AFTER THE TRANSITION

Justice, the judiciary and respect for the law in South Africa

CENTRE FOR THE STUDY OF VIOLENCE AND RECONCILIATION

Criminal Justice Programme • Transitional Justice Programme

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TRANSFORMATION AND THE INDEPENDENCE OF THE JUDICIARY IN SOUTH AFRICA

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CONTENTS

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ACRONYMS AND ABBREVIATIONS

ANC	African National Congress
ANCYL	ANC Youth League
CLAA	Criminal Law Amendment Act (105 of 1997)
Cosatu	Congress of South African Trade Unions
ICCPR	International Covenant on Civil and Political Rights (1976)
JSC	Judicial Services Commission
NP	National Party
TRC	Truth and Reconciliation Commission
UDHR	Universal Declaration of Human Rights (1948)
UN	United Nations

1. INTRODUCTION

During recent years there has been considerable debate about the judiciary in South Africa. One key issue which animated the debate was the controversy over five judicial reform bills, initially released by the Ministry of Justice in December 2004. Having been withdrawn in the face of criticism shortly after they were first issued, the bills, largely unaltered, were re-introduced to Parliament in mid-December 2005. In the months that followed, concerted opposition from the judiciary as well as from lawyers and others led to another defeat for the justice ministry's legislative programme. Now, as of late-2007, two of the bills have not been re-introduced to Parliament and the others have been substantially amended, largely in line with concerns raised about provisions that could have undermined judicial independence.[1]

The saga of the justice bills, ostensibly intended to improve court management and efficiency, rationalise court structures and promote transformation of the judiciary, has been one of the biggest tests for judicial independence in the post-apartheid period. At this point in time, it seems that the overall impact of this episode has not only been benign but that it may have contributed to a strengthening and deepening of understanding about the meaning of judicial independence among the various concerned role players in South Africa.

Focusing on the issue of judicial independence and transformation in South Africa, this paper discusses not only the justice bills but also other matters related to this topic, including the overall attitude of government and the ruling African National Congress (ANC) toward judicial independence. The paper also discusses the process of judicial appointments and the functioning of Judicial Services Commission (JSC), examining questions about whether the government uses the JSC process to create a judiciary that complies with and is aligned with governmental policies.[2]

This paper is intended to provide a perspective on questions related to the independence of the judiciary in present-day South Africa. While South Africa is no longer in the heart of its political transition, the legacy of apartheid rule is still strongly felt and post-apartheid "transformation" continues to be a central concern of government and society more broadly. But how does judicial independence relate to transformation? Rather than conceiving of it as a separate issue, this paper departs from the point of view that the consolidation of judicial independence is a key dimension of the process of judicial transformation in South Africa. If this is so, the question arises as to whether there may be tensions between independence and other key elements of transformation, including the creation of a judiciary that is representative of the people and that is dedicated to protecting and promoting South Africa's constitutional values, fostering an atmosphere of judicial accountability, and improving the efficiency and appropriateness of the justice system to ensure access to justice for all people.

While strengthening independence appears to be largely compatible with other aspects of transformation, there are potential tensions, and the report tries to clarify where these tensions lie. South Africa's constitutional democracy is barely over a decade old and faces complex challenges due to the lasting effects of over fifty years of apartheid rule. Repairing the problems left behind

[1] It should be noted that the ANC policy conference in June adopted a draft resolution with the somewhat ambiguous resolution in favour of "Adoption and Implementation of Transformative bills that are currently being debated" (ANC, 2007: 17). It is not at all clear if this resolution is referring to the revised bills that are currently before Parliament or is also supposed to refer to the two bills that are currently completely withdrawn. The policy conference is a preparatory conference for the ANC national conference due to start on 16 December, and draft resolutions are developed for consideration by the national conference. Once adopted by the national conference they are intended to direct ANC, and thus government, policy.

[2] Another saga which is not discussed in detail in this report (though see the section on Race and Gender Transformation in the discussion of judicial appointments, footnotes 19, 20 and 21, and the Conclusion), involves two prominent court cases, one culminating in June 2005 (the trial of Schabir Shaik) and one in May 2006 (the rape trial of Jacob Zuma), which have had implications for the political career of Jacob Zuma and the succession battle within the ANC. In both of these cases, the judiciary was placed under pressure and selectively undermined and belittled by elements in the ruling party and the ruling tripartite alliance (composed of the ANC, Cosatu and the South African Communist Party). However, the eventual acquittal of Jacob Zuma in May 2006 may have increased respect for the judiciary and improved understanding of its role, so that the overall impact of this episode on the judiciary might also, in some ways, have been quite positive. Due to the fact that this paper does not focus on this episode, the paper should perhaps be considered a discussion of the way in which the ruling bloc within the political alliance that governs South Africa has dealt with the issue of judicial independence.

by apartheid, a legal order that institutionalised discrimination and impacted on every aspect of society, is a complicated, slow and often frustrating process. The judiciary is immune neither from the negative effects of apartheid nor from the challenges associated with transformation. However, to effectively protect the Constitution and ensure that discrimination and other abuses do not reoccur, the judiciary must consolidate and resist intrusions into its independence.

