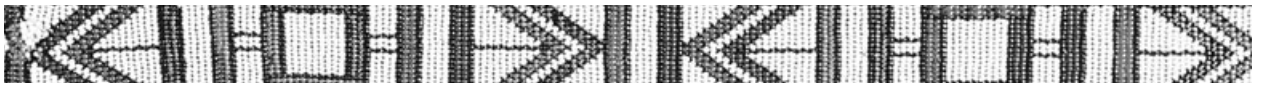


# South Africa

## Justice Sector and the Rule of Law

A DISCUSSION PAPER



AfriMAP and Open Society Foundation for South Africa

2005



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Collection of the Orlando Museum of Art, gift of Norma Canelas and William D. Roth

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# Introduction

This discussion paper is based on a comprehensive report on the South African legal system entitled *South Africa: Justice Sector and the Rule of Law* (the main report). The main report is the product of a year-long, questionnaire-based research project that solicited views and information from across civil society. It is one of a series of reports on South Africa and other African countries to be produced by AfriMAP, a project of the Open Society Foundation (OSF) that is being run in conjunction with OSI's foundations in Africa (for this report with the Open Society Foundation for South Africa).

The idea behind AfriMAP is to conduct an audit of African governments' compliance with African and international standards on human rights and good governance, including the commitments made in national constitutions. The reports are intended to be a resource for human rights activists in the countries concerned, and for those working in other African countries, to improve respect for human rights and democratic values on the continent.

This discussion paper is not a summary of the main report, which should be read in its own right. Rather, it aims to draw together information and arguments from the main report under the following five headings:

- South Africa's record in ratifying, domesticating and reporting under international human rights treaties
- The independence of the judiciary and the National Prosecuting Authority
- The implementation of laws
- Crime and punishment
- Access to justice.

These areas have been identified as the five most important areas of concern emerging from the main report. The purpose in highlighting them in this discussion paper is twofold. First, we hope that this will assist government in identifying the main issues that still need to be addressed in transforming the South African legal system from one based on the principle of racial superiority to one based on the principle of democracy and justice for all. Secondly, we hope that this paper will stimulate discussion about the role of civil society in assisting government to achieve this goal, and in holding government to account in the event that it falls short.



# I: International human rights treaties

South Africa has played a significant role in the globalisation of human rights, first during the pre-democratic era, when the language of human rights was mobilised in opposition to apartheid, and thereafter in the design of its two post-apartheid constitutions. The 1996 Constitution, in particular, is recognised as one of the most sophisticated and human-rights friendly constitutions in the world. South Africa's reputation in this regard, however, is based on the strength of its domestic human rights regime. At the international level, South Africa has not lived up to its own high standards in at least three respects: its failure to ratify several important international human rights treaties, its failure to enact certain other treaties into law once ratified, and its poor record in reporting on its adherence to those treaties to which it is a party. This section briefly explores the constitutional provisions on the application of international law before examining South Africa's record in these three areas. It then posits two possible explanations for South Africa's mixed record in complying with the procedural steps required to give effect to its support for the international human rights law regime. On the basis of this analysis, various recommendations are made about what needs to be done.

Section 39(1)(b) of the 1996 South African Constitution provides that, when interpreting the Bill of Rights, 'a court, tribunal or forum ... must consider international law'. Although this provision has not resulted in international law being considered as much as might have been expected, the Constitutional Court has been more open to international law arguments than many other courts of equivalent status. According to one review, the Constitutional Court has considered international law in detail in 14 per cent of cases decided during the first decade of its existence. Although this percentage is perhaps lower than might have been expected, given the injunction in section 39(1)(b), it is still far higher than the percentage in most other countries.

Unfortunately, the record of the political branches of government in supporting the international human rights regime is less impressive. The main provision dealing with this issue is section 231 of the Constitution. This section draws a distinction between the negotiation and signing of international agreements, which is an exclusively executive function, and the ratification and domestication of such agreements, which depends on a measure of co-operation between the executive and the legislature. With the exception of agreements of a 'technical, administrative or executive nature' (for example, agreements relating to the activities of

the World Health Organisation), an international agreement is not binding on South Africa unless it has been approved by resolution of the National Assembly and the National Council of Provinces. For an international agreement to become law in South Africa, it must further be enacted into law by national legislation.

Since the transition to democracy in 1994, South Africa has become party to five of the most important treaties in the international human rights system: the International Covenant on Civil and Political Rights; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Elimination of All Forms of Discrimination against Women; the International Convention on the Elimination of All Forms of Racial Discrimination; and the Convention on the Rights of the Child. However, South Africa—in common with most countries that receive rather than send migrant workers—has not as yet signed the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. It has also failed to sign the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (which allows individuals to lodge complaints with the United Nations), and the Optional Protocol to the Convention against Torture (which seeks to establish a system of international visits to sites where people are detained). Three other important treaties have been signed but not ratified: the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Political Rights of Women, and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. As noted above, South Africa is widely and justifiably seen as a world leader in the field of human rights law. Its failure to become a party to these treaties is therefore disappointing. Given the inclusion of an extensive list of social and economic rights in the 1996 Constitution, and the high proportion of women in Parliament, South Africa's failure to ratify the ICESCR and the Convention on the Political Rights of Women (one of the earliest adopted by the UN system) is particularly perplexing.

Another cause for concern is the fact that, until very recently, there has been no systematic process in South Africa for enacting international human rights treaties into national legislation once these have been ratified. Where domestication of international treaties has occurred, it has been on an ad hoc or partial basis. Thus, for example, the Promotion of Equality and Prevention of Unfair Discrimination Act adopted in 2000 partially enacts the International Convention on the Elimination of All Forms of Racial Discrimination, and the Children's Bill, which was due for enactment in 2005, will go some way towards particularising the Convention on the Rights of the Child to South African circumstances. But these legislative measures have not resulted from a systematic attempt to bring South Africa's domestic human rights regime into conformance with its international law obligations. Rather, they are the result of sectoral law reform developments. There are signs, however, that this situation is beginning to improve. As indicated in the main report, since 2004, the Department of Justice and Constitutional Development (DoJCD) has begun taking steps to ensure that all human rights obligations arising under international treaties are domesticated, where compatible with the 1996 Constitution. This process should be encouraged. It also needs to be supplemented by a more systematic mechanism to ensure that existing laws that conflict with South Africa's international treaty obligations are identified,

removed or amended.

Of even greater concern, perhaps, is the fact that South Africa has on occasion failed to fulfil 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 on schedule. At the time of writing, South Africa had also not yet submitted 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. On the other hand, South Africa has submitted initial reports on its adherence to the following conventions: the Convention on the Rights of the Child (report submitted in 1997), the Convention on the Elimination of All Forms of Discrimination against Women (1998) and the International Convention on the Elimination of All Forms of Racial Discrimination (2004).

Overall, it is fair to say that South Africa's record in ratifying, domesticating and reporting on its adherence to international human rights treaties is fairly mixed, especially when one takes into account the prominent role it has played in the international community in promoting human rights, and the strides made at the domestic level in enacting a comprehensive human rights regime. There seem to be two possible explanations for this state of affairs: either the national executive has simply been remiss in not putting into place systematic mechanisms through which South Africa's undoubted commitment to international human rights law can be demonstrated, or there is some conceptual, practical or legal difficulty in demonstrating that commitment.

As to the first possibility, it would appear that the lack of a dedicated unit in government to draw up the various reports required by the international human rights treaties to which South Africa is party is a contributing factor in its failure to submit these reports on schedule. At present, the International Affairs directorate within the DoJCD is responsible for compiling these reports. Its inability to perform this function properly suggests that the capacity of this directorate needs to be strengthened, or indeed that a separate, dedicated directorate needs to be created, either in the DoJCD or elsewhere.

