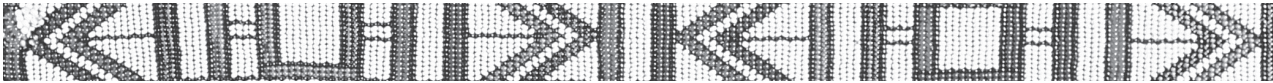


# South Africa

## Justice Sector and the Rule of Law



A review by AfriMAP  
and  
Open Society Foundation for South Africa



OPEN SOCIETY FOUNDATION

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Published by:  
Open Society Foundation for South Africa

ISBN: 1-920051-22-8

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Design by: Jeanne Criscola/Criscola Design, New York  
Layout and printing by: Compress, South Africa

Cover image: Headband, 20th century Ndebele; South Africa Glass beads, fiber 20 1/4 x 2 1/2 in.  
Collection of the Orlando Museum of Art, gift of Norma Canelas and William D. Roth

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# List of acronyms

AfriMAP	Africa Governance Monitoring and Advocacy Project
ACDP	African Christian Democratic Party
ANC	African National Congress
APRM	African Peer Review Mechanism
AWB	Afrikaner Weerstandsbeweging
AU	African Union
AZAPO	Azanian People's Organisation
CALS	Centre for Applied Legal Studies
CSSDCA	Conference on Security, Stability, Development and Co-operation in Africa
CPF	Community Police Forum
CSPRI	Civil Society Prison Reform Initiative
CV	Curriculum Vitae
DA	Democratic Alliance
DoJCD	Department of Justice and Constitutional Development
ENE	Estimates of National Expenditure
FBI	Federal Bureau of Investigation
FXI	Freedom of Expression Institute of South Africa
HURISA	Human Rights Institute of South Africa
ICD	Independent Complaints Directorate
ICESR	International Covenant on Economic and Social Rights
IDASA	Institute for Democracy in South Africa
IFP	Inkatha Freedom Party
IPV	Independent Prison Visitor
JSC	Judicial Services Commission
LLB	Bachelor of Law degree
LSSA	Law Society of South Africa
MEC	Member of the Executive Council (provincial executive)
MTEF	Medium-Term Expenditure Framework
MTSF	Medium-Term Strategic Framework
NDPP	National Director of Public Prosecutions

NEC	National Executive Council (of the ANC)
NEPAD	New Partnership for Africa's Development
NGO	Non-governmental Organisation
NICRO	National Institute for Crime Prevention and the Reintegration of Offenders
NNP	New National Party
NPA	National Prosecuting Authority
OAU	Organisation of African Unity
OHCHR	Office of the UN High Commissioner for Human Rights
OSF-SA	Open Society Foundation for South Africa
PAGAD	People Against Gangsterism and Drugs
PAIA	Promotion of Access to Information Act
PAJA	Promotion of Administrative Justice Act
PEACA	Peninsula Anti-Crime Agency
PLT	Practical Legal Training course
Poslec Seta	Police, Private Security, Legal, Correctional Services and Justice Sector Education and Training Authority
SABC	South African Broadcasting Corporation
SAHA	South African History Archive
SAHRC	South African Human Rights Commission
SANDF	South African National Defence Force
SANGOCO	South African Non-Governmental Organisation Coalition
SARS	South African Revenue Service
SAPS	South African Police Service
SCOPA	Standing Committee on Public Accounts
SIU	Special Investigating Units
TAC	Treatment Action Campaign
TRC	Truth and Reconciliation Commission
UN	United Nations
USA	United States of America
WLC	Women's Legal Centre

# Acknowledgements

The preparation and finalisation of this report would not have been possible without the valuable contributions of a number of individuals and research organisations.

Key amongst these contributors is Anthea van der Burg (OSF-SA), who played many roles from researcher to editor to manager. Without her pivotal role, this report may yet be a work in progress.

Karla Saller undertook the task of legal editor and not only did a superb job, she enjoyed herself too.

Sean Tait and Louise Ehlers, senior members of staff at OSF-SA, contributed excellent research on the Criminal Justice System in South Africa.

A panel of researchers, comprised of the Human Rights Institute for South Africa (HURISA), the Institute for Security Studies, and Chaskalson and De Jong Associates, prepared sections of the report.

Bronwen Manby, executive director of AfriMAP, edited drafts of the report and made valuable contributions.

Smita Choraria, programme assistant to AfriMAP, provided painstaking work in checking footnotes and summarising chapter contents, as well as contributing supplementary research and leading the report design.

Zohra Dawood, executive director of OSF-SA, provided intellectual guidance and valuable advice throughout the process.

Sincere appreciation is extended to all involved.



# Preface

The Africa Governance Monitoring and Advocacy Project (AfriMAP) of the Open Society Foundation was established in 2004 to monitor observance of standards relating to human rights, the rule of law and accountable government, by both African states and their development partners.

African states have undertaken increasing commitments to good governance since the African Union replaced the Organisation of African Unity in 2002. Among these commitments are the provisions of the Constitutive Act of the African Union, in which member states agree to promote human rights, democratic principles and institutions, popular participation and good governance. Other newly adopted documents include the New Partnership for Africa's Development (NEPAD) and the African Peer Review Mechanism (APRM), as well as the Convention on Preventing and Combating Corruption. AfriMAP's research is intended to facilitate and promote respect for these commitments by highlighting key issues, and providing a platform for national civil society organisations to engage in their own monitoring efforts.

AfriMAP's methodology is based on standardised reporting frameworks that link respect for good governance and human rights, to development that benefits poor people. Through a process of expert consultation, AfriMAP has developed reporting frameworks in three thematic areas: the justice sector and the rule of law; political participation; and the delivery of public services. The questionnaires that result, among them the questionnaire on the justice sector and the rule of law that guided this report, are available at the AfriMAP website: [www.afriMAP.org](http://www.afriMAP.org).

The reports are elaborated by experts from the countries concerned, in close collaboration with the Open Society Institute's network of foundations in Africa and AfriMAP's own staff. Drafts of this report were reviewed by a range of experts, with their comments and criticisms reflected in the final content. The aim is that the reports should form a resource both for activists in the country concerned, and for others working across Africa, to improve respect for human rights and democratic values.

# Foreword

This report, *South Africa: Justice Sector and the Rule of Law*, comes at an important time for South Africa and the African continent. It is one of a set of reports initiated by AfriMAP that intend to go beyond describing the institutional arrangements in a constitutional democracy and reflect on the health and quality of democracy and governance in South Africa. In particular, these reports will measure South Africa's compliance with the commitments undertaken since 2000 by the African Union and NEPAD's African Peer Review Mechanism.

This report on the justice sector arises from a comprehensive questionnaire that benefited from wide consultation and input, from within Africa and beyond. Such continent-wide studies, as undertaken by AfriMAP, require much reflection on the state of the justice sector, commitment and application of the rule of law, and on the main challenges and opportunities facing governments, civil society and regional and continental bodies in creating better outcomes for our societies.

Reflecting on the detailed information contained in the report, a number of key challenges have been identified. These include, amongst others:

- Weaknesses in domestication of international human rights treaties, as well as inconsistency in monitoring and reporting against those that have been ratified;
- The ongoing need for transformation of the judiciary, while respecting the independence of the courts from the executive;
- The need to reflect on the strengths and weaknesses of the major reforms undertaken in relation to the South African justice system since 1994, and to ensure that the new initiatives work as they were intended;
- The need for the executive to take steps to ensure that court judgments may challenge government policy, and also where they indicate a simple lack of administrative capacity to respect the law;
- The need to build and strengthen the civilian oversight of police;
- The need to promote an integrated approach to sentencing and improve the conditions of detention; and
- The need to ensure wider access to justice.

Responding to the above would inform the ongoing business of the OSF-SA. It is hoped that the utility of the report lies in the richness of information it contains for use by practitioners and policymakers. Crucially too, the report should enrich discourse on the profound benefits of committing to the principles eloquently set out in the NEPAD document.

In the words of the Solemn Declaration at the Conference on Security, Stability, Development and Co-operation in Africa (CSSDCA), ‘Democracy, good governance, respect for human and people’s rights and the rule of law are prerequisites for the security, stability and development of the continent.’

The conditions to meet the values set out in the CSSDCA exist in South Africa, on the part of both government and civil society. The ongoing transition in the country requires vigilance to address set-backs and challenges in order to guarantee and sustain a robust democracy.

Zohra Dawood  
Executive director, OSF-South Africa



# Executive summary

South Africa's legal and institutional landscape has changed remarkably since the end of apartheid in 1994. The 1996 Constitution contains a comprehensive Bill of Rights that includes socio-economic as well as civil, political and cultural rights. Since 1994, South Africa has become party to most key international human rights instruments, and there has been substantial legal and institutional reform. However, despite the leaps and bounds made, a more systematic process is needed to domesticate the content of the international human rights treaties that South Africa has become party to, as the record to date is mixed, with partial domestication of international law only in specific cases. The Constitutional Court has heard over 50 cases challenging the constitutionality of legislation (particularly pre-1994) and has played an important role in developing the law, including interpretation of economic and social rights provisions.

Generally, since the new regime was established in 1994, the executive has not been viewed as frustrating the affairs of the judiciary or interfering in prosecutions, with the possible exception of the investigation and prosecution on corruption charges of the special adviser to Deputy President Jacob Zuma, and subsequently Zuma himself. Overall, there is a healthy tradition of judicial review of executive actions, though there have been some cases of government failure to comply with subsequent rulings.

The Department of Justice and Constitutional Development (DoJCD) is the national government department responsible for the administration of justice, and since 1994, has been subject to substantial reorganisation. Budget and resource allocation to the DoJCD takes place at a national level, and the department regularly faces under-funding, leading to pressure on resources. Despite improvements in the department's financial management in recent years, fiscal accountability issues remain. Nonetheless, the courts are in a reasonable state of repair (though less so in rural areas), staff are generally punctually remunerated, and legislation and jurisprudence are publicly available.

The separation of powers between the judiciary and executive is firmly enshrined in the 1996 Constitution and also well recognised in South African case law. Since 1994, the appointment process for judges and magistrates has been substantially revised, greatly increasing institutional protection for the independence of the judiciary. Constitutional provisions also require progress in achieving racial and gender transformation. Although a large number of black judges have been appointed since 1994, white judges are still in the majority, in part a reflection of

the limited number of suitable black candidates for appointment. To date, there have been no accounts of direct interference in the independence of the judiciary from the executive, although controversy over affirmative action has led some to voice concerns that a rapidly accelerated process of transformation could lead to a decline in the quality and independence of judges.

South Africa continues to face an extremely high violent-crime rate, and issues relating to policing and prisons remain in need of attention, despite the substantial progress made since 1994.

Prior to 1994, the South African Police Service (SAPS) was in effect an enforcer of the apartheid state, and since then reform has been far-reaching. Rigorous training of officers has been introduced, accountability mechanisms set up (both civilian oversight secretariats and the Independent Complaints Directorate), and a 'prevention of torture' policy instated. However, public lack of faith in SAPS persists, due in part to limited access to policing in traditionally black areas, as well as continuing allegations of abuse, corruption and poor service delivery.

Prison overcrowding has become an increasing cause for concern, reflecting an extremely high incarceration rate. Although this cannot be attributed to any one factor, it has led to debate on the effects of minimum sentencing as introduced under the 1997 Criminal Law Amendment Act, and exploration of alternative sentencing options. Widespread delays in bringing cases to court are also contributing to prison overcrowding.

The right to a fair public hearing of any dispute is constitutionally enshrined, and also outlined in several international and regional treaties to which South Africa is party. However, despite efforts to introduce small claims procedures, an active set of organisations involved in public-interest litigation and the expanding mandate of the Legal Aid Board to include civil cases, the financial cost of legal proceedings remains a significant barrier to realising equal access to justice. In particular, the cost of legal professional services remains unaffordable to the average South African, contributing to the continuing popularity of traditional courts as a practical forum for dispute resolution, especially in rural areas.

A number of independent oversight institutions were established by Chapter 9 of the 1996 Constitution, most notably the South African Human Rights Commission (SAHRC). Although these institutions do provide alternative avenues of recourse for individuals, their effectiveness has been criticised, with issues such as overlapping mandates and a lack of adequate parliamentary support being raised.

# 1

## Legal and institutional framework

South Africa's legal and institutional landscape has changed remarkably since the end of apartheid in 1994. The 1996 Constitution contains a comprehensive Bill of Rights that includes socio-economic as well as civil, political and cultural rights. Since 1994, South Africa has become party to most key international human rights instruments, and there has been substantial legal and institutional reform. However, despite the leaps and bounds made, a more systematic process is needed to domesticate the content of the international human rights treaties that South Africa has become party to, as the record to date is mixed, with partial domestication of international law only in specific cases. The Constitutional Court has heard over 50 cases challenging the constitutionality of legislation (particularly pre-1994) and has played an important role in developing specific areas of law, including interpretation of economic and social rights provisions.

### **A. International law, the Constitution and national legislation**

Since the end of white minority rule in 1994, South Africa has transformed its legal and constitutional rights framework, becoming party to the majority of international and African human rights treaties and adopting a Constitution that includes a wide-ranging Bill of Rights. In addition, there has been widespread reform of national legislation.

## International law

Although South Africa has become party to most of the important international human rights instruments,<sup>1</sup> some key human rights treaties have not been signed and/or ratified. In common with other countries that receive many migrant workers, South Africa has not signed the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Nor has it signed either the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, which allows individuals to lodge complaints with the UN committee monitoring respect for the convention, or the Optional Protocol to the Convention against Torture, which seeks to establish a system of regular visits undertaken by independent international and national bodies in order to prevent torture and ill-treatment.<sup>2</sup> Three important treaties have been signed but not ratified, including the International Covenant on Economic, Social and Cultural Rights (signed on 3 October 1994); the Optional Protocol to the Convention on the Rights of the Child, on the involvement of children in armed conflict (signed on 8 February 2002); and the Convention on the Political Rights of Women (signed on 29 January 1993). All human rights treaties ratified since 1994 have been accepted without reservation.<sup>3</sup>

South Africa's failure to ratify the International Covenant on Economic and Social Rights in particular is perplexing, given that South Africa's Constitution in fact contains a more detailed set of commitments. However, it may be that the government sees practical difficulties in complying with both sets of obligations—constitutional and international law—simultaneously, given differing interpretations of state responsibilities in this area.

The negotiation and signing of all international agreements is an executive function. However, in terms of the Constitution, an international agreement will generally only bind

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<sup>1</sup> See Annex A: List of human rights treaties supplied by the office of the chief state law adviser (international law), Department of Foreign Affairs; supplemented by electronic and telephonic communication on 15 March 2005. In particular, South Africa is a party to five of the seven most important treaties in the international human rights system: the International Covenant on Civil and Political Rights (signed on 3 October 1994, ratified on 10 December 1998); the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (signed on 29 January 1993, ratified on 10 December 1998); the Convention on the Elimination of All Forms of Discrimination against Women (signed on 29 December 1993, ratified on 15 December 1995); the International Convention on the Elimination of All Forms of Racial Discrimination (signed on 3 October 1994, ratified on 10 December 1998); and Convention on the Rights of the Child (signed on 29 January 1993, ratified on 16 June 1995). The two to which South Africa is not a party are the Migrant Workers Convention and the International Covenant on Economic, Social and Cultural Rights. South Africa is also a party to the African Charter on Human and Peoples' Rights (signed on 9 July 1996, ratified on 9 July 1996); its protocols on the Establishment of an African Court on Human and Peoples' Rights (signed on 9 June 1999, ratified on 3 July 2002); on the Rights of Women in Africa (signed on 16 March 2004, ratified on 17 December 2004); and to the African Charter on the Rights and Welfare of the Child (signed on 10 October 1997, ratified on 7 January 2000).

<sup>2</sup> South Africa has also not signed the Indigenous and Tribal Peoples' Convention or the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.

<sup>3</sup> It is possible for a declaration clarifying a country's position to accompany the ratification of or accession to a treaty. South Africa has done this in at least three cases, namely the International Convention on the Elimination of all Forms of Racial Discrimination (signed on 3 October 1994, ratified on 10 December 1998); the International Covenant on Civil and Political Rights (signed on 3 October 1994, ratified on 10 December 1998); and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (signed on 29 January 1993, ratified on 10 December 1998). Mostly, South Africa has pointed to the fact that the Constitution imposes more stringent requirements than the treaty in question.



the republic in its interaction with other states after it has been approved by both houses of Parliament. Once Parliament has approved the treaty, the executive may then ratify a signed treaty or accede to it. An international agreement only becomes binding within the republic once it is enacted into national law, unless it is 'self-executing', in which case it becomes law upon being approved by both houses of Parliament.<sup>4</sup> International law generally acts as an interpretative tool for national law.<sup>5</sup>

There has been no systematic process of domesticating international human rights treaties once they are ratified or acceded to. Nonetheless, partial domestication of international law has taken place in specific instances: for example the Convention on the Elimination of All Forms of Racial Discrimination has been enacted into national law through the Promotion of Equality and Prevention of Unfair Discrimination Act,<sup>6</sup> and the Convention on the International Criminal Court has been enacted into national law through the Implementation of the Rome Statute of the International Criminal Court Act.<sup>7</sup> In addition, since 2004 the Department of Justice and Constitutional Development (DoJCD) has begun taking steps to develop legislation that domesticates all human rights obligations under international treaties, where compatible with the Constitution.<sup>8</sup> Equally, there is no systematic mechanism to ensure that laws which conflict with treaty obligations are identified, removed or amended. However, the South African Law Reform Commission has recently conducted an audit of the constitutionality of the laws in force.<sup>9</sup>

Since South Africa's constitutional democracy was introduced in 1994, only one case has been lodged against South Africa with an international human rights body. The Centre for Human Rights at the University of Pretoria has lodged a communication before the African

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<sup>4</sup> Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), Section 231: International agreements

- (1) The negotiating and signing of all international agreements is the responsibility of the national executive.
- (2) An international agreement binds the republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in Subsection (3).
- (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the assembly and the council within a reasonable time.
- (4) Any international agreement becomes law in the republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the republic, unless it is inconsistent with the Constitution or an act of Parliament.
- (5) The republic is bound by international agreements, which were binding on the republic when this Constitution took effect. Available at <http://www.info.gov.za/documents/constitution/index.htm>.

<sup>5</sup> *Ibid.*, Section 39(1)(b) requires a court to consider international law when it interprets the Bill of Rights. Section 233 requires a court to prefer a reasonable interpretation of legislation that is consistent with international law, over an interpretation that is not.

<sup>6</sup> The Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000), in the *Government Gazette* Vol. 416, No. 20876, 9 February 2000.

<sup>7</sup> Implementation of the Rome Statute of the International Criminal Court Act, in the *Government Gazette*, 2002 (Act 27 of 2002), Vol. 445, No. 23642, 18 July 2002.

<sup>8</sup> Interview with John Makubela, Director of International Affairs, DoJCD, Pretoria, 15 December 2004.

<sup>9</sup> See further below, p.9 *Legislation*.

Commission on Human and Peoples' Rights, the treaty body under the African Charter on Human and Peoples' Rights, invoking freedom of religion and conscience as guaranteed in Article 8 of the African Charter. The case concerns the use of marijuana for religious purposes among Rastafarian people, which remains illegal in South Africa.<sup>10</sup> The government has lodged a response and is awaiting the commission hearing to present its case.<sup>11</sup>

The government is failing to submit timely reports under its reporting obligations under international human rights treaties. For example, after submitting its initial report in 1998 to the African Commission on Human and Peoples' Rights, South Africa has failed to submit two subsequent periodic reports according to schedule. The government has submitted its initial reports on its adherence to the following conventions: UN Convention on the Rights of the Child (4 December 1997); International Convention on the Elimination of All Forms of Racial Discrimination (2 December 2004); and the Convention on the Elimination of All Forms of Discrimination against Women (5 February 1998).<sup>12</sup> At the time of writing, South Africa was yet to submit its initial and periodic reports to treaty bodies of the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, and the International Covenant on Civil and Political Rights. It would appear that the lack of a dedicated unit to compile these documents is a contributing factor in the late submission of reports. At present, the International Affairs Directorate within the DoJCD is responsible for compiling these reports. Its inability to complete the work on time suggests that further capacity needs to be built in this directorate, or indeed, that a separate, dedicated directorate needs to be created.

## The Constitution

During the apartheid era, South Africa followed a doctrine of parliamentary sovereignty. Since Parliament was the supreme law-giver, courts could not test the content of legislation but only that it was passed in accordance with the correct procedure and that the executive complied with its provisions. Since 1994, South Africa has a system of constitutional democracy based on a supreme Constitution, which includes a comprehensive Bill of Rights.<sup>13</sup> The courts are now obliged to test laws against the requirements of the Constitution and 'must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency ...'.<sup>14</sup>

The Constitution was developed through a consultative process led by a Constitutional Assembly. The Constitutional Assembly consisted of members of the National Assembly and

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<sup>10</sup> The Constitutional Court upheld the criminalisation of marijuana use, in all circumstances, in *Prince v The Cape Law Society and Others* 2002 (2) SA 794 (CC), 2002 (3) BCLR 231 (CC).

<sup>11</sup> Interview with John Makubela, Director of International Affairs, DoJCD, Pretoria, 15 December 2004; *Gareth Anver Prince v South Africa*, 255/2002, lodged at the African Commission on Human and Peoples' Rights, on 12 August 2002.

<sup>12</sup> Further information on reporting status can be viewed at the Office of the UN High Commissioner for Human Rights (OHCHR) website, available at <http://www.unhcr.ch/TBS/doc.nsf/NewhvVAlSPRByCountry?OpenView>.

<sup>13</sup> The Constitution of the Republic of South Africa, 1996 (Act 108 of 1993), Chapter 2.

<sup>14</sup> *Ibid.*, Section 172(1).

the Senate, who were elected in the first non-racial elections in 1994. It was governed by basic principles adopted in the 1993 Interim Constitution, and it was agreed between the parties to the negotiations leading up to South Africa's first democratic elections.<sup>15</sup> The Constitutional Assembly undertook public consultation through hearings and consultative meetings with different sectors.<sup>16</sup> Submissions were received from a variety of groups, including the legal fraternity, women, local communities, traditional structures, business sectors, labour, the land sector, media, arts and culture, youth and disabled and children's rights groups.<sup>17</sup> The assembly also received 1 990 334 submissions from members of the public.<sup>18</sup> Several books have been written on the process, including an analysis of the argument for the inclusion or exclusion of different social and economic rights.<sup>19</sup>

The Constitutional Assembly initially adopted a constitutional text on 8 May 1996 and referred it to the Constitutional Court for certification in terms of the provisions of the Interim Constitution.<sup>20</sup> During proceedings before the Constitutional Court, political parties, interest groups and private persons were permitted to submit representations. The Constitutional Court refused to ratify several sections in what became known as the 'first certification judgment'.<sup>21</sup> The Constitutional Assembly then passed an amended text on 11 October 1996, which was then certified by the Constitutional Court on 4 December 1996 in what is known as the 'second certification judgment'.<sup>22</sup> The Constitution of the Republic of South Africa, 1996, came into force on 4 February 1997.

The Constitution contains an extensive Bill of Rights in Chapter 2, including civil, political, cultural and socio-economic rights.<sup>23</sup> In addition to the vertical application of the rights against state organs, Section 8(2) provides that a right contained in the Bill of Rights may also apply horizontally between natural or juristic persons 'if, and to the extent that it is applicable, taking into

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<sup>15</sup> The Interim Constitution of the Republic of South Africa, 1993 (Act 200 of 1993), available at <http://www.polity.org.za/html/govdocs/legislation/1993/constito.html?rebookmark=1>.

<sup>16</sup> The address by the chairperson of the Constitutional Assembly, Mr. C Ramaphosa, during Parliamentary Briefing Week, 14 February 1996, available at <http://www.info.gov.za/speeches/1996/f26constass.htm>.

<sup>17</sup> The address by President Nelson Mandela to the Constitutional Assembly on the occasion of the adoption of the New Constitution, Cape Town, 8 May 1996, available at [http://www.info.gov.za/speeches/1996/960513\\_Ox764.htm](http://www.info.gov.za/speeches/1996/960513_Ox764.htm).

<sup>18</sup> Constitutional Assembly: Views expressed by Past. Willie Viljoen of AGS, 29 April 1996, available at [http://www.info.gov.za/speeches/1996/960430\\_Ox513.htm](http://www.info.gov.za/speeches/1996/960430_Ox513.htm).

<sup>19</sup> Hassen Ebrahim, *The Soul of a Nation: Constitution-making in South Africa*, Oxford University Press, Cape Town, 1998; TRH Davenport, *The Birth of a New South Africa*, University of Toronto Press, Toronto, 1998; Siri Gloppen, *South Africa: The Battle over the Constitution*, UNESCO, Brookfield, 1997; Paul Bell (ed), *The Making of the Constitution: The Story of South Africa's Constitutional Assembly, May 1994 to December 1996*, Churchill Murray Publications for the Constitutional Assembly, Claremont, 1997; Per Strand, *Decisions on Democracy: the Politics of Constitution-making in South Africa*, Uppsala University, Uppsala, 2000.

<sup>20</sup> The Interim Constitution of the Republic of South Africa, 1993 (Act 200 of 1993).

<sup>21</sup> *In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC), (on certification of the interim Constitution of the Republic of South Africa, 1993, (Act 200 of 1993)).

<sup>22</sup> *Ex parte* Chairperson of the Constitutional Assembly; *In re Certification of the Amended Text of the Constitution of the Republic of South Africa*, 1996, 1997 (2) SA 97 (CC).

<sup>23</sup> The Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), Chapter 2.

account the nature of the right and the nature of any duty imposed by that right'. Rights in the Bill of Rights are subject to a limitation clause in Section 36, which requires that any limitation of a right must be 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom...'.<sup>24</sup> Section 7(2) of the Constitution requires that the state 'must respect, protect, promote and fulfil the rights in the Bill of Rights', thereby imposing a positive duty on the state to realise these rights.

The Constitution also contains provisions on courts and the administration of justice in Chapter 8. The chapter includes provisions vesting judicial authority in the courts;<sup>25</sup> provisions outlining the judicial system and the different types of courts;<sup>26</sup> provisions on court procedures;<sup>27</sup> provisions on the appointment, terms of office, remuneration and removal of judicial officers;<sup>28</sup> provisions on the Judicial Service Commission;<sup>29</sup> and provisions on the prosecuting authority.<sup>30</sup> There are also specific provisions in the Bill of Rights that apply to the courts and the justice sector. In particular, the articles on access to courts;<sup>31</sup> the rights of arrested, detained and accused persons;<sup>32</sup> enforcement of rights;<sup>33</sup> and the interpretation of the Bill of Rights,<sup>34</sup> contain provisions aimed directly at courts and the justice sector broadly.

In Chapter 9, the Constitution establishes a range of independent and impartial state institutions which aim to 'strengthen constitutional democracy'.<sup>35</sup> Of these institutions, the South African Human Rights Commission (SAHRC),<sup>36</sup> the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities<sup>37</sup> and the Commission for Gender Equality<sup>38</sup> are specifically tasked with the protection and promotion of human rights, and with particular monitoring and reporting functions relating to human rights.

The South African Constitution has been hailed as the most progressive in the world, an accolade based on its extensive social and economic rights provisions. The Constitution protects the following social and economic rights:

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<sup>24</sup> *Ibid.*, Section 36(1).

<sup>25</sup> *Ibid.*, Section 165(1).

<sup>26</sup> *Ibid.*, Section 166.

<sup>27</sup> *Ibid.*, Section 171.

<sup>28</sup> *Ibid.*, Sections 174 to 177.

<sup>29</sup> *Ibid.*, Section 178.

<sup>30</sup> *Ibid.*, Section 179.

<sup>31</sup> *Ibid.*, Section 34.

<sup>32</sup> *Ibid.*, Section 35.

<sup>33</sup> *Ibid.*, Section 38.

<sup>34</sup> *Ibid.*, Section 39.

<sup>35</sup> *Ibid.*, Section 181.

<sup>36</sup> *Ibid.*, Section 184.

<sup>37</sup> *Ibid.*, Section 185.

<sup>38</sup> *Ibid.*, Section 187.

- Environmental rights;<sup>39</sup>
- Property rights;<sup>40</sup>
- The right to access adequate housing;<sup>41</sup>
- The right to access healthcare, food, water and social security;<sup>42</sup>
- An extensive children's rights provision that includes the right to basic nutrition, shelter, basic healthcare services and social services;<sup>43</sup> and
- The right to basic and further education.<sup>44</sup>

In many cases, constitutional protection extends to providing access to social and economic rights only: the duty imposed on the state is to take reasonable steps, within available resources, to achieve their progressive realisation. Other rights are not subject to this qualification, including the right to education and children's rights provisions.<sup>45</sup> The Constitutional Court considered the inclusion of socio-economic rights in its first certification judgment and confirmed their inclusion in the Bill of Rights.

## Legislation

Many of the most egregious laws violating international human rights norms were repealed by the former government of South Africa during the transition to democracy between 1990 and 1994, or by the 1993 Interim Constitution that came into effect when the new government took office in 1994. Nevertheless, there remain laws in force that are not in compliance with South Africa's international obligations or the Constitutional Bill of Rights. At the transition, all laws remained in force subject to action by the legislature, which can repeal or amend any law, or a declaration of constitutional invalidity by the Constitutional Court.<sup>46</sup>

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<sup>39</sup> *Ibid.*, Section 24.

<sup>40</sup> *Ibid.*, Section 25.

<sup>41</sup> *Ibid.*, Section 26.

<sup>42</sup> *Ibid.*, Section 27.

<sup>43</sup> *Ibid.*, Section 28.

<sup>44</sup> *Ibid.*, Section 29.

<sup>45</sup> See Danie Brand, 'Introduction to socio-economic rights in the South African Constitution', in Danie Brand and Christof Heyns (eds), *Socio-economic Rights in South Africa*, Pretoria University Law Press, 2005.

<sup>46</sup> The Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), Item 2 of Schedule 6 (Transitional arrangements), provides for the continuity of laws during the transition to the new Constitution. Item 2 reads:

2 Continuation of existing law

- (1) All law that was in force when the new Constitution took effect, continues in force, subject to –
  - (a) any amendment or repeal; and
  - (b) consistency with the new Constitution.
- (2) Old order legislation that continues in force in terms of sub-item (1) –
  - (a) does not have a wider application, territorially or otherwise, than it had before the previous Constitution took effect, unless subsequently amended to have a wider application; and
  - (b) continues to be administered by the authorities that administered it when the new Constitution took effect, subject to the new Constitution.

Parliament has been effective in passing legislation required by the Constitution, and thereby creating a legislative framework in which the courts, the National Prosecuting Authority (NPA), the independent institutions established under Chapter 9 of the Constitution and other constitutionally mandated bodies can function.<sup>47</sup>

In addition, the South African Law Reform Commission completed in July 2004 an audit into post-1909 legislation that is still in force. This audit examined only primary legislation and is the first step in a project aimed at examining the constitutional compliance of existing legislation, customary law and common law.<sup>48</sup> An effort has been made to address shortcomings in a thematic manner. Repeal and replacement of the Interpretation Act<sup>49</sup> of 1957 and the Black Administration Act<sup>50</sup> of 1927 have been recognised as priorities by the Law Reform Commission.<sup>51</sup> In July 2005, a bill to repeal the Black Administration Act was introduced to Parliament: since not all of the provisions of the act can be repealed without replacement, the bill envisages the repeal of some of the provisions immediately, and others when new laws provide substitute mechanisms to manage the matters that the act has governed up to now. The Recognition of Customary Marriages Act<sup>52</sup> has been in effect since November 2000, and the Law Reform Commission is developing legislation to recognise Islamic marriages.<sup>53</sup> Challenges to laws on the basis of the Constitution have also led to particular provisions of legislation being overturned (see 'Constitutional challenges to the law', p.12).

However, to date, there has been no systematic repeal of colonial or apartheid laws that conflict with the Constitution, and the Law Reform Commission has drafted papers mostly as a result of lobbying efforts by civil society.

At a departmental level, the review conducted by the National Department of Provincial and Local Government of legislation affecting local government, is probably the most extensive statute law-revision exercise carried out to date. This project, which was completed in April 2002, reviewed over 1 000 legislative instruments and over 8 000 provisions for redundancy against the new framework legislation on local government.<sup>54</sup> A similar review was conducted of the Gauteng statute book in 2003, this time for redundancy against new national legislation, including the Constitution.<sup>55</sup>

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<sup>47</sup> See Annex B for some of the key pieces of legislation giving effect to the provisions of the Constitution.

<sup>48</sup> Interview with Hendrick Potgieter, Researcher for Project 25, South African Law Reform Commission, Pretoria, 17 January 2005.

<sup>49</sup> The Interpretation Act, 1957 (Act 33 of 1957).

<sup>50</sup> The Black Administration Act, 1927 (Act 38 of 1927).

<sup>51</sup> The South African Law Reform Commission, *Annual Report 2002/03*, p.25.

<sup>52</sup> The Recognition of Customary Marriages Act, 1998 (Act 120 of 1998), No. R. 1101, in the *Government Gazette* No. 21700, 1 November 2000.

<sup>53</sup> The South African Law Reform Commission, *Project 59: Islamic Marriages and Related Matters*.

<sup>54</sup> Ashira Consulting (Pty) Ltd and the Centre for Applied Legal Studies, 'Review of Legislation Affecting Local Government', April 2002.

<sup>55</sup> Ashira Consulting (Pty) Ltd and Centre for Applied Legal Studies, 'Gauteng Statute Law Revision Project: Final Narrative Report', June 2003.

The most comprehensive, cross-department, statute law-revision exercise was an audit of the entire national, provincial and local government statute book to assess the extent of compliance with the constitutional right to just administrative action. This 2004 study, commissioned by the German Agency for Technical Co-operation, concluded that 97 per cent of the provisions dealing with administrative action on the statute book were 'supplementable', in the sense that the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) could be used to bring them into line with the Constitution. Two per cent of the provisions were found to be compliant with PAJA, and less than one per cent non-compliant and unfair.<sup>56</sup>

Despite these various law-reform efforts, there remain significant areas of the statute book that still bear the marks of South Africa's apartheid past. The Freedom of Expression Institute of South Africa (FXI) has registered its concern over several pieces of legislation impacting on freedom of expression. In several reports it has submitted that the Regulation of Gatherings Act,<sup>57</sup> which was passed in 1993 and came into force in 1996, allows local government agencies to prohibit demonstrations and assemblies.<sup>58</sup> The FXI has also raised concerns that the Criminal Procedure Act<sup>59</sup> permits the subpoena of journalists compelling them to testify and/or to reveal their sources. In 2003, it published an opinion on the constitutionality of several acts, all of which were passed during the political upheaval of the 1980s or earlier, which it argues impermissibly impact on freedom of expression.<sup>60</sup> Included in this list were the Defence Act, the Internal Security Act, the Intimidation Act, the National Key Points Act, the National Supplies Procurement Act and the Protection of Information Act.<sup>61</sup>

The Internal Security Act<sup>62</sup> was repealed by the Protection of Constitutional Democracy Against Terrorist Activities Act,<sup>63</sup> which came into operation on 20 May 2005. The Protection of Constitutional Democracy Against Terrorist and Related Activities Act was passed after heated debate in Parliament and much opposition from organisations representing civil society. The act is not as intrusive as similar legislation which has been passed in many other countries, including the United States, Great Britain, Canada and Australia. It does not permit the detention

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<sup>56</sup> See Jonathan Klaaren, 'An audit of administrative action and the South African statute book: Research methods and conceptual issues', *South African Journal of Public Law*, Vol. 19, 2004, pp.532-542.

<sup>57</sup> The Regulation of Gatherings Act, 1993 (Act 205 of 1993).

<sup>58</sup> The FXI Anti-Censorship Programme, *Third progress report to the Open Society Foundation for South Africa*, March 2004, FXI Annual Report 2003/04, Annual Report 2002/03, available at [www.fxio.org.za](http://www.fxio.org.za).

<sup>59</sup> The Criminal Procedure Act, 1977 (Act 51 of 1977), Section 205.

<sup>60</sup> The FXI Anti-Censorship Programme, *Opinion on Legislation Affecting Freedom of Expression in South Africa*, January 2003.

<sup>61</sup> The Defence Act, 1957 (Act 44 of 1957); the Internal Security Act, 1982 (Act 74 of 1982); the Intimidation Act, 1982 (Act 72 of 1982); the National Key Points Act, 1980 (Act 102 of 1980); the National Supplies Procurement Act, 1970 (Act 89 of 1970); and the Protection of Information Act, 1982 (Act 84 of 1982). One of the most notorious pieces of South African legislation, used extensively by the apartheid government to suppress political activity and protest, the Public Safety Act and regulations issued in terms of it, was repealed with effect from October 1995. The Public Safety Act, 1953 (Act 3 of 1953), repealed by the State of Emergency Act, 1995 (Act 86 of 1995). No. 1546, 6 October 1995.

<sup>62</sup> The Internal Security Act, 1982 (Act 74 of 1982).

<sup>63</sup> The Protection of Constitutional Democracy Against Terrorist Activities Act, 2004 (Act 33 of 2004), in the *Government Gazette*, Vol. 476, No. 27266, 11 February 2005.

without trial of suspects or the proscription of organisations. However, the definition of ‘terrorist activity’ is very broad and vague. It overlaps with a wide range of common law and statutory offences, including common assault, public violence, intimidation, sedition and treason. The broadness and vagueness of the definition makes uncertain the kinds of activity that now fall under the rubric of ‘terrorist activity’. Uncertainty of the reach of the legislation arguably makes it vulnerable to challenge, on the basis that it fails to comply with the principle of legality.

It is likely that there are still several apartheid-era statutes, and many more individual provisions on the South African statute book, that are not only contrary to the Bill of Rights and international human rights norms, but also offensive to the majority of South Africans. For this reason, the Law Reform Commission’s recently announced project on cleansing the statute book of all provisions that are considered to be unconstitutional, redundant or obsolete, is to be welcomed. For this initiative to succeed, however, it needs to be combined with a comprehensive system to assess the impact of regulations adopted by the executive, in accordance with the laws passed by Parliament.

## Constitutional challenges to the law

Only superior courts (high courts and above—see below for description of court structures) have constitutional jurisdiction. Where a constitutional point is raised in a lower court, proceedings are suspended and the question referred to a high court. A high court has the power to declare legislation unconstitutional, but an order of this kind must be confirmed by the Constitutional Court before it has any effect.<sup>64</sup> Section 172(1)(b) of the Constitution provides that all courts with jurisdiction have wide remedial powers when deciding a constitutional matter, namely the power to ‘make any order that is just and equitable’.

Section 39(1)(b) of the Constitution provides that, when interpreting the Bill of Rights, ‘a court, tribunal or forum ... must consider international law’. A review of the Constitutional Court’s decisions from 1995 to the end of 2004 reveals that this provision has not resulted in international law being considered as much as might have been expected, with international law being considered in detail in only 14 per cent of cases.<sup>65</sup> Nevertheless, the same study praised the Constitutional Court for its openness to international law, which, in comparison with Australia, appears far-sighted and generous.

Reference is often made to rulings in other jurisdictions (Section 39(1) of the Constitution also allows a court to consider foreign law when interpreting the Bill of Rights), although more attention is paid to the easily accessible judgments of developed countries, as opposed to developing or African countries. Comparative law has remained of persuasive value only and the focus in South Africa’s constitutional jurisprudence has been on the text of the South African Constitution.

The Constitutional Court has heard over 50 cases challenging the constitutionality of

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<sup>64</sup> The Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), Sections 167(5) and 172(2).

<sup>65</sup> Devika Hovell & George Williams, ‘A tale of two systems: The use of international law in constitutional interpretation in Australia and South Africa’, *University of Melbourne Law Review*, 2005.



specific provisions in legislation. The majority of these cases have challenged pre-1994 legislation. In roughly half of the cases, the court has ruled against the legislation.

Two areas of law in particular have experienced significant development through the Constitutional Court, namely the customary law of succession and the law relating to marriage. In the *Bhe*<sup>66</sup> case, in which the South Africa Human Rights Commission intervened as *amicus curiae*, the Constitutional Court declared that Section 23 of the Black Administration Act<sup>67</sup> and Section 1(4)(b) of the Intestate Succession Act<sup>68</sup> were unconstitutional and invalid. It also declared that the rule of male primogeniture, as it applies in African customary law to the inheritance of property, is inconsistent in terms of the Constitution and invalid to the extent that it excludes or hinders women and extra-marital children from inheriting property. The estate of a black deceased person now devolves as does that of a white person.

The Constitutional Court has contributed to bringing existing legislation in line with the Constitution, by recognising same-sex life partnerships as equivalent to marriage for certain purposes,<sup>69</sup> by reading provisions into the Children's Status Act,<sup>70</sup> the Child Care Act,<sup>71</sup> the Aliens Control Act,<sup>72</sup> and the Judges' Remuneration and Conditions of Employment Act,<sup>73</sup> among others. The Supreme Court of Appeal has developed the common law in a similar manner.<sup>74</sup>

The court has also heard a number of cases challenging the validity of actions or decisions of different governmental authorities, including local government and provincial government, as well as the national executive. In the *Pharmaceuticals* case,<sup>75</sup> the Constitutional Court stated clearly that the courts' judicial review of the exercise of public power by the executive and other administrative bodies is a constitutional matter, and as such will always be subject to the jurisdiction of the Constitutional Court.

The role of the Constitutional Court in the interpretation of the economic and social rights provisions of the Bill of Rights has been particularly important, given the groundbreaking nature of the protection to economic and social rights in South Africa's Constitution, with two notable cases being the 2001 *Grootboom* case and the 2002 *Treatment Action Campaign (TAC)* case.

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<sup>66</sup> *Bhe and Others v Magistrate, Kayelitsha and Others; Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) BCLR 1 (CC).

<sup>67</sup> The Black Administration Act, 1927 (Act 38 of 1927).

<sup>68</sup> The Intestate Succession Act, 1987 (Act 81 of 1987).

<sup>69</sup> For example in *J and Another v Director General, Department of Home Affairs, and Others* 2003 (5) SA 621 (CC); *Satchwell v President of the Republic of South Africa and Another* 2003 (4) SA 266 (CC); *Du Toit and Another v Minister of Welfare and Population Development and Others* 2003 (2) SA 198 (CC); and *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC).

<sup>70</sup> The Children's Status Act, 1987 (Act 82 of 1987).

<sup>71</sup> The Child Care Act, 1983 (Act 74 of 1983).

<sup>72</sup> The Aliens Control Act, 1991 (Act 96 of 1991).

<sup>73</sup> The Judges' Remuneration and Conditions of Employment Act, 2001 (Act 47 of 2001).

<sup>74</sup> *Du Plessis v Road Accident Fund*, 2004 (1) SA 359 (SCA).

<sup>75</sup> *Pharmaceutical Manufacturers Association of SA and Another. In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC).

In the case of *Grootboom*,<sup>76</sup> the Constitutional Court was asked to consider the demands of a community for which the state had made inadequate housing provision in an emergency situation. The court found that the state's failure to provide relief in emergency situations, where it was in its power to do so, was in contravention of the right to access to adequate housing, contained in Section 26(1) of the Constitution. The court made it clear that government could not avoid its responsibilities towards the most vulnerable segment of the population, and must take effective steps towards the progressive realisation of socio-economic rights. This did not mean that socio-economic rights had to be immediately and fully realised, but it did require active engagement on behalf of government.

In the case of the *Minister of Health v Treatment Action Campaign (TAC)*,<sup>77</sup> the Constitutional Court held that government was under an obligation to embark on reasonable legislative and other measures in the furtherance of socio-economic rights. The court declared that the government was not fulfilling its responsibilities and ordered it to do so, requiring the department to provide a comprehensive programme to prevent mother-to-child transmission of HIV. The court issued a detailed order, saying that unless equally effective measures became available and were incorporated into the government's policy, the government was obliged to:

- (a) Remove the restrictions that prevent Nevirapine [an anti-retroviral drug] from being made available for the purpose of reducing the risk of mother-to-child transmission of HIV, at public hospitals and clinics that are not research and training sites.
- (b) Permit and facilitate the use of Nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV and to make it available for this purpose at hospitals and clinics, when in the judgment of the attending medical practitioner acting in consultation with the medical superintendent of the facility concerned, this is medically indicated, which shall if necessary include that the mother concerned has been appropriately tested and counselled.
- (c) Make provision if necessary for counsellors, based at public hospitals and clinics other than the research and training sites, to be trained (in) the counselling necessary for the use of Nevirapine to reduce the risk of mother-to-child transmission of HIV.
- (d) Take reasonable measures to extend the testing and counselling facilities at hospitals and clinics throughout the public health sector, to facilitate and expedite the use of Nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV.

The TAC (and other public interest organisations) have on numerous occasions complained that government continues to comply only reluctantly and partially with this order, and have also

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<sup>76</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC). Also, see case-study on Grootboom, p.31.

<sup>77</sup> *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC).

highlighted the difficulties faced in obtaining information regarding the implementation.<sup>78</sup>

There are different views on the courts' approach to litigation-enforcing rights and its record in the last ten years. The government argues that the court judgments have largely reflected a progressive interpretation of the Constitution and social rights.<sup>79</sup> There is academic argument, however, that the record(s) of the Constitutional Court on socio-economic rights demonstrates a reluctance to interfere with state decisions made in the context of scarce resources. Dennis Davis, a judge in the Cape High Court, argues in particular that the court has refused to follow the 'minimum core content' approach favoured by the relevant United Nations bodies; and (has) shown an unwillingness to grant structural interdicts.<sup>80</sup> Others have been disappointed at the Constitutional Court's weak interpretation of the children's rights provisions of the Constitution.<sup>81</sup> On the other hand, it has also been argued that the Constitutional Court has legitimately been wary of the 'minimum core content' approach to economic and social rights, and has instead focused on 'seeking to protect the interests of vulnerable sectors of society, while also leaving the primary responsibility for co-ordinating socio-economic programmes in the hands of the state'.<sup>82</sup> It would be fair to conclude that the courts have been open to rights litigation generally, although cautious in addressing social and economic rights.

