

Chapter 5

Human Rights in the "new" South Africa

South Africa entered the world of democratic nations on April 27, 1994, when national, non-racial, democratic elections were held for the first time in the history of the country. It was during these elections that Nelson Mandela was inaugurated as the first “black” president of South Africa.

The focus in this chapter is on the ways in which human rights are framed within this new democratic order in South Africa. I look at how human rights are constructed, and points at which they may be argued to be more inclusive than other constitutions of the world, including the United Nations Universal Declaration of Human Rights, of which South Africa is now a signatory. I focus mainly on the “new” Constitution of South Africa, and statutory bodies which have been established in terms of the Constitution. In this regard, I focus particularly on the Constitutional court of South Africa, the South African Human Rights Commission and the Commission on Gender Equality. In addition I also look at the Employment Equity Act of 1998 and the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000, which are legislations that have been put into place to operationalise the Constitution in terms of particular social groups and relations.

My argument in this chapter, is that despite attempts to make human rights more specific, the framing currently of human rights in South Africa perpetuates and reinforces the legalism, formalism and universalism of the Universal Declaration of Human Rights. In this regard, human rights in South Africa remain within a modernist and enlightenment project. However, the specification of sexual orientation rights in the Constitution, as well as “affirmative action” measures in regard to “black” people and women in particular, indicate a potential to make human rights more particular and substantive.

The Constitution of the Republic of South Africa

27 April, 1994 will remain indelibly engraved on the minds and hearts of South Africa, and in the history of South Africa, Africa and the world. On this day, all South Africans, for the first time in the history of the country, voted in the same election and were on the same voters roll. For the first time in the lives of "black" South Africans, they were recognised as equal before the law and entitled to political participation and exercised their 1st generation rights to vote. For the first time in the life of "black" South Africans were they able to belong to political parties of their choice, without fear of detention or being banned; hold the kinds of political beliefs and opinions they chose and asserted themselves in the ways they defined their own identities. The first democratic election in South Africa also for the first time recognised "black" South Africans' 2nd generation rights. "Black" South Africans, after years and years of struggle against apartheid, after many lives being lost and many people being maimed for life, and after life times of being subjected to the indignity, humiliation and injustices of racism and brutal apartheid repression, finally won recognition in the law as being citizens in the country of their birth and choice.

The 27 April 1994 elections in South Africa, thus, is a poignant example of the significance and importance of recognition in the law and by the law. The legal recognition of "black" South Africans as citizens of South Africa, on the basis of equality of all before the law, altered the political landscape of South Africa and restored the "dignity" of all South Africans (cf. Valli, 2004). It also provided the basis for "black" people to enter the political system, be members of parliaments on all levels of the country, and become president of the country. The official abolition of apartheid, which the 27 April 1994 elections signalled, is, thus, not only of titular and symbolic importance but critical to altering materially the positioning of "black" South Africans in the polity of South Africa, and as human beings. South Africa also was welcomed back into the community of democratic nations in the world because of this historic accomplishment. The recognition in

and by the law is, thus, important and does effect material changes in people's lives. This cannot be underestimated or undermined.

The 27 April, 1994 elections were made possible by the adoption, in 1993, of an interim constitution, which was the outcome of the negotiations that led to the changes in South Africa (see Levin, 1991). However, it is the Constitution of the Republic of South Africa of 1996 (hereafter referred to as the "Constitution") that encapsulates the dominant articulation of human rights in South Africa. In it one notices the centrality of notions of a "social contract", the importance of democratic representation and participation, and a commitment to a culture based on human rights. I look at the Constitution in the following terms: 1) The legacy of apartheid; 2) the positioning of people and construction of their identities; and, 3) universalism within the context of nation-building in a global economy. In approaching an analysis of the Constitution of South Africa in these ways, I want to demonstrate that human rights are framed as being historically contingent, and in that way also specific; universalist, both in the senses of being nationalist and internationalist; modernist in its references to social categories; and, selective in the way it privileges particular forms of identities over others.

The Preamble of the Constitution reads as follows:

We, the people of South Africa,
Recognise the injustices of our past;
Honour those who suffered for justice and freedom in our land;
Respect those who have worked to build and develop our country; and
Believe that South Africa belongs to all who live in it, united in our
diversity.
We, therefore, through our freely elected representatives, adopt this
Constitution as the supreme law of the Republic so as to –
Heal the divisions of the past and establish a society based on democratic
values, social justice and fundamental human rights;

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by the law;
Improve the quality of life of all citizens and free the potential of each person; and
Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.
May God protect our people.
Nkosi Sikelel' iAfrica. Morena boloka stejhaba sa heso.
God seen Suid-Afrika. God bless South Africa.
Mudzimu fhatutshedza Afrika. Hosi Katekisa Afrika (Preamble of the Constitution of South Africa, 1996, pg. 1).

