

The doctrine of precedent and the value of Section 39(2) of the Constitution

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By Bayethe Maswazi

The principle of *stare decisis* is a juridical command to the courts to respect decision already made in a given area of the law. The practical application of the principle of *stare decisis* is that courts are bound by their previous judicial decisions, as well as decisions of the courts superior to them. In other words a court must follow the decisions of the courts superior to it even if such decisions are clearly wrong. The importance of this principle is best illustrated by the words of Brand AJ, as he then was, in the case of *Camps Bay Ratepayers' and Resident Association and Another v Harrison and Another* 2011 (4) SA 42 (CC), when he said: '*Stare decisis* is therefore not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution.' Clearly the above dictum does give the doctrine of precedent a constitutional flavour, but whether the doctrine ought always to be subject to the Constitution or *vice versa*, Brand AJ did not deal with that, opining as he did that the issue was not relevant in the instant matter since he was dealing with post constitutional precedent. That observation illustrates the complexity of the issue, at least when a pre-constitutional precedent is relevant and binding. The issue though does not only pertain to pre-constitutional precedents, even post constitutional precedent may sometimes present problems.

In this article I examine whether a court in a given scenario is bound by the principle of *stare decisis* in circumstances where it deals with the decision or precedent set by a court superior to it, particularly, if the latter has interpreted a particular legislative provision in a manner which plainly does not accord with the command or the constitutional directive contained in s 39(2) of the Constitution. I further examine the relationship between s 39(2) of the Constitution and the doctrine of precedent with a view to determine the extent to which courts have solved the possible conflict between the two. The question then is, in the event of the conflict between the doctrine and s 39(2) of the Constitution, which of the two principles must reign? The obvious answer is that s 39(2) by virtue of the supremacy of our Constitution must reign. An excavation of various court decisions suggests that the issue is not that simple and courts have not given a clear answer or where direction has been given by the Constitutional Court (CC), lower courts have not readily followed. Is there a real conflict between the two principles? If so, can a reconciliation between them be achieved? Confronted by a binding precedent on the one hand and s 39(2) on the other in a given legal issue, where does a court go? These questions are not intended to suggest that there is an automatic conflict that arises at every given interface between the doctrine and s 39(1) of the Constitution. On the other hand, they arise because there has been a trend where the significance of s 39(2) have somehow been diminished. The survey of these cases in this article will reveal this tendency.

The meaning of s 39(2) of the Constitution

Section 39(2) directs every court or tribunal – when interpreting legislation or developing common law or customary law – to promote the object, purport and spirit of the Bill of

Rights. The development of common law and customary law are beyond the scope of this article, which is concerned only with the interpretation of legislation, though s 39(2) affects the common law and customary law as well as the section suggests. There are various pertinent factors that arise out of the reading of s 39(2). Firstly, the section confronts directly and singularly every court as it interprets legislation. Secondly, it imposes a duty on courts to view every legislation through the lens of the spirit, object and purport of the Bill of Rights, by making sure that its spirit, purport and object percolate through the interpretive process. In other words, the final product of each interpretive process must exhibit proof of the promotion of the purport, spirit and object of the Bill of Rights. Section 39(2) does not necessarily imply the elevation of a particular right in the Bill of Rights, nor a transfiguration of same into spirit, purport and object of the Bill of Rights. The meaning then, I submit, of the purport, spirit and object of the Bill of Rights is not the raw collections of the rights in the Bill, it is the profound and collective message found in the values of the Constitution as encapsulated in s 1 of the Constitution. What s 39(2), therefore, asks for is that, these values must shine through in the interpretive process. I do not propose this as the best meaning of s 39(2), rather I suggest it as the most preferable approach towards the interpretation of s 39(2). No occasion has arisen, so far, for the CC to consider itself confronted by the issue as to what is the true or best meaning of s 39(2), at least not to my knowledge, nor has the CC ever been asked how courts ought to approach the interface between s 39(2) and the doctrine of precedent, an issue which makes this article all the more significant.

In *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC), Langa DP had an occasion to consider the meaning of s 39(2) and he opined as follows: ‘The purport and objects of the Constitution finds expression in s 1, which lays out the fundamental values which the Constitution is designed to achieve.’

The *Hyundai* case is not, in my view, the best example to illustrate the importance of s 39(2) because the case implicated directly various rights in the Bill of Rights, yet the provisions of s 39(2) do not demand judicial attention only when there is a constitutional issue to be considered, they seek attention of the court whenever it interprets legislation. Nonetheless, the *Hyundai* matter was an important foundation in this regard.

The pertinent precedent on s 39(2) and *stare decisis*

In *S v Walters and Another* 2001 (10) BCLR 1088 (TK) Jafta AJP was confronted with a question of whether s 49 of the Criminal Procedure Act 51 of 1977 (CPA) in sanctioning a peace officer to kill a fleeing suspect who is suspected of committing a schedule 1 offence, was constitutional. Having examined the applicable precedent including the decision of the Supreme Court of Appeal (SCA) in *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA), he came to the conclusion that the section was unconstitutional. Of interest in the case is that even though the court in the *Walters* matter had a wide opportunity to consider whether to avoid the applicable judicial precedent, which was binding on it through s 39(2) of the Constitution, the court chose not to refer to the section at all. In the result Jafta AJP lost an opportunity to define the relationship between s 39(2) and the doctrine of precedent, even though he grappled with the question whether he was bound by the SCA decision in the *Govender* matter.

In *Minister of Safety and Security v Sekhoto and Another* 2011 (5) SA 367 (SCA), Harms DP in a unanimous decision, took the opportunity to consider whether a peace officer – when considering the arrest of a suspect under s 40 of the CPA – must also additionally consider whether there are other less restrictive means of securing the attendance of the suspect at court. This was in the context of the decisions of the various High Courts, which had held that arrest must be a last resort, in other words, a peace officer must consider alternative to arrest before actually effecting the arrest. Harms DP issued a stern rebuke of the High Courts and held that this was not necessary since the jurisdictional requisites of an arrest are contained in s 40 of the CPA, no more is needed by the peace officer other than the factors set out in s 40. Of s 39(2) he merely held that it was not suggested in what way s 40 of the CPA may be interpreted to promote the purport, spirit and objects of the Bill of Rights. In other words he was not convinced that as he was interpreting s 40 of the CPA, he had to consider s 39(2) of the Constitution in interpreting s 40 of the CPA.