## B. Structure of the court system

South Africa's court system has been substantially revised since 1994, but is still in the process of transformation and there remain aspects of the old system still to be reorganised. Section 166 of the Constitution sets out the court structure in the republic,<sup>83</sup> and sections 167 to 170 establish and provide for these courts. A table of relevant laws applying to each court, supplied by the

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<sup>78</sup> *Mail & Guardian*, 16 March 2004; *TAC Newsletter*, 3 December 2004; Joint statement COSATU/TAC, 23 February 2005; *AIDS Budget Unit Annual Report 2002, 2003 & 2004*, IDASA; 'TAC, Health Department Lock Horns', *The Star*, 3 November 2004.

<sup>79</sup> Policy Co-ordination and Advisory Services—The Presidency, *Towards a Ten Year Review—Synthesis report on the Implementation of Government Programmes* (Discussion document), October 2003, pp. 45-46.

<sup>80</sup> Dennis Davis, 'Socio-economic rights in South Africa: the record of the Constitutional Court after 10 years', *ESR Review*, Vol. 5, No. 5, Dec 2005.

<sup>81</sup> Paula Proudlock, *Children's Socio-Economic Rights: Do they have a right to special protection?* Available at [http://communitylaw-centre.org.za/ser/esr2002/2002sept\\_special.php](http://communitylaw-centre.org.za/ser/esr2002/2002sept_special.php).

<sup>82</sup> Murray Wesson, 'Grootboom and beyond: Reassessing the socio-economic jurisprudence of the South African Constitutional Court', *South African Journal on Human Rights*, Vol. 20, No. 2, 2004, p.285. See also, Marius Pieterse, 'Coming to terms with judicial enforcement of socio-economic rights', *South African Journal on Human Rights*, Vol. 20, No. 3, 2004.

<sup>83</sup> Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), Section 166:

Judicial system

The courts are –

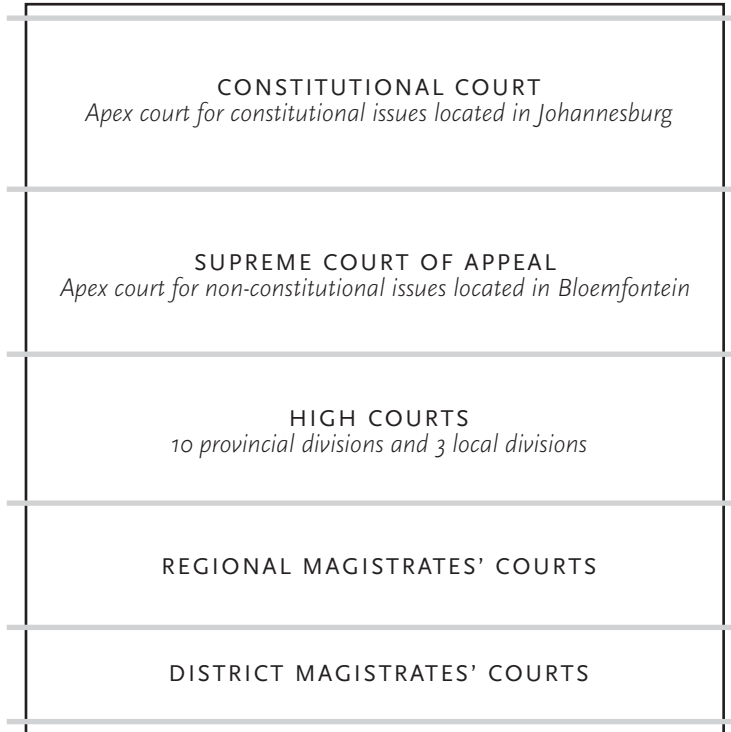
- (a) The Constitutional Court;
- (b) The Supreme Court of Appeal;
- (c) The high courts, including any high court of appeal that may be established by an act of Parliament to hear appeals from high courts;
- (d) The magistrates' courts; and
- (e) Any other court established or recognised in terms of an act of Parliament, including any court of a status similar to either the high courts or the magistrates' courts.

DoJCD, is attached as Annex C.<sup>84</sup>

In terms of Item 16(6)(a) of Schedule Six of the Constitution, ‘all courts, their structure, composition, functioning and jurisdiction, and all relevant legislation, must be rationalised with a view to establishing a judicial system suited to the requirements of the Constitution’. The Minister of Justice and Constitutional Development must, after consultation with the Judicial Services Commission (JSC), manage this process, which is ongoing.

#### *Current court structure*

*(excluding special courts established by legislation)*<sup>85</sup>



The Constitutional Court, created as a new institution in 1994, is situated in Johannesburg and is the highest court in all constitutional matters. It deals solely with constitutional matters, including whether the conduct of the president, the executive and the acts of Parliament are consistent with the Constitution and the Bill of Rights. Its decisions are binding on all persons and

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<sup>84</sup> See Annex C: Court structure, also available at [http://www.doj.gov.za/2004dojsite/ab\\_dojcd/2001\\_courtstructures.htm](http://www.doj.gov.za/2004dojsite/ab_dojcd/2001_courtstructures.htm).

<sup>85</sup> Much of the information contained in the text below is derived from the Government of South Africa website, [www.gov.za](http://www.gov.za), with particular information on the courts and the justice sector generally to be found at <http://www.info.gov.za/aboutgovt/justice/courts.htm> and <http://www.info.gov.za/aboutgovt/justice/admin.htm> respectively.

organs of state,<sup>86</sup> as well as on all other courts. It is headed by the chief justice of South Africa and further comprises a deputy chief justice and nine other judges.<sup>87</sup>

While the Constitutional Court is generally speaking an appeal court, Section 167 of the Constitution provides that the Rules of the Constitutional Court may provide for direct access to the court where this is in the interests of justice, as well as for direct appeal from any other court to the Constitutional Court, thereby allowing a litigant to 'leapfrog' over the ordinary appeal process.<sup>88</sup> In both instances, a litigant must show why the court should grant direct access in the interests of justice, and the court has held in numerous cases that this will not easily be granted.<sup>89</sup> In practice, however, the direct access provisions have been strictly interpreted, and the Constitutional Court receives on average only 50 cases a year, of which it decides roughly half.

The Supreme Court of Appeal, situated in Bloemfontein, is the highest court in respect of all other matters, and was the highest court for all matters before 1994 (when it was known as the Appellate Division of the Supreme Court). It is composed of the president, deputy president and a number of judges to be determined by national legislation. This legislation has not yet been passed, and the Supreme Court Act of 1959<sup>90</sup> remains the only legislation regulating the Supreme Court of Appeal and the high court divisions. Currently, there are 15 permanent and six acting judges of appeal on the bench. The quorum of the Supreme Court of Appeal is usually five judges. The court has jurisdiction to hear and determine an appeal against any decision of a high court division. Decisions of the Supreme Court of Appeal are binding on all courts of a lower order. The relationship between the Constitutional Court and the Supreme Court of Appeal has not been entirely problem-free, and remains a matter of debate.<sup>91</sup>

In 2001, the Interim Rationalisation of Jurisdiction of High Courts Act<sup>92</sup> partially rationalised the jurisdictions of the high court divisions inherited from the previous government. Although it repeals the First Schedule to the Supreme Court Act, which established the high court divisions in accordance with the previous geographical set-up of provinces and so-called self-governing territories, it also provides that 'the seats and the areas of jurisdiction of the high courts referred to in the said First Schedule shall ... remain as they were immediately before the

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<sup>86</sup> The Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), Section 165(5).

<sup>87</sup> *Ibid.*, Section 167 (1).

<sup>88</sup> See also the Constitutional Court Complementary Act, 1995 (Act 13 of 1995), Section 16; and Rule 18 of the Rules of the Constitutional Court, 2003, No. R. 1675, in the *Government Gazette* No. 25726, 31 October 2003.

<sup>89</sup> For example, see *S v Pennington and Another* 1997 (4) SA 1076 (CC); *Bruce and Another v Fleecytex v Johannesburg CC and Others* 1998 (2) SA 1143 (CC); *MEC for Development Planning and Local Government, Gauteng v DP and Others* 1998 (4) SA 1157 (CC); *Moseneke and Others v The Master and Another* 2001 (2) SA 18 (CC); and *National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 (3) SA 1 (CC).

<sup>90</sup> The Supreme Court Act, 1959 (Act 59 of 1959).

<sup>91</sup> See for example, the programme for a 2004 Department of Justice Colloquium, available at <http://www.doj.gov.za/2004dojsite/cfw/colloquium/framework.htm>.

<sup>92</sup> Interim Rationalisation of Jurisdiction of High Courts Act, 2001 (Act 41 of 2001), in the *Government Gazette* Vol. 438, No. 22893, 5 December 2001.

commencement of this act'.<sup>93</sup> Consequently, there are ten provincial divisions (although they do not follow the current division of the republic into nine provinces) and three local divisions. Each provincial division, with the exception of the Venda Supreme Court, is headed by a judge president who also bears responsibility for a local division within its geographical jurisdiction. Decisions of the high courts are binding on magistrates' courts within the respective areas of jurisdiction of the divisions. A decision by a high court is subject to appeal, usually to the Supreme Court of Appeal.

*Current location of high court divisions*

<b>Name of court</b>	<b>Location</b>
Ciskei	Bisho
Orange Free State	Bloemfontein
Cape of Good Hope	Cape Town
Durban and Coast local division	Durban
Eastern Cape	Grahamstown
Witwatersrand local division	Johannesburg
Northern Cape	Kimberly
Bophuthatswana	Mmabatho
Natal	Pietermaritzburg
South Eastern Cape local division	Port Elizabeth
Transvaal	Pretoria
Venda	Thohoyandou
Transkei	Umtata

One noticeable feature of the South African court system since 1994, has been a rapid increase in the number of specialist courts. In addition to the Constitutional Court, the Supreme Court of Appeal and the provincial and local divisions of the high court, there now exist at superior court

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<sup>93</sup> *Ibid.*, Section 4(2).

level the following courts: the labour court and the labour appeal court,<sup>94</sup> the land claims court,<sup>95</sup> the electoral court,<sup>96</sup> the competition appeal court,<sup>97</sup> special (consumer) courts,<sup>98</sup> and the income tax courts.<sup>99</sup> Of these, only the special (consumer) courts and the income tax courts existed before 1994. Other specialist courts, such as dedicated sexual offences courts and maintenance courts, as well as equality courts established under the Promotion of Equality and Prevention of Unfair Discrimination Act 2000, have been created by giving ordinary courts specialist functions.

These specialist courts have been created with the aim of improving the delivery of justice in relation to the matters over which they have jurisdiction, especially in the context of a judiciary that in 1994 was almost wholly white and male and entirely appointed by the previous government. These new courts have played an important role in ensuring that policies designed to reverse the effect of apartheid laws would not be struck down by apartheid-era judges. The land claims court, for example, was established in 1996 to adjudicate matters arising from the government's land-reform programme, a highly controversial area given South Africa's history of land expropriation. Nevertheless, the record of the land claims court tends to suggest that appointing judges with human-rights credentials to specialist courts is a necessary but not sufficient condition for progressive legal transformation, and that a change in professional legal culture is also required. In one well-known case, the land claims court turned down the claim of an indigenous community to its ancestral land, only for this decision to be overturned by the non-specialist Supreme Court of Appeal.<sup>100</sup> In another case, it appeared to reverse an earlier precedent that had protected female farm workers as tenants in their own right.<sup>101</sup>

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<sup>94</sup> Established under the Labour Relations Act, 1995 (Act 66 of 1995) and with exclusive jurisdiction to hear disputes under the act. Judges are either of the high court or lawyers of ten years standing and with special expertise in labour law. Appeals from the labour court are made to the labour appeal court, and from there to the Supreme Court of Appeal.

<sup>95</sup> The land claims court was established in 1996. It is a specialist court which hears disputes arising from the Restitution of Land Rights Act, 1994 (Act 22 of 1994); the Land Reform (Labour Tenants) Act, 1996 (Act 3 of 1996); and the Extension of Security of Tenure Act, 1997 (62 of 1997). Appeals lie to the Supreme Court of Appeal and, in appropriate cases, to the Constitutional Court. Aspects of the court's jurisdiction and proceedings are peculiar to the functions it performs, for example, it may conduct any part of its proceedings on an informal or inquisitorial basis and it may convene hearings in any part of the country to make it more accessible.

<sup>96</sup> An electoral court is provided for by Section 18 of the Electoral Commission Act 51 of 1996, and consists of three judges and two other persons appointed by the president, with the responsibility to adjudicate electoral disputes and hear appeals from decisions of the Electoral Commission.

<sup>97</sup> Established by Section 36 of the Competition Act 89 of 1998.

<sup>98</sup> Established by Section 13 of the Consumer Affairs (Unfair Business Practices) Act 71 of 1988, these courts operate on an ad hoc basis.

<sup>99</sup> Special income tax courts are set up under the Income Tax Act of 1962, within divisions of the high court, and consist of a judge of the high court, assisted by an accountant of not less than ten years' standing and a representative of the business community. This court deals with high-value disputes between a taxpayer and the South African Revenue Service. Appeals are made directly to the Supreme Court of Appeal.

<sup>100</sup> *Richtersveld Community v Alexkor Ltd* 2001 (3) SA 1293 (LCC), and *Richtersveld Community v Alexkor Ltd* 2003 (6) SA 104 (SCA). See also, Theunis Roux, 'Pro-poor court, anti-poor outcomes: Explaining the performance of the South African Land Claims Court', *South African Journal on Human Rights*, Vol.20, No.4, 2004.

<sup>101</sup> *Die Landbou Navorsingsraaad v Klaasen*, LCC Case 83R/01 (unreported, 29 October 2001).

The Superior Courts Bill, introduced to Parliament in 2003 and still being debated, intends to complete the process of rationalisation for the superior courts (that is, the high courts and above), repealing the Supreme Court Act of 1959 and consolidating the laws relating to the Constitutional Court, Supreme Court of Appeal and high courts into a single act of Parliament.<sup>102</sup> The bill also provides for the restructuring of the existing high courts into a single High Court of South Africa, comprising one division in each province, with the exception of Gauteng, where there will be two divisions. It will also abolish the labour court and labour appeal court, giving jurisdiction in labour matters to the high court and instead establishing a panel of specially selected judges within the high court, who may hear labour matters. A bill to amend the Constitution accordingly has also been introduced.<sup>103</sup>

The lower courts comprise regional and district magistrates' courts. Magisterial districts have been grouped into 13 clusters, each headed by a chief magistrate, or in a few cases, by a senior magistrate. Regional courts deal solely with serious criminal matters, such as murder, rape or armed robbery. District courts deal with a variety of matters, but the bulk of the work is made up of civil or criminal matters. The district courts may not sentence an individual to more than three years' imprisonment, and civil matters may not be heard where the quantum of the dispute exceeds R100 000. All lower cases in both district and regional courts may be subject to review or appeal by the high court.

Courts structures are not equitably distributed and effective throughout the country. In particular, specialist courts tend to be based in urban centres. In 1999, the then Minister of Justice and Constitutional Development, Dr Penuell Maduna, acknowledged several problems with regards to the efficiency of the courts in a presentation before Parliament. In this presentation, the minister discussed problems in terms of quality of court accommodation in townships and rural areas. He also outlined problems in acquiring the required personnel and magistrates in these areas.<sup>104</sup>

In an attempt to address these issues, the DoJCD has publicly sought to strengthen and standardise court services delivery, which includes building new courts, upgrading existing court facilities, training court personnel and investigating the need for new court facilities.<sup>105</sup> The department also runs an Additional and Saturday Court Project,<sup>106</sup> aimed at reaching areas where insufficient court resources exist. In 2003, 72 courts participated in this project, finalising 23 836 cases.<sup>107</sup>

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<sup>102</sup> The Superior Courts Bill, (B52-2003).

<sup>103</sup> The Constitution of the Republic of South Africa Amendment Bill, (B 60-2003).

<sup>104</sup> The DoJCD, Matters arising from the Statement by the Minister of Justice and Constitutional Development on the Efficiency of the Courts, 9 September 1999, available at [http://www.doj.gov.za/2004dojsite/reports/1999reports/courtefficiency/1999\\_courtsefficiency.htm#4](http://www.doj.gov.za/2004dojsite/reports/1999reports/courtefficiency/1999_courtsefficiency.htm#4).

<sup>105</sup> The DoJCD, *Annual Report 2003/04*, pp.28-32.

<sup>106</sup> Parliamentary question to Minister of Justice and Constitutional Development, additional courts, 2003, available at [http://www.doj.gov.za/2004dojsite/parliament\\_qa/2003/pqas/qa\\_hr\\_18.htm](http://www.doj.gov.za/2004dojsite/parliament_qa/2003/pqas/qa_hr_18.htm).

<sup>107</sup> The DoJCD, *Annual Report 2003/04*, pp.29-30.



Prominent among the new court structures are the equality courts, established by the Promotion of Equality and Prevention of Unfair Discrimination Act (No. 4 of 2000), with the aim of providing remedies to victims of discrimination by both public and private institutions; in the context of South Africa, especially of racial discrimination. Equality courts are specialised chambers within the existing system of high courts (automatically designated so by the act) and magistrates' courts (staff must have training before they can receive that status)—though in practice most cases will be brought before magistrates' courts. The act provides for procedural and evidentiary rules that aim to maximise access to justice, and for a number of different remedies that aim to improve and educate offenders, rather than merely punish them. The first courts began operating in June 2003. By June 2005, more than 200 equality courts had been designated and more than 800 magistrates trained on the implementation of the act.

As with the other specialist courts that must be incorporated and accommodated within the existing court infrastructure, the equality courts are likely to be constrained by a lack of human resources: trained personnel are scarce and already overworked. It is early to evaluate the operation of the equality courts, but the record so far is somewhat mixed in terms of the ability of potential complainants to access the system. Although the experience of the land claims court indicates that a change in legal culture may be necessary for these new institutions to be effective, the equality courts are potentially powerful tools for an effort to end discrimination. Several of the early cases have received high-profile media attention, placing pressure on those accused of discrimination to reach a settlement.<sup>108</sup>

In May 2004, President Mbeki used his 'State of the Nation' address to Parliament to identify as a priority the establishment of at least two 'community courts' in each province, based on a pilot project established at Hatfield, in Tshwane.<sup>109</sup> Community courts are district courts that deal with the same cases as normal district magistrates' courts (that is, less serious crimes); the difference lies in the way the courts are intended to be integrated with other services. In particular, community courts are to handle offences relating to drug and alcohol abuse; offences relating to municipal by-laws; and petty offences like theft. Offenders will be dealt with immediately and the idea is that sentences other than imprisonment or fines should, where possible, be considered and imposed. In addition, court services are supposed to be integrated into an array of social support and control mechanisms created by community members. By the end of 2004, such community courts were in the process of being established at twelve locations.<sup>110</sup>

The Open Society Foundation for South Africa (OSF-SA) has funded the evaluation of

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<sup>108</sup> Information from Philippa Lane, 'South Africa's Equality Courts: An early assessment', *Race and Citizenship in Transition Series*, Centre for the Study of Violence and Reconciliation, 2005. See also, Speech by Minister for Justice and Constitutional Development, Ms BS Mabandla, 21 June 2005, available at [http://www.doj.gov.za/2004dojsite/m\\_speeches/sp2005/2005\\_06\\_21\\_eqcourts.html](http://www.doj.gov.za/2004dojsite/m_speeches/sp2005/2005_06_21_eqcourts.html).

<sup>109</sup> Thabo Mbeki, 'State of the Nation' Address, 2004, available at <http://www.info.gov.za/speeches/2004/04052111151001.htm>.

<sup>110</sup> The Open Society Foundation for South Africa, *Evaluation of the Western Cape Community Courts*, Cape Town, July 2005, p.9; Institute of Criminology, *Social Justice Resource Project Position Paper: Specialist Courts & Community Courts*, University of Cape Town, Cape Town, May 1997; deputy Minister for Justice and Constitutional Development, address at the official launch of the Western Cape Community Courts, 7 December 2004, available at <http://www.info.gov.za/speeches/2004/04121010151002.htm>.

community courts and will be looking more specifically at the recent implementation of specialist courts. The intention in setting up the specialist courts appears to have been to ensure that justice is made more accessible and that cases are heard by adjudicators with relevant expertise. However, there are questions as to whether these specialist courts do in fact ensure that justice is more accessible and, more importantly, whether this method of justice is cost effective or simply diverts expenditure, leaving the regular court system under-funded.

In addition to the court structures described above, traditional or chiefs' courts exist in most of the former 'homeland' areas that were designated for black Africans under the apartheid system.<sup>111</sup>

### **C. Reform of the legal sector**

Although there have been wide-ranging and important reforms of the laws governing the courts since 1994, there has been no systematic review of all laws governing the courts. Reform has taken place on a piecemeal basis. The reform process has been driven by the South African Law Reform Commission, judgments of the courts, constitutional obligations and the judiciary itself in some instances. Important reforms include the rationalisation of the different apartheid divisions into a single judicial system, rationalising different legal aid systems, recognising attorneys from different apartheid divisions and providing for judges' and magistrates' remuneration and greater independence.

Law reform is the responsibility of the Minister of Justice and Constitutional Development. The South African Law Reform Commission is an advisory body established to renew and improve the law of South Africa.<sup>112</sup> While anyone may submit proposals for law reform to the Law Reform Commission, the Law Reform Commission also identifies reform matters to investigate. A preliminary enquiry is instituted to justify taking up the matter. The Law Reform Commission then produces and disseminates an 'Issue Paper' outlining the existing legal position, any problems that must be addressed, an international comparative study and suggested options for reform. The Issue Paper is the basis for public consultation with the aim of establishing the most suitable solution. A 'Discussion Paper' contains the preliminary results of research, including public comment and a proposed solution usually in the form of draft legislation. This paper is also subject to public comment before a full report on the investigation, final recommendations and draft legislation is submitted to the minister.<sup>113</sup>

Post-1994 reform of criminal and civil procedure has been more systematic. The Law Reform Commission has several projects reviewing these areas, including Project 73: Simplification of Criminal Procedure; Project 25: Statute Law; Project 82: Sentencing; and Project 90: Customary Law. While investigations are ongoing, legislation has already been passed addressing bail

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<sup>111</sup> See further below, Section 6.F, on 'Traditional' Justice Systems, p.118.

<sup>112</sup> The South African Law Act, 1973 (Act 19 of 1973). The members of the Law Reform Commission are appointed by the president; the commission was substantially reconstituted following 1994, to better reflect South Africa's racial and religious diversity.

<sup>113</sup> The South African Law Reform Commission, *Thirtieth Annual Report 2002/03*, Pretoria, March 2003, pp.8-9.

matters, appeal matters and regulating plea bargains.<sup>114</sup>

The reform of the legal sector has been slow. The department has justified the delays by pointing out that it attempts to achieve consensus amongst key role-players, which has resulted in these delays.<sup>115</sup> Legislation regulating the legal practice has also been prolonged since 2001. The legislation has been prolonged because of strong differences within the legal profession<sup>116</sup> on a range of matters, including the recognition of paralegal practice and the powers of specific regulatory bodies.

### Case study: Successful institutional reform—sexual offences courts

The sexual offences courts are lauded by the DoJCD as an example of successful institutional reform. These courts, which are ordinary establishments but with special facilities and offering support for vulnerable witnesses, were first piloted in 1993, as a response to civil society calls for a criminal justice system that was more sensitive to victims of sexual violence during trials.

The first sexual offences court in Wynberg, near Cape Town was created in 1993, as the conceptual model. It provides suitable facilities including separate consultation rooms, waiting rooms, toilet facilities and camera facilities. The court model requires collaboration between different role-players who all contribute to effective service provision: social workers, district surgeons, members of the child-protection unit, professionals and NGOs that provide support services. The effectiveness of the court also requires training of relevant personnel.

Throughout the years, the sexual offences courts have, however, been criticised for a range of weaknesses. Initial concerns about the slow roll-out process became more detailed concerns about implementation in specific courts. A 2001 assessment of the sexual offences courts in Wynberg and Cape Town found the courts to have inadequate human, financial and other resources, and inadequate physical facilities. Support services provided by NGOs were found to be wanting, while cross-sectoral training and intersectoral co-ordination were identified as areas that required improvement. A later review argues that the sexual offences courts continue to depend primarily on donor funding.

Despite these criticisms, there is wide consensus that these courts have a higher conviction rate than normal courts—up to 63 per cent. By 2004 a Sexual Offences Court Strategy and Blueprint was approved by the DoJCD. A National Project Oversight Committee had been established to co-ordinate role-players at a senior departmental level. Fifty-three permanent

<sup>114</sup> See also Annex B: List of notable laws affecting the justice system.

<sup>115</sup> The DoJCD, *Annual 2003/04*, p.5.

<sup>116</sup> Parliamentary question to Minister of Justice and Constitutional Development: Legal Profession, 2003, available at [http://www.doj.gov.za/2004dojsite/parliament\\_qa/2003/pqas/qa\\_lp\\_53.htm](http://www.doj.gov.za/2004dojsite/parliament_qa/2003/pqas/qa_lp_53.htm).

courts and 19 additional courts have since been established. Personnel have been contracted to function as intermediaries, court-preparation officials and victim assistants. Work has also been done to co-ordinate training, including the development of guidelines for prosecutors in sexual offences courts and the development of an intersectoral Child Law Manual.

Ongoing improvements have made the sexual offences courts a primary example of institutional reform in the justice sector. Combined with improvements in the caseflow and information-management systems of the department, the courts have been able to 'respond to the needs of women and children'.

**SOURCES:**

Mastoera Sadan, Lulama Dikweni, Shaamela Cassiem, *Pilot Assessment: The Sexual Offences Courts in Wynberg and Cape Town, and related services*, IDASA, 2001;

Penny Parenzee, *Investigating the Implications of Ten Years of Democracy for Women: The Role of the Department of Justice and Constitutional Development*, IDASA, 2004; and

The DoJCD, *Annual Report 2003/04*.

# 2

## Government respect for the rule of law

Generally, since the new regime was established in 1994, the executive has not been viewed as frustrating the affairs of the judiciary or interfering in prosecutions, with the possible exception of the controversy surrounding the investigation and prosecution on corruption charges of the special adviser to former Deputy President Jacob Zuma, and subsequently Zuma himself. Overall, there is a healthy tradition of judicial review of executive action, though there have been some cases of government failure to comply with subsequent rulings.

### **A. The legislative process**

In general, the South African government upholds international, constitutional and legal standards when generating laws.

However, one instance in which legislation was passed that was widely regarded as serving the ruling party's interests, was the introduction in early 2002 of a law to allow Members of Parliament from one party to 'cross the floor' and join another party. The New National Party (NNP) sought to leave an alliance it had entered into with the opposition Democratic Alliance (DA), and instead enter into an alliance with the ruling party, the African National Congress (ANC). But under existing legislation and constitutional provisions, members of the NNP would lose their elected seats when they left the DA, under whose name they had been elected. In June 2002, Parliament passed four pieces of legislation that would change the Constitution to allow

floor-crossing at national, provincial and local level.<sup>117</sup>

There was strong resistance to the floor-crossing legislation, as opposition parties stated that it was passed out of political expediency for the ANC.<sup>118</sup> The Constitutional Court, however, decided in favour of the government on most points, in a case brought to challenge the laws, and stated that the motives of the parties supporting the legislation were not relevant to the question of whether the acts were constitutional.<sup>119</sup> But it declared the Loss or Retention of Membership of National and Provincial Legislatures Act<sup>120</sup> unconstitutional, because it had not followed the correct procedure through Parliament. The procedure that was followed was allowed only for a 'reasonable period', after the Constitution came into effect in 1996. Three years into Parliament's second term, and six years after the Constitution came into effect, was too long to be a 'reasonable period'. Parliament then passed the Constitution of the Republic of South Africa Amendment Act 2 at the beginning of 2003. The Amendment Act had a very similar content to the Membership Act, and this time the proper procedure was followed.

Concerns have been raised about the apparent lack of consultation with stakeholders in the passing of regulations (which are the rules for detailed implementation of an act, and in terms of Section 239 of the Constitution are regarded as 'national legislation'). Regulations have been subject to judicial review of administrative action under the common-law system, and the prevailing opinion is that they remain so under the recently passed Promotion of Administrative Justice Act (PAJA).<sup>121</sup> This means that their adoption must be procedurally fair. The most recent case has seen pharmaceutical groups challenge the legality of regulations<sup>122</sup> to the Medicines and Related Substances Act,<sup>123</sup> among other things, on the basis that their formulation and adoption was procedurally unfair. The Supreme Court of Appeal has ruled in favour of the applicants, agreeing that the regulations extend beyond the ambit of the original legislation, and that the consultation process was flawed.<sup>124</sup> The case has been appealed to the Constitutional Court.

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<sup>117</sup> The Constitution of the Republic of South Africa Amendment Act, 2002 (Act 18 of 2002) in the *Government Gazette* Vol. 444, No. 23542, 20 June 2002; Local Government: Municipal Structures Amendment Act, 2002 (Act 20 of 2002) in the *Government Gazette* Vol. 444, No. 23543, 20 June 2002; the Constitution of the Republic of South Africa Second Amendment Act, 2002 (Act 21 of 2002) in the *Government Gazette* Vol. 444, No. 23544, 20 June 2002; and Loss or Retention of Membership of National and Provincial Legislatures Act, 2002 (Act 22 of 2002).

<sup>118</sup> Donwald Pressly, 'Floor-crossing: Bad news for opposition', *Mail & Guardian*, 21 September 2004.

<sup>119</sup> *United Democratic Movement v President of the Republic of South Africa and Others* (No. 2) (ACDP and Others intervening; Institute for Democracy in South Africa and Another as amicus curiae) 2003 (1) SA 495 (CC).

<sup>120</sup> The Loss or Retention of Membership of National and Provincial Legislatures Act, 2002, (Act 22 of 2002).

<sup>121</sup> The Promotion of Administrative Justice Act, 2000 (Act 3 of 2000) in the *Government Gazette* Vol. 416, No. 20853, 3 February 2000.

<sup>122</sup> Regulations relating to a transparent pricing system for medicines and scheduled substances, made in terms of Section 22G of the Act and promulgated on 30 April 2004.

<sup>123</sup> The Medicines and Related Substances Act, 1965 (Act 101 of 1965).

<sup>124</sup> *Pharmaceutical Society of South Africa and Others: New Clicks (Pty) Limited v Minister of Health and Another: Tshabala-Msimang NO and Another*, 542/04, 543/04 SCA.

## B. Executive compliance with the law

The government has not always been successful in complying with the requirements of its own new laws. A particularly concerning instance is the only very gradual implementation of the Promotion of Access to Information Act (PAIA), which was passed in 2000 and came into force in 2001. PAIA is a groundbreaking piece of legislation that requires government organs to make information available regarding their operations. The act envisages a central role for the South African Human Rights Commission (SAHRC), including the drafting of a guide on how to use the act,<sup>125</sup> and to receive reports from other public bodies concerning statistics of requests made and to provide guidelines for such reporting.<sup>126</sup> The SAHRC is also required to include in its annual report to Parliament a section on the implementation of the act.<sup>127</sup> The guide was eventually published and launched on 1 March 2005, and distribution of the guide was taking place in phases at the time of writing.<sup>128</sup> Furthermore, despite the fact that Section 32 of the act came into effect in March 2001, there was still widespread non-compliance with reporting requirements in 2003, which was the first year that the SAHRC actively sought compliance with the act's requirements.<sup>129</sup> The South African History Archive (SAHA), a non-governmental organisation, has published an assessment of the compliance of public bodies with the reporting requirement contained in Section 32 of PAIA, and concludes that a large number of public bodies have not submitted reports as required and that there are considerable problems with the reports that were submitted.<sup>130</sup> The SAHA points out that the country's three most populous provinces, the Eastern Cape, Gauteng and KwaZulu-Natal did not report to the SAHRC, and all but three municipalities failed to submit reports.<sup>131</sup>

The Department of Home Affairs has also been criticised for its administration of the Refugees Act.<sup>132</sup> Reports by organisations working on refugee and asylum-seeker issues show that the department has failed to process applications for asylum under the refugee status-determination process, within the requisite 180 days.<sup>133</sup> The result has been a backlog of applica-

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<sup>125</sup> The Promotion of Access to Information Act, 2000 (Act 2 of 2000), Sections 10 & 83, in the *Government Gazette* Vol. 416, No. 20853, 3 February 2000.

<sup>126</sup> *Ibid.*, Section 32.

<sup>127</sup> *Ibid.*, section 83, read with Section 185(5) of the Constitution.

<sup>128</sup> Information obtained via telephone from SAHRC, 20 March 2005.

<sup>129</sup> The SAHRC *Annual Report 2002/3*.

<sup>130</sup> Rolf Sorenson, *Statistics with respect to the Promotion of Access to Information Act (PAIA): Report to National Assembly by Human Rights Commission pursuant to section 84(b) of PAIA*, South African History Archive, 2003, available at [http://www.wits.ac.za/saha/publications/FOIP\\_2\\_1\\_Sorensen.pdf](http://www.wits.ac.za/saha/publications/FOIP_2_1_Sorensen.pdf).

<sup>131</sup> *Ibid.* p. 3.

<sup>132</sup> The Refugees Act, 1998 (Act 130 of 1998), in the *Government Gazette* Vol. 402, No. 19544, 2 December 1998.

<sup>133</sup> Lee Anne de la Hunt, *Tracking Progress: Initial Experiences with the Refugees Act 130 of 1998*, researched for the National Consortium for Refugee Affairs, Johannesburg, September 2002, pp. 36–37; Human Rights Committee of South Africa, 'Access to Justice—Focus on Refugees and Asylum Seekers', *Quarterly Review*, Braamfontein, March 2001, pp. 1–5; the Community Agency for Social Enquiry, *National Refugee Baseline Survey*, researched for United Nations High Commissioner for Refugees and the Japan International Co-operation Agency, Johannesburg, November 2003, pp. 93–96.

tions, which have an adverse effect on an asylum seeker's ability to exercise his or her rights as protected under the Constitution, particularly accessing social services and finding employment legally.

## Compliance with court orders

In general, actions by the executive and by its members in the course of their official duties have always been subject to scrutiny by the courts. The 1957 State Liability Act provides that a wrongdoing by a 'servant of the state', in principle, will give rise to a claim in contract or delict against the state, as long as he or she was acting within the scope of his or her employment.<sup>134</sup> However, where a specific action is authorised by statute, it cannot be wrongful and this may prevent a successful claim in delict, since wrongfulness is an element of delictual liability. Nevertheless, the former Appellate Division pointed out that an administrative body does not have immunity from liability simply because damage was caused 'in the course of implementing a general policy'.<sup>135</sup>

Since 1994, the Constitution has given substantial new grounds to the courts to review legislation and executive action against the standards of the Bill of Rights and other provisions. As noted above, the Constitutional Court has been active in ruling on a wide range of cases.

In particular, Section 33 of the Constitution has given specific protection to the right to 'just administrative action', thus entrenching the power of the courts to engage in judicial review of administrative action.<sup>136</sup> The Promotion of Administrative Justice Act (PAJA)<sup>137</sup> has been passed to give effect to this right, as required by Section 33(3) of the Constitution. The act builds on a long tradition of judicial review of the exercise of public power by the courts, under the pre-1993 common law. In terms of Section 33 and the PAJA, however, only 'administrative action' is reviewable. This has led the courts to develop the principle of *legality*, to denote a standard of conduct that has to be complied with when bodies are exercising public power that does not qualify as administrative action, and thus falls outside the scope of Section 33.<sup>138</sup> The principle of legality is a constitutional principle implied in the rule of law entrenched as a founding provision of the Constitution.<sup>139</sup> The exercise of public power by members of the executive and other bodies is routinely reviewed against the standards contained in Section 33 and the PAJA, as well

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<sup>134</sup> The State Liability Act, 1957 (Act 20 of 1957). See also *Mohlomi v Minister of Defence* 1996 (12) BCLR 1299 (CC); 1997 (1) 124 (CC), relating to damages arising from a shooting.

<sup>135</sup> *East London Western District Farmer's Association v Minister of Education and Development Aid* 1989 (2) SA 63 (A).

<sup>136</sup> The Constitution of the Republic of South Africa, 1996, (Act 108 of 1996), Section 33:  
'Just administrative action

(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.'

<sup>137</sup> The Promotion of Administrative Justice Act, 2000 (Act 3 of 2000), in the *Government Gazette* Vol. 416, No. 20853, 3 February 2000.

<sup>138</sup> This principle was prominently developed by the Constitutional Court in these cases: *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council* 1999 (1) SA 374 (CC); *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC); *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC).

<sup>139</sup> The Constitution of the Republic of South Africa, 1996, (Act 108 of 1996), Section 1(c).



as against the principle of legality. Court rulings in this regard are, as a rule, complied with.

Rulings against the state by the Constitutional Court are generally respected and implemented. However, there have been contentious cases where a judicial decision was not or could not be implemented. In the case of *Mohamed v the President*,<sup>140</sup> the applicant had been handed over to the FBI by the South African government and put on trial in New York. This happened without an undertaking by the United States government that he would not be subject to the death penalty should he be found guilty. The court affirmed that the South African government could not expose a person to the risk of execution. Consequently, the court held that the applicant had been illegally removed from the country. Since the applicant was already outside of the jurisdiction and control of the court, it ordered that the judgment should be brought to the attention of the trial court in New York. As noted above, the Treatment Action Campaign (TAC) has repeatedly complained that the government has only partially complied with the Constitutional Court's 2002 order to make the anti-retroviral drug, Nevirapine, available in public hospitals for the purpose of reducing the risk of mother-to-child transmission of HIV. The SAHRC has also criticised the government's failure to implement fully the judgment of the Constitutional Court in the *Grootboom* case.<sup>141</sup>

It is also of concern that the Department of Home Affairs has on several occasions opposed in court the recognition of same-sex life partners, despite the provisions of Section 9 of the Constitution, which contains a presumption of unfair discrimination where legislation differentiates between people on the basis of their sexual orientation.<sup>142</sup> This happened in the case of *J v Department of Home Affairs*, where the applicant sought to have sections of the Children's Status Act 82 of 1987 declared unconstitutional, insofar as they discriminated against permanent same-sex life partners.<sup>143</sup> Another example is the defence offered by the department against an application to have sections of the Aliens Control Act 96 of 1991 declared unconstitutional, insofar as they discriminated against same-sex life partners.<sup>144</sup> In both cases, the court ruled against the department.

At provincial level, however, the government record in implementing court orders has often been poor. In particular, there have been a string of cases against different branches of the provincial government of the Eastern Cape, widely regarded as South Africa's most dysfunctional province.

The Eastern Cape Department of Social Development<sup>145</sup> has found itself in contempt of court on numerous occasions for failing to adhere to high court rulings requiring it to deal with,

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<sup>140</sup> *Mohamed and Another v President of the Republic of South Africa and Others* 2001 (3) SA 893 (CC).

<sup>141</sup> See the case study on *Grootboom*, p.31.

<sup>142</sup> The Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), Section 9(3).

<sup>143</sup> *J and Another v Director General, Department of Home Affairs, and Others* 2003 (5) SA 621 (CC).

<sup>144</sup> *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC).

<sup>145</sup> The Eastern Cape Department of Social Development changed its name from Department of Welfare on 20 May 2002, in terms of proclamation 23439.

and pay out, pensions and other social grants timeously.<sup>146</sup> In the case of *Vumazonke*, the court commented as follows:<sup>147</sup>

[10] The problem may be summarised in this way: notwithstanding that literally thousands of orders have been made against the respondent's department over the past number of years, it appears to be willing to pay the costs of those applications rather than remedy the problem of maladministration and inefficiency that has been identified as the root cause of the problem. [...] the courts are left with a problem that they cannot resolve: while they grant relief to the individuals who approach them for relief, they are forced to watch impotently while a dysfunctional and apparently unrepentant administration continues to abuse its power at the expense of large numbers of poor people, the very people 'who are most lacking in protective and assertive armour' and whose needs 'must animate our understanding of the Constitution's provisions'. What escalates what I have termed a problem into a crisis, is that the cases that are brought to court represent only the tip of the ice-berg. (Footnotes have been omitted.)

There have been other reports of provincial departments failing to implement court orders. In November 1998, a *rule nisi* was issued against the Eastern Cape Member of the Executive Council (MEC) for Transport and Public Works, for failing to pay 35 employees' voluntary severance packages and interest, pursuant to a court order. The MEC was called upon to show cause as to why he should not be arrested for failure to comply with the order. The payment was made before the return day.<sup>148</sup>

This immense problem was also recognised by the Supreme Court of Appeal in 2004 in the *Jayiya* case.<sup>149</sup> In that case, not only was the Provincial Department of Welfare in the Eastern Cape failing to provide the service, but it had also ignored a direct court order. The Supreme Court of Appeal held, however, that where an order is granted against a government department granting financial relief to the applicant, that order cannot be executed against the State's property, nor can an official responsible for the government department be imprisoned for contempt of court. The court held that the responsibility for a department's performance lies solely with the political head of the department in a representative capacity, namely the national minister or the provincial member of the executive council—displaying a perhaps regrettable reluctance to hold individual officials liable for their own incompetence.

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<sup>146</sup> See, for example, *Vumazonke and Others v MEC for Social Development, Eastern Cape Province* (unreported case, Case Nos: 110/04; 826/04; 143/04; 2541/03, 25 November 2004); *Ntame v MEC for Social Development, Eastern Cape Province* (unreported judgment, Case Nos: 3667/04; 3634/04; 3635/04, 11 January 2005).

<sup>147</sup> *Vumazonke and Others v MEC for Social Development, Eastern Cape Province* (unreported case, Case Nos: 110/04; 826/04; 143/04; 2541/03, 25 November 2004).

<sup>148</sup> 'For the record', *Dispatch Online*, 29 February 1999; 'MEC to be arrested for contempt', *Mail & Guardian*, 24 February 1999.

<sup>149</sup> *Jayiya v MEC for Welfare, Eastern Cape, and Another* 2004 (2) SA 611 (SCA).

A failure to obey court orders has not been limited to the Eastern Cape. In the case of *Hardy Ventures CC*,<sup>150</sup> the Pretoria High Court cautioned that it would be preferable to issue a *rule nisi* against a state organ (Tshwane Metropolitan Municipality) that did not appear in court, instead of an order for contempt of court and committal. In the case of *Settlers Agricultural High School*,<sup>151</sup> the Constitutional Court issued a strongly worded rebuke to the Limpopo Provincial Department of Education for failing to pay the costs of a previous judgment, granted against it in the same matter. In another matter, a Correctional Services Department spokesperson who claimed that the Pretoria High Court had erroneously granted bail to Eugene Terreblanche, leader of the extremist right-wing Afrikaner Weerstandsbeweging (AWB), was found in contempt of court and fined with an option of imprisonment.<sup>152</sup>

## Case study: Government's failure to comply with the Grootboom judgment

In the case of *The Government of the Republic of South Africa and Others v Grootboom and Others*, the Constitutional Court was asked to consider a constitutional challenge to the national housing programme by a group of people, collectively known as the Wallacedene community (510 children and 390 adults). The community had been forcibly removed from municipal land that they had illegally occupied, which had been earmarked for a low-income housing project. The court found that the fact that the national housing programme, whilst providing permanent housing to people on the provincial waiting lists, did not cater to the immediate needs of people in the situation of the Wallacedene community, was unreasonable, and therefore in violation of the right of access to adequate housing (Section 26 of the Constitution).

The Court issued two orders (which are often confused). The first order contained a detailed arrangement between the parties, which provided for the supply and maintenance of toilets, water taps and building material. The court's second order, issued a month later with full reasons, declared that Section 26(2) of the Constitution imposed on the state the obligation to deal with people in crisis, such as the applicants. It ordered the state to devise and implement a programme that would do so, but specified no particular action. The court's judgment was the first to deal with the positive obligations imposed on the state to progressively realise the socio-economic rights stated in the Constitution.

The South African Human Rights Commission, which had made a submission to the court as *amicus curiae*, assumed the responsibility of monitoring the implementation of the court's

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<sup>150</sup> *Hardy Ventures CC v Tshwane Metropolitan Municipality* 2004 (1) SA 199 (T).

<sup>151</sup> *Head of Department, Department of Education Limpopo Province v Settlers Agricultural High School and Others* 2003 (11) BCLR 1212 (CC).

<sup>152</sup> 'Correctional services official guilty of contempt', *Mail & Guardian*, 22 August 2000.

orders (itself confusing the references made in the judgment to imply that it should monitor the first rather than the second order). It submitted a report to the Constitutional Court outlining the extent to which the state had failed to fulfil the specific commitments to improve the situation of the Wallacedene community. It concluded that, while the state had appeared to comply with the immediate obligations imposed in the first order, it had failed to maintain sanitation and water services on an ongoing basis, and the standard of provision thus deteriorated quickly. However, since there was no further application by those affected, the Constitutional Court had no mandate to engage with the issue. The SAHRC does not have the power to force the state to take action on its report, and the implementation of policy rightly remains a function of the executive.

The government has, however, supplemented the national housing programme with two other programmes that go some way towards filling the gap identified by the litigation: an Emergency Housing Programme (2003), which provides temporary housing to people who have lost their homes in natural disasters or are facing an imminent threat of eviction; and the Informal Settlement Support Programme (2004), which is aimed at the upgrading of existing informal settlements. Implementation is proceeding at a slow pace, but in the end the immediate families involved in this groundbreaking litigation have seen few results.