There are three important aspects about the Preamble of the Constitution to which I want to draw attention. First, is the historical specificity and context of the Constitution. Second, is the centrality of the law in establishing a democracy based on a culture of human rights in South Africa. Third, is the universality and inclusivity of the sentiments expressed within it.

There is explicit noting of the historical context within which this Constitution has emerged and the ways in which it is meant to address issues of the past in the future development of democracy in South Africa. The Constitution notes that it replaces what existed under apartheid and attempts to "heal the divisions of the past". In order to do so, it "recognises the injustices of our past", "honour those who suffered" in the "past" and all those who have contributed to "build(ing)" and "develop(ing)" South Africa. In these senses, the Constitution cannot be understood outside of its historical context and the legacies of apartheid. Its purpose and point of emergence is to (re)address the "injustices" and "divisions" of apartheid and to "lay the foundations of a democratic and open society" which were illegitimated and repressed under apartheid. The Constitution may be seen as being substantive because it specifically aims at addressing a particular historical social formation, as opposed to being a generalised articulation of constitutional

provisions that could very well have been in any part of the world. The Constitution particularly (re)addresses South Africa and its apartheid history. It, therefore, may be argued to encapsulate a specificity in time and space.

The Constitution encapsulates **a specificity in time** in that it (re)addresses the past in the present, in order to construct a democratic future. It encapsulates **a specificity in space** because the idea that “South Africa belongs to all those who live in it” is also meant to signal that South Africa is no longer formally divided along racial, ethnic or tribal lines and that all South Africans belong equally to South Africa, "black and white", and which are seen in deracialised and desegregated ways.

South Africa, as one country, as opposed to a conglomeration of racist “homelands” and “group areas” is one “sovereign state”. The inclusivity with which the "people of South Africa" is described, also a generalisation, has the purpose of "redressing" the racism and exclusivist definitions of human rights under apartheid white supremacy and heterosexism, inter alia.

The Constitution also places democracy and a culture based on human rights as foundational to the South African political order. In this regard, the Constitution recognises the importance of a “social contract”, the “supremacy of the law” and the “right” of all South Africans to protection “by the law”. The Constitution is adopted “through our freely elected representatives” and “based on the will of the people”. In this way, the Constitution is the outcome of “free(ly)” consenting people, who elect their representatives, “authority” or “government” and who thus are “based on the will of the people”. As such, the conditions of a “social contract” are noted and met in the Constitution. The Constitution also notes that given the legitimate existence of a “social contract”, it places the Constitution as “the supreme law of the country” to which all citizens are legally bound. The centrality of the law in the arbitration of social and individual conflicts is thus put into place. This is, of course, premised on the understanding that “all citizens” are guaranteed “equal protection by the law”.

One can notice the central importance the “law” is accorded in order to operationalise democracy and human rights in South Africa. As will be seen later, the "supremacy of the Constitution" is further reinforced by the establishment structurally, and through constitutional provisions, of the South African constitutional court, which is the "highest court" in the country "on constitutional matters".

However, the centrality of the law in the establishment of democracy in South Africa also puts into place a legalistic orientation to human rights. In Chapters 1 and 2, it was argued that such a legalistic orientation to human rights is necessary due to both the conditions of a "social contract" and also because of the genealogy of human rights, as "rights". But, it was also argued that such legalistic approaches to human rights may be necessary but not sufficient. They remain insufficient because human rights remain at the level of the formal, generalised and abstract due to the legalistic framing of human rights.

The Preamble of the Constitution also articulates a universalism in the way in which it refers to South Africans. South Africans are viewed in generalised terms only: as “the people of South Africa”, “every citizen” , “all citizens” and “our people”. In this way, the Constitution takes on a distinctly universalist register. However, given the context of emergence of the Constitution and its links with the “past”, the universalism that is used here also refers to an inclusivist view of South Africans. South Africans are viewed in inclusivist terms due to the “divisions of the past” which were put into place because of apartheid.

However, as a “sovereign state” South Africa also enters into the “family of nations” and thereby the Constitution signals another level of universalism, that of being in an international order. Thus, the Preamble of the Constitution projects a universalism that is at once nationalistically and historically inclusivist, and, at the same time, a universalism that is internationalist. More on this is discussed later in this chapter in terms of South Africa's location within a global economy.

The Preamble of the Constitution is followed by the Bill of Rights, which outlines the basic formal equality provisions pertaining to all South African citizens. These provisions also reinforce the universalism and legalism of the Constitution. However, it is in the Bill of Rights that one gets a clearer sense of the ways in which human identities are viewed. It is to these that I now turn attention.

