CHAPTER -II
HUMAN RIGHTS DISCOURSE IN
INDIA AND SOUTH AFRICA

2.1 HUMAN RIGHTS IN INDIA

The term “Human Rights” is comparatively recent in origin, but the idea of human rights is as old as the history of human civilization.\(^1\) The new phrase “Human Rights” was adopted only in the present century from the expressions previously known as “Natural Rights” or “Rights of men”.\(^2\) Introducing the concept of Human Rights it can be said that “Human rights is a twentieth century name for what has been traditionally known as natural rights or, in a more exhilarating phrase, the rights of man.\(^3\)

The rights of man have been the concern of all civilizations from time immemorial.\(^4\) The concept of ‘rights of man’ and other fundamental human rights were not unknown to the peoples of earlier periods.\(^5\) These ‘rights of man’ had a place in almost all the ancient civilizations of the world. In the middle east, the Babylonian laws, the Assyrian laws and the little laws provided for the protection of the rights of man. In India, the Dharma of the Vedic period and in China, the jurisprudence of Lao-Tze and Confucius protected rights. In the West, a number of rights, bearing some semblance to what we call civil and political rights today, were available to a section of people. Cicero, the great Roman jurist, tells us that the Greek Stoics, around 200-300 years B.C., developed, on the basis of what we now consider as basic human rights, an authentic ‘natural-law’ theory, prescribing inviolability of these rights.\(^6\)

Frankly speaking, though the philosophy of Human rights in India has come a long weary way yet the progress through the historical path has always remained gradual and never lost its link with past. In recorded history and ancient scriptures, there have

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\(^3\) Ibid., p. 22.

\(^4\) Ibid.

\(^5\) Ibid.

been references on the basic Human Rights, though they were not referred to by that name. The truth is that the concept of rights of human beings is neither entirely western nor modern. There are numerous thinkers who opine that the history of human rights and fundamental freedoms did not begin with the Magna-Carta signed by King John of England in 1215. Nor did the world come to know of them for the first time through the endeavours of Locke, Rousseau and Jefferson or the proclamation of the Declaration of Independence by the representatives of the thirteen North American Colonies in 1776, and the adoption of the declaration of the Rights of man and of the citizen by the National Assembly of France in 1789. The Indian history is warranted by the fact that Human Rights Jurisprudence has always occupied a place of prime importance in India’s rich legacy of historical tradition and culture. This is evident in the prevalence of different cultures, traditions, faiths in India. The truth is that what the West has discovered about human rights now, India had embedded the same in its deep-rooted traditions since time immemorial.

The philosophy of human rights in the modern sense has taken shape in India during the course of British rule. The Indian National Congress, which was in the vanguard of freedom struggle, took the lead in this matter. National struggle for freedom was truly an attempt of the Indians to secure basic human rights for all the people with the result that the promulgation of the Constitution by the people of India in January 1950 ushered in the heroic development of the philosophy of human rights in India. It would be gleaned from the study that ancient Hindu civilization perennially contributed a lot to the origin of what is now known as the human rights movement. The historical account of ancient Bharat proves it beyond doubt that the Human Rights were as much visible in the ancient Hindu and Islamic Civilizations as in the European Christian Civilizations. Ashoka, Prophet Mohammed and Akbar cannot be excluded from the genealogy of human rights.

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7 See Yogesh K. Tyagi, op. cit., p. 127.
8 Ibid.
9 Supra note 8, p. 107.
10 Ibid., p. 108.
11 Dr. S. Subramanian, op. cit., also see Subhash C. Kashyap, op. cit., p. 20.
12 Dr. S. Subramanian, op. cit., p. 28.
13 Subhash C. Kashyap, op. cit., p. 20.
14 See S. Subramanian, op. cit., p. 23.
15 See Yogesh K. Tyagi, op. cit., p. 124.
2.2 HUMAN RIGHTS IN PRE INDEPENDENT IN INDIA

The modern version of human rights jurisprudence may be said to have taken birth in India at the time of British Rule.\textsuperscript{16} The origin of this ideal in India lies in the history of India, especially in the struggle for freedom against the British rulers.\textsuperscript{17}

When the British ruled India, resistance to foreign rule was manifested in the form of demand for fundamental freedoms and civil and political rights for the people.\textsuperscript{18} There was no fundamental law guaranteeing the subject’s rights and liberties and they were humiliated and discriminated against in many ways, in their own country. British resorted to arbitrary acts such as brutal assaults on unarmed satyagrahis, internments, deportations, etc. The freedom movement and the harsh repressive measures of the British rulers encouraged the fight for civil-liberties and the demand for constitutional guarantees of some fundamental rights. The avowed objective of several national organisations including that of the Indian National Congress in the beginning was only to secure some civil liberties and human rights of non-discrimination on grounds of race, colour, etc., in the matter of access to public places, offices and services. So National struggle for freedom, from its earliest stages, in its practical manifestation was largely directed against racial discrimination and to securing basic human rights for all the people.\textsuperscript{19}

Under the British rule, human rights and democracy were suspect, and socialism was anathema for the processes of administrative and judicial justice.\textsuperscript{20} So British period in India was rightly depicted as Kaliyuga or dark period in Indian history. It was the British rule that created ripples in the political and legal spheres leading to imposition of British political and legal culture on India. The entire system of the country was oriented to the needs of British imperialism and domination over India. Lord Macaulay rejected the ancient Indian legal and political system as ‘dotages of Brahmanical superstition’ and condemned ancient Indian legal heritage and its inner core as ‘an immense apparatus of cruel absurdities.\textsuperscript{21}

\textsuperscript{16} Subhash C. Kashyap, \textit{op. cit.}, p. 20; also see Dr. Subramanian, \textit{op. cit.}, p. 56.
\textsuperscript{17} Ibid.
\textsuperscript{18} Dr. S. Subramanian, \textit{op. cit.}, p. 122.
\textsuperscript{19} \textit{Supra note} 82, p. 58.
\textsuperscript{20} S.N. Dhyani, \textit{op. cit.}, p. 243.
\textsuperscript{21} Ibid., p. 143.
The British looked down upon Indian values, myths, mores and lores as a lump of loathsome and demeaning thought. Like-wise the language used by British rulers for Indians was disparaging. Lord Wellesley condemned Indians as Vulgar ignorant rude and stupid’ and Lord Cornwallis described as an axiom that ‘every native of Hindustan is corrupt’. East India Company debarred Indians from high offices and deprived them of their political, social and economic rights.22

Gandhiji condemned British rule over India as ‘Satanic’, ‘Adharmik’ (unjust) and coercively violent (himnsa). Therefore, he expounded the theory of peaceful resistance (satyagraha) to fight British laws, for they deprived Indians a meaningful life, liberty and national independence.23 The right to life, liberty and pursuit of happiness as inalienable rights aroused the spirit of self-respect, nationalism and patriotism in the hearts of Indians. The people of India under the leadership of Mahatma Gandhi launched non-violent struggle to achieve self-government and fundamental rights for themselves. Though some militants took to violence also. Lokmanya Tilak advocated that freedom was the birth right of Indians for which they will have to fight.24

Constitution of the Irish State 1921 included a list of Fundamental Rights. This had profound influence on the thinking of the Indian National Congress, which in 1925 finalised the draft of ‘Commonwealth of India Bill’ embodying a Declaration of Rights. Further, Madras Congress of the Indian National Congress in 1927 demanded incorporation of a Declaration of Fundamental Rights in any future constitutional framework. A Committee under Motilal Nehru was appointed. Reporting in 1928, this committee declared that the first concern of the people of India was to secure Fundamental Rights. It is interesting to note that the Constitution of the Republic of India enacted in 1950, incorporated ten of the nineteen Rights enumerated in the Motilal Nehru Committee Report, 1928. The Rights emphasised by the Motilal Nehru Committee Report were.25

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22 Ibid., p. 184.
23 Ibid., p. 243.
24 Dr. Sunil Deshta, op. cit., p. 101.
25 See Dr. S. Subramanian, op. cit., pp. 56-57.
1. Personal liberty, inviolability of dwelling place and property;
2. Freedom of conscience and of profession and practice of religion subject to public order and morality;
3. Right of free expression of opinion and to assemble peaceably and without arms and to form association and unions subject to public order and morality;
4. Right to free elementary education. Maintained and aided by the State without distinction of caste and creed;
5. Equality for all citizens before the law and in civil rights;
6. Right to every citizen to the writ of habeas corpus;
7. Protection of respect of punishment under ex-post facto law;
8. Non-discrimination against any person on grounds of religion, caste, or creed in the matter of public employment;
9. Equality of right to all citizens in the matter of access to, and use of public roads, wells and other places of public resort;
10. Freedom of combination and association for the maintenance and implementation of labour and economic conditions.
11. Right to keep and bear arms in accordance with Regulations; and

The Simon Commission, appointed by the British Government in 1927, however, totally rejected the demand voiced by the Nehru Committee Report.26

2.3 HUMAN RIGHTS PHILOSOPHY AND THE CONSTITUENT ASSEMBLY IN INDIA

India achieved independence on August 15, 1947, but it was incomplete. To give real meaning and content to political freedom, it was necessary to wage a peaceful war for economic freedom and to build a new social order free from exploitation of man by man: The struggle for freedom was not merely for political independence, it was

26 Ibid
essentially for freedom from want and hunger, from poverty and squalor, from exploitation and discrimination. The dream of the father of the Nation was for a total revolution, social, economic, political and spiritual. He wanted to “wipe every tear from every eye”. And for Nehru, the service of India and her people in leant, “the ending of poverty and ignorance and disease and inequality of opportunity.”

Further, on 10th December, 1948, when the Constitution of India was in the making, the General Assembly proclaimed and adopted the Universal Declaration of Human Rights, which surely influenced the framing of India’s Constitution. Viewed from the Indian standpoint, human rights have been synthesized, as it were, not an integrated fabric by the preambular promises and various constitutional clauses of the National Charter of 1950. The Constituent Assembly pledged to draw up a Constitution for the country wherein shall be guaranteed and secured to all the people of India, Justice, Social, Economic and Political; Equality of Status, of opportunity and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality and where in adequate safeguards would be provided for the minorities, backward and tribal areas and depressed and other classes. The architect of the objective Resolution, Jawahar Lal Nehru expressed the hope that the Constitution, would bring about the dawn of real freedom that have clamoured for, and that real freedom in turn will bring food to our starving people, clothing for them, housing for them and all manner of opportunities of progress. The Constituent Assembly incorporated in the Constitution of India the substance of most of the rights proclaimed and adopted by the General Assembly in the Universal Declaration of Human Rights. Dr. S. Radhakrishnan rightly has described these rights as pledge to our people and a pact with the civilized world.

2.4 HUMAN RIGHTS IN POST-INDEPENDENT INDIA

During the freedom movement, with vision and foresight, Indian leaders included Human Rights in their agenda for post-Independent India. Human Rights, the product

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30 C.A.D., Vol. VII, pp. 40-41,
of historical processes, were quite significant in India’s struggle for independence from the Colonial rule. The Indian political scene witnessed the gradual, yet inevitable, emergence of the normative aspirations of the people. Free India addressed itself to the formulations of Human Rights through the legal instrument of the Constitution. Political freedom brought into focus the need to change the socio-economic conditions left behind by the Colonial Rule. It was realised that economic stability and enjoyment of individual civil and political rights were inseparable. It is perhaps in this background that the wise founding fathers of Indian Constitution had the economic and social content of freedom in their minds.