This report therefore provides an analysis of the question of judicial independence in current day South Africa. Part II gives a brief explanation of judicial independence and the principle of separation of powers. Part III provides an historical backdrop, examining the role of the judiciary during apartheid. Part IV discusses how judicial independence has been entrenched in the post-apartheid political dispensation and how the concern with independence relates to other dimensions of transformation. Part V explores some current challenges to protecting and promoting judicial independence, focusing on the government's attitude toward the judiciary, attempts at judicial reform in the form of the five justice bills, and the appointment of judges.

Finally, the conclusion of the report argues that while none of the recent events poses an insurmountable challenge to the independence of the judiciary, South Africans must continue to be aware of threats to judicial independence and prevent independence from being undermined. Although some of the concerns that motivated the judicial bills and other actions that potentially threaten judicial independence are valid, independence is crucial to an effectively functioning democracy and should not be sacrificed to achieve other, albeit valid and important, goals.

1.1 Methodology

The methodology employed for this report included a literature review of books, journal articles and reports from non-governmental organisations and other sources, as well as a survey of relevant newspaper and magazine articles from 2004 to the present. In addition, a number of individuals in government, the judiciary, academia and civil society were solicited for interviews; in total, nine people responded and open-ended interviews were conducted with each. The names of the nine interviewees are listed in Appendix A. For purposes of anonymity, no names are used when interviewees are cited in the document; only dates are provided. On one day, three interviews were conducted, and on all other days only one interview was conducted. Although a broad group of judges, lawyers, activists and legal scholars were contacted for interviews, many did not reply. The research for this report was conducted largely between June and August 2006, and the paper was finalised in mid-2007.

2. OVERVIEW OF JUDICIAL INDEPENDENCE

And independent judiciary is a fundamental element of democracy. Various international treaties including the Universal Declaration of Human Rights (1948) (UDHR), the International Covenant on Civil and Political Rights (1976) (ICCPR) and the African Charter on Human and People's Rights (1981) contain provisions affirming the importance of this principle. For instance, Article 14 of the ICCPR states that:

> In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Similarly, Article 26 of the African Charter declares that:

> State parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

Judicial independence is intertwined with the doctrines of separation of powers and of checks and balances, both of which are generally considered to be defining characteristics of a democracy. Originating in the writings of the "French philosopher Montesquieu and the American statesmen Madison", the notion of separation of powers stems from the belief that "the best way to control government power is to divide it among the various branches of government — the legislative, executive and judicial branches" (Motala, 1995: 506). The three branches of government must be functionally separate and refrain from interfering with the functions of one another. The doctrine of checks and balances "seeks to make the separation of powers effective by balancing the power of one agency against that of the other" (ibid). By separating official power among three different organs and by providing mechanisms by which each organ can check the power of the other, the tripartite system of government aims to prevent any one person or institution from gaining too much power and control over the government and thus the people.

The judiciary plays a crucial role in the system of checks and balances, a role which demands independence from the executive and legislature. By applying national constitutions, legislation and the common law to official actions, courts are supposed to ensure that the other branches of government respect the rights of the people and do not act illegally. Courts are often asked to review the validity of legislation, and members of the executive branch often come before the courts as litigants. To allow courts to carry out their functions and fairly determine the legality of governmental action, courts must be free from any actual or perceived interference by other branches of government. Clarifying the importance of independence in assuring the effective functioning of courts, David Dyzenhaus, a law and philosophy professor, stated:

> At the moment that a court accepts jurisdiction over a controversy between government and an individual, government is demoted — it loses its claim to be the exclusive representative of the state. At the same time, the individual is promoted to a public role, to one with an equal claim to represent the state. The court, then, in deciding between these claims, articulates a vision of what the state is and publicly draws the line between law and politics... In order to articulate this vision, the court needs to be independent (1998: 172).

2.1 Institutional independence

On a more structural level, judicial independence has two components: individual independence and institutional independence. Institutional independence refers to the existence of "structures and guarantees to protect courts and judicial officers from interference by other branches of government", while individual independence refers to judicial officers' acting independently and impartially (International Bar Association, April 2006: 4). Underscoring the nearly universal support for these notions, numerous documents shed light on the structural safeguards that protect institutional and individual independence. Recognising that "an independent, impartial, honest and competent judiciary is integral to upholding the rule

of law and engendering public confidence and dispensing justice", the *Commonwealth (Latimer House) Principles on the Three Branches of Government* (2003), a document approved by the heads of government of the Commonwealth countries, provides a framework for implementing the principles of separation of powers and judicial independence. Similarly, the *Basic Principles on the Independence of the Judiciary* (1985) (*UN Principles*), a United Nations (UN) document endorsed by the General Assembly in 1985, lists several principles aimed at securing independence.