Universalism of Human Identity in the Constitution

The Bill of Rights in Chapter 2 of the Constitution is the most significant in the provision of human rights. The generally accepted legal format in the provision of human rights, that is in terms of 1st generation (individual) rights, 2nd generation (social rights) and 3rd generation rights (environmental, developmental and limitation of rights) also frame the Bill of Rights in the Constitution.

Articles 9 to 14 of Chapter 2 of the Bill of Rights outline 1st generation, individual rights. They cover the rights to equality (Article 9), human dignity (Article 10), life (Article 11), freedom and security of the person (Article 12), slavery, servitude and forced labour (Article 13) and privacy (Article 14). Except for Article 9, Articles 10 to 14 continues to refer to human beings in generalized, depersonalized and universalized terms only. Words such as "everyone", "no one" and "person" are used throughout. On the one hand, such references are meant to signal equality before the law and therefore represent necessary, formal equality provisions. On the other hand, the level of generality of such formal equality provisions does not get to address particular people in their specific conditions of existence in South Africa.

Article 9 of the Bill of Rights, however, refers specifically to categories of people, and in this way is more specific than the other Articles. Article 9 states:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair (Constitution of the Republic of South Africa, Section 9, Chapter 2, 1996).

In the above, one may notice the continuity of the use of generalised terminology in the description of people. Words such as "everyone", "anyone" and "any person" are to be found in this Article too. However, Article 9 (2) indicates the possibility of substantive equality provisions in that the state is empowered to "take measures" that may be deemed necessary to "protect or advance persons or categories of persons, disadvantaged by unfair discrimination". This means that the South African government can legislate in relation to particular people or groups of people who may have been subject to forms of discrimination. In addition Article 9 (4) reinforces this by enabling the state to pass "national legislation" "to prevent or prohibit unfair discrimination". Whilst Article 9 (2) and (4) indicate the potential to put substantive equality provisions in place. Later in this chapter I will show how the Employment Equity Act of 1998 and the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 attempt to make such equality provisions more substantive.

Article 9 (3) of the Bill of Rights is most suggestive of the ways human identities are viewed in the Constitution. Article 9 (3) notes 16 different identities: "race,

gender, sex, pregnancy, marital status, ethnic or social origin, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth". The types of identities referred to here amount to 16, if "ethnic or social origin", are counted separately. There are three points I wish to make in relation to the projection of human identities in these terms within the Constitution: First, the continuity of enlightenment and modernist influences in conceptualising human identities within the Constitution. Second, the inclusivity within the Constitution, which extends the United Nations Universal Declaration of Human Rights. Third, despite the apparent comprehensiveness of Article 9 (3) human identities remain conceptualised in formal terms at the level of social category generalisation and thus remain depersonalised, legalistic and abstract.

The enlightenment influences in Article 9 and consequently Article 9 (3) are evident in the claim of "equality in nature", which characterises not only Article 9, but also all the 1st generation rights in the Constitution (Articles 9-14). Although Article 9 (3) specifies particular categories of people, it does so in the overall context of 1st generation, universalised rights and the rest of Article 9. Whilst people are noted to differ in terms of their membership of particular social categories, they are constitutionally guaranteed equality before the law and protection from discrimination, as universalised human beings.

But, the Constitution does recognise 16 different identities. In comparison the United Nations Universal Declaration of Human Rights Article 2 notes only 12 identities. The United Nations Universal Declaration of Human Rights Article 2 states:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory, to which a person belongs, whether it is independent,

trust, non-self-governing or under any other limitation of sovereignty (UN Universal Declaration of Human Rights, Article 2, 1948).

The South African Constitution Article 9 (3), thus, expands the types of social categories to which people are thought to belong. This points, on the one hand, to the South African Constitution being more comprehensive than the United Nations Universal Declaration of Human Rights. On the other hand, it also points to human rights being historically contextual and subject to change.

The United Nations Universal Declaration of Human Rights was promulgated in 1948; the South African Constitution was adopted only in 1996. South Africa, thus, was in a position to draw on human experiences globally and the kind of lives they live. The expansion of social categories in the South African Constitution, thus, represents an acknowledgement of human life during modernity. In these experiences during modernity feminists have enabled us to distinguish between "gender" and "sex", and the particularity of being "pregnant" (Wolpe *et al*, 1997). Gay and lesbian movements have enabled us to distinguish between "sex", "gender" and "sexual orientation" (Gevisser & Cameron, 1994). And, the disabled people's movements have alerted us, during modernity, to the particular experiences of disabled people and the implications of these for human rights (DPSA, 1994). The South African Constitution, thus, is able to be more comprehensive than the United Nations Universal Declaration of Human Rights because it draws on, as it re/presents, modern experiences of human lives in terms of modernist social categories. However, whilst the South African Constitution, mainly due to Article 9 (3), may be argued to be more comprehensive and inclusivist than the United Nations Universal Declaration of Human Rights, the references to people belonging to such an expanded list of social categories projects human identities in the terms of such social categories.