**SOURCES:**

*The Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC); and *Grootboom and Others v The Government of the Republic of South Africa and Others* (CCT38/00); Kameshni Pillay, 'Implementing Grootboom, Supervision needed', *ESR Review*, July 2002, is available at [http://www.communitylawcentre.org.za/ser/esr2002/2002july\\_grootboom.php](http://www.communitylawcentre.org.za/ser/esr2002/2002july_grootboom.php); 'Nine years under the kgotla tree', *Mail & Guardian*, 3 May 2004; and The South African Human Rights Commission, 'The Right Of Access To Adequate Housing' 5th Economic and Social Rights Report: 2002/03, 21 June 2004, is available at [http://www.sahrc.org.za/5th\\_esr\\_housing.pdf](http://www.sahrc.org.za/5th_esr_housing.pdf).

### **c. Investigation of executive action: commissions of enquiry**

Section 84(2)(f) of the Constitution unconditionally empowers the president, as head of state, to appoint commissions of enquiry.<sup>153</sup> A commission of enquiry is ordinarily headed by a retired judge or a senior member of the legal profession, and operates in terms of clearly defined terms of reference. A commission of enquiry drafts a report on the questions put to it and will then hand the report to the president. These reports are, in almost all cases, published within a reasonable time after they are completed. A commission has no enforcement mechanism at its disposal.

Commissions of enquiry are generally provided for in the outdated Commissions Act,<sup>154</sup> and

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<sup>153</sup> *Ibid.*, Section 84(2)(f):

'84 Powers and functions of president  
(2) The president is responsible for –  
(f) appointing commissions of inquiry; ...'

<sup>154</sup> The Commissions Act, 1947 (Act 8 of 1947).

are specifically provided for in several pieces of recent legislation.<sup>155</sup>

Since 1994, there have been numerous commissions appointed to enquire into issues of national importance. Examples include:

- The Cameron Commission to enquire into illegal arms dealing by South Africa in 1994;
- The Steyn Commission to enquire into objections raised against the Saldanha Steel Plant in 1995;
- The Hoexter Commission on the establishment of a system of family courts in 1996;
- The Satchwell Commission to enquire into the Road Accident Fund in 1998;
- The King Commission to enquire into Cricket Match Fixing in 2000;
- The Jali Commission to investigate allegations of corruption, mismanagement, intimidation and violence in South Africa's prisons in 2001;<sup>156</sup> and
- The Myburgh Commission to enquire into the rapid depreciation of the exchange rate of the rand in 2002.

At provincial level, the premiers are empowered to appoint commissions of enquiry in terms of Section 127(2)(e) of the Constitution. Several provinces have enacted provincial legislation dealing with provincial commissions.<sup>157</sup> Examples of provincial commissions include:

- The Dreyer Commission in 1997, which was appointed by the premier of Mpumalanga after a report by the attorney-general to enquire into the Mpumalanga Rural Housing Project; and
- A Commission of Enquiry into Hospital Care Practices in 1999, appointed by the premier of Gauteng, to enquire into the poor levels of service in provincial hospitals.

Following the upsurge in political violence ahead of the local government elections, in the first quarter of 2005 in KwaZulu-Natal, the provincial government has reportedly recommended the establishment of a commission. Two commissions of inquiry were appointed to investigate issues surrounding the prosecution of Schabir Shaik, adviser to former Deputy President Jacob Zuma, and of Zuma himself.

A further mechanism that allows for the investigation of executive action, is the occasional appointment by the president of Special Investigating Units (SIU) and special tribunals in terms

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<sup>155</sup> For example, the Prevention of Public Violence and Intimidation Act, 1991 (Act 139 of 1991); the National Sport and Recreation Act, 1998 (Act 110 of 1998); the National Environmental Management Act, 1998 (Act 107 of 1998); and the Road Accident Fund Commission Act, 1998 (Act 71 of 1998).

<sup>156</sup> For further discussion see Makubetse Sekhonyane, 'The Jali Commission on Prison Corruption', *SA Crime Quarterly* No. 2, Institute for Security Studies, Pretoria, November 2002.

<sup>157</sup> For example, in Gauteng: the Provincial Commissions Act, 1997 (Act 1 of 1997); the Western Cape Provincial Commissions Act, 1998 (Act 10 of 1998); the Provincial Commissions Act (Eastern Cape), 1994 (Act 5 of 1994).

of the Special Investigating Units and Special Tribunals Act.<sup>158</sup> In terms of the act, the purpose of SIUs is to investigate serious misconduct relating to the administration of state institutions, state assets and public money, and other serious conduct that may harm the public. Special tribunals are set up to adjudicate upon civil matters, emanating from investigations by SIUs. Initially, the act required the appointment of a judge as head of an SIU, but this requirement was held to be unconstitutional, since the head of an SIU was performing essentially executive functions, including investigation of offences and subsequent prosecution.<sup>159</sup> SIUs have been appointed on numerous occasions, and a special tribunal has been appointed and adjudicated in two reported cases since 1996.<sup>160</sup>

## Case study: The Schabir Shaik and Jacob Zuma prosecutions

In 2003, stories in the media based on leaked information indicated that the then National Director of Public Prosecutions (NDPP), Bulelani Ngcuka, was investigating Schabir Shaik, head of Nkobi Holdings and financial adviser to Deputy President Jacob Zuma, and the Deputy President himself, for corruption in relation to a highly controversial arms deal. Tensions surfaced between the African National Congress (ANC) and the NDPP.

In August 2003, the NDPP announced that while there was a *prima facie* case against the Deputy President for corruption, he would not be prosecuted because the prosecution services were not confident they could secure a conviction—leading to accusations that he was abusing his position.

Former Transport Minister Mac Maharaj (a member of the ANC who was also being investigated by the office of the NDPP), and Mo Shaik (the brother of Schabir Shaik, a special adviser to the foreign affairs minister and a former ANC intelligence operative), accused Ngcuka of having been a spy for the apartheid government and claimed that the investigations were the result of obligations to his former paymasters. A commission of enquiry was established under Judge Joos Hefer (known as the Hefer Commission), which cleared Ngcuka in January 2004 and made clear that there had been little or no evidence to substantiate the allegations made by Maharaj and Shaik; but not until after there had been heated allegations and counter-allegations in the media. The commission was harshly criticised, both by opposition parties and by independent observers and academics such as Dr Barney Pityana, a former head of the SAHRC, as being an expensive deflection away from the main question, namely whether the arms deal was tainted by corruption.

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<sup>158</sup> The Special Investigating Units and Special Tribunals Act, 1996 (Act 74 of 1996), in the *Government Gazette*, Vol. 453, No. 25024, 14 March 2003.

<sup>159</sup> *South African Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC).

<sup>160</sup> *Special Investigating Unit and Another v Mfeketo and Twenty Similar Matters* 2001 (1) SA 1089 (SpT); *Special Investigating Unit v Kim Diamonds (Pty) Ltd* 2004 (2) SA 173 (SpT).

Shortly thereafter, the Public Protector Lawrence Mushwana began an enquiry into whether the NDPP had abused the power of his office by investigating, and later not prosecuting, the Deputy President. Mushwana found that Ngcuka had infringed the Deputy President's right to dignity and had prejudiced him when he made the statement that there was a *prima facie* case against the Deputy President. The report was adopted by an ANC-dominated parliamentary committee, in which Ngcuka was denied a hearing, despite requests by members of opposition parties to hear him. Bulelani Ngcuka resigned in September 2004. The Minister of Justice and Constitutional Development, Penuell Maduna, who had also been implicated in the media coverage of the issue and who was Ngcuka's political superior, retired from active politics after the 2004 general elections.

Legal proceedings against Schabir Shaik were launched in the latter part of 2004. In May 2005, he was convicted of two charges of corruption and one of fraud related to his relationship with the deputy president—which the court stated was 'generally corrupt'—and sentenced to an effective fifteen years imprisonment. Shortly after this decision was handed down, the president 'relieved' the deputy president of his duties. The ANC Youth League, meanwhile, argued that the judgment of the Durban High Court against Schabir Shaik should be disregarded because the judge concerned had once been a member of the Rhodesian Parliament; the SAHRC condemned this statement for being based purely on the race of the judge concerned, and not the actual content of the judgment.

Bulelani Ngcuka's successor, Vusi Pikoli, reversed the National Prosecuting Authority's (NPA) decision not to prosecute the Deputy President, and two charges of corruption were instituted amid allegations of a 'conspiracy' against him. This case was still ongoing as this report went to press; and the allegations of improper pressure on the NPA were also being investigated by a further commission of inquiry. In addition, a new political storm erupted over a search operation conducted at the deputy president's Johannesburg home and that of his legal adviser, with allegations being made that this operation was a 'fishing expedition' improperly carried out after charges had already been instituted. In August 2005, the Johannesburg High Court declared that the search warrant, issued in respect of the former Deputy President's legal adviser, was unlawful.

**SOURCES:**

Media stories, including Wally Mbhele and Mawande Jack, 'Hefer probe "a waste of money"', *News24.com*, 25 October 2003, available at [http://www.news24.com/News24/South\\_Africa/Hefer\\_probe/o,6119,2-7-1536\\_1435903,00.html](http://www.news24.com/News24/South_Africa/Hefer_probe/o,6119,2-7-1536_1435903,00.html);

Devan Pillay, 'Conspiracy theories flourish as the spy story subplot thickens', *Sunday Times*, 30 Nov 2003, is available at <http://www.suntimes.co.za/2003/11/30/insight/ino6.asp>;

'Racial attack on judge "unwarranted"', SAPA, 6 June 2005, available at [http://www.mg.co.za/articlePage.aspx?articleid=242532&area=/breaking\\_news/breaking\\_news\\_\\_national/](http://www.mg.co.za/articlePage.aspx?articleid=242532&area=/breaking_news/breaking_news__national/); and

The minutes of the parliamentary committee deliberations can be found on the Parliamentary Monitoring Group's website, available at <http://www.pmg.org.za/viewminute.php?id=4112>.

See also Chapter 5.C on independence of the prosecution service.

## D. Pardons and amnesties

South Africa does not have legislation allowing for general amnesty. However, an epilogue to the 1993 Interim Constitution, which governed the transitional period following the 1994 elec-

tions until the final Constitution was adopted in 1996, provided that ‘amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past’. In accordance with this provision, the Promotion of National Unity and Reconciliation Act was passed in 1995.<sup>161</sup> The act provided for amnesty from civil and criminal liability to any person who made full disclosure of all facts relevant to an act that was ‘associated with a political objective committed in the course of the conflicts of the past’.<sup>162</sup> Aside from this exceptional legislation, the Constitution makes general provision for presidential pardons. These two mechanisms will be discussed here.

The Truth and Reconciliation Commission (TRC), created in terms of Section 232(4) of the Interim Constitution<sup>163</sup> and established and regulated by Chapter 2 of the Promotion of National Unity and Reconciliation Act,<sup>164</sup> played an important role in South Africa’s transition from the apartheid era to the present constitutional dispensation. In order to avoid a general amnesty provision, the Amnesty Committee of the TRC had, under section 20(1) and (7), the power to grant individuals immunity from civil and criminal liability, where perpetrators of human rights violations made full disclosure of their role. Further, the state was immune to civil liability if the perpetrator committed the human rights violations under the employ of the state. In all, 849 people had been granted amnesty (out of 7 112 applicants) by the TRC, by the time it wound up its operations in 2001.<sup>165</sup>

In the case of *AZAPO v The President*,<sup>166</sup> the Azanian Peoples’ Organisation, on behalf of three families of killed activists (the Bikos, Mxenges and Ribeiros), argued before the Constitutional Court that by providing amnesty from civil liability, as well as from criminal prosecution, the act violated the right to access to court provided for in the Interim Constitution. The court ruled, however, that the Interim Constitution, in its epilogue provision, specially authorised Parliament to pass legislation as broad as the Promotion of National Unity and Reconciliation Act.

Provision is made in Section 84(2)(j) of the Constitution for presidential pardons. While the discretion is granted to the president, the DoJCD prepares the documentation when considering an application for pardon. In so doing, the DoJCD considers the following guidelines:

- The age of the offender at the time of the commission of the offence;
- Whether a reasonable period has lapsed since conviction;
- Circumstances surrounding the commission of the offence;

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<sup>161</sup> The Promotion of National Unity and Reconciliation Act, 1995 (Act 34 of 1995), office of the president, No. 1111, 26 July 1995.

<sup>162</sup> *Ibid.*, Section 20(1)(b).

<sup>163</sup> The Interim Constitution of the Republic of South Africa, 1993 (Act 200 of 1993).

<sup>164</sup> The Promotion of National Unity and Reconciliation Act, 1995 (Act 34 of 1995), office of the president, No. 1111, 26 July 1995, Section 2(1).

<sup>165</sup> For further information, see the Truth and Reconciliation Commission website, available at [http://www.doj.gov.za/trc/trc\\_frameset.htm](http://www.doj.gov.za/trc/trc_frameset.htm).

<sup>166</sup> *Azanian Peoples’ Organisation (AZAPO) and Others v President of the Republic of South Africa and Others* 1996 (4) SA 671 (CC); 1996 (8) BCLR 1015 (CC).



- The nature and seriousness of the offence;
- Personal circumstances of the offender at the time of the application for pardon;
- Interests of the state and the community; and
- Interests of the victim.<sup>167</sup>

The DoJCD maintains that it is the president who makes the final decision,<sup>168</sup> as he must decide if the action is to be lawful. The decision by the president is furthermore subject to the Bill of Rights. In the case of *Hugo*, the Constitutional Court found that the power of presidential pardon is granted to the president to be exercised when, in his view, 'the public welfare will be better served by granting a remission of sentence or some other form of pardon'.<sup>169</sup> This was the case in at least two instances, namely to correct mistaken convictions and reduce excessive sentences in individual cases, and where such action would be in the public interest. Although the president, by virtue of the discretion granted to him, had extensive powers in differentiating between groups, his actions still had to comply with the requirements of the Bill of Rights (which the court found they did).

In May 2002, President Mbeki granted pardons to 33 cadres of former armed groups during the liberation struggle.<sup>170</sup> These included members from the Azanian Peoples' Liberation Army and the Pan African Congress.<sup>171</sup> Civil society organisations such as Human Rights Watch, Amnesty International and the Centre of the Study of Violence and Reconciliation, raised the concern that pardoning individuals who had applied for amnesty to the TRC, but had been unsuccessful, could undermine the entire work of the TRC, with potentially serious consequences for the future of justice and reconciliation in South Africa.<sup>172</sup>

The DoJCD reported that it received 1 251 applications for pardons in 2003, of which 645 related to politically motivated offences.<sup>173</sup> The department has indicated that it is considering drafting legislation to deal with these cases appropriately.

One recent instance in which a presidential pardon was granted, amid criticism from opposition political parties, is the case of Allan Boesak. President Mbeki granted a pardon to ANC member and anti-apartheid activist Boesak, who was sentenced to a six-year prison term

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<sup>167</sup> The DoJCD, 'The Process for presidential pardons in terms of section 84(2)(j) of the Constitution of the Republic of South Africa—a special reference to Dr Allan Aubrey Boesak's case to expunge criminal records', Public Statement, 18 January 2005, available at <http://www.info.gov.za/speeches/2005/05011815151001.htm>.

<sup>168</sup> *Ibid.*

<sup>169</sup> *The President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC), Paragraph [44].

<sup>170</sup> The DoJCD, 'Pertaining to the official release of names of people granted presidential pardon in terms of section 84 (2) (j) of the Constitution of the Republic of South Africa', Public Statement, 19 May 2002, is available at <http://www.info.gov.za/speche/s/2002/02052009461006.htm>.

<sup>171</sup> *The Herald*, Port Elizabeth, 22 May 2003.

<sup>172</sup> Human Rights Watch, *World Report 2003*, New York, 2003, p. 74; a joint document by Amnesty International and Human Rights Watch, *Truth and Justice: Unfinished Business in South Africa*, 13 February 2003, available at <http://web.amnesty.org/library/Index/engAFR530012003?OpenDocument&of=COUNTRIES%5CSOUTH+AFRICA>.

<sup>173</sup> The DoJCD, *Annual Report 2003/04*, p. 34.

for fraud and theft during his tenure as the chairperson of the Foundation for Peace and Justice, in January 2005. The opposition Inkatha Freedom Party (IFP) criticised this move as favouring a person who was linked to the ruling party. The IFP argued that it had submitted a list of 394 prisoners who had committed politically motivated crimes to the president for consideration of a presidential pardon, without success.<sup>174</sup>

Apart from these politically significant instances, President Mandela pardoned imprisoned mothers with children under 12 years of age in May 1996. This presidential pardon was challenged by a male prisoner on the grounds that the action discriminated on the basis of gender. However, the Constitutional Court rejected the case.<sup>175</sup>

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<sup>174</sup> The Inkatha Freedom Party (IFP), 'Boesak's pardon a tip of the iceberg,' 17 January 2005; this press statement is available at <http://www.ifp.org.za/Releases/170105apr.htm>.

<sup>175</sup> *The President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC).

# 3

## Management of the justice system

The Department of Justice and Constitutional Development (DoJCD) is the national government department responsible for the administration of justice, and since 1994, has been subject to substantial reorganisation. Budget and resource allocation to the DoJCD takes place at a national level, and the department regularly faces under-funding, leading to pressure on resources. Despite improvements in the department's financial management in recent years, fiscal accountability issues remain. Nonetheless, the courts are in a reasonable state of repair (though less so in rural areas), staff are generally punctually remunerated, and legislation and jurisprudence are publicly available.<sup>176</sup>

### A. Planning and financial management

In South Africa, several ministries are broadly considered to comprise the justice sector, namely the South African Police Service (SAPS), the Department of Correctional Services and the DoJCD. They are further grouped with the Department of Defence and the Independent Complaints Directorate (ICD) to form the Justice and Protection Services cluster. The DoJCD is the national government department in South Africa responsible for the ongoing planning and determination of priorities and objectives for the administration of justice. Therefore, in what follows, only the DoJCD will be evaluated in detail.

The DoJCD has been subject to ongoing and intermittent restructuring since 1994. At present, its governance and operational arrangements are based on a model of internal business units (also referred to as branches), each with a clear set of functions. The DoJCD currently consists of units and two semi-autonomous structures. Of the eight units, four have the responsibility for delivering core justice functions:

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<sup>176</sup> In addition to included footnotes, see Annex D for a full list of sources used in answering this section.

- Court services;
- Legal advisory services;
- Legislative and constitutional development; and
- Master's office.

Four units (listed below) deliver support services to each of the core units above:

- Financial services/office of the chief financial officer;
- Human resource development;
- Public education and communication; and
- Information systems and management.

Besides these eight units, two semi-autonomous structures play a pivotal role in the delivery of justice services: the National Prosecuting Authority (NPA) and the Legal Aid Board.

Communication and co-operation amongst the units and semi-autonomous bodies within the DoJCD is secured through an executive committee, which is chaired by the chief executive officer (also referred to as the director-general) and which includes managing directors (also referred to as deputy director-generals) from each unit. The executive committee is responsible for the development, monitoring and evaluation of the strategic plans of each unit. The minister is also assisted by a board of directors, which operates in a consultative capacity and which includes the chief justice, the chairperson of the Legal Aid Board and the National Director of Public Prosecutions (NDPP) as non-executive members, as well as representatives from all units as executive members.<sup>177</sup>

## Strategic planning

After 1994, the DoJCD faced the challenge of restructuring the national department existing prior to 1994, as well as incorporating the previous 'homeland' departments of justice. A number of high-level 'umbrella' documents were drafted and approved as departmental policy for this purpose. These included, amongst others, an overall strategic plan adopted in 1997 called Justice Vision 2000, and a comprehensive Gender Policy Statement of May, 1999.<sup>178</sup>

Currently, the DoJCD is in the process of adopting a new medium-term strategic plan. This plan is supplemented by three additional tactical or operational plans, namely the departmental operational plan or Medium-Term Strategic Framework (MTSF), three-year plans for each operational unit and an annual action plan.<sup>179</sup>

The strategy of the DoJCD provides for two key strategic result areas, each with their own performance indicators. The key strategic result areas are: ensuring access to justice for all, and the transformation of the administration of justice.

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<sup>177</sup> A telephone interview with the DoJCD's webmaster, on 8 April 2005.

<sup>178</sup> The Justice Vision 2000 & Gender Policy Statement, May 1999, available at [www.doj.gov.za](http://www.doj.gov.za), (documents section).

<sup>179</sup> The DoJCD, *Annual General Report 2003/04*.

A third key strategic area relating to modernisation has also recently been added. The exact parameters of this new strategic result area are currently under discussion.<sup>180</sup>

The department has been subject to almost continuous internal restructuring and organisational transformation since 1994. This has often meant that plans were not actualised as implementation responsibilities shifted and priorities were redefined. Some policy analysts and commentators have noted the disjuncture between elaborate planning and limited implementation, in the case of many departmental initiatives.<sup>181</sup> Two instances in which strategic plans have indeed formed the basis of action, are the e-Justice programme and the *Re Aga Boswa* project (which seeks to transform the court management system). Since 2000, there has also been some improvement in co-ordinating intra-departmental planning, implementation and monitoring.

Efforts are made to mainstream women and vulnerable groups in both the staffing of the DoJCD and the adoption of strategic priority areas. The Gender Policy Statement plays an important role in this regard. The department has recognised the importance of compliance with the Employment Equity Act,<sup>182</sup> and gender transformation specifically. The DoJCD has created a dedicated Gender Unit, which is currently located within the office of the director-general. This unit is tasked with promoting a gendered perspective across all departmental planning, as well as ensuring that specific gender-related interventions are given priority. In addition, there is a sub-unit focusing on vulnerable groups, which is located within the Court Services unit. The purpose of this sub-unit is to plan and implement specific programmes contributing to the protection of vulnerable groups. Examples of such projects include the sexual offences courts, the new priority given to family and children's courts, as well as programmes aimed at addressing victim empowerment and restorative justice.

## Financial resources and management

In terms of the Constitution, the administration of justice is a national function. Thus budget planning and resource allocation to the DoJCD takes place exclusively at the national level. The division of resources amongst the national, provincial and local spheres of government is a political process based on negotiation. As in all developing countries, resource allocation is a vexed process: there is an ongoing need to allocate resources to various urgent and competing priorities ranging from health, education, housing, job-creation, poverty alleviation, policing and so forth. Within the Justice and Protection Services cluster, the DoJCD receives a relatively small share of the budget. The DoJCD is not fully funded, in the sense that it does not receive all the resources it needs to fulfil all its functions and implement all its strategic priorities. As a result, the justice department often has to revise its plans and scale down on some of its interventions and initiatives.

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<sup>180</sup> The information provided was done so on the basis of confidentiality; the interview was with an official at the DoJCD, December 2004.

<sup>181</sup> See, for example, Stack & Soggot, *Enhancing Policy Implementation—Lessons from the Justice Sector*, Centre for Policy Studies, Johannesburg, October 2001; Chaskalson & de Jong Consulting—*Family Courts Policy Document*, Cape Town, December 2002.

<sup>182</sup> The Employment Equity Act, 1998 (Act 55 of 1998).

The South African Treasury makes allocations to national government departments in two stages. The first stage is an initial allocation to each government department, which takes into account governmental-spending priorities. Once these baseline allocations have been made, each national department may submit a bid for additional discretionary Treasury funding.

In the 2004/05 budget, a total amount of R58 269 million<sup>183</sup> was allocated to the Justice and Protection Services cluster.<sup>184</sup> Within the total allocation to this cluster, the DoJCD budget of R5 054 million is significantly smaller than that of the SAPS (R24 500 million), the Department of Defence (R20 257 million) and even the Department of Correctional Services (R8 400 million). The DoJCD budget for 2004/05, as a percentage of the national overall budget, constitutes 3.4 per cent.

South Africa has a three-year rolling budget called the Medium-Term Expenditure Framework (MTEF). The MTEF process is managed by the National Treasury, with co-operation from provincial treasuries as well as national and provincial departments. Policy priorities for the MTEF period are set and revised annually by the cabinet. They are informed in this regard by a host of technical, fiscal and sector-specific teams and advisers, including officials from the various government departments. South Africa's budget-formulation process is generally regarded as transparent and participative. There is considerable access to good-quality budget information, and firm structures are in place to facilitate participation on the part of the legislatures, the executive and civil society. The DoJCD plays an active role in the MTEF process. It prepares submissions to the MTEF and seeks political support to get its priorities funded.<sup>185</sup>

The medium-term baseline allocations to the DoJCD<sup>186</sup> for the upcoming MTEF period, are set out in Table 3.1 below. Table 3.2 shows the baseline financial resources available to the department in 2005/06, once expenditure on transfers, subsidies<sup>187</sup> and capital works has been subtracted. Table 3.3 outlines how the remaining baseline budget for 2005/06 is divided to meet departmental expenditures.

*Table 3.1: Medium-term baseline allocations to the DoJCD 2005/06—2007/08*

2005/06	2006/07	2007/08
R5 608 357	R5 985 041	R6 284 293

<sup>183</sup> As of 1 April 2005, 1 US dollar was equivalent to 6.25 South African rands.

<sup>184</sup> As pointed out above, the cluster includes SAPS, the Department of Correctional Services, the Department of Defence, the Independent Complaints Directorate (ICD) and the DoJCD.

<sup>185</sup> For further information, see the most recent Treasury guidelines, available at [www.treasury.gov.za](http://www.treasury.gov.za).

<sup>186</sup> Information contained in this section was provided by the office of the chief financial officer of the DoJCD.

<sup>187</sup> Transfers and subsidies relate to money which the DoJCD holds for other autonomous or semi-autonomous institutions, for example the Legal Aid Board, the SAHRC and the Gender Commission.

Table 3.2: Financial resources of the DoJCD, from the baseline allocation for 2005/06

Available budget	R5 608 million
Less transfers and subsidies	R 664 million
Less capital works	R 450 million
Remaining budget	R4 493 million

Table 3.3: Expenditure of the remaining DoJCD baseline allocation for 2005/06

Compensation of employees	R3 084 million
Goods and services	R1 409 million
Total	R4 493 million

In its bid for additional discretionary funding over the next three years, the DoJCD has requested a total amount of R6 797 million from the Treasury. These bids are costed and revised on a quarterly basis. Table 3.4 sets out the bids for additional revenue for the upcoming MTEF period of 2005/06 to 2007/08.

Table 3.4: Bids for additional DoJCD funding for 2005/06 to 2007/08

2005/06	2006/07	2007/08
R1 963 799	R2 446 471	R2 387 069

The additional resources requested by the DoJCD are to be used for expenditure on priority projects, which are not funded by the baseline allocations. These amounts, when added to the baseline allocations, give a reflection of the department's views on the total budget it requires to perform its functions properly.

South Africa's Public Finance Management Act<sup>188</sup> provides for the establishment of clear and comprehensive financial reporting and auditing procedures in government departments. These procedures are generally regarded as effective and supportive of fiscal accountability and transparency. There are both internal and external audit procedures. Internal auditing functions are performed by a dedicated unit located at the office of the director-general. This internal audit unit also has a regional presence in DoJCD offices throughout the country. An audit committee within the department, under the leadership of an external and independent person, is active and fulfils an important oversight role.

<sup>188</sup> The Public Finance Management Act, 1999 (Act 1 of 1999).

External auditing is performed by the office of the auditor-general, a body mandated by section 188 of the Constitution. The auditor-general's functions include auditing all government departments to ensure that sound financial-management policies are followed, and that fruitless and wasteful expenditure is avoided. The auditor-general has extensive powers and obligations conferred on his or her office in terms of the Auditor-Generals' Act.<sup>189</sup> The report of the auditor-general is published on an annual basis, together with the DoJCD annual report, and both are tabled in Parliament.

There are two main parliamentary sub-committees which play an important oversight role with respect to the DoJCD. The first is the Justice Portfolio Committee, which tends to focus on issues relating to the administration of justice. The second is the Standing Committee on Public Accounts (SCOPA), which oversees the management of public finances within government departments. Both of these bodies scrutinise spending in the justice sector and may call for clarification from the department if necessary.

The track-record of the DoJCD in the area of financial management has improved considerably over recent years. The DoJCD received a No Audit Qualification (which is an unqualified audit approval) from the office of the auditor-general for the first time in more than ten years, in respect of the 2003/04 financial year. However, this audit finding was in respect of the vote account only, which is the account in which the department's budget funds are administered. In respect of discretionary funding received from Treasury, and more importantly in respect of the administration of agency funds (such as the administration of maintenance and guardianship payments), the department's audit finding remained qualified, and this must be regarded as an area of great concern.

## Access to planning and financial information

There does not appear to be a clear DoJCD strategy to engage with civil society around planning and budgeting. At present, formal civil society involvement in planning and budgeting is minimal. The DoJCD publishes its annual report and its Estimates of National Expenditure (ENE) every year, and as such, the information they contain is in the public domain. Yet there is no formal process of inviting comment or facilitating discussion with civil society organisations to inform planning or budgeting.

The Open Society Foundation for South Africa (OSF-SA) has funded initiatives advocating and lobbying for access to information, in respect of the Promotion of Access to Information Act (PAIA).<sup>190</sup> The act aims to promote transparency, accountability and effective governance of public bodies, an understanding of their functions and operation, and the ability to effectively scrutinise and participate in decision-making by public bodies that affect citizens' rights. A legislative framework, including the Budget Appropriation Act, the Division of Revenue Act, the Municipal Finance Management Act and the Public Service Act, provides clear guidelines to

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<sup>189</sup> The Auditor-Generals' Act, 1995 (Act 12 of 1995).

<sup>190</sup> The Promotion of Access to Information Act, 2000 (Act 2 of 2000), in the *Government Gazette* Vol. 416, No. 20853, 3 February 2000.



government departments to provide access to their strategic plans, business plans, monthly and quarterly expenditure reports, performance reports, reports to the auditor-general, reports on financial misconduct and oversight reports. The public can therefore demand access to various reports and in this way ensure accountability and transparency on the part of government departments.

An example of litigation which directly impacted on justice-sector planning and budgeting is the *Moseneke* case.<sup>191</sup> In this case, the Constitutional Court confirmed a high court decision that it was unconstitutional, in terms of section 23(7) of the Black Administration Act,<sup>192</sup> an apartheid-era law, that the master's office<sup>193</sup> did not handle deceased estates of black people (which were rather handled by magistrates' courts). The order that the legislation was invalid was, however, suspended for two years, and the master was permitted but not required to deal with black estates in the interim. In terms of the order, the Minister of Justice and Constitutional Development was 'requested to ensure that this order is brought to the attention of all masters of the high courts and all magistrates dealing with the administration of estates under the Black Administration Act 38 of 1927'. This order necessitated that the DoJCD set in place a consistent approach to all deceased estates, regardless of racial grouping. Although it appears that the master's office dealt with the interim period on an ad hoc basis, it was able to implement the order when the suspension of invalidity came to an end on 5 December 2002, despite the ruling adding an estimated additional 60 000 estates to the case load of the masters.<sup>194</sup>

DoJCD budgets are disaggregated to court level, which means that a budget is drawn up for each individual court throughout the country. These budgets are broken down into two main categories: compensation of employees; and goods and services. However, the budget data is not disaggregated in such a way that spending on different types of services or beneficiaries can readily be identified or monitored. For example, it is not possible to distinguish how justice expenditure across courts is broken down amongst civil, criminal and family court matters. Likewise, there is no way to track, for example, what portion of total justice expenditure is used to provide services that directly benefit women or children. In addition, justice budget data is not broken down to match or reflect the outcomes attached to the department's various strategic priorities. As such, the budget format does not allow the department to account for its expenditure on different programmes, in terms of the outcomes they have achieved.<sup>195</sup>

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<sup>191</sup> *Moseneke and Others v The Master and Another* 2001 (2) SA 18 (CC).

<sup>192</sup> The Black Administration Act, 1927 (Act 38 of 1927).

<sup>193</sup> The masters of the high court are involved with the administration of justice in estates of deceased persons and those declared insolvent, the liquidation of companies and close corporations, and the registration of trusts.

<sup>194</sup> The DoJCD, *Implementation of the Moseneke Decision by the Master's Business Unit*, Press Statement, 4 December 2002; speech by the Deputy Minister for Justice and Constitutional Development, at the launch of the masters of the high court Business Unit, Pretoria, 31 October 2002.

<sup>195</sup> Information supplied by the office of the chief financial officer, DoJCD, December 2004.

## B. Court administration

The DoJCD is the ministry responsible for the administration of justice. As such, the executive plays an active role in court administration. There is, however, a debate around the institutional separation between administrative staff and the judiciary.

The proposed Superior Courts Bill has been particularly controversial in this regard. The long title to this bill states that it is intended: ‘to rationalise, consolidate and amend the laws relating to the Constitutional Court, the Supreme Court of Appeal and the high court of South Africa; to incorporate certain specialist courts into the high court of South Africa; to make provision for the administration of the judicial functions of all courts; to make provision for the administrative functions and budgetary aspects relating to the functioning of all courts; to make provision for the making of rules for all courts; and to provide for matters incidental thereto’. These purposes provoked a storm of discussion when the bill was made public. The main issue in contention surrounds Clause 15(1), which provides that ‘The minister exercises final responsibility over the administrative functions of all courts referred to in section 165 [sic] of the Constitution, including the budget and finances of all courts’. Traditionally, such issues as the assignment of judges to cases and everything else connected to the adjudicative functioning of courts, have been administered by the most senior member of the court in question. In trying to improve the efficiency of courts in South Africa by relieving judges and magistrates of some of their administrative duties, Clause 15(1) runs the risk that the ‘administrative functions’ of courts will be defined too broadly, thereby threatening judicial independence. The other aspect of the Superior Courts Bill that has attracted attention is the provision for ministerial involvement in the making of court rules, including rules of procedure. This provision appears to run contrary to Section 173 of the Constitution, which provides that ‘the Constitutional Court, Supreme Court of Appeal and high courts have the inherent power to protect and regulate their own process...’.

In addition, through its *Re Aga Boswa* project (which aims among other things at the transformation of court administration), the department is seeking to decentralise the court management system with decision-making authority about court operations devolved to court managers. Previously, at the level of lower courts, court administration was the responsibility of the senior magistrate.<sup>196</sup> In terms of the department’s model, court managers are clustered under the control of a senior court manager. Each cluster has a shared court-services centre, which provides the day-to-day support services for transactional (repetitive) matters required by the various courts. Non-transactional services (once-off services) are provided by the local court manager.<sup>197</sup> Currently, court management falls under the operational responsibility of the Court Services Unit of the DoJCD.

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<sup>196</sup> Minister B Mabandla’s address at the *Re Aga Boswa* Launch, Durban, 29 November 2004, is available at [http://www.doj.gov.za/2004dojsite/m\\_speeches/sp2004/2004\\_percent2011\\_percent2029\\_min\\_boswa.htm](http://www.doj.gov.za/2004dojsite/m_speeches/sp2004/2004_percent2011_percent2029_min_boswa.htm).

<sup>197</sup> *Re Aga Boswa*—Extended Steering Committee Meeting, Business Unit Court Services, April 2003; S Jiyane, Criminal Justice Strengthening Programme—Work Plan, 2002; Price Waterhouse Coopers, *Shared Services Organisational Study*, 2002; the DoJCD *Annual Reports*.

## Training and remuneration of court staff

The training of administrative staff (that is, public servants who provide administrative support to judicial officers) is conducted on an in-service training model, with occasional support from the DoJCD's Justice College. Training is supplemented with various specialised training courses by the department. This training is either conducted following the in-service model or by means of external trainers hired by specific projects.

During 1998, the government passed the Skills Development Act.<sup>198</sup> This act aims at facilitating and promoting skills development in the private and public sectors. Its purpose is to improve the country's competitiveness and productivity, and to address the education inequalities of the past. Twenty-five sectors were identified. The justice sector falls under the ambit of the Police, Private Security, Legal, Correctional Services and Justice Sector Education and Training Authority (Poslec Seta), which was established in 2000 and has the mandate to provide for training and skills development through the planning and monitoring of progressive skills development in the sector.<sup>199</sup>

Training by the Poslec Seta is accredited in terms of the South African Qualifications Authority Act.<sup>200</sup> A project-management skills programme for court managers is currently running and three further learnerships are envisaged, namely the court services learnership, the court interpretation learnership and a family law learnership.

Administrative staff are public servants. The terms and conditions of employment in the public sector are regulated by the Public Service Act of 1994.<sup>201</sup> This act provides for the power and duties of the Minister for Public Service Administration, including the making of policy with respect to employment practices, salaries and other service conditions. Increases are negotiated annually between the Department of Public Service and Administration and the relevant labour unions.<sup>202</sup>

There are no reports of systematic non-payment of administrative staff members within the justice system. It should however be noted that the DoJCD makes use of numerous temporary appointments to fulfil administrative functions. These contract workers sometimes experience difficulties in receiving payments on time. This appears to be related to administrative difficulties, and is receiving attention as part of a broader updating of the departmental payroll system.

Internal disciplinary systems are in place to respond to allegations of corruption and other misconduct by administrative staff. However, these procedures are frequently very slow. This may result in staff members being transferred or suspended on full pay for substantial periods of time, pending the outcome of proceedings. In 1999, the DoJCD adopted a 'Charter for Service

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<sup>198</sup> The Skills Development Act, 1998, (Act 97 of 1998).

<sup>199</sup> Further information on the Poslec Seta is available at [www.poslecseta.org.za](http://www.poslecseta.org.za).

<sup>200</sup> The South African Qualifications Authority Act, 1995, (Act 58 of 1995).

<sup>201</sup> The Public Services Act, 1994 (Act 103 of 1994).

<sup>202</sup> The relevant current pay scales are available from the Human Resources unit of the DoJCD.

Delivery for Court Users'.<sup>203</sup> The charter sets out standards of service delivery that citizens can expect from court officials, and sets out procedures to be followed when standards are not met. It does not, however, create a dedicated office to deal with complaints arising out of poor service, and implementation of the charter is likely to suffer as a result of this.

Delays in court proceedings occur for a variety of reasons, including the absence of witnesses, incomplete police investigation or the absence of legal representation. The absence of court staff, particularly court interpreters, also occurs regularly and is a cause for concern.

## Record keeping

There are a myriad of different types of files utilised by the DoJCD in its day-to-day activities. These files can be broken broadly into two categories, which dictate how they are handled after they are no longer active. 'A' category files are those types of files which have to be sent to archives twenty years after they are finalised, in terms of internal policy. Category 'D' files are files which may be destroyed after a fixed period of time has elapsed from closure of the file. There are also further sub-categories and the applicable time period varies according to category. The list of the DoJCD prescripts in this regard is contained in a master document called 'Code Archives'. After 1994, the files belonging to the former 'homeland' states became governed by Code Archives.<sup>204</sup>

Current records of criminal court proceedings are kept in a fireproof safe with restricted access. At the conclusion of a criminal case, these records are transferred to a secure filing area where they are kept for a defined regulatory period. After this, they are destroyed. Civil records are kept in controlled-access filing areas and are also reasonably secure. It should be noted that for the most part, such civil records are available to members of the public and are thus treated with less confidentiality than the records of criminal trials. Some civil courts are experiencing severe filing constraints and in these courts, old records are often stored in offices and corridors. These records are therefore not very secure, but they are also unlikely to contain confidential information.

Most records in the South African court system are not stored on computer. There are a number of current initiatives to examine the feasibility of digital file storage, but no action has been taken so far. The DoJCD's e-Justice programme aims to modernise the court system and introduce the extensive use of automation. The programme can best be described as falling into four main categories: a digital infrastructure including computer equipment and both local and wide-area networks; various programmes dealing with the financial matters of a court; a workflow project which is currently focused on civil and criminal workflows in court; and a project office aimed at running this ambitious undertaking and ensuring that management information is available and utilised. The e-Justice programme has met with mixed success.<sup>205</sup>

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<sup>203</sup> 'The Charter for Service Delivery for Court Users', 1999, is available at <http://www.doj.gov.za/2004dojsite/policy/misc/court-users.htm>.

<sup>204</sup> Information provided by DoJCD office services, December 2004.

<sup>205</sup> Further information on the e-Justice programme is available at [www.doj.gov.za](http://www.doj.gov.za).

With adequate understanding of the court-filing process, it is possible for a member of the public (or his or her legal representative) to track the progress of his or her case through the court system. Legal professionals generally have little problem in obtaining the relevant information. Without knowledge of the court-filing process, members of the public may struggle to do the same. It is generally far easier to obtain the relevant information in the high courts than in a large magistrates' court. In high-volume courts, files are more likely to be moved around the court as different service providers work on different aspects of the matter. From time to time, some files are temporarily or permanently misplaced or lost.

In terms of the PAIA,<sup>206</sup> citizens are entitled to request information that is held by both state and private bodies. Unfortunately, in practice, it is sometimes difficult to access information relating to court cases, particularly when information is not contained in a court file.<sup>207</sup> Section 7 of the act exempts from the operation of the act, any records that are requested for the purpose of criminal or civil proceeding after their commencement. Obtaining information while engaged in litigation is subject to the Rules of Court dealing with discovery (disclosure of documents), though documents may be requested prior to litigation in terms of the PAIA.

## Physical conditions and facilities

Generally speaking, court buildings in South Africa are in reasonable repair, both those belonging to high courts and most magistrates' courts. Certain rural courts have run into disrepair, but the DoJCD is working actively to address these problems. The department is particularly concerned with providing new court buildings in previously ignored areas. For example, more courts are to be located in rural areas, as opposed to more established peri-urban and urban areas. In 2003/04, 12 new court buildings were completed, including the Constitutional Court. A further 16 buildings are currently under construction.

There was a total appropriated budget of R229.7 million for new court buildings in the 2003/04 financial year. Currently, 65 DoJCD buildings have been earmarked for renovation or new construction. Of the planned new buildings, the overwhelming majority are in rural areas.

The stationery and furniture available for use in courts are normally suitable for the needs concerned. However, once again, certain lower courts face more difficulties in this regard. At times, court staff experience bureaucratic hurdles to gain access to stationery, fax machines and so forth. Once the relevant procedures have been complied with, access is normally granted. For example, some courts request that a staff member return his or her old pen before a new pen will be issued. Other courts, for instance, insist that authorisation must be obtained before using a fax machine.

There is thus variation across courts, in terms of accommodation and access to resources. The pattern of variation seems to correlate closely with the status of the court—whether it is a high court or a lower court—and with its proximity to urban areas. Generally speaking, isolated

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<sup>206</sup> The Promotion of Access to Information Act, 2000 (Act 2 of 2000), in the *Government Gazette* Vol. 416, No. 20853, 3 February 2000.

<sup>207</sup> For further information, see the website of the Open Democracy Advice Centre, available at [www.opendemocracy.org.za/publications.html](http://www.opendemocracy.org.za/publications.html).

rural magistrates' courts face more problems in this regard than urban high courts.

## c. Availability of legislation and jurisprudence

### Legislation

The Constitution regulates the national legislative process and stipulates that the publication of bills is an essential requirement in the enactment of legislation. Section 81 of the Constitution provides that 'a bill assented to and signed by the president becomes an Act of Parliament, must be published promptly, and takes effect when published or on a date determined in terms of the act'. The president is always presented with two copies of a bill for signature. Normally, bills are initially drafted in English and one other language determined by the minister presenting the bill. This ensures that the full text of a principal or amendment act, irrespective of when it was enacted, is available in at least two official languages. The publication requirement applies to all legislation, including delegated legislation such as regulations and proclamations, which are usually drafted in English only.

The Government Printer publishes all acts and regulations promulgated in terms of legislation, in the *Government Gazette*. Since the Government Printer is an official government service provider and not a commercial entity in the strict sense of the word, gazettes containing legislation can be bought for a small price. However, they are not commonly available in public libraries or stores, and this will impede access by persons living outside of urban centres.

The Government Printer publishes amendment acts as and when they are promulgated, separately from the relevant principal acts. However, it does not consolidate principal acts so as to reflect any amendments. The two main commercial publishers of legal material in South Africa, namely Juta and LexisNexis (Butterworths), publish consolidated versions of amended legislation. The hard copies and electronic versions of legislation, published by the aforementioned private publishers, are generally used by the members of the legal fraternity as an easily accessible source of South African statutory law. Access to these databases is expensive, however, and beyond most individuals' means.

Legislation is widely available electronically over the internet, both from government websites and civil society organisations. National departments, for example, often publish legislation administered by them, and Parliament's website reflects legislation that has been enacted since 1994.

Several important acts have been published and disseminated in 'plain language' and 'pocket book' formats. Some government departments, either on their own initiative or in compliance with statutory obligations, issue brochures and booklets regarding the legislation administered by them. The DoJCD also disseminates brochures and pamphlets on a regular basis, in an attempt to provide user-friendly information on certain pieces of legislation. The following are, amongst others, available to members of the public:

- *The Family Advocate*, a pamphlet that explains the role of the family advocate;
- *Equality of All*, a booklet explaining the provisions of the Promotion of Equality and

Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000), and the functions of the equality courts;

- *Small Claims Court*, a pamphlet giving information on how to institute a claim in the small claims court (established in terms of the Small Claims Courts Act of 1984);
- *Domestic Violence Destroys Our Society*, a booklet providing information relating to the Domestic Violence Act of 1998;
- *Sheriffs*, which contains information on the duties of sheriffs, their training and contact details for the South African Institute of Sheriffs; and
- *Law Talk for Children*, an information booklet that describes how some laws affect the rights of children and provides practical suggestions on how children can access the justice and legal system.<sup>208</sup>

This list is not exhaustive and there are many other publications, including a recent maintenance booklet and a booklet aimed at explaining the Constitution to citizens. The updating of these publications, however, occurs infrequently.

## Jurisprudence

The availability of court transcripts to interested parties is regulated in terms of the Magistrates' Courts Act<sup>209</sup> and the Supreme Court Act.<sup>210</sup> Rules 30 and 66 of the Magistrates' Courts Rules of Court<sup>211</sup> deal with the records of proceedings in civil matters, and the records of criminal cases, respectively. Rule 30(7) provides that a transcript of proceedings is to be supplied to any person upon payment of the cost thereof. Rule 66 contains a similar provision, as far as it relates to records of criminal cases. The same principle applies in respect of the records of the high court and Rules 39 and 56 of the Uniform Rules of Court, which regulate high court practice. These rules regulate access to such records.