The tryst to make the India’s Constitution a viable instrument of the Indian People’s salvation, and to secure all persons’ basic human rights, is implicit from the preambular promise, fundamental rights, directive principles, and various other provisions of the Constitution. Most of the Articles of the Universal Declaration of Human Rights, 1948 and two international covenants are building blocks of our constitutional framework. Though the Constituent Assembly was primarily concerned with the welfare of masses, yet there was considerable emphasis on the ameliorative role of the State. Strictly speaking, the promulgation of the Constitution by the people may be said as a landmark in the development of Human Rights Jurisprudence in India. The Preamble, Fundamental rights and the Directive Principles of State policy together guarantee the basic Human Rights for the people of India. To quote Granville Austin:

“The Constitution was to foster the achievement of many goals. Transcendent among them was that of social revolution. Through this revolution would be fulfilled the basic needs of the common man, and, it was hoped, this revolution would bring about fundamental changes in the structure of Indian society”.

2.5 NOMENCLATURE OF HUMAN RIGHTS

The struggle for Independence was over by 15th August, 1947. But the attainment of the Independence was not an end itself. It was only the beginning of a struggle, the struggle to live as an independent nation and, at the same time, establish a democracy
based on the ideas of justice, liberty, equality and fraternity. The need of a new Constitution forming the basic law of the land for the realisation of these ideas was paramount. Therefore, one of the first and foremost tasks undertaken by independent India was framing of a new Constitution.

Thus, the preamble concisely sets out quintessence of human rights which represents the aspirations of the people, who have established the Constitution. The Preamble to the Constitution is of extreme importance and the Constitution should be read and interpreted in the light of the grand and noble vision expressed in the Preamble.

The wise founding fathers of our National Charter have given a detailed list of the human rights and incorporated them in the form of Fundamental Rights and Directive Principles under Part III and Part IV of our Constitution. These rights have been classified as under:

I. **Right to Equality**

   Article 14  Equality before law
   Article 15  Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.
   Article 16  Equality of opportunity in matters of public employment.
   Article 17  Abolition of untouchability.
   Article 18  Abolition of titles.

II. **Right to Freedom**

   Article 19  Protection of certain rights regarding freedom of speech etc.
   Article 20  Protection in respect of conviction for offences.
   Article 21  Protection of life and personal liberty.
   Article 22  Protection against detention in certain cases.

III. **Right against Exploitation**

   Article 23  Prohibition of traffic of human beings and forced labour.
   Article 24  Prohibition of employment of children in factories, etc.
IV. Right to Freedom of Religion


Article 26  Freedom to manage religious affairs.

Article 27  Freedom as to payment of taxes for promotion of any particular religion.

Article 28  Freedom as to attendance at religious instruction or religious worship in certain educational institutions.

Cultural and Educational Rights

Article 29  Protection of interests of minorities.

Article 30  Right of minorities to establish and administrate educational institution.

Right to Constitutional Remedies

Article 32  Right to Constitutional Remedies.

The incorporation of a formal declaration of Fundamental Rights in Part III of the Constitution is deemed to be a distinguishing feature of a democratic State. These rights are prohibitions against the State. The State cannot make a law which takes away or abridges any of the rights of the citizens guaranteed in the Part III of the Constitution. It must, however be mentioned here that Fundamental Rights are not absolute rights. They are subject to certain restrictions. What is true is that our Constitution tries to strike a balance between the individual liberty and the social interest.

Similarly, the Directive Principles of State Policy enshrined in Part IV of the Constitution set out the aims and objectives to be achieved by the States in the governance of the country. Unlike the Fundamental Rights, these rights are not justifiable. If the State is unable to implement any provisions of Part IV, no action can be brought against the State in a law court, yet the State authorities have to answer for them to the electorate at the time of election. The idea of a welfare State envisaged in
our Constitution can only be achieved if the States endeavour to implement them with a high sense of moral duty.

2.6 THE HUMAN RIGHTS MOVEMENT IN INDIA

A democratic society is one where the government and the citizens come together to create an open society where there is maximum and effective public participation. Citizens must evince an active interest in the formulation of policies and their execution and thus exercise their democratic rights as important stakeholders in the governance process. The starting point of all contemporary civil society initiatives is the assumption that the State cannot be held solely responsible for governance, development and growth of the nation. People can effectively participate and contribute only when they are empowered with knowledge of their rights and avenues of redress. The first step in this direction is to secure basic human rights within the framework of the Constitution, through legislation and a transparent political process. Civil society movements have largely articulated and agitated for rights safeguarded by the Constitution and its constant impingement by the State and its instrumentalities. The citizenry must be conscious and vigilant if human rights are to be ‘realized’ and the State is to be prevented from encroaching on fundamental rights.

2.6.1 Defining a Social Movement

It is not simple to define a social movement, especially in a multiethnic and multilingual society like India. Yet broadly, it can be identified as ‘any explicit or implicit persuasion by non-institutionalized groups seeking public gain by attempting to change some part of the system.’

Social movements are an effort to change institutions and practices. They are usually for the purpose of furthering the rights of one or more groups within a system, either through reform or more radical changes. Social movements labour to alter

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32 ‘Civil Society And Governance An Overview Of Issues And Trends In India’ http://www.ids.ac.uk/ids/civsoc/docs/India2.doc.
fundamentally existing social relationships and institutional structures. Given this broad definition of a social movement, it must be kept in mind that the trajectory of democracy and freedom in India is largely different from that of the Western liberal democracies.

2.7 SOCIAL MOVEMENTS IN COLONIAL INDIA

A number of social movements have marked Indian history from the 1800s onwards. Such struggles were generally in opposition to the governments of the time, although some reforms were carried out under ruling administrations. For example, the British colonial government enacted some changes for the cause of social equality after efforts were initiated by individuals like Raja Ram Mohan Roy, Ishwar Chandra Vidyasagar, and Dayanand Saraswati. Generally, these changes had positive impacts on groups that have historically been marginalized in India. Women, for example, were primary beneficiaries of new laws that ended the practice of sati, and allowed widows to remarry.

2.7.1 The Nationalist Movement and the Struggle for Democratic Rights

The movement for independence, led by the Indian National Congress (INC), engaged in a larger struggle for democracy, which was inclusive of greater human rights and civil liberties. In that capacity, the INC contested several repressive laws contrary to civil rights such as the Arms Act 1878 and the Press Sedition Act 1878. However, the INC also supported some very draconian laws during that time, and was therefore not a wholly democratizing influence. The INC’s primary interest was in gaining independence from British rule, and it struggled to balance its support for human rights with the need to establish stability as a precursor to achieving that independence. Therefore, it was not an adequate advocate for civil liberties and there still remained space for a more far-reaching civil and social movement.

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33 Ibid.
35 Ibid., p. 77.
36 Supra n. 6 at 77.
2.7.2 The Indian Civil Liberties Union (ICLU)

The Indian Civil Liberties Union (ICLU) was established in 1934, and this marked the beginning of a distinct civil rights movement. Its main activities were ‘gathering information about violations of civil liberties, particularly regarding the conditions of prisoners and people in detention, police brutality, proscriptions on literature and restrictions on the press’.  

Along with the ICLU, the Bombay Civil Liberties Union, the Madras Civil Liberties Union, and the Punjab Civil Liberties Union further marked the birth of viable social movements for rights in India. In 1937, the INC and its provincial governments came into power. Many of these provincial governments were held responsible for human rights violations. Tension grew between the INC and the ICLU when the ICLU raised these issues. Furthermore, the founders of the ICLU declared that, with independence, the need for a civil liberties organization was redundant. This ultimately led to the collapse of the ICLU.  

2.8 HUMAN RIGHTS IN POST INDEPENDENCE INDIA

2.8.1 The Constitution of India

The Congress government led by Pandit Jawaharlal Nehru guaranteed the citizens of independent India certain inalienable, fundamental rights through the Constitution of India. The Constitution of India is one of the longest, most sweeping and most rights-based Constitutions in the world. It was heavily influenced by the Universal Declaration of Human Rights, which was written shortly before, and also drew on a range of existing rights-based Constitutions. Consequently, it encapsulates and guarantees the fundamental principles of human rights.

Evidence of India’s historical struggle against the British colonial powers that so consistently abused the rights of the people can also be found in the document. The Constitution provides protections against such infractions, and includes other

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37 Ibid., at 78.
principles that informed the battle for independence-in particular, social reforms against practices like sati, child marriage, and untouchability. The Constitution also directs the State to set policies for the welfare and relief of the people, thereby encompassing ideas of economic and social rights in addition to civil liberties.

The leadership of Mahatma Gandhi saw the capitalization of the ‘constructive spirit’ within the society. Instead of regarding the people ‘as raw material of reform, which in essence meant, at best, westernization, and at worst, collaborating with the colonial regime, the Gandhian movement focused on reorganizing people’s own resources for goals of material and spiritual well-being which they were enabled to set for themselves. After independence, all voluntary initiatives that were hitherto mobilizing people against oppressive rule of the British now placed reliance on the independent government to realize dreams. The policies of the government clearly widened the gaps and lead to the appropriation of privileges by the upper castes and the wealthy. The ‘casteist, feudal and communal characteristics of the Indian polity, coupled with a colonial bureaucracy, weighed against and dampened the spirit of freedom, rights and affirmative action enshrined in the Constitution.

The government’s commitment to civil liberties was further challenged by internal instability. The left-wing Naxalite movement of the 1960s was formed in response to the ongoing repressions and abuses of the central government. This caused the State to even further suppress dissent and exert political control- sometimes violently-over citizens. However, it also drew attention to the contradictions between the Constitution and State practices, precipitating the growth of new social and civil rights movements.

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40 Ibid.
43 See Civil Society and Governance an Overview of Issues and Trends in India http://www.ids.ac.uk/ids/civsoc/docs/India2.doc.
44 Supra n. 11.
45 Supra n. 6 at 80.
2.8.2 Origin of Civil Liberties Movement in India

In response to the Naxalite rebellion and similar movements, which attempted to change economic and social inequalities through violent methods, in 1975, the government of Indira Gandhi imposed a nation-wide State of emergency to suppress opposition. Mrs. Gandhi’s unilateral action ultimately served to spark a resurgence of civil liberties movements in India. The Emergency gave rise to gross violations of human rights, with preventive detention laws being used extensively. More than 100,000 people were arrested and detained for political reasons, often under false charges. This included political opposition leaders, trade union leaders, and social activists. The government also imposed censorship on newspapers, media outlets, and prohibitions on public gatherings. The Constitution of India and all of its protections were entirely suspended for 19 months.46

It was during this period that the human rights movement developed a wide organizational base and became more visible. The agenda of the civil liberties movement included arbitrary detention, custodial violence, prisons, and the misuse of the judicial process.47 Several organizations were formed during this period like the People’s Union for Civil Liberties and Democratic Rights (PUCLDR), the Andhra Pradesh Civil Liberties Union, and the Association for the Protection of Democratic Rights (APDR). Besides these groups, which were formed to fight the lawlessness of the State, there were several other groups formed that were fighting for distributive justice. All these groups can be classified as human rights groups.48

46 Ibid., at 81.
47 The decision in the infamous Habeas Corpus case, ADMJabalpur v. Shiv Kant Shukla (1976) 2 SCC 521 struck a mortal blow to civil liberties enshrined in the Constitution. The Supreme Court decided ‘In view of the Presidential Order dated 27th June 1975 no person has any locus to move any writ petition under Art. 226 before a High Court for habeas corpus or any other writ or order or direction to challenge the legality of an order of detention on the ground that the order is not under or in compliance with the Act or is illegal or is vitiated by mala fides factual or legal or is based on extraneous considerations’ A writ of habeas corpus is a judicial mandate to a police or prison official ordering that an inmate be brought to the court so it can be determined whether or not that person is imprisoned lawfully and whether or not he should be released from custody. A habeas corpus petition is a petition filed with a court by a person who objects to his own or another’s detention or imprisonment. The petition must show that the court ordering the detention or imprisonment made a legal or factual error.
Chapter-11: Human Rights Discourse in India and South Africa

There have been five major activities taken up by these groups, namely:

- Fact-finding missions and investigations
- Public interest litigation
- Citizen awareness programmes
- Campaigns
- Production of supportive literature for independent movements and organizations

They have also served to relieve, support, and lobby for those whose rights have been breached in times of crisis; for example, during the 1984 Sikh riots, the Bhopal gas disaster, the Bhagalpur riots in 1989, and, more recently, those displaced by the Sardar Sarovar Project and victims of the Godhra riots.