In *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC), the CC had to consider the provisions of the Prescription Act 68 of 1969. Jafta J recognised the significance of s 39(2) when dealing with pre-constitutional precedent. However, this recognition was somehow dampened by the observation Jafta J made when he said at para 90: ‘The Constitution in plain terms mandates courts to invoke the section [s 39(2)] when discharging their judicial function of interpreting legislation. The duty is triggered as soon as the provision under interpretation affects the rights in the Bill of Rights.’

Section 39(2) on its plain wording seems applicable every time a court interprets legislation not only when that legislation affects the Bill of Rights. Therefore, with respect, the last sentence of the above passage is not necessarily the correct interpretation of s 39(2). The interpretation attached to the section by Jafta J in the above dictum illustrates the complexity surrounding this section. But, the *Makate* case was not dealing with the interface between s 39(2) and doctrine of precedent, accordingly, while it is important for the definition of the section, it bears less relevance to the theme of this discussion.

In *Turnbull-Jackson v Hibiscus Coast Municipality and Others* 2014 (6) 592 (CC) the CC was confronted with the argument that the decision of the CC in *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) was more in accordance with the provisions of s 39(2) than the SCA decision in *True Motives 84 (Pty) Ltd v Mahdi and Another* 2009 (4) 153 (SCA) concerning the meaning of s 7(1)(b) of the National Building Regulations and Building Standards Act 103 of 1977. The pity though is that s 39(2) did not play as significant a role as expected in the overall decision in the *Turnbull-Jackson* case.

Overall these cases illustrate the complex role that s 39(2) of the Constitution has played so far in our jurisprudence, particularly with the inconsistent recognition that the section has been accorded by our courts. The fact that no case has considered pertinently, which direction our jurisprudence must take in the relationship between s 39(2) and the doctrine of precedent, is an illustration of the fact that this section has not been given as much recognition in our jurisprudence as one would expect.

Conclusion

Section 39(2) has had a difficult journey within the South African jurisprudence, from its inception its interface with judicial precedent has made the journey all the more complex. The voice of the CC as the guide to the SCA and the various High Courts is needed.

Regardless of this situation, it is unlikely that the section will be subordinated to judicial precedent given the supremacy of the Constitution. It is the doctrine that should be subordinated to the Constitution and not the Constitution to the doctrine. The common law must develop in consonant to the Constitution. Section 39(2) is equally an important mechanism of building a solid human rights jurisprudence demanded by s 1 of the Constitution, the sooner our courts realise this, the better. There is a need to give meaning to the relationship between s 39(2) and the judicial precedent, our courts must be urged to define this relationship, it is important for the survival of the nascent human rights culture that we have built since 1994.

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Precedent: Doctrine and rule of Law

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Turnbull-Jackson v Hibiscus Court Municipality (CCT 104/13) [\[2014\] ZACC 24](#); 2014 (6) SA 592 (CC); 2014 (11) BCLR 1310 (CC) (11 September 2014) per Madlanga J.

[54] The *Walele – True Motives* controversy brings to the fore the important doctrine of precedent, a core component of the rule of law,[footnote omitted] without which deciding legal issues would be directionless and hazardous. Deviation from it is to invite legal chaos. [footnote omitted] The doctrine is a means to an end. This Court has previously endorsed the important purpose it serves:

“[The doctrine of precedent] is widely recognized in developed legal systems. Hahlo and Kahn describe this deference of law for precedent as a manifestation of the general human tendency to have respect for experience. They explain why the doctrine of stare decisis is so important, saying:

‘In the legal system the calls of justice are paramount. The maintenance of certainty of the law and of equality before it, the satisfaction of legitimate expectations, entail a general duty of judges to follow the legal rules in previous judicial decisions. The individual litigant would feel himself unjustly treated if a past ruling applicable to his case were not followed where the material facts were the same. This authority given to past judgments is called the doctrine of precedent.

...

It enables the citizen, if necessary with the aid of practising lawyers, to plan his private and professional activities with some degree of assurance as to their legal effects; it prevents the dislocation of rights, particularly contractual and proprietary ones, created in the belief of an existing rule of law; it cuts down the prospect of litigation; it keeps the weaker judge along right and rational paths, drastically limiting the play allowed to partiality, caprice or prejudice, thereby not only securing justice in the instance but also retaining public confidence in the judicial machine through like being dealt with alike. . . . Certainty, predictability, reliability, equality, uniformity, convenience: these are the principal advantages to be gained by a legal system from the principle of stare decisis.” [Footnotes omitted].

[55] I cannot but also borrow from the eloquence of Cameron JA:

“The doctrine of precedent, which requires courts to follow the decisions of coordinate and higher courts in the judicial hierarchy, is an intrinsic feature of the rule of law, which is in turn foundational to our Constitution. Without precedent there would be no certainty, no predictability and no coherence. The courts would operate in a tangle of unknowable considerations, which all too soon would become vulnerable to whim and fancy. Law would not rule. The operation of precedent, and its proper implementation, are therefore vital constitutional questions.” [Footnote omitted].

[56] The doctrine of precedent decrees that only the ratio decidendi of a judgment, and not obiter dicta, have binding effect. The fact that obiter dicta are not binding does not make it open to courts to free themselves from the shackles of what they consider to be unwelcome authority by artificially characterising as obiter what is otherwise binding precedent. Only that which is truly obiter may not be followed. But, depending on the source, even obiter dicta may be of potent persuasive force and only departed from after due and careful consideration.[footnotes omitted].