As to the second possibility, the following points need to be made. Precisely because South Africa has made such rapid strides at the domestic level in enacting a comprehensive human rights framework, its compliance with the procedural steps consequent to its commitment to the international human rights regime may have lagged behind. To give just one example: ratification of the ICESCR would require South Africa to report on progress made in realising a range of rights, including the right to housing, food and healthcare. It is the inclusion of these very rights in the 1996 Constitution that give that document its progressive character. On the one hand, this means that there may be an understandable feeling on the part of government that South Africa has already gone further than many other countries in demonstrating its commitment to the fulfilment of these rights. On the other, there is the practical difficulty of complying with both sets of obligations simultaneously.

According to the Constitutional Court's decision in the *Grootboom* case (see Section III, Implementation of new laws), the South African state's obligation under the 1996 Constitution

is to devise and implement reasonable laws and policies aimed at the progressive realisation of economic and social rights. However, the UN Committee on Economic Social and Cultural Rights (CESCR), which is responsible for monitoring the ICESCR, takes a different approach, based on the idea that states have an absolute obligation to fulfil a 'minimum core content' of these rights, before progressively raising the level of protection. Satisfying the minimum core content of a right as required by international law and meeting the Constitutional Court's reasonableness standard will not always require the same policy choices and implementation strategies. There is arguably, therefore, a substantive reason why ratification of the ICESCR needs to be carefully considered. In the case of the Migrant Workers Convention too, South African law and practice is likely to be found to be in conflict with the international standard in certain respects, and a review of compatibility is thus legitimately called for.

To this extent, the South African government's reluctance to commit itself to international obligations that it may not be able to comply with shows an admirable intention to take international law seriously, unmatched by many other states. However, in the case of economic and social rights, it seems unlikely that the CESCR would condemn South Africa for adopting an approach to realising economic and social rights that complies in the first instance with the Constitutional Court's reasonableness standard, and thereafter, to the extent possible, with the standards laid down by the CESCR. The ICESCR is a crucial component of the international human rights law regime, embodying the view that first and second-generation rights are indivisible and mutually supporting. South Africa has been a major proponent of this view, and therefore ought to ratify the ICESCR for this reason alone. As the Constitutional Court observed in *Kaunda v President of the Republic of South Africa* (2004), the 'ratification of international human rights instruments is a positive statement by the government to the world and to South African nationals that it will act in accordance with these instruments if any of the fundamental human rights enshrined in the international instruments it has ratified are violated'. By the same token, the non-ratification of an important international human rights treaty may create the impression that the government is not committed to the rights it contains.

It is therefore recommended that the South African government should move with all deliberate speed to ratify the ICESCR and other outstanding international treaties, including the Convention on Political Rights of Women and the Convention on Migrant Workers, undertaking reviews of national law and practice where necessary. If the government has substantive reasons for non-ratification or non-domestication, South Africa's citizens are entitled to know what these reasons are, so that they can be subjected to public debate. Even if there are instances of direct conflict between South Africa's obligations under international law and its domestic constitutional obligations, these can only provide a partial excuse for its failure to act proactively over the last decade. And, of course, the failure to fulfil state reporting obligations under a treaty that has been ratified is not excusable. South Africa's position in the world as a significant beneficiary of, and contributor to, global human rights discourse requires it to lead by example in committing itself to all the major human rights instruments and scrupulously adhering to its reporting obligations under them.

## II. Independence of the judiciary and the National Prosecuting Authority

One of the key requirements of the rule of law is that the courts and the state prosecution services be independent from the executive and other forms of political interference. Although the doctrine of separation of powers is well entrenched in the 1996 Constitution and recognised by the courts, the true measure of the independence of the judiciary and the state prosecution services lies in the way these institutions relate to the executive and other organs of state in practice. This section examines South Africa's record in this respect.

### A. Independence of the judiciary

In South Africa, public discussion of the independence of the judiciary is inevitably intertwined with the need to transform the racial and gender composition of the judiciary. This point is well illustrated by the heated debate that followed the ANC National Executive Committee's statement, in January 2005, that the 'collective mindset' of the judiciary needed to be transformed in keeping with the 'vision and aspirations' of the majority of South Africa's population. This statement, which the ANC subsequently made clear was intended to stress the continuing importance of transforming the judiciary, was interpreted by many as a direct attack on the independence of the judiciary. Although the debate has since died down, there remain two lingering concerns about judicial independence in South Africa. On the one hand, the fact that both the superior and the lower courts are still dominated by white men feeds a popular perception that judges and magistrates 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. On the other hand, the government's stated commitment to rapid racial and gender transformation of the judiciary has given rise to a concern in some quarters that competent white male lawyers are being unfairly excluded from appointment to judicial office, especially the High Court. Indirectly, this concern also involves judicial independence, in so far as the appointment of young, inexperienced black judges and magistrates allegedly reduces the capacity of the judicial branch of government to resist legislative and executive pressure.

Given this context, any analysis of judicial independence in South Africa needs to begin

with some basic information on the progress made with the transformation of the judiciary. The main report indicates that just over half of South Africa's 207 superior court judges are white men. More glaringly, perhaps, there are only 28 women of all races on the superior court bench. The apex Constitutional Court, with five black men, one black woman and one Indian man out of a complement of eleven, is one of the more racially representative courts in the country, although even here women are still badly under-represented. The racial and gender composition of the magistrates' courts is slightly better, with transformation having started from a higher base. Thus, 903, or just under half, of South Africa's 1 822 magistrates are white, with 250 white female magistrates. Indian female magistrates outnumber Indian male magistrates by 77 to 47, and there are 678 black magistrates, of whom 178 are women. Five of the ten Regional Court Presidents are black, one is a coloured female and one an Indian female. Whites, however, are still over-represented among Regional Magistrates, the next most senior level, with 194 of the 305 Regional Magistrates coming from this population group.

This situation clearly places a great deal of pressure on the judicial appointments process, which needs simultaneously to respond to the need for racial and gender transformation, whilst maintaining high levels of professional expertise. At present, the appointment of judges is regulated by the 1994 Judicial Service Commission Act, and sections 174 and 178 of the Constitution. Section 174 outlines the basic structure of the judicial appointments process and section 178 prescribes the composition of the Judicial Service Commission (JSC), an independent body set up to oversee the appointments process. In the case of High Court judges, the President makes the appointment on the advice of the JSC, whereas in the case of ordinary judges of the Constitutional Court, the President makes the appointment from a list of names supplied by the JSC. This list may be supplemented on a one-off basis by the JSC if one or more of the vacancies cannot be filled to the satisfaction of the President. The appointment process for the Chief Justice and Deputy Chief Justice of the Constitutional Court, and the President and Deputy President of the Supreme Court of Appeal, is slightly different, with the President, as head of the national executive, only needing to consult the JSC and the leaders of political parties represented in the National Assembly, before making his decision.