In all cases, litigants are furnished with a typed copy of the judgment as soon as it is available. A copy is then also placed in the court file. Copies of judgments that are not reported in the law reports, may then be viewed by gaining access to the court file. The transcription of judgments is done reasonably speedily and they are made available at a reasonable cost. However, after some time has elapsed, access to stored court files may present some difficulty.

Law reports are regularly published by Juta and LexisNexis. These private publishers make the decision as to whether to report a judgment in their respective publications, or not. At times, a case will be reported in one law report and not in another. Lay people would be unlikely to purchase, and generally financially unable to purchase, these reports, but the libraries of all law faculties of the universities in South Africa make provision for public access. The DoJCD does not provide law reports and textbooks to all magistrates' courts and high courts from a central

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<sup>208</sup> These publications are available at [http://doj.gov.za/2004dojsite/brochure\\_list.html](http://doj.gov.za/2004dojsite/brochure_list.html).

<sup>209</sup> The Magistrates' Courts Act, 1944 (Act 32 of 1944).

<sup>210</sup> The Supreme Court Act, 1959 (Act 59 of 1959).

<sup>211</sup> The Magistrates' Courts Rules of Court. These rules are made in terms of an act of Parliament, called the Rules Board for

distribution point. The acquisition of these manuscripts must be specifically budgeted for by the various offices, which competes with other needs of the office. Most courts, however, have access to law reports.

The judgments of the Supreme Court of Appeal are available on its website,<sup>212</sup> dating back to March 1999. Decisions by the Constitutional Court are available on its website,<sup>213</sup> dating back to 1995. It is possible to subscribe to an electronic mailing list of the Constitutional Court, which notifies interested members of the public when decisions are handed down and provides a link to that judgment. The Constitutional Court has also played a leading role in providing the public with access to legal documents through its library, which is now also accessible electronically.<sup>214</sup>

## Expert commentary

There are numerous South African legal textbooks that are widely published on an ongoing basis. These textbooks are used by the legal profession, but prove beyond the financial means of the average person. In relation to the availability of textbooks to courts, one should draw a distinction between the superior courts, which have well-equipped libraries and dedicated budget resources to keep these updated, and the lower courts, where the situation varies from court to court and budgetary constraints mean updated textbooks are often not available.

## D. Access to information about the courts

As a rule, the courts must be open to members of the public.<sup>215</sup> In certain instances—such as those involving maintenance enquiries, cases involving minors or when a specific application for an *in camera* hearing has been granted—court proceedings are closed to members of the public. The print media generally have access to court proceedings except where prohibited or limited by statute. For example, reportage in maintenance matters needs the permission of the director-general (the most senior civil servant in the department) and may not be of such a nature that the identity of any minor child concerned can be ascertained. There are analogous provisions in the Divorce Act. Recent court applications have been made to allow for broadcast coverage of high-profile court proceedings, but these have been largely unsuccessful.

The government keeps statistics on the number of cases before the courts. This information, in so far as it relates to criminal matters, is collected by the National Prosecuting Authority (NPA) and is analysed by the Court Nerve Centre of the DoJCD (the nodal point for the management of all information relating to the courts throughout the country). The information is readily available to DoJCD employees by way of an internal intranet. It appears that there would

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Courts of Law Act 107 of 1985. The rules are updated when it is deemed necessary.

<sup>212</sup> The Supreme Court of Appeal website is available at <http://wwwserver.law.wits.ac.za/sca/index.php>.

<sup>213</sup> The Constitutional Court website is available at <http://www.constitutionalcourt.org.za/site/home.htm>.

<sup>214</sup> The Constitutional Court online library is available at <http://www.constitutionalcourt.org.za/site/thelibrary/aboutthelibrary.htm>.

<sup>215</sup> The Constitution of the Republic of South Africa, 1996, (Act 108 of 1996), Section 34.



be no objection, on legitimate request, for the release of such information to non-DoJCD staff members.

The number of appeals is collected by means of the department's annual return, which is submitted by all courts once per year, and which is available as a total annual figure, per court. This is not readily published, but is available on request from the department.

The records relating to civil case statistics, including family-law matters, are less accurate and up-to-date than those relating to criminal matters.<sup>216</sup>

## Case study: Media access to court hearings

Over recent years, there has been a trend within western countries to make the workings of the judicial system more accessible to members of the public, by carrying live radio and television feeds. The United States of America and Australia have played a leading role in this regard. In South Africa, the Constitution requires that court hearings be public, and this includes access to the media. However, no live broadcasts of court proceedings are normally carried on radio or television.

After 1994, repeated calls have been made for live broadcasts of court proceedings. This has been fuelled by the live broadcast of the workings of various commissions during this period, such as the Truth and Reconciliation Committee (TRC), which actively sought such coverage in order to expose the content of its hearings as widely as possible to citizens of South Africa. The King Commission into cricket match-fixing and related matters was also made available for public broadcast, and similarly received a large following. A third example of a commission which carried live radio and television broadcasts is the Hefer Commission of Enquiry, which dealt with whether the head of the NPA had been an apartheid spy or not.<sup>217</sup> On the other hand, the enquiry led by Public Protector Selby Baqwa into the arms deal that the NPA had been investigating, was closed to the broadcast media.

The argument in favour of allowing live broadcast of judicial proceedings gains strength from the fact that South Africa has a low literacy rate, and most people receive information over the radio or on television. Furthermore, the live broadcast of proceedings may be more accurate than summaries of the day's proceedings provided by print journalists. On the other hand, there is a strong concern that live broadcast by electronic media may have a significant impact on witnesses, who may be intimidated.

Two recent examples of attempts by the electronic media to gain access to court proceedings that were of particular public interest, are the trial of Schabir Shaik in the Durban High Court and court proceedings in the Cape High Court relating to Sir Mark Thatcher's involvement in an alleged coup in Equatorial Guinea. The application by the independent broadcaster e.tv to cover the Shaik trial was refused on the basis that witnesses might be intimidated by the presence of the electronic media. The application by the state broadcaster, the South African Broadcasting Corporation (SABC), to cover the proceedings against Thatcher was allowed on the basis that it was an application which consisted of legal argument only, and thus witnesses

were not required and could not be intimidated by the presence of electronic media. In that case, the court allowed the SABC to record a daily package of edited highlights for delayed broadcast.

**SOURCES:**

<sup>216</sup> Information provided by Court Nerve Centre, DoJCD, December 2004.

<sup>217</sup> See the case study on the Schabir Shaik and Jacob Zuma prosecutions, p.34.

# 4

## Independence and accountability of judges and lawyers

The separation of powers between the judiciary and executive is firmly enshrined in the 1996 Constitution, and is also well recognised in South African case law. Since 1994, the appointment process for judges and magistrates has been substantially revised, greatly increasing institutional protection for the independence of the judiciary. Constitutional provisions also require progress in achieving racial and gender transformation. Although a large number of black judges have been appointed since 1994, white judges are still in the majority, in part a reflection of the limited number of suitable black candidates for appointment. To date, there have been no accounts of direct interference in the independence of the judiciary from the executive, although controversy over affirmative action has led some to voice concerns that a rapidly accelerated process of transformation could lead to a decline in the quality and independence of judges.

### A. Judges and magistrates

#### **Judicial independence**

The Constitution makes specific provision for the separation of powers between the judiciary, executive and legislative arms of government.<sup>28</sup> In terms of Section 165 of the Constitution, the judicial authority of South Africa is vested in the courts, which are independent and subject only to the Constitution and the law. The section further provides that no person or organ of state may interfere with the functioning of the courts and that organs of state, through legislative and other measures, must assist and protect the courts to ensure their independence, impartiality, dignity

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and effectiveness. The section concludes by stating that an order or decision of a court binds all organs of state and persons to whom it applies. The separation of powers is a well-recognised doctrine in South African case law.<sup>219</sup>

Adjudication in the South African justice system is provided by judges at Constitutional, Supreme and high court level and by magistrates at lower court level. The appointment process for judges and magistrates has been substantially revised since 1994, and provides significant protection against overtly political appointments.

Section 174 of the Constitution provides for the appointment and removal of all judicial officers (including both judges and magistrates). In the case of judges, appointments are made by the president, after consultation with a specially constituted body called the Judicial Services Commission (JSC).<sup>220</sup> The JSC is made up of 23 people: the chief justice, the president of the Supreme Court of Appeal, one judge president of the high court, the Minister of Justice (or nominee), two advocates nominated by the profession, two attorneys nominated by the profession, one legal academic nominated by academia, six members of the National Assembly (three from opposition party ranks), four delegates from the National Council of Provinces and four presidential nominees. The process of appointment of other judicial officers is to be set out by an act of Parliament.

There is no formal confirmation procedure of judges in the legislature and the only scope for civil society input (other than the legal profession) would be in terms of presidential nominees to the JSC. There is no particular qualification requirement regarding presidential nominees, though they are usually distinguished legal practitioners.

In general, the appointment of judges commences when the head of a court (the presiding judicial officer) informs the JSC of a vacancy. The vacancy is then published and nominations are solicited. Written nominations, together with letters of written consent and curriculum vitae (CVs), are sent to the secretary of the JSC. These documents are then circulated to members of the JSC. A sub-committee is then tasked with drawing up a shortlist and forwarding this to the full committee for consideration. After approval of the shortlist, the names of the candidates are then published. This aspect of the appointment of judges has been criticised, on the basis that the public is not aware of the identity of candidates who did not make the shortlist.<sup>221</sup> The JSC invites comments on the shortlisted candidates from members of the public, and it is customary for the relevant professional bodies to respond to this call. The candidate's professional organisation is further required to formally submit a letter of 'good conduct'. Finally, interviews, which are open to members of the public, are held.

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<sup>218</sup> The Constitution of the Republic of South Africa, 1996, (Act 108 of 1996), Chapters 5 & 8.

<sup>219</sup> Some recent examples are *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC); *Khosa and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC); *United Democratic Movement v President of the Republic of South Africa and Others* 2003 (1) SA 488 (CC); *Geuking v President of the Republic of South Africa and Others* 2003 (3) SA 34 (CC); and *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC).

<sup>220</sup> The JSC was established in terms of the Judicial Service Commission (JSC) Act, 1994 (Act 9 of 1994).

<sup>221</sup> Carmel Rickard, *The South African Judicial Service Commission*, October 2003, available at <http://www.law.cam.ac.uk/docs/view.php?doc=879>.

Because of the ANC's dominant position in the National Assembly and the National Council of Provinces, a majority of the JSC could conceivably be constituted from persons over whose appointment the ANC has direct control, which could be perceived as amounting to undue political influence over the judicial appointments process. However, there are very few countries in the world where judicial appointments are not politically controlled, and the ANC's *de facto* control of judicial appointments is therefore not, on its own, a reason to question the independence of the judiciary in South Africa. However, the civil society participation in the process could be strengthened, in particular by making available the names of persons nominated for consideration by the JSC, but not shortlisted for interview.

Section 176 of the Constitution provides the framework which governs the terms of office of judges. This framework is supplemented by the Judges' Remuneration and Conditions of Employment Act.<sup>222</sup> Constitutional Court judges are appointed for a non-renewable term of 12 years. Constitutional Court judges were initially required to retire at the age of 70. Currently, Constitutional Court judges continue their service until either they reach the age of 70 or they complete 12 years of service, whichever event comes first.<sup>223</sup> High court judges hold office until the age of 70 provided that by this age, they have served a period of at least ten years of active service. In the event that this is not the case, they may continue to serve as a high court judge until such time as the ten-year period has been completed.<sup>224</sup>

The removal of judges is governed by section 177 of the Constitution. The grounds for such removal are incapacity, gross incompetence or gross misconduct. A judge may only be removed on the above-listed grounds on such a finding by the JSC or by the National Assembly, should either one adopt a resolution to this effect. Such a resolution requires at least two-thirds support. Since the inception of the current Constitution, such an event has not occurred.

All judges are exempt from civil liability for their actions properly undertaken while exercising their official duties. Where a civil action arises out of conduct that does not lie within the scope of the judge's duties, the Supreme Court Act<sup>225</sup> provides in Section 25 that no summons or subpoena in a civil action may be issued out of any court against the chief justice, a judge of appeal or any other judge in the high court divisions, unless that court has given consent. In the case of a summons or subpoena issued out of an inferior court, the provincial division that has jurisdiction to decide an appeal in a civil action from that court, must consent to the issuing of the summons or subpoena.

Section 174(7) of the Constitution provides that other judicial officers (including magistrates) must be appointed in terms of an act of Parliament. This act must ensure that the appointment, promotion and transfer of judicial officers, as well as any dismissal steps against them, must take place without favour or prejudice.

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<sup>222</sup> The Judges' Remuneration and Conditions of Employment Act, 2001 (Act 47 of 2001), in the *Government Gazette* Vol. 462, No. 25638, 10 December 2003.

<sup>223</sup> *Ibid.*, Section 3(1).

<sup>224</sup> *Ibid.*, Section 3(2).

<sup>225</sup> The Supreme Court Act, 1959 (Act 59 of 1959).

Magistrates are appointed in terms of the Magistrates' Act of 1993,<sup>226</sup> read with the Magistrates' Courts Act of 1944.<sup>227</sup> The former establishes the Magistrates' Commission,<sup>228</sup> a body that considers all applications for vacant posts, transfers, promotions, as well as matters relating to misconduct and the dismissal of magistrates. The composition of the Magistrates' Commission is set out in Section 3 of the Magistrates' Act. The procedures followed for these processes are governed by the 'Regulations for Judicial Officers in Lower Courts', published in 1994 in terms of section 16 of the Magistrates' Act. The Magistrates' Commission makes recommendations to the Minister of Justice and Constitutional Development, who then decides on appointments, transfers or the promotion of magistrates. The minister also sets the salaries of the magistrates. With regard to misconduct or dismissals, the Magistrates' Commission makes recommendations to Parliament to remove the magistrate with whom fault has been found, or to impose any other appropriate sanction.

The tenure of magistrates in office is governed by Section 13 of the Magistrates' Act, which provides that a magistrate may serve until he or she reaches the age of 65. At this stage, the Minister of Justice and Constitutional Development may, after consultation with the Magistrates' Commission, extend such an appointment for a specified period.

Before the Magistrates' Act came into effect in 1994, magistrates were regarded as ordinary civil servants, whose appointment and conditions of service were regulated by the Public Service Act 111 of 1984. The establishment of the Magistrates' Commission therefore undoubtedly remedied what would have been an unconstitutional state of affairs. Nevertheless, according to one calculation, 21 of the 27 members of the Magistrates' Commission are still appointed in one way or another by the ruling party.<sup>229</sup> This, and other features of the statutory framework governing the magistrates' courts, were challenged in the *Van Rooyen* case. In a judgment handed down by the Pretoria High Court,<sup>230</sup> the Magistrates' Commission was found not to be sufficiently independent of the executive, mainly on the basis of the commission's composition. This decision was, however, overturned by the Constitutional Court.<sup>231</sup> In the Constitutional Court's view, it could not be inferred from the mere fact that a majority of the Commission owed their appointment to the ruling party, that they would not perform their duties 'with integrity'.

In several other cases, the Constitutional Court adopted a reading of ambiguous sections that strengthened the role of the Magistrates' Commission and limited the discretion of the minister in taking decisions relating to magistrates. Its findings relevant to this question may be summarised as follows:

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<sup>226</sup> The Magistrates' Act, 1993 (Act 90 of 1993).

<sup>227</sup> The Magistrates' Courts Act, 1944 (Act 32 of 1944).

<sup>228</sup> The Magistrates' Act, 1993 (Act 90 of 1993), Section 2.

<sup>229</sup> See Jane Franco & Cathi Powell, 'The meaning of institutional independence in *Van Rooyen v The State*' (2004) 121 *South African Law Journal* 562 at 568.

<sup>230</sup> *Van Rooyen and Others v The State and Others*, 2001 (4) SA 396 (T).

<sup>231</sup> *Van Rooyen and Others v The State and Others (General Council of the Bar Intervening)*, 2002 (5) SA 246 (CC).

- The fact that the executive had a strong influence in the appointment of the members of the Magistrates' Commission did not mean that magistrates' courts lacked institutional independence.<sup>232</sup>
- Appointment criteria for members of the Magistrates' Commission (and in particular the power of recall granted to the minister) had to be objective, and could not accommodate the subjective opinion of the minister.<sup>233</sup>
- The fact that the executive was actively involved in processing complaints against magistrates, as well as in their appointment and the determination of the conditions of service, did not in itself pose a threat to the independence of the judiciary.<sup>234</sup>
- Although magistrates did not have the same financial protection as judges did, in that there was no provision preventing their salaries from being reduced, this did not threaten the independence of magistrates, because there were sufficient safeguards in place, such as the requirement to consult the Magistrates' Commission and the fact that only the legislature could reduce salaries.<sup>235</sup>
- The grounds for removal of a magistrate, namely for 'misconduct, continued ill-health or incapacity' was constitutionally permissible, but procedures had to ensure that a member of government should not be given the power to exercise discipline over judicial officers, and that the Magistrates' Commission was decisively involved at every stage.<sup>236</sup>

This decision has been criticised on the grounds that it ignores the differences in composition and functions between the JSC and the Magistrates' Commission, and places too much weight on the judicial review of magistrates' court decisions by the high court.<sup>237</sup> Concerns have also been raised that in terms of the Magistrates' Act, magistrates remain under the control of the executive and the Magistrates' Commission exercises a mainly recommendatory function.<sup>238</sup> As a practical matter, however, the outcome of the *Van Rooyen* case has foreclosed further discussion of the independence of the magistracy in South Africa.

In general, judges and magistrates are not subject to harassment or pressure from the executive. However, there have been some instances of criminal attacks on magistrates or magistrates' courts. An example of a magistrate having being killed in a gang-related incident, which occurred as a result of a high-profile (but unreported) trial in Cape Town, is the killing of Magistrate Pieter Theron. Shortly before his killing, he had sentenced one member of a vigilante group, known as

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<sup>232</sup> At [71] and [73].

<sup>233</sup> At [93] to [95].

<sup>234</sup> At [100] and [101], [123] and [124], [213] and [214], and [241].

<sup>235</sup> At [147] to [149].

<sup>236</sup> At [162], [165], and [170] to [201].

<sup>237</sup> Franco & Powell, *op cit*.

<sup>238</sup> Lazarus Kgalema & Paul Gready, *Transformation of the Magistracy: Balancing Independence and Accountability in the New Democratic Order*, Centre for the Study of Violence and Reconciliation, June 2000.

People Against Gangsterism and Drugs (PAGAD), to prison and was at the time of the killing, presiding over a trial of two others. Prior to this, the same magistrate presided over a trial against Ebrahim Jeneker that was halted as a result of a pipe bomb outside the Wynberg Magistrates' Court, which deterred or killed essential witnesses. Government ministers have also blamed PAGAD for attacks that included the shooting of the Wynberg magistrate and the bombing of targets in Constantia, Gatesville, Observatory and central Cape Town, but were unable to prove or disprove such claims.<sup>239</sup>

## Composition of the judiciary

Section 174(2) of the Constitution specifically requires that the appointment of judges must reflect the racial and gender composition of the broader population. This section was included in the Constitution in an attempt to correct the imbalances in the composition of the judiciary, which existed before 1994.

In the context of South Africa, the need to transform the racial and gender composition of the judiciary is inevitably linked in public discussion with issues of judicial independence (see the case study on transformation of the judiciary, on page 62). As the information below shows, both the superior and the lower courts are still dominated by white men, feeding a perception that the courts are not 'independent' in the sense of being free from racial or gender bias. Thus, in a number of criminal cases, white male judges and magistrates have been accused of wrongly failing to convict persons charged with inter-race crimes, or of failing to impose adequate sentences.<sup>240</sup> On the other hand, there are concerns in some quarters that competent white male lawyers are being unfairly excluded from appointment to judicial office, especially to the high court.<sup>241</sup>

Table 4.1 below sets out the most recent figures available on the number of superior court judges, together with a breakdown of their race and gender. Currently, no information as to religion or ethnicity is recorded.<sup>242</sup> It is clear from the data that there is still an urgent need to transform the composition of the bench. The JSC has publicly committed itself to redress the imbalances.

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<sup>239</sup> Dixon & Johns, *Gangs, Pagad and the State: Vigilantism and Revenge Violence in the Western Cape*, Institute for Security Studies, Violence and Transition Series, Vol. 2, May 2001. For more on PAGAD, see case study on PAGAD, p.106.

<sup>240</sup> For example, in 2001, the decision by a Vryburg magistrate to acquit 15 white parents on charges of assaulting black pupils. Khadija Magardie, 'Public must root out racist judges', *Mail & Guardian*, 17 August 2001.

<sup>241</sup> See, for example, Serjeant at the Bar, 'White men can judge', *Mail & Guardian*, 23 July 2004.

<sup>242</sup> Information provided by the Human Resources Directorate of the DoJCD, in December 2004.



Table 4.1: Composition of superior court judges

Court	All judges	'White'		'Black'		'Coloured'		'Indian'	
		M	F	M	F	M	F	M	F
Constitutional Court	11	4	1	4	1			1	
Supreme Court of Appeal	18	13	2	2				1	
High courts									
Kimberley	6	2	1	2		1			
Grahamstown	9	7		2					
Port Elizabeth	8	5			1			2	
Cape Town	28	16	3	5		2	1	1	
Bloemfontein	13	10		2					1
Pretoria	29	19	1	8		1			
Johannesburg	33	18	3	5	3			4	
Pietermaritzburg	10	5		4					1
Durban	14	5	1	3		2	1	2	
Mmabatho	5	1		1	2	1			
Umtata	7	2	1	3	1				
Bisho	4	1		2				1	
Venda	2			2					
Land claims court	4	1		2					1
Labour court	6	1	1	1		1		1	1
TOTAL	207	110	14	48	8	8	2	13	4

Table 4.2 on page 62 reflects the most recent information available on the composition of the presiding officers in magistrates' courts.<sup>243</sup>

<sup>243</sup> Information provided by the Secretariat of the Magistrates' Commission, December 2004.

Table 4.2: Composition of presiding officers in magistrates' courts

Rank	All magistrates	'White'		'Black'		'Coloured'		'Indian'	
		M	F	M	F	M	F	M	F
Regional court president	10	3	0	3	2	0	1	0	1
Regional magistrate	305	162	32	64	23	7	3	4	10
Special grade chief magistrate	1	0	0	1	0	0	0	0	0
Chief magistrate	22	8	1	8	2	0	1	0	2
Senior magistrate	143	43	17	67	10	1	1	2	2
Magistrate	1341	437	200	377	121	60	33	51	62
TOTAL	1822	653	250	520	158	68	39	57	77

## Case study: Transformation of the judiciary in South Africa

South Africa, after 1994, inherited a judiciary that was overwhelmingly white and male. Section 174(2) of the Constitution acknowledges the obvious need for transformation—it requires that the need for the judiciary to reflect broadly the racial and gender composition of South Africa, must be considered in the appointment of judicial officers. The implementation of this requirement has not been without controversy, however.

The first problem is that as a result of South Africa's apartheid legacy, there are a limited number of black, coloured and Indian legal practitioners who have the necessary skills and qualifications for appointment to the bench. These potential candidates often have lucrative legal practices and may be reluctant to take significant salary decreases in order to accept appointments to the bench. In a meeting of the Justice Portfolio Committee in 2003, the chief justice expressed strong concern about this.

Tensions around the appointment of a high court judge to the Cape Bench arose in late 2004, where close to two-thirds of the bench remained white. Two candidates were shortlisted, one white and the other black. While both candidates were suitably qualified, the white candidate had an outstanding human rights track record and his exceptional qualities were widely acknowledged. When the black candidate was ultimately appointed, heated public debate ensued around the weight that should be given to the need for racial transformation, which included statements from opposition politicians as well as senior members of the bench. At the same time, the Minister for Justice and Constitutional Development, Ms Mabandla, also raised the need for gender transformation of the bench, which continues to lag behind racial transformation.

This debate was taken up by the ruling party, the ANC, early in 2005. In a statement by the

National Executive Council (NEC) of the ANC, on 8 January 2005, the NEC called for the transformation of the 'collective mindset of the judiciary to bring it into consonance with the vision and aspirations of the millions who engaged in struggle to liberate our country'. This call for popular accountability of the judiciary caused a strong reaction in the media, among opposition politicians as well as civil society organisations. Two days later the ANC issued a further statement, in which it affirmed its commitment to the independence of the judiciary, but also re-affirmed its position on the need for popular accountability and visible, speedy transformation of the judiciary.

The vehemence of the debate caused the chief justice to issue a statement in which he expressly affirmed the judiciary's commitment to ongoing transformation. The debate has not died down, but is continuing in the context of the minister's efforts to introduce training for judicial officers under the auspices of the DoJCD.

**SOURCES:**

*News24*, 'White judges not good enough', 2 November 2004;

Minister B Mabandla's address at the Women Judges Conference, August 2004, is available at [www.doj.gov.za/speeches](http://www.doj.gov.za/speeches);

<http://www.anc.org.za/ancdocs/pr/2005/pro108.html>; and

Judge Chaskalson CJ, Public Statement, January 2005, at [www.derebus.org.za/current](http://www.derebus.org.za/current).

## Judicial qualification, training and remuneration

Section 174(1) of the Constitution provides that any 'appropriately qualified woman or man, who is a fit and proper person, may be appointed as a judicial officer'. There is no further legislative or other requirement regarding the qualifications of a judicial officer, although section 174(5) requires that 'at least four members of the Constitutional Court must be persons who were judges at the time they were appointed to the Constitutional Court'. Currently, the Constitutional Court bench consists of 11 members.

In early 2005, the Minister of Justice and Constitutional Development told Parliament that her department was drafting legislation to ensure that Justice College was used to train aspirant judges. Amongst these pieces of legislation were: the Judicial Services Amendment Bill; the Judicial Conduct Tribunal Bill; South African National Justice Training College Draft Bill; and the Superior Courts Bill.<sup>244</sup> Their collective aim is to rationalise the superior court structure in South Africa, to strengthen procedures for the investigation of complaints against judges, and to extend existing arrangements for magistrates' training at the Justice College to judges. In response to arguments that some of the provisions in these bills are unconstitutional, the minister has indicated that an amendment to Section 165 of the Constitution would not be out of the question.

In relation to judicial qualifications, the objections to these bills include concerns over the extent to which the executive may properly be involved in the disciplining of judges, the manner in which complaints against judges should be investigated, particularly in the current context of rapid transformation of the judiciary, and the extent of executive influence over judicial training.

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<sup>244</sup> 'Debating the transformation of the judiciary: rhetoric and substance', *E-politics SA*, IDASA, Edition 3, 2005.

Much of the detail of these provisions is still under discussion.

The qualifications required for the appointment of magistrates are dealt with in Section 9 of the Magistrates' Court Act. That section provides that a person must hold a Bachelor of Law (LLB) degree from a South African university or have passed the Public Service Senior Law Examination, or an examination deemed by the minister to be the equivalent to that examination. In terms of Section 10 of the Magistrates' Court Act, all magistrates have to pass the Civil Service Lower Law Examination or an equivalent examination, and the Magistrates' Commission may give preference to a person who has passed the Civil Service Higher Law Examination. In-service training takes place on an ad hoc basis in the Magistrates' Courts, and formal training is conducted by the Justice College, an internal DoJCD training unit.

According to information supplied by the Department of Justice, the training of magistrates through the Justice College has integrated constitutional values, human rights, sensitisation to issues of discrimination and cultural difference into all its courses.<sup>245</sup>

At Magistrates' Court level, judicial quality assurance inspections are conducted on a regular basis by magistrates serving in the National Judicial Quality Assurance office. In the high courts, performance assessment is less formal and conducted by the senior presiding officer in each court. Promotions at the lower-court level are done on a combination of length of service and ability. High court promotions are all advertised and approved on application to the JSC.

The salaries, allowances and benefits of judges are determined by the president and must be approved by Parliament. Judges' salaries may not be reduced<sup>246</sup> and are administered by the DoJCD, but they are reflected as a direct charge against the National Revenue Fund.<sup>247</sup> Judges receive a car allowance and medical aid contributions, in addition to their salary.

Table 4.3: Judges' salaries<sup>248</sup>

Designation of office	Salary per annum
Chief justice	R 688 537
Deputy chief justice and president of the Supreme Court of Appeal	R 676 930
Deputy president of the Supreme Court of Appeal	R 666 076
Judge of the Constitutional Court and the Supreme Court of Appeal	R 633 825
Judge president of the high court and the labour court	R 629 948
Deputy judge president of the high court and the labour court	R 619 811
Judge of the high court and the labour court	R 615 130

<sup>245</sup> The DoJCD, *Annual Report 2003/04*, p.72-73.

<sup>246</sup> The Constitution of the Republic of South Africa, 1996, (Act 108 of 1996), Section 176(3).

<sup>247</sup> The Judges' Remuneration and Conditions of Employment Act, 2001 (Act 47 of 2001), in the *Government Gazette* Vol. 462, No. 25638, 10 December 2003, Section 3(5).

<sup>248</sup> In terms of Notice 1374, *Government Gazette* 27025, 26 November 2004.

Acting judges receive the same salary as permanent judges, and an additional amount of R 237 per day as practice allowance. Concerns have been raised repeatedly over how judges' salaries compare unfavourably with earnings in private practice, where a senior member of the bar may expect to earn at least three to four times as much as a high court judge. This impacts particularly on the availability of senior counsel to act on the high court bench. In addition to their salaries, parties above the rank of regional magistrate receive a car allowance, and all magistrates receive a housing allowance and medical-aid benefits equivalent to those of a deputy director in the civil service.

*Table 4.4: Magistrates' salaries<sup>249</sup>*

Designation of office	Salary per annum
Special grade chief magistrate	R 388 941
Regional court president	R 388 941
Chief magistrate and regional magistrate	R 314 162
Senior magistrate	R 284 245
Magistrate	R 258 576

## Oversight of the judiciary

The Judicial Services Commission (in respect of high court judges) and the Magistrates' Commission (in respect of magistrates) are responsible for maintaining appropriate standards of judicial conduct.

Misconduct is grounds to remove either a magistrate or a judge from the bench. In the case of judges, the appropriate procedure is set out in Section 174 of the Constitution. In terms of that section, a judge may be removed from office only if the JSC finds that the judge is guilty of gross misconduct (or, in terms of the section, suffers from an incapacity or is grossly incompetent), and if the National Assembly calls for that judge to be removed by a resolution supported by at least two-thirds of its members. The president may suspend a judge pending an investigation by the JSC, but only on the advice of the JSC.

In the case of magistrates, the Magistrates' Act of 1993 provides for the establishment of regulation by a complaints committee that must be accessible to the public, investigate allegations of improper conduct, and thereupon report to the Magistrates' Commission.<sup>250</sup> The Commission makes recommendations to the Minister of Justice regarding the magistrate's temporary or permanent suspension. A magistrate must be removed from office by the minister, upon the passing of a resolution by Parliament to that effect.<sup>251</sup> The Magistrates' Act also makes provision for the drafting of a code of conduct by the Magistrates' Commission.<sup>252</sup>

<sup>249</sup> In terms of Notice 1375, *Government Gazette* 27025, 26 November 2004.

<sup>250</sup> The Magistrates' Act, 1993 (Act 90 of 1993), Sections 6A, 6B & 7.

<sup>251</sup> *Ibid.*, Section 13.

<sup>252</sup> *Ibid.*, Section 4.

No judge has been removed from office for misconduct. Several magistrates have faced enquiries, however. At the beginning of 2005, Parliament was awaiting the reports and recommendations by the Magistrates' Commission in several instances of alleged misconduct by magistrates.<sup>253</sup> In the case of *Lapping*,<sup>254</sup> the high court had to consider the implications for an accused, where the presiding magistrate was suspended on suspicion of fraud and facing criminal charges. The court found that in such a case, where it was possible to repeat the presentation of evidence in a relatively short time, it would not infringe the accused's right to a fair trial and that the proceedings could thus begin afresh.

In addition to these formal procedures, the process of appeal forms a system of oversight for lower-court judges. A number of advocacy groups engage in public-interest litigation to determine constitutional questions and thus set a precedent binding on lower courts.<sup>255</sup> The institutions established by Chapter 9 of the Constitution,<sup>256</sup> in support of democracy, have also intervened in selected court cases. Both the bar (advocates) and particularly the side-bar (attorneys) have formalised programmes by which *pro bono* assistance is provided in cases that do not qualify for legal aid, but which raise legal issues of public importance. There are no publicised cases in which a violation of a previous higher-court order or human rights norm was allowed to stand, because of the inadequacy of appeal procedures.

## B. Lawyers

### Structure and composition of the legal profession

The South African legal system makes provision for a bar and a side-bar. The bar consists of those who specialise in representing clients in court, known as advocates, while the side-bar consists of attorneys who may handle contentious or non-contentious matters. Advocates must be briefed via an attorney, and may not accept funds or instructions directly from a client.<sup>257</sup> Traditionally, only advocates had the right to appear (argue in person before the court) in high court matters. Since 1995, attorneys have been entitled to appear in the high court if they have been admitted to do so, in terms of Section 4 of the Right of Appearance in Courts Act.<sup>258</sup>

The most recent figures available from the General Bar Council of South Africa,<sup>259</sup> indicate that there were 1 871 practising advocates in 2004.

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<sup>253</sup> See IDASA, *Parliamentary Update No. 6*, week of 22 March 2005 to 8 April 2005.

<sup>254</sup> *S v Lapping* [1998] 1 All SA 331 (W).

<sup>255</sup> For example, the Legal Resources Centre, IDASA, the Women's Legal Centre, the Centre for Applied Legal Studies (CALS), and the Lesbian & Gay Equality Project have all intervened in litigation as *amici curiae*, or funded litigation that they considered of particular importance.

<sup>256</sup> For example, the Commission on Gender Equality and the SAHRC.

<sup>257</sup> *De Freitas and Another v Society of Advocates of Natal and Another* 2001 (3) SA 750 (SCA).

<sup>258</sup> The Right of Appearance in Courts Act, 1995 (Act 62 of 1995).

<sup>259</sup> Dated April 2004.

Table 4.5: Racial and gender composition of members of the bar

	'Black'		'White'		'Indian'		'Coloured'	
	M	F	M	F	M	F	M	F
<b>Silks<sup>260</sup></b>	7	-	281	10	16	2	7	1
<b>&gt; 5 years</b>	58	8	670	89	37	8	9	4
<b>&lt; 5 years</b>	136	32	283	107	37	30	23	16
<b>Total</b>	201	40	1234	206	90	40	39	21

According to the Law Society of South Africa (LSSA) in 2004, there were 11 245 male attorneys, 4 226 female attorneys, 2 156 candidate male attorneys, and 1 778 candidate female attorneys. The LSSA does not have statistics on the racial composition of its members,<sup>261</sup> but it would be safe to say that the majority are still white.

The DoJCD released a draft Legal Practice Bill<sup>262</sup> in August 2000. The draft bill provides for all the various component members of the legal profession (attorneys, advocates, inhouse legal advisers and paralegals) to be regulated by a single umbrella body, the Legal Practice Council. According to the bill, no person would be entitled to offer legal services of any kind unless he or she were registered as a legal practitioner by the council. Though the bill is not very clear on this, it would appear that this rule would also cover paralegals who would need to register as legal practitioners in terms of the bill. The current restrictions on their capacity to appear on behalf of clients in court, however, would be maintained.

The response to the draft Legal Practice Bill was not uniformly positive, with the organised attorneys' profession in particular raising concerns that it threatened the independence of the profession.<sup>263</sup> In April 2001, the Minister of Justice accordingly appointed a task team to look into the development of the bill. The task team produced its report in April 2002, but was unable to reach consensus on a new draft, with the Law Society of South Africa producing its own draft bill for consideration. Both the task team's bill and the Law Society's bill remain committed to the idea of a comprehensive re-regulation of the legal profession, under a single Legal Practice

<sup>260</sup> A 'silk' is an advocate of proven experience and skill, who after at least ten years of practice is appointed by the president of South Africa as a senior consultus (SC). Each year the bar councils make recommendations about who should be appointed as silk.

<sup>261</sup> The Law Society of South Africa's response to a questionnaire, December 2004.

<sup>262</sup> Available at <http://www.info.gov.za/bills/2000/draftlpb.htm#draft>.

<sup>263</sup> See 'Draft Legal Practice Bill "threatens the independence of the profession"', *De Rebus*, October 2000, available at <http://www.derebus.org.za/archives/2000Oct/news/bill.htm>.

Council. There are still considerable differences of opinion, however, over the degree to which the various components of the legal profession should be allowed to regulate themselves.

## **Independence**

In general, lawyers are not harassed by government or private individuals and thus conduct their professional activities within acceptable conditions. There have been isolated cases of criminal pressure being placed on individual lawyers and magistrates, but such instances are not the norm.

## **Legal training**

Both attorneys and advocates are generally required to fulfil all the requirements of an LLB degree at a South African university,<sup>264</sup> although there may be some exceptions determined by the minister. Currently, the LLB-degree requirements include courses dealing with human rights and legal ethics.

In addition, before an individual may join the bar (although it is possible to practise as an advocate without joining the bar, as a so-called 'independent advocate') or the side-bar, further practical training and examination is provided by the relevant professional body, which in both cases involves training and an examination in ethics.

Before beginning to practise at the bar, a 'pupillage' programme of one year's duration is compulsory. This includes a bar examination and a practical course in advocacy training, conducted under the supervision of the National Advocacy Training Committee of the General Council of the Bar of South Africa.

After obtaining a four year LLB, a candidate attorney may elect to attend a six months Practical Legal Training (PLT) course at one of nine schools around the country. Thereafter, the candidate does a year of 'articles' (a traineeship) at a suitable firm or other organisation, such as a justice centre. The other alternative available to a candidate attorney is to undertake two years of articles. After the two years of articles (or six months of PLT and one year of articles) are completed, the candidate then sits for the board examination for admission as an attorney.

The legal training provided to candidate attorneys generally includes components of human rights law. Often, the lecturers are well known human rights lawyers or judges, who provide a human rights-based approach to essential legal courses.

## **Disciplinary systems**

The formal professions of both attorneys and advocates have well-established disciplinary systems. In general, the profession maintains high standards and ensures that its members follow acceptable standards of practice. Both bodies conduct disciplinary enquiries as and when required. Where appropriate, members are removed from the respective rolls. Advocates who practice independently (that is, they are not members of the bar) and pupils are also subject to the

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<sup>264</sup> In terms of Section 3 of the Admissions of Advocates Act 74 of 1964, and Section 2 of the Attorneys Act 53 of 1979.



disciplinary rules of the bar, and candidate attorneys are subject to the discipline of the side-bar.

In the case of *De Freitas*,<sup>265</sup> the Supreme Court of Appeal pointed out that the requirement that advocates may not receive instructions or funds directly from a client, is to ensure that the restrictions placed on attorneys in handling clients' trust funds continue to protect the public. No such protective requirements apply to advocates.

Where a court is made aware of unprofessional conduct by a member of the profession, the court will refer its judgment to the relevant body.<sup>266</sup> This happens regularly, though not frequently.

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<sup>265</sup> *De Freitas and Another v Society of Advocates of Natal and Another* 2001 (3) SA 750 (SCA).

<sup>266</sup> For example, this recently happened in *Jafftha v Schoeman and Others* 2005(1) BCLR 78 (CC).

# 5

## Criminal justice

South Africa continues to face an extremely high violent crime rate, and issues relating to policing and prisons remain in need of attention, despite the substantial progress made since 1994.

Prior to 1994, the South African Police Service (SAPS) was in effect an enforcer of the apartheid state, and since then reform has been far-reaching. Rigorous training of officers has been introduced, accountability mechanisms set up (both civilian oversight secretariats and the Independent Complaints Directorate), and a 'prevention of torture' policy instated. However, public lack of faith in SAPS persists, due in part to limited access to policing in traditionally black areas, as well as continuing allegations of abuse, corruption and poor service delivery.

Prison overcrowding has become an increasing cause for concern, reflecting an extremely high incarceration rate. Although this cannot be attributed to any one factor, it has led to debate on the effects of minimum sentencing as introduced under the 1997 Criminal Law Amendment Act, and exploration of alternative sentencing options. Widespread delays in bringing cases to court are also contributing to prison overcrowding.

### A. Protection from crime

#### **Incidence of crime**

South Africa has one of the highest rates of violent crime in the world. According to police statistics, 19 824 people were murdered in the fiscal year 2004/05, a rate of more than 40 per

100 000 people each year.<sup>267</sup> The recorded murder rate has, however, been falling since 1994, when 25 965 people were murdered, including many in political violence leading up to the first democratic elections. Reported crime rates for other violent crimes are also extremely high, including in particular rape and other violent crimes against women. Debates over policing policy and the rights of accused persons take place against the background of vocal public concern at this high level of violent crime.

The accuracy of police crime statistics has been a controversial issue for some years.<sup>268</sup> Crime statistics are collected from all police stations and units according to a coding system distributed to station commissioners and published, nowadays, on the police service website.<sup>269</sup> In July 2000, Police Minister Steve Tshwete controversially suspended publication of police crime statistics pending a review of how they were collected.<sup>270</sup> Publication of statistics was resumed in 2001. While criticisms remain, and this is a controversial subject in the South African media, both SAPS statistics and independent victim surveys show a drop in crime between 1998 and 2003.<sup>271</sup>

The 2003 National Victims of Crime Survey, conducted by the Institute for Security Studies,<sup>272</sup> found that just more than one-fifth (22.9 per cent) of all South Africans had been a victim of crime in the 12 months preceding the survey. This is slightly less than the overall victimisation rate recorded by the 1998 survey, in which one-quarter (24.5 per cent) of South Africans had experienced crime over the preceding year. This means that overall, the victimisation rate dropped by 1.6 per cent over the previous five years. According to the SAPS Annual Report for 2003–2004, reports of all contact crimes (that is, crimes during which persons have been killed, seriously injured and/or traumatised) decreased over the previous year (with the exception of robbery with aggravating circumstances).<sup>273</sup>

Despite the decline in crime rates indicated by the victim surveys and the official crime statistics, South Africans felt less safe in 2003 than they did in 1998. The number of respondents feeling unsafe in the 2003 victim survey had doubled over the previous five years—from 25 per cent in 1998 to 58 per cent in 2003.<sup>274</sup>

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<sup>267</sup> See statistics for crime in South Africa, for the period April to March 1994/95 to 2003/04, SAPS, Crime Information Analysis Centre (CIAC), available at [http://www.saps.gov.za/statistics/reports/crimestats/2004/\\_pdf/crimes/rsa\\_totals03\\_04\\_new.pdf](http://www.saps.gov.za/statistics/reports/crimestats/2004/_pdf/crimes/rsa_totals03_04_new.pdf).

<sup>268</sup> See for example, Antony Albeker, 'Puzzling statistics: Is South Africa really the world's crime capital?', Institute for Security Studies, *Crime Quarterly* No. 11, Pretoria, 2005.

<sup>269</sup> The SAPS website is available at <http://www.saps.gov.za>.

<sup>270</sup> See for example, Martin Schönteich, 'Moratorium on crime figures', in *Focus*, Helen Suzman Foundation, Johannesburg, September 2000.

<sup>271</sup> See for example, Borrie la Grange, Pieter du Toit & Liezel de Lange, 'Crime stats: Mixed response', *News24*, Cape Town, 21 September 2004.

<sup>272</sup> Patrick Burton, Anton du Plessis, Ted Leggett, Antoinette Louw, Duxita Mistry & Hennie van Vuuren, *National Victims of Crime Survey South Africa 2003*, Institute for Security Studies, Monograph 101, Pretoria, July 2004.

<sup>273</sup> The SAPS, *Annual Report 2003-2004*.

<sup>274</sup> Antoinette Louw, *Citizen Perceptions of Crime and Policing in South Africa*, Konrad-Adenauer-Stiftung, Johannesburg, 1999.

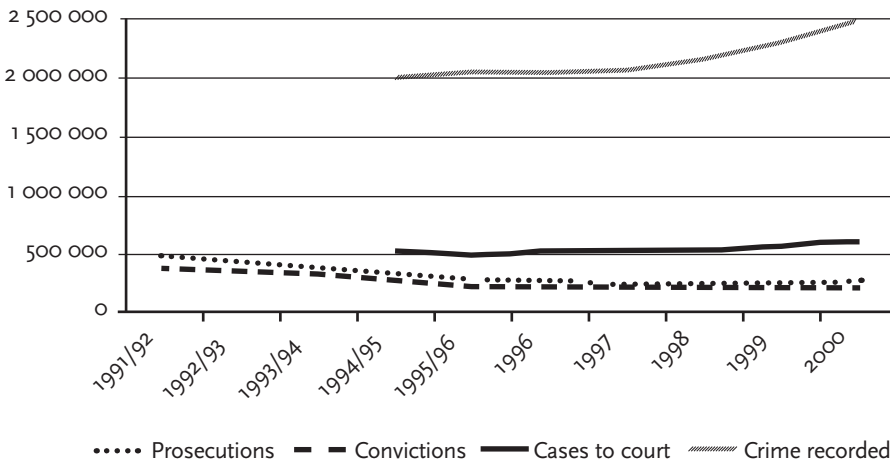
None of the survey work undertaken has been able to determine what percentage of actual crimes is reported to the police. It is generally accepted, however, that except for murder and major property crime, few victims report their experiences to the authorities, although the trend is that reporting is increasing.<sup>275</sup>

### Arrest, prosecution and punishment of criminal offenders

The National Victims of Crime Survey also tests perceptions of police performance, in a questionnaire to all respondents on how they think the police are doing in their area of residence. In 2003, just over half (52 per cent) of South Africans said that the police were doing a good job in their area, while more than two out of five (45 per cent) thought they were doing a bad job.<sup>276</sup>

The number of cases taken on by the prosecution service has declined at a time when recorded crime is increasing. The number of serious crimes, as recorded by the SAPS, increased by 24 per cent (481 000) between 1994 and 2000. In 1994/95, 350 200 prosecutions and 260 900 convictions took place. This decreased to 271 100 prosecutions and 211 800 convictions in 2000. There was, however, a slight increase in the number of prosecutions and convictions between 1999 and 2000. Yet, while the number of recorded serious crimes increased by 24 per cent between 1994 and 2000, the number of prosecutions dropped by 23 per cent and convictions by 19 per cent. The chances of the average offender being caught and punished consequently declined after 1994.

