

CHAPTER THREE

3. DEMOCRACY AND POLITICAL GOVERNANCE

3.1 Overview

70. Democracy and political governance constitute one of the major commitments of the New Partnership for Africa's Development (NEPAD). The overarching objectives of NEPAD are the promotion of human development and the reduction of poverty. The promotion of human development would require the mobilisation of human and material resources; and the establishment of various kinds of cooperation and partnership between governments, civil society and the private sector, and between the peoples, the government and various other organisations at both national and international levels. For all these things to begin to materialise, however, an initial environment of peace, security and stability is needed.
71. The key objective of democracy and political governance is to consolidate a constitutional political order in which democracy, respect for human rights, the rule of law, the separation of powers and an effective, responsive public service are entrenched to ensure sustainable development and a peaceful and stable society.
72. One cannot overstate the importance of the context within which constitutional governance arrangements have been crafted in South Africa. The ideology of apartheid and the oppressive institutions it established shaped the context and processes of Constitution-making. It required endless, detailed negotiations on virtually every principle and institution of post-apartheid constitutional governance. In this light, the South African Constitution is more of a contract among parties who in the past had little trust in each other, rather than a covenant born from shared experience. This negotiated contract literally becomes the sole document that binds multiple and diverse communities together, and is the basis for the legitimacy of their quest to evolve as a nation. Therefore, the South African Constitution is not only the most important document in the construction of the state, but also the most crucial instrument in forging a nation. This partially explains why the agreement on formal rules – and this is what the Constitution is essentially about – has become the most celebrated and sacred achievement of South Africans in post-apartheid South Africa. The very fact that an acceptable Constitution to all could be worked out should be a celebrated accomplishment not to be underestimated. It is indeed essential to bear in mind how fundamentally important the Constitution is to the country's citizens.
73. As most South Africans see it, the oppressive political and governance institutions established by the system of apartheid cannot be reformed; they must be transformed. This transformation can be led only by an appropriately





activist state dedicated to correcting imbalances and ensuring justice for all. The transformation also necessitates a commitment to measured, contextual and customised applications of governance processes that operate in circumstances bound to lead to controversy and disagreement. This is why the Constitution prescribes a process of institutionalised contestation known as co-operative government to be undertaken sympathetically and productively as a generalised means of first resort in resolving conflicts.

74. This indeed is the genius of the South African constitutional arrangements that should be communicated to other African states. In most African countries, there is a short supply of deliberative forums designed to enhance the understanding of diverse views and positions. In these countries, there is typically a rush to formulate legislation without adequate public discourse. This frequently produces dangerous consequences for the body politic and the political community as a whole. The need to build and sustain a sense of shared political community seems uppermost in South African political thinking at all times and is prioritised in most political decisions and actions. This creates the dilemma of the quest for establishing an activist state on the one hand, and meeting the demands for national cohesion and nation building on the other. This predicament is not uniquely South African; its uniqueness, however, is demonstrated by how South Africans have decided to address it.
75. Operating under the principle of co-operative government, South Africa has been making deliberate efforts to strengthen local governance. Since 1994, three Acts of parliament have been passed to achieve these objectives: the Municipal Systems Act of 2000, the Municipal Electoral Act of 2000 and the Municipal Structures Act of 1998. Laudable as such efforts are, direct intervention by central government to build local capacity poses certain dangers.
76. Experiences elsewhere have demonstrated that such intervention hardly ever comes to an end and often results in recentralisation. In a governmental system dominated by an organisation whose decision-making structures operate on principles of democratic centralism, due care must be taken to ensure that new institutions and structures of democratic governance do not ultimately establish only efficient top-down processes of service delivery. Democracy can be messy sometimes, especially the closer one gets to the grassroots and local community level. Initiatives to strengthen local capacity carry with them the risks of strengthening local “bosses”, accepting high levels of inefficiencies, legitimising exclusion of local minorities and ignoring, if not encouraging, perverse local cultural practices.
77. These are all serious concerns. Yet there is growing evidence that local capacity is hardly strengthened through hands-on implementation from the outside, including from national or central government. Best practices show that local people must first be vested with the legal authority and then entrusted with the responsibilities of local governance. They will make mistakes and act defiantly at times. Accordingly, they will need advice, including technical advice from outside, but it is only through their own initiatives that they can

develop the capacity for governance. Should they fail to learn and develop, then they face sanctions from the citizenry.

78. Section 40(1) of the Constitution notes that the government is constituted as national, provincial and local spheres of government that are distinctive, interdependent and interrelated. Section 41 further spells out the principles of co-operative government and intergovernmental relations. The CRM found that, even though in this constitutional arrangement local government is a distinct sphere of government, many stakeholders continue to perceive it as a passive and subordinate sphere of government. Downplaying the eminent role assigned to local government, even inadvertently, will be doing more harm than good in the South African context. It is, therefore, imperative that the nation should facilitate and even compel local units to behave and perform as governmental bodies vested with constitutional responsibilities. This is the only way that democracy can become truly effective at grassroots level and development from below can become a reality.
79. For democracy to be sustainable, it must also be pluralistic. Among other things, it requires establishing and strengthening the rules that will sustain multiparty systems. In South Africa's political system and governance process, the issue of floor-crossing could potentially undermine political pluralism and the consolidation of democracy. In principle, floor-crossing is not necessarily undemocratic in a governance system where individuals are elected by a direct vote on the basis of their merits and declared electoral promise. In a proportional representation system such as practised in South Africa, floor-crossing may diminish the potential for a strong, effective opposition to emerge and flourish. The adverse effects of floor-crossing on the long-term development, vitality, vibrancy and sustainability of constitutional democracy in a post-apartheid South Africa should therefore be assessed.
80. In the meantime, the African National Congress (ANC) as the dominant political party has a specific responsibility to adopt an orientation and put in place the necessary machinery for nurturing citizens who are capable of sustaining democracy and political governance through bottom-up decision-making processes. The model should encourage mobilisation for implementation regarding the dispensing of public goods and services at the grassroots and local levels, as well as the determination and production of public goods and services. The ANC should therefore intensify current initiatives in the direction of bottom-up decision-making processes.

3.2 STANDARDS AND CODES

i. Summary of the CSAR

Instruments Signed or Ratified by South Africa

81. According to the Country Self-Assessment Report (CSAR), South Africa has either signed or ratified most of the African and international codes and standards. They include the following 26:





- i. Charter of the United Nations (ratified in 1945);
- ii. International Covenant on Civil and Political Rights (ratified in 1998);
- iii. International Covenant on Economic, Social and Cultural Rights (signed in 1994);
- iv. Optional Protocol to the International Covenant on Civil and Political Rights (acceded to in 2002);
- v. Convention on the Rights of the Child (ratified in 1995);
- vi. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (acceded to in 2003);
- vii. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (acceded to in 1995);
- viii. African Charter on Human and People's Rights (ACHPR) (1981; acceded to in 1996);
- ix. African Charter on the Rights and Welfare of the Child (ACRWC) (1990; ratified in 2000);
- x. Protocol to the ACHPR on the Establishment of an African Court on Human and Peoples' Rights (1998; adopted in 1998);
- xi. Convention on the Prevention and Punishment of the Crime of Genocide (ratified in 1998);
- xii. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (ratified in 1998);
- xiii. International Convention on the Elimination of All Forms of Racial Discrimination (ratified in 1998);
- xiv. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (ratified in 1995);
- xv. Convention on the Political Rights of Women (signed in 1998);
- xvi. Protocol to the ACHPR of Women in Africa (ratified in 2004);
- xvii. Convention Relating to the Status of Refugees (acceded to in 1996);
- xviii. Protocol Relating to the Status of Refugees (acceded to in 1996);
- xix. AU Convention on Preventing and Combating Corruption, Objectives 5 and 6 (ratified in 2005);
- xx. AU Peace and Security Protocol (ratified in 2003);
- xxi. AU Declaration on Democracy, Political, Economic and Corporate Governance (signature not necessary);
- xxii. Grand Bay Mauritius Declaration and Plan of Action for the Promotion and Protection of Human Rights, 1999 (signature not necessary);
- xxiii. Constitutive Act of the African Union (2000; ratified in 2001);
- xxiv. OAU Refugee Convention (1969; acceded to in 1995);
- xxv. NEPAD Framework Documents; and
- xxvi. Declaration on Framework for an OAU response to Unconstitutional Changes of Governments, 2000 (signature not necessary).

ii. Findings of the CRM

82. Although South Africa has acceded to the Convention on Socio-Economic and Cultural Rights, the parliament has confirmed that the country has not ratified it. In addition, South Africa has neither signed, nor ratified the Covenant on the Protection of Migrant Workers. The same applies to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Despite these shortfalls, there is evidence in its domestic statutes and Acts of parliament that South Africa is committed to adhering to international standards. The 1996 Constitution contains an expansive justiciable Bill of Rights protecting political, social and economic rights, thus affirming the country's commitment to the promotion and protection of rights. However, the domestication and implementation of some of these conventions, such as the Convention on the Rights of the Child, are still inadequate.
83. During stakeholders' consultations, it was evident that most South Africans were unaware of the conventions their country has acceded to. The general lack of awareness of these instruments may impact on the ability of the citizenry to exercise their rights and discharge their responsibilities in relevant domains. Awareness of and education programmes on all these instruments are essential.
84. During the Country Review Mission's (CRM) extensive discussions with various stakeholders, it was generally agreed that the parliament should play a proactive role in monitoring the domestication and compliance of the government with various international and regional instruments and standards.

iii. Recommendations

85. The APR Panel recommends that South Africa:
- Increase awareness and accessibility of various rights to the public. The "Know Your Rights Awareness Campaign" identified in the National Programme of Action (NPOA) is a commendable project. However, it needs to identify clearly the actors who will be involved, allocate the budget and set the timeframes for implementation. [Government; Relevant Chapter 9 Institutions; Civil Society Organisations]
 - Consider the ratification of the three aforementioned conventions and protocols that have not yet been ratified. [Government; Parliament]
 - Give the Parliament, with the concurrence of all stakeholders, the responsibility of monitoring and domesticating all international and African codes. [Government]





3.3 ASSESSMENT OF THE PERFORMANCE ON APM OBJECTIVES

Objective 1: Prevent and Reduce Intra and Inter-Country Conflicts

i. Summary of the CSAR

Conflicts and Their Causes

86. Since 1994, when the apartheid regime was formally abolished and South Africa became one country and one nation under a single system of governance, the government has made tremendous progress in nurturing and maintaining peace and stability in the country. This has been achieved through courageous resolution to confront the past and overcome its pain in order to avoid future conflicts, using mechanisms such as the Truth and Reconciliation Commission (TRC). Since the adoption of constitutional democracy, South Africa has not experienced any internal conflicts. It is not in conflict with any other country and there is little potential for conflict in the future.
87. While the apartheid government destabilised the southern African region through the harassment of, and military incursions into neighbouring countries, the new democratic government of South Africa has deliberately and actively engaged itself in building peaceful relations, cooperation and partnerships with them through various programmes of regional economic growth and development. South Africa has also participated in peacekeeping missions in a number of war-torn African countries. However, some stakeholders view political conflicts and economic instability in other African countries as causing tension in South Africa due to strained relations between local communities and migrants seeking political and economic stability.
88. The democratic dispensation has facilitated the mitigation of the political and social conflicts that characterised colonialism and apartheid. However, it is also recognised that the realities of socio-economic inequality and unequal wealth distribution, coupled with the competition among communities and citizens for available state resources, constitute potential sources of social conflict in South Africa. Poverty is a pervasive factor among black South Africans. Women and children are the worst affected by poverty. If not appropriately and urgently addressed, protest against poor or uneven service deliveries could be a major problem in the future.
89. Crime remains a major problem in the country, and, in particular, the extreme use of violence. Men are the main perpetrators of violence and it also impacts heavily on women's freedom and quality of life. Violence against women and children is identified as a matter of serious concern. Thus, gender relations are one of the critical factors in analysing and addressing crime in South Africa.
90. Stakeholders mentioned the potential for conflict between traditional leaders and

councillors. These persons work in close proximity, compete for the same resources and may be affected by possible changes in cross-boundary municipalities. Furthermore, such conflicts could be fuelled by disparities in service delivery and levels of competence.

91. The government also acknowledges its vulnerability to organised crime such as human smuggling (women, children and migrants), drug trafficking and illicit arms trade at airports, harbours and borders. These exchanges could be potential sources of inter-state conflicts.
92. Although there have been sporadic expressions of dissatisfaction, as well as isolated election-related violence, stakeholders have generally accepted the legitimacy and integrity of the electoral processes and results. Thus, unlike in some other African countries, the performance of the governance system is not likely to be a source of conflict in South Africa.