Article 9 (3) does not indicate how combinations between social categories may be viewed. The possibility of a post-modern view of human identity as multiple, de-centred and complex does not seem present in the Constitution. How would the

violation of the human rights of a "black", gay, working class man be understood, for example? Can one combine, in legal terms, the social categories that such a man occupies? The significance of this is that, and it is more likely than not, that this gay, "black", working class man may be discriminated against in ways that are organically informed by an intersection between the variables of all the social categories of 'race', "gender", "sex", "sexual orientation" and "social origin", as was the case with Simon Nkoli discussed in Chapter 4, for example. Thus the Constitution does not allow for a more immediate application of human rights in specific and particular ways.

2nd generation, social rights are to be found in Articles 15 to 35 of the Bill of Rights, Chapter 2 of the Constitution. They outline "freedom of religion, belief and opinion" (Article 15), "freedom of expression" (Article 16), "freedom of assembly, demonstration, picket and petition" (Article 17), "freedom of association" (Article 18), "political rights" (Article 19), "citizenship" (Article 20), "freedom of movement and residence" (Article 21), "freedom of trade, occupation and profession" (Article 22), "labour relations" (Article 23), "environment" (Article 24), "property" (Article 25), "housing" (Article 26), "health care, food, water and social security" (Article 27), "children" (Article 28), "education" (Article 29), "language and culture" (Article 30), "cultural, religious and linguistic communities" (Article 31), "access to information" (Article 32), "just administrative action" (Article 33), "access to courts" (Article 34), and "arrested, detained and accused persons" (Article 35). In each instance, 2nd generation rights continue to use generalised language. 2nd generation rights are articulated in the universalist language of "every person" or "all people" or "everybody" and thereby generalises and universalises, rather than being specific and particular.

3rd generation rights or the limitation of rights are contained in Articles 36 (limitation of rights), 37 (states of emergency), 38 (enforcement of rights) and 39 (interpretation of the Bill of Rights). Articles 36 to 39, then, outline the limitation of the rights provided for in the Bill of Rights, limitations in the interpretation of them and special legal arrangements in the instance of a state of emergency being

declared or if and when particular rights need to be enforced. Not in any of these instances are human rights and/or human identities viewed specifically, individually, personally or particularly, since the articulation of 3rd generation rights are about the procedures to be followed by "everybody".

What, then, can be said about the framing of human rights and identities in the South African Constitution? Human rights and identities are framed in the Constitution as:

- Based on an enlightenment notion of equality in nature that is universalist.
- Legalistic and generalised in respect to 1st, 2nd and 3rd generation rights, where formal legalism is emphasised, despite provisions for substantive equality being present in some of the Articles.
- Modernist in its recognition of social categories to which people belong, but remains generalised and formal at the level of social categorisation.
- Inclusivist, but not necessarily more specific or personal.

Given this background of human rights provisions in the Constitution, I want to now look at the establishment of statutory bodies such as the Constitutional Court of South Africa, the South African Human Rights Commission and the Commission on Gender Equality. Being established directly through constitutional provisions, such structures are supposed to make the Constitution more personal, real and alive. In addition, I also look at the Employment Equity Act of 1998 and the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 in order to discern whether human rights in South Africa do in fact become more personal, specific and real through such legislation.

Constitutionally Provided Statutory Bodies: Making the Constitution more specific?

The Constitutional court, South African Human Rights Commission and the Commission for Gender Equality are "state institutions supporting constitutional

democracy" (SA Constitution, Chapter 9: 99). Their purpose is to monitor, uphold and promote the Constitution. There are six such institutions provided for in the Constitution, including the Public Prosecutor, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Auditor-General, and the Electoral Commission. Later in the Constitution (Schedule 6: 161) the South Africa Reserve Bank, the Judicial Service Commission and the Pan South African Language Board are also indicated as "constitutional institutions". However, I only focus on three of these constitutional institutions here: The Constitutional court, South African Human Rights Commission and the Commission for Gender Equality.

The Constitutional Court

The Constitutional court is "the highest court in all constitutional matters" (SA Constitution, Chapter 8, Section 167 (3) a: 90) and was established in 1996, soon after the adoption of the Constitution itself. The Constitutional court has heard cases on "constitutional matters", ranging from education rights, women's rights to the rights HIV+ /AIDS pregnant women and mothers and the right of their children to receive antiretroviral medication (Constitutional Court of South Africa, 2000). However, the Constitutional court, is the "highest court" on "constitutional matters" in the country, and, as such, is decidedly legalistic in its purpose and modes of operation. It is the constitutional court that ensures the maintenance of the legal, necessary conditions of constitutional provisions. It is the constitutional court that maintains the formalism, legalism and universalism of human rights provisions and adherence in South Africa. In these ways, the Constitutional court does not render human rights more personal or specific.