Given the central role played by the JSC in the judicial appointments process, much depends on its composition. According to section 178 of the Constitution, the JSC is ordinarily made up of 23 people: the Chief Justice, the President of the Supreme Court of Appeal, one Judge President from the various provincial divisions of the High Court, the Minister of Justice and Constitutional Development (or his or her nominee), two advocates nominated by the advocates' profession, two attorneys nominated by the attorneys' 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 (the upper house of Parliament), and four presidential nominees. 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, namely: the Minister of Justice and Constitutional Development, three of the six members designated by the National Assembly, the four delegates from the National Council of Provinces and the four persons directly

designated by the President. Given the central role played by the JSC in the judicial appointments process, and indeed the role played by the President himself in the appointment of the most senior members of the bench, the fact that the JSC is capable of domination by the ANC 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 free of political influence, and the ANC's *de facto* control of judicial appointments, therefore, is not on its own a reason to question the independence of the judiciary in South Africa. In any case, it is a control that stems directly from the ANC's overwhelming electoral majority won through a free and fair election. It would be very difficult, and even unwise, to design a constitutional system to prevent political-party control of judicial appointments in a situation where one party enjoys more than two-thirds electoral support.

There is, however, one minor respect in which the process for judicial appointment may be criticised—the fact that there is currently very little scope for civil society participation. As indicated in the main report, the only room for civil society input at present (other than through the legal profession) is in nominating candidates for appointment to the bench. Other than this, civil society participation is restricted to the right to attend, but not ask questions, at JSC hearings. Arguably, civil society should be given an opportunity to make formal submissions to the JSC on nominated candidates and perhaps also to suggest questions that could be put to them in the formal JSC interview. Of particular concern is the fact that the names of persons nominated for consideration by the JSC, but not short-listed for interviews, are not published. This would be a simple enough matter to remedy.

The system for appointment of magistrates—that is lower-ranking judges who generally do not proceed to a career on the high court bench—is different. In this case, all that the Constitution says is that 'other judicial officers must be appointed in terms of an Act of Parliament which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take place without favour or prejudice'. The two acts of Parliament regulating the appointment of magistrates are the 1993 Magistrates' Act and the 1944 Magistrates' Courts Act. The first establishes the Magistrates' Commission, which considers all applications for vacant posts, transfers and promotions as well as matters relating to misconduct by and dismissal of magistrates. The steps followed for these processes are governed by the 1994 Regulations for Judicial Officers in Lower Courts, promulgated under section 16 of the Magistrates' Act. In essence, the Magistrates' Commission makes recommendations to the Minister of Justice and Constitutional Development, who then decides on appointments, transfers or promotions of magistrates.

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 of 1984. The establishment of the Magistrates' Commission therefore undoubtedly remedied what would have been an unconstitutional state of affairs. Nevertheless, 21 of the 27 members of the Magistrates' Commission are still appointed in one way or another by the ruling party. 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, the

Magistrates' Commission was found not to be sufficiently independent of the executive, mainly on the basis of its composition. The Constitutional Court, however, overturned the decision, stating that 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'. 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. As a practical matter, however, the outcome of the *Van Rooyen* case appears to have foreclosed further discussion of the independence of the magistracy in South Africa.

In addition to the judicial appointments process, a country's commitment to judicial independence is typically measured by three indicators: the rules relating to judges' terms of office, including the procedures for removal of judges; the remuneration of judges and, in particular, whether the executive has the power to reduce or suspend judicial salaries; and the degree of institutional independence that the court in question enjoys.

As to the first issue, the Judges' Remuneration and Conditions of Employment Act of 2001 provides that High Court judges, once appointed, hold office until the age of 70, provided that by this age, they have served a period of at least ten years active service. In the event that this is not the case, they may continue to serve until such time as the ten-year period has been completed. The Constitution provides that Constitutional Court judges are appointed for a non-renewable term of 12 years, or until they attain the age of 70 years, whichever comes first. The tenure of magistrates in office is governed by the Magistrates' Act, which provides that a magistrate may serve until s/he 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. These provisions clearly conform to internationally accepted standards of judicial independence.

The removal of judges is governed by section 177 of the Constitution, which provides that a judge may only be removed from office before the expiry of his or her term of office on grounds of incapacity, gross incompetence or gross misconduct, or if a two-thirds majority in the National Assembly calls for such removal. These provisions, too, clearly conform to internationally accepted standards of judicial independence. In addition, despite the calls for more rapid transformation of the judiciary, and the allegations made about racial and gender bias, no judge has been so removed since the enactment of the 1996 Constitution.

The position with regard to the removal of magistrates from office is somewhat different. In this case, the Magistrates' Act provides for the establishment of a complaints committee that reports to the Magistrates' Commission. The Commission then makes recommendations to the Minister of Justice and Constitutional Development regarding the magistrate's temporary or permanent suspension. A magistrate may be removed from office by the minister upon passage of a resolution by Parliament to that effect. In the *Van Rooyen* case, these provisions were held to be constitutionally permissible, provided that government officials were not given the power to exercise discipline over judicial officers, and that the Magistrates' Commission was decisively involved at every stage. At the time of writing, Parliament was awaiting the Magistrates'

Commission's recommendations in relation to several instances of alleged misconduct by magistrates.

The salaries, allowances and benefits of judges are determined by the President and must be approved by Parliament. Importantly, judges' salaries may not be reduced and, although administered by the DoJCD, are reflected as a direct charge against the National Revenue Fund. Magistrates' salaries, by contrast, are set by the Minister of Justice and Constitutional Development, and may be reduced by the legislature after consultation with the Magistrates' Commission. Once again, in the *Van Rooyen* case, the Constitutional Court considered these to be adequate safeguards against executive interference with the magistracy.

The institutional independence of the judicial branch as a whole is guaranteed by the Constitution, which makes specific provision for the separation of powers between the judicial, executive and legislative arms of government. In terms of section 165, 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 and effectiveness'.

Overall, the constitutional and legislative provisions regulating the appointment, terms of office, remuneration and institutional independence of the judiciary, with some minor reservations about the procedure for the appointment of magistrates, clearly comply with international standards. Until recently, therefore, despite the concerns raised by the need to transform the composition of the judiciary, the issue of judicial independence itself was not a cause for concern in South Africa. In the first quarter of 2005, however, the Minister of Justice and Constitutional Development announced that she planned to introduce a series of bills to Parliament in 2006 that will directly affect the independence of the judiciary. The bills are: the Superior Courts Bill, the Judicial Service Commission Amendment Bill, the Judicial Conduct Bill and the Justice College Bill. The collective aim of these bills 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 to judges. Although on the whole welcomed by civil society, certain aspects of these bills have been subjected to vigorous criticism, including arguments that some of the provisions in the bills are unconstitutional. In response, the Minister of Justice and Constitutional Development has indicated that an amendment to section 165 of the Constitution would not be out of the question. Since that provision is generally regarded as the linchpin of judicial independence in South Africa, it is worth briefly considering the recent legislative reform proposals in order to assess whether they are indeed something that civil society ought to be concerned about.

The Superior Courts Bill, in particular, has been very controversial. 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 seemingly innocuous purposes provoked a storm of discussion when the bill was made public. The main issue in contention appears to be clause 15(1), which provides that 'The Minister exercises final responsibility over the administrative functions of all courts referred to in section 165 [this should read section 166] 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 function of courts, have been administered by the most senior member of the court in question. The concern expressed has been that in trying to improve the efficiency of courts in South Africa by relieving judges and magistrates of some of their administrative duties, the minister will exercise her powers under clause 15(1) too vigorously, thereby threatening judicial independence. Unfortunately, in some cases, this concern has been expressed as though ministerial interference with the strictly adjudicative function of courts were already a *fait accompli*, rather than a danger to be guarded against. This in turn has prompted firm denials from the minister, which have made open, reasoned discussion of the real issue difficult.

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'. Once again, however, the actual extent of political interference with the independence of the judiciary will depend on how this provision is interpreted and applied. It may be, for example, that the minister will simply enact rules that the courts largely have devised themselves. Alternatively, the process of drafting the rules that govern court procedure could be a more co-operative, consensual one between the courts and the minister, and in which the courts are still given the opportunity to provide substantial input.