Mechanisms for Preventing, Reducing and Managing Conflicts

93. South Africa has established a robust institutional framework and various mechanisms for the prevention, management and resolution of conflict. Internally, there are constitutionally created institutions that protect and promote democratic governance. They include: the South African Human Rights Commission (SAHRC); the Public Protector; Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; Commission for Gender Equality; the Auditor-General; and the Independent Electoral Commission (IEC).
94. The cumulative effects of these commissions have reinforced the struggles against racism and discrimination; strengthened gender equality and human rights; disciplined and moderated political discourse; and regulated the electoral democratic processes.
95. South Africa has played a major role in peacekeeping and conflict resolution efforts in the region and on the continent. It has participated in conflict resolution efforts and disarmament through diplomatic negotiations and peacekeeping missions in countries such as Burundi and the Democratic Republic of Congo. South African troops have also been involved in peacekeeping operations in the Darfur region in the Sudan. In addition to numerous instruments adopted and ratified for conflict prevention and management, the government of South Africa is an active member and strong supporter of regional organisations and initiatives such as the Southern African Development Community (SADC) and the African Union (AU). It is also one of the key architects of NEPAD, which seeks to promote peace, stability and sustainable economic growth and development in Africa. South African civil society organisations (CSOs) have developed links and partnerships with their African counterparts and have assisted them in many areas, especially in post-conflict peace dialogues and disaster management.





ii. Findings of the CRM

Intra-State Conflicts

96. South Africa has managed potential internal conflicts competently since the demise of apartheid in 1994. A spirit of reconciliation and accommodation has been cultivated in governance systems and within civil society. A political culture of dialogue and the accommodation of divergent views and perspectives under constitutional democracy has generally prevailed.
97. Nonetheless, emerging from centuries of colonialism and decades of apartheid, coupled with a long period of violent liberation struggles, post-1994 South Africa could be realistically described as a post-conflict country. Residues of racism still exist, and together with problems associated with pervasive poverty, deprivation and unequal access to basic social services, constitute potential for conflict. These challenges therefore need to be addressed.
98. Since 1994, the government has made a concerted effort to reintegrate ex-combatants into society. However, non-completion of the process poses some challenges. The end of apartheid divided former soldiers into “winners” and “losers”. The winners were those who pursued and acquired some level of education during their service in the liberation movements, while losers were those without education. Winners could further be divided into those who were integrated into the new army because they met the criteria, and those who sought alternative employment. The remainder of the ex-combatants have sunk into poverty and/or a life of crime. The social and security implications of this situation cannot be overemphasised.
99. Since 1994, South Africa has played a prominent role on the international scene, especially in the area of conflict prevention and peace-making operations. The government has shown a strong commitment to regional peace and security, and to the strengthening of regional bodies. This commitment is manifested in the number of peace deals the government has brokered, the troop missions deployed, and the financial and technical assistance provided to African peace and security operations.
100. The majority of stakeholders recognise the major strides the government has made since 1994 in ameliorating and improving the quality of life of the disadvantaged population. Various programmes such as social grants, housing, and broad-based black economic empowerment (B-BBEE) legislation are generally appreciated, although significant challenges remain in the battle against poverty and the legacy of inequality. Nonetheless, stakeholders generously agree that the government is doing its best to ensure that the socio-economic imbalances of the past are being addressed. However, as more is being done, more appears to be needed.

101. Moreover, stakeholders have raised a number of specific issues, such as the influx of illegal immigrants, the struggle for resources, and poor service delivery. The government acknowledges the need to address these issues in order to prevent, or at least reduce, intra- and inter-state conflicts and to deepen democratic governance.

The Issue of Illegal Immigrants

102. Despite high levels of crime and socio-economic inequalities, South Africa's democratic governance system appears to be stable and secure. Its economy is also highly sophisticated and robust. Unsurprisingly, therefore, people from neighbouring countries and beyond are attracted to South Africa, primarily to better their own lives. These immigrants hope to take advantage of opportunities to be creative and productive in their chosen professions – opportunities that do not exist or are difficult to access in their own countries. Some come looking for employment, health treatment, or simply peace and security to escape the insecurity and violence of their countries of origin. South Africa thus is home to many refugees, economic immigrants and other undocumented persons.
103. Given the levels of unemployment, socio-economic inequalities and inadequacies in and service delivery in South Africa, some stakeholders perceive the presence of immigrants as an additional problem in their own struggle for a better life. These perceptions have prompted social tension and the eruption of violence and crimes which, if not properly managed, may convert into major sources of internal strife and, possibly, potential sources of inter-state conflict. An atmosphere of xenophobia, particularly against black people coming from other African countries, seems to be emerging. However, some stakeholders in Soweto affirmed that South Africans generally welcome other Africans who seek economic opportunities in the country, especially when they bring needed skills and professional qualifications. They are, however, wary of those who come to be an economic and social burden on society. This appears to be the basic cause for the rising tide of xenophobia, which must be addressed.
104. In KwaZulu-Natal, the Western Cape and Northern Cape, stakeholders complained that women and children are being exploited and abused by immigrants who use them for prostitution and drug peddling. It must, however, be noted that there is no statistical evidence from the South African Police Service (SAPS) to support this claim. Furthermore, the tension between immigrants and locals is fuelled by the employment of immigrants as “cheap labour”. This has a devaluing impact on the overall wage level, thus undermining domestic labour negotiations and strategies. This has fanned general distrust of immigrants and a sense of xenophobia towards them. Paradoxically, it is primarily a black-on-black phenomenon and largely reflects the realities of the country's two economies and two labour markets. Not all Black and white South Africans compete in the same labour market.





105. The CRM undertook an extensive tour of the facilities of the Lindela Repatriation Centre, where illegal immigrants are kept in custody after apprehension by the police. They remain in custody while their cases are investigated and until their deportation. While the facilities at Lindela appear to be of acceptable standards, there were complaints from inmates about overcrowding and incidences of physical abuse by the police. Accusations of human rights violations and lack of medical facilities, which have allegedly led to the deaths of some detainees, were also made.

Social and Economic Inequalities

106. Unequal access to wealth and wealth creation, coupled with stiff competition among communities and citizens for state resources, constitutes a great potential for intra-state social conflict. In South Africa, deep-rooted socio-economic inequalities between the various races are a legacy of the apartheid era. There are emerging widening and deepening socio-economic inequalities within the black communities, a post-1994 phenomenon and the consequence of the black economic empowerment (BEE) policy. As the government seeks to provide social services such as housing, health and education, a new source of conflict may arise between the people (particularly low-income earners) and government bureaucrats who manage these services. Because of the scarcity of resources, bureaucrats may be compelled to adopt a system of allocation that entails discretion with regard to the criteria for eligibility. These discretions may be abused, leading to incipient and creeping corruption.
107. Stakeholders are strongly opposed to such creeping corruption and feel betrayed, regarding corruption as a negation of democratic gains after a long period of struggle. They also fear that, if not addressed, creeping corruption may incrementally lead to conflict among the intended beneficiaries – between who are perceived to have obtained services by corrupt means and those who did not because they conformed to the rules.

The Land Issue: Ownership and Utilisation⁹

108. Access to land – possession and usage – remains a potentially explosive matter in South Africa. In 1994 the government, in its effort to correct the injustices of apartheid, reduce poverty and improve welfare, introduced the Land Reform Programme. It consisted of two prongs: land restitution (returning land or compensating for land lost during the apartheid era), and land redistribution (assisting disadvantaged people, particularly women, the poor, farm workers, labour tenants, and emergent and commercial farmers to purchase land with the help of a state grant for residential or commercial use).
109. The Land Reform Programme has been pursued in a considered, reasonable and largely market-oriented manner. It is firmly rooted in the constitutional settlement on property rights and in recognition of the need to right past wrongs without damaging future prospects. Various policy instruments such as the BEE and B-BBEE strategies are laying a foundation for redistribution and empowerment. Thus far, delivery has averaged 0.38 million hectares

⁹ More information about land issues is discussed in Chapter Five on socio-economic development.

a year. If the current pace is maintained, the target of redistributing 30 per cent of white-owned agricultural land will be reached in 54 years' time, or delivery will have to be increased fivefold to meet the 2014 target.

110. The state's targets are unlikely to be met unless a comprehensive approach to address socio-economic inequalities (as elaborated in Chapter Six) is taken. There is also a need to address enduring attitudes of dependency on government handouts. If not checked, creeping dependency tends to put incremental pressure on service delivery, thereby further straining capacity for service delivery, given the scarcity of resources. Inability to deliver may lead to dissatisfaction and, ultimately, to disaffection with the governance system and the spirit of reconciliation. Not having delivered on its promises may undermine the programme's legitimacy and acceptability. Such a situation is replete with potential for social conflict. There are signs of growing impatience and calls for the matter to be tackled more expeditiously.

Gender Inequality and Violence Against Women

111. Violence against women is prevalent in South Africa. This adversely impacts on the freedom of women and the welfare of children. Rape and child abuse cases are high. In the course of its mission throughout the provinces, the CRM heard various stakeholders affirming that, although laws prohibiting violence (e.g. the Sexual Offences Act of 1957) are in place, their implementation has been a major problem.
112. Related to this is the deteriorating moral and social fabric within the South African society. Dysfunctional families and incoherent parental guidance contribute to the rise in the number of street children, delinquency, drug abuse and other related crimes.

Traditional Leaders and Local Councillors

113. The close working proximity between traditional leaders and local councillors, competition for the scarce resources and attention from the other spheres of governance, coupled with the possibilities of boundary changes, are likely to be potential sources of conflict. Although the basic problems may be due to misunderstanding, lack of capacity, professional and political competition at local level, as the fact that local and provincial governance structures are still evolving as well as emerging from the apartheid governance system, there is a need to address these potential sources of conflict.

Inter-State Conflict

114. There is general consensus among stakeholders that since 1994 South Africa has managed to establish friendly and peaceful relations with its neighbours. Unlike during apartheid, there is an environment of peace and stability in the region. The government has also been actively engaged in various efforts to prevent, mediate and resolve conflicts in other parts of Africa (in countries such as Burundi, Côte d'Ivoire, the Democratic Republic of





Congo and Sudan). At international level, South Africa's contributions to the exploration of mutually acceptable and lasting solutions to the Palestine/Israel conflict are commended.

115. Mercenary activities are a source of instability across the continent. The South African government applies the regulations of the Foreign Military Assistance Act of 1998, which criminalises these activities. Yet South African security companies have been accused by the media and the press of organising mercenaries to destabilise some African countries. For example, following the failed coup in Equatorial Guinea in 2005, a number of South Africans were caught, tried and convicted.
116. Some stakeholders believe that those involved in mercenary activities are former demobilised white soldiers and security officers. Since 1994, there has been a proliferation of private security companies, some of which are used to recruit and train mercenaries.

iii. Recommendations

117. The APR Panel recommends that South Africa:
 - Devise a programme of partnership and collaboration with the private sector and CSOs to address fully and effectively the issues of social inequality, poverty and unemployment. This is important in ensuring that violent conflict is prevented. [Civil Society; Department of Justice and Constitutional Development; SAHRC]
 - Deal systematically, deliberately and effectively with any lingering vestiges of racism. The policy and practice of the North-West of not doing anything without reaching out to everybody is worthy of emulation. [Judiciary; SAHRC; Department of Education; Provincial and Local Governments]
 - Strengthen dialogues about democracy and service delivery through Imbizo (a forum for enhancing dialogue and interaction between the government and the people) at local government level and municipalities in order to avert possible conflict based on racism or competition over scarce resources, misunderstanding or political rivalry. [Department of Home Affairs; Judiciary; Provincial and Local Governments; Civil Society]
 - Find better-informed measures for combating the growing problem of xenophobia, such as programmes of civic education. [Department of Home Affairs; Department of Education; Civil Society Actors]
 - Devise a more enlightened, comprehensive strategy for dealing with the issue of refugees. Promoting an environment of peace, stability and prosperity in the region is also likely to stabilise and regularise the movement of people. [Department of Foreign Affairs; Department of Home Affairs; Department of Justice and Constitutional Development]
 - Refocus the moral and social values of society that will help revive the moral and social fabric of South Africa in order to combat crime in general and, in particular, violence

against women and children. [SAPS; Department of Home Affairs; Department of Justice and Constitutional Development; Office on the Status of Women (Presidency); and Department of Education]

Objective 2: Constitutional Democracy, Including Periodic Political Competition and Opportunity for Choice, the Rule of Law, a Bill of Rights and the Supremacy of the Constitution are Firmly Established in the Constitution

i. Summary of the CSAR

Democratic Governance and Competition for Political Power

118. South Africa has a democratic, multiparty political system with universal franchise for all citizens over the age of 18 and allows for free and fair elections. A combination of proportional and constituency representation is used. National and provincial electoral systems are based on proportional representation, while municipal elections combine proportional representation with ward representation. The system provides for a party list on which a registered party is allocated seats in the National Assembly in direct proportion to the electorate votes it gained. The absence of a minimum qualifying threshold for participation ensures that minority groups are also represented in the parliament. However, the general public has called for public debates and discussions on the review and assessment of the system.
119. The law permits party elected representatives to move from one party during certain specified periods between elections without losing their seats in the National Assembly and provincial legislatures. Some stakeholders, however – including certain political parties – strongly disagree with this practice and would like to see it reversed.
120. The IEC is a constitutionally established independent organ. It is mandated to ensure the conduct of free and fair elections, in particular that the counting of votes and declaration of results at the national, provincial and local spheres of governance are undertaken in a transparent way. The IEC also has the responsibility of allocating government funding to the political parties represented in the National Assembly and provincial legislatures. The funding derives from the Constitution with the intention of ensuring and promoting multiparty democracy in all three spheres of governance. The amount allocated is equity based, depending on the relative strength of the parties.

Supremacy of the Constitution and the Rule of Law

121. The Constitution of South Africa of 1996 provides the bedrock for the rule of law. Section 2 states that the Constitution is the supreme law of the Republic. Laws, policies, practices or conduct inconsistent with the Constitution are invalid and the obligations imposed by it must be met.