In terms of ensuring institutional independence, constitutional guarantees of the separation of powers and of non-interference in the judiciary by other branches of government are crucial. As the *UN Principles* states:

> The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary (section 1).

Moreover, institutional independence requires that the judiciary has sole "jurisdiction over all issues of a judicial nature" (sections 3 and 4).

2.2. Individual independence

Individual independence involves a variety of factors that help ensure that judges can act free from the influence of any outside sources. For instance, judges must have security of tenure either in the form of life-long appointments, set terms of office or a mandatory retirement age (*Latimer House Principles*, section IV[b]; *UN Principles*, sections 11, 12). A well-defined process for removing judges from office also prevents the executive or legislature from dismissing judges in retaliation for an unfavourable decision and from using threats of impeachment to pressure judges. Likewise, judges should be removed only "for reasons of incapacity or behaviour that renders them unfit to discharge their duties" (*UN Principles*, section 17; *Latimer House Principles*, section IV[d]). Disciplinary procedures should also be "fairly and objectively administered" (*Latimer House Principles*, section VI[b]). Similarly, to protect them from fear of reprisals for their decisions, judges should be immune from civil suits arising from acts or omissions in the course of exercising their judicial functions (*UN Principles*, section 16).

Another important safeguard, financial security, is crucial to maintaining individual independence preventing other branches of government from using threats of salary reduction to influence judges (*UN Principles*, section 11; *Latimer House Principles*, section IV[b]). Financial security includes adequate remuneration and protections against the arbitrary reduction or suspension of judges' salaries. Similarly, the adequate provision of resources allows the "judicial system to operate effectively without any undue constraints which may hamper" independence (*Latimer House Principles*, section IV[c]).

The judicial appointments process also impacts on individual independence. Judicial appointments "should be made on the basis of clearly defined criteria and by a publicly declared process" (*Latimer House Principles*, section IV[a]). The appointments process must also "safeguard against judicial appointments for improper motives", and people selected should "be individuals of integrity and ability with appropriate training or qualifications in law" (*UN Principles*, section 10). If the appointment of judges were not based on well-defined criteria or not open to public scrutiny, the executive could try to appoint judges who shared its beliefs and would be unlikely to challenge government acts. Similarly, if appointments are based on merit as opposed to party allegiance or other inappropriate factors, judges will be less likely to feel that they need to favour the people who appointed them. Merit-based appointments also help ensure that judges have the necessary legal education and experience, both of which help foster and reinforce the importance of judicial independence. Furthermore, to protect independence, any system of promoting judges "should be based on objective factors, in particular ability, integrity and experience" (UN Principles, section 13). If judges believe that the content rather than the quality of their decisions will impact on their likelihood of being promoted, they might be reluctant to make decisions upon which the government will look unfavourably.

2.3 Impartiality

Structural safeguards help protect judges from outside influences, but the ability of each judge to put aside his or her own biases and decide cases objectively is as important While independence is objective and protected by constitutional and other legal guarantees, impartiality is more subjective and refers to a judge's state of mind. According to Justice Harms, "without an independent mind, approach and attitude [on the part of a judge], judicial independence is worthless. Structures and constitutions cannot create this state of mind, they can only provide its framework and support it" (Harms, 1998). As Justice Harms points out, many of the formal protections of independence help support an independent judiciary, but judges themselves carry much of the burden of remaining impartial. While distinct, the concepts of independence and impartiality are closely linked and both crucial to maintaining an effective and well-respected judiciary.

Codes of judicial conduct provide useful guidelines for judges and are an important source of information for the general public. Many countries, international organizations and judges' organizations have developed their own codes and guidelines, but the *Bangalore Principles of Judicial Conduct* (2002) (*Bangalore Principles*) arguably represent the views of the majority of democracies. According to its preamble, the *Bangalore Principles* "establish standards for ethical conduct of judges" and are "designed to provide guidance to judges" and to aid members of the government, lawyers and the general public "to better understand and support the judiciary". The principles were written by the Judicial Group on Strengthening Judicial Integrity after extensive consultation with judges from civil- and common-law countries[3] and after considering several existing national and international codes. They include provisions aimed at six key areas related to individual judges: independence; impartiality; integrity; propriety; equality; and competence and diligence. Each of these six categories impacts on a judge's ability to decide a case without bias or prejudice and thus impacts on the independence of the judiciary as whole.

The section on impartiality, for instance, demands that a judge "disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially" (section 2.5). Judges also must not make comments that could affect the outcome of a trial or impact on the fairness of the process (section 2.4). Many of the provisions addressing propriety deal with a judge's refraining from acting in a way that would compromise his or her impartiality or the appearance of impartiality. For example, a judge or family member of a judge cannot accept gifts or favours in relation to anything done as part of the judge's official functions (section 4.14). Similarly, if a judge has relationship with members of the legal profession who practice in his or her court, he or she must "avoid situations which might reasonably give rise to the suspicion or appearance of favouritism or partiality" (section 4.3). On a slightly different note but similarly encouraging impartiality, the *Bangalore Principles* demand that judges are cognisant of diversity and "carry out judicial duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and judicial colleagues, without differentiation on any irrelevant ground..." (section 5.3). Various other provisions also address issues pertaining to a judge's impartiality in the performance of his or her judicial functions. Essentially, when accepting a seat on the bench, a judge must put aside his or her personal biases and should refrain from any activity that directly affects or gives the appearance of affecting his or her ability to decide cases impartially.