2.9 THE RIGHT TO INFORMATION ACT

India’s Right to Information (RTI) Act was the culmination of a long and arduous campaign to ensure that governmental funds for development were actually spent on the poor, for whom they were meant, and not siphoned off by corrupt officials. The struggle was spearheaded by MKSS—the Mazdoor Kisan Shakti Sangathan, a grass-roots organization operating in Rajasthan’s Rajsamand district. In the late 1980s and 1990s, MKSS actively engaged in livelihood issues such as underpayment of wages by officials who billed the State government the entire sum. To ensure that workers got their full wages, there was a need for information on government schemes, which could be matched against the testimony of workers on how much they were actually paid. Also salient was the issue of ensuring availability of essential items to the poor through the PDS. The main problem was that items meant to reach the poor at subsided rates were being siphoned off to the open market, and sold for private gain. PDS stocks hence got depleted. As part of the cover up, bogus names were listed in sales registers, or inflated amounts were shown against genuine ration card holders. To expose the fraud, there was a need for official documentation on how much stock each ration shop received from the civil supplies department of the government, as well as the names of the ration card holders and the quantities of the commodities they supposedly purchased.

49 Ibid.
To uncover malfeasance, the MKSS held a series of *Jan Sunwais*, or public hearings, at which numerous skeletons tumbled out of the closet. Fraud was uncovered—of people who were listed as recipients of government programmes but never received the benefits, of sums given to contractors for works that were never executed. The cross-checking of government documents in public, the modus operandi of the *Jan Sunwais*, stoked the fires of protest and resistance. Three salient facets of the forces unleashed by this process are worthy of note. Firstly, corruption as an obstacle to resource delivery to the poor got to be seen as a salient feature of the right to information. Secondly, the right to information, which, in the 1990s, was interpreted as the right to free expression, came to be viewed in the context of the Constitution of India’s right to life and livelihood. Thirdly, the collective participation in securing access to information, which characterized the public hearings of the MKSS, highlights the participatory colouring that the right to information has inherited in the Indian context.\footnote{Ibid.}

Since accessing government records often proved difficult, the MKSS and its allies sought a legal basis for doing so. A train of events was set in motion in 1995 when, as a concession to public sentiment, the Rajasthan Chief Minister Stated on the floor of the State legislature that the citizens would be given the right to photocopy documents related to development works. What was actually awarded, after a year’s delay, was the right of inspection only, not the right to photocopy. ‘This made it next to useless for social audits, since certified copies of documents are needed for use as evidence when registering *prima facie* cases of corruption’.\footnote{Ibid., p.4} A 52-day protest ensued, in May-June 1997, at the end of which the demonstrators were informed that a government order had been issued 6 months earlier, allowing photocopy of government documents, but only those pertaining to development works under the local government bodies. The PDS, which was a joint State and local government operation, was hence excluded. Furthermore, there was no provision for punitive measures against officials who failed to provide information. As a consequence, there was a lot of foot dragging by officials, and even intimidation and harassment of...
MKSS activists. Some officials were cooperative but others colluded with elected representatives to sweep the dirt under the rug.  

Other organizations joined the MKSS in the fray, in the struggle to ensure a legal basis for the right to information and seek reform of the Official Secrets Act of 1923, which covered all government documents. In 1996, the Press Council of India, senior faculty of the National Academy of Administration and other interest groups joined hands with the MKSS to establish the National Campaign for People’s Right’ to Information. ‘Despite bureaucratic subterfuge and resistance from various quarters, vigilance and advocacy groups helped ensure that a strong right to information bill was passed by the Indian Parliament in June 2005’. The Act came into effect on 12 October of the same year.

Right to information under the Act is the right to any information under the control of a public authority, and includes the right to certified copies of documents. The Act stipulates obligations on the part of public authorities provides for Public Information Officers, and specifies that a request for information be responded to ‘as expeditiously as possible, and in any case within thirty days of the receipt of the request…’. Certain categories of information, for instance, information that will compromise national security, or may constitute contempt of court, etc., are exempted from the purview of the act. Details on the constitution of a Central Information Commission and State Information Commissions, its powers and functions, terms of service of appointees, penalties for not satisfactorily discharging duties, etc. are also set forth.

53 Ibid.
54 Ibid., p.5.
55 MKSS and People's Right to Information. N.d. 'Towards a just and equal society'. National Campaign for the People's Right to Information.
2.10 HUMAN RIGHTS DISCOURSE IN SOUTH AFRICA

This Human Rights discourse in South Africa has two areas of focus. The first provides an overview of the historical context of human rights in the pre-democracy era by giving an account of the struggle for liberation, the human rights deficit and inequalities caused by apartheid, as well as a background audit of what South Africa inherited in 1994. While it has not always been possible, this chapter attempts to move along timelines in the development of, and the fight against, apartheid.

The second area of focus looks at the nature of the post-apartheid State, the challenges of transformation, the changing nature of civil society, and South Africa’s role in the world. It looks specifically at the achievements and challenges of the post-apartheid period. The period from 1994 to 1999 can be characterised as Transition to Democracy’, during which Nelson Mandela held the presidency. The Mandela government emphasised policy-making, nation building and reconciliation. It abolished a litany of discriminatory apartheid legislation, which diminished the citizenship rights of blacks and reduced them to second-class citizens in their own country. This period had a largely inward-looking focus.

The second period is dubbed ‘Stabilising Democracy’, and it stretches from 1999 to the present. The era of the Mbeki presidency placed an emphasis on delivery, including widespread extension of essential services, the transformation of society, the economic empowerment of blacks, and the political, economic and cultural revival of Africa, or ‘the African Renaissance’.

2.11 HISTORICAL CONTEXT OF HUMAN RIGHTS IN APARTHEID SOUTH AFRICA

Apartheid is synonymous with the gross violation of human rights. Between 1948 and 1989, South Africa gradually became one of the most oppressive and repressive regimes; in turn it became one of the most isolated pariah States because of this inhuman system.
The apartheid State made human rights violations and art form. During this period, South Africa consolidated one of the most racist States, basing its racial segregation on the apartheid system and doctrine of political, social and economic participation and exclusion of its citizenry according to crude racial criteria. This social engineering of apartheid secured a virtual monopoly of political and economic power for whites. South Africa was a Racistocracy,\textsuperscript{61} Albinocracy and Pigmentocracy.\textsuperscript{62} The Universal Declaration of Human Rights, which was adopted by the General Assembly on 10 December 1948, the same year that apartheid was formally adopted, was, at the very least, politically, if not legally binding on States. South Africa disregarded and violated the solemn proclamation in the Declaration which Stated that:

\begin{quote}
All human beings are born free and equal in dignity and rights . . .
Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.\textsuperscript{63}
\end{quote}

Especially since the political revolts of 1976, there were blanket bans on outdoor political gatherings, and by the mid- to late-1980s, the apartheid regime banned even internal political gatherings, notably those which advocated work stoppages, stay-aways and educational boycotts. There was formal censorship of books, pamphlets and publications, with the State reserving for itself the right to declare certain material ‘undesirable’ and banning it under numerous publications laws.\textsuperscript{64} Between 1963 and 1989, tens of thousands of publications were banned, with government gazetting hundreds on a weekly basis since 1963.\textsuperscript{65} During the 1970s and 1980s, many newspapers were closed down by the apartheid State, and more

\textsuperscript{64} \textit{Ibid.}, p. 17.
\textsuperscript{65} \textit{Ibid.}.
were severely restricted. Press censorship was commonplace. There was also a prohibition on the quoting of listed persons.  

From the mid-1980s, the apartheid State began to rely on vigilantes and kitskonstabels to ferment ‘black-on-black’ violence, low-intensity and counter-revolutionary warfare. These vigilantes were hit squads made up of ‘unknown’ persons who targeted opponents of apartheid and randomly killed them. This period also witnessed the passing of various draconian and public safety legislation and States of emergency.

The apartheid State pursued a destabilisation campaign against South Africa’s black neighbours, notably Angola, Mozambique, Zimbabwe and Botswana. As a policy and strategy, destabilisation was an open and blatant form of cross-border violation of human rights. It sought to make the southern African countries accept apartheid by making the States in the region dependent on white-ruled South Africa, as well as making them militarily weak so that they could pose only a small threat to the apartheid State.

2.12 SOUTH AFRICAN LEGISLATION COMPRISING THE LAW OF APARTHEID

The “law of apartheid” can broadly be divided into two categories: first, those laws which prescribe the personal, social, economic, cultural, and educational status of the individual in society; and second, those laws which construct the institutions of separate development and determine the political status of the individual.

2.13 THE PERSONAL STATUS OF THE INDIVIDUAL UNDER APARTHEID

2.13.1 Race Classification

In South Africa, a person’s political, civil, economic, and social rights are determined by the race or ethnic group to which he belongs. This classification is not left to social determination because this might allow a person to climb from a less privileged racial

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66 Ibid.
67 Ibid., p. 38.
68 Ibid., p. 39.
69 Ibid.
group to a more privileged group if his physical appearance or social acceptance permits such a change. In order to prevent such racial “crossings” an elaborate legislative scheme has been established to identify each person racially.

The estimated South African population of over 26 million is made up of 4,300,000 whites, 2,400,000 colored people, 746,000 Asians, and 18,600,000 Africans. Although it is possible to place the majority of South Africans in one of these racial categories there remains a large number of people who do not easily fall into any distinct group and who belong to the borderlands of racial classification. The South African legislature is undaunted by the failure of the geneticist and the anthropologist to compile a complete and perfect grouping of people along racial lines and has constructed a racial classification scheme based on the criteria of descent, appearance, and general acceptance. Inevitably, it has failed in its search for racial purity and legal certainty as, in the words of Mr. Arthur Suzman Q.C. of the Johannesburg Bar, “[a]ny attempt at race classification and therefore of race definition can at best be only an approximation, for no scientific system of race classification has as yet been devised by man. In the final analysis the legislature is attempting to define the indefinable.”

