement of Water and Sanitation Goals in Africa**

This section of the report expands the discussion on water to incorporate consideration of the Sharm El-Sheikh Commitments for Accelerating the Achievement of Water and Sanitation Goals in Africa. The Sharm El-Sheikh instrument also focuses on sanitation as being central to Africa's human capital development. Considered here is the existence of a national policy and regulatory frameworks, the adequacy of implementation, as well as monitoring, evaluation and reporting mechanisms.

The South African Constitution, Water Services Act and Municipal Systems Act set out government's obligations to provide basic municipal services. South Africa published the White Paper on Water Supply and Sanitation Policy in 1994, followed by the formation of the National Sanitation Task Team (NSTT) to co-ordinate sanitation interventions among the national departments. In 1996 the Department of Water Affairs and Forestry (DWAF) launched the National Sanitation Programme, which aimed to eradicate the sanitation

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May 2012. [http://d2zmx6mlqh7q3a.cloudfront.net/cdn/farfuture/1-sXKkbvYX4rPsgR3rORGG90Yx7P8pUW7XuEHLwIcRs/mtime:1366018709/files/120904review\\_0.pdf](http://d2zmx6mlqh7q3a.cloudfront.net/cdn/farfuture/1-sXKkbvYX4rPsgR3rORGG90Yx7P8pUW7XuEHLwIcRs/mtime:1366018709/files/120904review_0.pdf)

<sup>77</sup> WHO/UNICEF (2010). Joint Monitoring Programme for Water Supply and Sanitation: Data Table South Africa, 2010. <http://www.wssinfo.org/data-estimates/table/>

<sup>78</sup> Statistics South Africa. Census 2011. 56-57.

<http://www.statssa.gov.za/Publications/P03014/P030142011.pdf>

<sup>79</sup> [http://www.csir.co.za/nre/docs/CSIR%20Perspective%20on%20Water\\_2010.PDF](http://www.csir.co.za/nre/docs/CSIR%20Perspective%20on%20Water_2010.PDF)

<sup>80</sup> Creamer Media (2012). Water 2012: A Review of South Africa's Water Sector. May 2012

<sup>81</sup> Ibid.

<sup>82</sup> Department of Water Affairs. *National Water Resource Strategy 2012*.

<http://www.dwa.gov.za/nwrs/NWRS2012.aspx>

<sup>83</sup> National Treasury National Budget Review 2012. Chapter 7: Infrastructure.

<http://www.treasury.gov.za/documents/national%20budget/2012/review/default.aspx>

backlog by 2010, and in 2002 the National Sanitation Programme Unit was created within the Department. The National Sanitation Programme Unit was transferred to the Department of Human Settlements (DHS) in 2009, putting DHS in charge of household sanitation infrastructure.<sup>84</sup>

According to South Africa's census data, household sanitation has improved with 60.1 per cent of households using flush toilets (toilets connected to the public sewage system) in 2011, up from 51.9 per cent in 2001. The use of chemical toilets (from 1.9 per cent to 2.5 per cent) and pit latrines with ventilation (from 5.7 per cent to 8.8 per cent) increased slightly, while the use of unventilated pit latrines dropped from 22.8 per cent to 19.3 per cent, and the use of bucket latrines dropped from 4.1 per cent to 2.1 per cent. Municipal waste removal services also improved as compared to 2001, with the number of households enjoying weekly municipal removals increasing from 52.1 per cent to 62.1 per cent.<sup>85</sup>

With these improvements, South Africa has achieved the Millennium Development Goal on sanitation, namely to halve by 2015 the number of people without access to basic sanitation, but challenges remain, particularly at the local government level.<sup>86</sup> According to a 2010 study of 523 community service delivery protests between 2007 and mid-2010, 15 per cent of protests complained about lack of adequate sanitation.<sup>87</sup> Reports indicate that while South Africa's policies have succeeded in achieving set numbers and targets, quality has suffered and the failure rate of the sanitation facilities provided is high.<sup>88</sup> Policies also lack a compulsory minimum standard for basic sanitation service levels, meaning that quality varies around the country.<sup>89</sup> The national regulation and monitoring of sanitation has been negatively impacted by the confusion over responsibilities between the two national departments, the DWA and the DHS.<sup>90</sup>

### 3.3.6 Vegetation Cover

Article Eight of the Convention on the Conservation of Nature and Natural Resources directs state parties to take the necessary steps to ensure the protection, conservation and sustainable use of vegetation cover, including forests, wetlands and marine areas.

South Africa developed a White Paper on Sustainable Forest Development in 1996, revised during 2009, as a policy framework for sustainable forest management.<sup>91</sup> In total,

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<sup>84</sup> Tissington, Kate (2011). *Basic Sanitation in South Africa: A Guide to Legislation, Policy and Practice*. Socio-Economic Rights Institute. July 2011. [http://www.nwu.ac.za/webfm\\_send/42156](http://www.nwu.ac.za/webfm_send/42156)

<sup>85</sup> Statistics South Africa. Census 2011.

<sup>86</sup> Many informal settlements do not have functioning toilets, municipalities are often embroiled in scandals related to the delivery of sanitation, and the government has reneged on a commitment to eradicate the bucket system in informal settlements by the end of 2007.

<sup>87</sup> Jain, J (2011). "Community protests in South Africa: Trends, Analysis and Explanations" *Local Government Working Paper Series* No. 1, Community Law Centre, University of the Western Cape (August 2010); Tissington, Kate (2011). *Basic Sanitation in South Africa: A Guide to Legislation, Policy and Practice*. Social Economic Rights Institute. July 2011.

<sup>88</sup> Water Dialogues-South Africa (2009). "Straight talk to Strengthen Delivery in the Water Services Sector" *WD-SA Synthesis Report*. August 2009; South African Institution of Civil Engineering (2011) "Infrastructure Report Card for South Africa 2011"; Tissington, Kate (2011). *Basic Sanitation in South Africa: A Guide to Legislation, Policy and Practice*. Socio-Economic Rights Institute. July 2011.

<sup>89</sup> Tissington, Kate (2011). *Basic Sanitation in South Africa: A Guide to Legislation, Policy and Practice*. Social Economic Rights Institute. July 2011.

<sup>90</sup> Ibid.

<sup>91</sup> State of the Forests Report: 2007-2009. Department of Agriculture, Forestry and Fisheries. [http://forestry.daff.gov.za/webapp/Documents/Notices/Stateoftheforestsreport\\_web.pdf?action=search&searchType=advanced&category=report](http://forestry.daff.gov.za/webapp/Documents/Notices/Stateoftheforestsreport_web.pdf?action=search&searchType=advanced&category=report)

the forest area in South Africa was last reported by the World Bank in 2011 at 7.6 per cent of total land, a figure that has remained unchanged since 2000.<sup>92</sup>

The economic cost of alien plant invasions at current levels in South Africa is estimated to be R6.5 billion annually. Over the past 15 years, government has invested R3.2 billion in controlling invasive species. Estimates suggest that, had no control been carried out, losses could have been as high as R41.7 billion.<sup>93</sup> Despite this, control operations appear to have been applied to relatively small areas, and in many areas biomes invasions appear to have increased and remain a serious threat.<sup>94</sup>

According to the South African National Biodiversity Institute, with 23 marine protected areas (MPAs), South Africa's coastline is considered relatively well protected. While 23 per cent of the coastline is under MPAs, this is not evenly distributed among bioregions, and only 9 per cent of this is 'no-take'.<sup>95</sup>

South Africa's wetlands are seen as the most threatened of all ecosystems in the country with 65 per cent of South Africa's wetlands threatened (48 per cent critically endangered, 12 per cent endangered and 5 per cent vulnerable). Only 11 per cent of wetland ecosystem types are well protected, with 71 per cent not protected at all.<sup>96</sup> According to South Africa's 2011 National Biodiversity Assessment, South African legislation<sup>97</sup> provides sufficient mechanisms for protection of wetlands, but the "capacity to enforce, coupled with sufficient information to make prudent choices about the sometimes inevitable trade-offs between development and loss of ecosystem services, remains a challenge."<sup>98</sup>

### 3.3.7 Conservation Areas

Article 12 of the African Convention on the Conservation of Nature and Natural Resources directs state parties to establish, maintain and extend conservation areas, and develop and enforce associated legislation and programmes to ensure the long term conservation of biological diversity.

The management and conservation of South Africa's biodiversity is provided for by the National Environment Management Biodiversity Act (10 of 2004) within the framework of the National Environmental Management Act (107 of 1998). According to the 2011 National Biodiversity Assessment, South Africa's total land-based protected area increased from just under 6 per cent in 2004 to 6.5 per cent in 2011. Forty per cent of terrestrial ecosystem types remain threatened (9 per cent critically endangered, 11 per cent endangered and 19 per cent vulnerable) by loss of land attributed to cultivation, mining, forest plantations and urban expansion. Over the last seven years, the government has succeeded in establishing stewardship programmes in which protected areas are declared

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<sup>92</sup> World Bank Data Catalogue. Forest Area (per cent of land area). South Africa. <http://data.worldbank.org/indicator/AG.LND.FRST.ZS>

<sup>93</sup> vanWilgen, Brian W. et al (2012). An assessment of the effectiveness of a large, national-scale invasive alien plant control strategy in South Africa. *Biological Conservation*. Volume 148, Issue 1, April 2012, pp28–38 <http://www.invasives.org.za/resources/downloadable-resources/finish/51-assessment-national-invasive-plant-strategy/332-assessment-national-invasive-plant-strategy.html>

<sup>94</sup> Ibid.

<sup>95</sup> NSBA Marine Protected Areas. Biodiversity GIS Website. <http://bgis.sanbi.org/nsba/marineAreas.asp>

<sup>96</sup> SANBI National Biodiversity Assessment 2011, Synthesis Report. [http://bgis.sanbi.org/nba/NBA2011\\_SynthesisReport\\_lowres.pdf](http://bgis.sanbi.org/nba/NBA2011_SynthesisReport_lowres.pdf)

<sup>97</sup> The legislation includes: National Water Act, Conservation of Agricultural Resources Act (Act 43 of 1983) and National Environmental Management Act (Act 107 of 1998).

<sup>98</sup> SANBI; National Biodiversity Assessment 2011, Synthesis Report.P.82.



on private or communal land. The National Protected Area Expansion Strategy of 2008 identified areas for expansion of the protected areas network.<sup>99</sup>

The National Environment Management Biodiversity Act (10 of 2004) also allows for the listing of endangered species, including critically endangered species, endangered species, vulnerable species, and protected species. Assessments in South Africa show that one in five inland mammal species is threatened; one in five freshwater fish species is threatened; one in seven frog species is threatened; one in seven bird species is threatened; one in eight plant species is threatened; one in twelve reptile species is threatened; and one in twelve butterfly species is threatened. The primary threats are due to loss of natural habitat as a result of cultivation, as well as invasive alien species.<sup>100</sup>

In particular, the plight of the rhinoceros has come under the spotlight in South Africa with multiple civil society campaigns highlighting the adverse effects of poaching. Poaching of the Southern White Rhinoceros increased dramatically from 2008 to meet the growing demand for rhino horn in Southeast Asia. The number of rhino deaths due to poaching in South Africa has risen from only 13 rhinos (white and black) in 2007, to 333 animals in 2010 and 448 (approximately 2.4 per cent of the national population) in 2011.<sup>101</sup>

### **3.4 African Mining Vision**

The African Mining Vision (AMV) that South Africa acceded to in February 2009 aims at consolidating previous “initiatives and efforts made at sub-regional, continental and global levels to formulate policy and regulatory frameworks to maximize the development outcomes of mineral resource exploitation.” This thinking was framed in the context of a major paradox in which a continent blessed with enormous natural resources was also the site of poverty, under-development and low standards of living. The AMV acknowledges this and aims to address the disparities.

This Report recognises the overall objective of the AMV and assesses South Africa’s commitment based on legal and policy frameworks enacted to enhance development and governance of the sector, including whether the management of mineral wealth accrues benefits to communities.

South Africa currently holds some of the world’s richest mining reserves, worth a total estimate of US\$2.5 trillion. South Africa is currently the world’s largest producer of gold and chromium, the fourth largest producer of diamonds and the fifth largest producer of coal.<sup>102</sup> In 2011, mining contributed R260.4 billion (US\$31.5 billion) or 9.8 per cent to South Africa’s gross domestic product and accounted for 37.8 per cent of the country’s total exports of goods.<sup>103</sup>

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<sup>99</sup> Ibid. P.4-5.

<sup>100</sup> Ibid. P.119-120.

<sup>101</sup> Ibid. P.129. Major problem of invasion of alien plants on protected areas and the issue of contaminated water around mining areas soiling biodiversity, Dr S. Zondi.

<sup>102</sup> Donovan, Daniel R (2013). *Prospecting for solutions: The challenges of South Africa’s mining industry*. Consultancy Africa Intelligence. 16 May 2013.

[http://www.consultancyafrica.com/index.php?option=com\\_content&view=article&id=1291:prospecting-for-solutions-the-challenges-of-south-africas-mining-industry&catid=57:africa-watch-discussion-papers&Itemid=263](http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=1291:prospecting-for-solutions-the-challenges-of-south-africas-mining-industry&catid=57:africa-watch-discussion-papers&Itemid=263)

<sup>103</sup> Department of Mineral Resources. <http://www.dmr.gov.za> (accessed on 15 May 2013).

Given its size, it is not surprising that the South African private sector plays a leading role in mining on the continent. For the past 19 years, South Africa has organised the African Mining Indaba (AMI), the world's largest gathering of mining's most influential stakeholders and decision-makers. The AMI has channelled billions of US dollars of foreign investment into the mining value chain. 2012 was a record-breaking year, with more than 7,000 individuals representing more than 1,500 international companies from 100 countries and approximately 45 African and non-African government delegations.

At the domestic level, South Africa has attempted to bring about equitable reform to the mining sector through the promulgation of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA). The Act acknowledges that the country's mineral resources belong to the nation and the State is appointed as custodian of these resources.<sup>104</sup> Building on this, South Africa gazetted the Amended Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry in September 2010 which aims to promote equitable access to the nation's mineral resources; to substantially and meaningfully expand opportunities for the historically disadvantaged to enter the mining and minerals industry and to benefit from the exploitation of the nation's mineral resources; and to promote employment and advance the social and economic welfare of mining communities and labour-sending areas.<sup>105</sup> While the Charter has been applauded for seeking to increase participation in the mining sector, it has been criticised for not sufficiently considering the rights of communities in terms of "community consultation; community input into planning for mining developments; direct community control of shares in mining companies; and lastly, new mechanisms (beyond existing Black Economic Empowerment policies) by which communities can directly benefit from mining operations in a meaningful, equitable manner."<sup>106</sup>

While artisanal and small-scale mining remain controversial on the continent, the South African Department of Mineral Resources has established the Directorate of Small-Scale Mining to develop and address the challenges faced by the small-scale mining sector. The directorate is working to legalise the small scale operations that currently exist and assist small scale miners become economically viable.<sup>107</sup>

Despite policy attempts by government to ensure that the wealth created through mining also benefits South Africans, the mining sector has been besieged by labour challenges in recent years, bringing the squalid living and working conditions in mines under the spotlight. The conflict between mine companies and mine-workers was highlighted in August 2012 when striking mine-workers clashed with police at Lonmin's Marikana platinum mine, leaving 34 dead and 78 injured. In the months following, South Africa witnessed widespread strikes as mine-workers continued to demand higher wages and better living conditions.<sup>108</sup>

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<sup>104</sup> Van der Schyff, Elmarie. *South African Mineral Law*. Faculty of Law, North-West University: Potchefstroom Campus.

[http://dspace.nwu.ac.za/bitstream/handle/10394/7021/No\\_64\(2012\)\\_6\\_Van\\_der\\_Schyff.pdf?sequence=1](http://dspace.nwu.ac.za/bitstream/handle/10394/7021/No_64(2012)_6_Van_der_Schyff.pdf?sequence=1)

<sup>105</sup> South Africa Department of Mineral Resources, Mining and Mineral Policy Development.

<http://www.dmr.gov.za/mineral-policy-a-promotion/mining-a-mineral-policy-development.html>

<sup>106</sup> Tobela Tapula (2012). *Making the Mining Charter go further towards genuine empowerment*. South African Institute of International Affairs. 25 July 2012. <http://www.saiia.org.za/opinion-analysis/making-the-mining-charter-go-further-towards-genuine-empowerment>

<sup>107</sup> Small Scale Mining. South African Department of Mineral Resources. <http://www.dmr.gov.za/small-scale-mining.html>

<sup>108</sup> Donovan, Daniel R (2013). *Prospecting for solutions: The challenges of South Africa's mining industry*. Consultancy Africa Intelligence. 16 May 2013.

### 3.5 Summary of Findings

- South Africa is one of the architects of the New Partnership for Africa's Development (NEPAD) Comprehensive Africa Agricultural Development Plan (CAADP) and the African Convention on the Conservation of Nature and Natural Resources (ACCNNR). CAADP is a plan of action created with the objective of augmenting obligations set under the United Nations Millennium Development Goals. However, South Africa has not yet committed to the compact plan through signing the agreement.
- The establishment of smallholder farmer's schemes with provision of subsidies to enable previously disadvantaged farmers to benefit in the currently white-dominated commercial farming sector is positive. However, the conceptualisation of the scheme is lacking and more training, research and skills development is required to ensure sustainability of small-scale farmers. This includes the acceleration of land restitution and land redistribution to previously disadvantaged communities.
- While the ACCNNR is yet to come into force, South Africa is commended for passing ten Acts which give effect to the ACCNNR. However, there are environmental challenges that require the state to take up its primary duty of promoting environmental conservation through education, consultations and forging partnerships with the stakeholders, including civil society, taxi drivers, unions, and various national institutions to overcome the challenge of environmental degradation affecting the country.
- South Africa is among the world's leading producers in the mining industry. The country has attempted to bring about equitable reform to the mining sector through the promulgation of legislation and policies which seek to increase the number of historically marginalised communities benefiting from the country's natural resources. However, there are still very few Black people involved in the mining sector and, in recent years the high number of demonstrations by mine-workers has highlighted their poor living and working conditions.
- While South Africa has achieved the Millennium Development Goal on sanitation which is to halve by 2015 the number of people without access to basic sanitation, challenges remain, particularly at the local government level. Many communities are still waiting for delivery of their basic rights including the right to access water and sanitation. Policies lack a compulsory minimum standard for basic sanitation service levels across the country.

### 3.6. Recommended Actions

- ☑ Since the CAADP compact has not yet been signed, the South African government should escalate the signing of the CAADP Compact, as well as the development and implementation of the national CAADP Compact.
- ☑ The South African government should review the concept and effectiveness of smallholder farmer schemes through consultations, and should implement a programme for skills development and capacity-building.
- ☑ South Africa should engage stakeholders, including civil society, the National Health Research Institute, taxi drivers, trade unions and partners to address environmental hazards and improve health conditions in the country.
- ☑ The South African government should improve consultation processes to ensure the inclusion of historically marginalised communities in mining processes for them to equitably benefit from the mining industry.
- ☑ The South African government should accelerate delivery of clean water and improve access to quality sanitation, and, in particular, discontinue the use of the pit and bucket system in poor communities and informal settlements.