2.4 Independence and public confidence

While judicial conduct is important in ensuring that judge's act impartially, public perception of the judiciary is also fundamental to creating an effective system of justice and a legitimate government. The preamble to the *Bangalore Principles* asserts that "public confidence in the judicial system and in the moral authority and integrity of the judiciary is of the utmost importance in a modern democratic state". According to Justice John Evans of the Canadian Federal Court of Appeal, independence "is a necessary condition for obtaining and maintaining this confidence, without which the courts' legitimacy ... will rapidly erode,

[3] In common law countries, such as the US and the UK, judges interpret and apply legal rules by relying heavily on precedent from earlier judicial decisions. In civil law countries, such as Japan, judges apply comprehensive legal rules that are usually, though not always, codified. Legislation is the primary source of law in civil-law countries, whereas case precedent is the primary source of law in common law countries. Some countries, such as South Africa, have mixed civil and common-law systems. South Africa's legal system relies on both English common law and Roman-Dutch civil law.

and with it human rights and the rule of law" (Budlender, 25 July 2005). Courts are supposed to protect the people against illegal action by the executive or legislature; if people do not believe that the courts are independent, they will not trust courts' pronouncements about the validity of government action and may thus loose faith in the system as a whole. If the public does not have confidence in the courts, the legitimacy of the entire government will be called into question. Moreover, if people doubt the impartiality of judges or view the judiciary as representative or supportive of a certain segment of society, individuals may stop turning to the courts for dispute resolution or may fail to respect court decisions, with a negative impact on efforts to establish the rule of law and the ability of courts to fulfil their functions.

Many of the provisions in the *Bangalore Principles* aim to foster public confidence. For instance, a judge must "ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary" (section 2.2). Similarly, the *UN Principles* provides that members of the judiciary are entitled to freedom of expression, belief, association and assembly but includes the caveat that "judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary" (section 8). Independence and impartiality, as expressed in court decisions, in the processes by which judges arrive at decisions, and in judges' individual behaviour, underpin public confidence in the legitimacy of the judiciary and thus strengthen democracy as a whole.

3. JUDICIAL INDEPENDENCE DURING APARTHEID

South African history demonstrates the vulnerability of the judiciary to manipulation even while the pretence of independence is maintained. Throughout apartheid, in an attempt to legitimate the political order, the National Party (NP) government claimed consistently that the judiciary was independent. While formal structural guarantees of independence existed and while the judiciary had a history of independence and at times rendered decisions contrary to the wishes of the ruling party, a closer examination of the judiciary's position, powers and composition reveals that the judicial branch was not truly independent and did not effectively curb abuses of power by the other branches of government. Instead, by upholding blatantly discriminatory and unjust legislation, the judiciary functioned as part of the apartheid legal order and contributed to legitimising and sustaining it. The role and attitude of the judiciary during apartheid sheds light on why both institutional and individual independence are critical to an effectively functioning judiciary that is able to protect the people and fairly adjudicate disputes between individuals and the government.

3.1 Formal independence

During apartheid, the judicial branch did not enjoy true independence from the executive and legislature, and the government often tried to stymie what little independent decision-making power judges were able to invoke. However, to lend legitimacy to the apartheid legal order, the government insisted that the judiciary was independent. The Truth and Reconciliation Commission's (TRC) report on the legal hearings (1998) explains the basis for the government's claims:

> [T]he appearance of judicial independence and adherence to legalism under the guise of "rule by law" serves as powerful legitimating mechanisms for the exercise of governmental authority. It is all the more useful to a government which is pursuing legislative and executive injustice to be able to point to superficial regulation by the judiciary, while being able to rely on the courts not to delve too deeply in their interpretation and enforcement of the law (chapter 4, volume 4).

Because of the virtual universal acceptance that judicial independence is a hallmark of democratic and legitimate government, the NP benefited from assertions that the South African judiciary was independent. As Professor Wacks observed, a "government that can point to an apparently independent judiciary which ... acquiesces in the promulgation of blatantly unjust laws and Draconian assaults upon some of the most sacred principles of justice, is readily able to legitimise itself" (1984: 280). Thus, claims that an independent judiciary was protecting the people and overseeing the exercise of government power helped strengthen the government's contention that the apartheid legal order was legitimate, legal and just.

Throughout apartheid, the judiciary enjoyed many of the formal structural protections of independence. For instance, courtrooms were generally open to the public, and although career advancement may have "depended on not incurring the political displeasure of politicians" (Dyzenhaus, 1998: 89), all judges had security of tenure and of salary. Judges served until the age of seventy and could be removed before that time only by the state president "at the request of both Houses of Parliament in the same session, on the grounds of misbehaviour or incapacity" (Dugard, 1978: 10). No judge was removed during apartheid. Moreover, the remuneration of judges was guaranteed legally and could not be reduced during a judge's term of office (Forsyth, 1985: 37).