The confusion over race classification has been aggravated by the failure of the legislature to lay down a uniform racial definition. Instead the definition and number of racial groups vary according to the object of each enactment. While some statutes follow the customary division into four racial groups-white, Bantu, colored, and Asiatic-other statutes distinguish between whites and “non-whites” only or between whites, Bantu, and colored. The Immorality Act of 1957, for example, which outlaws sexual relations between “white persons” and “colored persons,” distinguishes only between a “white person,” whom it defines as “any person who in appearance obviously is or who by general acceptance and repute is a white person,” and a “colored person” who is defined as “any person other than a white person,”

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70 1976 Survey of Race Relations 32. These figures predate the independence of Transkei and thus include the population of both South Africa and Transkei. Approximately 2 million people live in Transkei.
72 For a full account of the confusion resulting from different definitions, see Suzman, op. cit., and Elizabeth S. Landis, “South African Apartheid Legislation: Fundamental Structure” (1961) 71 Yale Law Journal 1 at 4-16.
73 Act 23 of 1957, section 16.
74 Section 1.
2.13.2 The Group Areas Act,\textsuperscript{75}

On the other hand, distinguishes among three groups, namely white, Bantu, and colored,\textsuperscript{76} but in addition allows the State President to define “any ethnic, linguistic, cultural or other group of persons” who belong to the Bantu or colored groups and then to treat each as a separate group for the purposes of the Act. This has resulted in proclamations declaring Indians, Chinese, and Malays to be sub-groups of the colored group. The result of this lack of uniformity is that the same person may fall into different racial categories for different purposes.

2.13.3 Population Registration Act

The Population Registration Act is strewn with human suffering.\textsuperscript{77} Families are torn apart when husbands and wives, parents and children, brothers and sisters are differently classified with all the ensuing consequences to their personal, economic, and political lives.\textsuperscript{78} In order to overcome the hardships of racial classification over a thousand objections have been lodged since the inception of the Act, of which several hundred have been upheld.\textsuperscript{79}

The purpose of the Population Registration Act is to place each individual in a particular racial group in order to determine his social, economic, and political status. Both black and white are obliged to be classified in this way with the result that it is argued that this statutory scheme is an example of differentiation rather than discrimination. This argument fails to take into account that once classified as “colored” or “Bantu” a person is automatically relegated to an inferior racial stratum with lesser rights.\textsuperscript{80} The Population Registration Act therefore provides the machinery for unfavorable treatment under other

\textsuperscript{75} Act 36 of 1966.
\textsuperscript{76} Section 12.
\textsuperscript{78} For examples of such cases, see 1967 \textit{Survey of Race Relations} 20; 1968 ibid. 35; 1969 ibid. 25; and 1970 ibid. 30.
\textsuperscript{79} The exact figures on this subject are confusing: in 1960 the Minister of the Interior disclosed that 2,623 appeals had been lodged against classifications (House of Assembly Debates, vol. 103, col. 1397, 12 February 1960), while in 1969 the Minister stated that 1,157 such appeals had been made (ibid., vol. 26, col. 4890, 2 April 1969).
\textsuperscript{80} In Mohamood v. Secretary for the Interior, 1974 (2) S.A. 402 (C), Van Winsen J. accepted this necessary implication of the Population Registration Act when he stated, “The decision as to a person’s classification is, under the laws of this country; of cardinal importance to him since it affects his status in practically all fields of life, social, economic and political. An incorrect classification can in all of those fields of life have devastating effects upon the life of the person concerned” (at 407).
statutes. Moreover, this Act is par excellence an example of a statute which produces humiliation and a sense of inferiority among those obliged to submit to investigations into their family history, social habits, and physical appearance. What could be more humiliating than an enquiry into the precise racial admixture of one’s parents, the color of the friends one keeps, and the extent to which one’s hair, fingernails, lips, and other physical features incline towards Caucasian or Negroid?

2.13.4 Separate Facilities

One of the greatest causes of racial humiliation in South Africa is the simple sign “Whites only” or, in Afrikaans, “Slegs blankes” which is to be found at the entrances to rest rooms, toilets, post offices, elevators, restaurants, railway carriages, buses, and most public amenities. Sometimes there may be a sign nearby denoting a similar amenity for “non-whites” or “nie-blankes.” But this is not necessary for in law there is no general obligation to provide separate facilities for different racial groups. The “separate but equal” approach has been repudiated and in its stead South Africa approves the “separate and unequal” philosophy. The present position is the result of a long history and is the culmination of a struggle between courts and legislature. This history will be briefly recounted here as it highlights the differences in response to racial separation in the United States and South Africa at similar periods in time.

As under the 1953 Act, it is expressly Stated in this proposed amendment that no reservation shall be declared invalid on the ground that no similar, or substantially similar, amenity has been provided for any other race or class.

Whereas the 1953 Act merely permits persons in charge of public amenities to provide separate facilities if they so wish, and relieves them of the burden of providing substantially equal facilities for the different racial groups, the 1977 Bill proposes to give to the Government the power to direct that separate facilities be established against the wishes of the person in control of the amenity in question. This will empower the Government to ensure that segregation remains part of the legal

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The Reservation of Separate Amenities Act of 1953 is not a statute inherited from the pre-1948 era. On the contrary, it is a statute which was introduced in order to reverse an enlightened judicial movement towards substantial equality of treatment. While other statutes, on their face, do not discriminate unequally between the races, this statute expressly authorizes unequal treatment of different racial groups. It, more than any other statute, is incapable of reconciliation with Mr. Vorster’s Statement that separate development is opposed to racial discrimination.

2.13.5 Marriage and Sexual Relations

One of the first laws to be passed by the National Party Government after it came to power was the Prohibition of Mixed Marriages Act of 1949, which forbids marriages between “a European and a non-European” and provides that any union entered into in contravention of this law “shall be void and of no direct.” A marriage officer who performs a marriage ceremony in contravention of this law commits a criminal offence. Before 1949 mixed marriages were rare in South Africa and averaged less than one hundred per year between 1943 and 1946, but the Government wished to legislate against such marriages in order to prevent coloreds from “infiltrating” the dominant white group by marriage. Government spokesmen justified this statute, inter alia, on the ground that some thirty States in the United States of America retained similar laws. During the past twenty years, however, South Africa has remained insensitive to evolving concepts of non-differentiation in this field—and even extended the scope of the law in 1968—while the United States experienced a gradual repeal of these State laws until the Supreme Court declared the

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83 Act 55 of 1949.
84 Section 1.
85 Section 2.
88 In 1968 the Act was amended to invalidate a marriage entered into outside South Africa between a South African male citizen and a woman of another racial group (Act 21 of 1968).
remaining statutes unconstitutional in 1967. In Loving v. Virginia\textsuperscript{89} the Supreme Court held that a Virginian statutory scheme\textsuperscript{90} designed to prevent marriages between persons solely on the basis of racial classification was unconstitutional on the ground that it violated the Equal Protection and Due Process clauses of the Fourteenth Amendment and added that “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”\textsuperscript{91}

Persons belonging to different racial groups are not only denied the right to marry each other in South Africa; they are also denied the right to cohabit. The Immorality Act of 1957\textsuperscript{92} makes it an offence for a white person to have intercourse with a black person or to commit any “immoral or indecent act” with such a person. It is also an offence to entice, solicit, or importune another to commit any of these acts or to attempt to do so or to conspire with another to commit such acts. The maximum penalty for this offence is seven years’ imprisonment.\textsuperscript{93} The 1957 statute confirms previous statutes, for, unlike the prohibition on mixed marriages, the prohibition on sexual relations between persons of different races is of pre-1948 vintage. In 1927 extra-marital carnal intercourse was prohibited between whites and Africans\textsuperscript{94} and in 1950 this prohibition was extended to sexual relations between whites and all blacks, viz. including coloreds and Asians.\textsuperscript{95}

\textbf{2.13.6 Separate Areas}\textsuperscript{96}

Territorial and residential separation were part of the South African legal order before the National Party came to power in 1948. These laws have not, however, simply been accepted as historical relics; instead they have been used and extended to form the very

\begin{itemize}
\item \textsuperscript{89} 388 U.S. 1 (1967).
\item \textsuperscript{90} For an examination of the Virginian laws, see Walter Wadlington, “The Loving Case: Virginia’s Anti-Miscegenation Statute in Historical Perspective” (1966) 52 Virginia Law Review 1189.
\item \textsuperscript{91} 388 U.S. 1 at 12.
\item \textsuperscript{92} Act 23 of 1957, section 16. For a commentary on this Act, see Garth M. Hardie and Gordon F. Hartford, Commentary on the Immorality Act, Cape Town, Juta & Co., 1960.
\item \textsuperscript{93} Sections 16 and 22.
\item \textsuperscript{94} Immorality Act, 5 of 1927, sections 1-3.
\item \textsuperscript{95} Immorality Amendment Act, 21 of 1950, section 1.
\item \textsuperscript{96} See further on this subject, Elizabeth S. Landis, “South African Apartheid Legislation: Fundamental Structure” (1961) 71 Yale Law Journal 1 at 16ff.
\end{itemize}
foundation of the apartheid order. In approaching these laws it is necessary to draw a distinction between those which create separate areas for Africans and other racial groups, and those which establish separate residential areas within the urban areas.

2.14 TERRITORIAL SEPARATION

The Bantu Land Act of 1913$^{97}$ and the Bantu Trust and Land Act of 1936$^{98}$ together set aside some thirteen per cent of the total area of South Africa for the exclusive occupation of Africans. The 1913 Act demarcated certain areas, known as “reserves,” for Africans and forbade the transfer to, or lease of land by, other races within these reserves. At the same time Africans were prohibited from acquiring land elsewhere. In terms of the Act a Commission was established to investigate the allocation of further land to Africans and in 1916 the Beaumont Commission$^{99}$ recommended the setting aside of additional land for African occupation. Twenty years later effect was given to these recommendations by the Bantu Trust and Land Act which established the South African Bantu Trust to acquire the land and to exercise control over it. Land owned by Africans before 1936 outside the areas set aside by the 1913 and 1936 Acts and surrounded by white farms-described as “black spots”-may be expropriated by the South African Government.$^{100}$ This land scheme has not yet been fully implemented. The Bantu Trust has not yet acquired all the land promised to Africans by the 1913 and 1936 Acts and the Government is still engaged in the expropriation of land occupied by blacks in white areas. This has resulted in large-scale population removals and by 1975 about 211,626 Africans had been removed from “black spots” and related areas and resettled on land adjoining the homelands.$^{101}$ This frequently results in great human suffering as the new areas often lack the necessary facilities for human habitation and are far from sources of employment. The land issue has become one of the main sources of conflict between the South African Government and the

$^{97}$ Act 27 of 1913.

$^{98}$ Act 18 of 1936.


$^{100}$ Section 13(2) of Act 18 of 1936.

$^{101}$ House of Assembly Debates, vol. 64, col. 721 (Question) (1 April 1976).
homelands Governments, which are united in their demands for additional land and their rejection of the 1936 land allocation.

**2.14.1 Separate Education**

Racial division is maintained at all levels of education. Separate schooling was practised long before 1948 and could probably be described as part of the traditional South African way of life. While education is compulsory up to the age of sixteen years for white children, it is not compulsory for black children. Although major steps have been taken in the direction of compulsory schooling for Indians and coloreds, only about seventy-five per cent of the African children of school-going age attend school. The Government has, however, introduced a new program whereby children who attend school are required to stay for at least four years and this has been described as part of a move towards compulsory education for Africans. Undoubtedly educational facilities have increased considerably for blacks during the past years but there is still a great distinction in the per capita expenditure on the education of black and white children. Thus in 1974-1975 the estimated per capita expenditure on Africans in primary and secondary schools was R39.53 compared with the amount of about R605.00 spent on each white child. With such a great discrepancy in expenditure it is inevitable that black educational facilities are inferior to those of whites and that the resulting standard of education is lower. Dissatisfaction with the system of “Bantu education” sparked off the nation-wide demonstrations of 1976, which shook South Africa more than any event since the days of Sharpeville. Although the protests were initially directed at the use of Afrikaans as a medium of instruction in African schools, the protests later widened to encompass the whole

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103 See Moller v. Keimoes School Committee, 1911 A.D. 635, discussed in Chapter 10.
104 1973 *Survey of Race Relations* 310, 315.
105 1975 *ibid.* 220.
system of Bantu education and most schools in Soweto and the Cape Town townships were forced to close for several months.