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4.2.3 Judicial Precedent

The doctrine of judicial precedent binds courts to uphold the law as expressed in previous decisions of superior courts, courts of co-ordinate jurisdiction and its own decisions. A court may however depart from decisions of courts of co-ordinate jurisdiction or its own decisions if it can demonstrate that they were wrongly decided. [31] The doctrine, with its origins in English law, is founded on the principle that the law which was applied to a specific situation should be likewise applied in similar situations. [32] It is firmly rooted in the principle of

stare decisis which literally means ‘to stand by decisions’ (previous decisions). The principle of *stare decisis* is well settled in common law jurisdictions. In the case of *United States Internal Revenue Serv. v. Osborne (In re Osborne)*, the ninth Circuit Court of Appeals lucidly described *stare decisis*, stating that:

Stare decisis is the policy of the court to stand by precedent; the term is but an abbreviation of stare decisis et quia non movere — "to stand by and adhere to decisions and not disturb what is settled." Consider the word "decisis." The word means, literally and legally, the decision. Nor is the doctrine stare dictis; it is not "to stand by or keep to what was said." Nor is the doctrine stare rationibus decidendi — "to keep to the rationes decidendi of past cases." Rather, under the doctrine of stare decisis a case is important only for what it decides — for the "what," not for the "why," and not for the "how." Insofar as precedent is concerned, stare decisis is important only for the decision, for the detailed legal consequence following a detailed set of facts. [33]

The doctrine of judicial precedent, as described above, implies that courts are ordered in a hierarchical fashion.

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INTRODUCTION INTO THE SOUTH AFRICAN LEGAL SYSTEM

2.1 Historical Overview

350 years of colonialism and apartheid dominated the South African legal system that reflected the values of the colonial and apartheid rules. As a result, a distinction was drawn between South African common law, the "law of the white people" and traditional African law which was referred to as "native law". This "native law" was supposed to represent customary law (unwritten) of the indigenous people. Colonial and apartheid rule not only marginalised indigenous or customary law but in the process of interpretation, legislation was given a slant which facilitated colonial and apartheid rule. In this regard the role of traditional leaders and traditional courts is a case in point.

The Union of South Africa formed in 1910 represented an alliance between English and Afrikaans speaking whites and the triumph of white domination over blacks. The legal

system reflected that domination. In the past, the court system, the administration of estates, and all other parts of the system of justice were moulded around the needs of white people who made up 20% of the national population. The black majority, including coloureds and Indians, who made up 80% of the population, had marginal services that were segregated and of a low standard. Instead of being helped by the justice system, black people were most often the victims of it.

The South African Constitution, 1996 ([Act 108 of 1996](#)) brought about a positive change to the South African legal system.

2.2 SOURCES OF SOUTH AFRICAN LAW

South Africa has an uncodified legal system. This means that there is not only one primary source where the law originates and can be found. South African law has more than one source:

- Legislation
- Case Law (court decisions)
- Common Law
- Custom
- Old writers / authors
- Indigenous Law

2.2.1 Legislation

Legislation is law laid down by an organ of the State which has the power to do so. These laws are embodied in writing and are known as statutes (or acts). In South Africa, Parliament is the highest organ that can pass legislation at the national level. There are also other bodies, that can pass subordinate legislation. These include the provincial legislatures which pass provincial acts and municipal councils which pass by laws. Legislation is a powerful source of law. In principle it binds the whole society.

2.2.2 Case Law

Courts are institutions that apply the law on daily basis. Judges and magistrates, like all lawyers consult legislation and rules of common law and custom applying to the particular case before them. Courts also take into account their previous judgements in similar cases, because they are bound to the approach followed in the past. Previous judicial decisions therefore constitute law and the way in which the law was applied there is authoritative. The reason for this lies in the system of judicial precedent, also called the doctrine of *stare decisis*, which applies in South Africa. The application of the doctrine of precedent depends, among other things, on reported cases.

2.2.3 Common Law

When a specific matter is not governed by legislation, common law usually applies. South African common law is mainly the 17th and 18th century Roman-Dutch law that was transplanted to the Cape. This forms the basis of modern South African law and has binding authority. Examples of common law crimes include murder, robbery and rape, etc. Whilst South African common law is mainly Roman-Dutch law, not all the principles of Roman-Dutch law were transplanted to South Africa. Sometimes English law had, by means of precedent, influenced South African common law. Some common law principles are, for this reason, no longer pure Roman-Dutch law. The sources of Roman-Dutch law are the old sources which are the following:

- Legislation (placaaten) - few of these still apply in South Africa
- Judgements of the old Dutch courts
- Writings of learned authors (the so-called old authorities) such as Hugo de Groot, Voet, van Leeuwarm and van der Linden.

2.2.4 Customary Law

Customary law is generally unwritten law. It is fixed practices in accordance with which people live because they regard it as the law. Customary law therefore does not concern all customs or practices, such as practices of polite behaviour. Old Germanic law also consisted of customs. The same can be said of indigenous law. In modern law custom does not play such an important role as a formative source of law. Any assertion of a custom as law has to be proved. The court in the well-known case of *van Breda v Jacobs 1921 AD 330*, required that the following be proved before a custom could qualify as law⁽²⁾:

- It must be immemorial;
- It must be reasonable;
- It must have continued without exception since its immemorial origin; and
- Its content and meaning must be certain and clear.

2.2.5 Writings of modern authors

It has already been pointed out that the writings of the old authorities on common law have binding force as a source of law. Many academics and other lawyers write books and articles in law journals. There are useful sources in which to find legal principles. The authors explain the whole legal position with respect to legislation, common law and case law. Legal practitioners, the courts and students consult these writings on regular basis. Although these writings do not have binding authority, they can sometimes have persuasive authority. A court may decide to follow the opinion of a particular author, or to depart from a precedents which is at variance with such an opinion. In this way modern authors can influence legal reform.

2.2.6 Indigenous Law

Many black communities live according to indigenous law, which also takes on the form of written or unwritten customary law. Indigenous law is applied in the ordinary courts. The Evidence Amendment Act, (Act 45 of 1988) stipulates that a court can take judicial notice of indigenous law, provided that it is not in conflict with the principles of public policy or natural justice. In some instances an expert will have to give testimony on the content of these rules. The Black Administration Act, 1927 constitutes a partial codification of the

principles of indigenous law *albeit* in a distorted form. The Code of Zulu Law is an example of codified African Customary Law. Case law on African Customary law is also applied.

The big challenge facing democratic South Africa is to free indigenous law from the effects of colonial and apartheid domination and to develop a legal system that reflects the true values of a new democratic South Africa. The entire South African legal system and its sources must be re-examined critically. All law is being subjected to critical scrutiny to reflect the new constitutional order. The central values of the South African Constitution mainly democracy, equality, dignity and freedom require a fresh look at South African common law, indigenous law, and religious personal law so that the new South African legal system will reflect the plural nature of the South African society and put an end to South Africa's colonial and apartheid past in its legal system. The process of law reform has begun but is bound to be a long process.