The objections to the other bills concern the extent to which the executive may properly be involved in the disciplining of judges for misconduct that falls short of the grounds for dismissal contemplated in section 177 of the Constitution, 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, especially of High Court judges. Here, too, much of the detail and practical effect of these provisions is still uncertain, and it is therefore too early to say whether the independence of the judiciary is indeed seriously threatened. The proper role of civil society at this stage, therefore, is to make use of all formal opportunities that are provided for influencing the content of these provisions, and to insist on these opportunities being made available where government is seen to be failing to consult. As the legislative process unfolds, the crucial issue, for both government and civil society, should be to ensure that the provisions that are eventually adopted make a clear distinction between the administration of courts, which the executive may legitimately seek to control, and the adjudicative functions of courts, the control of which should be left to the judiciary.

## B. Independence of the National Prosecuting Authority

One of the most politically explosive issues in South Africa, and the first real test of its commitment to constitutional democracy, has concerned the so-called ‘Schabir Shaik’ trial, in which the accused, Mr Schabir Shaik, was found by the Durban High Court to have been involved in a ‘generally corrupt’ relationship with the then Deputy President, Mr Jacob Zuma. Shortly after this decision was handed down, the President ‘relieved’ the Deputy President of his duties. Independently of this, the National Prosecuting Authority (NPA) instituted two charges of corruption against Mr Zuma.

In the political storm that followed the Deputy President’s dismissal and indictment, allegations were made that the President had abused the NPA for private political purposes. These allegations are currently being investigated by the ANC. It is nevertheless instructive to examine the constitutional and legal provisions pertaining to the independence of the NPA to see whether, at an institutional level, there might be any basis for this view.

Section 179 of the 1996 Constitution establishes the NPA as an independent body with the authority to institute criminal proceedings on behalf of the state. In terms of section 179(4), national legislation must ensure that the NPA exercises its functions ‘without fear, favour or prejudice’. (The 1998 National Prosecuting Authority Act (the NPA Act) has since been enacted.) In terms of section 179(5) of the Constitution, the functions of the NPA are to determine a prosecuting policy, which must be observed in the prosecution process; issue policy directives; intervene in the prosecution process when a policy directive is not followed; and review decisions to prosecute or not to prosecute.

Section 32(b) of the NPA Act explicitly provides that no organ of state shall improperly interfere with, hinder or obstruct the prosecuting authority in the exercise and carrying out of the powers, functions and duties of the National Director of Public Prosecutions (NDPP). Political responsibility over the NPA rests with the Minister of Justice and Constitutional Development, but the NDPP has independence in undertaking his or her tasks. The Department of Justice and Constitutional Development is 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 NPA Act, the institution is accountable to Parliament in relation to its powers, functions and duties. 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.

Under its first head, Mr Bulelani Ngcuka, the NPA adopted a robust approach to prosecutions and, in general, there is no evidence of executive interference in the prosecution services during his term of office. Mr Ngcuka was, however, accused of abusing his position by announcing, in August 2003, that while there was a *prima facie* case against the Deputy President for corruption, the prosecution services were not confident of securing a conviction and would accordingly not be instituting charges. This announcement was later investigated by the Public Protector, who found that Mr Ngcuka had infringed the Deputy President’s right to dignity. The Public Protector’s report was adopted by an ANC-dominated parliamentary committee, in which Mr Ngcuka was denied a hearing despite requests by members of opposition parties to hear him.

In the meantime, the former Minister of Transport, Mr Mac Maharaj (a member of the ANC who was also being investigated by the office of the NDPP), and Mr Mo Shaik (the brother of Schabir Shaik), accused Mr Ngcuka of having been a spy for the apartheid government, implying that the investigation into the relationship between Schabir Shaik and the Deputy President was the result of obligations to his former paymasters. A commission of enquiry under Judge Joos Hefer cleared Mr Ngcuka of this allegation in January 2004.

Mr Ngcuka resigned in September 2004. His successor, amidst intense media pressure, reversed the NPA's decision not to prosecute the Deputy President, and two charges of corruption were instituted. Since then, a new political storm has erupted over a search and seizure operation conducted at the Deputy President's Johannesburg home and that of his two legal advisers, with allegations being made that this operation was a fishing expedition improperly carried out after charges had already been instituted. The Johannesburg High Court declared the search warrant issued in respect of one of the former Deputy President's legal advisers unlawful in August 2005, and the lawfulness of the search and seizure operation in respect of the former Deputy President and his other legal adviser are currently subject to judicial decision.

The entire episode surrounding the relationship between Mr Schabir Shaik and the former Deputy President has thus far involved the NPA, two divisions of the High Court, the Public Protector, a parliamentary portfolio committee, a commission of inquiry appointed by the President, the President himself and the Deputy President. No other issue since 1994 has required the participation of such a variety of institutions. Whilst the actual extent of political manipulation of the NPA is still under investigation, therefore, the 'Zuma affair' has at least had the positive effect of testing the robustness of South Africa's state institutions and the impartiality of the officials who serve in them. For example, when the ANC Youth League argued that the judgment of the Durban High Court against Mr Schabir Shaik should be disregarded because the judge concerned had once been a member of the Rhodesian Parliament, the South African Human Rights Commission (SAHRC) was quick to condemn this statement for being based purely on the race of the judge concerned, and not the actual content of the judgment. Incidents like these are encouraging, since they indicate that the institutions of constitutional democracy are beginning to function as authentic guarantors of the rules of fair democratic discussion. Until recently, much of the relationship between the institutions established under the 1996 Constitution has been subterranean, in the sense that it has been worked out within the ANC, beyond public view. The 'Zuma affair', whilst alarming in some respects, has had the positive effect of bringing the internal political dynamics of the ANC out into the public sphere, where they can be discussed by all those affected.

At this stage, therefore, the independence of the state prosecution services does not appear to be threatened. In particular, the constitutional and legislative framework appears to provide adequate safeguards against political interference. Even if evidence of such interference does begin to emerge, the true test will be whether existing state institutions rise to the challenge of dealing with such allegations according to the standards set by the Constitution and the legislative framework.

## III: Implementation of new laws

The rule of law is a contested notion that has several different meanings. In South Africa, the need to overcome the legacy of apartheid gives the rule of law a particular inflection, one that emphasises the role of law in effecting social change. This in itself is not a new idea. What makes the South African commitment to the rule of law different is the sheer scale and ambition of the post-apartheid social transformation project. The legislative frameworks put in place since 1994 have not merely sought to regulate the exercise of state power; in a very profound way they have also sought to transform unequal social and economic power relationships in accordance with the Constitution's vision of a non-racist, non-sexist society.

Ten years after the transition to democracy, this approach to social transformation, and the conception of the rule of law that goes with it, are coming under increasing attack. Although the law-driven approach to social transformation was arguably dictated by the nature of the transition, and therefore to some extent not a matter of choice, the government is being criticised for not moving fast enough. So much store has been set by the capacity of law to effect social change that if that change does not occur, the rule of law's place as a foundational constitutional value may be imperilled. Indeed, there are already signs that poor South Africans are beginning to become impatient with the pace of change, and that this is beginning to undermine popular support for the rule of law.

In this context, South Africa urgently needs to redouble its efforts to make law-driven social change work. There appear to be at least three aspects to this ongoing enterprise: improving the technical quality of post-1994 legislation and the mechanisms put in place to monitor and evaluate its impact; a more positive attitude on the part of the executive towards court judgments handed down against the state, and due recognition for the way in which such judgments, far from being setbacks, can be used to reveal and redress shortcomings in the legislative framework; and the need to revisit the role of specialist courts in adjudicating claims made under social-change legislation.