## CHAPTER FOUR

### HEALTH STRATEGY AND ACCESS TO HIV/AIDS, TUBERCULOSIS AND MALARIA SERVICES

#### 4.1 Background

This Report evaluates South Africa's compliance with selected provisions of the standards set out in the Africa Health Strategy (AHS) 2007-2015 (2007) and the Abuja Call for Accelerated Action Towards Universal Access to HIV and AIDS, Tuberculosis and Malaria Services by 2010 (2006). In particular, the Report focuses on the standards of the African Health Strategy which require member states to promote all aspects of human resources for health development and retention, as well as those in the Abuja Call on universal access, strengthening health systems, and resource mobilisation.

**Table 4: Legal Instruments for Healthcare**

<b>Legal Instruments</b>	<b>AHS</b>	<b>Abuja Call</b>	<b>MPA</b>
Legal nature	Not a treaty	Not a treaty	Not a treaty
Date of adoption	09-13 April 2013	02-04 May 2006	18-22 September 2006
Date of entry into force	NA	NA	NA
Date of signature by SA	No	No	NA
Date of ratification	NA	No	NA
Date of deposit of instrument	NA	No	NA

Source: Prof Mangu, HURISA, October 2013

#### 4.2 Resource Mobilisation and Strengthening Health Systems

The AHS emphasises the importance of increasing access to healthcare services. This is reflected in the South African Constitution which states that, "everyone has the right to have access to healthcare services including reproductive healthcare; and no one may be refused emergency medical treatment".<sup>109</sup>

Overall, South Africa has 7.6 physicians to 10,000 people, which is above the regional average of 2.5.<sup>110</sup> According to a 2011 household survey, 41.5 per cent of South Africans took 15 to 29 minutes to travel to their healthcare facility, whereas 39.3 per cent took less than 15 minutes.<sup>111</sup> The same survey indicated that a mere 16 per cent of South Africans have some form of medical aid coverage.

The AHS advises governments to improve the governance and performance of their healthcare systems, and prioritise healthcare spending. While the budget of South Africa's Department of Health grew by 15.3 per cent from R21,7 billion in 2010/11 to R25,7 billion

<sup>109</sup> Constitution of the Republic of South Africa, Act 108 of 1996. Section 27.

<sup>110</sup> World Health Organisation (2013). *South Africa Health Profile*. May 2013. <http://www.who.int/gho/countries/zaf.pdf>

<sup>111</sup> Statistics South Africa (2013) - Use of health facilities and levels of selected health conditions in South Africa: Findings from the General Household Survey, 2011. <http://www.statssa.gov.za/Publications/Report-03-00-05/Report-03-00-052011.pdf>

in 2011/12,<sup>112</sup> the overall allocation to health in the 2011-2012 national budget was only 5 per cent, falling short of the 15 per cent target set by the African Health Strategy.<sup>113</sup>

The World Reports of 2002-2011 suggest that health expenditure is significant, but the Health Systems Trust Report<sup>114</sup> suggests that in fact the health expenditure has not caught up with the rise in the country's GDP. In keeping with the World Health Organisation's decisions on universal health coverage and the African Union's emphasis on alternative sources of sustainable finance including health insurance systems (Section 4.1.2a of the African Health Strategy), South Africa formally decided in 2009 to establish the National Health Insurance in a phased process over 10 to 15 years.

Recognising overall deficiencies in the healthcare sector, the South African government started implementing the National Health Turnaround Plan in 2009. The first among the ten clusters of the plan is the strengthening of the strategic leadership, the revitalization of health facilities and the improvement of social compacts between key stakeholders in line with section 4.1 of the African Health Strategy.<sup>115</sup> To this end, in 2011 and 2012 the South African government completed an institutional audit of 3,880 public health facilities around the country, covering infrastructure, human resources, staff attitudes, safety, customer care, infection control, drug stockouts, patient queues and quality of care. In line with the Department of Health's National Core Standards for Healthcare Facilities, the audit identified challenges in customer care and staff attitudes, patient safety, cleanliness and infection control, and availability of medicines and supplies.<sup>116</sup>

In 2011 and 2012, a new process for appointing chief executive officers of hospitals and heads of clinics was introduced, as was a stringent and elaborate process of evaluating candidates.<sup>117</sup> By the end of 2012, the larger multi-functional hospitals including major provincial and academic hospitals had new chief executive officers whose performance contracts were also made known to parliament and the public. Under the National Health Amendment Bill, the government has also proposed to create an Office of Standards Compliance<sup>118</sup> to ensure all public and private facilities are able to "deliver decent, safe and quality care".<sup>119</sup>

### **4.3 Universal Access to HIV/AIDS, Tuberculosis and Malaria Services**

The Abuja Call emphasises the importance of reducing the incidence of major infectious diseases, especially HIV/AIDS, Sexually Transmitted Infections (STIs) and Tuberculosis (TB). The Abuja Call requires countries to invest greater financial resources; have their political leaders lead by example; and to make efforts to find affordable and accessible medicines, including traditional medicine. The South African ten-point turnaround plan for

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<sup>112</sup> South African Government Information, Health. <http://www.info.gov.za/aboutsa/health.htm> (Accessed 24 July 2013)

<sup>113</sup> Africa Health Strategy. Section 4.1.2a  
[http://www.nepad.org/system/files/AFRICA\\_HEALTH\\_STRATEGY\(health\).pdf](http://www.nepad.org/system/files/AFRICA_HEALTH_STRATEGY(health).pdf)

<sup>123</sup> McIntyre, D. and Thiede, M. 'Health Care Financing and Expenditure'. Available at  
[http://www.hst.org.za/uploads/files/chap3\\_07.pdf](http://www.hst.org.za/uploads/files/chap3_07.pdf)

<sup>115</sup> Ibid. South African Government Information.

<sup>116</sup> Health Systems Trust (2013). National Healthcare Facilities Baseline Audit. National Summary Report 2012.  
<http://www.doh.gov.za/docs/reports/2013/Healthcare.pdf>

<sup>117</sup> Department of Health (2013). 'Health Minister Dr Aaron Motsoaledi press statement on the appointment of hospital CEOs'. 17 January 2013. Available at  
<http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=33738&tid=96549>

<sup>118</sup> National Department of Health (2011). *National Core Standards for Health Establishments in South Africa*.  
<http://www.sarrahsouthafrica.org/LinkClick.aspx?fileticket=YnbSHfR8S6Q=>

<sup>119</sup> Ibid. P6.

health placed “Accelerated implementation of the HIV and AIDS and STI National Strategic Plan 2007-2011, and increased focus on TB and other communicable diseases” at priority number seven. National funding for these programmes has increased since 2006. After 2009, the President, cabinet and the Minister of Health personally led the campaign for HIV and TB awareness.

The Abuja Call also requires a closer alignment between prevention and treatment. South Africa’s African Peer Review Mechanism Report shows a major focus on public awareness including high-profile leadership, targeted programmes and lower-level campaigns. The Prevention of Mother to Child Transmission (PMTCT) programme has been particularly successful in ensuring that more than 95% of babies born to HIV-positive mothers are HIV-negative. HIV-positive pregnant women now access free dual therapy from 14 weeks of pregnancy (down from previously 28 weeks) until post-delivery. As a result, the rate of HIV infants at birth has reduced from 15.2 in 2008 to 9.4 per cent in 2010.<sup>120</sup>

Statistics South Africa’s National Community Survey update of 2009 found that knowledge of treatment increased to 87 per cent from 42 per cent in 2006. Those who knew about antiretroviral treatment (ART) stood at 73 per cent as compared to 40 per cent in 2006.<sup>121</sup>

The incidence of HIV and AIDS has declined remarkably, and life expectancy has improved, but the number of infected people remains very high. More HIV-positive people live in South Africa than in any other country, and South Africa has the most people in the world on the largest antiretroviral treatment programme.<sup>122</sup> The challenges relating to social dimensions of sickness (poverty-health relationships) remain extensive, partly because of poor integration between health and other functions within government (such as employment, sustainable livelihoods, and social development).

According to the WHO Global TB Report for 2013, South Africa diagnosed about 15,400 Multiple Drug Resistant TB cases last year. MDR-TB treatment gaps are widening as access to testing increases. South Africa is the first country with a high TB burden to roll out the rapid TB and MDR-TB test, the GeneXpert, to get more people tested for TB. There are, however, challenges of drug-resistant TB (DR TB), especially the MDR-TB, which is resistant to the most commonly used anti-TB drugs, rifampicin and isoniazid. Rising rates of not only new MDR-TB but also TB are just two reasons the country is unlikely to reach several of the United Nations Millennium Development Goals (MDGs) including targets to reduce new TB cases and deaths.

#### **4.4 Unsafe Abortion**

Section 4.2 of the AHS acknowledges high rates of mortality and morbidity from unsafe abortions, and recommends that states ensure provision of safe termination of pregnancy and post-abortion services, as far as domestic law allows. In South Africa abortion was illegal until 1 February 1997, when the Choice on Termination of Pregnancy Act (Act 92 of 1996) came into force. Under the Act, a woman can obtain an abortion for any reason if

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<sup>120</sup> The Presidency, *The Second Report on the Implementation of South Africa’s APRM Programme of Action*, p44.

<http://www.thepresidency.gov.za/MediaLib/Downloads/Home/Publications/AfricanPeerReviewMechanism/aprm2ndreport.pdf>

<sup>121</sup> Statistics South Africa (2007). *Community Survey 2007. Basic Results: Western Cape*.

<http://www.statssa.gov.za/publications/Report-03-01-31/Report-03-01-312007.pdf>

<sup>122</sup> Statistics South Africa (2011). *Use of health facilities and levels of selected health conditions in South Africa: Findings from the General Household Survey, 2011*. <http://www.statssa.gov.za/Publications/Report-03-00-05/Report-03-00-052011.pdf>

she is less than 13 weeks pregnant. If she is between 13 and 20 weeks pregnant, she must prove her own physical or mental health is at stake, she is not in a conducive social or economic situation, she is pregnant because of incest or rape, or the baby will have severe mental or physical abnormalities. Over 20 weeks of gestation, there must be evidence that her or the foetus' life is in danger or that there are likely to be serious birth defects.<sup>123</sup>

According to a 2012 report by the National Committee on Confidential Enquiries into Maternal Deaths (NCCEMD), 4,867 maternal deaths were recorded between 2008 and 2010 in public healthcare facilities in South Africa. Of these, 186 women died of a septic miscarriage, 23 per cent of which were the direct result of an unsafe abortion.<sup>124</sup> Since the Act came into force, the number of unsafe abortion-related deaths has decreased by up to 90 per cent, although the Act appears to have made little progress into decreasing the rate of illegal abortions taking place in South Africa.<sup>125</sup> Lack of knowledge among South African women about when abortion is possible under the Act, as well as reluctance and negative attitudes of public healthcare facility staff members, continue to act as barriers to accessing safe and legal abortions.<sup>126</sup>

#### 4.5 Summary of Findings

- The 2011-2012 national budget allocation to health was only 5 per cent, falling short of the 15 per cent target set by the African Health Strategy.
- Challenges in healthcare facilities include poor customer care and staff attitudes, patient safety, cleanliness and infection control, and availability of medicines and supplies.
- The Prevention of Mother-to-Child Transmission Programme has reduced the rate of HIV infants at birth from 15.2 per cent in 2008 to 9.4 per cent in 2010.
- HIV and AIDS spending grew from 7.9 per cent in 2012/13 to 8.8 per cent in 2013/14 as share of total health budget.
- South Africa is the first high TB burden country to roll out rapid TB and MDR TB tests to combat the challenge presented by drug-resistant TB. This contributes to achieving MDGs 4 and 5.
- Although the HIV/AIDS incidence statistic is steadily declining, South Africa remains the country with the highest rate of the pandemic.
- The number of deaths due to illegal abortions has decreased by 90 per cent. However, the legalisation of termination of pregnancy through the Choice on Termination of Pregnancy Act has had a limited impact on decreasing the rate of illegal abortions.

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<sup>123</sup> Choice of Termination of Pregnancy Act, No. 92 of 1996. <http://www.info.gov.za/gazette/acts/1996/a92-96.htm>

<sup>124</sup> National Committee on Confidential Enquiries into Maternal Deaths (2012). *Saving Mothers 2008-2010: Fifth Report on Confidential Enquiries into Maternal Deaths in South Africa*. May 2012. [http://www.doh.gov.za/docs/reports/2012/Report\\_on\\_Confidential\\_Enquiries\\_into\\_Maternal\\_Deaths\\_in\\_South\\_Africa.pdf](http://www.doh.gov.za/docs/reports/2012/Report_on_Confidential_Enquiries_into_Maternal_Deaths_in_South_Africa.pdf).

<sup>125</sup> Marie Stopes South Africa (2012). *Unsafe Abortion in South Africa: A Preventable Pandemic*. 2 July 2012. <http://www.mariestopes.org.za/sites/www.mariestopes.org.za/files/Unsafe%20abortion%20factsheet%20%20Marie%20Stopes.pdf>;

<sup>126</sup> Ibid.

#### **4.6 Recommended Actions**

- ☑ The South African legislature should accelerate the passing of the National Health Amendment Bill into legislation. It provides for the creation of an Office of Standards Compliance to ensure that all public and private facilities are able to deliver decent, safe and quality healthcare.
- ☑ The South African government should ensure that the national health budget allocation is in line with the African Health Strategy.
- ☑ The South African government should encourage alternative sources of sustainable finance including health insurance systems.
- ☑ The South African government should reduce the number of illegal abortions through providing education to healthcare workers and raising public awareness about the Choice on Termination of Pregnancy Act.



## CHAPTER FIVE

### RIGHTS OF WOMEN IN AFRICA

#### 5.1 Background

This section of the Report assesses South Africa's compliance with the following AU instruments: the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa - Maputo Protocol (2003); the Maputo Plan of Action for Implementing the Continental Sexual and Reproductive Health (SRH) and Rights Policy Framework 2007–2010 (2006); and the Standards in the African Youth Charter (2006) dealing with adolescent reproductive health.

South Africa ratified the Maputo Protocol with reservations. The government justifies these reservations as appropriate for providing more protection for South African women than endowed by the Maputo Protocol. These include Article 4(j) on the death penalty which is justified by its non-application in South Africa, as the death penalty has been abolished. Article 6(d) states that marriages should be registered in conformity with the national laws in order for them to be recognised. Article 6(h) accords equality between husband and wife where the nationality of their children is a concern. South Africa also considers that its national laws on citizenship provide more advantages for children than what is offered by the Protocol.

South Africa has also devised its own interpretative declarations. The definition of violence against women in Article 1(f) of the Protocol was aligned with the South African Constitution. Article 31, which asserts that the Protocol will not violate national laws that are more favourable to women was also interpreted in a way that prevents violations of guaranteed rights in the Protocol by national laws. As South Africa's Constitution and legislative framework provides more far-reaching protections than those endowed by the Maputo Protocol, domestication of the treaty is unnecessary. However, what remains critical is the obligation of the state to ensure realisation of these rights through practical implementation. Below is South Africa's status of ratification of the specified mechanisms giving effect to protection of women's rights, as developed by HURISA (2013).

**Table 5: Ratification of Mechanisms for Protection of Women's Rights**

<b>Legal Instrument</b>	<b>Maputo Protocol</b>	<b>Maputo Plan of Action: Continental Sexual &amp; Reproductive Health</b>	<b>Rights Policy Framework</b>	<b>Youth Charter</b>
Legal nature	Treaty	Treaty	Not a treaty	Treaty
Date of adoption	February 2009	15 September 1968	October 2008	30 June-1 July 2008
Date of entry into force	NA	16 June 1969	NA	NA
Date of signature by SA	16 March 2004	18 April 2012	NA	07 May 2009
Date of ratification	17 December 2004	No	NA	28 May 2009
Date of deposit of instrument	14 January 2005	No	NA	NA

## 5.2 Elimination of Discrimination Against Women

The South African Constitution is premised on the values of non-sexism and non-discrimination as enshrined in Section 9 of the Bill of Rights.<sup>127</sup> The Constitution prohibits racial, gender and all other forms of discrimination against women. More precisely, Section 9 of the Constitution stipulates that neither the state, nor any person, may discriminate directly or indirectly on the grounds of gender, sex, pregnancy, marital status or any other ground or combination of grounds listed or unlisted.

The Constitution also established the Commission for Gender Equality (CGE) under Section 187(1) as one of the six national institutions envisaged to oversee attainment of gender equity in the country through education, research, monitoring implementation of regional and international treaties, investigation, litigation, lobbying and reporting on gender issues. Since its inception in 1997, the CGE has worked towards achieving a South African society that is free from gender oppression and all forms of inequality. In this regard, it receives complaints, undertakes research and public education, engages in policy development and legislative initiatives, and also engages in litigation. Its composition, functions and powers are provided for under the Commission for Gender Equality Act No. 39 of 1996.

In 1998, the CGE concluded a comprehensive study that identified laws which discriminated against women either directly or indirectly. On the basis of this study, South Africa embarked on an elaborate law reform programme that has seen the repeal and amendment of statutes and provisions that discriminated directly or indirectly against women.<sup>128</sup> The General Law Fourth Amendment Act 132 of 1993 was especially enacted to repeal or to amend provisions that differentiated between men and women. It repealed discriminatory laws regarding, *inter alia*, citizenship, attendance at trials, dismissal of female employees on marriage grounds, and the prohibition of women from performing dangerous work or night shifts. The CGE formulated the National Gender Policy Framework 2000, which, although intended particularly for policy-makers and trainers, seeks to educate the general public on gender equality. Section 11 of the CGE Act empowers the CGE to monitor and evaluate policies and practices of state institutions at any level as well as private bodies, and to make recommendations it deems necessary.<sup>129</sup>

The CGE can recommend to parliament or any legislature the adoption of new legislation which will promote gender equity and the status of women. It has successfully proposed that policy formulation for youth unemployment be in line with the needs of the youth and embraces gender equity.<sup>130</sup> The CGE supported the National Traditional Affairs Bill and the functioning of South Africa's traditional leadership structures provided they were subject to the Constitution.<sup>131</sup> Legislation establishing Rental Housing Tribunals was monitored by the CGE to ensure that the majority of tenants, mainly women, children, people with disability and elderly persons, are protected against unscrupulous landlords.<sup>132</sup>

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<sup>127</sup> South African Constitution Act 108 of 1996.

<sup>128</sup> Department of Justice and Constitutional Development, Mangaliso Maseko.