Perhaps more important than structural guarantees is South Africa's history of judicial independence. Writing in 1978, John Dugard pointed out that the "South African judiciary has, until recent times, enjoyed an almost unsurpassed reputation for independence from the other branches of government" (279). Until the late 1950s the Appellate Division, the highest court at the time, "vigorously asserted its independence from the executive" and its "judgments frequently emphasised the importance of individual liberty above the interests of the state" (McQuoid-Mason, 1987: 232). However, the judgments invalidating legislation and frustrating NP initiatives prompted reaction from the government and the enactment of various measures aimed at frustrating the ability of the courts to act independently.

Two cases in the early 1950s illustrate the Appellate Division's impartiality and willingness to act in opposition to the NP. First, in 1951 the Appellate Division found that the Separate Representation of Voters Act — an act attempting to remove the Cape coloured voters from the common electoral role — was invalid because the legislature had not passed the Act according to the correct procedures. The government responded by passing the High Court of Parliament Act, which provided that when the Appellate Division invalidated an Act of Parliament, Parliament would then sit as a so-called "High Court of Parliament" and review the court's decision. In the case challenging this act, the five Appellate Division judges, each writing a separate but concurring opinion, found that the High Court of Parliament was "simply Parliament in disguise" and invalidated the Act (Dugard, 1978: 31). Noting the court's independence and willingness to assert its independence during this 1950s, John Dugard explained that the court "was in many ways perpetuating a tradition that had been fostered by the Appellate Division since the time of Union" (1978: 288).

In spite of formal guarantees, the judiciary's history and the government's contentions, a closer examination of the apartheid legal order reveals that the judiciary was not independent and impartial in practice and tended to sanction — either tacitly or at time more overtly — violations of individual rights by the government.

3.2 Parliamentary supremacy

Beginning at the time of the union of South Africa in 1910, the country had a Westminster system of government in which the legislature was supreme over the other branches of government. South Africa's various constitutions — the Constitution of the Union, the 1961 Constitution of the Republic, and the 1983 amended Constitution — codified the Westminster model and the accompanying doctrine of parliamentary supremacy. For example, section 34 of the 1983 Constitution stated that "no court of law shall be competent to inquire into or to pronounce upon the validity of an Act of Parliament" (Republic of South Africa Constitution Act No. 110 of 1983). In practical terms, this provision meant that the legislature, a body which theoretically represented the will of the people at large, could enact whatever legislation it desired (Cowling, 1987: 178). Thus, unlike in the present-day constitutional democracy, courts during apartheid did not have the power of judicial review by which they could determine the legality of acts of Parliament. Instead, courts were confined to interpreting legislation.

Moreover, the judiciary adopted a "narrow approach to its interpretive function" (Dugard, 1971: 182), choosing to interpret legislation according to what it believed Parliament would have desired. Dyzenhaus described the judiciary's approach to interpreting legislation as a "plain-fact" approach, meaning that:

> ... judges hold that the judicial duty when interpreting a statute is always to look to those parts of the public record that make clear what the legislators as a matter of fact intended. In this way, the judges merely determine the law as it is, without permitting their substantive convictions about justice to interfere (16).

In addition to courts' lacking the power to invalidate acts of Parliament, the South African constitution did not include a bill of rights nor did other legal provisions codify individual rights. Thus, the judiciary lacked "textual standards and equally important, a body of jurisprudence interpreting those textual standards, by which to evaluate alleged violations of civil liberties" (Higginbotham, 1990: 563). Rather than trying to apply notions of justice, equality, and fairness to their interpretation of acts of Parliament, judges tried only to discern the intent of Parliament and confined themselves to interpretation based on this intent.

Notwithstanding its relatively independent role, the Appellate Division, the highest court during apartheid, also explained its views of the judiciary's function and legislative interpretation. In the case of *Sachs* v. *Minister of Justice*, for instance, the court stated that "Parliament may make any encroachment it chooses upon the life, liberty or property or any individual subject to its sway, and ... it is the function of the courts of law to enforce its will" (1934 A.D. 11 at 37). In a 1986 decision, then Chief Justice Rabie explained the court's approach to dealing with acts of Parliament as follows:

> It has been said that, if the language thereof [of a statute] is uncertain or ambiguous, it should be interpreted in a way which least interferes with the rights of the individual. It is to be noted, however, that

> such an approach to the task of interpretation is permissible only if the language used by the legislature is indeed ambiguous or open to doubt. If it is not, and the meaning thereof is clear, the Court must give effect thereto, no matter how unfortunate the result may be for those who may be affected by it" (1986 [4] SA 1150, 1176[A] as cited in Davis, 1987: 102–3).