122. The Constitution entrenches a comprehensive set of inalienable rights. These include the right to freedom of association; to demonstrate; to assemble; to picket and present petitions; to form a political party; to be treated with dignity and respect; to have equality before the law and equal protection and benefit; to be protected against discrimination; to freedom of religion, belief and opinion; and the right to language and culture.
123. The Constitution recognises traditional leadership and makes provision for a House of Traditional Leaders. The government does, however, acknowledge that the role of traditional leaders in strengthening South Africa's constitutional democracy and promoting local economic development needs to be clarified and enhanced.
124. Various institutions and mechanisms supportive of democratic governance are entrenched in the Constitution. These include the so-called Chapter 9 institutions intended to ensure that the economic, social, cultural, civil and political rights as enshrined in the Bill of Rights of the Constitution are promoted and protected. The advancement of women and gender equality through the establishment of the Commission for Gender Equality is a major contribution to the protection and promotion of the rights of women.

Decentralisation

125. South Africa has a hybrid system of government based on a strong unitary framework. The country has introduced an innovative notion of decentralisation appropriate to its socio-economic and political challenges. The constitutional concept of co-operative government implies not only decentralisation of the governance processes, but also cooperation among and between spheres of governance. This is intended to minimise conflicts and maximise cooperation and synergies in “mutual trust and good faith” between the spheres and levels of governance, so as to “provide effective, transparent, accountable and coherent government for the Republic as a whole” (Constitution, s41(1)(d)). All spheres and levels of governance are expected to interact with each other on the basis of cooperation, coordination, partnership, support and negotiation in order to respond to the needs of the people and meet service delivery priorities. Central to the notion of co-operative government is the operational principle that each sphere of governance performs its assigned functions in such a way that it does not interfere with the territorial domain, or functional or institutional integrity of the government in another sphere. Yet all are collectively committed to the preservation of peace, national unity, security and the welfare of all citizens.
126. The Constitution provides for concurrent powers, as between the national and provincial spheres of governance, and for these spheres to intervene in the jurisdiction of the third sphere, namely local government. It nonetheless exhorts for mutual respect and consultations, and provides procedures and mechanisms for intergovernmental and judicial “checks and balances” in case of disputes. The Constitution stipulates that the different spheres of governance should utilise all available political means to solve their disputes before resorting to the courts.

127. Although there have been some successes in terms of service delivery and decision making, a major weakness has been the lack of capacity, resources and experience at local levels. The government has responded to these problems. Project Consolidate provides assistance to deficient municipalities on demand, or when such deficiencies have been independently identified and acknowledged by the municipalities concerned.

Civilian Oversight of Security Services

128. The security forces in South Africa operate under a rigorous political oversight as provided by Chapter 11 of the Constitution, which states that “national security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace, to be free from fear and want, and to seek a better life” (s198(a)). It is made very clear that “national security is subject to the authority of parliament and the national executive” (s198(d)). In the constitutional democracy of South Africa, security forces are therefore accountable to the elected parliament and President, and indirectly to the people who elected the members of parliament (MPs) and the President. Moreover, the Constitution provides for the creation of several institutions and mechanisms mandated to oversee the accountability of the security services. These include the Independent Complaints Directorate (ICD), the Public Protector, and the Promotion of Access to Information Act (PAIA) of 2000.

ii. Findings of the CRM

Democratic Governance and Political Pluralism

129. As mentioned in the overview to this section, stakeholders have affirmed their acceptance of the constitutional democratic governance system of their country. They accept its legitimacy and assert ownership. There is no doubt that the Constitution is the supreme law in South Africa. The manner in which it was crafted has placed it at the very centre of the people’s concerns, hopes, aspirations, sense of security and sense of belonging in the political community. The ideology of apartheid, its oppressive institutions and the violent behaviour of those who implemented it have shaped the context of the constitution-making processes by the black political leaders. They were thus prepared to reconcile with the painful past and to compromise on issues they had held dearly for generations in order to create a new democratic non-racist, non-sexist nation for future generations.
130. In order to defend and promote the rights, rules and obligations to which all must subscribe in accordance with the mechanisms and procedures to be adopted by all spheres and levels of governance for the promotion and protection of the common good, the Constitutional Court has been put in place where contestations, or clarifications, on these matters can be formally conducted and resolved. The fact that this kind of an elaborate Constitution could be crafted and accepted after the divisive, painful era of apartheid is something that needs to be saluted and celebrated. The fact that there is in South Africa a national enthusiasm





of living by the Constitution, along with readiness to improve on it where necessary, is certainly admirable. Although evolving from particular historical circumstances and amidst the challenges confronting post-apartheid South African leaders, the constitutional innovative concept of co-operative government deserves to be known in the rest of Africa. Clearly, this qualifies as a best practice worthy of consideration and emulation in Africa.

Best Practice 1: Co-operative Government

The Constitution prescribes a process of institutionalised contestation known as co-operative government to be undertaken sympathetically and productively as a generalised means of first resort in resolving conflicts, especially those of a jurisdictional nature. In many a country, there is a paucity of deliberative forums or clusters of institutions designed to enhance and deepen awareness of how the different “tiers” of governance function, promote understanding and galvanise synergies of the various actors in the governance systems. Litigation and legislative enactments seem to take the better part of attempts to resolve conflicts, quite often jamming the ill-equipped judicial system and complicating its inbuilt structural inefficiencies, in the case of the former; or marginalising and alienating substantial segments of the population, in the case of the latter. The effect on the political system is almost always that of pitting the people awkwardly against their government. This innovation in South Africa means that not only is conflict resolution fast-tracked, but also that appropriate intergovernmental “checks and balances” are ensured, and consequently, accountability and transparency in governance.

Source: Constitution of South Africa of 1996; and APRM CRM compilation, July 2006.

Proportional Representation

131. Although questions have been raised about proportional representation in the electoral process, it is widely accepted that this was the only viable way of institutionalising representative pluralist democracy in the new South Africa. Were South Africa to adopt the first-past-the-post and constituency-based electoral system, such as is found in virtually all other African countries, the deep divisions of apartheid would have been more difficult to bridge; the ANC would have emerged as the dominant party, eclipsing all other voices from governing and representative institutions; and South African politics would have been more conflict prone. The proportional representation system allows even the smallest of parties a voice in both the parliament and legislature. “Voiceless” groups such as women and children can also be heard through proportional representation.
132. The CRM found widespread support among stakeholders for the electoral system of proportional representation. Undoubtedly, the system has achieved the objectives for which it was designed, including fair distribution of votes cast, fair representation of

parties in the National Assembly, reconciliation and harmony, containment of conflict, and enhancement of women's participation in the democratic process. With regard to the last point, stakeholders pointed out that the proportional representation system was conducive to the promotion of gender equality and enhancement of women's participation and representation in the parliament. This was due in part to the deliberate party quotas adopted by parties themselves, as well as the commitment of the party leadership to gender parity.

133. However, the main challenge of the proportional representation system as practised in South Africa relates to the manner in which MPs maintain links with the electorate. Because the MPs are elected through a closed list, their election is dependent on the party bosses. The MPs are therefore beholden to the Party and its hierarchy rather than to constituents who elected them. This raises the issue of accountability. Although the problem has been somewhat mitigated by the creation of constituency offices, some stakeholders are still unhappy about the situation.
134. Some stakeholders also called for a reconsideration of the Van Zyl Slabbert Commission's recommendations to consider a hybrid party list with a district-based electoral system at all levels of government. Dr Frederick van Zyl Slabbert headed the Electoral Task Team commissioned in 2002 by President Thabo Mbeki to assess the South African electoral system and make recommendations for its improvement.

Floor-Crossing

135. A number of problems in the area of democratic governance are likely to undermine political pluralism and consolidation of democracy in South Africa, among which is the issue of "floor-crossing". The CRM noted the vigorous debate surrounding this issue in the course of its consultations with stakeholders throughout the country. It found that the legislation relating to floor-crossing was a major concern to both the electorates and the opposition political parties. They regarded it as a tendency likely to undermine democracy and good governance in South Africa. The Fourth Amendment Act in the Constitution permits two 15-day periods in every five-year parliamentary term, in which members of national, provincial and local assemblies may cross-over to other parties without losing their seats in the Assembly. In principle, floor-crossing in itself is not necessarily undemocratic in a governance system where individuals are elected by direct vote and on the basis of their merits and declared electoral promises. It allows for an expression of dissatisfaction with the policies of a particular party to which the individual may have been a member during the election period.
136. However, in the proportional representation system as practised in South Africa, floor-crossing further erodes the already weak link between MPs and the electorate. Moreover, the experience in South Africa is that floor-crossing has strengthened the ruling party. Through floor-crossing the ANC has increased its seats in the parliament from 69.75 per cent in the 2004 elections to the current 73 per cent of seats. The danger of floor-crossing





is that it reduces the opportunity for a strong opposition to emerge, thus undermining checks and balances and weakening the oversight responsibilities of the Assembly. This practice should be reviewed in the interest of promoting and consolidating democratic governance.

Funding of Political Parties

137. The Public Funding of Represented Political Parties Act of 1997 provides for the funding of represented political parties in the parliament on proportional basis. This gives those parties represented in the parliament some financial support, especially during election campaigns. The fees for registration for elections (R5000) and participation in elections (R150 000) required from parties by the IEC place a disproportionate burden on smaller parties.
138. Nonetheless, public funding is less contentious. It is private funding of parties that has drawn criticism among the public. In South Africa, political parties are allowed to raise money privately to meet their electoral campaign needs. However, there is no legislation regulating such funding. Lack of transparency in private funding has therefore become an issue, especially when related to the PAIA, and the right of citizens to know and consequently be able to judge party behaviour.
139. Some stakeholders have argued that unregulated private funding is the “legitimate” avenue by which the private sector, foreign governments and even organised criminals can exert influence over the political process and public policy. Non-disclosure due to the absence of regulation of private funding of political parties is likely to distort the institutionalisation of constitutional democracy in South Africa, as private interests compete for favours from the dominant or influential political parties. Equally serious are the related issues of corruption and the possibility of “state-capture”, as has happened elsewhere on the continent and beyond. More seriously for a new South Africa committed to the principles of constitutionalism, rule of law, accountability, transparency and conformity to internationally recognised standards and conventions, the non-disclosure of private funding to political parties contravenes the Memorandum of Understanding (MOU) of the AU’s Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA). The MOU commits acceding states to regulate and disclose political party finances.

The Rule of Law and Supremacy of the Constitution

140. The Constitution of the Republic of South Africa provides a firm legal and institutional anchor for the rule of law and democracy. It entrenches a comprehensive set of inalienable rights, including the right to freedom of association; to demonstrate and assemble; to form a political party; to expect dignity and respect; to have equality before the law and equal protection and benefit; to be protected against discrimination; to enjoy freedom of religion, belief and opinion; and to have the right to language and culture.

141. To strengthen constitutional democracy, the Constitution provides for Chapter 9 institutions mandated to protect the rights of the people and provide them with the political space to form their government and keep it in check. These include the Public Protector, SAHRC, IEC and Auditor-General. When rules are contested, the Constitutional Court is there not only as an arbiter but also to clarify and even chart new paths along which the Constitution is to be interpreted. The fact that this kind of elaborate Constitution could be accepted after the divisive apartheid era is something that needs to be celebrated.

Decentralisation and Popular Participation

142. Decentralisation entails the devolution of governance processes and de-concentration of administrative responsibilities. It “rationalises” governance so as to make it relevant, effective and meaningful to different parts of the same country. Appropriately implemented decentralisation reduces pressure on the central government, allowing it to focus on major national issues. It reinvigorates and democratises traditional local governance institutions, thus promoting greater popular participation at grassroots levels. It encourages local initiatives and ownership in the conduct of affairs directly relevant to the people on the ground. It enhances the responsiveness of the government to the needs and wishes of the people throughout the country.
143. Because decentralisation delegates powers, authority and responsibilities and stimulates popular participation in public affairs at the lower levels of governance, it is a critical factor in the promotion of good governance. It also facilitates local recruitment of and training for political leadership and provides expertise and experience for public servants, thus contributing to the enhancement of the political and administrative capabilities for local governance structures. Creatively managed, decentralisation may provide opportunities for relevant modernisation of traditional institutions and leadership. Appropriately modernised traditional institutions may retain local talents and expertise and attract others from the urban areas. In this respect, rural areas could become new centres of creative and productive economic activities, thus relieving poverty, frustration and alienation, offering alternative attractive civic life and, in the process, providing training grounds for good governance.
144. South Africa is a unitary state with federal characteristics. The Constitution provides for three spheres of government: national, provincial and local, which are “distinctive, interdependent and interrelated”. It also provides for both exclusive and concurrent competencies that all spheres of government must assume. The Constitution assigns legislative authority of a province to the provincial legislature and the implementation of provincial legislation in a province as an exclusive provincial executive power (s104(1) and s125(5) of the Constitution). This also applies to local government, whereby the executive and legislative authority of a municipality is vested in its municipal council (s151(2)). These constitutional arrangements imply more autonomy to provinces and municipalities and may be a source of contention between the three spheres of government.