2.3 THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 (ACT 108 OF 1996)

The South African Constitution prescribes the following institutions that strengthen and support democracy:

2.3.1 Human Rights Commission

[Sections 181 \(1\) and 184 of the Constitution](#) make provision for the establishment of the Human Rights Commission. The Human Rights Commission must, *inter alia*, -

- a. "promote respect for human rights and a culture of human rights;
- b. promote the protection, development and attainment of human rights;
- c. monitor and assess the observance of human rights in the Republic."

2.3.2 Commission on Gender Equality

[Section 181\(1\) and 187 of the Constitution](#) makes provision for a Commission on gender equality whose function includes, *inter alia*, the promotion of respect for gender equality and the protection, development and attainment of gender equality.

2.3.3 The Public Protector

[Section 182 of the Constitution](#) makes provision for the Public Protector. An Act of Parliament entitled the Public Protector Act, 1994 ([Act 23 of 1994](#)), provides for the office of the Public Protector. In terms of the Constitution, the Public Protector is empowered to investigate mal-administration in government affairs, abuse of power, improper or dishonest conduct by a person performing a public function, improper or dishonest acts in respect of public money etc. The Public Protector must report on such conduct and to take appropriate remedial action.

2.3.4 Truth and Reconciliation Commission

The Truth and Reconciliation Commission process arose from the need to give effect to the postamble of the [Interim Constitution](#) which reads as follows:

" This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for UBUNTU but not for victimisation.

In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed ."

Making provision for amnesty and dealing with gross human rights violations has presented the new democratic order with one of its biggest challenges. On the one hand effect had to be given to the Post amble. On other hand granting general blanket amnesty would have undermined South Africa's quest for establishing it rule of law and respect for the law. The Truth and Reconciliation Commission was designed not only to deal with issues relating to amnesty but to make provisions for victims of human rights violations.

The Promotion of National Unity and Reconciliation Act, 1995 ([Act 34 of 1995](#)) provides for the establishment of a Truth and Reconciliation Commission (TRC) to promote national unity and reconciliation in a spirit of understanding by the following means:

- Establishing the causes, nature and extent of gross violations of human rights which were committed during the period between 1 March 1960 and the 5 December 1993 cut-off date. President Nelson Mandela announced on 13 December 1996 that the original cut-off date would be extended to 10 May 1994.
- Granting amnesty to persons who make full disclosure of facts associated with political objectives.
- Establishing and making known the fate and whereabouts of victims of gross violations and restoring their human and civil dignity by letting them relate those violations and by recommending reparation measures.

- Compiling a report of activities of the Commission, containing recommendations on measures to prevent future human rights violations.

2.3.5 Judicial Service Commission

Section 178 of the Constitution provides for a Judicial Service Commission. The Commission's function is to make recommendations regarding the appointment, removal from office, term of office and tenure of judges of the Supreme Court and Constitutional Court and to advise the national and provincial governments on all matters relating to the judiciary and the administration of justice.

2.3.6 National Director of Public Prosecutions

The first National Director of Public Prosecutions (NDPP) was recently appointed. One of the values of having a national prosecutorial authority is that there will be national policies which ensure uniformity in the prosecutorial services. Up until now there has been complaints regarding discrepancies leading to public allegations of discrimination. This and other inherited problems have contributed to low levels of trust and acceptance of the judicial system particularly amongst the historically oppressed majority.

Section 179 of the Constitution makes provision for a single national prosecuting authority in the Republic in terms of an Act of Parliament. The national prosecuting authority shall consist of a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President and Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament. The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.

2.3.6.1 The Office for Serious Offences Economic Offences

The Investigation of Serious Economic Offences Act, 1991 (Act 117 of 1991) makes provision for an Office for Serious Economic Offences. This Office is a single co-ordinating body which is responsible for the effective and expeditious investigation of serious economic offences. This Office evaluates the charges and submits recommendations and reports to the Minister of Justice and the attorney-general concerned.

2.4 Courts and the Administration of Justice

Article 26 of the African Charter

States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

As discussed earlier, South African law is predominantly based on and influenced by both Roman-Dutch law and English law in respect of legislation and case law. South African legislation is constantly revised, adapted and supplemented to meet changing circumstances in a dynamic and developing society.

This is done on the advice of various government departments and the South African Law Commission after consultation with all relevant role players. The South African Law Commission Act, 1973 (Act 19 of 1973) makes provision for the establishment of a South African Law Commission whose function is to, *inter alia*, undertake research in all branches of the law of the Republic of South Africa and make recommendations on its development, improvement or reform.

The judicial authority of the Republic vests in the courts. The courts are independent, impartial and subject only to the South African Constitution and the law. No person or organ of state may interfere with the functioning of the court. The state must assist and protect the courts through legislative and other measures to ensure their independence, impartiality, dignity, accessibility and effectiveness. The President by Proclamation (31 March 1995) appointed a commission of inquiry (Hoexter Commission), chaired by the Honourable Mr Justice Hoexter, to investigate the rationalisation of all jurisdictional areas and court structures of the High Court.

The administration of justice is a function of the national Government which must ensure a uniform system of justice, guaranteeing equal protection. In terms of the South African Constitution, the eleven former apartheid-based Departments of Justice were amalgamated into one Department, with effect from 1 October 1994.

The product of the past poses some serious challenges for the new democratic government. The old framework for justice and the laws of the country have to be transformed to reflect the new Constitution, especially the human rights that are enshrined in it. The five key challenges facing the Justice System are:

Providing an Equal and a User Friendly System of Justice

South Africa needs a system of justice, both criminal and civil justice, including family care and the administration of estates, that gives an equal and user friendly service to everybody.

The background:

The colonial and apartheid legal orders, concentrated on the legalised subordination and oppression of black people. Blackness was stigmatised. Social amenities and legal services were segregated. Black communities were given very inferior legal services. Traditional courts and institutions were marginalised and underdeveloped. In many respects they were subverted to assist colonial and apartheid rule. Customary and religious laws that affected black communities were ignored or corrupted.

When the pseudo-independent black states were created, the justice system was deliberately fragmented into eleven different departments. Laws, and the way they were applied, were also fragmented according to the artificial borders. For example, maintenance services were provided on a racial basis. Black people were given inferior services through segregated, marginalised institutions. These services were further fragmented to provide segregated services for coloured and Indian communities along the lines of the 1983 apartheid Constitution that gave limited and segregated participation in government for coloured and Indian people.