<sup>129</sup> The Repeal of the Black Administration Act and Amendment of Certain Laws Act 28 of 2005 (as amended by Act 7 of 2008) amended the Black Administration Act 38 of 1927.

<sup>130</sup> *Confronting Youth Unemployment: Policy for South Africa*, 3 May 2011, National Treasury. Note was made to the New Growth Path (NGP) which aims to create 5 million jobs by 2020.

<sup>131</sup> 2 August 2011, Department of Cooperative Governance and Traditional Affairs designated to provide recognition to various traditional communities.

<sup>132</sup> Rental Housing Amendment Bill, 30 November 2011. Department of Human Settlements.

Table 6 below provides a list of legislation and policies developed to attain gender equity, which compel the government to legislate non-discriminatory laws to protect women, as stipulated in Article 2 of the Maputo Protocol. It also notes the role of institutions created to give effect to this legislative and policy framework on gender equality and women's empowerment.

**Table 6: Summary of legislation relevant to women's rights**

Legislation	Brief summary of legislation
Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000	Provides the framework for the implementation of Section 9 of the Constitution. Seeks to prevent and prohibit unfair discrimination on the grounds of, <i>inter alia</i> , gender, sex and pregnancy.
Choice of Termination of Pregnancy Act 92 of 1996	Provides for the circumstances in which and conditions under which pregnancy may be terminated.
Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007	Seeks to protect women and children by criminalising a wide range of acts of sexual abuse and exploitation.
Domestic Violence Act 116 of 1998	Seeks to afford the victims of domestic violence the maximum protection from domestic abuse that the law can provide
Children's Act 38 of 2005	Provides a broad framework for the protection of children's rights including those of the girl child.
Employment Equity Act 55 of 1998	Seeks to promote equal opportunity and fair treatment in employment through the elimination of unfair discrimination and promotion of affirmative action.
Basic Conditions of Employment Act 75 of 1997	Protects labour rights including those that are specific to women.
Preferential Procurement Policy Framework Act 5 of 2000	Provides a framework for preferential treatment of historically disadvantaged groups (such as women) in procurement transactions.
Recognition of Customary Marriages Act 120 of 1998	Recognises and protects women in customary marriages
Maintenance Act 99 of 1998	Protects women during the dissolution of the marriage.
Protection from Harassment Act 17 of 2011	Aims to protect victims of harassment (including sexual harassment), in order to give effect to the right of all people in South Africa to be free from all forms of violence from either public or private sources. It goes further in that the DVA protects all relationships not only domestic relationships.

The Prevention and Combating of Trafficking in Persons Act, Act 7 of 2013	Besides creating the main offence of trafficking in persons, the new legislation also creates offences such as debt bondage, possessing, destroying or tampering with travel documents, and using the services of victims of trafficking, all of which contribute to innocent persons becoming victims of this modern-day form of slavery. The legislation dealing with sexual offences addresses the trafficking of persons for purposes of sexual exploitation only, while the Children's Act addresses the trafficking of children specifically.
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Source: CGE 2011 report and MWCPD November 2013

The National Gender Policy Framework for Women’s Empowerment and Gender Equality was introduced in 2000 and is central to the promotion of gender equity across all government policies. South Africa also established the Ministry of Women, Children and Persons with Disabilities (MWCPD) in 2010 to monitor integration of gender issues, status of women, children and persons with disabilities in policy development by other government departments. The MWCPD established branches that are hosted in the office of the Status of Women located within the provincial premiers’ offices and provincial Departments of Social Services. Gender Focal Points are operational in all national and provincial departments. However, this development is yet to be established at local government level, reflecting the MWCPD’s lack of necessary capacity and inadequate financial support.

The challenges faced by women, especially women living in rural areas and informal settlements,<sup>133</sup> requires a bottom-up multi-sectoral dimensional approach. This should include increased visibility of the MWCPD at district level and the availability of adequate resources to tackle the complex deplorable living conditions, including under-development, poor service delivery, abject poverty and endemic unemployment of women.<sup>134</sup> The oversight mechanisms established at parliamentary level, such as the Joint Monitoring Committee and Parliamentary Portfolio Committee on Women, Children and People with Disabilities on the implementation of international instruments including the Maputo Protocol are an important tool but more needs to be done on the ground to ensure community empowerment.<sup>135</sup> SAHRC Deputy-Chairperson Govender testified, during the commemoration of International Women’s Day on 8 March 2012, that South African women still encounter serious challenges in realising their rights.<sup>136</sup>

The MWCPD also lacks policies to address the issue of women LGBTI. The discrimination faced by this group as well as refugees, asylum seekers and indigenous women is often not sufficiently articulated. Additionally, while Chapter 5 of the Equality Act deals with the

<sup>133</sup> The Diagnostic Overview Report of the National Development Plan identifies nine major challenges that impact on economic and social challenges: (i) too few South Africans are employed; (ii) poor educational outcomes; (iii) high disease burden; (iv) divided communities; (v) public service performance is uneven; (vi) spatial patterns marginalise the poor; (vii) corruption; (viii) resource intensive economy; and (ix) crumbling infrastructure. The NDP includes analysis of other areas not covered in the DOR, such as land reform, migration, crime and justice, the role of parliament, and the role of South Africa in the region. The analysis in both the DOR and in the NDP, accords with the analysis in other documents, notably the New Growth Path (NGP). Out of the nine major challenges, three are identified as critical in the NDP: jobs, education and state capacity.

<sup>134</sup> The National Gender Machinery and concerned citizenry must change the attitudes, practices and behaviour of society at large, CGE Annual Report 2011-2012, Acting Chairperson Ms. Janine Hicks.

<sup>135</sup> The National Planning Commission produced a Diagnostic Overview Report (DOR) (July 2011) and a National Development Plan (NDP) 2030 (August 2012).

<sup>136</sup> <http://www.sabc.co.za/news> (accessed on 12 March 2012).

obligations of the state to promote equality, it is still not operational.<sup>137</sup> The state's delay to put this chapter into operation remains unexplained after 13 years since its inception.<sup>138</sup> It provides *inter alia* for action plans and regular reporting on measures to address inequality.<sup>139</sup> The state's performance with regard to the promotion of the rights of persons with disabilities remains of great concern, by its own acknowledgment.<sup>140</sup> The record for the private sector is more comprehensive.<sup>141</sup>

### 5.3 The Rights to Life, Integrity and Security of the Person

Article 4 of the Maputo Protocol obliges state parties to protect women from cruel, inhuman and degrading treatment. The Maputo Protocol also guarantees women the right to integrity and security of person<sup>142</sup> and implores the state to identify causes of violence against women, the consequences of violence and to take appropriate measures to prevent and eradicate violence against women. Several provisions of the South African Constitution protect the rights of women to life, integrity, security and human dignity of the person as underpinned in the Maputo Protocol. In particular, Section 12(1)(a) protects the freedom and security of the person, including not to be deprived of freedom arbitrarily or without just cause. This section of the Constitution is explicit about protection of individuals from all forms of violence from either public or private sources. Torture, inhuman or degrading treatment is prohibited.<sup>143</sup>

Notwithstanding South Africa's progressive Bill of Rights and commendable jurisprudence echoing international and regional human rights standards, the protection of women against sexual abuse remains, in practice, very limited and ineffective. Insecurity of women both in the public and private sphere is a daily phenomenon in South Africa. Sexual violence continues to be the daily experience of many women while perpetrators continue to enjoy widespread *de facto* impunity. In addition, acts of domestic violence and sexual offences are often not reported despite far reaching legislation, including the Domestic Violence Act, 1998 (Act No 116 of 1998), Children Act, 2005 (Act No 38 of

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<sup>137</sup> General responsibility to promote equality; Duty of State to promote equality: Responsibility of persons operating in public domain to promote equality; social commitment by all persons to promote equality; Special measures to promote equality with regard to race, gender and disability provides an illustrative list of unfair practices in certain sectors.

<sup>138</sup> Of the nine major challenges three are identified as critical in the NDP: jobs, education and state capacity.

<sup>139</sup> Section 28(3)(a) the State institutions performing public functions and all persons have a duty and responsibility, in particular to Eliminate discrimination on the grounds of race, gender and disability; Promote equality in respect of race, gender and disability; Audit laws, policies and practices must enact appropriate laws, develop progressive policies and initiate codes of practice in order to eliminate discrimination on the grounds of race, gender and disability.

<sup>140</sup> In 2008, the Public Service Commission (PSC) published a document entitled "Assessment on Disability Equity in the Public Service" (Disability Assessment). It notes that as at October 2007 only 0.2 per cent of public employees were disabled. Of over 1 million public employees, less than 20 000 are disabled. This is in contrast to government's stated goal of ensuring that 2 per cent of its workforce is disabled, in order to roughly represent the percentage of economically active disabled people in South Africa. The most recent available figures are in the PSC's 2010 "State of the Public Service Report" which reflects the position as at 30 September 2009. The total representation of disabled people in the public service remains at 0.22 per cent.

<sup>141</sup> The Commission for Employment Equity (CEE), established by Section 28 of the Employment Equity Act, publishes an annual report which details the racial, gender and disability composition of South Africa's workforce. In the 2010-2011 Annual Report, the CEE analysed responses from 16,698 employers. It is submitted that the CEE Report reflects one of the best available understandings of disability in the workplace. According to the CEE Report, only 0.83 per cent of employees are disabled. This has not increased significantly since the EEC began recording statistic in 2006. Then, the total disabled representation was 0.7 per cent. More than 60 per cent of the disabled people reported in the survey occupied semi-skilled, unskilled and temporary positions.

<sup>142</sup> Article 1 *ibid*.

<sup>143</sup> Annah Moyo and Sufiya Bray. Centre for the Study of Violence and Reconciliation.

2005); and the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No 32 of 2007) which seek to challenge violence and sexual abuse perpetrated against women and children.<sup>144</sup> Crime statistics for 2010/2011 released by the South African Police Service reveal that 66,196 sexual offences were reported.<sup>145</sup> Lesbian women have been particularly targeted by violence. Shortcomings in education and awareness of prosecution have exacerbated the murder of lesbians and the use of rape of lesbians as a “corrective” measure. Of the 20 recorded cases of murder of lesbians, only two of the cases have been to court.<sup>146</sup> These high levels of sexual violence statistics are an indication that South Africa is failing to adequately meet its regional and international human rights obligations.<sup>147</sup>

The South African Police Service (SAPS) is required to make use of specialised investigative units called Family Violence, Child Protection and Sexual Offences (FCS) Units to improve the police’s handling of rape cases. However, there has been a failure to implement the Domestic Violence Act, as evidenced by the continued high rates of domestic violence, the prevalence of discriminatory practices by court officials, inadequate financial, infrastructural and human resources particularly in relation to the courts (equality courts), and lack of capacity in terms of people sensitised to, and respectful of gender equality. Furthermore, the SAPS are obliged in terms of the Act to report to Parliament on the implementation of the Act, but they have been criticised for not meeting their obligations in respect of the Act. In fact, the Independent Police Investigative Directorate (previously the ICD) in its reports has repeatedly stated that the SAPS does not comply with the Act, nor is there compliance in respect of the recommendations made by the IPID.<sup>148</sup>

Other major impediments to eliminating violence towards women include the failure by the police to execute their routine functions including failure to investigate telephonic reports of domestic violence; failure to assist with the service of court process; failure to refer complainants to shelters or organisations that can assist them; and failure to assist complainants obtain medical assistance or to provide them with the necessary forms to be completed by a registered medical practitioner in the case of a criminal case being opened. Police officers are reluctant to arrest perpetrators of abuse owing to the widespread perception that domestic violence is a family matter in which they have no right to involve themselves. Women often suffer secondary abuse when they report

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<sup>144</sup> Nondumisa Nsiband, People Opposing Women Abuse, POWA.

<sup>145</sup> For rape statistics as reported by the South African Police Services see: [http://www.saps.gov.za/statistics/reports/crimestats/2011/crime\\_stats.htm](http://www.saps.gov.za/statistics/reports/crimestats/2011/crime_stats.htm) (accessed 11 November 2011). See also Ursula Lau *Intimate Partner Violence Fact Sheet*, research undertaken by the Medical Sciences Research Council.

<sup>146</sup> In June 2013, Duduzile Zozo, a 26-year-old woman from Thokoza in Ekurhuleni, was raped and murdered a few metres from her home and a toilet brush lodged inside her vagina. This serves as an example of a litany of similar crimes. Such murders have also taken the lives of Zoliswa Nkonyana, Sizakele Sigase, Salome Masooa, Eudy Simelane and Pumela Nkononzi and others.<sup>146</sup> The Maputo Protocol places a duty on the state to take appropriate and effective measures to enact and enforce laws to prohibit violence against women.<sup>146</sup> In 2011, the public confidence in the justice system was boosted by the prosecution of four men for the murder of lesbians where each received eighteen year jail terms. This confidence was however deflated after a clear disparity and inconsistent translation and protection of the right to life and measures taken to realise this right.

<sup>147</sup> Nondumiso Nsiband, *ibid*. It is difficult to get reliable statistics on violence against women in South Africa because most cases go unreported and the police do not keep separate statistics on assault cases perpetrated by husbands or boyfriends. One woman is killed every six hours by an intimate partner.

<sup>148</sup> Wilmien Wicomb

domestic violence due to negative attitudes towards complainants; this is especially so when charges are withdrawn.

South Africa offers survivors of rape trauma counselling through the Thuthuzela Centres model. This measure corresponds to Article 2(f) of the Maputo Protocol which binds states to provide mechanisms for rehabilitation of survivors and make such services accessible for effective information dissemination and protection of women. However, knowledge about their existence and accessibility remains a challenge and does not fully benefit women and children traumatised by sexual violence.

South Africa is commended for the ratification of both the 1951 Refugee Convention and the OAU Refugee Convention and for the progressive enactment of the South African Refugees Act. However, implementation is problematic. South Africa is obliged to protect refugee women and ensure benefits guaranteed under refugee treaties.<sup>149</sup> Within the context of rape being used as a tool of war and as a political tool in the Democratic Republic of Congo and Zimbabwe respectively, a number of women leave their countries of origin as a result of persecution. However, a number of these asylum applications are adjudicated negatively, leaving women vulnerable. The Department of Home Affairs is yet to recognise the implications of rape as a tool of war.<sup>150</sup> While the Refugees Act recognises persecution on the grounds of sexual orientation, currently there are a number of asylum seekers who applied for asylum based on their sexual orientation or gender identity whose applications have been rejected.<sup>151</sup>

The prevalence of gender-based violence in South Africa together with the political dimensions of xenophobia places foreign women in further danger. In May 2008, during the upsurge of xenophobic attacks in South Africa, a number of women reported being the victims of sexual violence and rape.<sup>152</sup> Migrant women remain particularly vulnerable to gendered power imbalances as they are in a foreign country, and at risk of male dominance and sexual violence from both their own husbands and South African men.

#### **5.4 Elimination of Harmful Practices**

Article 5 of the Maputo Protocol prohibits and condemns all forms of harmful practices which negatively affect the rights of women. The South African Constitution recognises the right to culture and provides that culture must be developed in order to be in harmony with the Bill of Rights. This led to the development of the Equality Act to strengthen the state's duty to eliminate harmful practices against women.<sup>153</sup> In the KwaZulu-Natal and Eastern Cape Provinces, *Ukuhlola* and *Ukuthwala* traditional practices are common. Virginity testing is conducted by older women to determine whether young girls are no longer virgins. The proponents of this traditional norm believe it encourages intercourse in marriage, deters unwanted pregnancies and counters the spread of HIV/AIDS. *Ukuthwala* is abduction and forced marriage of underage girls and use of girls as sex slaves by older men.<sup>154</sup> The government acknowledges that these practices are

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<sup>149</sup> Article 2(f) *ibid.*

<sup>150</sup> Roshan Dadoo - Consortium of Refugees, Migrants and Asylum Seekers.

<sup>151</sup> *Ibid.*

<sup>152</sup> Human Rights Institute of South Africa advocated for adoption of Resolution 131 on the Rights of Migrants and Refugees in South Africa. South Africa is required to protect the life and property of non-nationals and to prosecute the perpetrators of these violations.

<sup>153</sup> The Act stipulates that unfair discrimination on the grounds of gender includes 'any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child'.

<sup>154</sup> Taryn Powys, Provincial Legal Officer of the CGE based in KZN Province.

culturally ingrained and therefore difficult to root out, and that the cultural acceptance is underpinned by patriarchal notions of girlhood, womanhood and marriage, especially in rural areas.<sup>155</sup> The fact that the socio-economic status of girls and their families is repressed and often marginally elevated through forced marriage with concomitant bride price negotiations makes forced marriage of the girl child socially accepted and an economic necessity. The CGE has intervened in these two provinces by commissioning two research studies on cultural practices, one on virginity testing and the other on investigation into the KwaZulu-Natal Provincial Government's response to the practice of *ukuthwala*. The *ukuthwala* report revealed, *inter alia*, that young girls are at risk of being abducted under the guise of this traditional practice. The CGE also found that virginity testing is an infringement of the girl child's constitutional rights and further that the focus on the virginity and sexuality of the girl child is demeaning and discriminatory as it is also invasive.

In response to the pervasiveness of the harmful practices in KZN, and based on the research findings, the CGE established a KZN Provincial *ukuthwala* task team which is co-ordinated by the Office of the Premier. The CGE has recommended that the task team, urgently establish and publicise an *ukuthwala* hotline, or toll-free number that will serve as a crisis number for girls to report threats and instances of *ukuthwala* and get immediate assistance; by designation of officials to receive reports of *ukuthwala* during the festive season; and devise a co-ordinated response strategy to ensure that representatives from relevant offices of the Department of Social Development, local SAPS stations and National Prosecution Authority officials are dispatched to intervene and respond to individual cases accordingly.

The Maputo Protocol provides women with the right to be assisted with legal and judicial support. While the government is improving the extent of prosecution of perpetrators of this crime, more still needs to be done to eliminate the scourge.<sup>156</sup>

The CGE is advocating for all cultural practices, cultural rights and religious practices which are harmful to women to be reviewed in line with the Constitution and international human rights standards. However, the CGE is yet to use its litigation powers for prosecution of perpetrators of this crime, with the exception of sub-poena powers being used during investigations.

## 5.5 Marriage

South Africa recognises marriage entered into according to civil law for heterosexual couples, and customary law, namely African tradition and same-sex marriages for same-sex couples. The Marriage Act 25 of 1961 governs marriages in South Africa, but was created by the apartheid regime and has been amended by the Marriage Act, Extension Act 50 of 1997, which is applicable to the whole country. Civil law recognises two types of marriages which are marriages in community of property and marriage out of community of property. The propriety right of civil law marriages is governed by the Matrimonial Act 88 of 1984.

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<sup>155</sup> Wilmien Wicomb, LRC.