While judges ostensibly had room to interpret unclear legislation and while a small number of judges took advantage of this opportunity, courts more often found that the language in legislation was unambiguous and that Parliament's intent, if not stated explicitly, could be easily inferred.

Two cases illustrate the judiciary's approach to alleged violations of civil liberties. First, in *Minister of the Interior* v. *Lockhat* (1961), the Appellate Division dealt with a case challenging the validity of a proclamation dividing Durban into group areas. The challenge was based on the fact that whites were given the best areas and Indians were given poorer areas. Speaking for a unanimous court, Justice Holmes explained that for the discriminatory division of land to be valid, "the power to discriminate unreasonably had to be given expressly or by necessary implication" (cited in Dyzenhaus, 1998: 17). Thus, the court had to answer the "purely legal" question of whether the legislation "impliedly authorise[d], towards the attainment of its goal, the more immediate and foreseeable discriminatory results" that occurred (ibid). Justice Holmes concluded that while not provided explicitly by the legislation, authorisation for the inequitable results was "clearly implied" (ibid: 17–18). Similarly, in the case of *Rossouw* v. *Sachs* (1964), a case concerning the detention of Albie Sachs under the 90-day law, Justice Ogilvie Thompson of the Appellate Division found that the law authorised "psychological compulsion" of detainees, and he thus attributed to Parliament the intention of authorising this compulsion (ibid: 69). Though the legislation in neither case expressly provided for or permitted the result being challenged, in both cases the court found that Parliament's intention to authorise the unfair outcome could be implied from the existence of the Act.

Under the Westminster model of government the legislature is supreme and courts are confined to interpreting acts when the language is ambiguous and to discerning the Parliament's intent. The Westminster system, however, was designed to work in a country where the legislature was representative of and considered legitimate by the majority of the people. In South Africa, the legislature was certainly not representative of or concerned with protecting the rights of the black majority; rather, the country was a "pigmentocracy" in which a "white oligarchy" controlled by an "Afrikaner elite" had all the political power (Dugard, 1978: 7). Thus, the political conditions during apartheid were not conducive to the Westminster-style of government and called instead for a judiciary that was able to protect the disenfranchised majority. Whereas a legislature that is subject to the will of all the people is restrained by the knowledge that it can be voted out of office, the South African legislature did not face this constraint.

In its report on the institutional hearings about the legal community, the TRC explained the problem with the Westminster model in apartheid-era South Africa:

> [P]arliamentary sovereignty and the rule of law work hand in hand and are premised on a political system that is fundamentally representative of all the people subject to that Parliament. This situation never applied in South Africa; not only was representative (and responsible) government conferred effectively only on the white inhabitants of the Union in 1910 (at maximum less than 20 per cent of the population), but South African political and legal life was never characterised by that unwritten sense of "fair play" which is so much a part of the native Westminster tradition (paragraph 41).

Thus, notwithstanding the judiciary's formal independence, the Westminster system combined with the "plain-fact" approach created a judiciary that was complicit in sustaining the apartheid legal order. The judiciary's reluctance to interpret legislation in favour of individual rights and preference for supporting the will of Parliament belied any claims of meaningful independence.

Despite the doctrine of legislative supremacy, some lawyers and academics argued at the time as well as in hindsight that judges often had leeway to interpret legislation in a manner that protected or at least mitigated the breach of individual liberties. The TRC report found that despite claims to the contrary by many apartheid-era judges, given the "inherent ambiguity of language

and the diversity of factual circumstances with which judges were confronted", they had some degree of latitude in interpreting and applying legislation in almost all cases (volume 4, chapter 4, paragraph 23). During apartheid, some members of the legal profession recognised the ability of judges to interpret legislation rather than merely discern the intention of Parliament. In his inaugural address as a law professor at the University of the Witwatersrand, John Dugard (1971) acknowledged the doctrine of legislative supremacy but called on judges to apply common law principles, many of which were rooted in Roman-Dutch law and had been recognised by the courts, to the interpretation of statutes (181–200).[4] He argued that because courts were frequently "called upon to discover the intention of the legislature on a subject in respect of which the legislature clearly had no intention at all", judges could play a "creative role in filling in the gaps of the statute" (183).

Furthermore, some people reject the notion that there exists only one valid interpretation of any given piece of legislation. In a 1987 article, DM Davis argued that "there is no such thing as an absolute unitary common use of language and hence any presumption that all parties who are subject to a legal document ... must necessary share the same meaning thereof or employ the same conceptual tools of interpretation, cannot be sustained" (230). Therefore, owing to the inherent ambiguity in language, judges always had some degree of room to interpret statutes and could have acted, more often than they did, to prevent the application of patently unjust legislation. Similarly, as CF Forsyth (1985) observed in his book about the Appellate Division, although the court repeatedly upheld discriminatory and repressive legislation such as the group areas act and various security measures, the legislation never compelled the court's decision and "frequently persuasive legal grounds exist[ed] which would justify if not compel, a less harsh result or one which kept the executive under judicial control" (226). However, in practice most judges failed to use the opportunities they had to interpret legislation in favour of the protection of individual liberties. The judiciary thus became more of a rubberstamp than an independent check on the actions of the executive and Parliament.