The way forward:

In the past South Africa had a justice system that was fragmented. It was racially skewed in

terms of resources and of service delivery. Now the courts must be deracialised, and to redemarcate jurisdictional areas. Maintenance services, the administration of estates and other services must be deracialised. We must change people's attitudes to eliminate racism and sexism and to ensure that service delivery is the same for everybody. Everybody who uses the justice system must be treated humanely and with dignity. Equal protection for everybody under the law must be guaranteed.

Making the Public Service and the Judiciary Representative

The South African Constitution and the government's policy on reconstruction and development (RDP) put forward a public service and a judiciary that are representative of all the people in South Africa.

The background:

In the past, most managerial positions were reserved for white people. These included judges and other legal professionals. Until recently, competent women and men from the black community, including coloured and Indian people, could not become judges, magistrates, prosecutors, state advocates or state attorneys. Nor could they hold many other senior posts in the public service. The creation of the Bantustan system and the tri-cameral system further segregated people along racial and ethnic lines.

The way forward:

As a result of the past, human resources in the justice system are skewed along race and gender lines. Posts in the former TBVC states and the lower posts in the justice system are virtually all held by black people. Senior posts are virtually all held by white people. The legal profession and its governing institutions are dominated by white males. This must be changed. There must be enough black people and women in senior legal posts and in the justice system as a whole. It must be made truly representative of the South African people. Corrective action must be embarked upon in order to ensure that this objective is achieved as speedily as possible.

Implementing the Constitution and the Bill of Human Rights

The South African Constitution entrenches a legal system of constitutional democracy with a justiciable [Bill of Human Rights](#). This gives the courts the power to test government decisions and even some of the decisions made by private people. Also, there is a Constitutional Court that is the highest court in the land, and that is the ultimate court on constitutional issues.

The background:

Many of the elements of the apartheid state were institutionalised through the law. The court system, including the prosecutorial services, were used to enforce apartheid laws such as the pass laws, the *Urban Areas Act*, the *Population Registration Act*, the *Group Areas Act*, the *Immorality Act*, the *Separate Amenities Act* and the various security laws which suppressed the free political activity. During the 1970s, as the liberation struggle gained momentum, so too did repression. The apartheid regime and its functionaries became increasingly authoritarian and dictatorial. Generally speaking, the judicial system, through the enforcement of security laws such as the *Suppression of Communism Act* and the *Terrorism Act*, became part of the repressive machinery upholding apartheid, destroying democratic values, undermining civil liberties and trampling upon the Rule of Law. As repression

increased during the 1980s, accompanied by a growing disregard for dignity, human rights, human suffering, and democratic values, the courts and the prosecutorial services became major instruments of repression. As the gap between justice and the law widened, the justice system put itself on the side of the law. State lawyers, including state advocates, state attorneys, prosecutors, state legal advisors and state legalisation drafters, found themselves at the heart of developing and defending apartheid laws and the apartheid state. Many times, state lawyers had to defend the gross human rights abuses of the state. Generally, attorneys-general used their powerful discretion in political trials and security related cases to uphold and strengthen the apartheid system.

The way forward:

The justice system was deeply affected by racial discrimination, repression and the destruction of democratic values. The victims of apartheid were not only black people, but also human values like dignity, openness, political participation, decent behaviour and caring relationships. Unfortunately, the loss of these human values will continue to affect the culture, or ethos, of the justice system for some time.

Nevertheless, the work must begin immediately (indeed it has already begun) to transform the justice system, especially the criminal justice system. One of the consequences of the emphasis on law, order and the protection of the state, rather than the pursuit of fairness and justice, is the relative neglect of the criminal justice system, especially the needs of the victims of crime. We are now challenged not only with transforming the criminal justice system, but also with combatting crime effectively. And we have to do this within the context of the South African Constitution and the Bill of Human Rights. This removes from the prosecution and the police the repressive and inhuman instruments that were available to them before. South Africa and in particular, the Department of Justice must design and implement a criminal justice system that can fight crime effectively but with due regard to basic human rights as enshrined in the new Constitution.

Providing Equal Access to Justice

One of the main principles in the Constitution is equality. Among other things, this means that real equality of access to justice for every person, regardless of their race, gender, culture, age, sexual orientation, disability or any other difference must be provided.

The background:

Traditionally, the legal system has not paid attention to issues of difference or disadvantage. This has meant, among other things, a failure to cater for the special needs of vulnerable groups such as women, children, the disabled and rural communities. Women only recently became recognised as equals before the law. South Africa has inherited a legal system that is based on the one hand on the common law, moulded by legislation, and on the other hand on customary and religious laws that were not given proper recognition.

The way forward:

Today South Africa has a mainstream system of formal courts, statutes and the common law, and a marginal system of customary or traditional law. Laws include those that treat women who are married under religious and customary laws as minors, and that do not fully recognise religious and customary marriages. Real equality must be brought into the justice system. All must be sensitised - including judges, magistrates, state advocates, prosecutors, state attorneys and all the other people involved in the justice system to the special needs of

children, women, the disabled, rural people, victims of wrongful acts, different religious communities, different cultural groups and all other categories of difference that are named in the Constitution. The legal system which has placed such importance on procedural justice must now also give equal attention to substantive justice.

Adapting to Change, Especially to Democracy

The South African legal system has to adapt itself to change. It has to be able to meet the needs of a stable democracy and greater access to justice, especially for marginalised communities. It must become responsive to the diverse and evolving needs of children, women, the disabled, workers, business people, professionals and many other different groups that make up our complex society.

The background:

During the apartheid years, South Africa was an outcast in the world. As a result, many people inside the country were excluded from international dialogue. This deprived our legal system of the full benefit of international developments in various branches of law and human rights.