Table 5.1: Number of prosecutions, convictions, cases brought to court and crime recorded<sup>277</sup>



<sup>275</sup> Burton et al, *National Victims of Crime Survey South Africa 2003*, p.106.

<sup>276</sup> Duxita Mistry, 'Falling crime, rising fear: 2003 National Victims of Crime Survey', Institute for Security Studies, *Crime Quarterly* No. 8, Pretoria, June 2004.

<sup>277</sup> Table 5.1 from Criminal Justice Monitor, Institute for Security Studies website, available at <http://www.iss.co.za/CJM/Justice.html>.

The figures in table 5.2 below<sup>278</sup> suggest that the criminal justice system is not performing optimally. Only a small percentage of the crimes reported to the police result in anyone being convicted (it should be noted, however, that this is true in all countries).

Table 5.2: Key statistics for the criminal justice system

Crimes recorded in 2000	2 575 617	100 %
Cases referred to court in 2000	609 928	24 %
Cases brought to trial in 2000	271 057	11 %
Convictions in 2000	211 762	8 %

Nevertheless, of the 271 057 cases the prosecution service took to trial in 2000, convictions were obtained in 211 762 cases. That is, once cases are successfully processed through most of the criminal justice system, with the suspects ending up in the accused box in court, their chances of being convicted are a high 78 per cent. Unlike the police, however, prosecutors have the luxury of being able to decide which cases to take on.

## B. Policing

### Legal framework

Section 12(1) of the Constitution asserts the right of everyone to freedom and security of the person. This includes the right to be free from all forms of violence, from either public or private sources. Section 205(3) of the Constitution provides for the police service 'to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the republic and their property, and to uphold and enforce the law'.

Legislation pertaining to policing in South Africa has undergone substantial reform since the 1994 democratic elections. The central piece of legislation, the South African Police Service's Act<sup>279</sup> was passed in 1995. Since 1994, several other pieces of legislation have been passed which impact on policing. These include the Domestic Violence Act;<sup>280</sup> the Firearms Control Act,<sup>281</sup> which establishes a comprehensive regulatory system for the possession and ownership of firearms; and the Prevention of Organised Crime Act.<sup>282</sup> The constitutionality of the Prevention of

<sup>278</sup> Statistics and information provided from *Criminal Justice Monitor*, Institute for Security Studies, on performance of the justice sector. Information on arrests rendered unavailable. See also the South African Law Commission, 'Conviction rates and other outcomes of crimes reported in eight South African police areas', *Research Paper 18* (no date).

<sup>279</sup> The South African Police Service's Act, 1995 (Act 68 of 1995).

<sup>280</sup> The Domestic Violence Act, 1998 (Act 116 of 1998), in the *Government Gazette* Vol. 414, No. 20778, 30 December 1999.

<sup>281</sup> The Firearms Control Act, 2000 (Act 60 of 2000), in the *Government Gazette* Vol. 430, No. 22214, 10 April 2000.

<sup>282</sup> The Prevention of Organised Crime Act, 1998 (Act 121 of 1998), in the *Government Gazette* Vol. 402, No. 19553, 4 December 1998.

Organised Crime Act, which allows for civil as well as criminal forfeiture of property, has been challenged on several occasions,<sup>283</sup> but so far unsuccessfully.

The 1998 Judicial Matters Amendment Act<sup>284</sup> changed the law relating to the use of force in making an arrest. It enacted an amendment to the Criminal Procedure Act<sup>285</sup> (1 of 27 amendments since 1994) that introduced a proportionality requirement for the use of force by a police officer making an arrest, and set clear limitations on when lethal force may be used. The amendment was only signed into law by the minister in June 2003, almost five years after it was passed by Parliament. This was despite a decision by the Constitutional Court handed down in May 2002,<sup>286</sup> declaring the largely unconstrained permission granted by the Criminal Procedure Act to use lethal force in affecting an arrest, to be unconstitutional. Several other proposed pieces of legislation that will impact on the police service, such as a new Sexual Offences Bill and the Child Justice Bill, have not yet been passed into law.

## Forces responsible for policing

The South African Police Service (SAPS) is the main force responsible for policing in South Africa. Membership of the SAPS as per the 2003/04 annual report stood at 134 857. This makes it one of the biggest police services in the world on a per capita basis, representing one functional police member to 450 citizens. However, distances and the geographic size of the country mean that resources are spread particularly thin in rural areas. In addition, South Africa's high crime rate means that it has only 1 officer per 6 recorded murders per year, as compared to 12 officers per 6 murders in Zambia, 93 per 6 in Egypt and 249 per 6 in Malaysia.<sup>287</sup>

Metropolitan or municipal police agencies are a relatively new feature in South Africa, and have a mandate that includes crime prevention, traffic and by-law enforcement. These agencies have been established in the metropolitan areas of Johannesburg, Tshwane, Cape Town, Durban and Ekurhuleni. Local-level police agencies are provided for by the South African Police Service's Act of 1995 and the Constitution.<sup>288</sup>

The South African National Defence Force has been used in support operations with the police, as well as in border duties and in patrolling rural areas, largely consisting of commercial farmland. The use of the army—in particular reserve units known as commandos—in rural

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<sup>283</sup> *National Director of Public Prosecutions and Another v Mohamed NO and Others* 2003 (1) SA 1 (CC); *National Director of Public Prosecutions v Seevnarayan* 2003 (2) SA 178 (C); *Phillips v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA); and *National Director of Public Prosecutions v Prophet* 2003 (6) SA 154 (C).

<sup>284</sup> The Judicial Matters Amendment Act, 1998 (Act 122 of 1998), in the *Government Gazette* Vol. 402, No. 19590, 11 December 1998.

<sup>285</sup> The Criminal Procedure Act, 1977 (Act 51 of 1977).

<sup>286</sup> *Ex parte Minister of Safety and Security and Others: In re S v Walters and Another* 2002 (4) SA 613 (CC).

<sup>287</sup> Ted Leggett, Antoinette Louw, Martin Schönteich & Makubetse Sekhonyane, *Criminal Justice in Review: 2001/2002*, Institute for Security Studies, Pretoria, October 2002. See 'Annex E: Policing in South Africa', for a list of state and private bodies involved in policing in South Africa.

<sup>288</sup> Gareth Newham, *Local Level Civilian Oversight of the Metropolitan Police Departments in South Africa*, Centre for the Study of Violence and Reconciliation, Johannesburg, June 2004.

safety in particular has been controversial, with some units being accused of serious abuses against those they have apprehended.<sup>289</sup> The use of the military both for border patrols relating to the control of immigration and crime, and for rural safety, is being phased out and both responsibilities will be taken over by the SAPS.<sup>290</sup>

The private security industry has expanded rapidly over the last decade and now stands at almost four private security members to every SAPS member. There were roughly 216 000 uniformed security guards to 90 000 uniformed SAPS members in 2000.<sup>291</sup> A 2004 press report alleged that as many as four out of five police officers take second jobs to supplement their very low pay.<sup>292</sup> These officers often find work in the security industry. Although this potentially gives rise to conflicts of interest, there have been no serious allegations of outright hire of SAPS members by powerful businesses or for political interests.

In addition, most South Africans (61 per cent according to the 2003 Institute for Security Studies Victim Survey) participate in volunteer neighbourhood watches and anti-crime organisations.<sup>293</sup> There have been occasional reports of community crime-prevention initiatives degenerating into vigilantism.<sup>294</sup> Recently, in a move to introduce uniformity and a standard code, neighbourhood watches have been offered training under the auspices of the Provincial Departments of Community Safety, and have registered with local community police forums.

## Policing strategy

The SAPS strategic plan for 2004 to 2007 targets a seven per cent reduction in contact crimes.<sup>295</sup> These crimes refer to physical contact between victim and perpetrator and include murder, attempted murder, rape, attempted rape and assault. These crimes account for some 40 per cent of serious crime reported. Within this framework, the SAPS have set themselves four strategic priorities: combating organised crime; combating serious and violent crime; reducing the incidence of violence against women and children; and improving service delivery at police stations.

The strategic plan flows from the National Crime Combating Strategy, adopted by the police in April 2000, which set out a two-phase approach to achieving these goals. Phase 1, from 2000 to 2003, sought to stabilise crime levels, and Phase 2, from 2004 to 2010, aims to normalise crime and policing.

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<sup>289</sup> Human Rights Watch, *Unequal Protection: The State Response to Violent Crime on South African Farms*, New York, 2001.

<sup>290</sup> Minister for Safety And Security, Mr Charles Nqakula's Parliamentary media briefing on Justice, Crime Prevention and Security Cluster, 28 October 2004, is available at <http://www.info.gov.za/speeches/2004/04110114451001.htm>.

<sup>291</sup> The Institute for Security Studies, *Crime Index*, Vol. 4, No. 3.

<sup>292</sup> Graeme Hosken & Bongani Mthembu, 'Cops for hire: Meagre salaries lead to rampant moonlighting', *The Star*, 20 May 2004.

<sup>293</sup> Burton et al, *National Victims of Crime Survey South Africa*, 2003.

<sup>294</sup> The Institute for Security Studies, *The Development of Vigilantism in South Africa*, Monograph No. 72, March 2002. See also Section 5.F on 'Non-state action against crime', p.104.

<sup>295</sup> The Ministry for Safety and Security, *Strategic Plan of the South African Police Services 2004-2007*, 2004, is available at [www.saps.gov.za/saps\\_profile/strategic\\_framework/strategic\\_plan/2004\\_2007/strategic\\_plan.htm](http://www.saps.gov.za/saps_profile/strategic_framework/strategic_plan/2004_2007/strategic_plan.htm).

The initial phase of this policing plan sets an approach where the police identify those police stations with the highest crime rates (those areas where more than 50 per cent of the most serious reported crimes occur, as identified by the SAPS' Crime Information Analysis Centre) and adopt measures to stabilise crime in their catchment areas. The rationale was that once this had been achieved, it would be possible to undertake 'normal' crime management. Under this plan, approximately 140 station areas were identified for particular attention from a total of almost 1 200 stations. In parallel to this, a number of priority crimes have been identified, particularly those impacting on women and children.<sup>296</sup>

Following the stabilisation phase, the normalisation component of the strategy activated in 2004 requires each station to come up with a crime-prevention plan which is wider than just policing, and in the process, to engage with non-government role-players in the station area. These crime-prevention projects aim to present a multi-pronged strategy that seeks to provide a proactive policing service to discourage the incidence of all types of crime, especially serious and violent crime, organised crime and crimes against women and children.

The SAPS have moved to establish a system of Sector Policing, breaking station areas into smaller, manageable geographical zones known as sectors, and establishing a system of communication and contact between dedicated officers stationed in the sector and the affected community.

However, a lot remains to be done. While considerable effort has gone into equitable allocation of policing, resources remain skewed to former historically white areas. For example, in small rural towns, the only police station is usually located in the centre of town and in the historically white area. Access to policing in urban areas is likely to be better than in the countryside. Equally, one of the ways in which an effort has been made to upgrade the facilities in police stations, is in the provision of private facilities for taking statements from complainants. However, in many rural areas or among the busier urban stations, the lack of privacy for the reporting of sensitive crimes, such as rape, is evident. Victims of these crimes are being discriminated against by the absence of such facilities.<sup>297</sup> These problems arise largely as a result of the legacy of apartheid, rather than current discrimination, as well as population demographics, infrastructure and geographical terrain. But they do call into question the ability of the SAPS to meet its constitutional obligations, which are to provide equal protection to all.<sup>298</sup>

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<sup>296</sup> Ted Leggett, Antoinette Louw, Martin Schönreich & Makubetse Sekhonyane, *Criminal Justice in Review: 2001/02*, Institute for Security Studies, Pretoria, October 2002.

<sup>297</sup> Siphon Ntuli & Antoinette Louw, 'The challenge of policing rural crime', in the *Institute for Security Studies Crime Index*, Vol. 2, 1998; Eric Pelsler, Antoinette Louw & Siphon Ntuli, *Poor Safety: Crime and Policing in South Africa's Rural Areas*, the Institute for Security Studies, Pretoria, May 2000.

<sup>298</sup> Antoinette Louw & Mark Shaw, 'Putting the police in place: The distribution of policing resources in South Africa', in *Crime Index*, Vol. 2, the Institute for Security Studies, Pretoria, 1998.



## Civilian input into policing decisions

In addition to the police's internal strategic-planning processes, structures have been established to obtain input from non-police officials and the general public into police decision-making. The two most important mechanisms for doing so are the civilian secretariats, established at national and provincial level, and the community police forums (CPFs) at each police station.

In light of South Africa's history, those involved in drafting the Constitution were particularly concerned with ensuring that South Africa's security forces would be brought firmly under democratic control. As one of the measures to achieve this, Section 208 of the Constitution provides that '[a] civilian secretariat for the police service must be established by national legislation, to function under the direction of the cabinet member responsible for policing'. In accordance with this provision, the South African Police Service's Act, passed in 1995, sets out the mandate of the National Secretariat for Safety and Security, and also provides for secretariats to be established in each province. Their responsibilities include advising the minister for safety and security in the exercise of his powers, and promoting democratic accountability and transparency in the police service. The first national secretary for safety and security was appointed in 1995, and the national and provincial secretariats were established shortly thereafter. Initially, many of the people staffing the secretariats had histories in non-governmental organisations, which influenced the nature of the secretariats and gave them a strong emphasis on transformation of the police service. In the first five years of the National Secretariat's existence, it played a prominent role in formulating policy and overseeing its implementation. After 1999, with a new minister in place, its capacity and influence diminished; some functions were transferred to the SAPS, and the head of the secretariat lost his intended influential role, which was as a civilian counterbalance to the police leadership.

The provincial secretariats are autonomous bodies, answerable to the provincial executives and independent of the National Secretariat. Some of the provincial structures are well funded, with budgets and staff complements varying from one province to another. Each of the provincial secretariats has a different configuration, but they broadly carry out the same type of work, including policy monitoring, responding to service-delivery complaints, and conducting crime awareness campaigns in their provinces.

A recent evaluation of the National and Provincial Secretariats for Safety and Security indicates that these civilian oversight mechanisms have had, at best, mixed success and have made a limited contribution to police transformation.<sup>299</sup>

Simultaneously, there have been efforts to increase civilian input into policing decisions at community level, in an attempt to build community trust in South Africa's historically illegitimate police service. Starting from the early 1990s, and initially on an ad hoc basis, community police forums were established at police-station level. The 1993 Interim Constitution made the first official reference to the establishment of CPFs, and the 1995 South Africa Police Service's Act formally established and detailed the functioning of the CPFs, emphasising their role in

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<sup>299</sup> Duxita Mistry & Judy Klipin, 'Keeping the police in check: Assessing the Secretariats for Safety and Security', *Crime Quarterly*, No.10, the Institute for Security Studies, Pretoria, 2004.

improved policing as well as greater local accountability.

Most police stations have these structures, which are at various levels of effectiveness. The police and community members co-operate in identifying key concerns and seeking appropriate solutions. Joint activity allows for the community to take greater responsibility for both crime prevention and for addressing the underlying social causes of crime. In general, the CPFs hold regular meetings, normally at the local police station. Members of the forum may visit victims, assist in mediating in conflict situations or engage the broader community on crime-prevention initiatives. To undertake some of these functions requires resources such as administrative support and transport to visit victims. Such support is not always forthcoming and is thus, in fact, limiting the role of the forum. The strength and effectiveness of CPFs varies considerably, and is reliant on strong leadership and adequate resources. In the context of highly unequal communities (such as rural farming areas), they are, perhaps inevitably, often dominated by powerful interests, at the expense of more vulnerable groups.<sup>300</sup>

Civil society engagement with the legislative process, in relation to policing, has been substantial. For example, an extensive civil society project to monitor implementation of the Domestic Violence Act identified a number of deficiencies in police response. The consortium of organisations involved have subsequently lobbied to have the remedies identified incorporated into the regulations governing the police service.<sup>301</sup> 'Gun Free South Africa' has led a successful advocacy campaign against the possession of guns, which has impacted significantly on the legislation and its regulations.<sup>302</sup> Civil society has also been vocal on the provisions relating to the use of force.<sup>303</sup>

The National Assembly has legislative power and oversight over the police as a national department. This oversight is carried out through the National Portfolio Committee of Safety and Security. The National Council of Provinces deals with provincial affairs. In this regard, it considers any proposed legislation and policy before it from a provincial perspective, and doing so can pass, reject, amend or propose any legislation. This work is carried out through the Select Committee on Security and Constitutional Affairs, and links strongly to the provincial legislatures and their respective portfolio committees. While the quality of oversight has varied, the committee has made an important contribution to the improved accountability of the police service.

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<sup>300</sup> The Human Rights Committee of South Africa, 'Popular justice', *Quarterly Review*, January 2001, p. 94; Eric Pelser, Johann Schnetler & Antoinette Louw, 'Not everybody's business: Community policing in the SAPS' priority areas', the Institute for Security Studies, Pretoria, 2002.

<sup>301</sup> Penny Parenzee, 'While women wait ... Monitoring the Domestic Violence Act', in *Crime Index*, Vol. 5, the Institute for Security Studies, Pretoria, 2001; see also the Gender Advocacy Program, available at <http://www.gender.co.za>

<sup>302</sup> See the Gun Control Alliance website, available at <http://www.gca.org.za/>.

<sup>303</sup> David Bruce, 'Use of Force Review as a learning process', in *Crime and Conflict*, No. 20, Centre for the Study of Violence and Reconciliation, Winter 2000.

## Qualification, training and remuneration of police officers

The entry-level qualification for the SAPS is now a matric or senior certificate qualification (which refers to school-leaving certificates generally obtained after at least 12 years of schooling and national examinations), being fluent in English and one other South African language, and having a driver's licence. The applicant may not have a criminal record or 'any visible tattoos that are contrary to the objectives of the SAPS'.<sup>304</sup>

Police training has been significantly transformed since 1994. A few milestones highlighted in an article on police transformation in South Africa,<sup>305</sup> include:

- The introduction of a rigorous selection system for new members;
- The revision of the entire basic training curriculum;
- The introduction, in 1997, of a code of conduct for the police;
- The implementation of a Special Service Order on the use of force in affecting arrest, intended to bring the regulatory framework relating to the use of lethal force more in line with the Constitution;
- The development and introduction of an anti-torture policy; and
- The reorganisation and retraining of public-order police.

Currently, basic training is structured over three phases and 24 months:

- Phase 1: Basic training and tactical policing programme—6 months;
- Phase 2: Field training as student constable in uniform—6 months (three inside the service centre and three outside); and
- Phase 3: In-service training—12 months.

A three-month Detective Learning Programme has also been introduced, which provides for specialised detective training.

A human rights training curriculum has been developed for the SAPS, although there is debate as to whether this curriculum should be provided as a stand-alone module during basic training or threaded throughout all functional training. The head of the Independent Complaints Directorate (ICD) recently questioned the impact of current training: 'As the ICD, while we understand the difficulties faced by the police in terms of policing and reducing crime effectively, as well as the killing of police officers, we feel that more should still be done in inculcating a culture of policing within a human rights ethic.'<sup>306</sup>

The SAPS Code of Conduct, adopted in 1997, includes an obligation that in carrying out duties, police 'shall at all times uphold the Constitution and the law; be guided by the needs of

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<sup>304</sup> Application for appointment in terms of the South African Police Service's Act, 1995 (Act No. 68 of 1995).

<sup>305</sup> David Bruce, *New Wine from an Old Cask, The South African Police Service and the Process of Transformation*, Centre for the Study of Violence and Reconciliation, 2002.

<sup>306</sup> Advocate Karen MacKenzie, quoted in *Business Day*, 23 September 2004.

the community’; will ‘uphold and protect the fundamental rights of every person; act impartially, courteously, honestly, respectfully, transparently and in an accountable manner’; and will ‘exercise the powers conferred upon ... (them) in a responsible and controlled manner’.<sup>307</sup>

Salary levels for rank and file police officers are low, while those with the rank of director and upwards enjoy higher remuneration levels. Eighty-five per cent of SAPS’ functional staff are inspectors and lower. Inadequacy of pay levels are therefore cited as major reasons for moonlighting by police officers.<sup>308</sup>

*Table 5.3: SAPS per annum salary rates*

National commissioner	R 752 000—R 811 000
Provincial/divisional commissioner	R 584 000—R 752 000
Assistant commissioner	R 447 126—R 518 889
Director	R 408 000—R 440 000
Senior superintendent	R 202 548—R 227 640
Superintendent	R 168 291—R 202 000
Captain	R 96 792—R 112 704
Inspector	R 77 937—R 96 549
Sergeant	R 52 452—R 63 708
Constable	R 44 205—R 51 534

## Police abuses

Before 1994, the South African police force had been one of the main enforcement mechanisms of the apartheid state, and was routinely involved in torture, summary execution and other abuses. Although the situation has improved considerably since the end of the apartheid era, allegations of misconduct by police officials have continued. Statistics in this area are, however, unreliable, not least because complaints may be reported to any one of a number of agencies—the police themselves, the ICD, the SAHRC or others—so there is no consolidated register of complaints.<sup>309</sup>

Largely in response to ongoing allegations of abuse, the SAPS introduced a ‘prevention of torture’ policy in 1998/99.<sup>310</sup> Nevertheless, civil society monitoring efforts (which are less numer-

<sup>307</sup> The SAPS Code of Conduct is available at [www.saps.gov.za](http://www.saps.gov.za).

<sup>308</sup> Graeme Hosken & Bongani Mthembu, ‘Cops for hire: Meagre salaries lead to rampant moonlighting’, *The Star*, 20 May 2004.

<sup>309</sup> Themba Masuku, ‘Numbers that count: National monitoring of police conduct’, *Crime Quarterly*, No. 8, Centre for the Study of Violence and Reconciliation, 2004.

<sup>310</sup> An extremely informative paper on police misconduct is by Piers Pigou, *Monitoring Police Violence and Torture in South Africa*, Centre for the Study of Violence and Reconciliation, April 2002.

ous than before 1994) continue to reveal the prevalence of police violence. The KwaZulu-Natal Campaign against Torture, for example, monitored six police stations in KwaZulu-Natal twice weekly for six months, between 2001 and 2002, finding 79 alleged incidents of torture.

Compliance with issues such as the use of minimum force remains contentious. According to the ICD, delays in implementing rules governing the use of lethal force by the SAPS, have contributed to the high number of deaths by shooting at the hands of police.<sup>311</sup> During 2004/05, 652 cases of death in custody or as a result of police action were reported to the ICD, compared to 714 received in 2003/04 (a decrease of 9 per cent). Three hundred and sixty-six of these deaths occurred as a result of shootings.<sup>312</sup> In the same period, reports of serious criminal offences committed by the police increased by 18 per cent to 1 731 cases (compared to 1 473 in 2003/04). Cases of less serious misconduct decreased by 8 per cent from the previous year, to 3 407, according to reports.

Amnesty International has also conducted research in this area and has noted its serious concerns.<sup>313</sup> Human Rights Watch has reported abuses carried out by Farm Watch units set up in rural areas, which are private units but whose members are frequently police reservists who co-ordinate activities with the police.<sup>314</sup> The US State Department, in its reports on human rights, has registered similar concerns.<sup>315</sup>

The SAPS investigated over 14 600 alleged crimes involving its members in 2000. Figures for previous years have been similar.<sup>316</sup> According to figures released by the minister of safety and security, on average 1 200 officers were convicted of criminal offences every year between 1995 and 1998.<sup>317</sup> During the same period, approximately 170 SAPS members were convicted

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<sup>311</sup> *Business Day*, 23 September 2004.

<sup>312</sup> The ICD presentation to the Parliamentary Portfolio Committee, June 2005, is available at <http://www.pmg.org.za/docs/2005/050622icd.htm>. The 652 death cases include: 128 natural deaths; 42 suicide cases; 45 cases of injuries sustained in custody; 71 cases of vigilantism, i.e. cases of injuries inflicted by members of the public prior to detention of the suspects; and 366 cases of shootings. The 45 cases of injuries sustained in custody, mainly refer to incidents where detainees fatally attacked fellow detainees.

<sup>313</sup> Amnesty International, *Policing to Protect Human Rights: A survey of police practice in countries of the Southern African Development Community, 1997-2002*, London, 2002.

<sup>314</sup> Human Rights Watch, *Unequal Protection: The State Response to Violent Crime on South African Farms*, New York, 2001. See also, Human Rights Watch, *World Report 2005*, New York, 2005, in an excerpt dealing with South Africa, which is available at <http://hrw.org/english/docs/2005/01/13/safric9886.htm>.

<sup>315</sup> The US Department of State, *Country Report on Human Rights Practices 2004*, is available at <http://www.state.gov/g/drl/rls/hrrpt/2004/>.

<sup>316</sup> Sibusisu Masuku, 'Policing the police: SAPS members charged and convicted of crime', *Crime Index*, Vol. 5, Institute for Security Studies, Pretoria, 2001.

<sup>317</sup> Statistics provided by the minister of safety & security in June 1998 show that 3 767 officers were convicted over a three-year period, for a range of crimes from murder and rape, to petty offences. This included 252 convictions for serious assault and a further 556 convictions for assault; 'Nearly 4 000 police guilty of a range of crimes', *Cape Argus*, 24 June 1998.

of murder, and a further 220 for attempted murder—it is not clear how many of these cases involved incidents that occurred during the course and scope of policing duties.<sup>318</sup> The ICD reported to Parliament that its investigations had resulted during 2003/04 in 12 police officers being convicted of murder, 7 of attempted murder, 2 of culpable homicide and others of several other offences.<sup>319</sup>

Between 1996 and 2001, 20 779 corruption cases were reported to the SAPS's anti-corruption unit. The closure of the unit (with the intention that the work should be handled by the ICD) has made it difficult to ascertain levels of corruption and has raised suspicion around subsequent figures. In 2001 and 2002, only 2 370 cases were recorded.<sup>320</sup> The SAPS annual report for 2003/04 stated that 347 police officers were suspended because of alleged involvement in corrupt activities.<sup>321</sup>

There has also been criticism raised against the police of targeting illegal immigrants in the search and seizure operations associated with the National Crime Combating Strategy. Research carried out by the Institute for Security Studies noted that 'concerns were expressed regarding the sometimes crude manner in which suspected illegal immigrants were identified or, in some instances, incorrectly identified. Disquiet was also expressed at the treatment that suspected illegal immigrants (have) received at the hands of the police and officials of the Department of Home Affairs'.<sup>322</sup>

In June 2005, the Constitutional Court found the Ministry for Safety and Security liable for the rape of a woman by three policemen, against the ministry's arguments that the men were off duty and had acted in a private capacity. The court found that although their conduct was a deviation from their duty, there was a close enough relationship between their employment and their wrongful conduct to make the ministry vicariously liable. The case highlights the ongoing threat to women of abuse and assault at the hands of the police, but also goes some way to exposing the culture of silence and denial in the SAPS that keeps the police from acknowledging this problem and assuming responsibility. This judgment, after a long battle through the lower courts, is an important milestone in providing the remedies necessary to address such abuses.<sup>323</sup>

A survey by the Institute for Democracy in South Africa (IDASA), on behalf of Gun-Free South Africa, revealed that between 1997 and 2001, two-thirds of firearms recovered by the SAPS

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<sup>318</sup> Piers Pigou, *Monitoring Police Violence and Torture in South Africa*, Centre for the Study of Violence and Reconciliation, April 2002. According to the ICD, 383 deaths occurred in police custody in 2003/4 and a further 384 as a result of police action (including, for example, individuals who died in crashes involving police vehicles). The majority of the deceased were male, black, between the ages of 19 and 35, and had died on the scene of the alleged crime.

<sup>319</sup> See the ICD briefing on the 2003/04 annual report to the Safety and Security Portfolio Committee, 5 November 2004, which is available at <http://www.pmg.org.za/viewminute.php?id=4827>.

<sup>320</sup> Themba Masuku, Centre for the Study of Violence and Reconciliation, input to Policing Workshop, 21–23 September 2004.

<sup>321</sup> The SAPS *Annual Report*, 1 April 2003 to 31 March 2004, p.9.

<sup>322</sup> Eric Pelsler, 'Operation Crackdown: The new policing strategy', *Crime Index*, Vol. 4, the Institute for Security Studies, 2000.

<sup>323</sup> Jenni Evans, 'Rape by cops: State loses court case', *the Mail @ Guardian*, 13 June 2005.

could not be accounted for.<sup>324</sup> According to the auditor-general's annual report in 2004, a total of 935 firearms valued at more than R2 million were lost by or stolen from police members in 2003/04.<sup>325</sup> This was up from 921 the previous year. R47 million is spent on firearms annually by the SAPS, of which some R16 million goes towards ammunition and spares.<sup>326</sup> The loss by value, therefore amounts to some 6.5 per cent of the total annual SAPS expenditure on firearms.

## Investigation of complaints against the police

In the context of South Africa's past of human rights abuses at the hands of the police, the drafters of the Interim Constitution that came into effect in 1994 emphasised the need for civilian oversight of the police, not just in setting agendas (as with the establishment of the National and Provincial Secretariats for Safety and Security) but also in investigating public complaints of police abuse. Section 222 of the Interim Constitution made provision for the establishment of an independent complaints mechanism to ensure 'that complaints in respect of offences and misconduct allegedly committed by members of the service, [were] investigated in an effective and efficient manner'.<sup>327</sup> In accordance with this provision, the Independent Complaints Directorate (ICD) was established by Section 50 of the South African Police Service's Act 68 of 1995; it began operating in 1997. Although—unfortunately—the final 1996 Constitution did not include reference to the ICD among the institutions mandated by Chapter 9,<sup>328</sup> the ICD remains in place as a statutory body. It has offices in all the provinces, and as of 2005, a total staff of 186 people.<sup>329</sup>

The ICD's mandate includes the investigation of deaths in police custody, and as a result, of police action and of complaints against the police. Under the South African Police Service's Act, the police are obliged to report to the ICD any cases of death in custody or as a result of police action, a requirement that, when introduced in 1995, immediately and dramatically increased the numbers of reported deaths involving the police.<sup>330</sup> Nevertheless, there are concerns that the police, who are required to report cases of deaths in their custody, do not always do so in time and in consequence, a true reflection of the full extent of such deaths may not be shown.<sup>331</sup>

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<sup>324</sup> 'SAPS "lose track of firearms"', the *Mail & Guardian*, 26 March 2004; see also 'Stats sheet, May 2002', available on the Gun Control Alliance website, at <http://www.gca.org.za/facts/briefs/44.htm>.

<sup>325</sup> The SAPS, 21 September 2004.

<sup>326</sup> Themba Masuku, Centre for the Study of Violence and Reconciliation input to Policing Workshop, 21–23 September 2004.

<sup>327</sup> For further discussion, see Human Rights Committee of South Africa, *Access*, Vol. 1, Quarterly 2, April 1999, p. 21.

<sup>328</sup> For further information on Chapter 9 institutions, see Section 6.H on 'Official mechanisms to assert rights outside the court system', p.124.

<sup>329</sup> See the ICD presentation to the Parliamentary Portfolio Committee, March 2005, available at <http://www.pmg.org.za/view-minute.php?id=5621>.

<sup>330</sup> In 1995, the last year before the ICD began operating, for which official statistics are available, 226 deaths in custody or as a result of police action were reported by the police (under pressure from human rights organisations, who had previously independently recorded only tens of deaths in custody each year). The ICD's annual report for the year April 1997 to March 1998, recorded 737 deaths. See Bronwen Manby, 'The Independent Complaints Directorate: An opportunity wasted?' in the *South African Journal on Human Rights*, Vol.12(3), 1996.

<sup>331</sup> Piers Pigou, *Monitoring Police Violence and Torture in South Africa*, Centre for the Study of Violence and Reconciliation, April 2002.

The mandate of the ICD is contained in three pieces of legislation. In the first instance, Section 53(2) of the South African Police Service's Act provides that the body:

- May *mero motu*, or upon receipt of a complaint, investigate any misconduct or offence allegedly committed by a member, and may, where appropriate, refer such investigation to the commissioner [of police] concerned;
- Shall *mero motu*, or upon receipt of a complaint, investigate any death in police custody or as a result of police action; and
- May investigate any matter referred to the [Independent Complaints] Directorate by the minister [of safety and security] or member of the executive council [of a provincial government].<sup>332</sup>

Section 18 of the Domestic Violence Act<sup>333</sup> also provides for the ICD to investigate failure by a police officer to comply with obligations under the Domestic Violence Act or a national instruction issued under this act. The national commissioner of police is required to report to Parliament on steps taken to implement recommendations from the ICD. In terms of Section 64 of the South African Police Service's Act, read with Regulation 9 and Annexure 5 of the Regulations for Municipal Police Services, the ICD has been given the same civilian oversight duties in respect of newly established municipal police services that it has in respect of the SAPS.

During the year April 2004 to March 2005, the ICD received 5 790 complaints falling within its mandate, a decrease of two per cent compared to the same period in the financial year 2003/04, when it recorded 5 903 complaints<sup>334</sup>—by comparison, in the first two years of the ICD's existence it administered only 1 500 complaints, an indication of the increasing importance of this body.<sup>335</sup>

In practice, for most of the complaints it receives, the ICD only monitors investigations carried out by the Internal Investigation Units of the SAPS. Even in the case of deaths, which the South African Police Service's Act requires the ICD to investigate directly, it does not do so in all cases.

The ICD receives no more than a third of the complaints investigated by the police themselves. To a large extent, this is due to the fact that only in the case of police-related deaths is there an obligation on the SAPS to report the incident to the ICD. No such obligation exists in the case of assault with intent to do grievous bodily harm, which is the category used to capture torture. Several commentators have questioned whether the ICD has the resources and capacity to effectively fulfil its mandate. Even where the ICD does carry out its own investigations, it has had problems recruiting and training sufficient numbers of skilled investigators, as recognised

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<sup>332</sup> The ICD, *Annual Report 2002/03, 2003*.

<sup>333</sup> The Domestic Violence Act, 1998 (Act 116 of 1998).

<sup>334</sup> The ICD presentation to the Parliamentary Portfolio Committee, June 2005, available at <http://www.prmg.org.za/docs/2005/050622icd.htm>.

<sup>335</sup> The Human Rights Committee of South Africa, *Access*, Vol. 1, Quarterly 2, April 1999, p. 21.



by the ICD itself in its reports to Parliament.<sup>336</sup> Finally, the ICD has only reporting powers, and no disciplinary or other powers over the police in order to enforce its findings.<sup>337</sup>

The Parliamentary Portfolio Committee on Safety and Security, responsible for oversight of the ICD, has also raised significant concerns about its performance, including a lack of capacity to respond to the duties placed on it, failure to submit reports to the committee, a lack of detail and data in its reports, and problems in accounting for expenditure.<sup>338</sup> Following a series of meetings, the committee made recommendations to the minister for safety and security in August 2005, including one on the need to ensure that the ICD had the capacity to fulfil its mandate in terms of the Domestic Violence Act and the inspection of police cells. In addition, the committee proposed that the minister should look at the feasibility of developing separate legislation to govern the functioning of the ICD, instead of retaining this in the SAPS's Act. The committee also raised concerns about the role and capacity of two new units within the ICD, a research unit established to enable better analysis and reporting on the complaints received, and a new 'anti-corruption command', which was intended to take over the previous SAPS's anti-corruption unit.

A review of the ICD's operations is clearly needed, with possible restructuring as a result. In this process, it is important that the key role of this institution—already downgraded with its omission from the list of Chapter 9 institutions in the 1996 Constitution—is maintained and strengthened. International experience shows that independent civilian oversight of the police is of crucial importance in ensuring effective performance that is also respectful of human rights.

The ICD is supported by a range of other agencies and institutions with varying degrees of oversight over the police, including the auditor-general, the public protector, the SAHRC, the civilian Secretariats for Safety and Security and the Parliamentary Portfolio Committees. However, this raises problems of its own: the absence of a single complaints register makes it difficult to know exactly how much abuse is being reported or to track cases. And in practice, most cases reported are referred back to the SAPS for investigation, and are then given capacity limitations within these various bodies.

## **C. Fair trial**

### **Right to representation**

Section 35 of the Constitution provides for the rights of detained, arrested and accused persons. An accused has the specific right to a fair trial, which includes the right to an interpreter during trial, the right to choose one's legal counsel, and the right to have legal counsel provided at state expense when 'substantial injustice would otherwise result'.<sup>339</sup> The absence of legal representation

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<sup>336</sup> The ICD *Annual Report, 2003-2004*.

<sup>337</sup> For example, Piers Pigou, *Monitoring Police Violence and Torture in South Africa*, Centre for the Study of Violence and Reconciliation, April 2002; Bronwen Manby, 'The South African Independent Complaints Directorate', in Andrew Goldsmith & Colleen Lewis (eds.), *Civilian Oversight of Policing: Governance, Democracy and Human Rights*, Hart Publishing, Oxford, 2000.

<sup>338</sup> Minutes of the Portfolio Committee, available at <http://www.pmg.org.za/viewminute.php?id=6122>.

<sup>339</sup> Constitution of the Republic of South Africa, 1996, (Act 108 of 1996), Section 35(3)(g).

may lead to delays in proceedings, but on the whole, all persons accused of serious crimes are afforded legal representation—though often only at trial stage, and not on arrest or at a bail hearing.

Legal representation to indigent persons is provided by the South African Legal Aid Board. The Legal Aid Board is an independent statutory body established in terms of the 1969 Legal Aid Act.<sup>340</sup> The board provides for legal assistance to members of the public who cannot afford representation, and in situations where injustice would result if those persons remained unrepresented: since 1994, the Legal Aid Board has undergone substantial reorganisation, in order to reorient it from a situation in which it mostly provided assistance to white defendants using lawyers in private practice. In 1996, the Legal Aid Act was amended to comply with the constitutional right to a fair trial.<sup>341</sup> The board maintains a close operational relationship with the DoJCD.

The Legal Aid Board now provides legal assistance through the following methods: justice centres (where individuals can get assistance from state-employed lawyers); the ‘judicare’ system (by which the state compensates lawyers in private practice); and through partner organisations, including legal aid clinics at universities across the country and public interest organisations.<sup>342</sup> There are presently 56 justice centres, 13 units based at high courts across the country and 27 satellite offices. In those areas where there are no justice centres, the board provides services through the judicare system and partner organisations.

According to the Legal Aid Board, 76 per cent of the cases it handled between April 2003 and March 2004 were finalised through the justice centre system. The balance of matters were finalised through partner institutions and organisations, and the judicare system. Legal fees, in the case where the Legal Aid Board will not provide assistance, are prohibitive to poor members of society, although some public-interest litigation groups have stepped in to fill this gap.<sup>343</sup>

While the system’s primary focus is on criminal cases, increasingly it has responded to providing assistance in civil matters. From 1 April 2003 to 31 March 2004, the Legal Aid Board had received 300 139 new cases, of which 27 280 were civil cases.<sup>344</sup>

## Independence of the prosecution service

Section 179 of the Constitution establishes a single, independent National Prosecuting Authority (NPA), which will have the authority to institute criminal proceedings on behalf of the state

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<sup>340</sup> Legal Aid Act, 1969 (Act 22 of 1969).

<sup>341</sup> The Legal Aid Amendment Act, 1996 (Act 20 of 1996).

<sup>342</sup> Partner organisations are the following: Odi Community Law Centre (Gauteng Province); University of Pretoria (Gauteng); University of the Witwatersrand (Gauteng); University of the North West—Mafikeng (North West); University of the North West—Rustenburg (North West); University of Potchefstroom Law Clinic (North West); Association for Community and Rural Advancement (Northern Cape); Lawyers for Human Rights—Karoo (Northern Cape); Lawyers for Human Rights—Overberg (Western Cape); and Lawyers for Human Rights—Umtata (Eastern Cape). See <http://www.legal-aid.co.za/about/report2004/chairperson.htm>.

<sup>343</sup> See also Section 6.C, on ‘Financial access’, p.111.

<sup>344</sup> The DoJCD, *Annual Report 2003/04*, p.82.

‘without fear, favour or prejudice’ (Section 179(4)). The functions of the NPA entail determining a prosecuting policy, which must be observed in the prosecution process; issuing policy directives; intervening in the prosecution process when a policy directive is not followed; and reviewing a decision to prosecute or not to prosecute.<sup>345</sup> The NPA is regulated in detail by the National Prosecuting Authority Act of 1998.<sup>346</sup>

The Constitution and the enabling legislation provide safeguards against political interference in the execution of the NPA’s powers, functions and duties. Section 32(b) of the National Prosecuting Authority Act explicitly provides that no organ of state shall improperly interfere with, hinder or obstruct the prosecuting authority in the exercise, carrying out of powers, functions and duties of the national director of public prosecutions (NDPP). Arguably, this institution, under the inaugural NDPP Bulelani Ngcuka,<sup>347</sup> adopted a robust approach to prosecutions under the law. In general, there is no executive interference in the prosecution process. In one case, however, when the NDPP was investigating the behaviour of Shabir Shaik, financial adviser to the deputy president, NDPP Bulelani Ngcuka experienced strong pressure as a result of the exercise of his functions, although this pressure was not applied directly.<sup>348</sup>

Political responsibility over the NPA rests with the minister, but the NDPP has independence in undertaking his or her tasks.<sup>349</sup> The DoJCD remains responsible for prosecutors’ salaries and other operational costs, and the NPA is represented on the department’s consultative board of directors. In terms of the National Prosecuting Authority Act, the institution is accountable to Parliament in relation to its powers, functions and duties.<sup>350</sup> The act further provides that annual reports shall be submitted to the Minister of Justice and Constitutional Development for tabling in Parliament. The NDPP is required to submit reports to the minister on decisions taken on cases, and the prosecution policy and directives.<sup>351</sup>

The appointment of the NDPP is made by the president. However, in the event that the president recommends to suspend the NDPP, section 12(6)(b) of the National Prosecuting Authority Act states that this decision should be communicated to Parliament within 14 days. Parliament has 30 days within which to pass a resolution to confirm or overrule this recommendation.

## Legal protections against abuse of process

In South Africa, an *interdictum de homine libero exhibendo* (the equivalent of the *habeas corpus* procedure) was available to any person under the common law prior to 1994. Since 1994, section

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<sup>345</sup> The Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), Section 179 (5).

<sup>346</sup> The National Prosecuting Authority Act, 1998 (Act 32 of 1998).

<sup>347</sup> Ngcuka resigned from the position of NDPP in September 2004.

<sup>348</sup> See the case study on ‘The Shabir Shaik and Jacob Zuma prosecutions’, p.34.

<sup>349</sup> The National Prosecuting Authority Act, 1998 (Act 32 of 1998), Sections 32 and 33.

<sup>350</sup> *Ibid.*, Section 35.

<sup>351</sup> *Ibid.*, Section 33(1).

12(1) of the Constitution guarantees the freedom and security of the person, and section 33(1) entitles everyone to administrative action that is lawful, reasonable and procedurally fair. Section 33 is given effect by the Promotion of Administrative Justice Act (PAJA).<sup>352</sup> All accused persons, including persons convicted by a special court, have the right of appeal to, or review by, a higher court in terms of Section 35(3)(o) of the Constitution.

There have been some concerns about the abuse of process in military courts that have jurisdiction over persons who are subject to the Military Code in terms of Section 104 of the Defence Act.<sup>353</sup> This includes all permanent members of the National Defence Force; and members of the citizen force (the commandos or the reserve), are subject to the Military Code when they are in service or training. Persons who are subject to the Military Code are also subject to the jurisdiction of civil courts, unless legislation provides otherwise in particular instances. Civil courts and military courts have concurrent jurisdiction to try persons subject to the code for civil, as well as military, offences. However, no military court may try a person subject to the Military Discipline Code for treason, murder, rape or culpable homicide.<sup>354</sup>

In the case of *Freedom of Expression Institute v President, Ordinary Court Martial*,<sup>355</sup> the high court found that the ordinary court martial proceedings provided for in the Defence Act violated the constitutional rights conferred in Section 12(1) and 35 of the Constitution, since they lacked guarantees of judicial independence. The ordinary court martial framework also permitted lay persons to convict and imprison an accused person for up to two years, since there was no requirement that prosecutors or judicial officers have legal training. The offending sections were repealed before the Constitutional Court, which confirmed the declaration of this invalidity.

The establishment of a prosecuting authority for the military, by the Military Discipline Supplementary Measures Act,<sup>356</sup> has been found not to offend Section 179 of the Constitution, which provides for the NPA.<sup>357</sup>

The Constitutional Court has also found that members of the National Defence Force must be allowed to unionise.<sup>358</sup> Subsequently, the high court found in the case of *South African National Defence Union and Another v Minister of Defence and Others*,<sup>359</sup> that this included the right to be represented by a union official in military disciplinary or judicial proceedings.

Those with the most difficulty in asserting their rights, in cases of abuse of process, are immigration detainees, who for the most part are not accused of any crime. The South African Human Rights Commission and non-governmental human rights organisations have repeatedly had problems in accessing the Lindela Repatriation Centre, where individuals are held

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<sup>352</sup> The Promotion of Administrative Justice Act, 2000 (Act 3 of 2000).

<sup>353</sup> The Defence Act, 1957 (Act 44 of 1957).

<sup>354</sup> Information obtained from the *Law of South Africa (LAWSA)*, Vol. 7, First re-issue, Chapters 332-334.

<sup>355</sup> 1999 (2) SA 471 (C).

<sup>356</sup> The Military Discipline Supplementary Measures Act, 1999 (Act 16 of 1999).

<sup>357</sup> *Minister of Defence v Potsane* 2002 (1) SA 1 (CC).