Helore 1959 most universities were segregated but the University of Cape Town and the University of the Witwatersrand admitted students on academic merit only, with no regard to race.\textsuperscript{108} The liberal philosophy of these two “open universities” incensed the National Party Government and in 1959 the Extension of University Education Act\textsuperscript{109} was passed which prohibits black students from attending either of the open universities without a permit from the responsible Minister. This Act also provided for the establishment of separate universities “for Bantu persons” and for “non-white persons other than Bantu persons” from which white students are barred.\textsuperscript{110} At the time of this legislation the only black university was the University College of Fort Hare which had admitted African, colored, and Asian students. Now it is restricted in admissions to the Xhosa-speaking group. In addition four new black universities were established for different ethnic groups. These are: the University of the North to serve the Sotho, Tsonga, Tswana, and Venda; the University of Zulu-land to serve the Zulu; the University of the Western Cape to serve the colored, Malay, and Griqua groups; and the University of Westville to serve the Asian group.

2.14.2 Apartheid and the Labour Market

Key elements of the apartheid dispensation worked to deprive African workers of alternatives to paid employment. The most important measures lay outside the normal purview of labour laws, and they were differentiated explicitly in terms of race and gender. They included: Reflections on Democracy and Human Rights: A Decade of the South African Constitution (Act 108 of 1996):

- The land and pass laws, which over centuries tilted the balance of power in the workplace strongly toward employers of African labour. These laws worked to

\textsuperscript{109} Act 45 of 1959
\textsuperscript{110} Sections 2(2), 3(1) and 17.
deprive Africans, especially in the homelands, of economic alternatives to migrant labour. In effect, they made them aliens in their own country, subject to the regulation and repression normally meted out to foreign workers.

- The measures preventing black households from access to education, skills, infrastructure and formal economic networks, especially access to financial and retail systems. Again, these strategies worked to deprive Africans of economic opportunities outside of poorly paid employment in white owned companies.

- Specialised laws encouraged reliance on foreign migrant workers in the mining and agricultural sectors. This system strengthened employers relative to workers, by increasing competition for jobs and by bringing in foreign-born workers, who were easier to intimidate and dismiss.

In contrast to the efforts to undermine African workers’ position, the State worked to empower white workers relative to employers. To that end, it minimized white unemployment and fostered white skills. Only whites could attend many training institutions, for instance, those for agricultural and higher-level teachers’ training. In addition, until the 1980s, the big parastatals provided apprenticeships on a large scale for whites and coloureds. Job reservation effectively increased the bargaining power of less skilled whites, especially in mining, until white workers moved up the hierarchy and out of production jobs. The public sector generally acted as a last-resort employer for white workers.

In short, apartheid effectively reduced the ability of black workers, especially Africans in lower-level jobs, to protect their rights, largely by generating underemployment and unemployment. At the same time, it systematically enhanced the position of white workers.
Table 2.1: Segmentation of the South African Labour Market

<table>
<thead>
<tr>
<th>Characteristic</th>
<th>Formal Top</th>
<th>Formal Lower</th>
<th>Colonial</th>
<th>Informal</th>
<th>Unpaid</th>
</tr>
</thead>
<tbody>
<tr>
<td>Occupations</td>
<td>Management professional</td>
<td>Production and service workers including big public professions</td>
<td>Mining, low-level public sector, domestic, commercial agriculture</td>
<td>Micro enterprise predominantly hawking and homeland agriculture</td>
<td>Mostly domestic and agriculture</td>
</tr>
<tr>
<td>Share in paid work</td>
<td>Around 5%</td>
<td>Around 45%</td>
<td>Around 30%</td>
<td>Around 20%</td>
<td>N.A.</td>
</tr>
<tr>
<td>Skills levels</td>
<td>Post secondary</td>
<td>Skilled, semi skilled unskilled</td>
<td>Skills typically not formally recognized</td>
<td>Skills typically not formally recognized</td>
<td>Skills not recognized</td>
</tr>
<tr>
<td>Race/gender/citizenship</td>
<td>Disproportionately white men, especially in the private sector despite a growing representation of black workers.</td>
<td>Predominantly black and from SA. Gender varies by sector (more women in services, light industry and retail)</td>
<td>Mining almost exclusively black men; domestic almost exclusively black women; agriculture mixed large number of foreign born workers in mining, agriculture and domestic</td>
<td>Almost exclusively black workers disproportionately women; apparently many undocumented foreign born in hawking</td>
<td>Mostly black women especially domestic work of all kinds.</td>
</tr>
<tr>
<td>Historic labour laws</td>
<td>Very strong protection for white employees</td>
<td>Formally differentiated, initially b race and gender form 1980s by permanence and skills</td>
<td>Special dispensations favouring employers linked to broader institutions of control (pass laws, criminal laws etc); special arrangements for foreign migrants in agriculture and mining.</td>
<td>No applicable labor laws. Shaped largely by apartheid laws on access to urban jobs training and infrastructure</td>
<td>No applicable labour laws. Shaped largely by apartheid laws on access to urban jobs training and infrastructure.</td>
</tr>
<tr>
<td>Current labour laws</td>
<td>Implemented for all</td>
<td>Generally implemented</td>
<td>Implemented in mining, but weak in agriculture and domestic</td>
<td>Mostly ignored</td>
<td>N.A.</td>
</tr>
<tr>
<td>Unionisation</td>
<td>Low</td>
<td>Strong</td>
<td>Strong in mining, very week in agriculture and domestic</td>
<td>Mostly existent</td>
<td>N.A</td>
</tr>
</tbody>
</table>

Notes: 1. Calculated from Statistics South Africa (Stats SA), Labour Force Survey, September 2002, using a combination of figures for occupation, industry and formal versus informal employment. Informal employment is defined as self-employment or employment for an employer who is not registered to pay value added tax.
2. Unpaid labour, for instance, fetching wood and water or subsistence agriculture is done by people with and without paying jobs.
2.15 THE POLITICAL INSTITUTIONS OF APARTHEID

At the time of Union the four colonies, which were to become the four provinces, were divided over the part to be played by blacks in the political process. While the Cape favored a non-racial, qualified franchise based on individual merit, the other three colonies pressed for the total exclusion of blacks from the franchise. The result was a compromise, with each province retaining its pre-Union franchise and the black vote in the Cape protected by an entrenchment procedure which provided that no change might be made to black voting rights without a two-thirds majority vote of both Houses of Parliament sitting together. But in the long run, the northern philosophy was to prevail. In 1936 African voters in the Cape were removed from the common electoral roll by the required two-thirds majority and placed on a separate roll to elect three white representatives to the House of Assembly. At the same time provision was made for four white Senators, elected by electoral colleges, to represent Africans throughout the Union. The coloreds in the Cape were left on the common roll until the National Party came to power in 1948, determined to purge all blacks from the political process. But the National Party was not able to command the necessary two-thirds majority vote and, after its attempts to remove the colored voters by a simple majority vote had been ruled unconstitutional by the Appellate Division, it enlarged the Senate in order to obtain the required majority. So it was that in 1956 the coloreds too were placed on a separate roll to elect four white representatives to the House of Assembly.

The first decade of National Party rule was marked by the constitutional struggle over the colored vote and the construction of an apartheid society based upon discriminatory measures of the kind described in section B. No real debit was made to provide an institutional framework for the promised vertical separate development, although the seed of future developments was to be found in the Bantu Authorities Act of 1951 which gave its approval to traditional, tribal authorities. The legislative implementation of the Grand Design of a commonwealth of nations in South Africa was left to Dr. Verwoerd.

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111 See Chapter 2 for a fuller account of the entrenched Cape voting rights.
112 Representation of Natives Act 12 of 1936.
113 Harris v. Minister of the Interior, 1952 (2) S.A. 428 (A.D.) and Minister of the Interior v. Harris, 1952 (4) S.A. 769 (A.D.).
114 Act 68 of 1951.
who became Prime Minister in 1958. The first step was to remove the white representatives of the African people in Parliament and to give legislative approval to the separate homelands policy. This was effected by the Promotion of Bantu Self-Government Act\textsuperscript{115} which declared in its preamble that the Bantu peoples of South Africa do not constitute a homogeneous people, but form eight separate national units on the basis of language and culture-namely, the Northern Sotho, Southern Sotho, Swazi, Tsonga, Tswana, Venda, Xhosa, and Zulu—which would one day form “self-governing Bantu national units.” In the meantime, the Government explained, there was no place for representation in the white Parliament because “participation in the government of the guardian territory does not form part of the preparation of the subordinate units for the task of self-government.”\textsuperscript{116}

Since 1971 the following self-governing territories have been proclaimed:

(i) Bophuthatswana,\textsuperscript{117} with areas in the Western Transvaal, Northern Cape, and Orange Free State for the Tswana national unit;

(ii) the Ciskei,\textsuperscript{118} in the Eastern Cape as a second homeland for the Xhosa national unit (the first being the Transkei);

(iii) Lebowa,\textsuperscript{119} in the Northern Transvaal for the North Sotho national unit and Northern Ndebele and Pedi;

(iv) Venda,\textsuperscript{120} in the North-eastern Transvaal for the Venda national unit;

(v) Gazankulu,\textsuperscript{121} in the Eastern Transvaal for the Tsonga (Shan-gaan) national unit;

(vi) Qwaqwa (previously Basotho-Qwaqwa), in the Eastern Orange Free State for the South Sotho national unit;

(vii) kwaZulu,\textsuperscript{123} in Natal for the Zulu national unit.

\textsuperscript{115} Act 46 of 1959.
\textsuperscript{116} White Paper 3 of 1959, pp. 6-7.
\textsuperscript{120} Proclamations R.11 and R.12, G.G.3769 of 26 January 1973 (Reg. Gaz.1733),
All these self-governing territories have constitutions that provide for a cabinet and legislative assembly with powers similar to those possessed by the Legislative Assembly of the Transkei under its Constitution of 1963. In each case the legislative assembly consists both of members designated by the tribal authorities (usually chiefs or headmen) and of elected members, with the former in the majority. The cabinet consists of a Chief Minister, elected by the legislative assembly, and five ministers appointed by the Chief Minister. So far no self-governing homelands have been created for the Southern Ndebele or Swazi groups.

The South African Government clearly favors independence for the homelands as soon as possible and no longer insists on economic viability as a pre-condition for independence. Initially the homelands leaders declared that they would not accept independence until their land demands had been met, but attitudes have changed over the past few years and the Transkei became independent in October 1976 and Bophuthatswana in December 1977.