However the Constitutional court, through its rulings, makes human rights apply legislatively in specific ways within given contexts. Two examples may assist to clarify this. In 1995/96, an Afrikaner school in the Potgietersrus area of the Northern Province, attempted to deny "black" pupils admission to "their" school on the grounds that the pupils were not Afrikaners and did not speak Afrikaans as

their first language (Constitutional Court of South Africa, 1998; Henrard, 1996). The Constitutional court ruled against this school and ordered them to enrol the said pupils, because their act was considered to be unconstitutional and a discrimination against the pupils on the basis of their 'race', and a denial of their right to education, thereby a violation of the equality principle.

In another case, the Constitutional court ruled in favour of an HIV/AIDS infected child to be admitted into a Johannesburg primary school, after the school refused to accept the child due to the child's HIV/AIDS status (Constitutional Court of South Africa, 1998, GDE Policy Register, 1996).

In both of these cases, the Constitutional court, through its rulings, made the constitutional provisions apply to very local, specific and, in these cases, personal contexts. The generalisation of human rights provisions were interpreted by the Constitutional court in ways that made them apply specifically, address particular individuals in particular contexts and articulate what of their human rights were at work in these situations. Thus, the actions of the Constitutional court may lead to substantive, specific and personal applications of human rights.

Constitution Hill

The establishment of the Constitutional court in South Africa, however, is not only about the existence and functioning of the court. It is tied to a broader project of advocating and upholding human rights through the development of "Constitution Hill". The Constitutional court is located in Braamfontein, Johannesburg, and it is on the site where a prison – The Fort – existed under apartheid. The location of the Constitutional court on the grounds of The Fort, which is located on a hill (hence the name Constitution Hill), is also intended to symbolically signal the "redressing" of the apartheid past in the promotion of human rights in current day South Africa. In order to reinforce this symbolic signal, the Constitutional court is surrounded by works of art and documentary, archival material that denote struggles against apartheid and human rights

violations in other parts of the world. Constitution Hill regularly hosts exhibitions, seminars and performances which address issues related to human rights, and which are open to the general public.

The development of Constitution Hill and the activities that are organised on it are attempts to make "the Constitution a living document" (Constitution Hill, 2004). What is significant here is that whilst the Constitutional court is distinctly legalistic and formal, Constitution Hill enables the Constitutional court to reach beyond the court to the level of people's experiences and expressions. Constitution Hill, then, represents an attempt to go beyond the legalistic, depersonalised and formal nature of the Constitution, law and human rights, by allowing for ordinary people to engage with, display and perform about their own human rights experiences as individuals in personal and specific ways.

The South African Human Rights Commission

The South African Human Rights Commission (SAHRC), also formally established in 1996, is a statutory, "constitutional institution" whose purpose it is to monitor, uphold and promote human rights, and educate and train people in human rights. In this regard, the SAHRC is a "watchdog" of the South African government and its adherence or otherwise to human rights in South Africa. Since its establishment, the SAHRC has monitored the activities of the South African government, and has reported annually and accordingly to the United Nations Human Rights Commission. The SAHRC has also provided training and education to people in most sectors of South African society in terms of human rights; ranging from labour, to the police, and education. They have also embarked on a series of human rights campaigns including the establishment of a "consultative forum on racism in the South African public education and training sector" in 1999, and a "roll back xenophobia" campaign since 1997. In addition, the SAHRC regularly receives complaints about human rights violations to which they offer legal assistance.

The SAHRC has, given its track record, monitored, promoted, trained and responded to human rights issues and concerns in South Africa. Their treatment of human rights, however, has been framed by a formal legal rationality and an attempt to address human rights issues more sectorally, rather than nationally and generally. The SAHRC's legal rationalist treatment of human rights is most evident in its attempts to popularise human rights in each sector of South African society. Whether the SAHRC had been engaging with the police, educators or workers, their dissemination of human rights to such people has been in terms of what is contained in the Constitution of South Africa, in other laws and international human rights "instruments", including the United Nations Universal Declaration of Human Rights (SAHRC, 2000). However, the SAHRC has also attempted to make such human rights provisions more applicable and specific to such sectors. In this way, the SAHRC attempts to make human rights more particular and personal, to workers, youth, educators or the police, for example. But they have done so in ways that are formal and legalistic by emphasising mainly the legal provisions that exist in relation to the sector being focused upon. Thus, for example, workers rights and laws pertaining to workers are looked at when the SAHRC deals with workers (SAHRC, 2000). In their campaigns, such as the ones on racism in public schooling and xenophobia, the attempts have been to engage more with the specificity of such experiences in individual, personal lives and, thus, it is in the SAHRC's campaigns, as opposed to its other activities, that one may notice a more particular approach to human rights.