The way forward:

South Africa's past isolation means that a great deal will have to be done to reform the legal system so that it can respond to the needs of a modern democratic society that cares for its people. The South African Constitution prescribes a number of institutions that strengthen and support democracy. These institutions include bodies like the *Human Rights Commission*, the *Commission on Gender Equality* and the *Office of the Public Protector* (see par 2.3), which are already operating. We must now ensure that they work and that their independence is strengthened. They must be supported, and at the same time, they must be critically assessed and reassessed. There is also the ongoing challenge of facilitating the operation of the *Truth and Reconciliation Commission* (see par 2.3) to deal with the gross violations of human rights under apartheid and to help build stable foundations for our young democracy. The question of what happens beyond the *Truth and Reconciliation Commission* is a further challenge. Also, other matters like the need for equality or anti-discrimination laws to provide for legal recourse for social injustices in private life as well as the public sphere and for administrative justice must be dealt with. Laws that promote and regulate the right to information and to facilitate public accountability must be put in place.

2.4.1 Structure of the Courts

Democratic South Africa inherited a system of courts that reflected an apartheid dispensation which provided for the Republic of South Africa and the four "independent" states or homelands (Transkei, Bophuthatswana, Venda and Ciskei) and six "self-governing territories". The new constitutional democracy now makes provision for 9 provinces. The court system is currently being rationalised so that it reflects the new order.

The South African Constitution depicts South Africa's judicial system as follows:

- a. the Constitutional Court
- b. the Supreme Court of Appeal
- c. the High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts

- d. the Magistrate's Courts
- e. any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrate's Courts.

2.4.1.1 The Constitutional Court

In terms of the Interim Constitution of South Africa, the Constitutional Court is the highest court in cases regarding the interpretation, protection and enforcement of the Constitution. The Interim Constitution of South Africa, was repealed by the Constitution of the Republic of South Africa Act, 1996 (Act 108 of 1996). The Constitutional Court -

- a. is the highest court in all constitutional matters;
- b. may decide only constitutional matters and any issues related thereto; and
- c. makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.

Jurisdiction of the Constitutional Court

The Constitutional Court consists of a President, a Deputy President and nine other judges. The court has its seat in Johannesburg and has jurisdiction within the whole geographical area of South Africa.

It may only decide constitutional matters and issues connected with such matters. It is the highest court with respect to constitutional matters and its decisions bind all other courts, including the supreme court of appeal.

The constitutional court has exclusive jurisdiction in the following matters:

- disputes between **organs of state** in the national or provincial sphere
- the **constitutionality** of parliamentary or provincial **bills** after the president or the premier of a province, respectively, has referred them to the constitutional court, which can happen when the president or a premier refuses to sign a bill
- the **constitutionality** of a parliamentary or provincial **act** after members of the national assembly or a provincial legislature, respectively, have applied to the constitutional court for an order declaring such an act unconstitutional
- the **constitutionality** of any **amendment** to the **constitution**
- the question whether parliament or the president has failed to fulfil a **constitutional duty**
- the certification of a **provincial constitution**

As no other court has jurisdiction in these matters, the constitutional court functions as a **court of first instance** in such cases.

Because the constitutional court is the highest court as far as constitutional matters are concerned, it also functions as a **court of appeal** in such matters. Appeals against constitutional judgments of the high court or the supreme court of appeal can proceed to the constitutional court.

The constitutional court has the final say with respect to the unconstitutionality of an act of parliament, a provincial act or conduct of the president. When the supreme court of appeal or

a high court makes such an order, it will only have force after it has been referred to the constitutional court and has been **confirmed** by it.

2.4.1.2 Higher Courts

a) Supreme Court of Appeal

The chief justice heads the supreme court of appeal. The other presiding officials are the deputy chief justice and judges of appeal. The supreme court of appeal has jurisdiction within the whole geographical area of South Africa. It functions only as a court of appeal and never as a court of first instance. It hears appeals from the high courts and it is the highest court of appeal in all matters **except constitutional matters**.

- **Criminal and civil cases** The supreme court of appeal can decide all criminal and civil cases on appeal. It is the highest court of appeal in such matters and it can impose any sentence and make any order. Its decisions in this regard bind all the ordinary courts.
- **Constitutional matters** The Supreme court of appeal can decide appeals on constitutional matters except matters that only the constitutional court can decide (that fall within the exclusive jurisdiction of the constitutional court). It can declare an act of parliament, a provincial act or conduct of the president unconstitutional. However, such an order of constitutional invalidity will only have force after it has been referred to and confirmed by the constitutional court.

b) High Courts

Section 169 of the Constitution provides that a High Court may decide -

" (a) any constitutional matter except that -

- i. only the Constitutional Court may decide; or
- ii. is assigned by an Act of Parliament to another court of a status similar to a High Court; and

(b) any other matter not assigned to another court by an Act of Parliament."

A judge president heads a high court. The other presiding officers are judges. Each high court has jurisdiction within a particular provincial area. A local division may co-exist within that provincial area. A high court has appeal jurisdiction and it can function as court of first instance. A local division is usually a court of first instance only.

- **Jurisdiction as court of first instance** High courts have jurisdiction as courts of first instance in the following cases:
- **Criminal cases** A charge of high treason must always be heard by the high court. Furthermore, it can try any criminal offence, but in practice it will try only serious cases. These are cases where the possible sentence is imprisonment of more than ten years or a fine of more than R200 000. Only the high court can impose these sentences.

- **Civil cases** If the amount of the claim is more than R100 000, the claim must be instituted in the high court. If the claim is one for specific performance without damages in the alternative, it must also be instituted in the high court. Only the high court can hear cases concerning matters of status, such as an application for a presumption of death and matters concerning wills. At present only the high court has jurisdiction in divorce cases, but this will change as soon as family courts are established (see para 3 below).
- **Constitutional matters** A high court can decide any constitutional matter except a matter which falls within the exclusive jurisdiction of the constitutional court. It also cannot decide matters assigned by an act of parliament to another court of a status similar to a high court, for example a special court. Like the supreme court of appeal, the high court can declare an act of parliament, a provincial act or conduct of the president unconstitutional. But such an order will only come into force after it has been referred to and confirmed by the constitutional court.
- **Appeal and review jurisdiction** High courts review and hear appeals of **criminal** and **civil** cases in the lower courts. In such cases a further appeal can be made to the supreme court of appeal. Sometimes one can appeal within a high court against the decision of a single judge to full bench (three judges) of the same court.

2.4.1.3 Lower Courts (Magistrates' Courts)

Magistrates are the presiding officers in the lower courts. The regional court has jurisdiction within a particular regional division and the district court within a particular magisterial district. They only function as courts of first instance. As an exception, they can hear appeals from the courts of chiefs and headmen. In practice, regional courts only try criminal cases, while district courts try criminal and civil cases. The Magistrate's Commission deals with the appointment, promotion, transfer or dismissal of or disciplinary steps against magistrates.