### **A. Improving the technical quality of new legislation**

The advent of democracy in 1994 saw an almost frenetic attempt to rid the South African statute book of undemocratic, inappropriate and racist laws, and to replace these laws with statutes more in line with the needs of the majority of South Africa's population, and of a more

outward-looking, modern democratic state. There is widespread agreement that the first decade of democracy represents a remarkable achievement in the depth and breadth of the laws enacted, the generally progressive tenor of these laws, and the comprehensiveness of the issues covered. At the same time, however, there is also a growing recognition that the legislative reform effort was in some respects too ambitious, and that serious attention now needs to be paid to whether post-1994 legislation is in fact achieving its objectives.

A renewed commitment to making law-driven social transformation work requires two things: first, a more considered and technically sophisticated approach to the making of new legislation and, secondly, greater efforts to monitor and evaluate the efficacy of existing legislative frameworks. As to the first point, it is already apparent that the frenetic pace pursued in the first decade of law making is beginning to slacken, and that far fewer acts of Parliament are being passed now than was the case a few years ago. (For example, only 36 acts of Parliament were passed in 2004, as against 136 in 1998.) This situation is to be welcomed: as a result of the efforts made in the first decade of democracy, most sectors of South African society have now been comprehensively re-regulated, and it would be pointless to engage in a fresh round of law making before the reasons for the slow pace of change in certain areas have been properly understood.

As to the second requirement, most national government departments have now set up monitoring and evaluation (M & E) directorates to assess the impact of the legislation they administer. In some departments, M & E is part of a systematic policy review process in which regulation is periodically subjected to re-assessment. In other departments, M & E is in its infancy, and capacity still needs to be built to integrate this function into the mainstream policy-making process. In an ideal model, law making and M & E should be part of a continuous information cycle in which the reasons for legislative failure are fed back into the policy process.

In addition, the government has recently recognised the need to reform its law-making system, borrowing from the regulatory reform movement of the last twenty years in North America, Europe and Australia. The government's Programme of Action for 2005 included the possible adoption of a more formal Regulation Impact Assessment (RIA) system, capable of measuring both the likely impact of new laws and the actual impact of laws once implemented.

The introduction of RIA, or something like it, in South Africa could make a major contribution to improving the quality of new legislation, both primary and secondary. Although this methodology has been criticised for placing too much emphasis on the cost-benefit analysis of regulation, which may sometimes lead to greater importance being given to economic models at the expense of public participation in the law-making process, a properly tailored RIA model would seek to measure the impact of new and old regulation on a number of priority areas, such as job creation, poverty alleviation, bridging the dual economy, support for vulnerable groups and children, and so on. RIA is also particularly good at ensuring co-ordination between departments, something which, notwithstanding the introduction of the 'cluster system' grouping related departments together, has been somewhat lacking in South Africa to date. RIA could play an important role in making post-1994 legislation work (including the many reforming laws described in the main report), and, through this, in the achievement of the democratic social transformation project.

## B. Implementation of court judgments

In general, the South African government's record in implementing court judgments since 1994 has been good. Its slow response to the two main decisions on social and economic rights handed down by the Constitutional Court in this period has, however, been criticised by some commentators and human rights activists. In addition, a series of cases in the Eastern Cape has revealed an alarming insouciance on the part of certain government officials to court orders enforcing rights to pensions and other social grants. This section examines the executive's record in relation to these cases and concludes that the reasons for its slow response to the Constitutional Court's socio-economic rights decisions need to be distinguished from the reasons for its ineffective response to High Court orders directly enforcing rights to pensions and other social grants. Whereas the first set of responses may be influenced by separation of powers concerns, the second has to do with ongoing capacity problems at provincial and local government level.

### The executive's response to decisions enforcing social and economic rights

In the 2001 case of *Government of the Republic of South Africa v Grootboom*, 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, who were in desperate need of housing. At the time of the litigation, the community had been evicted from land 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 respond to the immediate needs of people in the situation of the Wallacedene community, was not 'reasonable', and therefore that the programme violated the right of access to adequate housing in section 26 of the Constitution.

The *Grootboom* decision was initially welcomed as a vindication of the decision to include socio-economic rights in the 1996 Constitution, but has subsequently come to be seen by some as not having gone far enough to address the needs of people without shelter. Some of the confusion about the meaning of this case stems from the fact that the Constitutional Court handed down two orders in *Grootboom*—an initial order confirming a settlement agreement, in which the state had undertaken to meet the specific housing needs of the Wallacedene community, and a second order, in which the court declared the national housing programme to be in violation of the right to housing, but in which no specific state action was mandated. These two orders are often confused in public debate, resulting in a failure to appreciate the true significance of the *Grootboom* case and its aftermath.

The first party to confuse the two orders was the SAHRC, which mistakenly interpreted the reference in the main *Grootboom* judgment to its constitutional role in monitoring the implementation of socio-economic rights as implying that it was under a duty to monitor the implementation of the first order. On presenting its report to the Court, the Commission was told, correctly, that the Court no longer had jurisdiction over the matter, and therefore could not consider the report. This incident has tended to distract attention from two linked, but essentially separate issues: the implementation of the first *Grootboom* order, and the extent to which the

national housing programme has changed in the direction suggested by the Court in the main judgment. Generally speaking, the state's record in relation to the first issue has been very poor, while in relation to the second order, it has been more promising.

At the time of writing, the situation of the Wallacedene community had by all accounts not changed very much from the time when the *Grootboom* case was first instituted. The community is still exposed to severe flooding in winter, and still lacks some of the basic facilities that the state undertook to provide it in the settlement agreement. On the other hand, the national housing programme has been supplemented by two sub-programmes that have gone some way towards filling the gap identified in *Grootboom*: the Emergency Housing Programme (2003), which provides temporary housing to people who have lost their homes in natural disasters, or who are facing an imminent threat of eviction, and the Informal Settlement Support Programme (2004), which is aimed at the upgrading of existing informal settlements. Both of these programmes respond to the needs of people who may only recently have arrived in an urban area, and who thus do not qualify for permanent Reconstruction and Development Housing (RDP houses) in the short to medium term. This is precisely the group that the Court was concerned about in *Grootboom*, suggesting that in this respect at least, the executive's response has been adequate.

The differing responses to the two *Grootboom* orders indicate that socio-economic rights litigation in South Africa is well suited to inducing long-term, structural changes in government policy, but that it may not be the best vehicle for providing direct, short-term benefits. This conclusion is supported by the outcome of the second major socio-economic rights case to come before the Constitutional Court, *Minister of Health and others v Treatment Action Campaign and Others*. In this case, which arose in the context of the catastrophic HIV/AIDS epidemic in South Africa and widespread public dissatisfaction with the government's response to it, the Court ordered the national Department of Health to provide a comprehensive programme to prevent mother-to-child transmission of HIV. Unlike the second *Grootboom* order, however, which was purely declaratory, the Court here 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 remove the restrictions preventing a particular antiretroviral drug (Nevirapine) from being made available at public hospitals. The Court further ordered the Department of Health to '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'.