<sup>156</sup> In 2009/2010, of the 493 reported cases of *ukuthwala*, 180 were finalised. In 2010/2011, 174 cases were reported. Only 67 were finalised. Out of the 1273 total reported cases as from 2008 to 2011, there are 617 cases still pending.



The main aim of the Maputo Protocol in regard to marriage is to ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. This study focuses only on the legal minimum age for women.

In South Africa, the age restriction for entering into marriage is 18 years which is a minimum age limit provided by the Protocol. However, South Africa also allows those younger than 18 to marry. In particular, girls aged 15 and boys aged 16 can enter into marriage with parental consent or with the consent of a court of law. A woman has a right to choose to take her husband's surname or to maintain her maiden name. The same applies to choice of nationality of her husband which is not automatically imposed against her will. A woman also has equal rights with her husband in respect of nationality of the children. Implementation of these rights is consistent with the Maputo Protocol.

## **5.6 Access to Justice and Equal Protection before the Law**

The right for everyone to access justice is prescribed by Section 34 of the Constitution. Section 9 of the Constitution promotes equality between men and women and bestows on the government the responsibility for ensuring that equal opportunity is provided for both men and women in the public and private sectors. South Africa has also taken steps to ensure that women are represented equally in the judiciary and law enforcement organs. Women were first allowed to enter South African legal practice and the police force in 1923 and 1972 respectively. It was only in 1993 that the first woman representing the white community entered the judiciary. The first black woman judge joined the judiciary in 1994 following the demise of apartheid. Since then, the number of women judges has increased with 13.52 per cent of judges being female in 2005 and one serving as a deputy judge. The number of female judges increased from 21 per cent in 2010 to 27 per cent in 2012. While the number of female magistrates is 40 per cent, with 1 Regional Court President as compared to 3 men in the same position, 42 regional magistrates are female and 74 are male; there are 3 female chief magistrates and 6 males, 9 female senior magistrates and 41 males. The Minister of Women, Children and People with Disabilities acknowledged this as a challenge based on the fact that women constitute 52 per cent of the country's population and their representation in the judiciary should thus be increased to 50/50 gender parity.<sup>157</sup>

Women are also under-represented in the South African Police Service (SAPS) despite gender equity and legislative frameworks entrenching parity and promotion of female police personnel. Since 1996, 80 per cent of police personnel has been male. This does not represent equality in the workplace and is an indication that the culture of policing seems to undermine the democratic values underpinning gender equality. This makes it difficult to generate positive change in law enforcement, because there appears to be an entrenched male-oriented tradition in the police environment in South Africa.<sup>158</sup> It was encouraging to note in the SAPS report of 2011 that the proportion of women in senior management positions will increase from 22.26 per cent to 29.06 per cent by 2014, with the position of National Police Commissioner held by a woman. However, the steps taken since then in relation to middle and junior management do not reflect the intended progress, and the reality is that representation of females will grow by less than 1.5 per cent over 5 years and in junior management by just 1.6 per cent over 5 years.

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<sup>157</sup> During the Conference of Women Judges held on 13 August 2012 in the Eastern Cape, Ms Lulu Xingwana, Minister of Women, Children and People with Disabilities advocated for gender parity in the judiciary.

<sup>158</sup> South African History Archive (SAHA).

At the production level within SAPS, a greater increase in the proportion of women is observed (4.1 per cent) over the same period, when compared to middle and junior management. However, the SAPS report indicates the ideal proportion of women working in these roles is 40 per cent as compared to 60 per cent for men, and does not provide an explanation for this discrepancy. Notably, the report considers that 50 per cent of the personnel employed in management positions should ideally be women.

## **5.7 Right to Participation in Political and Decision-making Processes**

South Africa has made great strides in the inclusion and participation of women in politics and decision-making processes. Mechanisms are in place to facilitate an open and democratic society based on freedom and equality. Section 39 of the Bill of Rights provides for an open and participatory process. The government enacted the Employment Equity Act 55 of 1998 to put into effect an affirmative action policy that will address the economic imbalances of the past.<sup>159</sup> This is an action-oriented policy concerned with competency and the provision of opportunity for the previously disadvantaged.<sup>160</sup> African women and women with disabilities are required to be prioritised in employment opportunities offered by both public and private bodies. This is complemented by the Basic Conditions of Employment Act 75 of 1997 which protects labour rights, including those that are specific to women. The CGE monitors implementation of these laws.

At a local level, the Local Government Municipal Systems Act 117 of 1998 is the central tool underpinning constitutional democracy for participation of citizens in the political life of the country and makes provision for equal representation of men and women on political party lists and among ward councillors.<sup>161</sup> At the legislative level, the Electoral Act 73 of 1998 requires registered parties and candidates to respect the rights of women and to communicate freely with parties and candidates to facilitate full and equal participation of women in political activities, ensure free access of women to all public meetings, marches, demonstrations, rallies and other public events, and to take all possible steps to ensure that women are free to engage in political activities. The Draft Women Empowerment and Gender Equality Bill contains a clause that recommends a specific mandate for equal representation of women at all levels.<sup>162</sup>

South African women are well represented at international level, including the United Nations and the African Union. South Africa women who have attained high office include the former Deputy President, Phumzile Nquka, who is the Executive Director of UN Women; Dr Nkosazana Dlamini-Zuma, former Minister of Home Affairs, Department of International Relations and Cooperation and Department of Health who is Chairperson of the African Union Commission; Geraldine Fraser-Moleketi, former Minister of Public Service and Administration who is Deputy Chair of the United Nations Committee of Experts on Public Administration; Dr Zonke Majodina, former SAHRC Deputy Chairperson, who is Chairperson of the UN Human Rights Committee; and Advocate Pansy Tlakula, the Chairperson of the Independent Electoral Commission of South Africa who is the Special Rapporteur on Freedom of Expression and Access to Information in Africa. At the national level, Riah Phiyega is the National Police Commissioner and Advocate Thuli Madonsela is the country's Public Protector. Two women are Deputy Chairpersons in important

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<sup>159</sup> It seeks to promote equal opportunity and fair treatment in employment through the elimination of unfair discrimination and promotion of affirmative action.

<sup>160</sup> Affirmative Action is not the same as quota system, or not the same as preferential treatment nor to be regarded as tokenism, by simply promoting someone without skills and qualifications.

<sup>161</sup> According to the IEC, more women (12 722 622 or 54.9 per cent) compared to men (10 459 375 or 45.1 per cent) registered to vote during the 2009 National Elections.

<sup>162</sup> DoJ & CD, Mangaliso Skhosana.

statutory bodies: Pregs Govender at the SAHRC and Thoko Mpumdwane at the CGE. Additionally, the Reserve Bank Governor is headed by a woman, Gill Marcus, as is the Johannesburg Stock Exchange, which has Nicky Newton-King as chief executive officer.

However, despite legislative reforms and the prominence of South African women in the highest echelons of government and in regional and international human rights bodies, the practical experience on the ground, especially at local level, indicates strong elements of resistance to women’s participation in decision-making. This is attributed in part to the development of laws that impede the participation of women. The Traditional Courts Bill aggravates women’s circumstances in rural areas and was criticised by civil society as well as the CGE which found a range of critical shortcomings in the Bill amounting to exclusion of women and which prejudiced their ability to participate equally with men in traditional courts. Other impediments relate to the conflation of separation of powers where traditional leaders will serve as guardians of traditional practices and also as presiding officers hearing disputes on cultural problems.<sup>163</sup> This violates the right of women as equal partners with men at all levels of development and implementation of state policies and programmes.<sup>164</sup>

The study also examined the extent of women in decision-making positions as described in detail below.

### 5.7.1 Women in Cabinet

There has been steady growth in the representation of women at cabinet level since the first democratic elections held in 1994. South Africa reached the target of 30 per cent representation of women in political decision-making positions in line with the SADC target in 2003. In 2005 South Africa adopted the 50 per cent gender parity principle in line with the AU Commission target, and in 2008 adopted the SADC Protocol on Gender and Development. The representation of women in cabinet currently stands at 41 per cent.<sup>165</sup>

Table 7 below highlights the trends in the representation of women cabinet ministers from 1994 to 2012.

**Table 7: Women Cabinet Ministers in the South African Cabinet, 1994 to 2012**

	1994	1996	2003	2004	2009	2012
No. of Women Ministers	3	4	9	12	14	21
No. of Male Ministers	24	21	18	16	20	15
Total No. of Ministers	27	25	27	28	34	36
Percentage representation of Women Ministers	11%	16%	33.3%	42.8%	41%	42%

### 5.7.2 Women Deputy Ministers

The representation of women deputy ministers is currently 47 per cent. The representation of women at this decision-making level is generally constant and consistent, attaining parity in 2003-2004. Following the 2009 elections the number of women deputy ministers declined to 39 per cent, but this figure changed following the

<sup>163</sup> CGE Annual Report 2011-2012. p23.

<sup>164</sup> Article 9(1)(c).

<sup>165</sup> Lanwani Linda Hlaisi, Ministry of Women, Children and People With Disabilities.

reshuffling of cabinet in early 2012. Table 8 below presents the representation of women deputy ministers from 1994 to 2012.

**Table 8: Women Deputy Ministers in South African Cabinet 1994 – 2012**

	<b>1994</b>	<b>1996</b>	<b>2003</b>	<b>2004</b>	<b>2009</b>	<b>2012</b>
No. of Women Deputy Ministers	3	8	8	10	11	17
No. of Male Deputy Ministers	9	5	8	10	17	15
Total No. of Deputy Ministers	12	13	16	20	28	32
Percentage representation of Women Deputy Ministers	25%	62%	50%	50%	39%	47%

### **5.7.3. Women in Parliament**

The representation of women in parliament increased from 27.8 per cent in 1994 to 44 per cent in 2012. Similarly, the representation of women in provincial legislatures increased from 25.4 per cent in 1994 to 42.4 per cent in 2009. KwaZulu-Natal had the lowest representation of women in 1994 at 13.6 per cent, but this increased to 37.5 per cent representation of women in the provincial legislature by 2009. On the other hand, the Western Cape has shown a decrease in 2009, and is now the province with the lowest proportion of women in the provincial legislature. Following the 2009 elections, all provinces exceeded the 30 per cent target and are on track towards 50/50 representation of women at the political decision-making level.

### **5.7.4. Women in Local Government Level**

Steady progress is seen at local government level in relation to the representation of women. Following the 2011 local government elections, the representation of females on local government councils is at 38.4 per cent compared to 28.2 per cent in 2000. Table 9 below indicates the trends in the representation of women members of local government councils following major local government elections.

**Table 9: Women members of local government councils 2000-2011**

	<b>2000</b>	<b>2009</b>	<b>2011</b>
	<b>%</b>	<b>%</b>	<b>%</b>
Proportional Representation	38%	42.4%	43.3%
Ward	17%	36.6%	32.9%
Overall	28.2%	39.7%	38.4%

According to the South African Local Government Association (SALGA), the number of women councillors increased from 29 per cent to 42 per cent between 1994 and 2006 due to its 50/50 campaign. As the country continues to advocate for gender equity, women in local government levels have organised themselves and established the SALGA Women's Commission. Table 10 below summarizes gender and local government election results over four municipal elections.

**Table 10: Gender and local government election results 1995-2011**

Year	% Women ward	% women proportional representation	% women overall
1995	11	28	19
2000	17	38	29
2006	37	42	40
2011	33	43	38

Source: Gender Links 2011

However, women’s participation in traditional councils depicts a different story. This is due to the Traditional Leadership and Governance Framework Act 41 of 2003 which contains elements that entrench patriarchal values and excludes women from participating in traditional governance. It does this by entrenching the power and status of the apartheid-era tribal authorities to select 60 per cent of the members of the traditional council.<sup>166</sup> Additionally, many of the traditional councils fail to meet the requirement of the 30 per cent threshold of women representatives and as a result they undermine the provisions of the Maputo Protocol which require the state to ensure increased and effective representation and participation of women at all levels of decision-making.<sup>167</sup> The Maputo Protocol is explicit about the state’s duty to protect women from discriminatory laws and practices such as cultural perceptions and the socialisation of women which present a threat to their human dignity, including preventing them from developing and progressing in life.

### 5.7.5 Women in the Public Sector

South Africa’s public service comprises a senior management service (SMS) which is made up of four categories ranging from level 13 at the entry level to SMS i.e. director to level 16 at the uppermost level i.e. directors-general or heads of departments, also commonly known as accounting officers.

There is at present approximately 38 per cent representation of women in the SMS level in the public service. Table 11 below shows the trends in representation from 2005 to 2012. Since 2005, the trends show an increase at an average of 1 percentage point per year.

**Table 11: Percentage of representation of women at SMS level: 2005-2012**

YEARS	PERCENTAGE REPRESENTATION OF WOMEN IN SMS LEVELS
December 2005	30%
December 2008	34.3%
March 2009	34.8%
March 2010	36%
March 2011	37%
March 2012	38.1%

<sup>166</sup> Key traditional governance structure, where few women are selected because the traditional view is that women should remain in the domestic sphere rather than enter the political arena, according to W. Wicomb.

<sup>167</sup> Article 9(2).

**Table 12: Representation in SMS by gender in 30 January 2011**

LEVEL	No. of women	No. of Males	Total No.	% of women
13: Directors	2205	3499	5704	38.6%
14: Chief Directors	697	1245	1942	36%
15: Deputy Directors-General	217	422	641	33.6%
16 Directors-General	44	111	153	26.6%
GRAND TOTAL	3163	5277	8440	37.4%

At the end of June 2011, there were 8,440 SMS occupied posts in the public service. Women at SMS filled 3,160 or 37.4 per cent of those positions.

Women in decision-making positions are concentrated at the lowest end of the economic ladder, as depicted by the highest number of women at the director level (level 13) at 38.6 per cent, tapering to level 16 which is the most senior level in the public service at 26.6 per cent.

**Table 13: Representation of women in SMS level by race for 2011/12 period**

SEX	RACE (in %)				Total No	%
	African	Asian	Coloured	White		
Female	42.3%	2.4%	2.7%	6%	3365	38.1%
Male	42.4%	3.9%	5.2%	10%	5461	61.9%

In the African population grouping, there is a balance between the representation of males and females at approximately 42 per cent each. There is also a majority representation of Africans in line with the demographics of the country.

## 5.8 Right to Education and Training

The right to education is guaranteed in the South African Constitution, in particular Section 25 which provides for the right of everyone to access basic education, including adult basic education. The two responsible agencies for the implementation of education in South Africa are the Department of Basic Education and the Department of Higher Learning. South Africa has adopted the Education White Paper 6 with the aim of implementing the Inclusive Education and Training System (2001) as well as providing for special needs in education. In 2005 the National Department of Education published three sets of guidelines for the implementation of White Paper 6.<sup>168</sup>

South Africa developed the Schools Act which is the guiding framework for education in the country, and which seeks to give effect to the equality provisions in the constitution and in accordance with the requirements of the Maputo Protocol and the Optional Protocol on the Rights of the Child. More specifically, the interpretation section clarifies

<sup>168</sup> The Conceptual and Operational Guidelines for the Implementation of Inclusive Education: 1. Emphasise Full Service Schools – These guidelines explain the main principles, upon which full service schools are founded, describe their characteristics and outline the institutional development of such schools. 2. Full Service Schools as Resource Centres: These guidelines provide a conceptual framework for an inclusive education system. They provide, *inter alia*, that disability should be seen not only in medical terms, but also in terms of the rights of the disabled person and contain operational procedures for a paradigm shift from special education to inclusive education. 3. District Support Teams. These guidelines sketch the role of support providers employed at the National Department of Education to assist education institutions such as schools and early childhood centres to identify and address barriers to learning and to promote effective teaching and learning.

the need to give effect to Section 9 of the Constitution and expressly makes reference to the non-discrimination clause on the grounds of sex and gender.

South Africa is a signatory to the Dakar Education for All Goals (2005) which require states to reach gender parity by 2015. The literacy rate for women in the 15-24 age group is reported to be 97.5 per cent.<sup>169</sup> The Children’s Institute suggests that there is little variation in school attendance rates across the income quintiles, irrespective of whether children live in the poorest or wealthiest 20 per cent of households. School attendance rates remain high at 96 per cent to 99 per cent.<sup>170</sup> This demonstrates that South Africa has made great strides in attaining gender parity, particularly at primary school level.<sup>171</sup>

**Table 14: School Attendance**

Primary school Enrolments		Primary School Attendance		Secondary school enrolment ratio		Secondary School attendance	
M	F	M	F	M	F	M	F
90	91	80	83	-	-	41	48

Source: Nondumiso Nsiband, POWA October 2013

The national Department of Basic Education adopted the National Strategy on Screening, Identification, Assessment and Support (2008) to guide the policy by defining the process of identification, assessment and enrolment of learners in special schools. The Guidelines for Responding to Learner Diversity in the Classroom through Curriculum and Assessment Policy Statements (2011) is intended to provide practical guidance to school managers and teachers on planning and teaching to meet the needs of a diverse range of learners.

These legislative developments are in accordance with Article 14(1)(a) of the Maputo Protocol which guarantees access to education and training. The Maputo Protocol also provides for state parties to take administrative and other measures to ensure that this intention is realised. South Africa is making efforts to address gender stereotypes, taking into account the traditional roles of girls in communities. Guidelines have been developed which emphasise prevention of teenage pregnancy, HIV and other sexually transmitted infections.<sup>172</sup> Despite these guidelines being in place, there is a lack of policy at a national level to deal appropriately with learner pregnancy, which is on the increase and is the main reason for girls dropping out of school.<sup>173</sup> Girls are affected disproportionately as they are often not reintegrated into the school system once they have given birth.

Though the legislative framework provides for the Department of Education to ensure that schools are safe spaces for children to learn, and expressly prohibits any form of gender-based violence, girls are often at risk of violence and harassment in schools from both learners and teachers. Incidents of rape, along with the attendant vulnerability to HIV infection, and interruption of education are growing concerns in South Africa and continue to undermine the practical access of girls to adequate education. Whilst enrolment rates are high and show little difference between girls and boys, attendance and drop-out rates are higher among girls. Family responsibilities which make particular demands on female

<sup>169</sup> World Bank Indicators, 2008.

<sup>170</sup> Children’s Institute, Child Gauge Report 2013.

<sup>171</sup> Source: *State of the World’s Children (SOWC)* 2013, UNICEF.

<sup>172</sup> The Department of Education in 2009, concerned about the increase in learner pregnancies in schools, introduced guidelines for the prevention and management of learner pregnancy (DOE Report 2007).