3.3 Executive-mindedness of the judiciary

In addition to the Westminster model of government influencing the judiciary's ability to act independently, judges were often accused of being "executive-minded". For example, in 1968 the International Commission of Jurists said of the South African judiciary: "In spite of a number of courageous decisions at first instance, the overall impression is of a judiciary as 'establishment-minded' as the executive, prepared to adopt an interpretation that will facilitate the executive's task rather than defend the liberty of the subject and uphold the Rule of Law" (Dugard, 1978: 280). More precisely, the allegation of executive-mindedness attributes to a judge:

> ... an excess of ardour in countenancing government power when its exercise is challenged before him. It suggests an attenuated commitment to protecting the rights and entitlements of individual citisens when these are infringed by government action. It may also, more broadly, imply that the judge concerned tends to lean toward the side of a government or public body when its interests are in dispute before him (Cameron, 1982: 52).

Importantly, executive-mindedness does not necessarily imply that a judge is consciously biased and intentionally partial to the government.

The judiciary's tendency to agree with the executive stemmed in part from the similar composition of the two branches and the fact that judges' past experiences and "perceptions of contemporary social circumstances and needs" impact on the way in which they interpret laws (Cowling, 1987: 190). Members of all branches of government were "drawn from the same privileged white elite" (Dugard, 1971: 191) and thus tended to have similar backgrounds and world views. Likewise, because judges came from the segment of society that benefited most from the prevailing political and social order, they were likely to support and want to preserve the status quo. Given that a judge is "inevitably influenced by his own perceptions of the needs of social policy, of the

[4] The common-law principles to which he referred included: "freedom from arbitrary arrest and detention without trial; freedom from cruel and unusual punishment; the right to legal representation when the individual's liberty is at stake; the right to be heard in one's own defence before one's liberty is curtailed; equality before the law; freedom of speech and literary expression; freedom of the Press; freedom of assembly; and freedom of movement" (197).

expectations of society and, perhaps, by inarticulate, subconscious factors which constitute part of the make-up of each judge" (Dugard, 1978: 303), it is not surprising that judges during apartheid tended to support the NP. While many may not have been consciously biased in favour of the executive, by virtue of the fact that they came from the same small sector of society, judges shared with other members of government similar interests and were thus less likely than judges in representative and diverse legal orders to disagree with legislative enactments.

The case of *Bloem* v. *State President* (1986 [4] SA 1064 [O]), concerning the validity of the state of emergency declared on 12 June 1986, is often cited as an illustration of the executive-mindedness of judges, specifically Chief Justice Steyn. Although Justice Steyn spoke about the duty of a court to balance fairly the power of executive against the rights of the individual, he prefaced his decision "with a politically partisan, one-sided and emotive exposition of the government's view on the causes and necessity for the declaration of the state of emergency" (Cameron, 1987: 224). Attempting to contextualise the enactment of the emergency regulations, Justice Steyn declared that South Africa was undergoing a period of constitutional, socio-economic, political and cultural reform which was "accompanied by social turbulence and unrest generated mainly by resistance to that change and reform not only as to its tempo but also to its ambit, nature and direction" (1986[4] SA 1064[O], 1067F). The resistance was violent and directed not only at government authorities but also at the private sector, members of the security forces and "indiscriminately at the general public" (ibid). Justice Steyn explained that it was in the context of this violent unrest and of the fear that the tenth anniversary of the Soweto uprising would "be the occasion for a grave escalation and intensification of the aforesaid unrest and violence", that the court would have to consider the validity of the emergency regulations (1986[4] SA 1064[O], 1068D).

Steyn's contextualisation of the environment in which the state of emergency was declared undeniably accorded with the executive's official view and justifications for the policy. Although he discussed the role of a court in balancing the needs of the executive and the individual and "undoubtedly considered that he was adopting an even-handed approach ... the ideological context in which he operate[d] made it almost impossible for him to interpret the enabling legislation in any other manner than in a pro-executive fashion" (Davis, 1987: 99). Given that he had accepted the government's reasons for declaring the state of emergency, Steyn would have had a difficult time finding that the regulations were invalid. The *Bloem* case is one illustration of the way in which a judge's view of society and ideological framework can affect his or her decision-making process. Because most judges shared not only with one another but also with members of the other branches of government similar backgrounds and positions in society, it was likely that judges would also share with the executive similar notions of what policies were desirable. Thus, along with the Westminster system's institutional impediments to independence, many members of the judiciary did not have the subjective impartiality necessary to act independently of the executive.

3.4 Attempts to undermine the judiciary

Some actions by the NP government also more directly and deliberately sought to undermine the judiciary and to create a bench where judges would be more likely to approve, or at least tacitly accept, apartheid laws.