145. The drafters of the Constitution foresaw this eventuality. Hence, co-operative government in Chapter 3 of the Constitution spells out the parameters of dispute resolution. An institutional and legal framework has been established to give effect to co-operative government in order to promote and facilitate relations between the spheres of government, and to ensure effective and efficient service delivery to the people of South Africa. It includes various committees, such as the Committee of Ministers and Members of the Executive Councils of Provinces (MINMEC).
146. The government has evoked the provisions of the 1996 Constitution to establish and institutionalise a new system of local government. The vision for the new system is based on a democratic and developmental local governance structure that would create and sustain humane, equitable and viable human settlements to remove the vestiges of spatial segregation that was the legacy of apartheid. The challenge of achieving institutional development and transformation and building democratic and participatory local government structures is a gigantic task. It is eminently an issue of capacity and resources.
147. Between 1998 and 2003, the government enacted legislation that entirely transformed the systems, institutions and processes of local government. Key among these was the Local Government: Municipal Structures Act of 1998, Local Government: Municipal Systems Act of 2000 and Local Government: Municipal Electoral Act of 2000. The Public Finance Management Act (PFMA) of 1999 was enacted to regulate financial management at national and provincial levels. The Local Government: Municipal Finance Management Act (MFMA) of 2003 was enacted to secure sound and sustainable management of financial affairs and other institutions in local government.
148. Co-operative government does, however, pose many challenges. While there have been successes in terms of service delivery and decision making, there were also shortfalls due to poor coordination among different departments and spheres of government. The lack of capacity, skills and resources is particularly acute at local government level and has had a negative impact on service delivery.
149. The government has put measures in place to bolster the capacity of decentralised institutions. Project Consolidate, a hands-on support programme from the national government to assist municipalities suffering capacity deficits, is a case in point. (See Objective 5 for more details.) Although decentralisation has been a challenging endeavour, it has enormously increased public participation in various spheres of government. The following are some of the institutions and mechanisms that have been established to ensure broader public participation and dissemination of knowledge and information about government service delivery:
- Ward committees, made up of not more than ten elected people representing diverse interests in the ward and chaired by a ward councillor. These are responsible for ensuring direct consultation with and participation of the citizenry in all government activities within the ward;

- Integrated Development Programme (IDP);
- Community development workers (CDWs);
- Imbizo and “citizen forums” bringing together citizens and leadership at all levels of government to deliberate public issues of concern. These gatherings create space for the public to voice concerns and grievances and to communicate wishes and aspirations.

Best Practice 2: Popular Participatory Governance through Imbizo

Imbizo is a public participation government initiative, which consists of a period of face-to-face interaction and engagement between senior government officials from all spheres of government (national, provincial and local) and the public. It gives the government the opportunity to communicate to the public its programme of action and how far it has been implemented, the challenges experienced, and areas that may need review. Imbizo also affords local communities the opportunity to voice their needs, concerns and grievances in the various areas of governance and service delivery. Thus, Imbizo is a forum for enhancing dialogue and interaction between the leadership and the governed (citizens). It gives a voice to the majority of people who were excluded from decision making by apartheid. As such, Imbizo gives effect to the ideals of participatory democracy.

There exist a Presidential Imbizo and other government-led Imbizo. During the Presidential Imbizo, the President visits communities and sees for himself some of the challenges that people are grappling with and the conditions under which they live. Similarly, communities are afforded the opportunity to air their concerns and communicate their suggestions and aspirations directly with the President and, in the President's presence, with the Premier, the members of the Executive Council (MECs), the mayors and local councils. In this way, Imbizo strengthens co-operative government and enables citizens to hold the three spheres of government accountable. Two Imbizo periods a year are held in South Africa.

Source: www.info.gov.za/issues/imbizo/index.htm, APRM CRM Compilation, July 2006.

Traditional Leaders and Local Government

150. The place given to traditional leaders in the democratic process is not only innovative but also respectful of South Africa's political heritage. The CRM found that the tensions and disagreements that surrounded the role and functions of traditional leaders in the governance system in South Africa are now being eased. Stakeholders cited the provisions of two legislations, namely the Traditional Leadership and Governance Framework Act of 2003 and the Communal Land Rights Act of 2004. Both Acts have clarified the role and functions and formalised the relationship between traditional leaders and the official governance structures in the country. There is widespread acceptance that traditional leadership is not incompatible with modern governance structures. Stakeholders have





accordingly called for traditional leaders to play a meaningful role in all spheres of the governance system in South Africa. Provincial legislators have enacted laws providing more space for participation by traditional leaders within the framework of provincial, district and local councils of chiefs. Most of these traditional houses are close to meeting the legislative requirement of having at least 30 per cent women as members.

151. The CRM found that, within the context of those provinces where they exist, there is a concerted effort by provincial governments to utilise the institution of traditional authorities as a unifying force and a source of nation building. For example, in KwaZulu-Natal, the CRM was informed that traditional leadership falls under the Provincial Department for Local Government and Traditional Affairs. This illustrates the important role assigned to traditional authorities, especially in rural areas where people rely heavily on traditional courts as a means of administering justice. The CRM also learnt that the provincial legislature in KwaZulu-Natal is considering legislation that would give more powers to the provincial, district and local houses of chiefs. This process of recognising and assigning roles to traditional leaders is under way in all the provinces that have traditional leaders within their boundaries.

iii. Recommendations

152. The APR Panel recommends that South Africa:

- Address adverse effects of floor-crossing on the long-term development, vitality, vibrancy and sustainability of multiparty constitutional democracy in a post-apartheid South Africa. [Parliament; Political Parties; Department of Justice and Constitutional Development]
- Find creative ways to make MPs more accountable to the electorate and less to the party hierarchy that determines the party list. The IEC may consider proposing a law-making, intra-party democracy an eligibility condition for party funding and for the process of compiling the list of candidates for elections. [IEC; Parliament; Political Parties; Department of Justice and Constitutional Development]
- In the light of experiences gained thus far, rethink and innovate the proportional representation system to ensure the development and consolidation of constitutional democracy is not hindered. In this regard, there is indeed a need for reconsideration of the Van Zyl Slabbert Commission's recommendations to combine party lists with a district-based electoral system at all levels of government. [IEC; Parliament; Political Parties; Department of Justice and Constitutional Development]
- Consider introducing a law on the modalities and disclosures of private funding to political parties. [Parliament; Department of Justice and Constitutional Development]
- Step up ongoing parliamentary review of Chapter 9 institutions to make them more efficient. [Parliament; Chapter 9 Institutions]

Objective 3: Promotion and Protection of Economic, Social, Cultural, Civil and Political Rights as Enshrined in the African and International Human Rights Instruments

i. Summary of the CSAR

Measures to Promote Rights

153. Affirming its commitment to the promotion and protection of economic, social, cultural, civil and political rights, South Africa has signed and ratified most African and international human rights instruments in addition to enshrining them in its Constitution. The Constitution contains an expansive justiciable Bill of Rights protecting political, social and economic rights.
154. The South African Constitution entrenches a Bill of Rights protecting political, social and economic rights such as the right to equality (s9); human dignity (s10); freedom and security (s12); freedom of religion, belief and opinion (s15); freedom of expression (s16); freedom of association (s18); freedom to make political choices (s19); freedom of movement and residence (s21); freedom of trade, occupation and profession (s22); and the right to fair labour practices (s23); property (s25); housing (s26); healthcare, food, water and social security (s27); education (s29); access to information (s32); access to courts (s34); and the rights of arrested, detained and accused persons (s35).
155. As mentioned, South Africa has acceded to, or ratified most of the African regional and international human rights instruments in the area of economic, social, cultural, civil and political rights.
156. South Africa has signed the Convention on Socio-Economic and Cultural Rights. However, the parliament confirmed that the country has not ratified it. It has neither signed nor ratified the Covenant on the Protection of Migrant Workers. The same applies to the Optional Protocol on Convention Against Torture, other Cruel Inhumane or Degrading Treatment or Punishment, which South Africa has not signed and ratified. There is also a call by women groups that the Beijing Plus Ten Progress Report should be aligned with policies and practices of CEDAW and other such human rights instruments.
157. In an attempt to domesticate these international standards and instruments, South Africa has adopted a comprehensive array of policies, laws and programmes. These include: the Labour Relations Act of 1995; Basic Conditions of Employment Act of 1997; Employment Equity Act (EEA) of 1998; Promotion of Equality and Prevention of Unfair Discrimination Act of 2000; Public Service Laws Amendment Act of 1997; Skills Development Act of 1998; South African Schools Act of 1996; and Adult Basic Education and Training Act of 2000.





158. The Constitution further creates a number of independent institutions, known as Chapter 9 institutions, mandated to promote, monitor and protect the human and socio-economic rights of citizens. These institutions include the:
- Commission on Gender Equality, established by sections 181 and 187 of the Constitution and the Commission on Gender Equality Act of 1996;
 - Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, established by sections 181 and 185 of the Constitution;
 - Public Protector, established by sections 181 and 182 of the Constitution and the Public Protector Act of 1994; and
 - South African Human Rights Commission established by sections 181 and 184 of the Constitution.
159. Despite the existence of laws and institutions to promote and protect people's rights, South Africa faces enormous constraints and challenges in implementing these rights. Apartheid's legacy of racial inequalities and economic disparities has ensured that the majority of the people, especially those in rural communities, are unable to exercise their constitutional rights, including accessing social services and justice. Other vulnerable groups, such as farm workers, face difficulties in accessing land and their constitutional socio-economic rights. Other challenges include the absence of resources, poor coordination by constitutional bodies, their limited capacity and weaknesses in monitoring and evaluation.
160. Equal access to education remains an unrealised expectation of many people. In addition, the quality and standard of education provided to disadvantaged people continue to be inadequate.

Equal Access to Justice

161. The CSAR notes that, in addition to guaranteeing equal protection before the law, the Constitution specifically guarantees the right of access to courts by all. The government has created a range of institutions and mechanisms for facilitating equal access to justice, including provision for alternative mechanisms for conflict resolution. Among these institutions and programmes are: legal aid providing legal assistance at the expense of the state especially to indigent people; a Rules Board of Courts that reviews the cost of judicial services to ensure affordability, simplicity, swiftness and fairness; and a Proximity of Courts programme that provides periodic courts to communities that have no access to courts due to the distances involved. The government is also making physical access possible to meet the needs of people with disabilities. The proposed restructuring of superior courts is aimed at reconfiguring the apartheid designation of courts and increasing access to justice.
162. To accelerate the administration of justice, the South African government has created special courts including sexual offences courts, family courts, labour courts and equality courts. Established in 2003, equality courts are aimed at eradicating the legacy of inequality

and at the same time bringing justice to citizens. There are currently 220 equality courts across South Africa and the plan is to ensure that each magisterial district eventually has its own equality court. The equality courts have so far dealt with about 800 cases. The Justice College of South Africa has a professional development programme for magistrates and court officials, including interpreters, prosecutors and administrative staff.

163. Alternative dispute resolution mechanisms are referred to the Commission for Conciliation, Mediation and Arbitration (CCMA).
164. The CSAR acknowledges that despite all these commendable efforts access to justice for all South Africans remains a major challenge. Persons with knowledge and resources are better able to access their rights than the poor and those without formal education. Court administration suffers from capacity constraints, including backlogs of cases, undue delays in case processing, and inadequate security limiting access to courts. In addition, the limited supply of properly trained professionals for both the judiciary and legal professions remains a challenge. A cluster of government departments working in justice, crime, and security systems plans to do a comprehensive review of the entire criminal and civil justice system with a view to making recommendations for improvements.

ii. Findings of the CRM

Measures Undertaken to Promote Rights

165. South Africa is one of few countries in the world where the Constitution expressly requires that in interpreting and applying the provisions in the Bill of Rights, particular attention should be given to relevant international laws, and even that comparable foreign experiences on the subject under consideration can be referred to. The domestication of international instruments is an admirable sign that South Africa is, indeed, committed to protecting and promoting the rights of its citizens and other nationals within its borders.
166. Perhaps more than many countries in the world, South Africa has developed policies and instruments for regulating the promotion and protection of gender equality, employment equity, preferential procurement, labour relations, basic conditions of employment, access to information, and administrative justice. Similarly, it has policy and legislation aimed at fostering access to social services such as housing, water, health and education. These are no mean achievements by any international standards and should be so recognised, especially given the country's history.
167. Despite these formidable achievements, several challenges relating to the implementation of laws and policies remain. High levels of poverty and unemployment have meant that people's socio-economic rights are not being fulfilled. The realisation of socio-economic rights, for all the country's polity, is still a challenge.