<sup>173</sup> The Measures for the Prevention and Management of Learner Pregnancy (2007) is not enforceable.

learners also present a high educational risk. Furthermore, school attendance of girls living in homes affected by HIV and AIDS is impacted more severely than for boys.<sup>174</sup>

The Maputo Protocol provides for the state to take specific positive action to promote literacy, education and training for women in all levels and in all disciplines, especially in the field of science.<sup>175</sup> While entry into higher education in South Africa has increased, women remain under-represented within the science, engineering and technology (SET) sectors. Gender imbalances in the workplace continue and key national instruments designed to develop highly skilled people do not specifically address the issue of women's participation in the sector.<sup>176</sup>

## 5.9 Health and Reproductive Rights

The Maputo Plan of Action commits state parties to address poor sexual health and reproductive rights which affect maternal mortality and morbidity in Africa.<sup>177</sup> The state is required to provide adequate and accessible health services including programmes and education. This is substantiated by the General Comments adopted by the African Commission to assist states to implement provisions of Article 14(1)(d) and (e) of the Maputo Protocol adopted in 2012 by the ACHPR.<sup>178</sup>

The Maputo Plan of Action seeks to address the regional challenges of access to healthcare services with the view of reducing the high rate of maternal mortality that result from challenging health conditions in the continent.<sup>179</sup> The legal framework for maternal health is drawn broadly from collective instruments promoting women. These include the Maputo Protocol, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Millennium Development Goals, the SADC Gender and Development Protocol, the South African Constitution and the South African National Health Act of 2004 ("NHA").

South Africa's constitutional and legal framework reflects the country's commitment to women's sexual and reproductive health and rights (SRHR) as aligned to the Maputo Protocol. Several policies detail the provision of services relating to sexual and gender-based violence, fertility, maternal, prenatal and newborn health, sexually transmitted infections (including HIV), and cancers of the reproductive system. Despite these positive developments, women's autonomy is all too often compromised by poverty, limited access to education, limited access to health care, and ongoing gender inequality that is reinforced by patriarchal norms.<sup>180</sup> The environment of health facilities is deteriorating and service delivery is poor especially for people living with HIV/AIDS, or in places where termination of pregnancies is procured.<sup>181</sup>

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<sup>174</sup> Article 12(a),(b), (c) and 13(a), (e) *ibid*.

<sup>175</sup> Article 12(a), (b), (c) and 13(a), (e) *ibid*.

<sup>176</sup> Article 1(a) *ibid*.

<sup>177</sup> The Plan of Action promotes family planning as a crucial factor in attaining the Millennium Development Goals, supports the sexual and reproductive health needs of adolescents and young people, seeks to address unsafe abortions through family planning, and promotes quality and affordable health services for safe motherhood, child survival, and maternal, newborn and child health.

<sup>178</sup> The General Comment addresses ambiguities related to this provision and further elaborates the State's obligations in giving effect to the rights enshrined therein. They are meant to assist governments to have a clear understanding of their obligations in terms of a particular treaty so that they are able to effectively implement the provisions thereof.

<sup>179</sup> Article 23(a) *ibid*.

<sup>180</sup> Muller, A. & Macgregor, H. Institute of Development Studies. <http://www.ids.ac.uk/publication/sexual-and-reproductive-health-rights-of-women-living-with-hiv-in-south-africa#sthash.A5pEO1Cr.dpuf>

<sup>181</sup> Over 5.5 million people are living with HIV/AIDS in South Africa and women are most affected.



Poor maternal health in South Africa, including the predominance of prenatal mental health disorders, is widespread.<sup>182</sup> There are three broad sets of modifiable causes of mortality: poor quality clinical care, administrative shortcomings, and avoidable factors within the community.<sup>183</sup> Traditional harmful practices may also affect maternal health outcomes although efforts are being made by the CGE and others to end these abuses, including through the judiciary.

According to a 2012 report by the National Committee on Confidential Enquiries into Maternal Deaths (NCCEMD), 4,867 maternal deaths were recorded between 2008 and 2010 in public healthcare facilities in South Africa. Of these, 186 women died of a septic miscarriage, 23 per cent of which were the direct result of an unsafe abortion.<sup>184</sup> Since the Choice on Termination of Pregnancy Act 92 of 1996 came into force, the number of unsafe abortion-related deaths has decreased by up to 90 per cent. However, the Act appears to have made little progress in decreasing the number of illegal abortions taking place in South Africa.<sup>185</sup> Lack of knowledge among South African women about when abortion is possible under the Act, as well as personal reluctance and often negative attitudes of public healthcare facility staff members, continue to act as barriers to accessing safe and legal abortions.<sup>186</sup>

There is also anecdotal evidence on coerced and forced sterilisation of women with disabilities in South Africa. Despite the fact that the National Health Act requires consent before administration of any surgery, there is some evidence that women may be given consent forms while in labour and informed that receipt of medical attention depends on signing the form.<sup>187</sup> Special protection of women with disabilities is an obligation placed on states by the Maputo Protocol.<sup>188</sup> Further information on coerced and forced sterilisation of women with disabilities is provided in this report under Access to Health Services.<sup>189</sup>

The NHA was modified in 2011 to improve the implementation of its provisions and health service delivery. These modifications established the Office of Health Standards Compliance. Additional legislation in South Africa has been enacted in an effort to ensure protection from improper practises, including the Patients' Rights Charter. While there is a mechanism for accountability to lodge complaints about any mistreatment, in practice this does not always function as required.

The national Department of Health has taken stock of shortcomings in healthcare services and has released the 2012-2016/17 strategic plan, which aims to provide an effective supportive regulatory environment for human resource health, equitable staffing, health workers and the re-engineering of primary healthcare provision. It also prioritises maternal, child and women's health, maintains the fight against HIV and AIDS, and

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<sup>182</sup> Elizabeth Matare, Executive Director: South Africa Depression and Anxiety Group (SADAG).

<sup>183</sup> Department of Health, 2011: p65.

<sup>184</sup> National Committee on Confidential Enquiries into Maternal Deaths (2012). *Saving Mothers 2008-2010: Fifth Report on Confidential Enquiries into Maternal Deaths in South Africa*. May 2012. [http://www.doh.gov.za/docs/reports/2012/Report\\_on\\_Confidential\\_Enquiries\\_into\\_Maternal\\_Deaths\\_in\\_South\\_Africa.pdf](http://www.doh.gov.za/docs/reports/2012/Report_on_Confidential_Enquiries_into_Maternal_Deaths_in_South_Africa.pdf).

<sup>185</sup> Marie Stopes South Africa (2012). *Unsafe Abortion in South Africa: A Preventable Pandemic*. 2 July 2012. <http://www.mariestopes.org.za/sites/www.mariestopes.org.za/files/Unsafe%20abortion%20factsheet%20-%20Marie%20Stopes.pdf>;

<sup>186</sup> Ibid.

<sup>187</sup> Nondumiso Nsiband, POWA.

<sup>188</sup> Article 23(a) *ibid*.

<sup>189</sup> Article 14(c).

promotes strengthened community-based healthcare. However, this new vision remains largely unseen in needy provinces and communities in a context where more than 80 per cent of the South African population depends on state provincial healthcare institutions which are often some distance away from communities who cannot afford to travel.

### **5.9.1 Access to Family Planning**

South Africa provides facilities for accessing family planning services including contraception, HIV/AIDS testing and extensive condom distribution. However, the compulsory life orientation subject for learners in schools from Grade R to Grade 12 does not address family planning. Omission of this intervention effectively neglects the duty of the state to support learners with education to prevent epidemic levels of teenage pregnancy. The state is required to take measures to inform learners about contraception and ensure access to contraceptives in rural and urban areas, and further to ensure the user-friendliness of the family planning services. The unique challenges to reproductive health for rural women remains a concern, particularly with regard to their access to adequate and affordable health services.<sup>190</sup>

### **5.9.2 Access to High Quality Antenatal Care**

An estimated 97 per cent of pregnant mothers have access to antenatal care during their pregnancies with 71.4 per cent receiving antenatal services five times during their pregnancy.<sup>191</sup> The South African Health Minister acknowledges the problem of high maternal mortality despite the country's efforts in providing healthcare facilities with nurses and midwives present to attend to the majority of births.<sup>192</sup> While the Prevention of Mother-to-Child Transmission (PMTCT) programme has successfully reduced mother-to-child transmission of HIV, the increase in deaths of newborn babies in healthcare facilities, especially in the poorer provinces, has increased child mortality in the country.<sup>193</sup> Although the country is better off than most states of the region, it is difficult to understand why such deaths occur.<sup>194</sup>

The government is addressing challenges in the health sector and has identified key policy priorities for future implementation to increase the percentage of pregnant women who access antenatal care before 20 weeks' gestation. This will include working towards providing high quality antenatal services and prioritising maternal and child care, including monitoring systems that focus on addressing maternal mortality and prenatal deaths.<sup>195</sup>

### **5.9.3 Access to Skilled Delivery Care**

The legal framework to address access to skilled delivery care incorporates principles drawn from the White Paper on Science and Technology, the Employment Equity Act, the

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<sup>190</sup> Breach of Article 14(2)(a) of the Maputo Protocol: Nondumiso Nsibandé.

<sup>191</sup> Shisana O, Simbayi LC, Rehle T, Zungu NP, Zuma K, Ngogo N, Jooste S, Pillay-Van Wyk V, Parker W, Pezi S, Davids A, Nwanyanwu O, Dinh TH and SABSSM III Implementation Team (2010). *South African National HIV Prevalence, Incidence, Behaviour and Communication Survey, 2008: The health of our children*. Cape Town: HSRC Press. [http://www.hsrc.ac.za/uploads/pageContent/656/TheHealthofourChildren\\_final.pdf](http://www.hsrc.ac.za/uploads/pageContent/656/TheHealthofourChildren_final.pdf)

<sup>192</sup> About 2,500 maternal deaths per year suggests that challenges remain with the quality of health care provided.

<sup>193</sup> South Africa is among 10 countries with a high infant mortality rate, largely because protocols in hospitals to save mothers and children not being followed: HRSC research findings.

<sup>194</sup> Dr Motsoaledi.

<sup>195</sup> The Maputo Plan of Action emphasises the need to mobilize domestic resources to support health programmes including compliance with the Abuja 2001 commitment to increase allocation of resources to the health sector to at least 15 per cent of the national budget.

Skills Development Act, the National Plan for Higher Education, the National Framework for Women's Empowerment and Gender Equality, the National Research and Development Strategy, and the Human Resources Development Strategy for South Africa, as well as Science, Engineering and Technology for Women (SET4W). The Maputo Plan of Action emphasises capacity-building to enable healthcare workers to fulfil their responsibilities effectively.

Lack of quality in health services including lack of access to skilled delivery care, adds to high levels of maternal mortality, especially in the public health sector. A comprehensive needs assessment of healthcare delivery systems, infrastructure, and management and human resource needs is required in order to integrate these considerations into the national health plan.<sup>196</sup>

Although pregnant women have free access to public healthcare and facilities, reports of deaths of women due to labour complications are very high; this is attributable to a range of issues. For example, the number of physicians working in the private health sector of the country increased from 40 per cent in 1980 to 79 per cent in 2007, leaving a huge shortage of supervision and guidance in the public health sector.<sup>197</sup> The 2011 report of the Department of Health showed disparity in the distribution of doctors and nurses between urban and rural areas, where only 19 per cent of the country's physicians and 12 per cent of the nurses are serving the rural communities which constitute 44 per cent of the population.<sup>198</sup> In addition, the distribution of human resources within districts also varies significantly within the private sector setting. Further challenges relate to sub-standard care resulting from non-adherence to standard protocols, a lack of motivation on the part of health workers to use and understand guidelines, and the lack of a supportive enabling environment that promotes and demands best practice and accountability.<sup>199</sup>

The closure of nursing colleges during the 1990s led to a reduced number of nurses and the emergence of home-based caregivers.<sup>200</sup> The health workforce is identified as having a weak knowledge base, as acknowledged in the national report "Human Resources for Health South Africa: Strategy for the Health Sector 2012/13-2016/17". The report notes serious inconsistencies between databases on the number of public health sector employees with the margin of error being as high as 30 per cent.<sup>201</sup>

The system of caregivers is recognised in South Africa with the majority of these caregivers being women from community-based organisations. While some are employed, many are voluntary caregivers who receive only a small stipend. The impact of unrecognised work on women's ability to engage with the economy is negative, especially the lack of job security even for those caregivers who are employed. Community caregivers are often poorly equipped to provide their services and resources are scarce.

Shortcomings in the health sector are being addressed in part by the launch of the African Union Campaign on Accelerated Reduction of Maternal and Child Mortality (CARMMA) which aims to intensify the implementation of the Maputo Plan of Action for Reduction of

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<sup>196</sup> DoH developed a Human Resource plan for training various cadres for local consumption, distribution, utilisation, and retention of health workers at all levels.

<sup>197</sup> Angeli Rawat. *Africa Portal: Back Grounder* 31 June 2012.

<sup>198</sup> Ibid.

<sup>199</sup> DFID, 31 August 2011.

<sup>200</sup> Coovadia, 2009: 830.

<sup>201</sup> Herein referred to as HRH SA 2012/13-2016/17.

Maternal Mortality in Africa and for the attainment of MDG 5. Although the principal focus of CARMMA is maternal mortality, it also includes reduction of child mortality.

### **5.10 Right to Sustainable Development**

The right to sustainable development is mentioned in the Constitution collectively with rights protecting conservation of the environment.<sup>202</sup> Section 24(b)(iii) of the Constitution guarantees ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. Access to property is enshrined under Section 25(5) which empowers the government to take reasonable legislative and other measures, within its available resources, to promote conditions which enable citizens to gain access to land on an equitable basis. The South African White Paper on Land Reform provided the policy framework for the abolition of all laws that discriminated against women in relation to property ownership. The White Paper was reinforced by a sectoral Land Reform Gender Policy that aims to create an enabling environment for women to access, own, control, use and manage land as well as access credit facilities. Several pieces of legislation have given effect to the White Paper and the Land Reform Gender Policy. The legislation includes the Land Reform (Labour Tenants) Act 3 of 1996; the Housing Act 107 of 1997; the Water Services Act 108 of 1997; and the Land Bank Amendment Act 21 of 1998.

South Africa's legislation and policies are recognised as being progressive, particularly in relation to gender and the environment, where the role of women is seen as being critical in the planning, management and preservation of the environment. However, the poor, including historically marginalised groups continue to struggle for access to needed resources and livelihoods such as land,<sup>203</sup> clean water, sanitation and electricity. Collection of firewood and water remains a common challenge in rural areas.<sup>204</sup> There is the continued challenge of managing the growth in informal settlements especially in and around the larger urban areas. Challenges around health, shelter, water and sanitation services are most pronounced in Johannesburg, Pretoria and Cape Town where the influx from rural areas contributes to pollution, dumping and littering.

Poverty continues to affect millions of people around the country, most of whom are women and many of whom reside in the rural areas. There is continued widespread unemployment in the formal sector of the economy, estimated at 40 per cent of the economically active population. The increasing growth of the economically active population in conjunction with a declining or stagnant rate of growth of the economy suggests that the level of unemployment is unlikely to decrease.

### **5.11 Right to Inheritance**

Article 11 of the Maputo Protocol promotes the widow's right to an equitable share in the estate of her late husband. In South Africa there have been cases of widows being robbed of their husband's inheritance due to lack of knowledge of the law in this regard. According to the traditional law that is often applied in communities, a widow should marry her late husband's relatives, especially the eldest male relative. The only way a widow can continue to enjoy the inheritance is through compliance with this practice. This

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<sup>202</sup> (a) Prevention of pollution and ecological degradation; (b) promote conservation; and (c) secure ecologically sustainable development. There are numerous statutes that have been enacted to ensure environmental protection and conservation.

<sup>203</sup> Only 13.29 per cent of women own land in South Africa.

<sup>204</sup> HURISA: Socio-Economic Rights Programme for Women and Children Living in Rural Areas 2010-2011.

contradicts the Maputo Protocol which accords women the right to continue living in the matrimonial house if they remarry, especially where the house belongs to the wife or has been inherited from her late husband.

The Maputo Protocol also encourages positive traditional law to be practiced among societies for advancement of women and development in the society. South Africa contributes to the development of African jurisprudence in the cases of *Bhe and Others v Magistrate, Khayelitsha and Others 2005(1) SA 580(CC)*. This Constitutional Court case referred to South Africa's regional obligations under the Maputo Protocol, in an effort to provide women with remedies and abolish all laws that discriminate against them. In *Gumede v President of the Republic of South Africa and Others (2008) ZACC 23*, the Constitutional Court cited articles 2, 6 and 7 of the Maputo Protocol in support of its position on eradication of all laws and practices that discriminate against women, noting that it was not only a constitutional obligation but an obligation that flowed from the regional instrument ratified by South Africa.

### **5.12 Summary of Findings**

- Legislation and mechanisms are in place through the Commission for Gender Equality for addressing the challenges that women continue to encounter, but there is a lack of implementation of such policies.
- The MWCPD plays an important role in monitoring implementation of legislation for protection of women, children and people with disabilities but the ministry is yet to be visible at district level and is not yet operational in all provinces.
- There is a very high level of gender-based violence which includes sexual offences against women and children, people with disabilities, refugees and LGBTI people. Traditional practices of abduction and forced marriages and virginity testing continue in provinces such as the Eastern Cape and KwaZulu-Natal.
- Poverty affects women and children and people living in rural areas the most.
- Access to land ownership for women remains a challenge, especially those living in rural areas of the poorer provinces.
- The Traditional Leadership Authority Act reinstates discrimination of women and limits their political participation in decision-making at local level.
- The Traditional Courts Bill suppresses women in rural areas and makes them subservient to men by restricting their equal participation in decision-making.

### **5.13 Recommended Actions**

- ☑ The government of South Africa should facilitate partnerships between the CGE, civil society and the DWCPD and develop strategies to improve implementation of legislation.
- ☑ The government of South Africa should increase the budget allocation to the DWCPD and CGE to ensure the effective implementation of their mandates across the country.
- ☑ The South African government should facilitate sensitisation programmes for the SAPS and communities around the laws promoting women and children's rights and to promote a better understanding of the Domestic Violence Act and its effective implementation.
- ☑ Civil society and national human rights institutions should undertake advocacy for the repeal of all discriminatory laws that may be detrimental to the development and upliftment of women in the economic and political spheres.

## CHAPTER SIX

### RIGHTS AND WELFARE OF THE CHILD

#### 6.1 Background

The African Charter on the Rights and Welfare of the Child (ACRWC) is the only region-specific child rights instrument in the world. It is an important tool for advancing children's rights whilst building on the same basic principles as the UN Convention on the Rights of the Child. Importantly, the Charter highlights issues of special importance in the African context.<sup>205</sup> As of November 2010, all member states of the AU have signed the Children's Charter and all but 8 states have ratified it. South Africa signed the Charter on 10 November 1997 and ratified it on 7 January 2000, signifying its commitment to advance children's rights in an African context, consistent with Section 39 of the South African Constitution<sup>206</sup> which requires that international law including treaties be considered in the interpretation of the rights contained in the Bill of Rights.