<sup>358</sup> *South African National Defence Force Union v Minister of Defence and Another* 1999 (4) SA 469 (CC).

<sup>359</sup> 2004 (4) SA 10 (T).

awaiting deportation; and as recently as September 2005, the UN Working Group on Arbitrary Detention criticised the effective inability of immigration detainees to challenge the validity of their detention.<sup>360</sup>

## Interpretation

English and Afrikaans remain the dominant languages through which court proceedings are conducted.

In a 1998 case, an accused argued that his case should be conducted in Zulu by the magistrate, citing Section 6 of the Constitution (which establishes 11 official languages, including Zulu). The court refused this and insisted that it had to be conducted either in English or Afrikaans, which led to a review by the high court. Documents submitted to court by the state showed that there were 37 regional court magistrates in KwaZulu-Natal, of whom only four had Zulu (the dominant language in the region) as their home language, while 33 had English or Afrikaans as their home language and had little or no knowledge of Zulu. There were 256 prosecutors in 50 magisterial districts—of whom, at the most, 81 had Zulu as their home language and 175 had English or Afrikaans as their home language. There were 41 advocates in the attorney-general's office (now the director of public prosecutions) of whom only 6 had Zulu or Xhosa as their home language, while 35 had either English or Afrikaans as their home language and had little or no knowledge of Zulu. The judge concluded by saying that '[i]n this province at present, it is clearly not practicable for an accused person to demand to have proceedings conducted in ... (any) language other than English or Afrikaans'.<sup>361</sup>

According to the National Census 2001 compiled by Statistics South Africa, Zulu was the most widely spoken home language, with English trailing as the fifth most spoken language in South Africa.<sup>362</sup> The demographics of the accused population suggest that most people would not understand the dominant languages in South African courts. However, interpretation services are available in the courts, and guaranteed by Section 35(3)(k) of the Constitution. The DoJCD has established a unit for interpretation, which provides such services by recruiting suitable persons to assist with interpretation.<sup>363</sup> Qualifications in court interpretation are available at several South African universities. Lack of availability of interpreters can cause delays to cases proceeding, and the DoJCD has recognised the need to improve the quality of interpretation.<sup>364</sup>

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<sup>360</sup> See case study on 'Access to justice for immigration detainees', p.115.

<sup>361</sup> *Mthethwa v De Bruin NO and Another* 1998 (3) BCLR 336 (N); discussed in Thami Ndlovu, 'Black Languages and the South African Courts', *De Rebus*, April 2002.

<sup>362</sup> *National Census 2001*, Statistics South Africa, at <http://www.statssa.gov.za/census2001/digiAtlas/index.html>.

<sup>363</sup> The DoJCD, *Annual Report 2003/04*, p.44.

<sup>364</sup> *Re Aga Boswa: The New Court Management Model Designed To Enhance Court Efficiency*, the DoJCD, 2004, available at [http://www.doj.gov.za/2004dojsite/brochure/Re percent20Aga percent20Boswa.pdf](http://www.doj.gov.za/2004dojsite/brochure/Re%20percent20Aga%20percent20Boswa.pdf)

## Delays in bringing cases to trial

Section 35(1)(d) of the Constitution provides that every arrested person has the right to be brought before a court as soon as is reasonably possible, but no later than 48 hours after the arrest (excluding days which are not ordinary court days). An accused person has the right to have their trial begun and concluded without unreasonable delay, in terms of Section 35(3)(d). Factors that may determine the reasonableness of the delay include the waiting time while a case is on a court roll, progress in the police investigation, and postponement requests by the accused. Where there has been unreasonable delay, the matter is struck off the roll, but the person may be charged again.

The detention cycle time, or the average length of time awaiting-trial prisoners remained incarcerated until the finalisation of their trials, rose considerably between 1996 and early 2002. In June 1996, the average awaiting-trial prisoner spent 76 days in custody; by February 2002 this had increased to 139 custody days. This means that, on average, accused persons are imprisoned for four-and-a-half months awaiting the finalisation of their trial.<sup>365</sup> Frequently, there are further postponements during proceedings. Reasons for this delay include the time taken to complete an investigation of the case and to find a slot on a full regional court roll.

The regional magistrates' courts, which handle cases such as robbery, rape and attempted murder, are experiencing an increasing backlog in cases. Between April 1999 and July 2001, regional courts finalised an average of 3 010 cases a month, but had an average of 43 500 cases per month outstanding on the courts' rolls. The actual number of cases finalised per month by the regional courts increased over the 28-month period, but the number of new cases coming into the system increased at a greater rate. In July 2001, the average regional court was finalising just under ten cases a month, some five cases per month below target.

There are a number of possible reasons for this. Firstly, the regional magistrates' courts deal with almost 95 per cent of all cases. Secondly, the implementation of 'Operation Crackdown' since 2000, a high-density cordon, search and seizure operation that is an integral component of the SAPS' strategy in those hot-spots most affected by crime, has brought with it an increase in arrests. These arrests resulted in an additional 1.1 million cases entering the system during 2001, and the regional courts have never managed to break the back of this sudden influx. Thirdly, the introduction of mandatory minimum sentencing has meant that not only has the sentencing process itself become more onerous and thus more time consuming, but all cases sentenced in terms of this legislation are sent on automatic review to the high court, resulting in lengthy delays in the finalisation of cases. According to research conducted by the Institute for Security Studies at the end of 2000, 184 253 incomplete criminal cases in the lower courts were carried over into 2001.<sup>366</sup> In 2001, 756 801 new cases entered the lower court system. Between April 1999 and November 2000, a district court, which deals with relatively minor offences such

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<sup>365</sup> See statistics and information overview presented by the Institute for Security Studies on the justice sector, at <http://www.iss.co.za/CJM/Justice.html>. See also, Martin Schönsteich, *Making Courts Work—A Review of the IJS Court Centre in Port Elizabeth*, Institute for Security Studies, Monograph No. 75, October 2002, chapter 1.

<sup>366</sup> *Ibid.*

as assault, theft and malicious damage to property as well as civil cases, on average, resolved 30 cases a month, with an average of 134 outstanding cases over the same period.<sup>367</sup> Because of the existing backlog, new cases cannot be placed on the court roll speedily.

The high court deals with appeals from the lower courts, referrals for confirmation of sentences from lower courts and is also a court of first instance. Particularly busy divisions, such as the Witwatersrand Local Division and the Transvaal Provincial Division, also experience a large backlog in cases. According to the DoJCD, it can take an average of 134 days from the date of indictment to the date of hearing on the court roll.<sup>368</sup> The same report shows that the longest period for a case to reach finalisation was 1 781 days.<sup>369</sup> However, according to this report, most cases take between 150 and 300 days to reach finality in the high court system.

## Victim and witness protection

The DoJCD has stated that it views victim empowerment and support as an integral part of the delivery of access to justice. Thus there are several initiatives driven by the department to support victims of crime. Several are focused on the assistance to victims of sexual and domestic violence, in recognition of the fact that survivors can experience secondary victimisation in an alienating and ineffective criminal justice system.

One of the primary aims of the sexual offences courts<sup>370</sup> is the reduction of secondary victimisation through a range of strategies, including the use of court preparation officials and victim assistants to support victims and their families through the criminal justice process.<sup>371</sup> National policy guidelines on victims of sexual offences outline detailed procedures for officials to provide support in all relevant departments (police, health, social development and justice).<sup>372</sup>

The department also has an extensive inter-sectoral programme on Victim Empowerment, which includes the development of a Victims' Charter and the establishment of minimum standards for victim empowerment.<sup>373</sup>

The witness-protection system is regulated by the Witness Protection Act,<sup>374</sup> which came into force on 31 March 2000. The act aims to improve the protection of witnesses in criminal proceedings and also to allow witnesses not in civil matters to seek protection. Thus witnesses in commissions of enquiry, inquests, proceedings of special tribunals, and investigations of the ICD may receive such protection. The NPA manages the witness-protection system. According

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<sup>367</sup> Martin Schönsteich, *Lawyers for the People—The South African Prosecution Service*, Institute for Security Studies, Monograph No. 53, March 2001, chapter 6.

<sup>368</sup> The DoJCD, *Court Nerve Centre: An Analysis of Criminal Court Work in the High Court during 2002 and 2003*, p.6; e-mail communication from the director of court information, the DoJCD, Pretoria, 30 March 2005.

<sup>369</sup> *Ibid.*, p.6.

<sup>370</sup> See the case study on 'Sexual offences courts', p.23.

<sup>371</sup> The DoJCD, *Annual Report 2003/04*, p.20.

<sup>372</sup> IDASA, *Pilot Assessment: The Sexual Offences Courts in Wynberg and Cape Town*, 2001, pp.8-13.

<sup>373</sup> The DoJCD, *Annual Report 2003/04*, p.30.

<sup>374</sup> The Witness Protection Act, 1998 (Act 112 of 1998).

to government, 635 people were under state protection in 1999. In 2000, the number had increased to 746.<sup>375</sup>

Prior to the revised system, the witness-protection system was decentralised and managed by the regional attorneys-general (formerly heads of the prosecution service in their regions). There have been a number of reported cases of a failure by the witness-protection system to adequately protect witnesses willing to testify in criminal proceedings. Numerous criminal cases against members of the People Against Gangsterism and Drugs (PAGAD), a vigilante organisation based in the Western Cape, have seen witnesses killed.<sup>376</sup> A number of witnesses were assassinated before the trial against PAGAD member Ebrahim Jeneker, two witnesses were killed in relation to the trial for the murder of Ben Lategan, and the assassination of Ashraf Saban left no witnesses against those accused of planting a bomb outside the Wynberg Magistrate's Court.<sup>377</sup>

Another example is the case involving the death of a farm worker in Limpopo, in 2004. The persons arrested for the killing were the farm owner and several co-workers. Attackers reportedly assaulted a witness testifying against the accused, and the witness sustained injuries requiring medical attention. This occurred despite the witness being in the witness-protection programme.<sup>378</sup> However, according to the NPA's 2002/03 report to Parliament, there was no record of assassinations of witnesses under the protection programme.

#### D. Appropriate remedies and sentencing

Debate in South Africa over the appropriate response to a high crime rate is divided on the one hand between a demand for an end to widespread impunity for violent crime in particular; and on the other, a recognition by those working in the sector that ever longer prison sentences are unlikely to have an effect in reducing crime, while creating conditions of detention in which any rehabilitation of offenders is rendered impossible. Although the government has undertaken or supported interesting initiatives to divert offenders from prison and provide more appropriate remedies to victims, these have so far proved inadequate to address the need for effective justice.

Women's rights organisations, in particular, have pointed out the inadequacy of existing remedies for crime in the context of sexual and domestic violence. Advocacy by these organisations led first to the passing of the Prevention of Family Violence Act (No. 133 of 1993), and then to its replacement by the Domestic Violence Act (Act No. 116 of 1998).

The Domestic Violence Act is applicable to a range of familial and domestic relationships and covers both heterosexual and same-sex relationships. Under the act, a victim of domestic violence may apply for a protection order to stop the abuse and to stop the abuser from entering the mutual home, the victim's residence or the victim's place of employment. The court may place

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<sup>375</sup> See the DoJCD Parliamentary Media Briefing, 13 September 2000, available at [http://www.doj.gov.za/archives/mst\\_archive/2000/sep\\_13\\_press\\_percent20brief.htm](http://www.doj.gov.za/archives/mst_archive/2000/sep_13_press_percent20brief.htm).

<sup>376</sup> The Human Rights Committee, *Popular Justice: Human Rights Quarterly Review*, 2001, pp.67-69.

<sup>377</sup> Keith Gottschalk, *Vigilantism v the State: A case study of the rise and fall of PAGAD, 1996-2000*, Institute for Security Studies, Occasional Paper 99, February 2005. See also the case study on PAGAD, p.106.

<sup>378</sup> *The Sowetan*, 15 March 2005.



other conditions on the order, including that the police seize any weapons or help the victim retrieve property from her home. The court can evict the abuser from the home and force him to pay rent and/or emergency maintenance to the victim. The court also has the power to limit the abuser's custody rights to children. If the court grants an interim or final protection order, it must issue a suspended warrant for the arrest of the abuser that will become active if the abuser violates the order. In 2000, the Women's Legal Centre (WLC) submitted a report to the Ministry of Justice showing the difficulty of making these remedies effective.<sup>379</sup> According to the WLC, magistrates failed to apply Section 10 of the act strictly, which allows for the withdrawal of a protection order on request of the complainant, but only if 'the court is satisfied that good cause has been shown ...'. The WLC argues that in cases where emotional power is exerted by the violent spouse, it frequently happens that a complainant is blackmailed to withdraw the complaint. Magistrates dealing with such cases too easily accept the request to withdraw the complaint at face value, and should not easily be satisfied that good cause has been shown. Secondly, Section 7 provides for an eviction order to be granted against a perpetrator, but it appears that this is regularly refused where the parties are married in community of property. A further concern raised by the WLC is that contraventions of protection orders are not regarded with sufficient condemnation, and perpetrators will usually only receive a small fine and rarely be subject to imprisonment. This severely limits the efficacy of a protection order in the first place. In addition, WLC research showed that only a small percentage of reported cases of sexual violence actually resulted in a conviction and/or the imprisonment of the perpetrators.

In 1997, responding to widespread public demands for harsher action against criminals, Parliament passed legislation introducing minimum sentences ranging from five years to life in prison for a variety of serious offences, including corruption, drug dealing, assault, rape and murder.<sup>380</sup> A court may impose a lesser sentence if 'substantial and compelling circumstances' exist.<sup>381</sup> These minimum-sentencing provisions were introduced for a trial period of two years, but have been repeatedly extended, most recently for another two years, in April 2005. This hastily drafted law bypassed a review of sentencing guidelines being conducted by the Law Reform Commission at that time, and there was little public consultation about its detailed content or consideration of its effects. For example, there was apparently no thought to the effect of the new rules on prison overcrowding. The constitutionality of the minimum-sentencing legislation has been challenged in several cases, although the Constitutional Court has found that it is not unconstitutional, since it allows some discretion to the courts to ensure that a sentence fits the crime.<sup>382</sup>

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<sup>379</sup> Deborah Quenet, *Domestic Violence: The Effectiveness of the Domestic Violence Act—an Assessment thereof through Case Studies*, Women's Legal Centre, Cape Town, 2000.

<sup>380</sup> The Criminal Law Amendment Act, 1997 (Act 105 of 1997). The act also provides that where a regional court has convicted a person of certain serious offences for which the minimum sentence is life imprisonment, or where the potential sentence exceeds the regional court's jurisdiction, the matter must be referred to the high court. See also the case study on Minimum sentencing, p.96.

<sup>381</sup> Section 51(3)(a) of the Act.

<sup>382</sup> *S v Dodo*, 2001 (1), *South African Criminal Law Reports* 593.

The impact of minimum sentencing on crime is difficult to quantify. However, no substantive claims have been made that crime has been reduced as a result; while (as noted above) fear of crime during the period it has been in operation has actually increased. The minimum-sentencing rules have also not achieved one of their primary aims, that is, an increase in consistency of sentencing. Meanwhile, prison overcrowding has been exacerbated. A more comprehensive sentencing-reform initiative should be a matter of priority, reviewing the experience so far.<sup>383</sup>

While minimum-sentencing rules have responded to public pressure for harsher action against criminals, the government has also introduced other measures designed to divert people from prison. Chapter VI of the Correctional Services Act III of 1998 provides for different categories of 'community corrections' to be imposed as an alternative or supplementary punishment on an offender, in order to 'enable persons subject to community corrections to live a socially responsible and crime-free life during the period of their sentence and in (the) future'. All persons subject to community corrections must be supervised in the community by correctional officials. The sentence of correctional supervision, as it is known, was introduced in 1992, and is a community-based sentence which can be imposed for any offence, even serious offences such as murder—though such offences would usually receive a prison sentence. Under correctional supervision, an offender may be sentenced to imprisonment for an initial period, after which he or she may be required to serve the remainder of the sentence in the community. Alternatively, the offender could immediately serve correctional supervision in the community. Conditions of the sentence may include a period of house arrest; the requirement that the person be home between specified hours of the day; that he or she attends a treatment programme; abstinence from alcohol or drugs; prohibition from leaving a magisterial district; or a certain number of hours of community service. Any or all of these conditions may be imposed.<sup>384</sup>

Although use of correctional supervision has increased since it was introduced, in general, the courts remain uncreative in their sentencing. Imprisonment and prison-related sentences are still the standard sentence imposed on most offenders, despite the fact that magistrates have wide discretionary powers to be creative in sentencing offenders.<sup>385</sup>

Incarceration is frequently ineffective and even counter-productive in preventing recidivism, suggesting that rehabilitation programmes within the prison system, or the prison sentence itself, are not effective. Researchers have found that resorting to sentencing options other than imprisonment enhances rehabilitation, and reduces the likelihood of recidivism.<sup>386</sup>

Diversion from the criminal justice system is increasingly seen as necessary in the South

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<sup>383</sup> See further, Julia Sloth-Nielsen & Louise Ehlers, L, 'A pyrrhic victory? Mandatory and minimum sentences in South Africa', the Institute for Security Studies, Occasional Paper 111, July 2005.

<sup>384</sup> See also, Amanda Dissel, *Alternative Sentencing in South Africa*, the Centre for the Study of Violence and Reconciliation, August 1997.

<sup>385</sup> Lukas Muntingh, *After Prison—The Case for Offender Reintegration*, the Institute for Security Studies, Monograph No. 52, March 2001, Chapter 6.

<sup>386</sup> Lala Camerer, 'Crime, violence and punishment—Putting victims on the agenda', *African Security Review*, Vol. 6, No. 3, the Institute for Security Studies, 1997.

African prison system. It has a dual function in that it, firstly, prevents further exposure to the rigours of the criminal justice process and, secondly, attempts to prevent further (criminal) offence by providing a variety of options. Diversion programmes are primarily used for juvenile offenders, although adults occasionally benefit from this service.<sup>387</sup> The first formal diversion programmes were established in the early 1990s by the National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Lawyers for Human Rights. In both instances, role-players were concerned about the number of children being convicted, often for petty offences, and receiving a meaningless sanction from the court such as a suspended or postponed sentence. Since these interventions, NICRO has developed five structured diversion programmes, which are available to the courts:

- Youth Empowerment Scheme: This offers a six-part life skills programme running over six weeks for one afternoon per week.
- Pretrial community service: In lieu of prosecution, the offender has to perform a number of hours of community service at a non-profit organisation.
- Victim Offender Mediation: This programme creates the opportunity for the victim and the offender to meet and work out a mutually acceptable agreement with the assistance of a mediator, with the aim of restoring the balance.
- Family Group Conferencing: These conferences are similar to mediation in certain instances, except that they involve the families of both the victim and the offender in the mediation process.
- The Journey: The Journey Programme is aimed at high-risk children and juveniles.

Some of the aims of these diversion programmes, usually applied in cases of child offenders under the age of 18, are to provide an opportunity for reparations; providing rehabilitation and education programmes to benefit victims/survivors and perpetrators; and to identify problems underlying the causes of crime.<sup>388</sup> The Open Society Foundation for South Africa has recently completed a review of the many civil society interventions underway in the field of diversion and reintegration.<sup>389</sup>

The long-awaited Child Justice Bill, first tabled before Parliament in 2002 and into which there has been extensive civil-society input, will introduce, upon passage, a range of new diversion options for juvenile offenders, both in respect of supervision within the home and community, as well as structured programmes. In addition, the bill introduces restorative justice processes such as Family Group Conferencing and Victim Offender Mediation, which can be used before the trial, during the trial and at the stage of sentencing.<sup>390</sup>

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<sup>387</sup> Information on NICRO's efforts to promote diversion from the criminal justice system, is provided at [http://www.capegateway.gov.za/eng/pubs/public\\_info/W/47590](http://www.capegateway.gov.za/eng/pubs/public_info/W/47590).

<sup>388</sup> Lukas Muntingh, *The Effectiveness of Diversion Programmes—A Longitudinal Evaluation of Cases*, NICRO, May 2001.

<sup>389</sup> Francois Steyn, *Review of South African Innovations in Diversion and Reintegration of Youth at Risk*, OSF-SA, Cape Town, 2005.

<sup>390</sup> Civil Society Prison Reform Initiative (CSPRI), *Alternative Sentencing Review*, May 2004, p.12.

## Case study: The effect of the introduction of minimum sentencing on prison overcrowding

Minimum sentencing was introduced into law by the Criminal Law Amendment Act, in 1997. The stated intention of the legislature, with the introduction of minimum-sentencing provisions, was to reduce serious and violent crime. Other motivations included 'popular punitiveness'; the need for government to show its concern over high crime rates; the public perception that sentences are not sufficiently severe; the need to 'be tough on crime'; sentencing as a deterrent; and retribution: the argument of just deserts/proportionality.

In light of the overcrowding problem in South African prisons, the question has to be asked as to whether this legislation will have a long-term impact on prison numbers. Several commentators, notably the inspecting judges of prisons, have ascribed worsening prison overcrowding to the impact of minimum sentences. Writing in *The Advocate* (April 2005), Judge Fagan says: 'The effect of the minimum-sentence legislation has been to greatly increase the number of prisoners serving long and life sentences.' Judge Fagan records that sentences of seven years and less showed little change from 1997 (67 535) to 2004 (67 483), while sentences of more than seven years increased rapidly from 1997 (29 376) to 2004 (67 081). Life sentences increased from 638 in 1997 to 5 511 on 30 September 2004. He notes that in April 1998—immediately before the implementation of the minimum-sentence legislation—only 18 644 (19 percent) of the sentenced prisoners were serving a term of longer than ten years. This has since increased to 49 094 (36 per cent). Judge Fagan's views are supported by the Department of Correctional Services, which is also concerned about the burgeoning prison population.

It is an unassailable reality that the sentenced prison population in South Africa has increased rapidly since 1998. Moreover, the evidence shows overwhelmingly that a significantly larger proportion of prisoners are serving long terms—with the number of prisoners serving sentences of more than ten years having quadrupled from 10 000 to 40 000 in the past nine years. Nevertheless, critics argue that it cannot be conclusively shown that the increase in long-term and life sentences is necessarily due to the implementation of the minimum-sentences legislation. It could, they assert, simply be due to a general increase in the prevalence of serious crime, or to a generally more punitive and intolerant mood among judicial officers. It could even be the result of better police-clearance rates for serious offences.

A case-by-case analysis would be needed to establish conclusively the link between the implementation of the legislation and the otherwise rather persuasive statistics shown above—such analysis was done five years ago during the South African Law Reform Commission's investigation into sentencing, but this information would need to be updated. Furthermore, proper docket analysis is required before it can be proved, or disproved, if any improvements in police investigative capability account for the increased numbers of prisoners serving long-term or life sentences.

Extract from: Sloth-Nielsen J & Ehlers, L, *A Pyrrhic Victory? Mandatory and Minimum Sentences in South Africa*, Institute for Security Studies, Occasional Paper 111, July 2005.

## E. Prisons

### Legal framework

On 30 July 2004, the 1998 Correctional Services Act<sup>391</sup> was brought into effect. The act's preamble states that it has the 'object of changing the law(s) governing the correctional system and giving effect to the Bill of Rights in the Constitution, 1996, and in particular its provisions with regard to prisoners'. After the act was passed by Parliament in November 1998, it remained in limbo for over five years, with the exception of certain sections that came into operation in the interim. Because of this, a confused situation prevailed for some time, with the 1959 Prisons Act still in force but superseded by a range of policy changes. The minimum standards required to give effect to constitutional imperatives of 'conditions of detention that are consistent with human dignity, including at least exercise, the provision of adequate accommodation, nutrition, reading material and medical treatment', in accordance with Section 35 of the Constitution, remained elusive. Now, though, the act specifies what measures need to be put in place not only to ensure that our prisons comply with the minimum requirements of detention with human dignity, but also for rehabilitation to take place.

These include provisions requiring cell accommodation with sufficient floor and cubic capacity to enable prisoners to move freely and to sleep, provision of adequate warmth, provision of separate beds for prisoners, together with bedding which complies with hygienic requirements, compulsory separation of children aged under the age of 18 from adult prisoners, and special minimum dietary requirements for incarcerated children aged between 13 and 18 years.<sup>392</sup>

A Draft White Paper released in December 2003, states that the primary responsibility of the Department of Correctional Services is 'first and foremost to correct the offending behaviour, in a secure, safe and humane environment, in order to facilitate the achievement of rehabilitation, and avoidance of recidivism'. Civil society organisations support this vision, but feel that due to overcrowding and understaffing, the department should focus its energies on the creation of a secure, safe and humane environment.

Civil society organisations have raised their concerns around the fact that no indication has been given of the resources required or of the financial implications of what the White Paper proposes. The department has indicated that the cabinet requires that it draft an implementation plan and budget. It also indicated that the White Paper will not be implemented in the next Medium-Term Expenditure Framework (MTEF) and it is clear from the budget vote for the year 2003/04, that the Department of Correctional Services will be unable to do so.<sup>393</sup>

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<sup>391</sup> The Correctional Services Act, 1998 (Act 111 of 1998).

<sup>392</sup> Julia Sloth Nielsen, 'Milestone reached for the establishment of a human rights basis for corrections', in *Civil Society Prison Reform Initiative* (CSPRI) Newsletter, October 2004.

<sup>393</sup> Submission by the Centre for the Study of Violence and Reconciliation to a Portfolio Committee on Correctional Services, 3 February 2004, p.1-2; Draft White Paper on Corrections in South Africa, December 2003, p.2.

## Rate of imprisonment

At the end of January 2005, there were 187 446 inmates in South African prisons; 52 326 awaiting trial, and 135 120 who were sentenced offenders.<sup>394</sup> At close to 400 prisoners per 100 000 of the population, this represents the highest incarceration rate in Africa, and one of the highest in the world.

A large number of accused persons spend time in prison while awaiting trial. The number of accused persons awaiting trial in state prisons has grown since 1994. In July 1995, there were 22 282 awaiting-trial prisoners.<sup>395</sup> By April 2000, the number had swelled to 64 000.<sup>396</sup> According to the Judicial Inspectorate of Prisons, an independent body established by the 1998 Correctional Services Act as of 24 March 2003, 19 592 pre-trial detentions were as a result of prisoners being unable to afford bail amounts of as little as R50.<sup>397</sup> This is a little over a third of pre-trial detainees over the same period. The office of the inspecting judge has also criticised police for making unnecessary arrests: in 2003/04, 16 500 awaiting-trial prisoners remained in custody after appearing in court, only to be released after three months.<sup>398</sup> Unaffordable bail and delays in completing cases are the other main causes. Awaiting-trial prisoners remain in prison waiting to be tried for an average of three months, some for several years. About 60 per cent of them will not be convicted.

The number of pre-trial detainees has an adverse impact on prison conditions, especially on overcrowding. An amendment to Section 63(A) of the Criminal Procedure Act of 1977, allows the head of a prison who finds that the conditions are becoming intolerable amongst the awaiting-trial prisoners to apply to the magistrate who fixed the bail to either reduce the bail, release the prisoner without bail, or place the prisoner under the supervision of a correctional officer. This process targeted prisoners with bail at around R500, but also tried to reach those with bail of R1 000, though usually unsuccessfully.<sup>399</sup>

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<sup>394</sup> Budget vote address in the National Assembly by the Minister for Correctional Services, Ngconde Balfour, MP, 13 April 2005.

<sup>395</sup> The Judicial Inspectorate of Prisons, *Annual Report 2002/03*, p.26.

<sup>396</sup> *Ibid.*, p.27.

<sup>397</sup> *Ibid.*, p.27.

<sup>398</sup> The office of the inspecting judge, *Annual Report 2003/04*.

<sup>399</sup> See the Parliamentary Monitoring Group, available at <http://www.pmg.org.za/docs/2002/viewminute.php?id=1676>.

Table 5.4: Average period of incarceration of awaiting-trial prisoners, 1996—2000<sup>400</sup>

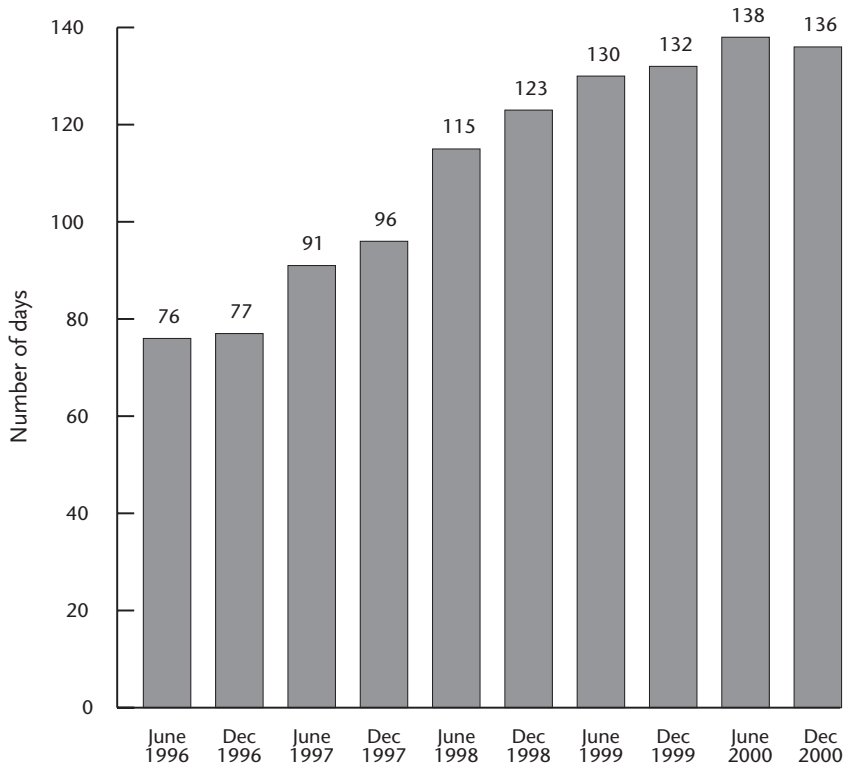


Table 5.5: Composition of prisoners, end of February 2005<sup>401</sup>

Total number of prisoners	186 823
Unsentenced (awaiting trial or sentence)	51 080
Sentenced	135 743
Total female	4 171
Total male	182 652
Children (under 18)	3 035
Children (sentenced)	1 423
Children (unsentenced)	1 612

<sup>400</sup> Martin Schönsteich, *Lawyers for the People—The South African Prosecution Service*, the Institute for Security Studies, Monograph No. 53, March 2001, chapter 6.

<sup>401</sup> Civil Society Prison Reform Initiative (CSPRI), August 2005.

## Conditions of detention

Historically, South African prisons were run in a highly militarised fashion, and formed an integral part of the apartheid system of control. They were places of extreme violence, much of it mediated through an elaborate gang system that dated back to the 19th century and was reflected in the militarised structures of the prison administration. Although recent demilitarisation of the prison system has broken down the rigid gang structures to some extent, they remain powerful institutions inside the prisons.<sup>402</sup> However, there are some indications that the incidence of violence is becoming less. In its report for 2003/04, the Department of Correctional Services recorded a reduction in assaults on both staff and offenders and, in line with this downward trend, a reduction in the number of unnatural deaths amongst offenders from 62 in 2002/03 to 45 in 2003/04.<sup>403</sup> Nevertheless, more than 7 000 assaults in prisons were reported to the system of Independent Prison Visitors (see below) during 2003, split roughly equally, between assaults by prison staff on inmates, and assaults among prisoners.<sup>404</sup>

Overcrowding in South African prisons makes detention conditions unacceptable—and has worsened since 1994. The resulting problems are associated with food, health, exercise, stress levels and rehabilitation. Prisoners' human rights are violated and the Department of Correctional Services is unable to fulfil its mandate, which includes the rehabilitation of prisoners.

In 2002, the Judicial Inspectorate reported that conditions in prisons, especially for unsentenced prisoners, were completely unacceptable and could not wait for long-term solutions. For example, one toilet is shared by more than 60 prisoners; there is the stench of blocked and overflowing sewage pipes; and a shortage of beds results in prisoners sleeping two on a bed, whilst others sleep on the concrete floors, sometimes with only a blanket. This is exacerbated by inadequate hot-water supply, no facilities for washing clothes, broken windows and lights, and insufficient medical treatment for the contagious diseases that are rife, including HIV.<sup>405</sup> In its report for 2003/04, the Judicial Inspectorate noted an escalation in the number of natural deaths in prison per year: in 1995, this was at 1.65 per 1 000 prisoners, but by 2003 it had risen to 9.1 per 1 000 prisoners, reflecting the impact of HIV/AIDS on prisoner mortality.<sup>406</sup> The Department of Correctional Services has produced a policy document on the management of HIV/AIDS in prisons.

Overcrowding not only results in a decline in staff morale, an inability to enforce basic discipline and order, and a breakdown in rehabilitative efforts, but the physical conditions of detention warrant serious concern: lack of ventilation; conditions conducive to increased sexual violence and the spread of infectious diseases; as well as water and plumbing systems collapsing under the strain. Indeed, conditions have reached such a point of degradation in some prisons

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<sup>402</sup> See Jonny Steinberg, *The Number*, Jonathan Ball, 2004.

<sup>403</sup> The Department of Correctional Services, *Annual Report 2003/04*, available at [www.dcs.gov.za/annual\\_report/Annual\\_Report2003/DCSAnnual04.pdf](http://www.dcs.gov.za/annual_report/Annual_Report2003/DCSAnnual04.pdf).

<sup>404</sup> The Judicial Inspectorate, *Annual Report 2003/04*, p.13.

<sup>405</sup> The Centre for Conflict Resolution, *Track Two*, Vol. 11, No. 2, April 2002, p.10.

<sup>406</sup> The Judicial Inspectorate, *Annual Report 2003/04*.



that civil society lobby groups report contemplating constitutional litigation to highlight and address the numerous human rights breaches caused by overcrowding.<sup>497</sup>

In September 2005, the Working Group on Arbitrary Detention of the UN Commission on Human Rights visited South Africa. In its press release at the end of the visit, anticipating its report to the 2006 Session of the UN Commission on Human Rights, it noted concerns related to the high rate of incarceration in South Africa, leading to ‘an alarming rate of overcrowding in detention facilities’.

In relation to conditions in pre-trial detention, the Working Group found that ‘the lack of adequate facilities are so blatant that they fall short of international guarantees’ and stressed that no juvenile should be detained at this stage of the court procedure, even for the most serious charges.

The Working Group noted that the lack of a clear stipulation that time spent in pre-trial detention would be taken into account in the final sentence, is not in conformity with international law.<sup>498</sup>

## Private prisons and detention facilities

Section 103(1) of the Correctional Services Act empowers the minister to enter into joint ventures with the private sector to design, construct, finance and operate any prison or part of a prison. Two such contracts were procured by the Department of Public Works on behalf of the Department of Correctional Services, using private-sector capital and expertise for their financing, designing, construction, operation and maintenance.

The first privately operated prison in South Africa is near Bloemfontein, and the second is in Limpopo. The Mangaung prison in Bloemfontein opened in July 2001 and became fully operational in January 2002. The prison in Limpopo opened in February 2002 and is run by a consortium led by the Florida-based Wackenhut Corrections Corporations.<sup>499</sup> Both prisons are maximum-security institutions.

On the face of it, private prisons seem better and provide more humane conditions for prisoners. Prisoners receive three regular meals a day, stay in cells designed for only three to four prisoners and are, in general, treated with dignity. However, the use of private facilities is problematic in several ways; moreover, insofar as they do provide better conditions, this is because they are not subject to the same constraints as the state prison system. First, the private prisons are much more costly than the 225 state-run prisons, meaning that they may not be financially viable in the long run. It is possible that future cost cutting to shore up profits could well have a negative impact on the quality of meals, recreational opportunities and other programmes. Secondly, the private prisons can turn away inmates when full, and do not house any awaiting-

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<sup>497</sup> Julia Sloth Nielsen, ‘Milestone reached for the establishment of a human rights basis for corrections’, in *Civil Society Prison Reform Initiative (CSPRI) Newsletter*, October 2004.

<sup>498</sup> ‘UN Panel on Arbitrary Detention ends visit to South Africa’, United Nations Press Release, 19 September 2005.

<sup>499</sup> KC Goyer, *Prison Privatisation in South Africa—Issues, Challenges and Opportunities*, Institute for Security Studies, Monograph No. 64, September 2001, Chapter 6.

trial detainees (a constantly fluctuating and unpredictable population in terms of numbers). They are not, therefore, subject to the same overcrowding pressures as state prisons, where the awaiting-trial facilities are the most overcrowded and the prison conditions are the poorest. Thirdly, there is a migration of staff from the Department of Correctional Services to private prisons, which weakens state capacity to provide satisfactory conditions of custody. And finally, because private prisons are in the business of keeping people in prison, this does not sit well with the rehabilitation and reintegration ambitions of the Department of Correctional Services, nor with attempts to reduce prisoner numbers.

A private company operates the main centre for immigration detainees, the Lindela Repatriation Centre, where there have been serious concerns about conditions of detention, and in particular about the inability of detainees to challenge the validity of their detention (see the case study on 'Access to justice for immigration detainees', p.115 below).

## Civilian oversight of prisons

The Correctional Services Act provides for the establishment of the office of the inspecting judge of prisons (the Judicial Inspectorate of Prisons), the object of which is to facilitate reporting on issues such as the treatment of prisoners, prison conditions and any dishonest or corrupt practices in prison.<sup>40</sup> The inspecting judge reports to the president and the minister of correctional services. Since its establishment, the Judicial Inspectorate has played an important role in highlighting unacceptable prison conditions, and its current director, Johannes (Hannes) Fagan, has been an outspoken advocate for prisoners.

The inspecting judge reports on prison conditions in his own right, and also appoints Independent Prison Visitors (IPVs) who are required to visit prisons, interview prisoners and record complaints received. This also promotes community involvement in the correctional system, and provides an independent mechanism for monitoring and promoting the proper treatment of prisoners. By April 2003, there were IPVs based in all nine provinces.

Visitors' committees are established in terms of Section 94(1) of the act, which provides that the inspecting judge may establish a visitors' committee for a particular area. A visitors' committee comprises all the IPVs appointed in that area, and meets monthly to discuss matters contained in the IPV manual. The functions of visitors' committees include considering unresolved complaints; submitting complaints to the office of the inspecting judge to be dealt with at national level; organising a schedule of visits; extending the community's interest and involvement in correctional matters; and submitting the minutes of its meetings to the inspecting judge.

The most common complaints received by IPVs from prisoners in 2003 relate to prisoner requests for transfers (usually to prisons nearer their families) and for better healthcare. The other most frequent complaints were about means for obtaining release from prison, including issues relating to appeals of conviction or sentence, and to parole and bail.

A shortcoming of this initiative is that IPVs are limited to making recommendations to the

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<sup>40</sup> The Correctional Services Act, 1998 (Act 111 of 1998), Section 90(1).

heads of prisons, and cannot actually solve problems themselves or ensure that their recommendations are implemented. Also, many of the complaints relate to issues that are systemic and cannot be resolved on an individual basis. It is important for this function to gain credibility if it is going to be accepted by prisoners, and to ensure that it is sustainable in the long term.

Surveys concerning the effectiveness of IPVs indicate that most people were of the opinion that the very presence of IPVs in prisons impacted positively on prisoners' rights, and provided an important additional avenue for dealing with prisoners' complaints. However, the view was also expressed that despite the presence of IPVs, conditions in South African prisons had not changed substantially. Another concern was that IPVs did not possess sufficient understanding of the context and systemic issues pertaining to prison reform, for them to be able to intervene and report effectively.<sup>411</sup>

Section 99(1) of the Correctional Services Act states: 'a judge of the Constitutional Court, Supreme Court of Appeal or high court, and a magistrate within his or her area of jurisdiction, may visit a prison at any time.' Section 99(2) provides that 'a judge and a magistrate referred to in Subsection(1) must be allowed access to any part of a prison and any documentary record, and may interview any prisoner and bring any matter to the attention of the commissioner, the minister, the national council or the inspecting judge'.

According to the current inspecting judge, judges and magistrates are not compelled to visit prisons but are encouraged to do so by the inspectorate of prisons. Visits are currently undertaken by judges on an ad hoc basis. Reports are then forwarded to the office of the inspecting judge, where a decision is made to send them either to the national commissioner or to the minister of correctional services, depending on the nature of the issue raised. It is the view of the inspecting judge that this is an extremely effective oversight mechanism, given the weight that the views of judges carry in South Africa.<sup>412</sup>

## Reintegration of offenders

The Correctional Services Act states that one of the three purposes of the correctional system is 'promoting the social responsibility and human development of all prisoners and persons subject to community corrections'.<sup>413</sup> The act gives guidelines on how to implement this, providing for the assessment of every prisoner;<sup>414</sup> as well as the participation of prisoners in designing programmes for their sentences.<sup>415</sup> The act also obliges the department to provide access to as full a range of programmes and activities as is possible to meet the educational and training needs of the prisoners, especially children.<sup>416</sup> Prisoners may also be compelled to participate in assess-

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<sup>411</sup> Saras Jagwanth, *A Review of the Judicial Inspectorate of Prisons in South Africa*, CSPRI, May 2004, p17; Jacqui Gallinetti, *Report on the Evaluation of the Independent Prison Visitors System*, CSPRI, May 2004.

<sup>412</sup> Louise Ehlers & Judge Hannes Fagan, personal correspondence, 28 July 2005.

<sup>413</sup> The Correctional Services Act, 1998 (Act 111 of 1998), Section 2(c).

<sup>414</sup> *Ibid.*, Section 38.

<sup>415</sup> *Ibid.*, Section 37.

<sup>416</sup> *Ibid.*, Sections 19 and 69.

ment and development programmes.<sup>477</sup>

The Department of Correctional Services has indicated that it placed rehabilitation at the centre of all departmental activities in partnership with external stakeholders. The social reintegration of offenders into their families and communities is a necessary component for effective rehabilitation. It requires partnerships between government and civil society, and hopefully results in social crime prevention. During a special national cabinet strategy meeting in 1995, the Department of Correctional Services identified rehabilitation as a key objective in reducing recidivism. Its strategy to meet this objective involves strengthening partnerships with civil society organisations. Specific objectives include the development of individualised need-based rehabilitation programmes; marketing programmes for inmates; promoting a restorative justice approach to imprisonment; combating illiteracy; increasing training facilities; and increasing prisoner-made goods and services to enhance the prisoners' self sufficiency.

The department is constrained by a lack of resources, such as insufficient social workers, teachers, psychologists and other professional staff. Prison staff are expected to play a significant role in the development of prisoners, but overburdened as they are by the numbers of prisoners, they are unlikely to have sufficient time to fulfil this role. Many prisons have severe space constraints and do not have rooms in which to run programmes. The conditions in most prisons are not conducive to a learning environment for prisoners. Even community assistance requires departmental resources, but prisons that are unable to accommodate their services often turn non-governmental organisations (NGOs) away. However, the past few years have seen growth in the number of services offered within prisons by community-based organisations, and an increase in partnerships on projects between the Department of Correctional Services and NGOs.<sup>478</sup> This is particularly important, as South Africa has no real tradition of offender-reintegration services that start in prison and continue after people are released. Within prisons, the emphasis has always been on security, and for this reason prisons have been closed to other agents who may wish to render services there.

NICRO has been the leading NGO in this regard, offering rehabilitation programmes to offenders. One of its programmes is the Working for Water Project: as part of its poverty-eradication programme, the government, through the Department of Social Development, made funds available to NICRO to provide temporary employment for 500 former prisoners in the Department of Water Affairs and Forestry's Working for Water Project. In terms of this programme, Working for Water employs these former prisoners for 60 days, while NICRO provides training, education and support services. The aim of the programme is to help participants to become economically self-sustainable.<sup>479</sup>

## F. Non-state action against crime

In the context of a high crime rate and lack of confidence in the police services, non-state action

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<sup>477</sup> *Ibid.*, Section 37.

<sup>478</sup> The Centre for Conflict Resolution, *Track Two*, Vol. 11, No. 2, April 2002, pp.12-13.

<sup>479</sup> Lukas Muntingh, *After Prison—The Case for Offender Reintegration*, Institute for Security Studies, Monograph No. 52, Chapter 6.

against crime in South Africa is extremely prevalent. There are two main sub-sets of actors involved in this activity; private security forces and self-help organisations known as vigilante groups.

The private security industry has grown rapidly over the past decade, with an annual turnover in excess of R10 billion<sup>420</sup> and around 265 000 registered security officers in 2004.<sup>421</sup> Since 1994, a significant number of former policemen, prison guards and defence staff have moved over into the lucrative private security industry. The rapidly expanding size of the industry threw the need for tighter regulatory measures into sharp relief and, in 2001, the Private Security Industry Regulation Act<sup>422</sup> was passed. The act provided for the establishment of a new oversight body, the Private Security Industry Regulatory Authority, and also made the registration and licensing of all operating security companies compulsory.

Vigilante groups tend to provide protection for the poorer classes, generally free, although one of the largest groups, Mapogo-a-Mathamaga, does charge members a 'subscription' fee.<sup>423</sup> Vigilante activity in South Africa has typically been associated with well-known groups such as Mapogo-a-Mathamaga, PAGAD and the Peninsula Anti-Crime Agency (PEACA). These highly organised, cohesive organisations have a wide network of members and operate under some form of command structure. One of the largest, Mapogo, claimed around 50 000 members, with over 90 branches throughout Gauteng in 2000.<sup>424</sup> However, alongside these organisations, a significant amount of vigilante activity is also carried out by local ad hoc groupings that come together within a community to deal with suspects, sometimes using informal justice mechanisms known as 'peoples' courts', to provide a rough-and-ready form of trial.<sup>425</sup>

Particularly in poor, black areas, where public confidence in the formal system remains low, vigilantism is still very much a feature of the landscape. In a recent survey conducted by the Institute for Security Studies, 26 per cent of South Africans said that a group or organisation other than the police exists in their area to provide protection against crime. Amongst those who said there was a non-state actor protecting against crime in their area, 76 per cent of blacks said that no joining fee was charged, compared to only 19 per cent of whites.<sup>426</sup>

The state has taken some firm steps against the highest profile vigilante groups. As a result, their activities have scaled down since the mid- to late 1990s, when PAGAD and Mapogo-a-

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<sup>420</sup> Jenny Irish, *Policing for Profit*, Monograph 39, Institute for Security Studies, August 1999; Institute for Security Studies, *Crime Index*, Vol. 4, No. 3.