Socio-Economic Rights

168. The CRM revealed that stakeholders held mixed views on the extent of the enjoyment of socio-economic rights in South Africa. One set of opinions was that these rights were being protected as a result of the Constitution, the Bill of Rights and the availability of legal services. Other stakeholders felt that socio-economic rights were not being sufficiently protected due to lack of access to housing, sanitation, water, and the persistence of unemployment and poverty.
169. In this context, it is important to make the distinction between constitutional provisions (rights and services the government is legally mandated to provide) and the objective realities (availability, accessibility and quality of the services to be provided). The former can be contested in the courts and may be resolved in favour of those eligible. The latter, however, depends on the availability of resources and the capacity to produce and deliver them.
170. There is a strong feeling among stakeholders across South Africa that the disparities between rich and poor and between rural and urban continue to determine access to social services. Those who reside in rural areas or townships within large metropolises tend to experience shortages the most and generally feel neglected by the government. For example, stakeholders in Mpumalanga, a small rural community in KwaZulu-Natal, townships around Cape Town and the Soweto township in Gauteng were the most vocal about being marginalised from the mainstream of society. Communities in these areas complained about lack of pipe-borne water, undue delays in delivery of houses, and inadequate sanitation services. They considered it unfair that their counterparts in urban centres and their suburbs are well serviced with all these amenities. While this general perception needs validating scientifically, it remains very strong across all the provinces and requires immediate attention.
171. Similarly, stakeholders hold the view that while services such as education and health are being provided, it is only the rich who benefit the most from better quality education and health facilities. In particular, the disparity in educational facilities has tended to exacerbate the illiteracy problem. For example, in KwaZulu-Natal, the CRM learnt that approximately 1.6 to 1.7 million people remain illiterate. Some 74 per cent of the poor reside in the heart of rural areas with very little or no access to basic infrastructure or services.¹⁰ To most of the stakeholders, this “denial” of access to educational and health facilities is tantamount to betrayal of the people by the government.
172. In the predominantly rural and farming provinces such as Free State, Mpumalanga and KwaZulu-Natal, the hardship and poor working conditions of domestic and farm workers elicited the most vocal complaints about low incomes, little or no access to health facilities, and lack of job security due to frequent evictions from the farms. Most of these farm workers are “captives” of their farm employers and have little means of exercising their socio-economic rights. The situation is thus a clear denial of their socio-economic rights and needs to be addressed.

¹⁰ KwaZulu-Natal Provincial APRM Self-Assessment Report, 2006. Provided to the APRM's CRM.

Crime

173. Stakeholders pointed out that the alarming rate of crime across South Africa, both in urban and rural areas, is an example of lack of protection of their human and civil rights. Criminal acts of burglary, violent robbery, serial killing, and rape were reported in most provinces. These crimes have bogged down the SAPS. The CRM heard that the cause of criminality in South Africa is deemed to rotate around unemployment, inequality of incomes and the apartheid legacy. In Cape Town, the CRM was informed that police services are concentrated in wealthy areas, thus leaving the poorer communities, mostly townships, largely unprotected. This has resulted in a complete imbalance in police services towards high-crime areas, especially in urban townships where drug trafficking and other violent crimes are committed. Even when these problems are reported to the police authorities, they do not react to emergency situations promptly. Many stakeholders are of the view that the police are negligent in protecting their rights and promoting justice by not solving crimes and arresting offenders.

Access to Justice

174. The CRM's consultations with stakeholders revealed that although South Africa has acceded to various African and international human rights instruments, and has domesticated most of them in its laws, the situation on the ground does not fully reflect the impact that implementation of these instruments should have. The Bill of Rights provides for access to the courts, a fair trial, the right to appeal, the right to an interpreter during trial, the right to choose one's legal counsel, and the right to have legal counsel provided by the state. Despite these guarantees, South Africa faces very serious obstacles in ensuring access to justice. Notably, the courts do not function properly in the rural communities where many people reside. Consequently, the majority of the poor have difficulty in enjoying their political and civil rights, including the right to fair justice, security and safety. The stakeholders explained that the lack of fair hearing and justice was attributable to corruption and the lingering apartheid legacy of white domination of the judicial system.
175. Access to justice in South Africa must be measured against these main criteria: knowledge of one's rights, physical access to courts, the affordability of court procedures and legal services, openness of courts to hearing of certain types of cases, the cultural and linguistic appropriateness of the dispute resolution system, and the existence of rights enforcement mechanisms outside of the courts. Of all these criteria, stakeholder consultations have indicated that the major barriers to access to justice in South Africa are poor people's inadequate knowledge of their rights and their inability to afford court procedures and legal services.
176. One of the prominent and persistent characteristics of South African society is the huge knowledge and skills gap that exists between the minority white population and the majority black population. Formal court proceedings tend to intimidate and thus inhibit the poor (who are mostly illiterate and rural based) to even contemplate access to courts, as well as having the courage and confidence to seek legal assistance. There is also a lack of appropriate, essential information.



177. Despite major efforts at institutional transformation, the perception of many people who appeared before the CRM is that the judicial system is still being dominated by white males, a feature that feeds into the popular perception that judges and magistrates are not impartial in the sense of being free from racial or gender bias. In consultations throughout the provinces, stakeholders alluded to a number of cases where white male judges and magistrates have been accused of allegedly wrongfully failing to convict persons charged with inter-race crimes or failing to impose adequate sentences because of the accused being a white rather than a black person. These perceptions further intimidate and alienate the majority of black people who are afraid of seeking justice, or are worried that they may not get a fair hearing from the courts.
178. The CRM also learnt that another key barrier to accessing justice in South Africa is the lack of resources, essentially financial, due to the high cost of legal services. It is estimated that the average South African household needs to save one week's salary to be able to afford a one-hour consultation with a lawyer.¹¹ For most poor black households, the cost is even higher. The reasons behind the high cost of legal services are inextricably linked to the dual nature of the economy, with a small rich population being served by a high proportion of trained legal professionals, while the majority of the poor population has no access to professional legal counsel.
179. Although state legal aid services have enhanced access to justice by the poor to a certain extent, it will not change the cost of legal services, especially the elite-based legal professional market often available to the rich. Although state-funded legal aid could only be accessed from lawyers in private practice, there has been a determined effort to diversify the source in which legal aid can also be obtained from justice centres staffed by state employees, civil society and university-based law clinics.¹² Yet lack of resources is only a part of the problem of lack of equal access to justice by the poor. Among the key factors mentioned by stakeholders are inefficiencies and chronic procedural delays that make it difficult for victims to obtain justice. These are also related to the lack of resources, manpower or professionalism among police and court staff. Other factors include the high rate of police fatalities, responsiveness of the police to crime as stated above, efficiency of police investigations, prosecution success rates, and corruption within the SAPS.
180. The issue of access to justice in South Africa is deep-rooted and complex. It is partly the legacy of apartheid, where wealth ownership and the creation of wealth were legally confined to white people and the law was used as the instrument of control, banishment and punishment of black people. Hence law as an instrument of social control, regulation and protection for the benefit of all is still suspect.

Alternative Dispute Resolution Mechanisms

181. Although the CSAR makes mention of the existence of an alternative mechanism for labour dispute resolution through the CCMA, the CRM did not get the opportunity to interact with

¹¹ Open Society Foundation of South Africa, 2005. South Africa: Justice Sector and the Rule of Law, pp. 29-30.

¹² Ibid.

this body. However, the issue of alternative dispute resolution for labour matters is also addressed under Objective 2 of the chapter on corporate governance. The CCMA is the main statutory body for dispute resolution established by section 112 of the Labour Relations Act of 1995. The functions of the CCMA include finding solutions to labour disputes through conciliation and arbitration, assisting in forming workplace forums, and providing advice and training to workers, registered trade unions and federations of employers on the most pressing labour relations issues, such as affirmative action, prevention of sexual harassment, disciplinary procedures, and collective bargaining.

182. The CRM met with councils of the house of traditional leaders in at least three provinces, who spoke eloquently about the need to encourage and standardise the role of traditional courts in the communities where they exist. The challenge, therefore, is how to integrate traditional legal systems founded on uncodified customs, conventions and norms with written constitutional principles of equality and non-discrimination, and come up with creative ways in which traditional courts can respond and adapt to the need for justice delivery to the poor and rural population in South Africa. This issue has moved beyond debate to a concrete policy based on the two recent legislation frameworks guiding the institution of traditional leadership and authorities.
183. Similarly, in KwaZulu-Natal, the provincial leadership expressed its profound commitment to transforming all existing traditional governance structures by aligning them with the new national legislation on traditional institutions and making them compatible with democratic principles and institutions in South Africa. The Speaker of the provincial legislature informed the CRM that the province is carefully studying proposals for integrating the traditional and modern justice sectors. It is exploring ways of harnessing the cultural and judiciary powers of traditional leaders for the purpose of promoting peace and unity within the province. In this regard, the provincial legislature was considering legislation that would give more powers to the provincial, district and local houses of traditional leaders. All these efforts are geared towards legitimising the important role of traditional institutions, including the traditional courts.

iii. Recommendations

184. The APR Panel recommends that South Africa:
- Without prejudice to the standard and impartiality of the judicial system, transform the manpower profile as soon as possible to reflect the realities of contemporary South Africa. [Department of Justice and Constitutional Development; Public Service and Administration; Professional Legal Associations]
 - Provide appropriate and adequate legal services in the rural areas. [Department of Justice and Constitutional Development; Legal Aid]
 - Modernise and, to the extent possible, integrate the traditional and modern justice systems where applicable. [Department of Justice and Constitutional Development; Houses of Traditional Leaders]





- Address capacity constraints in lower courts that continue to undermine full application of the Bill of Rights in the cases brought before them. This calls for concerted efforts at building the capacity of the various levels of magistrates' courts. [Government; Judiciary]

Objective 4: Uphold the Separation of Powers, Including Protecting the Independence of the Judiciary and Ensuring an Effective Capital Legislature

i. Summary of the CSAR

Separation and Balance of Powers

185. The separation of powers between the legislative, executive and judicial branches of the government is firmly established in the Constitution, in which the roles and functions of each branch are set out. The independent mandate and powers of the national parliament, consisting of the National Assembly and the National Council of Provinces (NCOP), are clearly defined in Chapter 4 of the Constitution, while the mandate and powers of the provincial legislatures are established by Chapter 6 and the independence and powers of the judiciary by Chapter 8.
186. There is general consensus among submissions that the post-apartheid constitutional and legislative infrastructure is in keeping with the principle of the separation of powers. South Africa's judiciary has maintained its high standards while undergoing a fundamental transformation of both legal frameworks as well as its own composition. Still under way, the transformation process has led to improvements in racial terms but women remain seriously under-represented in the judiciary.
187. Independence of the legislative bodies has also been established and maintained by appropriate legislative measures. Since 1999, all 11 legislatures (two national and nine provincial) have shifted to the oversight functions of their legislative responsibilities. Although the parliament is empowered by the Constitution to amend money Bills, the appropriate legislation has yet to be put in place. A multiparty task team was appointed in 2002 to review, evaluate and make recommendations on the executive reporting practices, committee operations and legislative involvement in the budgeting processes. The team was expected to report by the end of 2006.
188. The capacity of the legislature to perform its oversight responsibilities is a major issue that needs to be addressed. This is due partly to lack of resources and the limited legislative experience of newly elected representatives, as well as the initial focus of the legislature in drafting new laws in order to abolish apartheid laws and create appropriate new ones. The legislature was therefore more preoccupied with enacting laws to improve the lives of people and less with checking the executive.

ii. Findings of the CRM Separation of Powers in South Africa

189. Separation of powers is essentially about measures for and mechanisms of checks and balances calculated to inhibit the tendency for the excessive use of powers in a governance system. They are particularly intended to constrain the dominance of the executive over the other institutions, particularly the judicial and legislative powers. Checks and balances are usually inbuilt in a Constitution, such as the entrenchment of the principle of the separation of powers, the rule of law and due process of law, and an independent judiciary.
190. In South Africa, the principle of separation of powers between the legislature, executive and judicial branches of the government is uppermost in national policies and public debates. The independence of the judiciary is entrenched in section 165(2) of the Constitution, which states that “courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice”.
191. The independence of the parliament is enshrined in Chapter 4 of the Constitution, which establishes the mandate, composition and powers of the two Houses of Parliament: the National Assembly and the NCOP. The independence of the parliament is further protected in national legislation such as the Powers, Privileges and Immunities of Parliaments and Provincial Legislatures Act of 2004.
192. In cases of disputes between organs of state concerning constitutional status, powers or functions, there are various constitutional provisions aimed at resolving intergovernmental disputes. The Constitutional Court may, if the case is in the interest of the Constitution, hear and decide the constitutionality of such disputes.

Independence of the Judiciary

193. An independent judiciary is the cornerstone of the rule of law and due process of law. Moreover, it is designed to ensure that all public officials stand trials if their actions contravene the law. The independence of the judiciary means that judges and magistrates are secure in their positions and cannot be dismissed for taking a position against the executive or for making decisions that might indirectly have an adverse impact on the executive. Without independence, the judiciary is subject to the whims of political leaders and their changing priorities. When the judiciary is independent of other branches of government it can play an effective role in promoting good governance. Independence of the judiciary is generally an entrenched constitutional provision.
194. In South Africa, the judiciary is widely regarded as independent and free from executive domination and has gained international recognition for its judgments, which have seen laws rewritten and the government challenged. There also exist constitutional provisions aimed at promoting and safeguarding judicial independence. These include the protection from arbitrary removal from office, security of tenure, and a guarantee against the reduction of salaries.