The implication of ratification is that South Africa agrees to adhere legally to the provisions of the Charter and to compile and submit a state party report to the African Committee of Experts on the Rights and Welfare of the Child every three years (the first report is expected within two years of ratification) for "the purpose of examining the progress made by states' parties in achieving the realisation of the obligations undertaken" in the Charter.<sup>207</sup> In South Africa the report is compiled by the Department for Women, Children and People With Disabilities (DWCPD) with the involvement of all government departments as well as the provincial governments.<sup>208</sup> At the time of writing this Report, the DWCPD had already submitted a combined 2nd, 3rd and 4th Periodic State Report on the Convention on the Rights of the Child and the ACRWC to Cabinet.<sup>209</sup>

In addition to the Charter, South Africa has a rich inventory of legislation and policy initiatives developed since 1994 to give effect to the country's constitutional obligations to promote and protect child rights. The National Plan of Action is a culmination of 19 years of efforts to promote and protect child rights and has been adopted to give effect to South Africa's constitutional and international obligations and provide impetus to the Ministry of Women, Children and People with Disabilities.<sup>210</sup>

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<sup>205</sup> The Charter provides for the protection of children against child abuse and torture (Article 16); the protection of children against harmful social and cultural practises (Article 21); the protection of children in armed conflict (Article 22) and refugee children (Article 23). See generally the essays collected in W Ncube (ed) *Law, culture, tradition and children's rights in Eastern and Southern Africa* (1998), where the authors describe some peculiar challenges that obtain in the African context (post-colonial) that warrant continental and multi-lateral responses. Importantly the report also deals with some of the provisions in the Charter in its themes below such as protection against harmful cultural practises, refugee children and protection against child abuse and torture.

<sup>206</sup> Section 39 of the South African constitution states that "when interpreting the Bill of Rights, a court, tribunal or forum must: a) promote the values that underlie an open and democratic society based on human dignity, equality and freedom; b) must consider international law; and c) may consider foreign law.

<sup>207</sup> The Committee is the monitoring body of the ACRWC.

<sup>208</sup> Interview with Ms Sinah Moruane, Chief Director: Advocacy and Mainstreaming Children's Rights and Responsibilities, 07.10.2013.

<sup>209</sup> Ibid.

<sup>210</sup> National Action Plan 2012-2017.

## 6.2 Non-discrimination

Section 9 of the Constitution protects everyone from discrimination based on the listed grounds including background and status. Various policies and laws outlaw discrimination in the education system and guarantee children equal access to education and educational facilities. The Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000, the South African Schools Act No. 84 of 1996, and the Admission Policy for Ordinary Schools Act No. 27 of 1996 prohibit the unfair exclusion of learners from educational institutions on the full range of international and national legally prohibited grounds. Children born out of wedlock enjoy the same rights as children born from parents in validly recognised marriage under South African law. These include the right to maintenance from both parents and inheritance rights to both parents and blood relatives from parental lineage.

## 6.3 Right to Education and Training

South Africa has made tremendous strides in realising the right of children to access education but challenges remain. The government has introduced pro-poor education policies such as “no-fee” schools in the three poorest quintiles and school fee waivers for poor learners in fee-paying schools through the National Norms and Standards for Public School Funding and the Exemption of Parents from the Payment of School Fees programmes to ensure that children from poor communities receive preferential support. The number of children not paying fees rose from 0.7 per cent in 2002 to 55.6 per cent in 2011.<sup>211</sup> Nationally 582,000 children graduated from secondary school in 2010.<sup>212</sup>

The current system makes available:

- a) early childhood development (ECD) for children aged 0-4 through private ECD facilities;
- b) the General Education and Training (GET) band covering Grades R to Grade 9 (for children aged 5–15) represents the compulsory phase of education and is made available through 25,850 public and private ordinary schools (5.4 per cent of which are independent);
- c) the Further Education and Training (FET) band includes Grades 10–12 at schools (the senior secondary component), as well as vocational programmes at FET colleges;
- d) higher education, which is provided through 23 universities and other institutions across the country.<sup>213</sup>

Gender equality has largely been achieved within education. In 2009 there were 103,449 female learners enrolled at the Further Education and Training (FET) Colleges as compared with 134,257 male learners. The majority of these female learners were enrolled for business studies (52,250) followed by engineering (28,451).<sup>214</sup>

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<sup>211</sup> Statistics South Africa. General Household Survey 2011. 3 May 2012.

<https://www.statssa.gov.za/publications/P0318/P0318April2012.pdf>

<sup>212</sup> South African Human Rights Commission & UNICEF South Africa. South Africa’s Children. A Review of Equity and Child Rights. March 2011. [http://www.unicef.org/southafrica/SAF\\_resources\\_factschildrens11.pdf](http://www.unicef.org/southafrica/SAF_resources_factschildrens11.pdf)

<sup>213</sup> Department of Women Children & People with Disabilities (South Africa’s Combined Second, Third and Fourth Reports). Periodic State Party Report to the Committee on the Rights of the Child (Reporting period: 1998 - June 2012).

<sup>214</sup> Ibid.

Grade R enrolments have doubled from 300,000 in 2003 to 705,000 in 2011, which is near universal primary school enrolment rate of 98 per cent in 2010.<sup>215</sup> In addition, retention rates have improved. Eighty-eight per cent of learners completed Grade 9 in 2010 as compared to 80 per cent in 2003.<sup>216</sup>

However, despite these developments in providing universal education and access to education, 70 per cent of predominantly poor and rural children aged 0–4 years are excluded from Early Childhood Development services.<sup>217</sup> Approximately 120,000 learners of compulsory school age are excluded from school.<sup>218</sup> Older learners are at a high risk of dropping out with between 3.5 per cent and 11.8 per cent of children leaving school after Grade 9.<sup>219</sup> Low numbers of post-basic education learners (41 per cent) are retained and complete their FET cycle and very few gain access to FET colleges. In 2011 only 1.6 per cent of post-basic education learners attended FET colleges.<sup>220</sup>

Black children are poorly represented at university level. Only 3.5 per cent of this population group aged 18–29 was enrolled in 2011, only 0.4 per cent higher than in 2010, compared to 20 per cent of white and 14.9 per cent of the Indian/Asian population groups.<sup>221</sup>

#### **6.4 Children With Disabilities**

According to the 2012 National Census<sup>222</sup> there were approximately 2.3 million people (estimated at 5 per cent of the total population) reported to have a serious disability, defined as an impairment that prevents full participation in life activities such as socialising, and access to services such as education, health and work. The number of children with disabilities aged between 7 and 15 attending school increased by more than 20 per cent between 2002 and 2010. The rate of access for those aged 16-18 also increased from 51 per cent in 2002 to 68 per cent in 2010, and 480 000 children of school-going age with disabilities are out of school.<sup>223</sup>

In addition to the ACRWC Charter, there have been efforts made to mainstream disability in accordance with the Millennium Development Goals (MDGs) since this issue was highlighted at the Second Conference of States Parties in 2011. However, South Africa has not effectively built the inclusive MDGs into its planning frameworks in the alignment and harmonisation of programmes. There is also a lack of coherent data to measure progress.<sup>224</sup>

The Department of Basic Education (DBE) has developed and implemented a number of interventions to improve access for children with disabilities, including:

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<sup>215</sup> Department of Basic Education, Annual Report 2011-2012.

<sup>216</sup> Ibid.

<sup>217</sup> The Presidency, Department of Performance, Monitoring and Evaluation, 2012.

<sup>218</sup> Department of Basic Education, Annual Report 2011-2012.

<sup>219</sup> Department of Basic Education Report, Report on Dropout and Learner Retention Strategy to Portfolio Committee on Education, June 2011.

<sup>220</sup> 2011 South African Census. Statistics South Africa.  
<http://www.statssa.gov.za/Publications/P03014/P030142011.pdf>

<sup>221</sup> Ibid.

<sup>222</sup> Ibid.

<sup>223</sup> Department of Basic Education, Annual Report 2011-2012.

<sup>224</sup> Tele-interview with Bongzi Khuzwayo, Project Officer at the Child Rights Centre on 7 October 2013.



- a) a programme of action for the identification of learners with disabilities and other learning barriers governed by Education White Paper 6: Special Needs Education – Building an Inclusive Education and Training System (2001) and the National Strategy on Screening, Identification, Assessment and Support (2008);
- b) the provision of disability-friendly infrastructure in terms of the preceding policy and the National Policy for Equitable Provision of an Enabling School, Physical Teaching and Learning Environment (2008);
- c) the translation of core workbooks into Braille and the adoption of Sign Language as an official language within the curriculum.

While much effort has been made to address disability as a barrier to primary education, there is a significant policy gap in making similar provision for state-funded, regulated and otherwise supported early childhood education for children with disabilities. The DSD and DBE are in the process of responding to this need through the national ECD plan of action currently in development.

Furthermore, there are a number of challenges in the implementation of the inclusive education policy at primary and secondary levels. These largely relate to resource limitations. The DBE is committed to resolving these issues, and plans on building more full service schools so that there is one in each district (92) and training more teachers on the disability strategy, with the goal of training 416 teachers by 2014/15.

## 6.5 Health and Health Services

Two health-related Bills are currently before Parliament, namely the National Health Amendment Bill (Bill 24 of 2011)<sup>225</sup> and the Mental Health Care Amendment Bill (Bill 39 of 2012).<sup>226</sup> A major policy focus remains the planned introduction of National Health Insurance (NHI)<sup>227</sup> for which a Green Paper was released for comment in August 2011. The NHI policy paper<sup>228</sup> highlights, asserts amongst other priorities that inform its urgency, the burden and high numbers of maternal, infant and child mortality rates in South Africa.

The NHI's specific focus on high child mortality rates is notable.<sup>229</sup> Many children continue to live in poverty and child poverty remains an important underlying or contributing factor

<sup>225</sup> The Bill seeks to amend the National Health Care Act and provide for the Office of Health Standards, an independent structure outside of the Department of Health. However, the means to ensure its independence remains under debate.

<sup>226</sup> The Bill seeks to amend the Mental Health Care Act of 2002 and insert a new section to provide for the delegation of powers by the head of the national department to officials in the national department.

<sup>227</sup> The National Health Insurance (NHI) is a financing system that will ensure that all citizens of South Africa (and legal long-term residents) are provided with essential healthcare, regardless of their employment status and ability to make a direct monetary contribution to the NHI Fund.

<sup>228</sup> p.7 of the National Health Insurance Policy See: <http://www.info.gov.za/view/DownloadFileAction?id=148470>

<sup>229</sup> According to Hall and Berry in South Africa Child Gauge, Children's Rights Institute, University of Cape Town, 2012 See: [http://www.ci.org.za/depts/ci/pubs/pdf/general/gauge2012/sa\\_child\\_gauge2012.pdf](http://www.ci.org.za/depts/ci/pubs/pdf/general/gauge2012/sa_child_gauge2012.pdf) Infant and under-five mortality rates are widely used indicators of health status and socio-economic development because they reflect not only child mortality levels but also the health status of the broader population. The infant mortality rate (IMR) is defined as the probability of dying within the first year of life and refers to the number of babies under 12 months old who die in a year per 1,000 live births during the same year. Similarly, the under-five mortality rate (U5MR) is defined as the probability of children dying between birth and their fifth birthday. The U5MR refers to the number of children under five years old who die in a year per 1,000 live births in the same year.

to child death.<sup>230</sup> Children born to poor parents and who grow up in poor households are likely to remain poor, and there is evidence that disparities in income are coupled with inequities in access to services and treatment.<sup>231</sup> Child mortality rates have been found to be four times higher in the poorest quintile than in the wealthiest quintile.<sup>232</sup>

Data from child mortality audits show that the majority of deaths in children are due to a small number of health conditions, with five conditions accounting for 82.6 per cent of deaths in infants between one month and one year of age and 74.2 per cent of deaths in children between one and five years of age. These conditions are acute respiratory infections (mostly pneumonia) (28.9 per cent); diarrhoea (20.7 per cent); septicaemia or possible serious bacterial infection (16.2 per cent); TB (7.1 per cent); and meningitis (6.6 per cent). The audits also indicate that more than half of children who died had evidence of HIV infection or exposure, while 60 per cent of children were undernourished (as evidenced by underweight-for-age or severe malnutrition).<sup>233</sup>

The stillbirth rate in South Africa is estimated to be between 21 and 25 per 1,000 births. This is comparable with rates in other middle income countries, although the intrapartum stillbirth rate is higher than in these countries, which suggests that intrapartum care needs to be improved. A high proportion of both fresh stillbirths (18 per cent) and macerated stillbirths (48 per cent) is unexplained. Antepartum haemorrhage (15 per cent), intrapartum asphyxia and birth trauma (14 per cent), hypertension (13 per cent) and infections (5 per cent) are also important contributors to stillbirths.<sup>234</sup> In addition to the NHI, government's response resulted in the launch of a Plan for Accelerated Reduction of Maternal, Newborn and Child Mortality in Africa on 4th May 2012. The Plan is aligned to achieving national and international development goals, including the eradication of extreme hunger and poverty; promoting gender equality; reducing child mortality; improving maternal health; and combating HIV and AIDS and other diseases. Specifically, the plan is aligned to achieving the following targets:

- To reduce the maternal mortality ratio from 310 per 100,000 live births in 2009 to 270 by 2014;
- To reduce the under-five mortality rate from 56 to 50 per 1,000 live births by 2014 to 40 by 2016;
- To reduce the infant mortality rate from 40 to 36 per 1,000 live births by 2014 and to 32 by 2016;
- To reduce the neonatal mortality rate from 14 to 11 by 2016.

Specific mention of HIV and mother-to-child transmission rates by the NHI also point to government's resolve to intervene in this area.<sup>235</sup> According to a recent report released by UNAIDS, data from the National Health Laboratory Services (NHLS) shows a 15 per cent increase from 2010 (39.2 per cent) to 2012 (54.4 per cent) in the percentage of infants

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<sup>230</sup> Hall and Chennels. 2012. University of Cape Town Children Institute Children: *A brief Update: Income Poverty*. See: [http://www.childrencount.ci.org.za/uploads/brief\\_income\\_poverty\\_final.pdf](http://www.childrencount.ci.org.za/uploads/brief_income_poverty_final.pdf)

<sup>231</sup> Hall K. and Woolard I. Children and inequality: An introduction and overview. In: Hall K, Woolard I, Lake L, Smith C. (editors). *South African Child Gauge 2012*. Cape Town: Children's Institute, University of Cape Town.

<sup>232</sup> 87 per 1,000 live births than 22 per 1,000 live births.

<sup>233</sup> Sanders D, Reynolds L, and Lake L. Addressing inequities in child health: Opportunities and challenges. In Hall K, Woolard I, Lake L, Smith C. (editors). *South African Child Gauge 2012*. Cape Town: Children's Institute, University of Cape Town; 2012.

<sup>234</sup> Pattinson RC, (editor). *Saving babies 2008-2009: Seventh report on perinatal care in South Africa*. Pretoria: Tshepesa Press; 2011.

<sup>235</sup> Health Insurance Policy See: <http://www.info.gov.za/view/DownloadFileAction?id=148470>

testing for HIV within two months of birth.<sup>236</sup> The proportion of infants born to HIV mothers who test HIV-positive within 2 months of birth is an important indicator of the government's Prevention of Mother-to-Child Transmission (PMTCT) programme.

## 6.6 Child Labour

Article 15 of the ACRWC Charter protects children from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with their physical, mental, spiritual, moral or social development.

On the domestic front, the Child Care Act, 1983 (Act 74/83) as amended by Section 52A of the Child Care Amendment Act, 1991 (Act 86/91) and the Department of Social Services and Population Development are responsible for aspects pertaining to the "prohibition of employment of certain children".<sup>237</sup>

Child labour in South Africa is mostly reported in the agricultural sector and represents approximately 60 per cent of reported cases of child labour, followed by the retail sector. In a Statistics South Africa survey conducted in 2012, it was found that girls were more likely than boys to be affected by child labour. The findings of the survey reveal that a total of 121,000 children were engaged in market economic activities in 2012.

In the context of these alarming statistics, the Minister of Labour noted during a recent international conference that South Africa had adopted a child labour programme of action in 2010 to help prevent, reduce, and eventually eliminate the problem. The Child Justice Act that came into force soon after the 2010 conference not only seeks to increase access to justice but also provides innovative ways of engaging with children involved as Children used by Adults to Commit Crime (CUBAC) and/or Commercial Sexual Exploitation of Children (CSEC).<sup>238</sup>

## 6.7 Protection against Child Abuse and Torture

Article 16 of the ACRWC prohibits child abuse and torture and recommends that states adopt specific legislation and educational measures to protect the child from all forms of torture and provide necessary support for children and follow-up in instances of child abuse and neglect.

Consistent with the spirit and purport of the charter, the DCWPD launched an OnLine Child Safety campaign in partnership with other government departments and Google South Africa as part of Child Protection Week. The fundamental objective of this campaign is to protect children from harmful online activities.<sup>239</sup>

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<sup>236</sup> [http://www.unaids.org/en/dataanalysis/knownyourresponse/countryprogressreports/2012countries/ce\\_ZA\\_Narrative\\_Report.pdf](http://www.unaids.org/en/dataanalysis/knownyourresponse/countryprogressreports/2012countries/ce_ZA_Narrative_Report.pdf)

<sup>237</sup> Section 52A of The Child Care Act 52A stipulates that subject to the provisions of this Act or any other law, no person may employ or provide work to any child under the age of 15 years other than by exemption as granted by the Minister. Any person who contravenes the Act shall be guilty of an offence. Further, elements of child labour covered in sections 14(4) and 50 of the Act include any work that constitutes ill-treatment of a child, for example requiring the child to do excessive chores at home, and where a child has to work because a parent does not maintain the child or has abandoned the child.

<sup>238</sup> Press Release: *South Africa has made significant progress in fighting child labour, Labour Minister tells global conference.* South African Government Online. 9 October 2013.

<http://www.gov.za/speeches/view.php?sid=40413>

<sup>239</sup> Ibid.

The DCWPD also implemented measures to address the scourge of abuse against children. In 2012, working together with the South African Police Service (SAPS) and the Department of Justice and Constitutional Development (DoJ&CD), the department co-ordinated advocacy and awareness campaigns such as the Child Protection Week (27 May to 3 June 2012), the promotion of the use of positive discipline rather than corporal punishment, and the prevention of all forms of violence against children as articulated in the programmes of the National Council Against Gender Based Violence.