2.4.1.4 Regional courts

A regional court can try any criminal offence, such as murder and rape, but not high treason. It cannot, however, impose imprisonment of more than ten years, nor a fine of more than R 200 000. Apart from high treason, a regional court can, therefore, try any offence that the supreme court can try. As *dominus litis*, the Director of Public Prosecution decides in which of the two courts an accused is to be prosecuted. If the case is so serious that the possible sentence might exceed the jurisdiction of the regional court, the high court is used as court of first instance.

- **Criminal cases** The criminal jurisdiction of a district court is restricted. It cannot try offences such as murder, rape and, of course, high treason. It tries less serious offences, such as theft, drunken driving and assault. It may not impose a sentence of imprisonment for more than one year or a fine of more than R 20 000.
- **Civil cases** The civil jurisdiction of a district court is also restricted, in the sense that it has no jurisdiction in matters which fall within the exclusive jurisdiction of the high court. It can, therefore, only hear cases where the amount of the claim is less than R100 000. If the claim is one for specific performance with damages (of less than R100 000) in the alternative, the district court may hear the matter. It has no jurisdiction in matters concerning status or wills. Presently it also has no jurisdiction in divorce cases. This will change once family courts have been instituted (see para 3 below). If the amount claimed exceeds R100 000, the parties concerned may consent in writing to an increased jurisdiction of the court. The parties can only consent to such jurisdiction with respect to the **amount**. They cannot consent to

jurisdiction with respect with the **nature** of the claim, such as divorce or status matters, which always fall outside the court's jurisdiction.

- **Constitutional matters** A lower court has jurisdiction with respects to constitutional matters only if an act of parliament provides it with such jurisdiction. It can, however, never have the power to decide on the constitutionality of any legislation or any conduct of the president.

2.4.1.5 Special Courts

Special courts have been instituted for the purposes of specialised litigation. They are also divided into higher and lower courts. The presiding officers in the higher courts are judges. Special courts can decide constitutional matters only if an act of parliament allows it. Special lower courts, like the ordinary lower courts, may never decide on the constitutionality of any legislation or conduct of the president.

A brief outline of some of these courts is set out below:

a) Labour court and labour appeal court

The labour court and the labour appeal court were established in terms of the Labour Relations Act, ([Act 66 of 1995](#)).

The labour court consists of a judge president, a deputy judge president and additional judges. It has its seat in Johannesburg and has jurisdiction within the whole geographical area of South Africa. This court adjudicates labour disputes concerning, for example, strikes, retrenchments and discrimination. The Labour Relations Act provides the labour court with jurisdiction in certain constitutional matters, for example, when infringements of human rights by the state in its capacity as an employer are alleged.

The general rule is that a labour dispute must first be resolved through conciliation. Only if conciliation was unsuccessful, is the dispute referred to the labour court for adjudication.

An appeal can proceed from the labour court to the labour appeal court. This court consists of the judge president and deputy judge president of the labour court and three other high court judges.

b) Water court

The Water Act, (Act 54 of 1956) provides for the establishment of water courts. These courts adjudicate various disputes concerning the use of public water, for example private irrigation from public rivers. A session of the water court takes place before a water court judge, who is also a judge of the division of the high court. A water court has *inter alia* the power to make orders and rewards in disputes regarding the use, diversion or appropriation of public water and in applications in connection with claims for servitudes by means of which rights to use or dispose of public water or subterranean water may be exercised.

The water courts will be replaced by a water tribunal in terms of the National Water Act. The water tribunal will have jurisdiction in all the provinces of South Africa. The water tribunal has *inter alia* jurisdiction in appeals against decisions taken by administrative bodies in terms of the Act.

c) Court for income tax appeals

These courts hear appeals concerning income tax issues. The presiding judge sits together with an accountant who has at least ten years' experience and a representative of the commercial community.

d) Commercial court

A commercial court was instituted in the Witwatersrand local division. The purpose of this court is to ensure speedy and effective adjudication in commercial cases. Such cases deal with matters relating to, for example, companies, mining and minerals, banking and international trade. The presiding judges are experts in these fields. The procedure is less formal than usual, and the judge plays a more active part in the trial.

e) Land claims court

This court has been instituted by the Restitution of Land Rights Act, (Act 22 of 1994). The function of the court is to restore land rights to people who have been dispossessed of such rights in terms of racial discrimination after 19 June 1913. The court can, amongst others, restore the original or alternative state land or award compensation. Usually such a case is first dealt with by a Commission on Restitution of Land Rights. If the Commission cannot settle the claim, it is referred to the land claims court. The court consists of a president and additional judges as members.

2.4.1.6 Special Lower Courts

a) Children's court

Each magistrate's court functions as a children's court within its particular magisterial district. It investigates matters concerning, for example, the adoption of children, children whose parents or guardians cannot be traced or children whose parents or guardians are unfit. A children's court can make various appropriate orders with respect to these matters. The proceedings in such a court are confidential and may not be published without permission.

b) Maintenance court

Each magistrate's court functions as a maintenance court within its particular magisterial district. Some persons, such as parents, are legally liable to maintain (support) others, for example their children. If they do not fulfil their duties, a complaint can be lodged with the court's maintenance officer. The maintenance officer will investigate the case, and submit it to the court. The court can make an appropriate order. It can also increase the amount of maintenance in light of changed circumstances.

c) Family court

The Magistrates' Courts Amendment Act, 1993 (Act 120 of 1993) provides for the establishment of family courts. These courts will be instituted as pilot projects in the various provinces. Family courts will be part of the lower court structure, and these courts will hear divorce actions. The **exclusive** jurisdiction of the high court in such cases will therefore cease. Many divorce cases are quite simple because they are unopposed. The family court

will provide for cheaper litigation in such cases. It will not be necessary to appoint an advocate, as is the case in the high court, because an attorney will be able to appear in the family courts. It will also reduce the costs for people who live far away from a high court. But the high court will still have jurisdiction (although not exclusive jurisdiction) in divorce cases. This means that the high court will be a more suitable forum for opposed and complex divorce actions. The family court also has jurisdiction in other family related disputes such as maintenance, access, custody and guardianship of children.