The decision in the *TAC* case was interpreted by many commentators as signalling a greater preparedness on the part of the Constitutional Court to spell out government's precise obligations in relation to socio-economic rights. The three years since this decision, however, have witnessed an ongoing legal and polemical battle between the main applicant in the *TAC* case, the Treatment Action Campaign, and the Department of Health over the distribution of antiretroviral drugs in public hospitals. As late as November 2004, the Treatment Action Campaign was still reporting inadequate and grudging compliance with the order by the department. As with all public interest litigation, therefore, the effectiveness of socio-economic rights litigation depends

on the capacity and willingness of the state to comply with the court order handed down. There is also just a suggestion that the state's slow response to implementing the court order in the *TAC* case stems from a feeling that the Constitutional Court overstepped the limits of its role in this case. This separation-of-powers objection to the role of courts in adjudicating socio-economic rights was explicitly made in the state's argument on appeal from the High Court decision in the *TAC* case, and also by the Minister of Health in a public statement before the case was decided by the Constitutional Court. If this is indeed the state's attitude, it is regrettable. Far from usurping the political branches' role in the design and implementation of legislation, court orders on socio-economic rights may assist government in identifying policy gaps and implementation failures. Given the increasing pressure on government to make law-driven social transformation work, this function of socio-economic rights litigation should be welcomed.

### The executive's response to judgments enforcing rights to pensions and other social grants

The Constitutional Court's decisions in *Grootboom* and *TAC* illustrate one aspect of the way in which litigation is being used to drive social transformation in South Africa. Whilst these cases essentially involve high-profile challenges to the design and implementation of social policies, litigation is also being used to enforce statutory entitlements to existing welfare grants. In a series of cases heard in the Eastern Cape, for example, the provincial Department of Social Development has found itself in contempt of court for failing to adhere to High Court rulings requiring it to pay out pensions and other social grants. In one of these cases, *Vumazonke and Others v MEC for Social Development, Eastern Cape Province*, the court commented that, '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 crisis situation affecting the payment of social grants in the Eastern Cape was recognised by the Supreme Court of Appeal in *Jayiya v MEC for Welfare, Eastern Cape, and Another*. In this case, the provincial Department of Welfare had ignored a direct court order to provide the service in question. The Supreme Court of Appeal held 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 further 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.

Unlike India, therefore, where the courts have been prepared to order the incarceration of recalcitrant state officials, South African courts have stopped short of holding state officials personally liable for government non-performance. Whilst this has relieved the immediate pressure on the executive to comply with these orders, the level of maladministration and lack of capacity that these cases have revealed is alarming. In a mature multi-party democracy, the sanction for non-performance on this scale would be electoral defeat. In a one-party dominant state like South

Africa, the sanction is increasing popular dissatisfaction with government officials, particularly at provincial and local government levels, and increased social instability. Once again, rather than seeking to ignore or downplay this situation, government should be actively using welfare-grants litigation to identify problems in policy design and implementation strategy. Of course, the ideal would be to move to a position where such litigation was unnecessary. In the interim, however, welfare-grants litigation is an important source of information that should be used to identify and redress shortcomings in the legislative and policy framework.

### **c. Specialist courts and proposed changes to the court structure**

One very noticeable feature of the South African legal system since 1994 has been a rapid increase in the number of specialist courts. In addition to the Constitutional Court, the provincial and local divisions of the High Court (formerly the Supreme Court) and the Magistrates' Courts, there now exist the following courts: the Labour Court, the Labour Appeal Court, the Land Claims Court, the Electoral Court, the Competition Appeal Court, Special (Consumer) Courts and the Income Tax Court. Of these, only the Special (Consumer) Courts and the Income Tax Court existed before 1994. Other specialist courts, such as the Sexual Offences Courts, the Maintenance Courts and the Equality Courts, have been created by giving ordinary courts specialist functions.

The most important specialist court, in a sense, is the Constitutional Court, which was established as a court of parallel jurisdiction to the Supreme Court of Appeal under the 1993 Constitution and has become the apex court under the 1996 Constitution. After the Constitutional Court's decisions in the *Pharmaceutical Manufacturers Association* case (2000) and the *Carmichele* case (2001), it is now clear that any legal dispute in South Africa potentially involves a constitutional matter and, therefore, is in principle within the jurisdiction of the Constitutional Court. In practice, however, the Constitutional Court receives on average only 50 cases a year, of which it decides roughly half. This anomaly (i.e., the fact that the Constitutional Court is both the apex court with the final say in every legal matter, and also a court with a comparatively low caseload), is the function of two sets of legal rules: the Constitutional Court's own direct access jurisprudence, which has restricted access to it as a court of first instance in only the most compelling cases, and the principle of constitutional avoidance, which applies in the High Courts and dictates that cases must be decided on a constitutional point only as a matter of last resort. Whilst ensuring that the legal and factual issues pertaining to a constitutional matter are thoroughly ventilated before reaching the Constitutional Court, the Court's rules on direct access and the principle of constitutional avoidance mean that it is very difficult to access the Constitutional Court without significant time and resources. The Court's resultant low caseload has arguably restricted its self-declared transformational role within the South African legal system.

The Land Claims Court was established in 1996 as a specialist court in respect of matters arising under the 1994 Restitution of Land Rights Act. Later, this court was given exclusive jurisdiction over the 1996 Land Reform (Labour Tenants) Act, and parallel jurisdiction in respect of the 1997 Extension of Security of Tenure Act. Despite having the benefit of newly appointed judges with human rights backgrounds, the record of the Land Claims Court has not been uni-

formly positive. In one well-known case, it turned down the claim of an indigenous community to its ancestral land, only to have this decision overturned by the Supreme Court of Appeal. In another case, the Land Claims Court appeared to reverse an earlier precedent that had protected female farm workers as tenants in their own right. In general, 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.

Other questions that have been raised about specialist courts include their accessibility (most specialist courts are located in major urban centres), the danger of so-called forum shopping (as litigants move between the ordinary courts and specialist courts in search of a favourable outcome), and the general cost-effectiveness of specialist courts. One view is that specialist courts simply divert expenditure away from the ordinary courts, particularly magistrates' courts in rural areas.

A relative success story described in the main report concerns the Sexual Offences Courts, which were first piloted in 1993. These courts, which are ordinary courts with special facilities and support services available for vulnerable witnesses, depend on collaboration between government and civil society, including social workers, district surgeons, the child protection unit, and various other professionals and NGOs. Although criticised for being inadequately resourced, Sexual Offences Courts have achieved a higher conviction rate than ordinary courts and are beginning to play an important role in addressing impunity for the sexual violence crimes against women and children in South Africa.

Evidently in response to concerns about the proliferation and doubtful cost-effectiveness of specialist courts, the draft Superior Courts Bill proposes the rationalisation of some of these courts and their conversion into special divisions of the High Court. If the Bill is enacted in its current form, the Labour Court and the Labour Appeal Court will also be abolished, with jurisdiction in labour matters given to the High Court and the Supreme Court of Appeal, and provision made for a majority of the judges sitting in any particular labour matter to be selected from a list of judges with specialist expertise in labour law. The Land Claims Court, the Competition Appeal Court, the Electoral Court and the Income Tax Court, for their part, will all become special divisions of the High Court. It is to be hoped that the controversy surrounding certain aspects of the Superior Courts Bill (see Section II, Independence of the judiciary and the National Prosecuting Authority) does not get in the way of these much-needed reforms.