A report on crime and violence published by the Department of Social Development and the DCWPD notes that during the 2012 period the SAPS recorded approximately 50,000 crimes against children. More than 52 per cent of crimes reported were sexual in nature whilst crimes against adult women accounted for only 19 per cent. Most reported crimes against children are perpetrated against children between the ages 15 and 17 (55 per cent of murders, 60 per cent of attempted murders, 71 per cent assault with grievous bodily harm, 63 per cent of common assault, and 40 per cent of sexual offences). Furthermore, 61 per cent of children who endured sexual offences were under the age of 15 years and over a quarter (29 per cent) were aged between 0-10 years.<sup>240</sup>

According to Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN), an organisation that works to promote the rights and protection of children, in addition to the increase in sexual offences against children there is the challenge of ending corporal punishment in the home. In this regard, domestic legislation needs to be aligned with international and continental instruments. The current legal position in South Africa is that corporal punishment is unlawful in schools and other education institutions under Article 10 of the South African Schools Act (1996.), Article 3 of the National Education Policy Act (1996) and Article 16 of the Further Education and Training Colleges Act (2006). In 2000, the Constitutional Court dismissed a bid by 196 Christian schools to make an exception to the prohibition on grounds of religious conviction.<sup>241</sup> On the other hand, however, corporal punishment is lawful at home. Under common law, parents have the power "to inflict moderate and reasonable chastisement on a child for misconduct provided that this was not done in a manner offensive to good morals or for objects other than correction and admonition".<sup>242</sup> This power may be delegated to a person acting in the parent's place, although not in the case of teachers who are excluded. Provisions against violence and abuse in the Children's Act (2005), the Constitution (1996) and the Domestic Violence Act (1998) are not interpreted as prohibiting all corporal punishment in relation to child rearing.

The Children's Act was amended in 2007 to provide for prevention and early intervention programmes which must focus on, among other things, "developing appropriate parenting skills and the capacity of parents and caregivers to safeguard the well-being and best interests of their children, including the promotion of positive, non-violent forms of discipline". However, Article 144(1)(b), a clause which would have prohibited corporal punishment in the home was removed from the Amendment Bill before it was passed by Parliament, pending further investigation. Currently the Children's Act is under review and proposals have been made to include explicit prohibitions which are supported by the Department of Social Development.

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<sup>240</sup> <http://www.dgmt-community.co.za/sites/dgmt/files/documents/VAC%20final%20Summary%20low%20res.pdf>

<sup>241</sup> *Christian Education vs South Africa Minister of Education*, 2000 (4) SA 757 (CC).

<sup>242</sup> *R v Janke and Janke* 1913 TPD 382.

Despite an explicit ban on corporal punishment in schools, the Statistics South Africa General Household Survey 2012, which involved 30,000 households interviewed between July and September 2012, found that 17 per cent of students in South Africa had experienced corporal punishment at school. The highest percentage of students experiencing corporal punishment was in the Eastern Cape, which saw an increase from 23 per cent in 2010 to 30 per cent in 2012. In Limpopo, the percentage of students experiencing corporal punishment rose from 9 per cent in 2010 to 19 per cent in 2012. In the Northern Cape, North West and Gauteng, the percentage of students experiencing corporal punishment had declined since 2010. The lowest percentage of students experiencing corporal punishment was in the Western Cape at 4 per cent.<sup>243</sup>

The Centre for Justice and Crime Prevention (CJCP) 2012 National School Violence Study shows that 22.2 per cent of children at schools have experienced some form of violence while at school, most commonly threats of violence (12.2 per cent), assaults (6.3 per cent) and sexual assault (4.5 per cent). The experiences of the learners are substantiated by principals, more than 85 per cent of whom reported incidents of physical violence perpetrated by learners on fellow learners in their schools in the preceding year. While the rate of threats of violence against learners has decreased over the past five years, the rate of assaults and sexual assaults has increased.<sup>244</sup> Incidents of assault in Mpumalanga doubled over the past five years, and tripled in the North West Province. Increases in incidents of assault have been seen in Gauteng, Limpopo, the Eastern Cape and KwaZulu-Natal. The number of learners experiencing sexual assault at school has risen in all provinces, with the exception of Gauteng, which recorded a significant drop from 4.4 per cent in 2008 to 0.7 per cent of learners in 2012. Rates of robbery at school have remained relatively consistent in most provinces, with only the Free State showing a dramatic change where a 13.7 per cent drop was reported by learners.<sup>245</sup>

## **6.8 Protection against Harmful Social and Cultural Practices**

It is worth noting that the ACRWC Charter included a tribute to South African youth in recognition of their resistance to the apartheid government's actions in the 1970s, and as a result the 16<sup>th</sup> June which is recognised in South Africa as the day of the Soweto youth uprising has been declared the Day of the African Child for the Elimination of Harmful Cultural Practices.

Article 21 of the ACRWC enjoins states parties to take all appropriate measures to eliminate harmful social and cultural practices that may affect the welfare, dignity, normal growth and development of the child, particularly those customs and practices that are prejudicial to the health or life of the child, and those customs and practices discriminatory to the child on the grounds of sex or other status.

Section 12 of the Children's Act protects children from being taken for granted and subjected to customary practices. It prohibits virginity testing and male circumcision in the case of children younger than 16 years. In the case of boys under the age of 16 years, they may be circumcised for religious purposes or medical reasons. In both cases, all children, regardless of their age, have the right to refuse to be subjected to these

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<sup>243</sup> *General Household Survey 2011*. Ibid.

<sup>244</sup> Burton Patrick and Leoschut Lezanne. *School Violence in South Africa: Results of the National School Violence Study*. Centre for Justice and Crime Prevention. March 2013.

[http://cjcp.skinthecat.co.za/articlesPDF/65/Monograph12-School-violence-in-Southper centre cent20Africa.pdf](http://cjcp.skinthecat.co.za/articlesPDF/65/Monograph12-School-violence-in-Southper%20centre%20Africa.pdf)

<sup>245</sup> Ibid.

customs. In addition, section 12(2) of the Act prohibits the arrangement of marriages or engagement of children below the minimum age for a valid marriage.

However, despite these developments, many underage boys are circumcised and girls under the age of 16 years are subjected to virginity testing. Circumcision initiations are commonly practiced in Mpumalanga, Limpopo and the Eastern Cape Province, where each year sees the death of a number of initiates. In Mpumalanga, for example, 27 boys died in initiation schools and the Eastern Cape saw 450 related deaths in a five-year period from 2008 to 2012. The Minister of Health, Dr Motsoaledi, stated that the main causes of death in initiates are massive bleeding leading to hypovolemic shock, infection, septicaemic shock, dehydration from being denied water, hypothermia from exposure to extreme weather, and low blood sugar from extreme food restrictions, and also asserted that poor circumcision techniques can lead to genital amputation or mutilation. In some cases, the cause of death is assault.

The government is running a campaign for safe circumcision that is done in hospitals. While several arrests of circumcision practitioners occur every year, only five cases have been successfully prosecuted for illegal initiations in the Eastern Cape Province. Nineteen suspects were arrested in 2013 but all cases were dropped due to lack of evidence and the reluctance of witnesses to co-operate with the National Prosecuting Authority because the traditional ritual is performed in secrecy.

All marriages are required to be registered before being recognised as valid, especially marriages entered into according to civil law. However, although the Recognition of Customary Marriages Act (120 of 1998) requires spouses to register their customary marriages in order to have *prima facie* proof of the existence of the marriage, non-registration does not invalidate the marriage.

The registration of a birth is compulsory and should take place within 30 days of the birth. Between 2010/11 and 2011/12, the number of births registered within the required 30 days increased by 6 per cent. During the period 2010–2011, birth registration within a few days was 45 per cent while birth registration after 30 days and up to 2 years was 47 per cent. There was significant improvement in the period 2011–2012 with birth registration within days increasing to 51 per cent and birth registration after 30 days reducing to 39 per cent.

Regarding the inheritance rights of orphaned children, in the case of *Bhe and Others v Magistrate, Khayelitsha and Others*, an application was made to the courts for two minor daughters to inherit immovable property, namely a house, from their deceased father. The litigants contended that the customary law rule of male primogeniture unfairly discriminated against the two children. The Court agreed that the principle of primogeniture as expressed in the Black Administration Act 38 of 1927 and its regulations discriminated on the basis of race and gender. As the centrepiece of the customary law system of succession, it denies extra-marital children the right to inherit from their deceased fathers and also unfairly discriminates against them and infringes on their right to dignity. The result is that the limitation it imposes on the rights of those subject to it is not reasonable and justifiable in an open and democratic society founded on the values of equality, human dignity and freedom.<sup>246</sup> In its decision, the Court highlighted both South Africa's international obligations including Article 21 of the ACRWC and its constitutional mandate to develop customary law that aligns with human rights values.<sup>247</sup>

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<sup>246</sup> Ibid.

<sup>247</sup> Section 39(2).

## 6.9 Refugee Children

According to the South African Constitution, refugee children are entitled to the right to basic nutrition, shelter, basic healthcare services and social services as enshrined in section 28(1)(c). Refugee children are also entitled to basic education under section 29(1)(a).

In the case of *Centre for Child Law and Another v Minister of Home Affairs and Others (2005 6 SA 50 (T))*, the Court ruled that the state has an “active duty” to provide all the basic socio-economic rights to foreign unaccompanied children. The question whether indigent refugee children under parental or family care will have a similar direct, immediate claim to socio-economic rights remains unclear. According to child rights organisations, although refugee children have constitutional rights and these entitlements have been concretised in legislation and policies, the improper execution of most of these legislation and policies that result in the continued discrimination and exclusion of refugee children from education and social assistance grants remains a problematic area that requires urgent attention.<sup>248</sup>

A notable gain in relation to refugee rights in South Africa is the provision of social grants to recognised refugees. The Minister of Social Development promulgated amendments to the regulations of the Social Assistance Act 13 of 2004 which took effect from the 1 April 2012. This was the result of sustained advocacy from various rights groups which culminated in Lawyers for Human Rights (LHR) and the Refugee Social Services pursuing public interest litigation to give effect to elderly disabled refugees and the right of refugee children to access social assistance.

In an important precedent, on 6 June 2011 LHR brought a high court application in Durban on behalf of an elderly disabled refugee woman, based on Section 27(1)(a) of the Constitution which provides that everyone has the right to have access to “social security, including, if they are unable to support themselves and their dependents, appropriate social assistance”.<sup>249</sup> In this case, the elderly women qualified for a disability grant but was refused access to the grant because she reached the age of 60. All other disabled elderly refugees therefore were in the same predicament. South African citizens automatically have a disability grant converted to an older persons grant. LHR considered this to be a constitutional violation of the rights of elderly disabled refugees and challenged this. As a result of the case, from 1 April 2012, all recognised refugees now have access to social grants.

Many refugees find themselves in a similar situation where they are unable to work as a consequence of their disability. They are also unable to secure employment due to their status or age. Refugees are therefore left in a precarious situation where they are unable to maintain themselves or care for their families.<sup>250</sup> Similarly, vulnerable refugees who cannot access care dependency grants and child support grants face undue hardship.<sup>251</sup> It is notable that the Minister had previously made several undertakings to amend the

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<sup>248</sup> UNICEF Innocenti Research Centre. Reforming Child Law in South Africa: Budgeting and Implementation Practice. February 2009. [http://www.unicef-irc.org/publications/pdf/reformingchildlaw\\_reprint.pdf](http://www.unicef-irc.org/publications/pdf/reformingchildlaw_reprint.pdf)

<sup>249</sup> And Refugee Social Services, a non-profit organisation that provides social and integration assistance to refugees

<sup>250</sup> Yasmin Rajah, Director of Refugee Social Services.

<sup>251</sup> Lawyers for Human Rights. Press Release: Social Relief is Made Available to Vulnerable Refugees. <http://www.lhr.org.za/news/2012/social-relief-made-available-vulnerable-refugees>

regulations to the Social Assistance Act but had not taken adequate or reasonable steps, until faced with litigation, to realise the rights of refugees.<sup>252</sup>

## 6.10 Summary of Findings

- South Africa has not yet submitted periodic reporting to the African Committee of Experts on the Rights and Welfare of the Child. At the time of writing, the DWCPD had submitted a draft report to Cabinet in 2013 and once approved it will be submitted to the ACERWC.
- South Africa is commended for being the first state in the region to give effect to the Maputo Protocol through a Constitutional Court decision which drew upon specific provisions of the Maputo Protocol in providing remedies in relation to the protection of inheritance rights of women and children.
- Approximately 120,000 learners of compulsory school age are excluded from school.
- Conducive facilities for children with disabilities are yet to be established to enable them to access universal education. These include curriculum, translation of school books into Braille materials, adoption of sign language and special training of educators.
- Older learners are at a high risk of dropping out of school with a dropout rate of between 3.5 per cent and 11.8 per cent for children after Grade 9. Low numbers of older post-basic education learners (41 per cent) are retained and complete their FET cycle and access to FET colleges remains limited.
- Black children are poorly represented at university level. Only 3.5 per cent of this population group, aged 18–29 were enrolled in 2011 as compared to 20 per cent of white and 14.9 per cent of the Indian/Asian population groups. In 2011 only 1.6 per cent of learners attended FET colleges.
- *Ukuthwala* and initiation schools are widespread and harmful cultural practices and only a small number of cases relating to these practices are successfully prosecuted.
- Corporal punishment is being used in schools as a means of discipline despite the Constitution and legislation prohibiting children from being subjected to inhuman and degrading punishment. The Eastern Cape Province has the highest percentage of students experiencing corporal punishment at 30 per cent in 2012.
- Incidents of assault in schools in Mpumalanga doubled over the past five years, and tripled in North West province, and increases in assault have also been seen in Gauteng, Limpopo, the Eastern Cape and KwaZulu-Natal.
- The number of learners experiencing sexual assault at school has risen in all provinces, with the exception of Gauteng, which recorded a significant drop from 4.4 per cent in 2008, to 0.7 per cent of learners in 2012. Rates of robbery at school have remained consistent in most provinces, other than Free State where learners reported a 13.7 per cent drop.
- Child labour is reported to be highest in the agriculture and retail sectors and girls are more vulnerable than boys to child labour. A total of 121,000 children were engaged in market economic activities in 2012.
- Child mortality rates are higher in poor communities than in wealthier communities.
- Amendments to the Social Assistance Act affords refugee children the right to access certain social grants such as disability grants and foster care grants.

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<sup>252</sup> Ibid.



### **6.11 Recommended Actions**

- ☑ The South African government is commended for submitting the initial state periodic report to the African Committee of Experts on the Rights and Welfare of the Child, but is advised to improve its reporting timelines in future.
- ☑ The South African government should improve access to universal education by all children including the poor and children with disabilities as well as provide conducive facilities for children with disabilities.
- ☑ The South African government should support Black learners in science and mathematics subjects, and also support Black students at FET colleges and universities.
- ☑ The South African government should address child labour that persists in the various economic sectors including agriculture, domestic work and retail and which particularly affects girl children from poor communities
- ☑ The South African government should improve efforts to prosecute the perpetrators of torture, corporal punishment, harmful cultural practices and sexual violence.

## CHAPTER SEVEN

### AFRICAN YOUTH CHARTER

The African Youth Charter (AYC) is a treaty adopted at the 17th Session of the Assembly of African Union Heads of State and Government (AUGA) in Banjul, The Gambia, on 2nd July 2006. It became effective on 8th August 2009 and aims to protect the rights of the youth. The Charter is a political and legal document which serves as a strategic framework for African states, giving direction for youth empowerment and development at continental, regional and national levels. It is worth pointing out, for current purposes, that the concept of youth is broader than that of the child which refers to young people aged up to 17 years. Youth, under the Charter, includes persons between the ages of 15 and 35. As a treaty, the AYC binds every state party to develop supportive policies and programmes related to youth.

South Africa signed the AYC on 7th May 2009 and ratified it on 28th May 2009. The instrument of ratification was deposited with the AU Commission on 8th July 2009. The African Youth Charter is the first legal framework provided to Africa by the relevant actors in the specific sector in order to support national policies, programmes and actions that promote youth development.

#### 7.1 Youth Participation

Since 1994 South Africa has done a great deal to promote youth participation in all spheres of society, including in Parliament and other decision-making bodies. The youth participate in political, economic, social, technological and legal aspects of development, at both community and national levels. Each major political party has a youth league that plays an important political role. South Africa developed a national youth policy, as required, and the policy was adopted by Parliament and enacted into law.

#### 7.2 National Youth Policy

The Umsobomvu Youth Fund was established as a state institution with three major programmes: Contact Information and Counselling (CIC); Skills Development and Transfer; and Youth Entrepreneurship. The CIC programme gave young people access to information and counselling support while the Skills Development and Transfer programme equipped them with skills to access sustainable living and offered clearly defined job opportunities. The Fund was incorporated into the National Youth Development Agency. The National Youth Development Agency (NYDA) and the Youth Desk in the Presidency monitor the implementation process through the National Youth Policy<sup>253</sup> in partnership with government and civil society organisations for the direct implementation of the Charter.<sup>254</sup> The Youth Policy provides a framework for development in South Africa and attempts to simplify the implementation of youth development for implementation agencies such as the NYDA. According to the NYDA, with about half (42 per cent in 2012) of the country's population comprising people belonging to the age group 14 to 35, it is important to have a co-ordinated and integrated development

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<sup>253</sup> The NYDA derives its mandate from the NYDA Act 54 of 2008, the National Youth Policy 2009-2014 and the draft Integrated Youth Development Strategy as adopted by the African Youth Convention of 2006.

<sup>254</sup> *South Africa Ratifies African Youth Charter*. South African Government Online. 24 July 2009. <http://www.gov.za/speeches/view.php?sid=3070>

approach by all sectors of society. It is against this backdrop that the National Youth Policy implementation guidelines aimed at simplifying the implementation of the policy were adopted by the NYDA.<sup>255</sup>

Consistent with the Youth Policy, the Inter-Departmental Committee on Youth Affairs is convened and co-ordinated by the NYDA comprising representatives delegated by heads of departments at national level, MECs at provincial level and municipal managers at local government level. Its main purpose is to assist in planning and monitoring progress made by stakeholders in implementing the National Youth Policy.<sup>256</sup> The Committee meets quarterly and the NYDA includes a summary of minutes of the Committee in its quarterly reports to the Presidency.

The National Youth Policy and its implementation and monitoring mechanisms has contributed to increased mainstreaming of youth development initiatives within the state. There are, however, many challenges, particularly in relation to the period under review.

### **7.3 Education and Skills Development**

Scholarships and bursary programmes (grants) are intended to encourage entry into post-primary school education and into higher education for young achievers from previously disadvantaged communities, especially young black females. Poverty is one of the challenges that impact on the ability of young women to access higher education and training. The National Student Financial Aid Scheme (NSFAS) provides access to tertiary education for students from poor and working class families who have academic potential. This is a category of student who would not be able to pursue higher education without financial assistance. The amount disbursed to students as loans and bursaries through NSFAS has increased from R3.5 billion in 2009 to R7.4 billion in 2012. Since 2012, NSFAS provides 100 per cent bursary allocations for all students with a combined annual family income below R122,000. Another bursary programme has been made available since 2008 to provide financial support to students with disabilities. This support is intended to provide the necessary additional teaching and learning (curriculum) support for this category of students to overcome any barriers to learning resulting from their disabilities. Youth are also provided the opportunity to access credit and to pursue entrepreneurship programmes as well as skills and training programmes.