2.4.1.7 Other Special Courts

a) The Short Process Courts and Mediation in Certain Civil Cases Act, 1991(Act 103 of 1991) ensure greater access to legal services and to keep the cost of litigation down while speeding up the resolution of civil cases. The presiding officer is referred to as the adjudicator. An adjudicator has the same powers as a magistrate. The court may take any steps on request of the parties to ensure a speedy and cost-saving resolution of the dispute. It can also abandon the application of the rules of evidence. Legal representatives may appear on behalf of the parties. No appeal is allowed against the court's judgment, but the institution on review proceedings is possible.

b) Traditional Courts

In rural areas the chiefs and headmen of certain black communities in the country have their own courts. These courts have restricted civil and criminal jurisdiction. They apply the traditional customary law of the specific community. No legal representation is allowed. There is a right of appeal to the magistrate court. Traditional courts are alternative dispute resolution structures and are involved mainly with mediation and arbitration.

2.4.1.8 Other Relevant Bodies

a) The Rules Board

The Rules Board Act, 1985 (Act 107 of 1985) makes provision for the establishment of a Rules Board. This Board reviews existing rules of the court and, subject to the approval of the Minister of Justice, may make, amend or repeal rules for the Supreme Court and lower courts.

b) Legal aid

The old Legal Aid Act, 1969 (Act 22 of 1969) which makes provision for the establishment of a Legal Aid Board, applied to the Republic of South Africa and not the former four homelands or states and six self-governing territories. This legislation was amended by Legal Aid Amendment Act, 1996 (Act 20 of 1996), making it applicable throughout South Africa thus ending discrimination in the legal system. The current legal aid system relies on the *judicare system*. This is a system whereby the Legal Aid Board distributes work to private legal practitioner. In consultation with relevant role players, the legal aid system is being transformed to make provision for the expansion of the public defender system

c) Office of the Family Advocate

Mediation in Certain Divorce Matters Act, 1987 (Act 24 of 1987), makes provision for the establishment of the Office of the Family Advocate which was established in 1990. The

Office is tasked with the responsibility of looking after the well being and needs of under age or dependent children in divorce cases. The Family Advocate, assisted by family counsellors, reports to the court and makes recommendations are in the best interests of the child. A mediation service is also provided to parents.

d) Legal Practitioners

The legal profession is divided into two branches, namely advocates and attorneys who are subject to strict ethical codes. Advocates are organised into Bar associations or societies. The General Council of the Bar of South Africa is the co-ordinating body of the various Bar associations. The attorneys have law societies in each province. The Association of Law Societies is the coordinating body of the various independent law societies. Previously, advocates were the only practitioners who had a right of appearance in the Supreme Court, the situation has now changed, in that attorneys are also afforded the right of appearance in the Supreme Court for certain matters.

Restructuring and rationalisation of the legal profession is being proceeded with in due course. Legislation will make provision for the regulation of the profession to maintain minimum standards and to protect the public. The right of the profession subject to minimum regulation, to organise themselves on the basis of the right of freedom of association will be respected.

In respect of legal qualifications, different branches of the legal profession previously required different legal qualifications. In the public sector in particular, there was a need to address legal qualifications for prosecutors and magistrates. In terms of the Qualification of Legal Practitioners Amendment Act, 1997 ([Act 78 of 1997](#)), a four year LLB course will be the new requirement in the private and public sector.

e) Heath Commission Special Investigating Unit

This Unit was created under the Special Tribunals Act, 1996 ([Act 74 of 1996](#)). It investigates and prosecutes corruption and the misuse of state resources under the management of Judge W Heath. It is relevant from a land reform perspective because, in some cases, the illegal and corrupt allocation of state land occurs with respect to land which is in fact subject to the rights of local people protected under the Interim Protection of Informal Land Rights 1996, ([Act 31 of 1996](#)).

2.5 The relationship between the branches of Government and NGOs in respect of State Reporting

It is generally accepted that one of the most efficient mechanisms for co-ordination of policies and programmes is through a partnership between government and civil society. Prior to the elections in 1994, civil society played a significant role in this regard but, since the first democratic elections, the responsibility for co-ordination has shifted from civil society to government. Government has accordingly initiated a number of mechanisms to give effect to its international commitments. These include the Inter-Ministerial Core Group (MCG) within Cabinet, and the National Programme of Action (Children) Steering Committee(NPASC) within government which has identified several task groups to work in particular areas.

The members of MCG were nominated by Cabinet in 1995 and comprise of the Office of the Deputy President and the Ministers of Health, Welfare, Education, Water Affairs and Forestry, Finance, and Justice. This group is charged with developing the National Programme of Action for Children.

The NPASC comprises the Directors-General of the departments corresponding to the seven ministries on the MCG, as well as representatives from the National Children's Rights Committee (NCRC), representing non governmental organisations and UNICEF South Africa. The NPASC is the executive arm charged with overseeing the identification and implementation of plans, as well as with overseeing co-ordination of all actors to ensure compliance with the Convention on the Rights of the Child. Since its inception the NPASC has co-opted other actors including the Human Rights Commission, the National Youth Commission and the Truth and Reconciliation Commission.

The preparation of South Africa's first country report on the implementation of the Convention on the Rights of the Child was a collaborative venture between government and organs of civil society.

The first country report on the implementation of the Convention on the Elimination of All Forms of discrimination Against Women (CEDAW) was also compiled by government in collaboration with NGOs.

In respect of the present Report to the African Commission, a similar methodology has been adopted. South Africa is currently engaged in the process of drafting a National Action Plan on the improvement of the protection and promotion of Human Rights to be deposited with the United Nations on 10 December 1998 in commemoration of the 50th anniversary of the Universal Declaration of Human Rights. The Department of Justice, in co-operation with the Human Rights Commission, is leading this process. NGOs including the United Nations Development Programme (UNDP), are represented in the Steering Committee. Other government departments are also involved in this process particularly through the National Coordinating Committee where all government Departments are involved. It was decided that the process of drafting the National Report to the African Charter on Human and Peoples' Rights should fall within the ambit of this process. Thus a drafting team composing relevant state departments and NGOs who have observer status at the African Commission have been co-opted on this drafting team.

Source : >>> <http://www.justice.gov.za/policy/african%20charter/afr-charter02.html> <<<