## IV. Crime and punishment

South Africa has one of the highest rates of violent crime in the world; nearly 20 000 people were murdered in the year 2004/05 (in a population of around 45 million). With close to 400 out of every 100 000 people in prison, South Africa also has one of the highest incarceration rates in the world. These two statistics are at some level connected, as with a high crime rate, it is to be expected that the numbers of those in prison will also be high. However, international comparisons show that crime and imprisonment rates have only a limited correlation, if any. It is also not the case that all those in prison in South Africa are necessarily those who should be there: many violent crimes do not lead to arrest and conviction of the perpetrator; and many of those in prison are there awaiting trial, or for relatively minor offences where other punishments would be far more suitable. In particular, despite some innovative diversion programmes, several thousand children (mostly aged 16 or 17) are still in prison, an environment in which they are likely simply to be trained for a life of crime. Moreover, the overcrowding in prisons resulting from a high incarceration rate undermines the potential role of incarceration in the rehabilitation of criminals, a role declared in South Africa's new Correctional Services Act. In this way, crime and punishment in South Africa appear to be locked in a vicious cycle of cause and effect, with first-time offenders and even innocent accused spending long months in deplorable conditions before they are eventually released or stand trial.

A high crime rate also places heavy demands on the South African Police Service (SAPS), which has at times struggled to respond effectively while conforming to the requirements of the constitutional democracy established in 1994. Widespread public anxiety over crime, especially violent crime, has been combined with a sense—often fed by media coverage—that the Bill of Rights is a 'charter for criminals'. The resulting pressure on politicians and police leadership has led to periodic, showy but essentially arbitrary and ineffective police crackdowns in high-crime areas. These raids have tended to over-fill the prisons (whose authorities are not consulted), often capturing mostly undocumented migrants and others who essentially pose no threat to society. Meanwhile, fears of looking 'soft on criminals' meant that it took the government five years to bring into effect an amendment to the law that had previously allowed the police to shoot a fleeing suspect, despite a Constitutional Court ruling that the provision was unconstitutional. Corruption within the police remains a concern, though it is hard to document its extent. At the same time, however, there have been remarkable efforts to turn the police from an apartheid-era

enforcement mechanism into an accountable institution providing the police service needed in a democracy; these efforts are continuing.

Two areas of concern stand out in particular: maintaining and strengthening civilian oversight of the police; and an integrated approach to sentencing that includes reviewing the impact of minimum sentencing legislation and overcoming the reluctance of judges to consider alternative, non-custodial forms of sentence. Linked to this is the urgent need to improve conditions of detention, in particular where overcrowding is most serious.

## A. Civilian oversight of policing

In light of South Africa's history, those involved in drafting the Constitution were particularly concerned to ensure 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 1996 Constitution provides that '[a] civilian secretariat for the police service must be established by national legislation'. The 1995 South African Police Service Act (the Police Act), which remains the main legislation governing the police, established national and provincial 'secretariats for safety and security', staffed by civilians. Their responsibilities include advising the national and provincial ministers and promoting democratic accountability and transparency in the police service. In the first five years of the National Secretariat for Safety and Security's existence, it played a prominent role in formulating policy and overseeing its implementation; many of the people initially working at the secretariats had histories in non-governmental organisations working on transformation of the police service, and this influenced output substantially. However, after 1999, with a new minister in place, the National Secretariat's capacity and influence diminished; some functions were transferred to the SAPS, and the head of the National Secretariat lost his intended influential role as a civilian counterbalance to police leadership. Perhaps as a result, these civilian oversight mechanisms have had mixed success.

The second important civilian oversight institution created by the 1995 Police Act was the Independent Complaints Directorate (ICD). The ICD is, surprisingly, not included among the 'State Institutions Supporting Constitutional Democracy' established by Chapter 9 of the 1996 Constitution; although it was provided for under the Interim Constitution that governed the period between 1994 and 1996. The ICD's mandate under the Police Act includes the investigation of deaths in police custody and as a result of police action, as well as complaints against the police. In 1998, the Domestic Violence Act added a responsibility to investigate failures by police officers to comply with their new obligations under the legislation. Under the Police 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. The numbers of complaints received by the ICD number in the thousands every year, in addition to the compulsory reports of deaths caused by the police, of which there were 652 in the fiscal year 2004/05 (representing a decrease of around 100 since the ICD began operating), 366 of which were caused by shootings.

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 Police Act requires the ICD to investigate directly, it does not do so in all cases (largely those where the death is relatively uncontroversial, such as car accidents). Even where the ICD does carry out its own investigations, it has had problems recruiting and training sufficient skilled investigators. Both non-governmental organisations and the Parliamentary Portfolio Committee on Safety and Security, responsible for oversight of the ICD, have raised serious concerns about the ICD's performance and its capacity to fulfil its mandate effectively. The Portfolio Committee has recently made recommendations to the Minister for Safety and Security to remedy these issues. The Committee also proposed that the Minister should look at the feasibility of developing separate legislation to govern the functioning of the ICD, instead of including its mandate under the Police Act.

A review of the ICD and the secretariats' operations are clearly needed, with possible restructuring as a result. In this process, it is important that the key roles of these institutions are maintained and strengthened. Although the systematic abuses carried out by the police against political opponents during the apartheid era are thankfully past, reports of serious abuses, including torture and summary execution do continue. International experience shows that strong independent civilian oversight of the police is of crucial importance in ensuring effective performance that is respectful of the rights of victims and of suspected perpetrators.

## **B. An integrated approach to sentencing**

Demands for effective action against crime have also brought calls for harsher punishments for sentenced criminals. Though politicians have resisted demands to overturn the Constitutional Court's early ruling that the death penalty is unconstitutional, in 1997 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. A court may impose a lesser sentence if 'substantial and compelling circumstances' exist (which saved the legislation from a Constitutional Court ruling that it did not comply with the Bill of Rights). 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.

The impact of the minimum sentencing rules on crime is difficult to quantify. However, no substantive claims have been made that crime has been reduced as a result, while fear of crime during the period it has been in operation has actually increased. More relevant to the crime rate is likely to be the probability of being caught rather than the length of sentence at the end of the criminal justice process. The minimum sentencing rules have also not achieved one of their primary aims, an increase in consistency of sentencing. Meanwhile, prison overcrowding has been exacerbated by the vastly increased number of prisoners serving long sentences: the number of prisoners serving life sentences, for example, jumped from 638 in 1997, to 5 511 in 2004.

During the same period that the minimum sentencing rules were being introduced, Parliament also adopted a new Correctional Services Act that codified and extended alternatives to imprisonment that had been explored since the beginnings of South Africa's transition to

democracy in the early 1990s. Chapter 6 of the Act provides for different categories of ‘community corrections’ to be imposed as an alternative or supplementary punishment, 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 future’. All persons subject to community corrections must be supervised in the community by correctional officials.

But although use of correctional supervision has increased, the courts remain generally uncreative in sentencing. Imprisonment and prison-related sentences are still the standard sentence imposed on most offenders, despite widespread recognition that incarceration is frequently ineffective and even counterproductive in preventing recidivism, despite the fact that magistrates have wide discretionary powers to be creative in sentencing offenders. Further training of magistrates and judges on the alternatives available to custodial punishment is clearly necessary, as is intensified funding of state organs and civil society organisations involved in providing such services.

A more comprehensive sentencing reform initiative should be a matter of priority. The minimum sentencing provisions were originally introduced for a trial period of two years, but have been repeatedly extended and are due for review again in 2007. The Department of Justice and Constitutional Development as well as Parliament should use the intervening period to consider the evidence and pass a more considered replacement for this law. The recent introduction of ‘community courts’—magistrates’ courts that are intended to handle less serious offences and be integrated with other services in the community—provides another opportunity to rein-vigorate the use of correctional supervision and other alternative sentences for petty offenders. Meanwhile, the innovative framework for juvenile sentencing provided by the long-awaited Child Justice Bill should at last be passed by Parliament and swiftly implemented.