### **7.4 Sustainable Livelihoods and Youth Employment**

The African Youth Charter enjoins state parties to address and ensure the availability of accurate data on youth employment, unemployment and under-employment so as to facilitate prioritisation of this matter in national development programmes that are complemented by clear programmes to address unemployment.

Despite the elaborate legislative and policy framework that South Africa has developed in the area of youth employment and in promoting sustainable livelihoods for youth, youth unemployment in South Africa remains a matter of grave concern.<sup>257</sup>

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<sup>255</sup> According to the NYDA the implementation guidelines will direct how sectors of society including organs of state, private and non-governmental organisations must implement programmes aimed at the development of young people, including measures to ensure compliance with sectors which are moving slowly on youth development. <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=26691&tid=64730>

<sup>256</sup> <http://www.thepresidency.gov.za/MediaLib/Downloads/Home/Publications/YouthPublications/NationalYouthPolicyPDF/NYP.pdf>

<sup>257</sup> Ebrahim-Khalil Hassen suggests that recent history reminds us that 'ticking time bombs' overthrew governments in the Middle East and North Africa in 2011: 2012, p36.

National policies, laws, and strategies for securing youth employment on youth employment include:

- The National Youth Policy which provides a national framework and statement of intent to address youth development, including youth employment in South Africa (National Youth Commission, 2009).
- The National Youth Development Strategy 2007/08–2011/12, a framework to secure collective national action and support to improve the situation of youth in South Africa (Department of Social Development, 2007).
- The National Youth Commission Act No. 19 of 1996 which establishes the National Youth Commission and its mandate, including the development of a national youth development plan and mainstreaming youth development across all sectors (Office of the Presidency, 1996).
- The Skills Development Act No. 97 of 1998 as amended which provides the framework for the development and implementation of national, sectoral and workplace strategies to strengthen skills in the South African workforce (Department of Labour, 1998).
- Outcome 4 speaks to Decent Employment through Inclusive Growth and sets out the South African government's commitments and outcomes to establishing an enabling environment for decent employment. Output 3 provides for a multi-pronged strategy to reduce youth unemployment (The Presidency, RSA, 2010).
- Outcome 5 which provides for a skilled and capable workforce to support an inclusive growth path sets out the government's commitment to increase both the supply and demand of a skilled workforce through, *inter alia*, improving access to, and the availability and quality of, post-school skills development programmes.
- National Development Plan 2030, titled Our Future lists improvements in education and youth employment as two of the national priority interventions for addressing poverty and inequality. It specifically prioritises youth unemployment through incentivising the employment of young, unskilled work seekers (National Planning Commission, 2012).

This discourse is also evident, for example, in the policy orientation of government. Diagnostic reports produced by the National Planning Commission (NPC) in 2011, in preparation for the subsequent release of a National Development Plan (NDP), variously refer to high levels of youth unemployment as the 'greatest threat to social cohesion' and the 'single greatest risk to social stability in South Africa'.<sup>258</sup> The NDP, tabled in Parliament just days before the Marikana Massacre in 2013 similarly warns of the need to 'find ways to urgently reduce alarming levels of youth unemployment and provide young people with broader opportunities or risk that this cohort is 'likely to rebel if left with no alternative but unemployment and poverty'. Disenchanted youth, the Commission observed, present "both a hazard and a lost resource to society".<sup>259</sup>

The recently released results of the 2012 Census confirm that South Africa is indeed experiencing a 'youth bulge'. Just under one-third of all South Africans (29.6 per cent) are younger than 14 and a further 28.9 per cent are aged 15–34, making up 58.5 per cent of the national population overall.<sup>260</sup> The government's Expanded Public Works Programme (EPWP) has provided relief for young people, particularly in rural areas. The EPWP remains an effective part of government's response to the triple challenge of poverty,

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<sup>258</sup> NPC, 2012b: 31; 2011a: 4.

<sup>259</sup> Ibid: 26, 98, 106, and 266.

<sup>260</sup> StatsSA, 2012b: 28.

unemployment and inequality.<sup>261</sup> Government's initial target in the second phase of the EPWP for the period 2009 -2014 was to create 4.5 million work opportunities.<sup>262</sup> According to recent statistics, this target had been increased to nearly five million new work opportunities, with a special emphasis on unemployed youth and women. Furthermore, the EPWP programme aims to recruit some 8,000 youth for artisan training to be employed by the national and provincial branches of the Department of Public Works. In the context of serious challenges in the area of employment and creating sustainable livelihoods, the EPWP's success deserves mention.<sup>263</sup>

## 7.5 Health

Article 16 of the African Youth Charter states that, "... every young person shall have the right to enjoy the best attainable state of physical, mental and spiritual health". Section 27 of the South African Constitution includes the right to health under a cluster of socio-economic rights, including the right to healthcare, food, water and social security. The Constitution places positive obligations on the state to take reasonable legislative and other measures within the context of available resources to achieve the realisation of these rights.

### 7.5.1 Teenage Pregnancy and Early Childbearing

South Africa has the lowest fertility rate in mainland Sub-Saharan Africa.<sup>264</sup> While teenage fertility has been declining over time, this has been at a slower pace than overall fertility.<sup>265</sup> It has been suggested that the slower decline in teenage fertility may be attributed to interruptions in fertility associated with national epochs. For example, the interruption of schooling during the struggle years was associated with a rise in teenage fertility. Similarly, the spike in fertility in the mid-1990s is associated with political changes during that period when there were concerns for the large cohort of young people who had become marginalised from mainstream systems of education, work, healthcare and family life. However, it must be noted that teenage fertility has declined by 10 per cent between 2006 (78 per 1,000) and 2012 (65 per 1,000).<sup>266</sup> A further decline in teenage fertility (54 per 1,000) was reported in the 2012 Community Survey. Older adolescents aged 17-19 account for the bulk of teenage fertility in South Africa. While rates are significantly higher among Black (71 per 1,000) and Coloured (60 per 1,000) adolescents, fertility among White (14 per 1,000) and Indian (22 per 1,000) adolescents approximates that of developed countries.<sup>267</sup> This difference can in all likelihood be accounted for by the wide variation in the social conditions under which young people grow up, related to disruptions of family structure, inequitable access to education and health services, as well as the concentration of poverty and unemployment in black and coloured communities.

Thus with the growing body of research pointing to South African teenagers as being less likely to have children than teenagers in previous decades, it is therefore essential to

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<sup>261</sup> According to Pule.

<sup>262</sup> NPC.

<sup>263</sup> Ibid.

<sup>264</sup> Ardington. C, Branson. N and Leibbrandt. M. "Trends in Teenage Childbearing and Schooling Outcomes for Children Born to Teens in South Africa," Southern Africa Labour and Development Research Unit Working Paper 75 (2012).

<sup>265</sup> Ibid.

<sup>266</sup> Ibid.

<sup>267</sup> General Household Survey 2011. Ibid.

strengthen the current prevention programmes and support services for teenage mothers and their children initiated by government.

### **7.5.2 Growing Up in the Shadow of HIV/AIDS**

HIV prevalence increases substantially during adolescence and early adulthood. Furthermore, the lifetime risk of becoming HIV-positive, for an HIV-negative teenager, is estimated to be between 40 per cent and 50 per cent. What this means is that by the age of 60 almost half of today's teenagers will be HIV-positive.<sup>268</sup>

Over the past decade, South Africa has implemented numerous measures to prevent new HIV infections amongst teenagers and young adults. To determine the success of these interventions, researchers examine the incidence, which is a measure of new HIV infections over a specific period of time. Incidence can be difficult to measure and this creates some uncertainty when tracking changes. Despite these difficulties, evidence from a number of sources has shown a decline in incidence during recent years for South African adolescents and adults.

The 2012 South African National HIV Prevalence, Incidence, Behaviour and Communication Survey reported a statistically significant reduction in incidence for young women between the ages of 15 and 24.<sup>269</sup> Using mathematical modelling and national prevalence data, Johnson established that incidence dropped around 30 per cent for 15-49-year-olds between the start of 2005 and the start of 2012. Additionally, UNAIDS has estimated a fall in incidence from around 2.9 to 1.8 per cent for 15-49-year-olds between the start of 2005 and the start of 2012.<sup>270</sup>

While this decline is encouraging, overall incidence rates remain unacceptably high. Researchers continue to assess the main risk factors for teenagers, as well as the success of prevention programmes to date. The sexual behaviour of South African youth continues to be scrutinised with the aim of reducing their risk of HIV infection.

A recent UNFPA study of HIV/AIDS prevalence in South Africa noted that young women between the ages of 15 and 24 are four times more likely to have HIV than males of the same age. This risk is especially high among pregnant women between 15 and 24 as well as survivors of physical and/or intimate partner violence). On average, young females become HIV-positive about five years earlier than males.<sup>271</sup>

According to the UNFPA study the steady decline in HIV/AIDS infection rate is attributed to the government's comprehensive implementation of antiretroviral (ARVs) provision and consistent messaging around prevention methods. For example, over the past decade South African teenagers have been exposed to communication prevention programmes encouraging positive change in sexual behaviour. There is some evidence that one of these programmes – the promotion of condoms – has had a significant impact in reducing new infections.<sup>272</sup>

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<sup>268</sup> Engaging with the National Strategic Review: <http://www.nspreview.org/2013/06/11/the-truth-about-youth/>

<sup>269</sup> World Health Organisation Strategic Directions of the Department of Maternal, Newborn, Child and Adolescent Health

See: [http://sti.bmj.com/content/86/Suppl\\_2/ii72.full](http://sti.bmj.com/content/86/Suppl_2/ii72.full)

<sup>270</sup> Ibid.

<sup>271</sup> UNFPA South Africa. HIV. <http://countryoffice.unfpa.org/southafrica/2013/05/03/6675/hiv>

<sup>272</sup> Ibid.

Released in 2012, the Third South African National HIV Communication Survey showed a marked increase in self-reported condom use by South African adolescents and adults. The number of people who reported using a condom at first sex increased from 18 per cent in 1992 to 86 per cent in 2012.<sup>273</sup> Young people also reported high rates of condom use at their most recent sexual encounter — 86 per cent with a casual partner and 75 per cent with a regular partner.<sup>274</sup> There is thus increasing evidence that young South Africans are engaging less than previously in risky sexual behaviour.<sup>275</sup>

### 7.5.3 Prevalence of Tobacco Smoking

South African adolescents have the highest reported smoking prevalence amongst African health surveys.<sup>276</sup> Amongst these youth, 30 per cent report ever having smoked a cigarette in their lifetime, 21 per cent are current smokers (smoked cigarettes on one or more days in the past month), nearly 7 per cent are frequent smokers (on 20 or more days in a month), and 6 per cent had smoked their first cigarette before the age of 10.<sup>277</sup> Of the current smokers, 47 per cent had tried to stop smoking within the past year. Smokeless tobacco use within the previous years was reported by 11 per cent of learners.<sup>278</sup> In South Africa 23-25 billion cigarettes are consumed each year with the age group 15-38 accounting for over 80 per cent of consumers. The equivalent of another 8 billion cigarettes is consumed in the form of pipe tobacco, hand-rolled cigarettes and snuff.<sup>279</sup>

According to Roger, during the period 2011-2012 a conservative estimation of 8% of youth deaths (21,500 deaths) were attributable to smoking.<sup>280</sup> The proportion of deaths from tobacco is expected to increase because the smoking epidemic is still maturing, and the segment of those most vulnerable (young people who started smoking when they were teenagers who will continue to smoke throughout their lives) is still increasing.

Out of 100 young people in South Africa who die from a smoking-related disease, 28 die of chronic obstructive pulmonary disease, 19 of TB, 13 of lung cancer, 12 of ischemic heart disease, 10 of cancer of the lip, mouth, pharynx and oesophagus, 9 of strokes and vascular disease and 9 of other conditions. It is estimated that if young people stopped smoking, 58 per cent of lung cancer deaths, 37 per cent of COPD deaths, 20 per cent of TB deaths, and 23 per cent of vascular deaths could be avoided. The above estimates are taken from an analysis of death certificates in 2011-2012.<sup>281</sup>

These statistics viewed against the backdrop of a growing tobacco manufacturing industry are cause for much concern. In research conducted between 2011 and 2012, the Health

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<sup>273</sup> Johnson, L *et al.* 'The effect of changes in condom usage and antiretroviral treatment on human immunodeficiency virus incidence in South Africa: A model-based analysis.' *J. R. Soc. Interface* 2012 (9).

<sup>274</sup> Geffen, N *et al.* 'Helen Epstein's wrong about South Africa's response to AIDS.' Available at: <http://tinyurl.com/b69m4yz> (1 August 2012).

<sup>275</sup> UN Millennium Development Goals Indicators. <http://mdgs.un.org/unsd/mdg/SeriesDetail.aspx?srid=802> Key findings of the third South African National HIV Communication Survey (2012). Available at: <http://jhuccp.org/sites/all/files/NationalHIVCommunicationSurvey.pdf>

<sup>276</sup> Visser, P. 2008. Tobacco and HIV and AIDS (2012). Medical Research Council (MRC). See: <http://www.mrc.ac.za/public/facts24.htm>

<sup>277</sup> Medical Research Council Study. Healthy Active Kids South Africa (2012). See: <http://www.mrc.ac.za/chronic/healthykids.pdf>

<sup>278</sup> Ibid.

<sup>279</sup> Ibid.

<sup>280</sup> Ending the Tobacco Epidemic: Progress Toward a Healthier Nation. Department of Health and Human Services, USA. August 2012. See: <http://www.hhs.gov/ash/initiatives/tobacco/tobaccoprogress2012.pdf>

Systems Trust noted that British American Tobacco (BAT), whose biggest brands include Rothmans and Peter Stuyvesant, has a 93 per cent share of the local tobacco market, and Japan Tobacco International, which has been in South Africa since 2010, has gradually grown its share to about 5 per cent with brands such as Camel and Winston. Swedish Match, which entered South Africa in 1999 through the acquisition of Leonard Dingler and two other tobacco businesses, describes South Africa as one of the group's more important markets. In 1999 Philip Morris, the biggest tobacco group in the world, established an office in South Africa from which it sells Marlboro. In 1999 Gallaher, maker of Benson & Hedges and Silk Cut cigarettes, bought a factory site in South Africa and started production in anticipation of the growth of the industry and entry into the African continent. South Africa thus remains strategic for the international tobacco industry. According to the Financial Mail, one of the advantages of South Africa is that it offers a springboard to the rest of Africa.<sup>282</sup>

The South African government has been quick to introduce legislative and policy interventions to curb the use of tobacco smoking. South Africa became one of the first countries in the world to ban smoking in public places in 2000 when it introduced its Tobacco Products Control Amendment Act. The Act impacted on the smoking culture in South Africa as it prohibited smoking in restaurants, bars, shopping centres and offices where there was no separate enclosed smoking room.

South Africa has made significant progress in the past decade in reducing tobacco use. Fewer people smoke, and fewer cigarettes are being smoked. This in time will translate into fewer deaths amongst the youth from diseases caused by tobacco use.

## **7.6 Summary of Findings**

- The African Youth Charter lacks reporting mechanisms to monitor implementation of the Charter at domestic level.
- South Africa has no national laws that give effect to full implementation of the AYC.
- The AYC commits states parties to develop a National Plan of Action to implement the guaranteed rights of the AYC.
- The National Youth Development Strategy 2007/08–2011/12 developed by the Department of Social Development in 2007 seeks to secure collective national action and support to improve the situation of youth in South Africa.
- South Africa has a National Youth Policy which seeks to address youth development including youth employment.
- The youth of South Africa experience serious economic and social challenges such as high unemployment, poverty and inequality.
- Use of tobacco is high among teenagers and contributes to 58 per cent of lung cancer deaths and 20 per cent of TB deaths.
- Young women between 15-24 years of age are four times more vulnerable to contracting HIV/AIDS, including survivors of physical or intimate partner violence.
- The incidence of new HIV/AIDS infections is reported to be declining due to successful campaigns promoting condom use.
- Teenage pregnancy is high among the 17-19 age group, with significantly high rates of 71 per 1,000 among Black women, 60 per 1,000 among Coloured women, 14 per 1,000 among White women and 22 per 1,000 among Indian women.

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<sup>282</sup> South Africa Venture Capital and Private Equity Association: Promoting private equity and venture capital in South Africa. See: [http://www.savca.co.za/downloads/Yearbook\\_2013.pdf](http://www.savca.co.za/downloads/Yearbook_2013.pdf)



## 7.7 Recommended Actions

- ☑ The South African government should popularise the AYC among officials, civil society and national human rights institutions.
- ☑ The South African government should empower the youth, especially young girls, to ensure their full rights, including socio-economic rights such as the right to employment, education, health, housing, water and sanitation.
- ☑ The South African government should develop, finalise, and implement a national plan of action to promote the rights of the youth and combat violence against young women by ensuring protection from harmful practices such as initiation and virginity testing of girls, and ensure that those found responsible are dealt with in law.
- ☑ The South African government must provide progress reports in respect of the Expanded Public Works Programme (EPWP) for the period 2009-2012, which is aimed at creating 5 million jobs for the youth, and recruitment of 8,000 youth for artisan training for employment within the national and provincial branches of the Department of Public Works.

## IN CONCLUSION

This Report has illustrated that South Africa has developed one of the most progressive legislative frameworks to protect citizens' rights, in particular political, economic and social rights, as well as the rights of women, people with disabilities, children and indigenous people. South Africa also strongly supports citizens' rights in relating to sexual orientation and gender identity.

Great progress has been made in the conservation of the environment, and towards ensuring that all citizens benefit from the use of the country's natural resources.

Complementing this, South Africa has ratified regional mechanisms aimed at strengthening sustainable democracy and socio-economic rights entrenched in the South African Constitution by adopting and ratifying agreements such as the African Charter on Human and Peoples' Rights; the Protocol on the Rights of Women in Africa (Maputo Protocol); the African Charter on the Rights and Welfare of the Child; the African Charter on Elections, Democracy and Governance; the African Youth Charter; and the Protocol Establishing the African Court.

South Africa has not achieved its goals in popularising regional agreements at the domestic level, to enable citizens to enforce their rights and acquire remedies where possible. Furthermore, irregular reporting and the long overdue periodic reports on the African Charter on Human and Peoples' Rights (merged with the Maputo Protocol), and the African Charter on the Rights and Welfare of the Child contradicts the culture of respect of human rights, democracy and accountability of the state. We recognise and applaud, however, that these reports are in the process of submission to relevant AU treaty bodies.

Despite great progress in all thematic areas covered by this Report, the challenge for South Africa is to establish the co-ordinating and other mechanisms to ensure efficient and effective implementation of the policies, legislation and related programmes so as to fulfil the country's commitments on various AU instruments.