195. Removal of judges from office is addressed in section 177 of the Constitution, which states that:
- (1) A judge may be removed from office only if –
 - (i) the Judicial Services Commission (JSC) finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and
 - (ii) the National Assembly calls for the judge to be removed, by a resolution adopted with a supporting vote of at least two-thirds of its members.
 - (2) The President must remove a judge from office upon adoption of a resolution calling for the judge to be removed.
 - (3) The President, on the advice of the JSC, may suspend a judge who is the subject of a procedure in terms of subsection (1).
196. Section 176 of the Constitution guarantees the tenure and remuneration of judges. All judges, except those of the Constitutional Court, hold office until discharged under the terms of an Act of parliament or at their retirement at the age of 70. Constitutional Court judges hold office for a non-renewable term of 12 years, but also retire at the age of 70.
197. Despite the record of its independence, the South African judiciary still struggles with legacies from the past regime and the justice system, a former tool of oppression, remains ill-equipped to deliver justice to the majority of the population. One major challenge that has been clearly identified in the justice system and needs to be addressed is that the public still looks at the judiciary and legal profession as racist due to the dominance of white people. The transformation project, which would see the bench change to represent the country's demographics, needs to be fast-tracked. Indeed, the CRM was informed that the Cabinet is considering draft legislation aimed at fast-tracking the transformation of the bench.
198. The transformation project that the government is pursuing is worthy and needs to touch all sectors of society. However, care must be taken to ensure that judges are appointed legitimately and on merit to avoid a situation in which new appointees become loyal to those who have appointed them, hence undermining the independence of the judiciary.
199. In discussions stakeholders also expressed their fears that recent provisions in draft legislation tabled before the parliament (e.g. the Judicial Conduct Tribunals Bill, the Superior Courts Bill, the proposed amendments to the Judicial Service Commission Act of 1994 and the 14th Constitution Amendment Bill) could seriously threaten the independence and/or delivery of justice in the country. Their concerns relate to the powers given to the executive in the proposed Bills on matters such as the appointment of senior judges, and the management of the budget of the judiciary.
200. The CRM was informed that the government was drafting a White Paper on the transformation of the judiciary, which would take into account public debate on the Bills previously published. It is hoped that this White Paper will facilitate further discourse on substantive aspects relating to the transformation of the judiciary.

201. Capacity constraints at lower courts and the police could threaten delivery of justice to communities. The SAPS has been severely criticised for its inability to uphold the security and safety of people of South Africa. The government needs to address these issues.
Independent and Effective Parliament
202. The legislature is the main forum in which national politics is conducted. In a democracy, the legislature consists of the elected representatives of the people. In many African countries, some members are appointed by the executive or are constitutionally entitled to represent identified interests such as gender, disability and youth.
203. The legislature has two important functions. One, it enacts laws, rules and regulations, appropriates revenue, allocates resources and oversees public expenditure. Two, it provides a forum for the representatives of the people to articulate the needs, interests and aspirations of those who elected them, express their grievances and anxieties, demand rectification of wrongs done by the executive, debate public issues and policy options, and take decisions in the interests and welfare of all people in the country.
204. Section 55 of Chapter 4 of the Constitution firmly establishes the independent mandate and powers of the parliament. It is stipulated that the National Assembly must provide for mechanisms to ensure that all executive organs of state in the national sphere of government are accountable to it; and to maintain oversight of the exercise of national executive authority, including the implementation of legislation, and any organ of the state. The NCOP represents the provinces to ensure that provincial interests are taken into account in the national sphere of government.
205. Since 1994, the government has set up a robust constitutional and legislative framework to put into effect the new constitutional mandates and aspirations for a democratic South Africa. This has involved the adoption of new laws and policies. It is estimated that over 789 legislative Acts or Amendment Acts aimed at transforming the South African society from one characterised by apartheid laws, rules and regulations into the modern, democratic, non-racist and non-sexist nation have been adopted.
206. The Constitution of South Africa recognises 11 official languages. These are Sepedi, Sesotho, Setswana, isiSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu. It furthermore provides that the state must take practical steps and positive measures to elevate the status and advance the use of these indigenous languages in South Africa. To give effect to this constitutional provision, the legislature conducts parliamentary debates and other business in any of the 11 official languages. This is worthy of emulation by other African countries. The parliament has also over time devised innovative strategies for reaching the electorate, such as the Taking Parliament to the People Programme.
207. Much of the work of the parliament is managed through an extensive committee system. Committees are designed to improve the efficiency of the legislative process; to deepen and enhance the deliberative function of the parliament; and to maximise public participation in the legislative process through public hearings and submissions by the public or special





interests. Most importantly, however, committees serve the role of strengthening the parliament's capacity to conduct effective oversight of the executive.

208. Despite the constitutional powers and mandate of the parliament and the committee system to strengthen the parliamentary oversight role, there are concerns that the parliament has not consistently exercised its functions and has, on certain controversial issues, such as the arms deal and HIV and AIDS, been hesitant to criticise the executive.

Best Practice 3: Taking the Parliament and Provincial Legislatures to the People Programme

The "Taking Parliament to the People Programme" underscores and promotes people participation in their governance. It is an outreach programme whereby the parliament and the provincial legislatures go to the grassroots level to interact with members of communities and listen to their concerns, needs and aspirations. It strengthens the parliament's commitment as a people-centred institution that is responsive to the needs of the electorate in order to realise a better life for all South Africans. By visiting these rural communities, the parliament gives a voice to those who would not necessarily have the opportunity to address or discuss issues (in their home language) with their representatives. This creates a platform for people to engage with the government and the parliament on various issues of concern. During its interaction with the people, the parliament gains a deeper understanding of the issues confronting the area and the rest of the province. Through its oversight role, the parliament can help highlight and overcome the constraints faced by local people. The gathering gives the parliament and the local sphere of government the opportunity to enhance the spirit of governance. Finally, the parliament will be able to assess the impact of the legislation it has passed on the development and empowerment of people and their communities.

Source: www.parliament.gov.za, www.pmg.org.za, www.info.gov.za, APRM CRM compilation, July 2006.

209. Stakeholders mentioned during discussions that the proportional representation electoral system negatively impacts on the parliament's oversight capabilities and independence. Since individual MPs are only indirectly accountable to the public, they are more likely to prioritise allegiance with the party that nominated them. This system implicitly enhances the power of the executive over the elected representatives.
210. It was further noted that the South African parliamentary system of government, where the executive is drawn from the legislature and the ruling party holds the majority seats, may sometimes obscure the separation of powers and reduce the autonomy of the parliament in its oversight exercise. Not only are Ministers playing an active role in the parliament as members, they are by virtue of their ministerial positions also exercising considerable influence on parliamentary affairs.

211. The oversight role of the parliament is limited by its rather low interaction with society, particularly in the work of the oversight committees. Minority parties complain of having ineffective voices in the National Assembly owing to proportional representation rules in parliamentary deliberations.

iii. Recommendations

212. The APR Panel recommends that South Africa:

- Speed up the transformation of the judiciary based on the fundamental constitutional principles of a non-racial, non-sexist society. [Government; Judiciary]
- Ensure that the JSC promotes progressive and increased appointment of black people and women as magistrates and judges. Where rules are prohibitive to this development, they should be revised without compromising the integrity of the judicial system. [JSC; Department of Justice and Constitutional Development]
- Ensure that the proposed Amendments to the Judicial Service Commission Act of 1994 and the transformation of the judiciary do not jeopardise or undermine the independence of the judiciary. [Department of Justice and Constitutional Development; JSC; Parliament]
- Strengthen the parliament to ensure its capacity to monitor the implementation of legislation it passes. Capacity constraints range from inadequate education, lack of information and knowledge of the legislators, to their capture or co-optation by the ruling party. [Parliament; Political Parties; Civil Society]

Objective 5: Ensure Accountable, Efficient, Effective Public Office-Holders and Civil Servants

i. SUMMARY OF THE CSAR

Measures to Improve Public Service Institutions

213. Since the end of apartheid rule, the government has made systematic and deliberate efforts to put in place legislation and structures for strengthening and consolidating constitutional democracy, rules, procedures, mechanisms, processes, principles and codes of conduct to guide the performance and achievement of a transformed public service. The main objectives were to transform the public service away from the apartheid-oriented government machinery geared to serving the interests of the white minority towards serving the interests of all South African citizens.
214. As the leading government department in the transformation agenda, the Department of Public Service and Administration (DPSA) has undertaken a range of policy and legislative initiatives to give effect to the constitutional principles. These are the White Papers on





the Transformation of the Public Service (1995 and 1997), the Public Service Act of 1994, the EEA of 1998 and the Skills Development Act of 1998. The government has also established modern planning, budgeting and management frameworks for resource allocation and financial accountability through the adoption of the PFMA and the MFMA. It has established participatory planning frameworks to enhance citizens' input into development planning and implementation, including the National Spatial Development Perspective (NSDP), Provincial Growth and Development Strategies (PGDSs) and, at local level, Integrated Development Planning (IDP), all of which require active citizen participation. The government has a robust human resource management and skill development strategy through the Performance Management Development Systems (PMDS), which provides training in and evaluation of the performance of public servants, and the South African Management Development Institute (SAMDI), which assists in developing management practices. Recognising the weaknesses of local governments and also the discrepancies in their capacities to deliver services, the government came up with Project Consolidate, an effort led by the Department of Provincial and Local Government (DPLG) to improve service delivery in ailing municipalities.

215. In order to facilitate the growth of the economy the government promoted the strategy involving the private sector in a public-private partnership (PPP). However, as this strategic partnership entailed the combination of public and private assets, some stakeholders raised concerns about the restructuring of state assets and its implications for public accountability. This reflects the ongoing debate regarding the nature and structure of the national economy.
216. To underscore the importance of people's participation in development and the commitment to quality service delivery, the government initiated Batho Pele, which requires that all service delivery institutions and officials set and adhere to standards and practices when engaging with the public, and conduct their work in a professional, courteous and transparent manner. Another creative approach to promote citizens' participation and leadership accountability is the Izimbizo programme championed by the President, in which national, provincial and local government officials visit communities where they often face tough questioning by citizens. To improve access to services, the government has initiated various projects including multi-purpose community centres (MPCCs), shared service centres and one-stop shops, as well as the appointment of a national corps of CDWs to support the coordination of local development processes.
217. The CSAR admits that despite strong regulatory and administrative measures implementation and service delivery have both lagged behind, especially at provincial and local levels. Lack of capacity, experience and responsiveness of public officials are some of the main problems. Innovative initiatives like Batho Pele are still poorly understood and have not addressed the fundamental issues behind poor service delivery. Public participation is usually ad hoc with little information of public awareness. In addition, civil society has a limited capacity to engage.

Best Practice 4: Batho Pele

A unique feature in the new South African governance system is the inauguration of Batho Pele. This is essentially a Citizen's Charter, based on the traditional Sesotho adage meaning "people first". The objectives of Batho Pele are to ensure that people are sufficiently informed about governance processes, the functions of the various ministries and departments, those in charge and what to expect from them; that the people are consulted; and that they have access to the necessary information regarding their citizenship entitlements and civic obligations. In the light of South Africa's previous system of governance and experience of legalised racism, Batho Pele is a deliberate measure for empowering all the people to participate effectively in public affairs and enjoy the benefits of citizenship, while ensuring transparency and accountability.

Source: www.dpsa.gov.za/batho-pele/index.asp, APRM CRM compilation, July 2006.

Best Practice 5: Multi-Purpose Community Centres

To meet the challenges of improved service delivery to the people, the government through Cabinet Memorandum No. 15 of 1999 implemented a bold initiative by establishing multi-purpose centres (MPCCs). The goal of an MPCC is to provide all South African citizens with access to information and services within five minutes of their place of residence.

An MPCC is a one-stop, integrated community development centre designed to provide information and a wide range of services to communities in an integrated and coordinated way. The National Intersectoral Steering Committee (NISSC), comprising 20 representatives from national government departments, parastatals, NGOs, research and tertiary institutions, the private sector and other stakeholders, coordinates and monitors the roll-out of the initiative. The NISSC is headed by an executive team that manages the MPCC project. The objective is to have an MPCC in each of the 43 districts and six metropolitan municipalities of the country.

Achievements to date include the buy-in by various stakeholders, the establishment of 14 MPCCs across the country, and a multitude of services made available to communities under one-stop shops.

Sources: NICC MPCC Business Plan, Government Communication and Information System, November 2001 and CRM findings.

ii. Findings of the CRM**Measures to Improve Public Service Institutions**

218. The Constitution envisages a people-oriented public service that is professional, efficient and effective in the utilisation of resources, with high ethical standards. Public administration should be broadly representative of the South African people, non-sexist and based on fairness, transparency and objectivity in redressing past imbalances. It should respond to the needs of the people, encourage people to participate in public policy formulation





and serve the people fairly, equitably and without any favouritism. Moreover, it should be development oriented. In addition, it is obvious that a major social and political transformation has taken place in South Africa since 1994. It is equally obvious that this transformation could not have taken place if the public service itself had not been transformed as well. South Africa is constitutionally one nation, with one public service serving all citizens, irrespective of their race, religion or gender.