The Commission for Gender Equality

The Commission for Gender Equality (CGE) was established in 1998. Its brief is to specifically monitor and promote the human rights of women in particular. Given the brief of the CGE, the CGE is more in a position to make human rights more personal and specific, at least with regard to women. However, since its establishment the CGE has been hamstrung by lack of resources, both material and human. The CGE offices are under-staffed and they do not have nearly enough of the budget they minimally require in order to carry out their tasks of

upholding and promoting women's rights throughout South African society (Fester, 2002). It is not surprising, therefore, that despite the existence of the CGE, the rate of the rape of women in South Africa remains the highest in the world, domestic violence against women continues, and public spaces, including schools, remain "unsafe" places for women (Cf also Wolpe *et al*, 1997; and Chisholm and September, 2005).

Taken together, the Constitutional court, the SAHRC and CGE are important "constitutional institutions". They have the potential to make human rights more specific and personal.

Legislative Measures: Making Human Rights More Specific?

In addition to such "constitutional institutions", the Constitution also allows the South African government to "enact measures" that it may consider necessary "to prevent or prohibit unfair discrimination" (Article 9 (4)) and, "to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken" (Article 9 (2)). The Employment Equity Act of 1998 and the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 are two examples of such "legislative measures" taken by the South African government to further "achieve equality". It is to these Acts that I now turn attention.

The Employment Equity Act of 1998 (EEA of 1998) is an important and interesting legislation because it overtly notes the discrimination of people in accessing the economy of the country. As noted in Chapter 4, the apartheid system put into place apartheid capitalism, which not only favoured "white" people throughout the economy, but also ensured that these were firmly in the hands of "white", homophobic, heterosexist, Afrikaner men. Whilst South Africa remains a country based on a capitalist economy, the purpose of the EEA of 1998

is to allow increased access to the economy in ways that "redress" the inequities of apartheid.

The Preamble of the EEA states:

Recognising--

that as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national labour market; and

that those disparities create such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws,

Therefore, in order to--

promote the constitutional right of equality and the exercise of true democracy;

eliminate unfair discrimination in employment;

ensure the implementation of employment equity to redress the effects of discrimination;

achieve a diverse workforce broadly representative of our people;

promote economic development and efficiency in the workforce; and

give effect to the obligations of the Republic as a member of the International Labour Organisation (Department of Labour, 1998).

The EEA is explicit about being a substantive equality provision. It notes that experiences of discrimination "cannot be redressed simply by repealing discriminatory laws". In so doing, it recognises a positive obligation on the state to provide "affirmative action" measures, which specifically redress the inequities

of the economy and measures that can be used to enable discriminated people to gain access to economic positions.

In Chapter 2 of the EEA, forms of discrimination are spelt out, including the use of psychometric and medical tests as conditions for employment. Chapter 3 in detail provides guidelines for employers to implement the EEA, including processes of consultations with employees, developing an employment equity plan and ways for recording progress. Chapter 4 of the EEA provides for the establishment of the Commission for Employment Equity and outlines the nature of its composition, roles and responsibilities. Chapter 5 outlines the procedures to be followed in regard to monitoring compliance to the EEA, and legal proceedings to be used in regard to matters related to the EEA, specifying in particular the roles of the labour courts and the Director General. As can be seen from this, the EEA is a piece of legislation that provides for substantive equality in regard to employment in South Africa.

The EEA has also significantly expanded the provisions of the Equality Clause in the Bill of Rights of the Constitution by adding "HIV status" to the list of social categories recognised. The EEA states:

No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth (EEA, Article 6, 1998).

In this way the EEA also reflects human rights as historically contingent and dynamic. HIV/AIDS or "HIV status" as the EEA refers to it, is recognised due to the phenomenal rise in HIV/AIDS in South Africa, which is currently of pandemic proportions. HIV/AIDS is also an issue around which a powerful social movement exists, the Treatment Action Campaign (TAC) which has taken

pharmaceutical companies to court for not making antiretroviral drugs affordable to people in developing country contexts. It has also lobbied government to enact laws and policies regarding HIV status and has brought applications of discrimination against people with HIV/AIDS to the courts, including the constitutional court. It would be fair to say the recognition of HIV status in and by the law is due in part to the struggles waged by the TAC.