<sup>421</sup> See the Private Security Industry Regulatory Authority website, available at <http://www.sira-sa.co.za/statsmenu.html>.

<sup>422</sup> The Private Security Industry Regulation Act, 2001 (Act 56 of 2001).

<sup>423</sup> Keith Gottschalk, 'Vigilantism v. the State: A case study of the rise and fall of Pagad, 1996-2000', *Occasional Paper 99*, Institute for Security Studies, February 2005.

<sup>424</sup> *Ibid.*

<sup>425</sup> Bronwyn Harris, 'As for Violent Crime, that's our Daily Bread', *Vigilante Violence during South Africa's Period of Transition*, Centre for the Study of Violence and Reconciliation, May 2001.

<sup>426</sup> Patrick Burton, Anton du Plessis, Ted Leggett, Antoinette Louw, Duxita Mistry & Hennie van Vuuren, 'Public Perceptions about Crime Prevention and Criminal Justice', in *National Victims of Crime Survey 2003*, Institute for Security Studies, July 2004.

Mathamaga were involved in high-profile bombings and public assassinations. The state has set up special investigative squads and many members of vigilante groups have been arrested, with some successful prosecutions. However, the rate of convictions has been relatively low, in large part due to the unwillingness of potential witnesses to come forward after the murder of a string of witnesses in trials against PAGAD members. Meanwhile, press articles suggest that more ad hoc vigilante activities, often termed by the media as ‘mob justice’ activities, are on the rise.<sup>427</sup> The Independent Complaints Directorate also noted in its 2004/05 report an ‘alarming’ increase (of 184 per cent, to 71 people) in the number of cases reported to it of people who had died in police custody, from injuries received in vigilante attacks before they were arrested.

Public opinion towards vigilantism remains mixed.<sup>428</sup> Over the years, groups such as PAGAD have alienated much of their mainstream support through the use of increasingly violent tactics. However, particularly for those with limited access to policing and the formal court system, vigilante groups offer protection from crime and justice against perpetrators when no other realistic alternatives may exist. The prevalence of vigilantism may also be due not solely to inadequacies in the formal criminal justice system, but to a more deep-rooted public desire for fast, retributive justice that is incompatible with the constitutional rights-based system that is in place.<sup>429</sup>

However, for the state, fighting vigilantism remains a priority, representing a direct challenge to the state monopoly on force and South Africa’s constitutional rights-based criminal justice system. Community self-help actions can play a constructive role—but this is more likely when they are in liaison with the state, such as through Community Police Forums or neighbourhood watches, rather than in parallel to the state.

### Case study: People Against Gangsterism and Drugs (PAGAD)

PAGAD was formed in late 1995 as a community anti-crime group fighting drugs and violence in the Cape Flats section of Cape Town, but by early 1998 it had also become involved in anti-government activities. PAGAD spoke out against the state’s inability to curtail drug-related crime in the Cape Flats and took the law into its own hands, fighting against gangs and drug traders, generally using violent means. The group has also been involved in providing anti-drug related social care within the community, and set up a Drugs Counselling Centre in Rylands in February 1999.

In addition to this primary objective, PAGAD, with a predominantly Muslim membership, has

<sup>427</sup> *The Sowetan*, 2 June 2003; *The Mercury*, 2 March 2005, available at ... <http://www.themercury.co.za/index.php?fSectionId=283&fArticleId=2430446>.

<sup>428</sup> Bronwyn Harris, ‘As for Violent Crime, that’s our Daily Bread’, *Vigilante Violence during South Africa’s Period of Transition*, Centre for the Study of Violence and Reconciliation, May 2001, p.15 (of download version).

<sup>429</sup> *Ibid.*

been linked to Qibla—a fundamentalist movement that arose in South Africa in the 1980s, aiming to propagate an Islamic Revolution. Although the exact extent of links between PAGAD and Qibla are unclear, these allegations have been seized upon by the state as part of its strategy to erode public support for the organisation.

In its early days, PAGAD benefited from public disillusionment with what seemed to be the state's inability to put a stop to the drug trade and gang warfare rife throughout the Cape Flats. Not only did the police seem incapable of fighting crime, with parts of the force also involved in corruption, but once arrests were made, the constitutionally-based criminal justice system was not providing the convictions public opinion desired. In 1996, during a PAGAD march that turned violent, Rashaad Staggie, leader of the Hard Livings gang, was lynched. Fellow leaders from the gang eventually faced trial, but prosecutors were unable to get a conviction for drug-selling and only after six years, obtained a conviction on other charges, including the illegal possession of firearms.

During this time, parts of the police force also seemed to be implicitly supportive of PAGAD, turning a blind eye to their activities and even accompanying them on marches to the houses of drug dealers. Led by Justice Minister Dullah Omar, the state also attempted to negotiate with PAGAD to refrain from violence, and to co-operate with the SAPS by providing information about drug dealers.

Through the late 1990s, PAGAD's tactics became more violent and radical, and their support began to dwindle. From around 1998, PAGAD's targets began to include police stations, individuals who spoke out against the organisation, and 'Western' targets. PAGAD was implicated in a series of bombings, including one which took place at the popular V&A Waterfront complex in January 1999, and at St Elmo's pizzeria in Camps Bay in November 1999, killing 48 people. The state attitude to PAGAD hardened, with a concerted effort to stamp out the group.

A state crackdown on PAGAD has led to many of its members being arrested and tried. In 1997, the police set up a squad of around 130 police members to investigate PAGAD and by 2000, police had arrested and brought charges against nearly 150 PAGAD gunmen. The investigating arm of the National Prosecuting Authority (known as the Scorpions) has also assisted in raiding PAGAD's highly armed G-Force cell. However, the assassinations or disappearances of many witnesses in PAGAD trials have highlighted the inadequacies of South Africa's witness-protection system. It has also made it very difficult for police to secure convictions, with many potential witnesses intimidated into silence or having gone into hiding to avoid being subpoenaed. Nonetheless, PAGAD today is mostly seen as a spent force, with limited public support and many of its members in jail.

**SOURCES:**

Keith Gottschalk, 'Vigilantism v. the State: A case study of the rise and fall of Pagad, 1996-2000', Institute for Security Studies, *Occasional Paper* 99, February 2005;

Anneli Botha, *Fear in the City, Urban Terrorism in South Africa*, Institute for Security Studies, Monograph 63, July 2001; and

The *Mail & Guardian* website, available at <http://www.mg.co.za/>.

# 6

## Access to justice

The right to a fair public hearing of any dispute is constitutionally enshrined, and also outlined in several international and regional treaties to which South Africa is party. However, despite efforts to introduce small-claims procedures, an active set of organisations involved in public interest litigation, and the expanding mandate of the Legal Aid Board to include civil cases, the financial cost of legal proceedings remains a significant barrier to realising equal access to justice. In particular, the cost of legal professional services remain unaffordable to the average South African, contributing to the continuing popularity of traditional courts as a practical forum for dispute resolution, especially in rural areas.

A number of independent oversight institutions were established in Chapter 9 of the 1996 Constitution, most notably the South African Human Rights Commission (SAHRC). Although these institutions do provide alternative avenues of recourse for individuals, their effectiveness has been criticised, with issues such as overlapping mandates and a lack of adequate parliamentary support being raised.

### A. Knowledge of rights

Despite the widespread debate that accompanied the drafting of the Constitution and its Bill of Rights, a 2002 study by the largely government-funded Human Science Research Council found that 69.5 per cent of South Africans had either not heard of or did not know the purpose of the Bill of Rights.<sup>430</sup> Similar statistics were reported relating to awareness of key institutions set up under Chapter 9 of the Constitution to protect, promote and monitor human rights. The study also found that these statistics are higher amongst vulnerable and poor social groups, especially when correlated with race, gender and 'standard of living' measurements. However, despite the lack of knowledge of the particular documents and institutions, South Africans showed 'a

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<sup>430</sup> The Human Sciences Research Council, *Public Attitudes in Contemporary South Africa—Insights from an HSRC Survey*, 2002.



popular and deep commitment to a substantive human rights regime, inclusive of second-generation rights'.<sup>431</sup>

The Department of Justice and Constitutional Development (DoJCD) has as one of its stated primary objectives, the improvement of access to justice through public communication and the education of vulnerable communities. Their emphasis is usually on rural and impoverished communities. To this end the DoJCD has published materials, developed videos, held education sessions within communities, hosted seminars, opened two additional citizen advice desks in courts in each province and participated in community radio slots. The DoJCD together with the SAHRC is also working to ensure that human rights are included in the normal schooling curriculum.<sup>432</sup>

Chapter 9 institutions are also tasked with promoting human rights, and thus raising human rights awareness. The SAHRC has reached out to 41 812 people through community workshops and 4 502 people through seminars. The Commission for Gender Equality has disseminated over 100 000 human rights materials (posters and pamphlets) and hosted over 130 awareness-raising events.<sup>433</sup> Non-governmental and community-based organisations often provide community education on human rights in the specific locality where they work, and focus on the human rights issues that they seek to address.

## **B. Physical access**

The Minister of Justice and Constitutional Development identified the establishment of suitable courts, in rural and township areas, as a priority in 1999.<sup>434</sup> Since then, much work has been done to upgrade and build courts in these communities. The DoJCD uses a court model blueprint to ensure that minimum standards are met.<sup>435</sup> Magistrates' courts are widely spread throughout the country; high courts are less accessible, and largely limited to urban areas.

Courts are not accessible to the physically disabled. The first case brought before the new equality court in 2003, established under the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000, tackled this issue when a practising attorney who is quadriplegic brought a case against the DoJCD and the Department of Public Works.<sup>436</sup> The case related to the applicant's difficulties in accessing courts due to her being in a wheelchair. The matter was resolved by a settlement agreement between the parties, which was then made an order of court. Under the terms of the settlement agreement, the courts in which the applicant primarily practices would be made accessible to people with disabilities. One court room would also be made accessible, together with one bathroom. Further to this end, the respondents were given six

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<sup>431</sup> *Ibid.*, p.163.

<sup>432</sup> The DoJCD, *Annual Report 2003/04*, p.63- 71.

<sup>433</sup> *Ibid.*, p.84.

<sup>434</sup> Presentation to Justice Portfolio Committee, 9 September 1999, available at [http://www.doj.gov.za/2004dojsite/reports/1999reports/courtefficiency/1999\\_courtsefficiency.htm](http://www.doj.gov.za/2004dojsite/reports/1999reports/courtefficiency/1999_courtsefficiency.htm).

<sup>435</sup> The DoJCD, *Annual Report 2003/04*, p.32.

<sup>436</sup> *Esthé Muller v DoJCD and Department of Public Works* (Equality Court, Germiston Magistrates' Court 01/03).

months to draw up an action plan with respect to other court buildings in the country. This plan must be submitted to the SAHRC and the court. The respondents agreed that there would be full compliance for access to courts for disabled people, within five years of the date of settlement.<sup>437</sup>

The DoJCD has made accessibility to courts for all vulnerable groups a key strategic-performance area.<sup>438</sup> Yet, despite the strategic objectives of the DoJCD, of the R229.7 million spent on constructing and upgrading court buildings in 2003/04, no funds were spent on ensuring physical access for disabled people to the courts identified in the above agreement.<sup>439</sup> In fact, by late 2004, the DoJCD had failed to submit the progress report required to finalise the agreement.<sup>440</sup>

## C. Financial access

South Africa introduced a small claims court system as early as 1984, in an effort to make justice more accessible.<sup>441</sup> Today, there are 153 of these courts across the country. Their jurisdiction is limited to claims for damages of R7 000 or less.<sup>442</sup> No legal representation is allowed in these courts and no court fees are charged. The courts also use a less adversarial approach to resolving disputes, and cases are heard by a commissioner, rather than a judge or magistrate.

The jurisdiction of magistrates' courts, which are cheaper to access than high courts, is limited to R200 000. Claims for higher amounts have to be brought to the high court.

### Court fees

In general, court fees do not hinder access (in contrast to practitioners' legal fees, which are often beyond the means of ordinary South Africans). In most courts, there are procedures to apply for indigent rulings, which would exempt the party from paying court fees. The details of different court fees and policies, applied in different courts, are described in greater detail below.

The fees required to lodge and conduct a case in the Constitutional Court are outlined in the Rules of the Constitutional Court.<sup>443</sup> In terms of these rules, a notice of appeal or a court order referring a matter to the Constitutional Court must be lodged with a revenue stamp, valued at R75.<sup>444</sup> Other prescribed court fees include:

- R10 per document for the lodging of an appeal or the answering of an affidavit;
- R15 for the lodging of a notice of appeal, cross-appeal or order of the court granting leave to appeal;

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<sup>437</sup> Jonathan Ancer, 'Lawyer wins her right to a dignified entrance', *The Star*, 25 February 2004.

<sup>438</sup> The DoJCD, *Annual Report 2003/04*, p.10.

<sup>439</sup> *Ibid.*, p.88-89.

<sup>440</sup> Jonathan Ancer, 'State's foot-dragging on (the) disabled angers lawyer: Two departments fail to heed ruling on ensuring easier access to courtrooms', *The Star*, Johannesburg, 8 September 2004.

<sup>441</sup> The Small Claims Courts Act 61 of 1984.

<sup>442</sup> The DoJCD, *Annual Report 2003/04*, p.11

<sup>443</sup> The Rules of the Constitutional Court, Government Notice R.1603, in the *Government Gazette* No.25643, 31 October 2003.

<sup>444</sup> *Ibid.*, Rule 4(4).

- R1 per page for certified copies; and
- R25 taxation fee.<sup>445</sup>

The Constitutional Court Rules also provide for the court registrar to waive fees if a party can show satisfactorily that he/she is indigent. The rules provide that a party must demonstrate that 'except for household goods, wearing apparel and tools of trade, such party is not possessed of property to the amount of R20 000, and will not be able within a reasonable time to provide such sum from his or her earnings'.<sup>446</sup>

The court fees for the Supreme Court of Appeal are contained in the Rules Regulating the Conduct of the Proceedings of the Supreme Court of Appeal of South Africa.<sup>447</sup> The rules provide for any party to request leave to prosecute or defend an appeal, *in forma pauperis*. This procedure allows the registrar of the court to make a ruling on the indigence of the party. The ruling is based on establishing that the party owns property valued at less than R10 000, and would be unable to earn this money or obtain legal aid within a reasonable amount of time. Once leave is granted, the party is exempted from paying court fees or lodging security for costs.<sup>448</sup> Court fees are prescribed in Rule 19:

- R10 to lodge an application, answer an affidavit, give notice of an appeal or to cross-appeal;
- R10 to obtain an order of the court granting leave to appeal;
- R2 per document for registrar's certification;
- R1 per page for photocopies; and
- R25 in taxation fees.

The court fees prescribed for the high courts are outlined in the Uniform Rules of Court. Rule 67 outlines the fees, as well as providing for an exemption for actions instituted *in forma pauperis*:

- R80 for lodging a notice of application, notice of action or notice of appeal from judgment of a single judge;
- R80 for the power of attorney to appeal from an inferior call, although no fees apply to appeals in criminal cases;
- R60 for every bill of costs submitted for taxation; and
- R2 per document.

The fees required to lodge and conduct a case in the land claims court are outlined in the Land

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<sup>445</sup> Ibid., Schedule 2.

<sup>446</sup> Ibid., Rule 4(5).

<sup>447</sup> The Rules Regulating the Conduct of the Proceedings of the Supreme Court of Appeal of South Africa, R.1523, in the *Government Gazette* No.19507, 27 November 1998.

<sup>448</sup> Ibid., Rule 15.

Claims Court Rules.<sup>449</sup> The rules provide that no fees are required if the case is instituted by the Commission or the Director-General; further, no fees are required if the party is represented by a statutorily established Legal Aid Board or can prove indigence.<sup>450</sup> Indigence is demonstrated when a party owns property valued below R30 000, and will not be able to obtain such an amount from their earnings within a reasonable time.<sup>451</sup> Fees are prescribed in Schedule 2 and include the following:

- A revenue stamp valued at R80 must be attached at every notice of application, notice of action, power of attorney and notice of appeal;
- A revenue stamp valued at R50 must be attached to every bill of costs submitted for taxation; and
- R1 per photocopy or certified copy.<sup>452</sup>

Court fees for magistrates' courts are prescribed in the Magistrates' Court Rules of Court. Table E of Annexure 2 to the act outlines the following fees:

- R20 for the lodging of initial documents or summonses, or an application for an order;
- R2 for any request to inspect an identified record;
- R5 for every 100 records searched, when requesting to inspect a record with an incorrect number or no number;
- R2 per 100 words for a typed copy of the court record;
- R1 per page for a photocopy of the court record;
- R2 per 100 words for examining and certifying a copy of the record; and
- R10 for completing the statement referred to in Section 74A(4) of the Magistrates' Court Act (this refers to the assistance given by the clerk of the court to an illiterate debtor, in the case of an application for an administration order).

No court fees are charged in equality courts.

Beyond officially required fees, reports and studies on corruption in the criminal justice system suggest that corruption within the court system is not as prevalent as in the other branches of the criminal justice system, but that it does still exist. One study conducted by the Institute for Security Studies makes reference to bribes being paid by the public in relation to 'court-related services', but does not specify whether these services include prosecutorial ser-

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<sup>449</sup> The Land Claims Court Rules, in the *Government Gazette* No. 17804, 21 February 1997.

<sup>450</sup> *Ibid.*, Rule 5(3).

<sup>451</sup> *Ibid.*, Rule 5(4).

<sup>452</sup> *Ibid.*, Schedule 2.

vices.<sup>453</sup> This study, which was conducted in 2003, shows that five per cent of respondents said that they had been asked for a bribe, but less than half of these paid a bribe for court-related services. The UN's Country Corruption Assessment Report for 2003 lists bribery of South African Department of Justice officials as one of the main categories of corruption in South Africa identified in the study, but does not specifically target judicial officers.<sup>454</sup> However, since the department provides administrative support to the courts, this may impact significantly on the functioning of especially the lower courts. A Markinor Omnibus Survey in 2001 revealed that 26.8 per cent of respondents believed that they were likely or very likely to have to bribe court officials.<sup>455</sup> The UN Corruption Report does point out that there is insufficient information on actual incidents of bribery, and that statistics on perceptions may differ significantly from the actual prevalence of the problem.

The Prevention and Combating of Corrupt Activities Act<sup>456</sup> makes corruption, which includes bribery by a civil servant such as a court official, an offence.<sup>457</sup> The department has indicated that it takes corruption and bribery seriously. It has an Anti-Corruption and Fraud Policy,<sup>458</sup> although in the year 2003/04 only six disciplinary hearings relating particularly to corruption were held.<sup>459</sup> Only one of these related to bribery.<sup>460</sup>

## Cost of legal advice

The major barrier to access to justice in South Africa remains the high cost of legal services, closely tied to the dual nature of the economy, with a small proportion of the population being served by a high proportion of the trained legal professionals.

There is general consensus that legal professional services are not affordable to the average person in South Africa. In litigation, the rules of each respective court sets the tariffs at which attorney's fees are to be taxed (that is, at what rate they can be recovered by a litigant who has been awarded the costs of a matter). To the extent that the taxed amount is less than the amount charged by the attorney, the client has to pay the difference, even if successful. Thus consultation for a case in the magistrates' court ranges from R67 to R80 for every fifteen minutes.<sup>461</sup> The Uniform Rules of Court set a consultation fee of R100, for every fifteen minutes, for a case in

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<sup>453</sup> Henni van Vuuren, 'Small bribes, big challenge(s): Extent and nature of petty corruption in South Africa', Institute for Security Studies, *Crime Quarterly* No 9, Pretoria, 2004. See also Burton et al, National Victims of Crime Survey South Africa 2003, Chapters 5 & 7.

<sup>454</sup> The United Nations Office on Drugs and Crime & the Department of Public Service and Administration, *Country Corruption Assessment Report: South Africa*, April 2003, p.122, available at <http://www.info.gov.za/otherdocs/2003/corruption.pdf>.

<sup>455</sup> *Ibid.*, p.104.

<sup>456</sup> The Prevention and Combating of Corrupt Activities Act, 2004 (Act 12 of 2004).

<sup>457</sup> *Ibid.*, Section 3.

<sup>458</sup> The DoJCD, *Anti-Corruption and Fraud Policy*, 2000, available at [http://www.doj.gov.za/2004dojsite/brochure/2000\\_anti\\_percent20corruption.pdf](http://www.doj.gov.za/2004dojsite/brochure/2000_anti_percent20corruption.pdf).

<sup>459</sup> The DoJCD, *Annual Report 2003/04*, p.118

<sup>460</sup> *Ibid.*, pp.116-117

<sup>461</sup> The Magistrates' Courts Rules of Court, Annexure 2.

any of the high courts.<sup>462</sup> The tariff for higher courts, including the Supreme Court of Appeal and the Constitutional Court, ranges from R70 to R105 for every thirty minutes of a consultation.<sup>463</sup> In non-litigation matters, the law societies often publish non-compulsory guidelines of fees. The Cape Law Society, for example, has established a guideline of between R75 and R400 for every 15 minutes of a consultation.<sup>464</sup>

In relation to advocates, the Magistrates' Court Rules do not deal with the taxing of advocates' fees, who seldom appear in the magistrates' court on civil matters. The rule in the high court is that the taxing master (who determines the amount at which litigation costs may be recovered by a successful litigant) shall allow such fees as he considers reasonable.<sup>465</sup> Similar provisions apply to the Supreme Court of Appeal and the Constitutional Court, although no express mention is made of advocates' fees.<sup>466</sup> The Bar Council issues a guideline of fees to be charged by advocates, according to seniority. These may be deviated from where there is good cause. The charging of excessive fees is a matter for disciplinary action by the Bar Council.

The split-bar system in South Africa implies that clients will often have to pay for the professional services of both an advocate and an attorney. Although attorneys are now permitted to appear in the high court in terms of Section 4 of the Right of Appearance in Courts Act,<sup>467</sup> matters at that stage are usually still referred to an advocate. While in theory the work done by either profession is distinct, and thus duplication of fees should not occur, in practice this does increase the cost of legal representation (for example, because of attendance at consultations and court hearings by both the attorney and the advocate). The high cost of legal advice is evident when compared to the average household income in South Africa. The 2000 Income and Expenditure Survey found that the average household income in South Africa is R29 004.16; the average income in black households is even lower at R17 193.16.<sup>468</sup> At just over R80 per day or R47.10 in the average black household, it would take a week's income to afford an hour-long consultation with an attorney.

South Africa has a long tradition of paralegal advice officers, dating back to the apartheid era. Paralegal assistance is still largely driven by non-governmental organisations through legal advice offices. A number of these offices are members of the National Community Based Paralegal Association. As of 2004, there are about 200 advice offices throughout the country

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<sup>462</sup> The Uniform Rules of Courts, Rule 70.

<sup>463</sup> Rules Regulating the Conduct of the Proceedings of the Supreme Court of Appeal of South Africa, Government Notice R.1523, in the *Government Gazette* No. 19507, 27 November 1998, Rule 18 part D.

<sup>464</sup> The Law Society of the Cape of Good Hope: Guideline(s) for the Taxing Committee for the Assessment of Non-Litigious Fees, April 1 2004, available at [http://www.capelawsoc.law.za/Non-lit 2004-04.doc](http://www.capelawsoc.law.za/Non-lit%2004-04.doc).

<sup>465</sup> The Uniform Rules of Court, Rule 69(5).

<sup>466</sup> The Supreme Court Rules, Rule 17; the Constitutional Court Rules, Rule 22.

<sup>467</sup> The Right of Appearance in Courts Act, 1995 (Act 62 of 1995); see also Section 4.B on Lawyers, p. 52.

<sup>468</sup> Statistics South Africa, *Income and Expenditure of Households 2000 South Africa*, Pretoria, 13 November 2002, p.86, available at <http://www.statssa.gov.za/publications/PO111/PO1112000.pdf>.

servicing rural and urban communities.<sup>469</sup> The cases covered by these offices include unlawful evictions, children's rights, farm workers' rights, domestic violence, maintenance and social grants. Organisations such as Black Sash, the Centre for Rural Legal Studies, the Centre for Socio-Legal Studies, the Social Change Assistance Trust, Lawyers for Human Rights and the Legal Resources Centre provide training and support for paralegals, as well as conducting and funding public-interest litigation directly.

The draft Legal Practice Bill, released by the Department of Justice and Constitutional Development in August 2000, has among its stated objectives to increase access to justice and create affordable access to legal assistance. It seeks to do this by, among other things, ensuring that all the various components of the legal profession are regulated by a single umbrella body, the Legal Practice Council. Though the Bill is not very clear on this, it would appear that paralegals would (for the first time) need to register as legal practitioners in order to be able to offer advice to the public, although the current restrictions on their capacity to appear in court, on behalf of clients, would be maintained. Whilst the formalisation of the paralegal system through accredited advice centres may enhance to a certain extent access to justice for poor people, it will not change the cost of legal services at the upper end of the market.

Individuals can choose not to have legal representation and can appear on their own behalf in the formal court system. Several special courts and tribunals, such as the equality court, the small claims court or the Commission for Conciliation, Mediation and Arbitration do not permit legal representation, and the judicial officer in these matters fulfils a far more inquisitorial function than is permitted in other courts. It is exceptionally rare that persons are not represented in the high court; it happens far more frequently in the lower courts.

Otherwise, individuals seeking to enforce their rights in court are dependent on state-funded assistance from the Legal Aid Board (see Section 5.C above). The Legal Aid Board, however, provides services mainly in criminal matters, though it is increasing its assistance in civil cases, where it prioritises matters involving children, women in divorce proceedings, maintenance and domestic violence cases, and unlawful evictions.<sup>470</sup> Despite these commitments, less than 10 per cent of the board's new cases in 2003/04 were civil matters.<sup>471</sup>

## Case study: Access to justice for immigration detainees

The Lindela Repatriation Centre is a holding centre for foreigners awaiting repatriation—for the most part undocumented migrants, but also failed asylum seekers—in Krugersdorp, near Johannesburg. It is owned and administered by the Dyambu Trust, an organisation set up by members of the ANC Women's League in 1996. The Dyambu Trust is responsible for housing

<sup>469</sup> See the *Directory of Paralegal Offices—Knowing Your Rights*, 2004, available at <http://www.uct.ac.za/depts/ci/pubs/pdf/rights/comtools/plegdir/prelims.pdf>.

<sup>470</sup> The Legal Aid Board, *Legal Aid Board Handbook*, available at [http://www.legal-aid.co.za/services/handbook/hb\\_what.htm](http://www.legal-aid.co.za/services/handbook/hb_what.htm)

<sup>471</sup> The DoJCD, *Annual Report 2003/04*, p.82.

and feeding detainees through a contract with the Department of Home Affairs. Rumours of bribery and abuse of power led to major fact-finding missions between 1998 and 2000 by the SAHRC and other human rights organisations, such as Lawyers for Human Rights, which expressed concern over the evidence of unsatisfactory conditions of detention. One of the concerns was that detainees were held at the centre for substantially longer periods than the 30 days allowed by the Aliens Control Act 96 of 1991.

On 3 September 1999, a team consisting of Jody Kollapen, Commissioner of the SAHRC, Andrew Rens of the Wits Law Clinic, Jacob van Garderen from Lawyers for Human Rights, and Emma Algotsson, a researcher affiliated to Wits University, went to the facility for an initial visit to meet up with representatives from Department of Home Affairs and Dyambu. Despite the initially positive response to the investigation, Emma Algotsson was denied access to the facility on her first two attempts to visit Lindela on her own. Only after further pressure was she given access to the facility. On subsequent visits, access to the centre at certain times, or to specific sections of the facility, was denied. On 27 September 1999, both the SAHRC representative and her translator were denied access to Lindela because the Dyambu junior manager had not been informed, though departmental officials Mr Mabote and Mr Meyer had agreed to the visit earlier that day, the same day, but had failed to inform Dyambu about the arrangement. Similarly, Andrew Rens, an attorney at the Wits Law Clinic, was denied access to the facility by the department and Dyambu when attempting to visit clients who had been held in excess of 30 days at the facility. Mr Rens was visiting Lindela for the preparation of a case for the SAHRC. The junior manager is reported as saying, 'This is my home, and if you would like to visit my home you have to have my permission.' Later, he stated: 'This is how I work and if you want to visit Lindela, you have to follow my rules.'

Through ongoing monitoring, the SAHRC discovered a substantial number of cases of people being detained for extensive periods, without any attempt made by the authorities to approach the high court for a legal extension. Finally, in November 1999, the SAHRC and the Wits Law Clinic approached the high court for an urgent order for the release of the 40 detainees who were unlawfully held at Lindela. The order was granted, and with the assistance of the sheriff of the court, the detainees were released.

But the problem of oversight over the facility remained. The Department of Home Affairs appeared to have no statutory or contractual power to review, monitor or report on activities at Lindela, nor did it appear to have the authority to intervene in a threatening emergency situation at the centre. Dyambu's accountability for the management of Lindela therefore relies on the inspection and supervision from an independent body. The law clinic launched a further application to the high court, asking for an interdict in terms of which the SAHRC would have an oversight role over the administration of the Lindela Centre.

Despite the court order and an ongoing monitoring process, the practice of holding persons for more than 30 days without the intervention of a court continued, and it was frequently necessary to threaten the authorities with further court action to ensure compliance with the law. Nevertheless, ongoing negotiations with the department and Dyambu has meant that the SAHRC and other human rights organisations have increasing access to persons detained, and other information relating to the facility.



Nonetheless, serious problems remain. In September 2005, the UN Working Group on Arbitrary Detention came to South Africa and visited Lindela. It noted that many of those held alleged that they had been arbitrarily arrested, and concluded that the fact that they were not able to contest the validity of their detention (even though Section 35 of the Constitution stipulates that every person detained has the right to challenge the lawfulness of the detention, in person, before a court) could not be justified.

#### SOURCES

*Lindela: At the crossroads for detention and repatriation*, SAHRC, December 2000;

*Report into the Arrest and Detention of Suspected Undocumented Migrants*, SAHRC, March 1999;

Botshabelo Sanctuary: Refugee Rights Project, LHR newsletter November 2001, Vol. 4/2, available at <http://www.lhr.org.za/refugee/nletter/v4i2.pdf>;

Wits Law Clinic: Past Cases, University of the Witwatersrand Law Clinic (Refugee Unit), available at <http://wwwserver.law.wits.ac.za/clinic/past.htm>;

*The Sowetan*, 'Move frees 40 detained aliens', 12 November 1999; and

'UN Panel on Arbitrary Detention ends visit to South Africa', United Nations Press Release, 19 September 2005.

## D. Right to appear/jurisdictional restrictions

Constitutional provisions on *locus standi*, the right to be heard in court, allow for wide access to the judicial process and are considered progressive. Section 38 of the Constitution reads:

### *Enforcement of rights*

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are -

- a. anyone acting in their own interests;
- b. anyone acting on behalf of another person who cannot act in their own name;
- c. anyone acting as a member of, or in the interests of, a group or class of persons;
- d. anyone acting in the public interests; and
- e. an association acting in the interests of its members.

Public interest litigation is thus permitted, and has been at the forefront of the majority of constitutional cases dealing with access to socio-economic rights. It plays a vital role in allowing the poor access to justice through the courts.

*Amicus curiae* (friend of the court) petitions are permitted and provided for in the Constitutional Court Rules, which set out the procedure for applying for recognition as an *amicus curiae*, in which case the party is able to participate in existing litigation.<sup>472</sup> The rules are widely

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<sup>472</sup> IDASA, *Advocacy, Litigation and Amicus Curiae*, 25 October 2004.

framed, allowing for any person with an interest in a case, including NGOs, to apply. *Amicus curiae* have also played a significant role in many constitutional cases, especially those focusing on socio-economic rights.

Some examples of South African cases in which *amicus curiae* have played a role include; *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others intervening; Institute for Democracy in South Africa and Another as amicus curiae)*.<sup>473</sup> This case raised the issue of *amici curiae*, shedding light on particular questions that arose in the case. In *South African Human Rights Commission and Another v President of the Republic of South Africa and Another*,<sup>474</sup> some of the respondents did not appear in court, so the *amicus curiae* was able to provide the court with a fuller picture where the matter was of particular public interest.

## E. Delays in court proceedings

Anecdotal evidence suggests that the time it takes for a civil case to be heard, particularly in the busier courts, is of concern. For example, in the Cape High Court the ordinary court roll for civil matters is full for close to a year.<sup>475</sup> The DoJCD does not, however, record information in relation to the time it takes civil cases in the lower and high courts, and it does not keep records of the time it takes a case to be heard on appeal.

## F. 'Traditional' justice systems

Under the various forms of colonial and white-controlled government in power in South Africa until 1994, traditional or customary law was regulated in ways similar to, but perhaps more extreme than, in other African colonies.<sup>476</sup> In 1927, a uniform approach to the recognition of customary law across South Africa was adopted with the passing of the Black Administration Act.<sup>477</sup> Under this law, initially only commissioners' courts (presided over by white officials) and their appeal courts were permitted to apply customary law. In 1988, Section 1(t) of the Law of Evidence Amendment Act<sup>478</sup> granted all courts the discretion to apply customary law between 'black' litigants. Recognition was subject to a 'repugnancy' proviso, which required that applicable rules of customary law should not be contrary to public policy or natural justice. This section is still in force and application of customary law in the formal court structures remains discretionary. The interpretation and application of this proviso has been highly prejudicial to Africans, with the result that many customary rules could not be applied. For example, until the passing of the

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<sup>473</sup> 2003(1) SA 495 (CC).

<sup>474</sup> 2005(1) SA 580 (CC).

<sup>475</sup> Information supplied by the clerk of the Cape High Court, 20 April 2005.

<sup>476</sup> Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*, Princeton University Press, Princeton, 1996.

<sup>477</sup> The Black Administration Act, 1927 (Act 38 of 1927).

<sup>478</sup> The Law of Evidence Amendment Act, 1988 (Act 45 of 1988).

Recognition of Customary Marriages Act,<sup>479</sup> customary marriages were not recognised.<sup>480</sup>

Two codes of customary law, the Natal Code<sup>481</sup> and the KwaZulu Code<sup>482</sup>, were recognised prior to 1994 and applied territorially, and they remain in force. Their interaction, application and relation to national legislation remain uncertain, and they have not yet been considered by the courts or the South African Law Reform Commission.<sup>483</sup> However, Section 2 of the Justice Laws Rationalisation Act<sup>484</sup> extended all South African laws across the whole territory of the republic. It is to be supposed that nationally applicable laws, such as the Divorce Act<sup>485</sup>, for example, supersede the provisions of the codes.

The Constitution for the first time recognised customary law as an equal source of law to the common law. Section 211 of the South African Constitution reads:

211 Recognition

- (1) The institution, status and role of traditional leadership, according to customary law, (is) ... recognised subject to the Constitution.
- (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.
- (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

Section 212 states that:

212 Role of traditional leaders

- (1) National legislation may provide for a role for traditional leadership, as an institution at local level on matters affecting local communities.
- (2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law—
  - (a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and
  - (b) national legislation may establish a council of traditional leaders.

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<sup>479</sup> The Recognition of Customary Marriages Act, 1998 (Act 120 of 1998).

<sup>480</sup> TW Bennet, *Human Rights and African Customary Law*, Juta & Co, Cape Town, 1995, p.189.

<sup>481</sup> Promulgated in its current version in Proc R151 of 1987.

<sup>482</sup> Promulgated in terms of KwaZulu homeland legislation, Act 6 of 1981.

<sup>483</sup> TW Bennet, *Human Rights and African Customary Law*, Juta & Co, Cape Town, 1995, p.189.

<sup>484</sup> The Justice Laws Rationalisation Act, 1996 (Act 18 of 1996).

<sup>485</sup> The Divorce Act, 1979 (Act 70 of 1979).

However, the abolition of discriminatory practices has faced great difficulties, since the Black Administration Act, while offensive in many respects, also lays the foundation for the recognition of customary law. The harmonisation of common law and customary law has been the subject of several Law Reform Commission reports and proposals. In 1999, the Law Reform Commission published a Report on the Conflict of Law, which included recommendations on a host of issues, including succession, marriage, evidentiary rules and choice of law rules, but the Law Reform Commission's proposals have not been translated into legislation.<sup>486</sup>

The Traditional Leadership and Governance Framework Act<sup>487</sup> came into operation in September 2004. It provides for the establishment of traditional councils to govern particular traditional communities, which have to fulfil certain requirements before they can be recognised as such.<sup>488</sup> This act requires that at least 40 per cent of the members of the traditional council must be democratically elected,<sup>489</sup> that one-third of the council must comprise of women,<sup>490</sup> and that traditional communities must transform and adapt customary law and customs to comply with the Bill of Rights, particularly by preventing unfair discrimination, promoting equality and progressively realising female leadership.<sup>491</sup>

The customary (chiefs') courts are encompassed by section 166 of the Constitution as 'any other courts established or recognised by an act of Parliament, including any court of a status similar to either the high courts or the magistrates' courts, since they are recognised in the Black Administration Act.<sup>492</sup> In terms of this act, their jurisdiction is limited to 'black' persons and to the application of customary law. Chiefs' courts are further limited in their penal jurisdiction, and may only impose fines, orders of peace and suspended sentences. An appeal from a chiefs' court is passed to a higher-level customary court and, where there is no higher-level customary court, to the magistrates' court. In that case, a magistrate has the discretion as to whether to apply customary law, but must quash proceedings in the chiefs' court if he or she finds that customary law was not applicable between the parties.

Parties who are subject to customary law may of course enter the court system by going to the magistrates' court directly, which will have the discretion to apply customary law. However, for most people in rural areas, chiefs' courts will be closer and more accessible and they are thus regarded as an effective way to deal with a range of every day conflicts. Traditional courts are generally seen as speedy, informal, not intimidating, cheap and accessible. Members of many com-

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<sup>486</sup> In July 2005, a bill to repeal the Black Administration Act of 1927 was introduced to Parliament. Since not all the provisions of the act can be repealed immediately, the bill envisages the repeal of some of the provisions immediately, and others on a particular date in the near future, or on the date of implementation of substitute statutory provisions by different role-players at the national and provincial levels of government.

<sup>487</sup> The Traditional Leadership and Governance Framework Act, 2003 (Act 41 of 2003).

<sup>488</sup> *Ibid.*, Sections 2 to 4.

<sup>489</sup> *Ibid.*, Section 3(2)(c)(ii).

<sup>490</sup> *Ibid.*, Section 3(2)(b).

<sup>491</sup> *Ibid.*, Section 2(3).

<sup>492</sup> The Black Administration Act, 1927 (Act 38 of 1927).

munities would rather appear before these courts than before a magistrate. There is a low appeal rate from traditional courts. Traditional courts substantially reduce the potential work-load of magistrates' courts. These courts exist in almost every area or jurisdiction of a chief or headman. They are also accessible regardless of social status, wealth or education. Legal representation is not permissible in the court of a chief, so justice is affordable. Customary law in these courts consists of rules and customs of that particular community. The informal approach of African traditional courts has been held up as a major advantage over their more formal counterparts, with their complex, technical rules that may allow a perpetrator to benefit from technicalities. The user-friendly procedure allows for parties to present their cases and have their witnesses give their version of events. Thereafter, the chief or headman and his councillors can question them. Members of the public can question the parties and witnesses. The language of the court is normally the local language of the defendants, with no risk of distortion through interpretation.<sup>493</sup>

However, there are problems with these courts, including the participation of women and youth, which has been discouraged to date. Anecdotal evidence suggests a strained relationship between chiefs (often referred to as *amakhosi*) and youth, in particular. This results in a low level of participation of youth in the traditional court system and other aspects of community life. Women struggle, because of their generally limited status in customary law, to participate in the traditional court system, particularly as authority figures. The well-documented struggle for recognition by women and youth in a patriarchal culture also plays itself out in the traditional court system. The marginalisation of key groups, such as the youth and women, still remains a problem with the way in which the courts currently function. It has been argued that a system for monitoring marginalisation and human-rights abuses may be necessary, as well as the monitoring of their engagement and satisfaction with the functioning of the courts.<sup>494</sup>

Chiefs' courts lie outside of the formal court structures and members do not receive training by the DoJCD. It is also a cause for concern that traditional courts hear cases that are, at heart, matters of social control. An example of this is compulsory virginity testing promoted through the courts, and cases relating to pregnancy. It has been argued that these practices deny young girls their sexual and reproductive rights. The *amakhosi* who have stopped practising virginity testing, said that they have done so because of complaints that it 'embarrassed' the girls and was an invasion of their privacy. The *amakhosi* who did support virginity testing did so because they believed it could reduce HIV infection and unplanned pregnancy rates.<sup>495</sup>

In January 2003, following a long discussion period, the Law Reform Commission published a report on traditional courts and the judicial function of traditional leaders.<sup>496</sup> Resulting from this project, the Law Reform Commission has proposed a draft bill on traditional courts.

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<sup>493</sup> M Peters, *Traditional Justice on Trial*, Centre for Socio-Legal Studies, University of Natal.

<sup>494</sup> Ingrid Palmay, *Traditional Leaders in the eThekweni Metropolitan Region: Their Role in Crime Prevention and Safety Promotion*, Centre for the Study of Violence and Reconciliation and the Midlands Women's Group, September 2004, pp.47-48, available at <http://www.csvr.org.za/papers/papalm7.htm>.

<sup>495</sup> *Ibid.*, p.38.

<sup>496</sup> The South African Law Reform Commission Report, *Project 90: Traditional Courts and the Judicial Function of Traditional Leaders*, January 2003.

The draft Traditional Courts Bill seeks to provide uniformity in the manner in which customary courts are constituted and regulated on a national scale. Sections 5 and 6 of this bill state that traditional courts will have jurisdiction over both civil and criminal cases, with the exception of a range of cases, including treason, fraud, murder, culpable homicide, public violence, rape, robbery, assault and domestic violence. There is some controversy around the question of whether the incorporation of adversarial legal practice would undermine the value of the traditional system, through which matters are resolved expeditiously and often with the involvement of the affected community. The bill also makes provision for the participation of women.

The draft Traditional Courts Bill also proposes that customary courts must keep written records of their proceedings, containing the particulars of the case and the judgment. Copies of these records, of the cases heard by each court, should be sent to the commissioner for customary courts for the province in which the court falls. Currently, the original record is sent or delivered by messenger to the magistrates' court in whose area of jurisdiction the chief's court falls. Under current regulations, the traditional leader or a person designated by him or her compiles the record. Where, due to illiteracy, the record cannot be made by the chief or someone under the chief, he or she may verbally furnish, either personally or by messenger, the particulars of the case heard by him to the clerk of the magistrates' court. It is envisaged that under the new system, the customary courts will have a clerk who is literate and who can compile a record for the purposes of the act.<sup>497</sup>

It is envisaged that the draft Traditional Courts Bill of 2003 will supersede the Black Administration Act. The bill has not yet been passed, however, and until such time, the provisions of the Black Administration Act remain in force.

## G. Respect for court orders

Where a court has issued an order against a party to a civil case, and where the person intentionally refuses to comply with it, the person commits contempt of court, which is a common-law criminal offence. Contempt of court orders are regularly issued against private individuals. Although such contempt may be prosecuted, it is usually up to the party wishing to enforce the order to bring an application to court for the conviction of the defaulting party. A court may impose imprisonment as well as a fine, though the sentence will almost always be suspended on condition that the defaulting party complies with the order in the manner prescribed by the court.<sup>498</sup>

The requirements for the issuing of an order for contempt of court, based on non-compliance with a court order, were reiterated in the case of *Townsend-Turner v Morrow*.<sup>499</sup> Firstly, an order had been granted against the respondent; secondly, the respondent had been served with the order or had been informed of the grounds of the order and could have no reasonable grounds for disbelieving the information; and thirdly, the respondent had either disobeyed or

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<sup>497</sup> *Ibid.*, pp.21-22.

<sup>498</sup> Information obtained from *LAWSA*, Vol. 6, first re-issue, chapter 202.

<sup>499</sup> *Townsend-Turner and Anther v Morrow* 2004 (2) SA 32 (C).

neglected to comply with such order. Once these requirements were met, the additional requirements of wilfulness and *mala fides* would be inferred, and the onus was then on the respondent to rebut those inferences.<sup>500</sup> The standard of proof, in contempt-of-court proceedings arising out of non-compliance with a court order, is the balance of probabilities; the civil standard of proof.

When former president PW Botha refused to obey a subpoena issued by the Human Rights Violations Committee of the Truth and Reconciliation Commission (TRC), he was charged with contempt of the Commission, fined and given a suspended jail sentence of 12 months, in August 1998. The Cape High Court overturned his conviction and sentence, however, on technical grounds.<sup>501</sup> By that time, the statutory time-frame within which the TRC operated had come to an end, and no new proceedings were instituted against Botha.

## H. Official mechanisms to assert rights outside the court system

The Constitution makes provision in Chapter 9 for ‘state institutions supporting constitutional democracy’. These bodies, which are independent and accountable to Parliament, provide individuals with an alternative opportunity to seek redress in the case of a violation. Members of these bodies are appointed by the president on the recommendation of Parliament. These bodies fall into two broad categories, human rights and governance/anti-corruption. The key statutory bodies that engage with the public in asserting rights are the following: the SAHRC; the Commission for Gender Equality; the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; and the public protector. In addition to these institutions, the Independent Complaints Directorate (ICD), mandated under the Interim Constitution of 1993 and now by the South African Police Service’s Act, has been discussed in Section 5.B, on Policing.