219. Nonetheless, the transition from the apartheid regime to the ANC-run administration faced many challenges, chief among which was the need to find public servants who believed in the transformation agenda as required by the Constitution of the new democratic South Africa. A further challenge was the new institutions that were to be put in place. For example, local governments in their present form only date back to 2000. The government has therefore been faced with a scarcity of human resources, low capacity in the delivery of services, as well as day-to-day administration and delivery amidst a tremendous demand for administrative and social services. At local government level in particular, where councillors and civil servants interact with people more regularly, problems of accountability abound. Efficient delivery of social services is a Herculean task.
220. Ensuring accountable, efficient and effective public officeholders and civil servants is indeed a priority commitment of the government, as is demonstrated by the plethora of legislative and regulatory frameworks that have been put in place. Nevertheless, the challenge to create a “unified civil service” in the context of the constitutionalised “three spheres” of government has not been easy. This delineation of spheres of administration inhibits the dynamic use of scarce specialised skills, as each sphere of government tends to protect its own terrain. The crunch in capacity and the service delivery challenge are partly due to such constitutional/institutional arrangements.
221. Another issue directly linked to inadequate human resources and skilled civil service is the lack of harmonisation and professional mobility among the three spheres of government. While the civil service at national and provincial levels falls under the ambit of the DPSA, civil service at local government level falls under the authority of the DPLG. As such, most of the development planning frameworks aimed at upgrading the skills levels of civil servants at all levels appear to lack proper cohesion and coordination. This accounts for disparities in the quality of service delivery in South Africa.
222. Initiatives like Project Consolidate, an effort led by the DPLG to improve service delivery at ailing municipalities through providing hands-on support by national and provincial government, are critical in meeting capacity constraints. Ironically, however, they could contribute to dependency on the centre without giving the local sphere of government the opportunity to learn from its own mistakes. While hands-on measures like Project Consolidate are crucial, a long-term strategy for skills development and capacity building is needed. In this regard, the CRM was informed that plans are under way by the DPSA to draft a Bill for unifying the public service at all levels.

223. The CRM learnt that innovative participatory mechanisms like Imbizo have contributed to making public officials, from the President to Ministers on downwards, accountable to the people at grassroots level. It has provided public forums for discussing government policy, proposals, achievements and failures. Having such space for public and citizen participation in the decision-making processes at provincial and local levels provides much comfort to the people that their concerns are being heard. However, consultations with representatives of Chapter 9 institutions and other stakeholders throughout the provinces revealed that despite mechanisms and provisions for public participation, many CSOs, especially at the rural grassroots level, feel marginalised and are not participating in the policy-making process.
224. The CRM observed that there appears to be a distinction between elite, urban-based CSOs (which have the resources and means to articulate their interests and advocate for changes at national level) on the one hand, and rural-based, community-based organisations (CBOs) (which often lack capacity to participate effectively in decision-making processes at local level), on the other hand. South Africa also has several mass movements in communities around issues regarding access to services. Examples are the Treatment Action Campaign, the Landless People's Movement and the Soweto Electricity Crisis Committee. However, these are essentially "protest movements" whose goals include influencing policy and campaigning around social justice issues. They have been successful at changing policy direction at macro-political level, but often relent after policies have changed.
225. What appears to be missing in the civil society sector in South Africa, but often found in many African countries, are "intermediary development-oriented" non-governmental organisations (NGOs) that are devoted entirely to service delivery or project implementation in partnership with CBOs and local government at grassroots level. These intermediary NGOs are usually sector specific (e.g. water, sanitation, electricity, housing) and provide training in different aspects of participatory development, not only in policy advocacy but also in project planning and implementation. They usually provide training to CBOs to make them effective partners in service delivery. Their main objective is voluntary contribution to development, often in strong partnership with local government.
226. In South Africa, the potentially powerful relationship between councillors and local government officials on the one hand, and citizens and communities on the other hand, is not being fully harnessed, partly due to the absence of development-oriented NGOs. The experience of other African countries has been that a genuine, mutually beneficial relationship between civil society (voluntary sector) and local government can turn the tense and often unproductive relationship into a productive, functional local government.
227. Through interactions with members of the National Governing Council (NGC) and civil society stakeholders in the provinces the CRM learnt that while such intermediary NGOs exist, they are quite small in number because funding remains a challenge for those who wish to take part in participatory development processes at the local level. Lack of domestic sources of funding has also affected the perceived independence of NGOs, which often





depend on foreign funding. There is a perception, especially within the government, that NGOs with external sources of funding often compromise their effectiveness, as they have to conform to the agenda of the donors.

228. Stakeholders have also stated that funding through the National Development Agency (NDA) – a government civil society funding mechanism – is often bureaucratic and slow in disbursement. The NDA has not been functioning optimally in terms of giving grants to CSOs and, in any event, NGOs receiving funds through them risk being perceived as co-opted. Stakeholders expressed preference for an independent foundation to fund activities of civil society in general, including development NGOs. The challenge of stimulating the growth and improving the capacity of intermediary NGOs to participate more effectively as partners with local government in service delivery hinges on resolving the dilemma of external versus internal sources of funding for CSOs.
229. Another plausible reason for the general lack of skills in the public sector is the recent rigorous enforcement of affirmative action programmes, mainly through BEE legislation. To meet their BEE compliance targets, most private sector employers are now inducing middle-level managers through high remuneration to leave the public service for the private sector, thus exacerbating the skills crisis in the government. This appears to make the government's goal of developing an efficient, competent and effective public service extremely challenging. Thus, despite legislation and initiatives to attract and retain skilled personnel in the public sector, other affirmative action policies for the private sector (such as BEE) are having the opposite effect of undermining public service human resource management and skills development.
230. In the municipalities there is an acute shortage of managerial staff capable of implementing projects. In the case of Gauteng, migration from other provinces is both a challenge and a positive input. Despite putting pressure on services and straining the pool of infrastructure, migrant labour provides skills and capabilities for various economic sectors in the province.
231. Related to the above is the issue of brain-drain as skilled labour is emigrating. The South African economy is therefore being depleted of skills, especially in the area of service delivery.
232. Although the government still faces enormous challenges in service delivery, it has taken bold initiatives to improve access to services. These include the Batho Pele charter, MPCCs, shared services centres and one-stop shops.

iii. Recommendations

233. The APR Panel recommends that South Africa:
 - Create the necessary incentives for attracting qualified talent to the public service. Attraction and recruitment to the public service must be based on different sets of criteria,

including vocational devotion to public service, patriotism, or some sort of bestowed honour and prestige by being a member of the public service. [DPSA; Government]

- Step up strategies to attract back skilled labour that has emigrated. [Government; DPSA]
- Design a comprehensive strategy for skills development and retention in the public sector (including regulatory frameworks, remuneration systems, education and training) to make them effective. This is essential for the development of a professional and effective public service. [DPSA; Public Service Commission; SAMDI]
- Step up the competence and accountability of the public service at all levels. [DPLG; All Performance Monitoring Institutions, such as the Auditor-General and Public Protector]
- Devise a strategy on how to encourage a philanthropic culture to assist the voluntary sector. The strategy should focus on providing incentives or stimulating the growth of a critical mass of service-oriented intermediary NGOs. [Government; NGOs]

Objective 6: Fighting Corruption in the Political Sphere

i. Summary of the CSAR

The State and Measures to Combat Corruption

234. The CSAR notes that the perception of corruption is actually worse than the reality on the ground. However, corruption in the political sphere is a challenge to all governments, including South Africa. In response to the problem of corruption in the public sector, the government has initiated a variety of anticorruption measures, culminating in the adoption of a comprehensive Public Service Anticorruption Strategy and the establishment of partnerships between the government, civil society and private sector. These partnerships have resulted in two National Anticorruption Summits (1999 and 2005) and the launch of a tri-partite National Anticorruption Forum in 2001.
235. In addition to the initiatives cited above, the establishment of an Independent Constitutional Office of the Director of Public Prosecutions,¹³ special investigative and prosecuting units (such as the Directorate of Special Operations, or “Scorpions”) and the Assets Forfeiture Unit has added new dimensions to the institutions of administration of law for combating corruption and organised crime.¹⁴ The efficiency of revenue collection by the South African Revenue Service (SARS) and the oversight roles of the Auditor-General, the Standing Committee on Public Accounts (SCOPA) in the parliament and the independent office of the Public Protector contribute to ensuring that the public sector, including politicians, is held accountable. Several other anticorruption programmes such as the Inter-Ministerial Committee on Corruption (comprising the Ministers of Justice, Public Service and Administration, Safety and Security, and Justice and Constitutional Development), are

¹³ Constitution of the Republic of South Africa, 1996, section 179.

¹⁴ Towards a Ten-Year Review, pp. 52-53: The legislative framework for these specialist crime-fighting agencies includes the Prevention and Combating of Corrupt Activities Act of 2004, the Prevention of Organised Crime Act of 1998 and the Witness Protection Act of 1998.



mandated to consider proposals for the implementation of an anticorruption campaign at both the national and provincial levels.

236. The government has also instituted several other anticorruption legislative and regulatory frameworks, including the:
- Parliamentary Code of Ethics (1997), which protects legislators from conflicts of interest through a system of financial disclosure;
 - Executive Members' Ethics Act of 1998;
 - Code of Ethics (2000);
 - Public Finance Management Act (PFMA) of 1999;
 - Protected Disclosures Act of 2000;
 - Financial Intelligence Centre Act (FICA) of 2001; and
 - Prevention and Combating of Corrupt Activities Act of 2004.
237. The PAIA came into force in 2000 and the National Corruption Forum was established in June 2001. In January 2002, the Cabinet adopted the Public Service Anticorruption Strategy, a document proposing a holistic, integrated approach to fighting corruption, by utilising preventive and combating activities and consolidating the institutional and legislative capabilities of the government. These measures have yielded tangible results and have not spared even high-profile politicians and prominent persons.
238. Nonetheless, corruption is a problem of society and the effectiveness of anticorruption measures will much depend on the cooperation and confidence of the public. Some stakeholders have complained that whistleblowers are not adequately protected, particularly from physical harm.

ii. Findings of the CRM

Corruption and Measures to Combat It

239. The CRM noted during the review period that newspaper reportage, radio and television news and public debates were replete with reports of corruption in the government, public institutions and private sector. While such reportage improves awareness of the dangers of corruption, it is an indicator of the weakness in public institutions that are supposed to keep the vice at bay. Stakeholders throughout the provinces confirmed that the government's institutional measures taken against political corruption, together with free and vigilant media, have helped expose corruption and shame those involved.
240. However, one persistent corruption issue in the public's mind, which the CRM heard repeatedly, is the absence of regulation in South Africa requiring the disclosure of sources of private funding for political parties. This makes it very difficult to determine whether there are potential conflicts of interest. Another issue raised, although not with as much intensity, is the apparent lack of restrictions on public office-bearers who move almost

immediately to the private sector without any cooling-off period. The CRM learnt that plans are afoot to introduce some restrictions later in 2006.

241. For post-apartheid South Africa, the issue of corruption is both challenging and urgent. The government appears to be convinced that public perception of corruption is greater than reality. Stakeholders, on the other hand, complain that the government is not very serious about combating corruption. For example, stakeholders' consultations revealed that there is tremendous concern for corruption at provincial and local levels, especially in the delivery of social services such as housing. For example, in a Gauteng provincial survey handed over to the CRM:

- 63 per cent of respondents agreed with the statement that “there is lots of corruption in the Departments”;
- 51 per cent said municipality funds are not well managed;
- 44 per cent said “bad performance of civil servants is not corrected”;
- 53 per cent agreed that officials involved in housing are corrupt;
- 49 per cent agreed that processes for allocating houses are unfair;
- 45 per cent agreed that the municipality is in touch with their needs; and
- 43 per cent said the municipality is better now than ten years ago.

242. These statistics were corroborated by anecdotal evidence in the CRM's stakeholder consultations at Kliptown, Soweto. There was broad consensus among many speakers that corruption was the major cause of severe delays in housing delivery and that those with connections to local government officials were likely to receive housing faster. This perception was repeated across all the provinces visited by the CRM. Many people voiced their wishes that corruption should be addressed, especially in house allocation where nepotism, favouritism and bribery were seen to be the main criteria for allocation.

243. Before proceeding to recommendations, it is important to understand why it is indeed very important for South Africa to fight corruption:

- It is a country in transition from apartheid – a system of governance based on racist exclusion, domination of the minority over the majority, enriching and favouring many white people and impoverishing the black majority – to a non-racist, non-sexist constitutional democracy with common citizenship and citizenship entitlements. However, there is a scarcity of resources and competent, experienced personnel. Hence the pressure on service delivery and the possibility of corruption by those seeking the delivery of services and those providing the services.
- It is a society with pervasive poverty among the majority black people who for a very long time have been denied rights purely on racist grounds, but now have constitutionally mandated access to rights and opportunities that could enrich them, their families and friends. Thus there are many temptations for all people in positions of power or decision-making processes to become involved in corrupt practices.





- The new democratic system of governance needs to be systematically and purposefully built on the stipulated constitutional principles. There are also ethical values for guiding those in power and authority that need to be systematically monitored and strengthened. If not, cynicism and loss of legitimacy may creep in to undermine and eventually destroy the authenticity of the democratic system of governance.
- Pervasive poverty, deep and widening socio-economic inequalities often breed greed and insensitivity to principles and ethics.

iii. Recommendations

244. The APR Panel recommends that South Africa:

- Ensure that the independence and capacity of anticorruption institutions already put in place are promoted and strengthened. [Anticorruption Unit; Department of Justice and Constitutional Development]
- Rationalise and streamline the mandates and functions of various units dealing with corruption. [Government; National Prosecuting Authority]
- Encourage more vigilance and empowerment of local institutions in fighting corruption. [Anticorruption Unit; Department of Home Affairs; Department of Justice and Constitutional Development; Local Government]
- Engage with the media to conduct their reporting, discussions and debates on the issues of corruption based on factual, objective or verifiable sources of information. [Government Communication and Information System]
- Remain proactive by openly talking about corruption and its impact on society and the economy. [Government; Parliament]
- Ensure that the movement or co-optation of civil servants from the public sector to the private sector is properly regulated so as not to become a potential source of corruption. [Parliament; Anticorruption Unit; Political Parties]

Objective 7: Promotion and Protection of the Rights of Women

i. Summary of the CSAR

Measures to Promote and Protect the Rights of Women

245. The South African government has made significant strides in promoting the rights of women. The country has acceded to a wide range of international conventions and protocols on the

advancement and protection of women's rights, most notably the ACHPR, CEDAW and the Beijing Platform for Action of 1995. Section 9 of the Constitution guarantees the right to equality and non-discrimination on the basis of gender, pregnancy and marital status. The Constitution also provides for the right to make decisions concerning reproduction and the right to the security in and control over one's body (s12).