**2.16 LONG HISTORY OF OPPRESSION IN SOUTH AFRICA**

The origins of apartheid racism did not start in 1948; the foundations were laid long before this period. The 17th century saw South Africa becoming subjected to colonisation by Europe, with the Dutch East India Company of Jan van Riebeeck establishing a settlement at the Cape in 1652. In 1688, the Huguenot settlers also arrived in the Cape, while ‘Trekboers’ moved into the hinterland, robbing the Khoikhoi and the San people of their land and animals. The foundations for racism were therefore established more than three-and-a-half centuries ago. The 1700s also witnessed the brutality of slavery in South Africa until it was eventually abolished in 1834. But no sooner was slavery outlawed than the Great Trek from the Cape Colony began, with white racist trekkers declaring war against indigenous groups like the Ndebele and the Zulus, leading to the Battle of Blood River in 1836.

From 1838 onwards, numerous battles were fought between white British and Afrikaner settlers over control of territory and resources. Following the discovery of diamonds in

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Capetown in the Northern Province in 1867, the settlers became more aggressive and greedy. This sparked numerous wars against each other, as well as against the natives. The first Anglo-Boer war broke out in 1880, and six years later, the Witwatersrand goldfields were discovered. This led to the birth of Johannesburg in 1886. The second Anglo-Boer war, also known as the South African War,\textsuperscript{125} started in 1899.

With the formation of the Union in 1910, great emphasis was placed on ‘segregation’ policies to guide ‘native policy’.\textsuperscript{126} The Union helped whites to consolidate white supremacy and black subjugation. The formation of the Union signalled clearly to blacks that the whites were not interested in creating a State based on equal rights; they were determined to establish a white State. Consequently, blacks felt compelled to establish their own liberationist institutions and in 1912 formed the South African Native National Congress (SANNC) - which became the African National Congress (ANC) in 1923.

But whites were not phased and in 1913, the Natives Land Act was introduced, limiting land ownership by blacks to tribal territories (non-quota land). Black South Africans launched numerous anti-pass campaigns that triggered more repression from the white settlers. The year 1936 was a significant period for settler domination as blacks were removed from the common voters’ roll in the Cape, and the Native Trust and Land Act authorised blacks a maximum of 13.7% of all land in the Union (as non-quota and quota land).\textsuperscript{127}

After 1948, the apartheid State turned anti-communism into a prime doctrine. The apartheid government introduced the Suppression of Communism Act in 1952. This Act set the platform for the introduction of broad-ranging and immensely repressive security legislation in the decades that followed.

\textsuperscript{125} Dunbar Moodie, \textit{The Rise and Fall of Afrikanerdom: Power, Apartheid and Afrikaner Civil Religion}, Berkeley, California, 1975.


2.16.1 South Africa and the State of Apartheid

South Africa was the only country post-World War II that was egotistical and racist enough to formally institutionalise racial discrimination and thereby defy the post-World War II drift toward self-determination of peoples. It showed total disregard for human rights values and freedoms, and defied the post-war spirit of democratisation. It introduced racist Acts such as the Mixed Marriages Act, the Immorality Act and the Bantu Education Act of 1953.

Democracy in apartheid South Africa was at best a sham - a limited whites-only democracy - in which white people contested for political power through democratic means, while black people were relegated to the level of spectators in this charade of democracy. Apartheid easily qualified as the world’s foremost raciocentric; this racial engineering project was ethno-chauvinism par excellence (above all others).

Many actors in the international community singled out and campaigned against South Africa’s discrimination, settler colonialism, prison conditions and violations of prisoners’ human rights. They offered support for the victims of apartheid, the exploited and oppressed children under apartheid; and non-governmental organisation (NGO) conferences for action against apartheid. Campaigns ranged from international youth and student solidarity with the oppressed people of South Africa; to strategies for resistance against apartheid; support for women’s movements against apartheid; culture against apartheid; education against apartheid; campaigns against apartheid in sports; and the international mass media against apartheid.

On the economic front, there were numerous efforts seeking implementation of sanctions; oil and arms embargoes against South Africa; study of the role of Trans-National Corporations (TNCs) in South Africa; seminars on loans to, and disinvestments from South Africa; and studies on determining the socio-economic implications of apartheid. By the 1970s, the international community had begun to react against nuclear collaboration with South Africa. Even though some States, among them the world’s established democracies in the West, chose to play the role of spoilers, small boycott movements quickly swelled into a global anti-apartheid movement. The Western powers were able to provide a new lease of life for the apartheid regime, as it emerged as a bastion against the international ‘communist onslaught’.
2.16.2 The International Anti-Apartheid Offensive

From the inception of the UN, many of its members were conscious of their obligation to promote the elimination of all forms of racial discrimination. In July 1948, India cautioned the UN that:

... if the belief that there is to be one standard of treatment for the white races and another for the non-white continues to gain strength among the latter, the future for solidarity among the members of the United Nations and, consequently, for world peace, will indeed be dark.¹²⁸

These were prophetic words indeed. In 1950, the General Assembly, for the first time, Stated that apartheid was decidedly anti-democratic because it was necessarily based on ‘doctrines of racial discrimination’ contrary to the principles Stated in the UN Charter. In 1955 the South African government began to feel the pressure as it was forced to withdraw from the United Nations Educational, Scientific and Cultural Organisation (UNESCO).

2.16.3 The Vibrant 1980s

The early 1980s saw the apartheid State experimenting with all sorts of cosmetic reforms. These culminated in the plans of the Botha regime to create a tri-cameral parliament, which established separate parliamentary chambers for whites, coloureds and Indians, and blatantly excluded blacks. This propelled the establishment of the United Democratic Front (UDF), a potent extra-parliamentary force. The UDF engaged in countrywide mass protest, and rendered many parts of the country ungovernable. The State responded with the imposition of a State of emergency and the country became embroiled in violence.

Internationally, apartheid had become a rallying point for civil rights movements, particularly amongst the African-American community in the United States. Congress also became a fierce anti-apartheid campaigner, contradicting President Ronald Reagan’s anti-sanctions stance.

In Western Europe, anti-apartheid movements campaigned on the basis that ‘apartheid was an evil to be combated by every means within their power’.\textsuperscript{129} Demands for sanctions and isolation were their chief strategies. They worked in creative ways with multilateral organisations such as the UN, the Commonwealth, the Non-Aligned Movement, and the OAU, to increase the pressure against South Africa. More importantly, they forged close working relations with the South African liberation movements in exile, as well as the UDF and the Mass Democratic Movement (MDM) inside the country.

\textbf{2.17 HUMAN RIGHTS IN POST APARTHEID SOUTH AFRICA}

From 1994 to 1999, the new government placed an explicit premium on transformation: the notion that the South African State and society should change fundamentally if South Africa was to move away from racism, autocracy, poverty and inequality. The challenges of formal democratisation, State reform, expanded delivery of social services, job creation, poverty alleviation and development all constituted salient elements of transformation. Transformation thus sought to deal with economic, political and social relations, and sought to improve the lives of the poorest South Africans.

In practical terms, the post-apartheid government was preoccupied with breaking ties with the apartheid past and putting in place new democratic and accountable institutions. The emphasis was on overhauling legislative frameworks; the creation of new institutional arrangements and structures to deliver the new policy frameworks; and transformation within government in line with the principles of broad representation.

Black Economic Empowerment (BEE), viewed as one way of addressing economic inequality, was a key government priority. Employment equity and affirmative action, that is legislative programmes of action aimed at redressing disadvantaged groups, was another major priority. The government sought to give blacks, co-loureds and Indians, as well as women and the physically disabled, a greater share of the

\textsuperscript{129} Kader Asmal, \textit{Address to the closing session of the symposium organised by the Anti-Apartheid Movement archives committee} to mark the 40th anniversary of the establishment of the Anti-Apartheid Movement, op. cit., p. 5.
employment opportunities in the country, in order to counterbalance the disparities caused by apartheid exclusionism.

South Africa was committed to achieving gender equality as part of its human rights vision, which incorporated an acceptance of the equal and inalienable rights of all women and men. This ideal is a fundamental tenet under the South African Bill of Rights. The socio-cultural dictates of all groups defined women as inferior to men and assigned them to positions of legal minors in both private and public life. Here, too, the legacy of apartheid was one that maintained structured and entrenched inequalities, which subjected the majority of women - especially African women who lived in mainly rural areas - to abject poverty. The ANC-led government sought to entrench its commitment to gender equality by setting up the Commission on Gender Equality and the Office on the Status of Women under the President. The government also set a target to have one-third of its members of Parliament women. In addition, legislation outlawing gender-based discrimination and violence against women was passed.

Affirmative action legislation targeted not only racial affirmation but also gender, requiring more women in the workplace, particularly in decision-making positions. Despite these transformative measures, women continue to be the poorest group in South Africa and are mainly unemployed or underemployed. South Africa, especially in its rural areas, remains largely a patriarchal society. In addition, violence against women and sexual assault in South Africa has reached serious proportions.

2.17.1 Rural-Urban Migration and Income Distribution after Apartheid

As the previous analysis indicates, the evaluation of the distribution of government services over the past decade requires an understanding of South African society across income groups and geographical regions. Without this background, disparities in provision, quality, affordability, and access to basic services may be misinterpreted. Using 1996, 2001 and 2003 data, we can piece together a picture of South Africa’s social and economic landscape since the birth of democracy. These factors help to make sense of patterns in the distribution of socio-economic rights across regions and social groups.
Table 2.2 shows the population distribution by province in 1996 and 2001. It indicates substantial migration from provinces that inherited former homelands to those with metropolitan areas. This table underStates the overall rural-urban migration, which is not published by the government, since it hides substantial migration within provinces.

Table 1b shows population growth in South Africa’s largest metropolitan areas during the same period. These cities grew between 3.8% and 5.1%, far greater than the national population as a whole.

**Table 2.2: Population by Province, 1996 and 2001**

<table>
<thead>
<tr>
<th>Population in thousands</th>
<th>1996</th>
<th>2001</th>
<th>Average annual % change</th>
</tr>
</thead>
<tbody>
<tr>
<td>Year</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Northern Cape</td>
<td>840</td>
<td>823</td>
<td>-0.4%</td>
</tr>
<tr>
<td>Eastern Cape</td>
<td>6.303</td>
<td>6.437</td>
<td>0.4%</td>
</tr>
<tr>
<td>Free State</td>
<td>2.634</td>
<td>2.707</td>
<td>0.6%</td>
</tr>
<tr>
<td>Limpopo</td>
<td>4.929</td>
<td>5.274</td>
<td>1.4%</td>
</tr>
<tr>
<td>North West</td>
<td>3.355</td>
<td>3.669</td>
<td>1.8%</td>
</tr>
<tr>
<td>Mpumalanga</td>
<td>2.801</td>
<td>3.123</td>
<td>2.2%</td>
</tr>
<tr>
<td>KwaZulu-Natal</td>
<td>8.417</td>
<td>9.426</td>
<td>2.3%</td>
</tr>
<tr>
<td>Western Cape</td>
<td>3.957</td>
<td>4.524</td>
<td>2.7%</td>
</tr>
<tr>
<td>Gauteng</td>
<td>7.348</td>
<td>8.837</td>
<td>3.8%</td>
</tr>
<tr>
<td>SA</td>
<td>40.854</td>
<td>44.820</td>
<td>2.0%</td>
</tr>
<tr>
<td>Losers</td>
<td>18.061</td>
<td>18.909</td>
<td>0.9%</td>
</tr>
<tr>
<td>Gainers</td>
<td>22.523</td>
<td>25.911</td>
<td>2.8%</td>
</tr>
</tbody>
</table>

Table 2.3: Growth in Major Metropolitan Areas, 1996-2001

<table>
<thead>
<tr>
<th>Population in Thousands</th>
<th>1996</th>
<th>2001</th>
<th>% Change</th>
<th>Difference due in-Migration</th>
</tr>
</thead>
<tbody>
<tr>
<td>Johannesburg</td>
<td>2 520</td>
<td>3 230</td>
<td>5.1%</td>
<td>3.0%</td>
</tr>
<tr>
<td>Cape Town</td>
<td>2 400</td>
<td>2 890</td>
<td>3.8%</td>
<td>1.7%</td>
</tr>
<tr>
<td>Durban</td>
<td>2 520</td>
<td>3 090</td>
<td>4.2%</td>
<td>2.1%</td>
</tr>
<tr>
<td>Total</td>
<td>7 440</td>
<td>9 210</td>
<td>4.4%</td>
<td>2.3%</td>
</tr>
<tr>
<td>SA</td>
<td>40 580</td>
<td>44 820</td>
<td>2.0%</td>
<td>0.0%</td>
</tr>
<tr>
<td>SA less these three cities</td>
<td>33 140</td>
<td>35 610</td>
<td>1.4%</td>
<td>-0.5%</td>
</tr>
</tbody>
</table>

2.17.2 Chapter Nine Institutions in the Constitution of South Africa

The Constitution is premised on a separation of powers between the legislature, the executive and the judiciary. Separation of powers and upholding the Constitution requires vigilant and strong countervailing institutions. Chapter 9 of the Constitution provides for ‘State institutions supporting constitutional democracy’, which include the South African Human Rights Commission (SAHRC); the Public Protector; the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Commission); the Commission for Gender Equality (CGE); the Auditor-General (AG); the Independent Electoral Commission (IEC); and the South African Broadcasting Corporation (SABC).