Currently, the EEA privileges 'race' and gender in its elaboration of affirmative action and to whom it ought to be primarily directed. To a lesser extent disabled people are also recognised. In this way, whilst the EEA specifically addresses the particularities of human rights protections in relation to "black" people and women, and less so, disabled people, it does privilege these identities in the list of social categories identified in the Equality Clause of the Constitution and in the EEA itself.

The conditions that allow for the privileging of 'race' and gender are linked to the history of apartheid and the need to redress the effects it had on "black" people and women in particular. The inclusion of references to people with disabilities is also partly tied to this history, given that close to 60% of disabled people in South Africa were not born disabled but acquired disabilities under apartheid in the face of police violence, torture, guerrilla warfare and stepping on land mines (cf. DPSA, 2000). Thus, the conditions and rationale for the privileging of 'race', gender and disability is historical and context specific to South Africa. But, the EEA does not pay such attention to other forms of identities. Sexual orientation, for example, does not get explicit or detailed treatment in the EEA (see also Carrim, 1998).

It is important to keep in mind that the EEA is law. It is distinctly within the frame of formal legalism, abstract, rationalist and masculinist. It also provides for more formal structures, like the commission on employment equity, labour courts and the office of the director general.

The Promotion of Equality and Anti-Discrimination Act of 2000 (PEADA) is similar to the EEA, and like the EEA it also recognises "HIV status" as a social categorisation that needs to be included in the Equality Clause. The Preamble of the PEADA notes 3 features explicitly and which need to be highlighted here. It notes that the PEADA is a direct response to the provisions of Article 9 of the Constitution, which empowers the state to enact measures necessary to prevent unfair discrimination. It also notes that forms of discrimination are "deeply embedded" and include people's "practices" and "attitudes". Finally the PEADA also notes that provisions like PEADA are also motivated by "international organisations". The Preamble states:

The consolidation of democracy in our country requires the eradication of social and economic inequalities, especially those that are systemic in nature, which were generated in our history by colonialism, apartheid and patriarchy, and which brought pain and suffering to the great majority of our people;

Although significant progress has been made in restructuring and transforming our society and its institutions, systemic inequalities and unfair discrimination remain deeply embedded in social structures, practices and attitudes, undermining the aspirations of our constitutional democracy;

The basis for progressively redressing these conditions lies in the Constitution which, amongst others, upholds the values of human dignity, equality, freedom and social justice in a united, non-racial and non-sexist society where all may flourish;

South Africa also has international obligations under binding treaties and customary international law in the field of human rights which promote equality and prohibit unfair discrimination. Among these obligations are those specified in the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Elimination of All Forms of Racial Discrimination;

Section 9 of the Constitution provides for the enactment of national legislation to prevent or prohibit unfair discrimination and to promote the achievement of equality;

This implies the advancement, by special legal and other measures, of historically disadvantaged individuals, communities and social groups who were dispossessed of their land and resources, deprived of their human dignity and who continue to endure the consequences;

This Act endeavours to facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom (Promotion of Equality and Anti-Discrimination Act, 2000, Preamble)

The PEADA provides for the establishment of what it calls "equality courts" which empowers "every magistrate and high court" in South Africa to decide on matters pertaining to discrimination. It also provides for the establishment of an "equality review committee" which is made up of constitutional bodies, discussed above, whose purpose is to monitor the implementation of the PEADA and to recommend changes to it if necessary. Thus, the prime effect of the PEADA is the establishment of more formal, legalistic structures in civil society. The PEADA re-articulates the personal in formal and legalistic terms and draws civil society "watchdogs" into the formal workings of the state itself. For example, the SAHRC may receive a complaint of a human rights violation. The matter will be referred to the Equality Court where the matter will be resolved in legalistic terms, following the normal processes of the court. Thus whilst the PEADA recognises forms of discrimination to be "embedded" in personal and individual experiences, it suggests that formal provisions like "special legal and other measures" can address these.

What is important to note in relation to the Preamble, is that among the motivations for the passing of the PEADA are formal obligations that the South

African government has in the global political economic order, and in respect to international human rights instruments. In other words, the operations of PEADA attempt to combine formal modes of addressing individual's lived experiences with a formal state response to international obligations. The PEADA was adopted in 2000, on the eve of the World Conference Against Racism which was held in South Africa in 2001, and the World Summit on Sustainable Development (WSSD) which was also hosted by South Africa in 2002. To ensure that the PEADA can also be showcased at the WSSD, "socio-economic" status of people is included in Article 34, the second last Article in the Act which refers to "HIV/AIDS, nationality, socio-economic status and family responsibility and status".