### **c. Conditions of detention**

Overcrowding in South African prisons has worsened since 1994. The result is problems with food, health, exercise, stress and rehabilitation. Prisoners’ human rights are violated and the Department of Correctional Services is unable to fulfil its mandate, which includes rehabilitation of prisoners.

These problems have been highlighted by the Judicial Inspectorate of Prisons, a civilian oversight body established under the 1998 Correctional Services Act. Under Judge Hannes Fagan, the Inspectorate and the Independent Prison Visitors it works with have played an important role in opening up prisons to outside view. In 2002, the Judicial Inspectorate reported that conditions in prison, especially for unsentenced prisoners, were completely unacceptable and could not wait for long-term solutions. For example, in one prison a single toilet was shared by more than 60 prisoners, there was a stench of blocked and overflowing sewage pipes, and a shortage of beds resulted in prisoners sleeping two on a bed, while others slept on the concrete floors, sometimes with only a blanket. This situation was exacerbated by inadequate hot water supply, no facilities for washing clothes, broken windows and lights, and insufficient medical treatment.

These views have recently been confirmed by the primary UN body responsible for conditions of detention. 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, it noted ‘an alarming rate of overcrowding in detention facilities’ and stated that, in relation to pre-trial detention, ‘the lack of adequate facilities is so blatant that they fall short of international guarantees’. The Working Group stressed that no juvenile should be detained before trial, even for the most serious charges. The Working Group also said that the lack of a clear stipulation that time spent in pre-trial detention should be taken into account in the final sentence is not in conformity with international law.

Among the key contributors to overcrowding in pre-trial detention are delays in bringing cases to trial. The average length of time awaiting-trial prisoners remain incarcerated until the finalisation of their trials rose considerably between 1996 and early 2002. On average, accused persons are imprisoned for four-and-a-half months awaiting the finalisation of their trial. The absolute number of accused persons awaiting trial in state prisons has also grown, almost tripling between 1995 and 2000. Many of these pre-trial detainees are in prison because they are unable to afford trivial sums for bail. The increase in the average awaiting-trial time is associated with an increasing backlog in the finalisation of criminal prosecutions, associated with police crime crackdowns, as well as the automatic review of mandatory minimum sentences by the High Court under the minimum sentencing legislation.

An amendment to Section 63A of the Criminal Procedure Act of 1977 allows a head of 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, or release the prisoner without bail, or place the prisoner under the supervision of a correctional officer. This provision should be used more frequently, but the ideal is for less serious offenders, especially first time offenders and those accused of petty offences, to be diverted before they enter prison at all.

In addition, the government must consider increased funding both for prisons, to ensure conditions amenable to the rehabilitation of offenders, and for the prosecution services and magistrates’ courts, in order to assist in overcoming the current backlog of cases. There are many competing demands on the public purse, but public safety and security must be a priority. Despite demands for retribution against violent offenders, the current conditions in prisons do nothing to assist the long-term security of South Africans, and may even be making matters worse.



## V: Access to justice

Section III of this document examined the way in which litigation in respect of social and economic rights is being used to force improvements in the design and implementation of government policy. Whilst such high-profile litigation is important, the success of the statutory frameworks put in place since 1994 ultimately depends on whether the intended beneficiaries of such legislation are routinely able to enforce their rights, not just through litigation, but in their day-to-day dealings with state institutions and private-sector bodies. Routine enforcement of statutory rights involves access to justice in its many facets: knowledge of rights, physical access to courts, the affordability of court procedures and legal services, the openness of courts to hearing certain types of cases, the cultural and linguistic appropriateness of the dispute resolution system, and the existence of rights enforcement mechanisms outside the courts.

Of all these various facets, the major barrier to access to justice in South Africa remains the high cost of legal services. As indicated in the main report, the average South African household would need to save a week's income in order to afford a one-hour consultation with an average attorney. For black households (mostly poorer than the average), the barrier to access is even higher.

The reasons behind the high cost of legal services in South Africa are 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. It is not surprising, therefore, that transformation of the legal profession has for some time been on the government's agenda. The draft Legal Practice Bill, which was released by the Department of Justice and Constitutional Development in August 2000, provides for all the various components of the legal profession (attorneys, advocates, in-house 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 fully clear on this, it would appear that this rule would also cover paralegals, who for the first time, would need to register as legal practitioners in order to offer advice to the public, although current restrictions on their capacity to appear on behalf of clients in court would be maintained.

The response to the draft Legal Practice Bill was not uniformly positive, with the organised attorneys' profession in particular raising concerns about the independence of the profession.

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 comprehensive re-regulation of the legal profession under a single Legal Practice 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. In addition, neither draft bill proposes any measures that are likely to have a significant impact on the high cost of legal services. Whilst the formalisation of the paralegal system through accredited advice centres will enhance access to justice for poor people to a certain extent, it will not change the cost of legal services at the upper end of the market. The right of appearance in court is also still likely to be conditional on the attainment of formal legal qualifications. To the extent that they wish to enforce their rights in court, poor people, even after the enactment of the Legal Practice Bill, are still likely to be dependent on state legal aid.

The legal aid system in South Africa has undergone significant restructuring since 1994, from a one-dimensional *judicare* system, in which state-funded legal advice could only be obtained from lawyers in private practice, to a mixed system in which legal advice can now also be obtained from justice centres staffed by state employees, and partner organisations, such as university-based law clinics. At the same time, there has been a determined effort to diversify the types of matters for which state legal aid can be given. In particular, the following priority areas have been identified: matters involving children, women in divorce, maintenance (i.e., spousal support), domestic violence and unlawful evictions. Notwithstanding these efforts, the overwhelming majority of state legal aid funding is still directed at criminal cases; more than 90 per cent of cases funded between 1 April 2003 and 31 March 2004 were criminal cases. Given that the right of accused persons to legal representation at state expense is constitutionally enshrined, the demand for state legal aid in criminal cases is unlikely to decline in the near future.

The most important issue facing South Africa from an access to justice perspective, therefore, is how to increase funding for certain types of civil litigation, that is, those involving the enforcement of the new statutory frameworks established since 1994, particularly constitutionally mandated statutes (including the Promotion of Access to Information Act, the Promotion of Administrative Justice Act and the Promotion of Equality and Prevention of Unfair Discrimination Act), and statutes that, if not directly mandated by the Constitution, have been enacted in partial fulfilment of the state's positive obligations under the Bill of Rights (including tenancy protection and other land reform legislation, welfare legislation, children's rights legislation and legislation promoting gender equality). Whilst the burden of funding litigation in these areas should largely fall on the state legal aid system, there is still a significant role to be played by donor agencies in ensuring the success of law-driven social change in South Africa.

The importance of this challenge should not be underestimated. As noted at the beginning of this paper, South Africa in many ways is at the epicentre of the global human rights movement. Should rights-based development in South Africa fail, the consequences for global efforts to promote respect for the rule of law and good governance would be severe.

# Conclusion

This discussion paper highlights both the distance that South Africa has travelled since its transition to democracy in 1994, and the work that still remains to be done in creating, in the words of the 1989 UN Declaration on Apartheid, 'a united, democratic and non-racial country, with justice and security for all its citizens'. Though South Africa has accomplished much in law and policy reform, work is still needed to bring national laws into line with international standards, where applicable and feasible. Most importantly, there is a great deal still to do to realise the high ambitions of the new laws adopted since 1994, and ensure that they are effectively implemented, especially in those provinces where state administrative capacity is weakest. The Open Society Foundation for South Africa recognises that these tasks are not easy, and pledges its support to seeing that they are accomplished.