These institutions have an important role to play in ensuring that the rights of South Africans are protected and respected by government and non-state actors. However, concerns have been raised on the effectiveness of the multitude of institutions and overlapping mandates, within a restricted budget climate.<sup>502</sup> For example, the area of work of the newly established Commission, designed to protect and promote the rights of linguistic, religious and cultural communities, can arguably be adequately undertaken by the SAHRC. Also, it could be argued that matters pertaining to the addressing of gender issues should be a directorate within the SAHRC, rather than a full commission.

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<sup>500</sup> At 49A/B—E.

<sup>501</sup> Human Rights Watch, *World Report 1999*, New York; US Department of State, Bureau of Democracy, Human Rights and Labor, *1999 Country Reports on Human Rights Practices*, available at <http://www.nationbynation.com/SouthAfrica/Human.html>.

<sup>502</sup> Human Rights Watch, *Protectors or Pretenders—Government Human Rights Commissions in Africa*, New York, 2001, p. 306.

## The South African Human Rights Commission

The mandate of the South African Human Rights Commission (SAHRC) is outlined in Section 184 of the South African Constitution. The key activities of the human rights institution are to investigate human rights violations; seek redress for victims of these violations; conduct research; and engage in public awareness and education on human rights. The SAHRC also has the important function to monitor 'measures that have been taken towards the realisation' of social and economic rights.<sup>503</sup>

The powers and functions of the Human Rights Commission and the procedures for the appointments of the commissioners are contained in the Human Rights Commission Act.<sup>504</sup> These include:

- Developing and conducting information programmes to foster public understanding of this act [the Human Rights Commission Act], Chapter 3 of the Constitution [the Bill of Rights], and the role and activities of the Commission;
- Maintaining close liaison with institutions, bodies or authorities similar to the Commission, in order to foster common policies and practices and promote co-operation in relation to the handling of complaints in cases of overlapping jurisdictions;
- Considering such recommendations, suggestions and requests concerning fundamental rights as it may receive from any source;
- Carrying out or causing to be carried out such studies concerning fundamental rights as may be referred to it by the president, and including in a report referred to in Section 118 of the Constitution [public access to and involvement in provincial legislatures] a report setting out the results of each study, together with the recommendations in relation thereto as it considers appropriate; and
- Bringing proceedings in a competent court or tribunal in its own name, or on behalf of a person or a group or class of persons.<sup>505</sup>

The act also protects the Human Rights Commission from 'interference, hindrance or obstruction' from any organ of state, its members or employers, and similarly from any other person or group of persons.<sup>506</sup>

The president appoints members of the Commission, but they are nominated by a cross-party parliamentary committee and approved by a 75 per cent majority in a plenary session of both houses of Parliament. The commissioners serve a seven-year term, subject to re-appointment. The SAHRC is made up of two sections: the Commission, which sets out policy, and a secretariat, which implements policy. Although law provides for up to 11 commissioners, the

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<sup>503</sup> The Constitution of the Republic of South Africa 1996, (Act 108 of 1996), Section 184 (3).

<sup>504</sup> The Human Rights Commission Act 54 of 1994, Section 7.

<sup>505</sup> *Ibid.*, Section 7 (1).

<sup>506</sup> *Ibid.*, Section 4 (2).



SAHRC currently has five full-time commissioners, including the chair and one part-time commissioner.<sup>507</sup> The secretariat currently has a staff of approximately 70. In order to manage its work, the SAHRC is divided into the following departments: advocacy; legal services; research and documentation; and finance and administration.<sup>508</sup>

While the SAHRC is empowered to resolve cases in a court of law, it can also use mediation and conciliation in resolving cases.<sup>509</sup> The SAHRC is granted the power to conduct a search and seizure operation, and issue subpoenas ordering parties to appear before it in the course of an enquiry. The SAHRC has intervened in important litigation as *amicus curiae*, such as in the case of *Grootboom*.<sup>510</sup>

In an attempt to avoid a duplication of case management with other institutions, the SAHRC identifies those matters that should be directed to other bodies. These include misconduct by the police (ICD); misconduct by government officials (public protector); labour matters (Commission for Conciliation, Mediation and Arbitration); and discrimination based on sex (Commission for Gender Equality).

The SAHRC began its work in 1995 under the chair of Barney Pitso, who was succeeded in 2002 by Jody Kollapen. In its early years, the Commission participated, working with the DoJCD, in the formulation of a national action plan for the protection and promotion of human rights in South Africa.<sup>511</sup> Since then, its work has largely been split into two components: the handling of individual complaints of abuses of rights from members of the public, and the holding of inquiries and other broader-based work on the promotion and protection of human rights. In addition, the Commission is responsible for monitoring the implementation of the Promotion of Access to Information Act (see further, Section 2.A above).

In relation to individual complaints, the majority of the SAHRC's work has been in response to issues of equality (discrimination); with other substantial categories being labour relations and issues surrounding arrest and detention.<sup>512</sup>

In its work, beyond the handling of individual complaints, the Commission has emphasised the struggle against racial discrimination and has argued for the realisation of economic and social rights. In 2001, the Commission held a national conference on racism, following

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<sup>507</sup> The commissioners currently are: Jody Kollapen (chair), Zonke Majodina, Tom Manthata, Charlotte McClain Nhlapo; Leon Wessels and Kathy Govender (part time). See [http://www.sahrc.org.za/commissioners\\_and\\_ceo.htm](http://www.sahrc.org.za/commissioners_and_ceo.htm) for further information.

<sup>508</sup> See <http://www.sahrc.org.za/departments.htm>.

<sup>509</sup> The Human Rights Commission Act, Section 8.

<sup>510</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC); See case-study on *Grootboom*, p.31.

<sup>511</sup> The national action plan on human rights protection and promotion in South Africa emanates from the Vienna World Conference on Human Rights, under the auspices of the United Nations Office of the High Commissioner on Human Rights in 1993.

<sup>512</sup> The South African Human Rights Commission, 6th Annual Report April 2001—31 March 2002 (the latest annual report available on the commission's website). See also, the Human Rights Committee of South Africa, *Access*, Vol.2, No. 3, July 2000, pp.8-10.

controversial hearings and reports on racism in the media.<sup>53</sup> In some cases, these investigations followed on from individual complaints: the SAHRC's widely publicised involvement in a case of racism in a state school in Vryburg, for example, culminated in a study on racism and racial integration in public secondary schools.<sup>54</sup> The Commission has also published a series of reports on economic and social rights, where it comments on national policy in the areas of education, housing, health, social welfare and so on. The reports comment systematically on national policy and legislation, outlining possible gaps and failings within them.

In some areas, the Commission has been relatively cautious. In the case of health, for example, the Commission's earlier reports on the subject of HIV/AIDS were limited to comments on the operational plan for HIV/AIDS and the inclusion of HIV/AIDS rights issues in the Patients' Rights Charter; the mainstreaming of gender issues into all HIV/AIDS programme activities; the need to address awareness around acceptance, care and non-discrimination towards people living with HIV/AIDS; the drafting of codes for HIV in the workplace; ensuring ethical guidelines on HIV/AIDS research; drafting clinical guidelines on HIV/AIDS care; issues surrounding tuberculosis (TB); reduction of mother-to-child transmission of HIV; and infant feeding for HIV-positive mothers. The commission's recommendations stated that:

The threat of the HIV/AIDS epidemic can only be addressed by translating political commitment into strong national and provincial programmes, based on past successful best practices, utilising civil society to ensure a national effort against the epidemic. The high prevalence of HIV/AIDS in [the] KwaZulu-Natal and Mpumalanga [provinces] and the rapid rate of increase of HIV/AIDS in the Northern Province, needs to be prioritised as provinces that require urgent intervention. The prevalence of HIV/AIDS in the Western Cape needs to be reassessed. Consideration should be made of the usage of antiretroviral(s) to reduce mother-to-child transmission of HIV.<sup>55</sup>

The emphasis was therefore very much more on prevention and containment of HIV/AIDS, with a limited focus on treatment; this was more or less in line with government policy at the time.

The SAHRC also convened a number of public hearings on human rights issues pertaining to farm workers, on commercial farms in South Africa, between 2002 and 2003. The hearings, which took place over a two-year period and brought together land-rights organisations, farm owners, managers and workers, community leaders and government officials, were documented

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<sup>53</sup> National Conference on Racism: *Final Report*, March 2001; *Faultlines: Inquiry into Racism in the Media*, August 2000; *Racism, 'Racial Integration' and Desegregation in South African Public Secondary Schools*, March 1999; *Inquiry into Racism in the SAPS Vryburg District*, November 1999; *Enquiry into Racism and Racial Discrimination in the Department of Justice and Constitutional Development*, 2002; and *Hate Crimes and Hate Speech*, September 2003. All available at [http://www.sahrc.org.za/sahrc/cms/publish/cat\\_index\\_41.shtml](http://www.sahrc.org.za/sahrc/cms/publish/cat_index_41.shtml).

<sup>54</sup> *Racism, 'Racial Integration' and Desegregation in South African Public Secondary Schools*, the South African Human Rights Commission, March 1999.

<sup>55</sup> The South African Human Rights Commission, *2nd Economic and Social Rights Report*, 1998-1999.

in a report published in June 2004.<sup>516</sup> The Commission also conducted a similar process surrounding the issue of poverty in South Africa. The poverty hearings were conducted in association with the South African Non-Governmental Organisation Coalition (SANGOCO) and the Commission for Gender Equality, between March and June 1998. The findings and recommendations were incorporated into a two-volume report, *On Poverty and Human Rights*, that was published by SANGOCO in October 1998. The SAHRC co-operated with SANGOCO in drafting a national plan of action on poverty. Important in these public hearings was the opportunity for particular human rights concerns to be opened up for debate.

The SAHRC's broad mandate and potential overlap with other bodies requires that it prioritise certain areas of work. Two concerns have been raised in regard to the SAHRC: namely that initially in the first five years after its establishment, it lacked focus and as a result had little impact; and that the SAHRC does not receive adequate support from Parliament, which does not give due consideration to its annual reports.<sup>517</sup>

## The Commission for Gender Equality

The core constitutional mandate of the Commission for Gender Equality is to promote respect for gender equality and the protection, development and attainment of gender equality.<sup>518</sup> In fulfilling its mandate, the Commission has the power to monitor, investigate, research, educate, lobby, advise and report on issues of gender equality.<sup>519</sup> In terms of Section 11 of the Commission on Gender Equality Act,<sup>520</sup> the Commission has the following powers and functions:

- Monitor and evaluate policies and practices [of state and non-state institutions] in order to promote gender equality;
- Develop, conduct or manage [information and educational programmes] to foster public understanding of matters pertaining to the promotion of gender equality and the role and activities of the Commission;
- Evaluate [legislation] in force at the time [of the] commencement of this act or any law proposed by Parliament or any other legislature after the commencement of the act, affecting or likely to affect gender equality or the status of women;
- Recommend to Parliament or any other legislature the adoption of new legislation which would promote gender equality and the [equal] status of women;
- Investigate any gender-related issues of its own accord or on receipt of a complaint;
- As far as is practicable, maintain close liaison[s] with institutions, bodies or authorities with similar objectives to the Commission, in order to foster common policies and

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<sup>516</sup> The SAHRC, *Final Report on the Inquiry into Human Rights Violations in Farming Communities*, June 2004, available at [http://www.sahrc.org.za/5th\\_esr\\_land.pdf](http://www.sahrc.org.za/5th_esr_land.pdf).

<sup>517</sup> Human Rights Watch, *Protectors or Pretenders—Government Human Rights Commissions in Africa*, New York, 2001.

<sup>518</sup> The Constitution of the Republic of South Africa 1996, Section 187 (1).

<sup>519</sup> *Ibid.*, Section 187 (2).

<sup>520</sup> The Commission on Gender Equality Act, 1996 (Act 39 of 1996).

practices and to promote co-operation in relation to the handling of complaints in cases of overlapping jurisdiction ... ;

- Monitor compliance with international conventions, international covenants and international charters, acceded to or ratified by the republic [of South Africa], relating to the object of the Commission;
- Prepare and submit reports to Parliament pertaining to any such convention, covenant or charter relating to the object of the Commission; and
- Consider such recommendations, suggestions and requests concerning the promotion of gender equality as it may receive from any source.

Joyce Piliso Seroke heads the Commission, which comprises four full-time and four part-time members.<sup>521</sup> Commissioners, who serve a five-year term, are assigned provinces and in some cases are physically based in the allocated province. For example, the commissioner based in the Western Cape is responsible for that province. The commission's senior management comprises five officials under the leadership of the Chief Executive Officer, Chana Majake. The Commission has 25 staff at its headquarters in Johannesburg. It has five provincial offices and they are located in the Eastern Cape, the Free State, KwaZulu-Natal, Limpopo and the Western Cape.

In addition to the enabling legislation and the constitutional provisions, a Code of Conduct guides the work of the Commission, including standards of professionalism, accountability and accessibility.<sup>522</sup>

The Commission for Gender Equality's plan of action covers the following areas: governance; gender-based violence; gender and poverty; gender; tradition, culture, religion and sexuality; and gender and HIV/AIDS.<sup>523</sup>

The Commission on Gender Equality was allocated a budget of R 17.3 million for the period between 1 April 2003 and 31 March 2004, by the DoJCD.<sup>524</sup> The annual report of the DoJCD stated that the Commission expended R19.2 million during that period. Donor funding covered the shortfall.

Receiving complaints is an important component of the protective mandate of the Commission. The Commission received 942 complaints between 1 April 2003 and 31 March 2004.<sup>525</sup> According to the report of the DoJCD, 45 per cent of the cases handled were resolved, while 33 per cent were referred to other institutions and 22 per cent remain pending. A majority of these cases relate to domestic violence, sexual assault and sexual harassment. The Commission has also received complaints pertaining to succession and inheritance under African customary

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<sup>521</sup> The commissioners in the Commission on Gender Equality are: B Khumalo (FT); G Fester (FT); N Siqwane Ndulo (FT); R Manjoo (PT); T Kgase (PT); T Maitse (PT); & T Dumisa (PT).

<sup>522</sup> The Commission on Gender Equality, *A Code of Conduct to Guide the Work of the Commission on Gender Equality*, is available at <http://www.cge.org.za/userfiles/codeconduct.html>.

<sup>523</sup> The Commission on Gender Equality, *Annual Report 2002/03*, p.4.

<sup>524</sup> The DoJCD, *Annual Report 2003/04*, p.83.

<sup>525</sup> *Ibid.*, p.79.

law, as well as others concerning custody and access.

In the course of conducting its investigations, the Commission has the power to demand any person to appear before it and to produce documents.<sup>526</sup> Furthermore, the Commission has search and seizure powers.<sup>527</sup>

Promotional work includes engaging with role players, such as provincial government departments and civil society groups, on gender-related issues through workshops, public hearings and training.<sup>528</sup> For example, according to the Commission's 2002/03 annual report, it held a public meeting on gender-based violence and how sexual offences courts operate in Mdantsane, East London, on 16 April 2002. The Commission is involved in a monitoring project to assess the ability of women to access social grants and employment opportunities, in the Public Works Department of the Eastern Cape. The Commission has also engaged in the annual Sixteen Days of Activism on No Violence against Women and Children campaign, which involves holding workshops with civil society organisations and government officials.<sup>529</sup>

## The public protector

The function of the public protector, as provided for in Section 182(1)(a) of the Constitution is, 'to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper, or to result in any impropriety or prejudice'. In contrast to other bodies, the public protector is not only authorised to report on his findings, but also 'to take appropriate remedial action'.<sup>530</sup> The public protector may initiate investigations or do so upon request. The Public Protector Act<sup>531</sup> regulates the office of the public protector.

The office is headed by Advocate Laurence Mushwana, who has been appointed for a seven-year, non-renewable term, as provided for by Section 183 of the Constitution. He follows Selby Baqwa, the inaugural public protector. Parliament amended the Public Protector Act in order to make provision for a deputy public protector;<sup>532</sup> however this post has not been filled. The office has its headquarters in Pretoria, while each province has its own regional office. Seventy-four junior and senior investigators comprise the staff complement.

The DoJCD allocated R 43 519 million towards the work of the office, which spent R43 115 million during the 2003/04 year.<sup>533</sup> Between 1 April 2003 and 31 March 2004, the public protector, through its investigators, had finalised 192 cases at its national office, 245 cases at its North West regional office and 198 at its other regional offices.<sup>534</sup> During this period, the offices of the

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<sup>526</sup> The Commission on Gender Equality Act, 1996 (Act 39 of 1996), Section 12 (4) (a) and (b).

<sup>527</sup> *Ibid.*, Section 13.

<sup>528</sup> The DoJCD, *Annual Report 2003/04*, pp.38-49.

<sup>529</sup> *Ibid.*, p.23.

<sup>530</sup> The Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), Section 182 (1)(b) & (c).

<sup>531</sup> The Public Protector Act, 1994 (Act 23 of 1994).

<sup>532</sup> The Public Protector Amendment Act, 2003 (Act 22 of 2003).

<sup>533</sup> The DoJCD, *Annual Report 2003/04*. 2005, p.85.

<sup>534</sup> *Ibid.*, p.81.

public protector received 17 295 complaints and resolved 15 946 (this number includes pending cases from previous years).

Special reports are published following such investigations. In the first five years of its work, some of the reports published by the public protector include an investigation on the Mpumalanga housing project (Report 8); a public statement by the premier of Mpumalanga, Ndaweni Mahlangu (Report 12); and alleged irregularities with regard to the affairs and financial statements of the Strategic Fuels Fund Association (Report 13).<sup>555</sup> The Mpumalanga legislature rejected the public protector's recommendation, arguing that the public protector had acted beyond his powers in investigating the matter<sup>556</sup> (initial matter in the list above).

The current Public Protector, Lawrence Mushwana, was formerly an MP for the ANC. As such, he has encountered charges from opposition parties that his political allegiance would compromise his independence. He has been criticised by opposition parties and the media in two cases in particular: his finding that the NDPP had infringed the Deputy President's dignity by stating that there was a *prima facie* case against him, but not prosecuting the charges; and his report on allegations that a private oil company illegally diverted public funds received from the state oil company to the ANC. The *Mail & Guardian* declared its intention to ask the Johannesburg High Court to review the public protector's findings in relation to the 'oilgate' scandal, under the Promotion of Administrative Justice Act.<sup>557</sup>

## The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities

The constitutional mandate of this Commission, which is the last Chapter 9 institution to be established, is contained in Section 185(1) of the Constitution and states that the Commission shall:

- Promote respect for the rights of cultural, religious and linguistic communities;
- Promote and develop peace, friendship, humanity, tolerance and national unity among cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association; and
- Recommend the establishment or recognition, in accordance with national legislation, of a cultural community or communities in South Africa.

The Constitution requires that the members of the Commission are broadly representative of the main cultural, religious and linguistic communities, and reflect the gender composition in South Africa.<sup>558</sup> The president appointed the 17-member body, to be chaired by Dr Guma in September

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<sup>555</sup> The Human Rights Committee of South Africa, 'National Institutions Project', in *Access*, Volume 2, Quarterly 2, April 2000, p.13.

<sup>556</sup> *Ibid.*, p.14.

<sup>557</sup> Case study on the Schabir Shaik and Jacob Zuma prosecutions, p.34; 'M&G vs Mushwana', *Mail & Guardian*, 4 August 2005, available, with other reports on the issue, at <http://www.mg.co.za/specialreport.aspx?area=oilgate>.

<sup>558</sup> The Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), Section 186 (2).

2003, in accordance with the Commission for the Promotion of the Rights of Cultural, Religious and Linguistic Communities Act.<sup>539</sup>

The Commission, which became operational on 1 January 2004, has eight staff members, including the chief executive officer. The chief executive officer of the Commission is Ms Pumla Madiba, who is responsible for its day-to-day management. The Commission was due to advertise posts for six additional staff members in mid-2005.<sup>540</sup> Since the Commission began its work, it has received some 20 complaints.

## I. Non-state mechanisms and alternative dispute resolution

In addition to the formal court system, commercial arbitration and mediation are used widely in the business sector, although the legislative framework providing for domestic and international arbitration is outdated. The DoJCD has demonstrated support for alternative dispute resolution, through a South African Law Reform Commission project<sup>541</sup> that recommends updating the existing legislation of Domestic Arbitration.<sup>542</sup> The Law Reform Commission also recommended the [drafting of the] International Arbitration Bill in July 1998. To date, however, no legislation has been passed comprehensively overhauling domestic arbitration or international arbitration. Arbitration proceedings are subject to judicial review in the high court only, unless the arbitration agreement provides for an appeal mechanism. There are several quasi-state institutions supporting mediation and arbitration. The Commission for Conciliation, Mediation and Arbitration is the forum responsible for settling labour disputes in terms of the Labour Relations Act.<sup>543</sup>

The SAHRC and the Commission for Gender Equality are also empowered to settle human rights disputes, using alternative dispute-resolution mechanisms.

Among poorer communities, street committees play a large role in South African urban life, which is a remnant of the apartheid policy of providing limited, or no, justice and police services in urban townships. There is a concern that non-state mechanisms of dispute resolution, such as street committees, are turning into vigilante movements, but they do provide affordable and accessible recourse for the majority of South Africans who cannot afford formal legal services or are alienated by the formal legal process.<sup>544</sup>

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<sup>539</sup> The Commission for the Promotion of the Rights of Cultural, Religious and Linguistic Communities Act, 2002 (Act 19 of 2002); Members of the Commission are: Dr Guma, Ms Bethlehem, Mr B Mgcina, Dr O Mnende, Dr M Jobson, Pastor M Ntlha, Ms Soni Amin, Prof. S Dangor, Dr M Dockrat, Dr T Magwaza, Prof. S Ngubane, Dr L Boshego, Ms D Mboweni-Marais, Ms Le Roux, Mr H Gouvalis, Dr W A Boesak & Dr Langeveldt.

<sup>540</sup> E-mail communication with the chief executive officer, 29 March 2005.

<sup>541</sup> The South African Law Reform Commission Report, *Project 94: Domestic Arbitration*, May 2001.

<sup>542</sup> Arbitration is currently governed by the Arbitration Act, 1965 (Act 42 of 1965).

<sup>543</sup> Labour Relations Act, 1995 (Act 66 of 1995).

<sup>544</sup> See also Section 5.F on 'Non-state action against crime', p.104.

# 7

## Development assistance

Every government department, including the Department of Justice and Constitutional Development (DoJCD), publishes an annual report, which includes figures for assistance received. In South Africa, development assistance plays a relatively minor role in the budget.

The DoJCD records in its annual statement for 2003/4 that it received a total of R20 986 000 in local and foreign-aid assistance as revenue. This contrasts sharply with the figures recorded for the year 2002/03 of R166 992 000,<sup>545</sup> as well as for 2001/02 of R4 845 000.<sup>546</sup> The department's annual report records the receipt of donor funding in two particular instances—firstly in relation to the Justice College, where funding has been received from a variety of international government agencies,<sup>547</sup> and secondly in relation to the Commission on Gender Equality.<sup>548</sup>

Financial assistance is given to civil society organisations as well as the government sector. The non-governmental sector is regulated by the Nonprofit Organisations Act,<sup>549</sup> which has as its stated object the encouragement and support of 'non-profit organisations in their contribution to

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<sup>545</sup> The DoJCD, *Annual Report 2003/04*, see Income Statement.

<sup>546</sup> The DoJCD, *Annual Report 2002/03*, see Income Statement.

<sup>547</sup> The DoJCD *Annual Report 2003/4* pp. 34-35; namely, the restructuring of the Judiciary Project funded by the French Embassy; the Training of Interpreters (tutor programme) funded by the government of the Kingdom of Denmark; the Fast-Track Training for Civil Magistrates funded by the government of the Kingdom of Denmark; the Canada-South Africa Justice Linkage Project; and the Criminal Justice Strengthening Programme funded by USAid.

<sup>548</sup> *Ibid.*, p.79.

<sup>549</sup> Non-Profit Organisations Act, 1997 (Act 71 of 1997).



meeting the diverse needs of South Africans'.<sup>550</sup> The act establishes the Directorate for Non-Profit Organisations,<sup>551</sup> which among other functions, is obliged to prepare and issue codes of good practice for non-profit organisations, and persons, bodies and organisations making donations and grants to non-profit organisations.<sup>552</sup> This requirement applies whether a non-profit organisation is registered in terms of the act or not. A non-profit organisation is defined by the act as being an organisation that is established for a public purpose and 'the income and property of which are not distributable to its members or office-bearers, except as reasonable compensation for services rendered'.<sup>553</sup> Registration in a registry of non-profit organisations is voluntary,<sup>554</sup> but the act authorises the minister to prescribe benefits or allowances to apply to registered organisations.<sup>555</sup> No such regulations have been passed to date.

Donor agencies hire employees and engage consultants from the private pool of labour that is available in South Africa, and this does not affect the working of government departments.

In general, development assistance has been provided for human rights objectives both within government and to civil society organisations, including human rights training for the police and others. South Africa has many organisations supported by development assistance from government and non-governmental sources, whose focus lies in the area of human rights.

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<sup>550</sup> Ibid., Section 2: Objects of Act

The objects of this act are to encourage and support non-profit organisations in their contribution to meeting the diverse needs of the population of the republic by

- (a) Creating an environment in which non-profit organisations can flourish;
- (b) Establishing an administrative and regulatory framework within which non-profit organisations can conduct their affairs;
- (c) Encouraging non-profit organisations to maintain adequate standards of governance, transparency and accountability and to improve these standards;
- (d) Creating an environment within which the public may have access to information concerning registered non-profit organisations; and
- (e) Promoting a spirit of co-operation and shared responsibility within government, donors and amongst other interested persons in their dealings with non-profit organisations.

<sup>551</sup> Ibid., Section 4.

<sup>552</sup> Ibid., Section 6(1)(b).

<sup>553</sup> Ibid., Section 1.

<sup>554</sup> Ibid., Section 12.

<sup>555</sup> Ibid., Section 11.

# Annex A: Human rights treaties

List of human rights treaties supplied by the Office of the Chief State Law Adviser (international law), Department of Foreign Affairs, March 2005:

The Republic of South Africa is party to the below Conventions, that have been ratified/ acceded/adhered to, or by definitive signature:

- Convention for the Suppression of Traffic in Women and Children, Geneva, 1921
  - Signed (definitive) on 28 June 1922
  
- Slavery Convention, Geneva, 1926
  - Acceded on 18 June 1927
  
- Convention for the Suppression of Traffic in Women of Full Age, Geneva, 1933
  - Signed (definitive) on 20 November 1935
  
- Protocol to amend the Convention for the Suppression of Traffic in Women and Children of 1921 and the Convention for the Traffic of Women of Full Age of 1933, Lake Success, 1947
  - Signed (definitive) on 12 November 1947
  
- Convention on the Prevention and Punishment of the Crime of Genocide, 1948
  - Acceded on 10 December 1998
  
- Geneva Conventions I to IV, 1949
  - Acceded on 31 March 1952
  
- International Agreement for the Suppression of White Slave Traffic (1904), amended by Protocol, 1949
  - Accepted on 14 August 1951
  
- International Convention for the Suppression of White Slave Traffic (1910), amended by Protocol, Lake Success 1949

- Accepted on 14 August 1951
- The Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others, plus Final Protocol, Lake Success, New York, 1950
  - Ratified on 10 October 1951
- Convention relating to the Status of Refugees, 1951
  - Acceded on 12 January 1996
- Convention Against Discrimination in Education, 1960
  - Acceded on 9 March 2000
- Protocol amending the Slavery Convention of 1926, New York 1957
  - Signed (definitive) on 29 December 1953
- Convention on the Nationality of Married Women, 1957
  - Signed on 29 January 1993; acceded on 17 December 2002
- Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1962
  - Acceded on 29 January 1993
- International Convention on the Elimination of All Forms of Racial Discrimination, New York, 1966
  - Signed on 3 October 1994; ratified on 10 December 1998

Declaration:

The Republic of South Africa—

  - (a) declares that, for the purposes of paragraph 1 of article 14 of the Convention, it recognises the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals, within the republic's jurisdiction, claiming to be victims of a violation by the republic in any of the rights set forth in the Convention, after having exhausted all domestic remedies; and
  - (b) indicates that, for the purposes of paragraph 2 of article 14 of the Convention, the South African Human Rights Commission is the body within the republic's national legal order, which shall be competent to receive and consider petitions from individuals, or groups of individuals within the republic's jurisdiction, who claim to be victims of any of the rights set forth in the Convention.

- International Covenant on Civil and Political Rights, 1966
  - Signed on 3 October 1994; ratified on 10 December 1998
  - Declaration:  
The Republic of South Africa declares that it recognises, for the purposes of article 41 of the covenant, the competence of the Human Rights Commission to receive and consider communications to the effect that a state party claims that another state party is not fulfilling its obligations under the present covenant.
- Optional Protocol to the International Covenant on Civil and Political Rights, 1966
  - Signed on 3 October 1994; ratified on 10 December 1998
- Protocol relating to the Status of Refugees, 1967
  - Acceded on 12 January 1996
- OAU Convention Governing Specific Aspects of Refugee Problems in Africa, 1969
  - Acceded on 15 December 1995
- Protocols I and II to the Geneva Conventions of 1949, relating to the Protection of Victims of International and Non-International Armed Conflicts, 1977
  - Acceded on 21 November 1995
- Convention on the Elimination of All Forms of Discrimination against Women, 1979
  - Signed on 29 January 1993; ratified on 15 December 1995
- Hague Convention on the Civil Aspects of International Child Abduction, 1980
  - Acceded on 8 July 1997
- The African Charter on Human and Peoples' Rights, Banjul, June 1981
  - Adhered on 9 July 1996
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984
  - Signed on 29 January 1993; ratified on 10 December 1998
  - Declarations:  
The Republic of South Africa declares that:  
it recognises, for the purpose of article 30 of the convention, the competence of the International Court of Justice to settle a dispute between two or more state parties, regarding the interpretation or application on the convention, respectively; and  
it recognises, for the purpose of article 21 of the convention, the competence of the Committee Against Torture to receive and consider communications that a state party claims that another state party is not fulfilling its obligations under the

convention; and

it recognises, for the purpose of article 22 of the convention, the competence of the Committee Against Torture to receive and consider communications from, or on behalf of, individuals who claim to be victims of torture by a state party.

- Convention on the Rights of the Child, 1989
  - Signed on 29 January 1993; and ratified on 16 June 1995
- Amendment to article 43 (2) of the Convention on the Rights of the Child, 1995
  - Accepted on 5 August 1997
- African Charter on the Rights and Welfare of the Child, July 1990
  - Signed on 10 October 1997; ratified on 7 January 2000
- Protocol to the African Charter on Human and Peoples' Rights, on the establishment of an African Court on Human and Peoples' Rights, 1998
  - Signed on 10 June 1998; ratified on 3 July 2002
- Protocol to the African Charter on Human and Peoples' Rights, on the Rights of Women in Africa, 2003
  - Signed on 16 March 2004; ratified on 17 December 2004
- Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2000
  - Acceded on 30 June 2003
- Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the UN Convention against Transnational Organised Crime, 2000
  - Signed on 14 December 2000; ratified on 20 February 2004
- Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime, 2000
  - Signed on 14 December 2000; ratified on 20 February 2004
- Protocol against the Illicit Manufacturing of and Trafficking in Firearm(s) Parts, Components and Ammunition, supplementing the United Nations Convention against Transnational Organised Crime, 2001
  - Signed on 14 October 2002; ratified on 20 February 2004

In addition, South Africa has signed the following treaties:

- Convention on the Political Rights of Women, 1953
  - Signed on 29 January 1993
  
- International Covenant on Economic, Social and Cultural Rights, 1966
  - Signed on 3 October 1994
  
- Optional Protocol to the Convention on the Rights of the Child, on the involvement of children in armed conflict, 2000
  - Signed on 8 February 2002

# Annex B: Notable laws affecting the justice system

Important South African laws affecting the justice system, passed since 1994.<sup>556</sup>

- The Judicial Service Commission Act 9 of 1994.
- The Public Protector Act 23 of 1994.
- The Human Rights Commission Act 54 of 1994.
- The Constitutional Court Complementary Act 13 of 1995.
- The Promotion of National Unity and Reconciliation Act 34 of 1995.
- The Right of Appearance in Courts Act 62 of 1995.
- The Judicial Matters Amendment Act 85 of 1995.
- The Justice Laws' Rationalisation Act 18 of 1996.
- The National Youth Commission Act 19 of 1996.
- The Commission on Gender Equality Act 39 of 1996.
- The Electoral Commission Act 51 of 1996.
- The Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996.
- The Special Investigating Units and Special Tribunals Act 74 of 1996.
- The International Co-operation in Criminal Matters Act 75 of 1996.
- The Criminal Procedure Amendment Act 86 of 1996.
- The State of Emergency Act 64 of 1997.
- The Contingency Fees Act 66 of 1997.
- The Natural Fathers of Children Born out of Wedlock Act 86 of 1997.
- The Criminal Law Amendment Act 105 of 1997.
- The National Prosecuting Authority Act 32 of 1998.
- The Magistrates' Courts Amendment Act 67 of 1998.
- The Maintenance Act 99 of 1998.
- The Witness Protection Act 112 of 1998.

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<sup>556</sup> The Department of Justice and Constitutional Development, laws administered by the DoJCD. Available at [www.doj.gov.za/2004dojsite/legislation/acts/act\\_admin/acad90.htm](http://www.doj.gov.za/2004dojsite/legislation/acts/act_admin/acad90.htm), accessed on 20 July 2005.

- The Debt Collectors Act 114 of 1998.
- The Domestic Violence Act 116 of 1998.
- The Recognition of Customary Marriages Act 120 of 1998.
- The Prevention of Organised Crime Act 121 of 1998.
- The Promotion of Access to Information Act 2 of 2000.
- The Promotion of Administrative Justice Act 3 of 2000.
- The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.
- The Protected Disclosures Act 26 of 2000.
- The Cross-Border Insolvency Act 42 of 2000.
- The Supreme Court Decree Amendment Act 16 of 2001.
- The Administration of Estates Laws Interim Rationalisation Act 20 of 2001.
- The Interim Rationalisation of Jurisdiction of High Courts Act 41 of 2001.
- The Judges Remuneration and Conditions of Employment Act 47 of 2001.
- The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.
- The Reinstatement of Enrolment of Certain Deceased Legal Practitioners Act 32 of 2002.
- The Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002.
- The Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002.
- The Judicial Officers Act 28 of 2003.
- The Judicial Matters Second Amendment Act 55 of 2003.
- The Prevention and Combating of Corrupt Activities Act 12 of 2004.



# Annex C: Court structure

*Table of relevant laws applying to each court, supplied by the Department of Justice and Constitutional Development:<sup>557</sup>*

## A. Constitutional framework

In terms of Section 166 of the Constitution, the courts are:

- The Constitutional Court;
- The Supreme Court of Appeal;
- The high courts, including any high court of appeal established by an act of Parliament to hear appeals from high courts;
- The magistrates' courts; and
- Any other court established or recognised by an act of Parliament, including any court with a status similar to either the high courts or the magistrates' courts.

## B. Existing courts

### B.1 Superior courts

Court	Origin	Related legislation
Constitutional Court	Section 167 read with item 16(2) of Schedule 6 of the Constitution	Constitutional Court Complementary Act 13 of 1995
Supreme Court of Appeal	Section 168 read with item 16(3) of Schedule 6 of the Constitution	Supreme Court Act 59 of 1959
High courts	Section 166(c) read with item 16(4) of Schedule 6 of the Constitution	Supreme Court Act 59 of 1959

<sup>557</sup> See the DoJCD website, available at [http://www.doj.gov.za/2004dojsite/ab\\_dojcd/2001\\_courtstructures.htm](http://www.doj.gov.za/2004dojsite/ab_dojcd/2001_courtstructures.htm), for further information. Last accessed on 19 September 2005.

Labour appeal court	Section 167 of the Labour Relations Act 66 of 1995	Section 166(c) and (e) read with item 16(1) of Schedule 6 of the Constitution
Labour court	Section 151 of the Labour Relations Act 66 of 1995	Section 166(c) read with item 16(1) of Schedule 6 of the Constitution
Land claims court	Section 22 of the Restitution of Land Rights Act 22 of 1994	Section 166(c) read with item 16(1) of Schedule 6 of the Constitution
Special income tax courts	Section 83 of the Income Tax Act 58 of 1962	Section 166(c) read with item 16(1) of Schedule 6 of the Constitution
Competition appeal court	Section 36 of the Competition Act 89 of 1998	Section 166(c) of the Constitution
Special (consumer) courts	Section 13 of the Consumer Affairs (Unfair Business Practices) Act 71 of 1988	Sections 84, 85 and 86A of the Income Tax Act 58 of 1962 ( <i>mutatis mutandis</i> applicable)
Electoral court	Section 18 of the Electoral Commission Act 51 of 1996	Section 166(c) read with item 16(1) of Schedule 6 of the Constitution

### B.2 Lower Courts

Court	Origin	Related legislation
Magistrates' courts	Magistrates' Courts Act 32 of 1944	Item 16(2) of Schedule 6 of the Constitution
Divorce courts	Section 10 of the Administration Amendment Act 9 of 1929	<ul style="list-style-type: none"> <li>Item 16(2) of Schedule 6 of the Constitution</li> <li>Divorce Courts Amendment Act 65 of 1997 (especially the Preamble)</li> </ul>
Small claims courts	Small Claims Courts Act 61 of 1984	Item 16(2) of Schedule 6 of the Constitution
Courts of chiefs and headmen	Sections 12 and 20 of the Black Administration Act 38 of 1927	Item 16(2) of Schedule 6 of the Constitution
Short process courts (No such courts are presently in existence)	Short Process Courts and Mediation in Certain Civil Cases Act 103 of 1991	Item 16(2) of Schedule 6 of the Constitution

## C. Jurisdiction of existing courts

### C.1 Superior courts

Court	Jurisdiction
Constitutional Court	<ul style="list-style-type: none"> <li>• Section 167(3) to (5) of the Constitution—the highest court in all constitutional matters</li> <li>• Section 173 of the Constitution—with the inherent power to regulate process and to develop common law</li> </ul>
Supreme Court of Appeal	<ul style="list-style-type: none"> <li>• Section 168(3) of the Constitution—the highest court of appeal in all except constitutional matters</li> <li>• Section 173 of the Constitution—with the inherent power to regulate process and to develop common law</li> </ul>
High courts	<ul style="list-style-type: none"> <li>• Section 169(a) of the Constitution—any constitutional matter not falling within the exclusive jurisdiction of the Constitutional Court or assigned to another court of a status similar to a high court</li> <li>• Section 169(b) of the Constitution—any other matter not assigned to another court by an act of Parliament</li> <li>• Section 173 of the Constitution—inherent power to regulate process and to develop common law</li> <li>• Section 19 of the Supreme Court Act 59 of 1959—general jurisdiction, including determination of appeals from, and review of, the proceedings of inferior courts</li> </ul>
Labour appeal court	<ul style="list-style-type: none"> <li>• Section 173 of the Labour Relations Act 66 of 1995—exclusive jurisdiction to determine appeals from the labour court, and to decide questions of law in terms of section 158(4) of the act</li> <li>• Section 173 of the Constitution—inherent power to regulate process and to develop common law</li> </ul>
Labour court	<ul style="list-style-type: none"> <li>• Section 157(1) of the Labour Relations Act 66 of 1995—exclusive jurisdiction in respect of all matters which must, in terms of the act or any other law, be determined by the labour court</li> <li>• Section 157(2) of the Labour Relations Act—concurrent jurisdiction with the high courts in respect of violations of fundamental rights related to labour matters</li> <li>• Section 173 of the Constitution—inherent power to regulate process and to develop common law</li> </ul>
Land claims court	<ul style="list-style-type: none"> <li>• Section 22 of Restitution of Land Rights Act 22 of 1994—exclusive jurisdiction to determine matters emanating from the application of the act</li> <li>• Section 173 of the Constitution—inherent power to regulate process and to develop common law</li> </ul>

Special income tax courts	<ul style="list-style-type: none"> <li>•Section 83 of the Income Tax Act 58 of 1962—hearing of income tax appeals</li> </ul>
Competition appeal court	<ul style="list-style-type: none"> <li>•Section 37 of the Competition Act 89 of 1998—to consider appeals from, or review decisions of, the Competition Tribunal</li> <li>•Section 173 of the Constitution—inherent power to regulate process and to develop common law</li> </ul>
Special (consumer) court	<ul style="list-style-type: none"> <li>•Section 13(1) of the Consumer Affairs (Unfair Business Practices) Act 71 of 1988—adjudication of matters in terms of the Act</li> </ul>
Electoral court	<ul style="list-style-type: none"> <li>•Section 20 of the Electoral Commission Act 51 of 1996. The Court: <ul style="list-style-type: none"> <li>•May review any decision of the Electoral Commission relating to an electoral matter;</li> <li>•May hear and determine appeals against any decision of the Commission;</li> <li>•Must determine which courts shall have jurisdiction to hear particular disputes and complaints about infringements of the Electoral Code of Conduct;</li> <li>•May hear and determine any matter relating to the interpretation of any law referred to it by the Commission; and</li> <li>•May investigate any allegation of misconduct, incapacity or incompetence of a member of the Commission.</li> </ul> </li> </ul>

### C.2 Lower courts

Court	Jurisdiction
Magistrates' courts	<ol style="list-style-type: none"> <li>1. Civil jurisdiction: <ul style="list-style-type: none"> <li>•Section 45 of Magistrates' Courts Act 32 of 1944—jurisdiction by consent if the matter would otherwise fall outside their jurisdiction; and</li> <li>•Section 46 of Magistrates' Courts Act—matters beyond their jurisdiction.</li> </ul> </li> <li>2. Criminal jurisdiction—Section 89 of Magistrates' Courts Act: <ul style="list-style-type: none"> <li>•Regional courts have jurisdiction in all matters except treason; and</li> <li>•District courts have jurisdiction in all matters except treason, murder and rape.</li> </ul> </li> <li>3. Penal jurisdiction—Section 92 of Magistrates' Courts Act: <ul style="list-style-type: none"> <li>•Regional courts—imprisonment not exceeding 15 years, fine not exceeding R300 000 (amount determined by notice in the Gazette); and</li> <li>•District courts— imprisonment not exceeding three years, fine not exceeding R60 000 (amount determined by notice in the Gazette).</li> </ul> </li> </ol>

	<p>4. Other jurisdiction as determined by various acts of Parliament, notably the following:</p> <ul style="list-style-type: none"> <li>•Section 12(4) of the Black Administration Act 38 of 1927— hearing of (civil) appeals against decisions by chiefs and headmen;</li> <li>•Section 3 of the Maintenance Act 99 of 1998—every magistrate’s court is a maintenance court for the purposes of that act;</li> <li>•Section 6 of the Inquests Act 58 of 1959—holding of inquests by magistrates or regional magistrates;</li> <li>•Section 7 of the Close Corporations Act 69 of 1984— adjudication of matters emanating from the act, including liquidation of Close Corporations;</li> <li>•Section 1 of the Promotion of Administrative Justice Act 3 of 2000—review of administrative actions;</li> <li>•Sections 1 and 78 of the Promotion of Access to Information Act 2 of 2000—applications regarding decisions not to disclose information;</li> <li>•Sections 1 and 16 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000—every magistrate’s court is an equality court; and</li> <li>•Section 4(2) of the Children’s Act 33 of 1960—every magistrate’s court is a children’s court.</li> </ul>
Divorce courts	Section 10(1) of the Administration Amendment Act 9 of 1929—divorce matters
Small claims courts	Sections 15 (causes of action) and 16 (matters beyond jurisdiction) of the Small Claims Courts Act 61 of 1984
Courts of chiefs and headmen	<ul style="list-style-type: none"> <li>•Section 12 of the Black Administration Act 38 of 1927—civil disputes</li> <li>•Section 20 of the Black Administration Act—certain offences</li> </ul>
Short process courts	Section 9 of the Short Process Courts and Mediation in Certain Civil Matters Act 103 of 1991—the adjudication of disputes which could not be resolved through mediation in terms of the act

# Annex D: Sources on management of the justice sector

In answering the questions set out relating to Section 3, 'Management of the justice sector', the following sources have been used:

- Justice Vision 2000, at the Department of Justice and Constitutional Development site, available at <http://www.doj.gov.za/>.
- Government Batho Pele Policy Statement.
- The Charter for Service Delivery for Court Users 1999, at the Department of Justice and Constitutional Development site, available at <http://www.doj.gov.za/>.
- Gender Policy Statement 1999—Balancing the Scales of Justice through Gender Equality, at the Department of Justice and Constitutional Development site, available at <http://www.doj.gov.za/>.
- The Annual General Report of the Department of Justice and Constitutional Development 2003/4.
- The South African Year Book, Government Communication and Information Systems (GCIS), available at <http://www.gcis.gov.za>.
- Stack & Sogot, Enhancing Policy Implementation—Lessons from the Justice Sector, Centre for Policy Studies, Johannesburg, October 2001.
- Chaskalson & de Jong Consulting—Family Courts Policy Document, December 2002.
- C Rickard, The South African Judicial Service Commission, available at [www.law.cam.ac.uk/docs/view.php?doc=879](http://www.law.cam.ac.uk/docs/view.php?doc=879).
- Government Communication and Information Services, available at <http://www.gcis.gov.za>.
- The South African government site, available at <http://www.gov.za/>.
- The South African government site—Justice section, available at <http://www.info.gov.za/structure/justice.htm>.
- The polity site for government information, including acts and bills, available at <http://www.polity.org.za/pol/home/>.

- The Department of Justice and Constitutional Development, available at <http://www.doj.gov.za/>.
- The Constitutional Court, available at <http://www.concourt.gov.za/>.
- The Supreme Court of Appeal, available at <http://wwwserver.law.wits.ac.za/sca/index.php>.
- The South African Treasury, available at [www.treasury.gov.za](http://www.treasury.gov.za).

Where additional sources were used, this is indicated in the text.

# Annex E: Policing in South Africa