The framing of human rights in South Africa is impacted by the play of forces within the global political economy (Carrim & Keet, 2005). Given that on international levels the mode of interaction is between nation-states, it follows that it would take on a formal, generalised and legalistic frame. One can notice the ways in which such a pressure ensures that an Act like the PEADA could, even in the instance of substantive equality provisions, which are supposed to be more individual, specific and personal, to be translated (and transmuted) into formal, legalistic abstractions. Hence, the global political location of human rights in South Africa should be taken into account. The framing of human rights in South Africa is linked to forces within the global political economy (see Motala and Pampallis, 2001). Human rights in South Africa is a matter of South Africa's inclusion in the "world of nations", particularly the United Nations. They are also tied to developments in Africa like those of the African Union and NEPAD (New Economic Programme for African Development).

The purpose of Chapters 3, 4 and 5 has been three-fold. First, they attempt to develop the theoretical tools to develop a sociology of human rights that would be able to capture the complexity of people's individual lives as they are actually lived, and avoid the pitfalls of reductionism, structuralism and over-generalisation. Second, the purpose has also been to demonstrate what such a

theoretical framework would entail when applied. Third, Chapter 5 has also explored the ways in which human rights are currently framed in the post-apartheid South African context. In Chapters 4 and 5, then, I have attempted to apply considerations of human rights to a particular context, in relation to particular social categories and identities, and in regard to the lives of specific individuals. The purpose has also been to show how human rights are articulated in existing policy and legislative texts in contemporary South Africa.

I have shown that a theory of articulation and portraiture provide valuable tools in balancing macro and micro forms of analyses, and, structure and agency. In applying them to apartheid South Africa they have enabled me to deconstruct apartheid in non-reductionist and non-essentialist ways in order to show the complex interplay of forces in its constructions. I have been able to explore the fields of religion, science and political economy in macro terms and also show how they have impacted upon the formation of particular identities in relation to 'race', gender and sexual orientation. This has also entailed showing the intersections between such social categories, and prevented an essentialism in terms of categories and homogenising of the people within such categories. Through this, I could show that not all men are the same, and that maleness intersects with, as it is constructed by, 'race' and sexual orientation, for example. It also allowed for a more complex portrait of individual lives including the points of tension and contradiction within them.

I have also shown that human rights in the contemporary South African situation are a significant shift from apartheid. Equality provisions are in existence, a culture of human rights is being promoted and democracy being consolidated consciously. Indeed Mandela and Nkoli would live radically different lives in the "new" South Africa. Mandela and Nkoli would have their human rights protected, be regarded as citizens, and would not be discriminated officially in terms of their 'race' or political views. In addition, as a gay man, Nkoli would have his rights protected formally as well. I have also shown that in the "new" South Africa, whilst there is a fundamental shift from apartheid, human rights tend to be framed

in generalised, legalistic and formal ways. However, I have also indicated that there are many instances of substantive equality provisions which attempt to make human rights more applicable to particular situations and people's lives. The statutory organizations such as the Constitutional Court, and the accompanying development of Constitution Hill, the Commission for Gender Equality and the South African Human Rights Commission, as well as legislation such as the Employment Equity Act and Promotion of Equality and Anti-Discrimination Act are significant in this regard. However, I have also noted that there is much room still left to make such provisions more substantive and to put in place other measures.

Human rights in the "new" South Africa are inclusive, comprehensive and move towards greater substantive provisions. However, they remain framed within universalised, generalised and legalistic ways like the Universal Declaration of Human Rights. At the same time, though, the framing of human rights in South Africa currently also tends to undermine the contradictions and tensions in its own articulations. These refer to juxtaposing human rights with global capitalism, promoting a universalism and at the same time wanting to demarcate the particularity of South Africa and its legacies of apartheid. As such, whilst a considerable transformation of apartheid constructions, human rights in the "new" South Africa are based on the provisions of formal and substantive equality. These are, however, more substantive and comprehensive than the Universal Declaration of Human Rights.

In Chapters 6 and 7 which follow, I focus particularly on human rights in education and human rights education. I look first at schooling under apartheid, and then look at the ways in which human rights are framed in the new education and training system of South Africa, including a discussion on conceptions of schooling, education and pedagogical practice, as well as reviewing briefly some approaches to human rights education from international experiences.

Human rights education and human rights in South African education is the prime focus of this study. However, in order to arrive at an analysis of human rights (in) education, it has been necessary to chart out the theoretical approach with which human rights are to be analysed. Chapters 1 to 5 have served this purpose. In the same vein, it is important to also outline how human rights (in) education are conceptualised and what approach(es) is to be adopted in the analysis of them. This study has empirically researched what pertains with regard to human rights in South African education. However, before discussing what the methodology for the research is, and what the data reveals, it is necessary to discuss approaches to education and schooling, human rights education, human rights in education and education as a human right. It is these that are focused on in the chapters that follow.