The aim of these institutions is to inculcate a culture of democracy and human rights in South Africa. They are also tasked with the monitoring of political and socio-economic rights, and overseeing the roles of institutions such as the National Assembly.

In order to ensure that the socio-economic rights in the Bill of Rights are progressively realised, section 184(3) of the Constitution mandates the SAHRC to monitor and assess, on an annual basis, the observance of these rights and accordingly report to the National Assembly. In terms of Section 183(4), the Commission has additional powers and functions prescribed by national legislation, such as the

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130 Section 183(4) provides that: Each year, the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken toward the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.
Promotion of Access to Information Act and the Promotion of Equality and Prevention of Unfair Discrimination Act, which require the SAHRC to report to the National Assembly.

In order to execute its constitutional mandate, the SAHRC developed a set of questionnaires (commonly referred to as ‘protocols’) in its first reporting cycle. The protocols were designed to provide it with information on policy and legislative, budgetary and other measures adopted during a reporting period in order to realise the socio-economic rights in the Constitution.

There is also a responsibility for the SAHRC, as an independent constitutional body responsible for monitoring socio-economic rights, to critically revisit its monitoring process. Other obligations include the mandate to carry out research, educate and raise awareness of human rights.

A human rights culture could not develop in apartheid South Africa. The system bred intolerance, a culture of violence, and lack of respect for life and, indeed, rights in general. After the fall of apartheid there was therefore an urgent need to help create and foster a human rights culture and to demonstrate the value of, and need for; human rights.

Four years after the country’s first democratic elections in 1994, South Africa is a far better place, at least as far as human rights are concerned, than at any other time in its history. This is not to say that a human rights culture has been established or that human rights issues are at the top of the national agenda. In fact the transition to a human rights-based constitutional democracy is proving to be a challenging task. However, there have been significant efforts and achievements: political violence has diminished considerably, enabling free political activity in most parts of the country; the security forces are being restructured; important human rights legislation has been passed; and all human rights institutions provided for in both the Interim and Final Constitutions have finally been established.

Nevertheless, significant obstacles remain, including the ongoing, though significantly reduced, political violence in KwaZulu-Natal, the slow rate of change in the police and the prison services, and the continuing violence in the taxi industry. In addition, some of the values enshrined in the Interim Constitution are being assailed from a variety of quarters. The popular response to crime presents one avenue of attack; another derives from perceptions that “illegal immigrants” are responsible for an escalation in drug dealing and other crimes, and the “practicalities” of government open a third route for criticism.

The high rate of crime is a critical issue, with major ramifications for human rights, particularly in view of the fact that many South Africans perceive the crime rate to be higher than it really is. Corruption, particularly in government, seems widespread and has the potential to derail the building of a human rights culture. Reducing the crime rate is therefore crucial but so is concrete improvement in the lives of the millions of poor South Africans, particularly in relation to housing and employment. Until the government delivers on its election promises and on socioeconomic rights contained in the Final Constitution, promoting human rights will continue to be more of a dream than a reality.

2.18 PARLIAMENT

When the new government came to power it committed itself to the democratic principles of transparency, public participation in government and the protection of human rights. Parliament also expressed its intent to play a more active role than in the past, and to counter the perception that it was a mere rubber-stamp for executive

136 See Reports of Aliens Flood Strokes Xenophobia, Bus. DAY, 1 Mar, 1996.
137 See Crime Will Cost South African Economy as Much as the RDP, supra note 6, at 7.
141 See South Africa Gets Favourable Human Rights Report, supra note 2, at 1.
decisions. These aims have required a radical transformation of the legislative process and the parliamentary infrastructure. Parliamentary committee meetings have, in general, been opened to the public and the committee process has been adapted to encourage the public to present their views on proposed legislation.

On the positive side, in 1996, Parliament set up a number of the human rights institutions envisaged in the Interim Constitution; namely, the Truth and Reconciliation Commission, the Human Rights Commission, the Land Restitution Commission, the Public Protector, and the Pan South African Language Board. However, reflecting a lack of commitment to redress gender issues, appointments to the Gender Commission took place only in November 1996 and were subject to controversy; most of the parties in parliament voted against the appointments.

Another milestone during 1996 was the enactment of legislation enabling transformation of the police service and the education system, two key aspects of the institutional framework for democracy. Significant progress was also made by the Ministry of Land in paving the way for land reform, with three laws aimed at tenure reform being enacted. A number of laws aimed at the transformation of the judiciary were passed as well attorneys were granted the right of appearance in the Supreme Court language requirements for admission to the profession were changed; and magistrate’s courts were made independent from the public service. While these are important steps, meaningful access to justice will require a more massive transformation of the justice system, including education of judicial officers.

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145 Staff are yet to be appointed.
2.19 THE CONSTITUTIONAL COURT

Until the introduction of a justiciable Constitution in April 1994, courts examining rights issues under State legislation habitually focused on procedure rather than the substantive merits. In other words, one effect of parliamentary supremacy was that judges were cast as mere technicians who could mitigate the effects of unjust laws only on procedural and technical grounds.150

However, the role of the courts, particularly with the introduction of the Constitutional Court, changed radically with the introduction of the justiciable Interim Constitution and its Bill of Rights,151 which became the supreme law. Courts will evaluate legislation enacted by Parliament or other bodies under the Bill of Rights when the law’s constitutionality is at issue. The newly conferred power of judicial review enables the courts to limit the power of the State, including the manner and degree to which organs of government may introduce into the lives of individual citizens.

2.20 THE TRUTH AND RECONCILIATION COMMISSION

A number of factors necessitated compromises in the political settlement that ushered in the new South Africa.152 These included the fact that those who were in power had not been defeated and therefore remained in control; that the security forces were still controlled by the old government; and that the concerns of both local communities and the economic community abroad had to be accommodated.153 Thus, the Interim Constitution provided for a process to be established so that amnesty could be granted to individuals who committed Politically-motive crimes.154 A Truth and Reconciliation Commission (TRC) was identified as the appropriate mechanism for coming to terms with the past. Months of debate, compromise, and delay preceded adoption of the legislation establishing the TRC.155

150 See Sarkin, supra note 88, at 71.
154 See id.
155 See id. 9.
The process for appointing the commissioners was a major focus. Various human rights and religious organizations called on the president to ensure that appointments were made on the basis of candidates’ track records in working for human rights, and not through a process of political horse-trading. The groups also called for the names of nominees to be published for public comment, indicating that the background and track record of every candidate would be carefully scrutinized.

In September 1995 the President announced a nomination process that attempted to accommodate these concerns. A selection panel, composed of members of civil society and government was appointed to consider nominations. The panel had to prepare a short list from 299 nominations and then select twenty-five names to submit to the President, from which he would appoint between eleven and seventeen commissioners. Candidates had to possess moral integrity, the ability to be impartial, and a known commitment to human rights, reconciliation, and the disclosure of the truth. They could not be high-profile members of any political party, nor could they intend to apply for amnesty. The final list of seventeen Truth Commissioners was announced to South Africa on 29 November 1995. The Amnesty Committee, almost independent of the rest of the TRC and solely responsible for determining who gets amnesty, was appointed without any transparent process on 24 January 1996. The President appointed three judges and two commissioners to this committee.

The primary task of the TRC is to develop a complete picture of the causes, nature, and extent of the gross violations of human rights committed from 1 March 1960 to 6 December 1993. Secondly, the TRC must facilitate the granting of amnesty to persons who make full disclosure of all the relevant facts relating to criminal acts associated with a Political objective. Thirdly, it must establish and make known the fate or whereabouts of victims, restore the human and civil dignity of survivors of abuse by granting them an opportunity to relate their own accounts of the violations.

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156 See id.
158 The original committee members were: Judge Hassan Mall (chair), Judge Andrew Wilson (deputy chair), Judge Bernard Ngoepe, Chris de Jager, and Sisi Kamphethe. During 1997 the committee was enlarged to deal with the large backlog of amnesty applications.
159 Promotion of National Unity and Reconciliation Act 34 of 1995.
160 See id.
they suffered, and recommend reparation measures with respect to them.\textsuperscript{161} Fourthly, the TRC must compile a report that details its activities and findings and that recommends measures to prevent future violations of human rights.\textsuperscript{162} Originally, the TRC was to complete these tasks within twenty-four months of December 1995.\textsuperscript{163} This time frame was extended July 1998 in order to complete decision making on amnesty applications.

The Act limits the TRC to investigating “gross violations of human rights.”\textsuperscript{164} The law defines “gross violations” to include killing, abduction, torture, or severe ill-treatment of any person, or any attempt, conspiracy, incitement, instigation, command, or procurement to commit any of these acts. More general injustices such as the detention without trial of at least 78,000 people over the thirty-year period under examination the jailing of about 18 million for pass law offenses, and the forcible removal of millions of people, do not fall within the jurisdiction of the TRC.