246. A wide range of national legislation enhances constitutional provisions on the promotion and protection of the rights of women:
- Basic Conditions of Employment Act of 1997;
 - Broad-Based Black Economic Empowerment Act of 2003;
 - Domestic Violence Act of 1998;
 - Maintenance Act of 1998;
 - Recognition of Customary Marriages Act of 1998;
 - Choice on Termination of Pregnancy Act of 1996;
 - Employment Equity Act of 1998;
 - South African Citizenship Act of 1995;
 - Labour Relations Act of 1995;
 - Promotion of Equality and Prevention of Unfair Discrimination Act of 2000; and
 - White Paper on Affirmative Action (1998).
247. The government has established robust national gender machinery to promote gender equality in all spheres of life. It comprises various structures from the state as well as civil society, with the most important being the Office in the Presidency on the Status of Women (OSW), gender focal points in government departments, and the Commission on Gender Equality. There exists a wide range of programmes that target women and their most pressing issues, including programmes to provide women's healthcare and educational programmes to support female learners, especially in science and technology, as well as programmes for HIV and AIDS awareness.
248. Government efforts to empower women extend also to the economic domain. Women empowerment programmes including employment opportunities through affirmative action, preferential procurement strategies and economic empowerment have increased access to services and representation of women in decision-making positions and business. The CSAR notes that women constitute 45 per cent of Ministers and Deputy Ministers, 33 per cent of MPs; 35 per cent of members of the NCOP; 32 per cent members of provincial legislatures; and four of the nine Premiers. In 2005, South Africa appointed its first woman Deputy President.
249. The government is aggressively combating violence against women with programmes and institutions such as the Anti-Rape Strategy, Interdepartmental Domestic Violence Programme and the Victim Empowerment Programme. Sexual offences courts and family courts have been established for cases of domestic violence, rape, assault and child abuse.





250. However, efforts to promote the rights of women are not without challenges. Women face high levels of unemployment, and those who do work are concentrated in underpaying occupations such as domestic work. Women also carry a disproportionate burden of unpaid labour, including caring for orphaned children and people infected with HIV and AIDS. Rural women are yet to benefit from various government programmes for women empowerment and gender equality.

ii. Findings of the CRM

251. South Africa's record in promoting and protecting the rights of women is most commendable. However, greater participation of women in the private sector needs to be further promoted and encouraged.

252. The CRM found that although a legislative framework exists for the protection and promotion of women's rights, and some women have been offered positions of responsibility in both the parliament and the executive arms of the government, the gender position of women in society is still low and their abuse is still persistent. It is true that women's views can now be heard and considered in society but they remain vulnerable and many lack access to economic opportunities and social amenities. The OSW lacks the capacity to perform its functions efficiently and effectively. Women continue to be abused by their husbands, particularly those living in mining areas, where the oppression is very acute. The CRM was informed that harassment rooted in the legacy of apartheid is still strong in some areas.

253. Some stakeholders informed the CRM that although women are now liberated, represented in many walks of life and no longer confined to the kitchen, there are still vestiges of men's traditional inclination to control and dominate.

254. The CRM was also informed that although the Constitution protects women's rights, some women lack the confidence to speak out when victimised. This is largely because most women, particularly in rural areas, are illiterate and are not fully aware of their rights. They fear to report cases of domestic violence of which they are the victim. When such cases are reported to the police, the latter tends to be lenient towards the perpetrator of the violence.

iii. Recommendations

255. The APR Panel recommends that South Africa:

- Ensure the systematic and deliberate implementation of policies and laws on women's rights. [Government; Women's Organisations]
- Take more initiatives to promote the appointment of qualified women magistrates and judges. [Judiciary; Government]
- Assign more policewomen to cases involving violence against women. [Government; SAPS]
- Modernise traditional political governance systems to conform to the constitutional requirements of a non-racist, non-sexist society. [Government; Traditional Leadership Structures]

Objective 8: Promotion and Protection of the Rights of Children and Young Persons

i. Summary of the CSAR

256. South Africa ratified the Convention on the Rights of the Child on 16 June 1995, and the African Charter on the Rights and Welfare of the Child (ACRWC) on 7 January 2000. It has also ratified the Hague Convention on the Civil Aspects of International Child Abduction, and enacted national domesticating law to that effect.
257. The Constitution provides a strong foundation for the advancement and protection of the rights of children and young persons. Not only are persons under the age of 18 guaranteed most of the rights and freedoms enshrined in the Bill of Rights, but children also have special rights including: the right to legal representation at state expense (s35); family care or parental care; basic nutrition; shelter; basic healthcare services; social services; and protection from neglect, maltreatment, abuse, exploitative labour and detention (s28).
258. In South Africa, the youth have been in the mainstream of political movements since the 1976 Soweto students' uprisings against the apartheid regime. The then ANC President, Oliver Tambo referred to them as "the young lions of the struggle". In 1987, the South African Youth Congress was established. In 1994, the then Deputy President Thabo Mbeki convened and established a National Youth Commission, with responsibility for making policy on critical issues affecting the youth.
259. As is the case with women, the government has given a great deal of deliberate and systematic attention to the welfare of children, as they too were victims of violence and suffering during the apartheid period.
260. The Office on the Rights of the Child (ORC) is situated within the Presidency and within each provincial Premier's Office. Similar bodies are expected to be established in the mayoral offices, with the objective to ensure child-centred approaches across all spheres and levels of governance by coordinating and advocating appropriate activities. In addition, there is a wide range of special programmes and facilities and various government initiatives that are supportive of the constitutional rights of young persons.
261. There are, however, some defects and gaps. The number of children held in detention continues to rise despite efforts to find alternative placement. There are also a number of street children who are not sheltered. Poverty and unemployment continue to be obstacles for many parents to cater for their children. Despite their constitutional rights children with disabilities enjoy little access to education. Similarly, although foreign children in South Africa are constitutionally guaranteed the same rights as the children of citizens, children of refugees and asylum seekers have little access to social workers.





ii. Findings of the CRM

262. The CRM learnt that although the rights of children and young people are provided for in the Constitution, a great deal still needs to be done in the promotion and protection of their rights. Some parents continue to abuse their children, often beating them severely in the name of “discipline”. Although children have been given a hotline to the police, it is difficult to understand how that could be useful to a victimised and possibly traumatised child. Orphaned children are somewhat better treated through receiving government child grants.
263. Only those children who attend primary school receive free education. Early child development does not appear to be given priority. The government appears to have left young children’s development to parents who are presumed able to provide for their children. The question is what happens to children of poor parents who are unable to afford good education for their young children.
264. The CRM also heard that some children are not registered like other citizens of South Africa and do not have birth certificates. They are thus unlikely to have access to services to which they are constitutionally entitled. Unattended and uncared for, some resort to drugs, while others roam the streets. Other abuses of children include child trafficking, which is a key issue in South Africa, child prostitution, drug addiction, and sex tourism, especially for the girl child.
265. A number of children are born to teenage urban girls who are unable to cater for them. The inability to sustain these children and the need to remain in urban areas and towns drive these young girls to relocate the children to their home villages. Village children are looked after by their elderly grandparents, whose support and care are often inadequate. Due to lack of sufficient care, these children often escape and return to the towns to do odd jobs, hard labour or engage in immoral behaviour. This is total denial of children’s right to proper care, a matter which should be addressed with all urgency.
266. The children of refugees and undocumented persons suffer when security forces detain their parents. There does not appear to be a recognised system of taking into account the interests and rights of these unfortunate children, although the Constitution does provide for such rights and their protection. Young persons are particularly vulnerable to drugs, and the peddling of these lethal commodities is on the increase in South Africa. Globalisation and the increasingly open society expose South Africans, particularly black people, to undesirable foreign cultural practices and influences that are detrimental to the development of their own personalities and that of a peaceful, harmonious, prosperous South Africa.

iii. Recommendations

267. The APR Panel recommends that South Africa:

- Improve the quality of education, especially for marginalised and disadvantaged children. [Department of Education; Children's Rights Unit; Finance; Parliament]
- Revisit the manner in which security forces deal with refugees and undocumented persons, and effectively implement policies on the care of children of refugees. [Department of Home Affairs; Children's Rights Unit]
- Step up efforts at mitigating drug and human trafficking in view of their extremely negative impact on young persons. A public information campaign on the effects of drug abuse and trafficking should be systematically incorporated into school curricula and youth programmes. [Department of Education; Children's Rights Unit; SAPS; Department of Justice and Constitutional Development; CSOs]

Objective 9: Promotion and Protection of the Rights of Vulnerable Groups Including Displaced Persons and Refugees

i. Summary of the CSAR

Vulnerable Groups

268. The term “vulnerable groups” refers to ethnic minorities; refugees; migrant workers; the aged; displaced persons; lesbian, gay, bisexual, trans-gendered and inter-sex people (LGBTIs); people living with HIV and AIDS; and children orphaned due to HIV and AIDS. Between 3 and 6 million South Africans are moderately or severely disabled.¹⁵ The country has acceded to a number of international conventions relating to the protection of vulnerable groups and people with disabilities, and the government has expedited the determination of refugees in the country. The international instruments include, among other things, the:

- Convention relating to the Status of Refugees;
- Protocol relating to the Status of Refugees;
- Declaration on the Rights of Disabled Persons; and
- Organisation of African Unity's (OAU) Refugee Convention of 1969.

269. The Constitution provides for the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (s181 and s185). Since 1994, refugees were regarded as any other immigrant aliens. In 1998, a new Refugees Act was enacted that adopted and adapted most of the important principles in international refugee law, in particular the Geneva Convention and its protocol¹⁶ and the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.¹⁷ The enactment followed the country's

¹⁵ Judi Hudson, 2005. Concept Note: “Democracy and Vulnerable Groups”, Centre for Policy Studies, October, p. 6

¹⁶ Convention Relating to the Status of Refugees, 28 July 1951, entered into force on 22 April 1954; and Protocol Relating to the Status of Refugees, 1966, entered into force on 4 October 1967.

¹⁷ 10 September 1969, entered into force on 20 June 1974.



accession to the Geneva Convention on 12 January 1996 and the OAU Convention on 15 January 1996. South Africa has approximately 142 000 registered refugees and 115 000 pending applications. Many of the refugees come from Burundi, Côte d'Ivoire, the Democratic Republic of Congo, and Zimbabwe.

270. The Department of Home Affairs grants asylum to refugees in the country and has established a national immigration branch, which includes a refugees' affairs section. South Africa has also established a Counter Xenophobia and Counter Corruption Unit that works to prevent abuse of refugees and asylum seekers.
271. In spite of these laws, the refugee determination process faces serious challenges. Reports of incidents of bribery and extortion involving the police, as well as false-arrests sometimes appear in the press. Some of these illegal practices are alleged in a study published by a United States-based human rights NGO, Human Rights Watch. Problems of discrimination, crime and xenophobic tendencies continue to trouble refugees.

ii. Findings of the CRM

272. South Africa is faced with a major problem of refugees, displaced people and undocumented persons. The approach so far has been to take refugees to reception centres; to confine undocumented persons to centres where they can be documented and/or deported; and to extend humanitarian help to deserving cases. The number of cases is on the rise and the pressure on infrastructural and social services is felt at many levels. Given the scarcity of resources, tensions arise between citizens and migrants who compete for access to the same resources and services.
273. However, the Constitution grants some social rights to refugees, including basic health services and primary education. The problem is the general lack of awareness at local government level of the rights of refugees. There also appears to be no effective plans for ensuring that services are extended to refugees.
274. The CRM was informed that the practice of denying some rights to foreigners, as well as suspicion towards non-South African people, is a legacy of the apartheid era. Obviously, the constitutional democracy of South Africa led by people who, when fighting for liberation and freedom were themselves once refugees and enjoyed the hospitality of other countries, should be more understanding and compassionate.
275. Stakeholders informed the CRM that although the foreigners are welcome, they should abide by South African laws if they are to stay in the country. They also admitted that some refugees bring with them skills and experiences that are useful and helpful to the South African economy and thus enrich the country.

iii. Recommendations

276. The APR Panel recommends that South Africa:

- Strengthen anti-xenophobic institutions such as the Counter-Xenophobia and Counter-Corruption Unit. [Counter-Xenophobia and Counter-Corruption Unit; Parliament; Judiciary]
- Capacitate institutions mandated to protect vulnerable groups, and use education and sensitisation campaigns to increase public awareness on rights of vulnerable groups and the need for tolerance. [Department of Home Affairs; CSOs; SAPS]
- Seek ways and means of mitigating the “push factors” from neighbouring countries to reduce the influx of refugees, displaced and undocumented persons. [Presidency; Department of Foreign Affairs; Department of Home Affairs]
- Address the issues of excessive use of violence and corruption by security forces in handling refugees. [Department of Home Affairs; Parliament; SAPS]