The \textit{Malan} trial acquittals Probably encouraged a number of perpetrators to take their chances and not apply for amnesty before the cut-off date for applications in December 1996.\textsuperscript{165} However the guilty verdicts in the Eugene de Kock\textsuperscript{166} and Motherwell\textsuperscript{167} cases probably had the reverse effect, as did the application for amnesty by a group of high-ranking security force officers shortly after the Malan acquittals. The granting of amnesty to Captain Brian Mitchell for the Trust Feeds massacre in Kwazulu Natal just before the December 1996 amnesty deadline also must have been seen as an incentive for perpetrators to apply for amnesty. A new spate of amnesty applications also followed the announcement by President Mandela in December 1996 of an extension for applications for amnesty until 10 May 1997.\textsuperscript{168} Mandela also extended the scope of amnesty protection so that violations that

\footnotesize{
\begin{itemize}
  \item \textsuperscript{161}See \textit{id}.
  \item \textsuperscript{162}See \textit{id}.
  \item \textsuperscript{163}See \textit{id}.
  \item \textsuperscript{164}The Commission must within three months after it has completed its work submit a final report to the president. The president shall make the report public by tabling it in Parliament, within two months of receiving it, and by publishing it in the Gazette.
  \item \textsuperscript{165}The life of the TRC was to be eighteen months but the legislation envisaged a possible six month extension. This the government formally agreed to in December 1996. See Three Cabinet Ministers Seek Amnesty from TRC, Argus, 13 Dec. 1996, at 13.
  \item \textsuperscript{166}Promotion of National Unity and Reconciliation Act 34 of 1995.
  \item \textsuperscript{167}See \textit{id}.
  \item \textsuperscript{168}See Sarkin, supra note 73, at 617.
\end{itemize}
}
occurred prior to 10 May 1994 would also be covered.\textsuperscript{169} At the end of the lengthened period within which perpetrators of human rights abuses could apply for amnesty (September 1997), about 7,000 people had made application to the TRC. Of these, more than 50 percent were in prison.

The TRC has faced a number of problems, not the least of which has been its legal ones.\textsuperscript{170} Other problems have included the TRC’s failure to publicize its mission, concerns about the capacity of the TRC to obtain “the” truth\textsuperscript{171}, and concerns about its ability to facilitate national unity and reconciliation, along with the TRC’s expenditure on unnecessary items and enormously high salaries (with further increases, cars, and bonuses granted), which could impact on the funds available for reparations to victims. The TRC’s investigation unit also has been beset with problems, including a slowdown by some members who were transferred temporarily to it from the police force and were aggrieved by differentiated salaries. (These members were paid their normal wages, while the salary for others doing the same work was considerably higher.)

Problems aside, the vital issue is that the TRC allows South Africans to recover a buried history, albeit only that dealing with cross human rights violations of the past three and a half decades. Victims across the political spectrum will have a credible and legitimate forum through which to reclaim their human worth and dignity. Perpetrators, irrespective of political persuasion and motivation, will have a channel through which to expiate their guilt. Provided the TRC is successful in its work, future generations will be served by the knowledge that the record of past abuses is as complete as it can be. The hope is that this record, and the recommendations made by the TRC, will not only ensure the avoidance of such human rights violations in the future, but also further the development of a human rights culture.

Until recently, South Africa’s man rights record has been appalling. Apartheid’s dehumanizing effects have pervaded every sphere of life. South Africans had little opportunity to participate in the structure of their society, much less play an active

\textsuperscript{169} See \textit{id.}
\textsuperscript{170} See \textit{S v. Peter Msane \& 19 Others}, No.CC1/96, (Durban & Coast Local Div. 1996).
\textsuperscript{171} \textit{Unreported decision} (on file with author).
role in its government. As a direct result, many people had little understanding of the functions and purposes of a constitution and bill of rights within a democratic society, much less the practical application of these principles in daily life.

Over the last few years, an increasing awareness of, and respect for, basic human rights has become evident. While this has largely been a result of NGO efforts, it must also be seen, in part at least, as a consequence of the multi-party negotiations that delivered the Interim Constitution. However, much work remains to be done by bodies such as the Human Rights Commission to inform the general public about rights and their meaning.

One of the major obstacles hindering the creation of a human rights culture in South Africa is the high crime rate and resultant fear among citizens. It is thus vital that the government finds solutions that do not compromise human rights standards unnecessarily. While the government’s commitment to fighting crime can be fully supported, its readiness to reduce the protections offered by human rights to all South Africans is unacceptable. Such a reduction is not a realistic means for fighting crime but rather an attempt to appease the public concern at the expense of building a human rights culture. Reforming the legal system and addressing crime with a realistic approach is the only way to foster a culture of respect for the rule of law and the legal system.

In addition, the State needs to focus more on human rights education. Emphasis should be placed on developing an understanding of, and respect for, the Constitution and Bill of Rights and the processes and mechanisms for their enforcement. The media have a major role to play in this regard. Participation by an informed electorate is fundamental to the success of a democracy. A key requirement in ensuring such participation is a media that is robust, independent, unbiased, and able to provide citizens with the necessary information to offer informed input on issues of public interest. It is a responsibility of the media to ensure that the democratic ideal flourishes. Democracy can be safeguarded only in the context of a free flow and dissemination of information and a diversity of views and opinions reexamine the
revised text. It certified the text on 4 December 1996\textsuperscript{172} and the Constitution came into force on 4 February 1997.

\textit{The Access to Information in South Africa}

Section 32 of the Constitution provides:

(1) Everyone has the right of access to-

(a) any information held by the State; and

(b) any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative burden on the State.

Parliament enacted the Promotion of Access to Information Act (PAIA) 2000 which seeks to give effect to section 32 of the Constitution. Section 32 and PAIA seek to break the past ethic of secrecy in respect of issues involving the State. A person requesting a record from the public body must be supplied with the information if the requester complies with the procedural requirements and access to information is not refused in terms of any of the grounds justifying refusal.\textsuperscript{173} The requester’s reason for wanting the information is irrelevant.\textsuperscript{174} All public bodies must appoint information officers to consider requests. These information officers must require requesters, other than personal requesters, to pay a prescribed fee before processing the request in respect of copying and searching for the information.\textsuperscript{175} The information officers must make a decision within 30 days of receiving the request as to whether the information should be disclosed. In certain exceptional circumstances, the Information officer may take a longer period, If the request for access is refused, the information officer must State the reasons for refusal and inform the requester that he or she may lodge an internal appeal or make an application to court.\textsuperscript{176} The PAIA allows the public body to refuse to divulge the formation on the following grounds:

\begin{itemize}
  \item \textsuperscript{172} Certification of the amended Text of the Const. of Repub. of S. Afr. 1996, 1997 (1) BCLR 1 (CC).
  \item \textsuperscript{173} Section 11 (1) of the PAIA.
  \item \textsuperscript{174} Section 12 of the PAIA.
  \item \textsuperscript{175} Section 22 of the PAIA.
  \item \textsuperscript{176} Section 25 of the PAIA.
\end{itemize}
• Mandatory protection of the privacy of a third party who is a natural person.
• Mandatory protection of certain records of the South African Revenue Services.
• Mandatory protection of certain confidential information, and protection of certain confidential information of third party.
• Mandatory protection of safety of individuals, and protection of property.
• Mandatory protection of police dockets in bail proceedings, and protection of law enforcement and legal proceedings.
• Mandatory protection of records privileged from production in legal proceedings.
• Mandatory protection of research information of third parties and protection of research information of a public body.
• Permissible protection of information that could reasonably be expected to cause prejudice to the defence, security and international relations of the Republic.
• Permissible protection of information, the disclosure of which would be likely to materially jeopardise the economic interests or financial welfare of the Republic.

Section 46 of the PAIA provides that the information officer must grant a request for access even if the record falls within identified exceptions if the disclosure would either reveal evidence of a substantial contravention or a failure to comply with the law or an imminent and serious public safety and environmental risk. In addition, the public interest in the disclosure must outweigh the harm sought to be prevented by the exceptions.

A requester denied access to information may apply to a court for relief. In terms of section 80 of the PAIA, any court that hears such an application may examine any record of a public or private body to which the application relates and determine whether the record ought to be disclosed. It is not permissible to withhold disclosure from the judge considering the matter.

The PAIA seeks to give effect to the constitutional commitment to an open and transparent government.
2.21 CONCLUSION

In analyzing Human Rights discourse in India and South Africa, one must move into account of two important differences. First the Indian constitution, a proud colonial one, was conceived and drafted before the adoption in 1948 of the UDHR, identified as the onset of the modern international human rights movements. Drafted some fifty years later, the South African constitution of 1996 emerged when the hegemonic influence of the modern human rights movement was at its peak, after an internationally scripted normative constructional framework had evolved.

The Second factor that accounts for differences between the two countries in the radically divergent process by which they were forged. Constitution making in India was the final State of a protracted freedom movement; the actual drafting process was dominated by elites of the Indian National Congress (INC), as mass based political party that was the Vanguard of the National movement and that, due to the emergencies of the time, allowed for little public participation.

Meanwhile, the South African constitution is a more revolutionary document, emerging from a process that was consciously designed to be a sharply participatory one.

This chapter is a comparison of human rights discourse in two countries: in the angle of a comparison of two constitution one conceived and drafted before the Universal Declaration, the other sculpted long after its inception. The inspirational impact of the UDHR and international human rights law is a dominant theme in the mainstream literature on Post-World War II. Constitution, including the Indian Constitution. However, little attention has been given to India’s role in the making of the UDHR.

This Chapter comprises three parts and in this chapter, I briefly present the similarities and the differences in the human rights discourse between two countries and their constitutions that make a comparative study meaningful.

In Chapter II, at the preliminary stage, I examine the genesis of the human rights discourse during the British colonial period, post independence period of the Indian constitutional and underscores the efforts that India’s nationalist leaders made to mobilize broad popular support for resisting the British administration and to initiate fundamental political and social change. I also examine India’s actual and elitist constitution makers who nevertheless made this process more participatory and accommodative.
South Africa’s participatory constitution making process, with preface summarizing the
genesis of human rights discourse in the apartheid and post apartheid South Africa.

In this Chapter, I too examine the making of the Bill of Rights of both constitutions,
highlighting the influence of the Indian Constitution and the vibrant jurisprudence that has
been covered around it on the content and interpretation of South Africa’s Bill of Rights.

I have already showcased the Indian and the South African constitution for their motivation,
arguing that there exists two torts improve upon the older models, and that, in particular, the
Indian Constitution has contributed to international human rights law.

As we have seen, far from influencing the Indian constitution, the UDHR an
embodiment of international human rights law that draws the link between social
conditions and the enjoyment of civil and political rights was itself shaped in part by
the practices of post colonial Indian and socialist contribution also. Economic and
social rights typically are not considered to be within the core of constitutionalism and
few States have been inclined to enshrine them in their national founding charters,
even though the link between social conditions and the enjoyment of civil and
political rights is one of the salient themes of UDHR. India’s constitutional framers,
however, chose to recognize socio-economic rights in their constitution in the form of
Directive Principles whereas South Africa went so far as to incorporate a list of
directly enforceable socio economic rights into its constitution.

The Indian and South African constitution making processes took place amidst
radically different international political settings. Far from condemning colonialism,
international law was central to its development. Therefore India’s liberation was
primarily the product, not of International pressure, but of a uniquely waged,
prolonged, local anti-colonial movement leveraged by the cataclysmic effects of
World War–II. In contrast, international pressure in part contributed to the
dismantling of apartheid in South Africa. Interestingly, it was India’s complaint to the
U.N. General Assembly in 1946 about South Africa’s discriminatory treatment
towards Indians that first internationalized apartheid.

Within the last fifty years, apartheid collided with the growing international human
rights standards that characterized as a crime and ostracized its practitioners until at
last it collapsed under its own weight.
Mahatma Gandhi the Preacher of Non-violence

Mahatma Gandhi is being help by baby
Chapter-II: Human Rights Discourse in India and South Africa

Nelson Mandella at prison in Robbin Island

Mr. Nelson Mandella with his wife Mrs. Wini Mandella

Nelson Mandella as President of New South Africa
Mr. Nelson Mandela after his release

Researcher is standing in front of the house of the Nelson Mandela in Soweto City
A Student was killed by white police during the time of apartheid

A view of areas in Johannesburg in post apartheid South Africa