3.4.1 Appellate Division Quorum Act

As discussed previously, in the early 1950s several Appellate Division decisions frustrated the government's legislative scheme. In 1995, the government responded to the court's invalidating the Separate Representation of Voters Act by expanding the number of judges in the Appellate Division from six to eleven and requiring that all eleven had to sit in cases concerning the validity of an Act of Parliament (Appellate Division Quorum Act, 1955). Thus, the NP created a situation in which it had to appoint five additional judges to the highest court, the likely effect of which "would be to dilute the opposition in the Appellate Division to the removal of the coloured voters from the roll" (Forsyth, 1985: 15). As Nadel member Zanade Hussein (1997) explained during the legal hearing at the TRC, although the Appellate Division invalidated segregatory regulations in several key cases in the 1950s, "a court expanded by the appointment of five new judges displayed no inclination to compromise the apartheid project" and upheld discriminatory legislation that the six member court likely would have overturned.

3.4.2 Appointment and promotion of judges

The appointment of judges to the bench and the elevation of judges to courts of appeal also affected perceived and actual judicial independence. The State-President-in-Council, that is, the cabinet, appointed all judges, and the appointment process was in private. This practice facilitated the creation of a situation where the bench "was largely a mirror of the political establishment: virtually all-male, all-white, all middle-class and largely Afrikaans speaking" (Rickard, 2003). Especially during the 1950s but throughout the apartheid-era, "the National Party government packed the Bench either with political appointments or with lawyers who had no history of opposition to apartheid" (Dyzenhaus: 38). Additionally, in its quest to appoint judges who were sympathetic to apartheid, the government often placed political factors above merit which "led in many cases to better qualified men being passed over in favour of other less worthy of appointments of promotion" (Ellmann, 1992: 228–29). A brief look at the composition of the bench and at some specific examples of appointments and promotions will illustrate the government's attempts to create a compliant judiciary.

First, in support of the contention that the government appointed conservative and politically like-minded judges, many critics point to the increase in the number of Afrikaans-speaking judges and to the disproportionate appointment, particularly to the appellate bench, of members of the Pretoria Bar. Denying membership to non-white people until the 1980s, the Pretoria Bar had a reputation throughout the apartheid era as one of the most conservative bars in South Africa. Moreover, because Pretoria was the administrative capital of the country, members of its bar were "well-positioned to come to government attention and, in particular, to the attention of officials involved in the process of selecting advocates for appointment to the bench" (Ellmann, 1995: 59). Beginning in the 1950s, the proportion of judges of appeal who had been members of the Pretoria Bar or who had served as civil servants there increased quite steadily. In 1950, only one judge in the Appellate Division had come from the Pretoria Bar (Forsyth, 1985: 42), but by 1980, although only 17% of advocates in the country were members of the Pretoria Bar, almost 50% of Appellate Division judges had practised there (Ellmann, 1985: 59). Similarly, the proportion of judges of the Appellate Division who had practised at the Johannesburg Bar, one of the more liberal bars in the country, fell during the NP's reign (Forsyth, 1985: 42).

Moreover, starting in the 1950s the number of Appellate Division judges whose first language was Afrikaans also grew steadily. Although a judge's language is not a definitive indication of his or her political beliefs, because Afrikaans speakers tended to support the NP or other conservative parties, the increase in the number of Afrikaans speakers indicated that the bench in general had become more conservative (Forsyth, 1985: 45). The increase in the proportion of Afrikaans-speaking judges coupled with the increase in the proportion of judges from the Pretoria Bar support claims that the government attempted to create a more conservative and thus sympathetic bench.

The government's desire to have a more compliant judiciary also extended to its appointment of chief justices to the Appellate Division. Since 1914 when the first chief justice died, whenever a vacancy occurred the senior judge of appeal was elevated to the seat of chief justice (Dugard, 1978: 286). However, the "seniority norm was violated" in 1957 when the NP appointed HA Fagan, an Afrikaner, instead of OD Schreiner, the senior judge of appeal (Hausegger & Haynie, 2003: 641). Although Justice Schreiner was the senior judge and "probably the most distinguished member of the court … the Government was clearly unable to forgive him for his persistent opposition to their legislative scheme to remove the coloured voters from the common roll in the Cape and his steadfast dedication to the notion of equality before the law" (Dugard, 1978: 286). From Fagan's appointment onwards, political considerations took their place alongside questions of seniority when decisions were to be made on whom to elevate to chief justice.

As with Fagan, the appointment of LC Steyn both to the Transvaal Provincial Division and later to the Appellate Division reveals the government's attempt to pack the bench with judges who would support the apartheid programme. Having represented the South African government at the UN from 1946 to1949, and having been a senior government lawyer, LC Steyn was named to the Transvaal Provincial Division in 1951, directly from his position as a government lawyer. Not only was his appointment to the Transvaal Provincial Division "a break with the wholesome practice of appointing to the Bench only senior members of the Bar", but after only four years in that position, he was also promoted to the Appellate Division "over the heads of more senior and undoubtedly more able judges" (Forsyth, 1985: 14). In 1959, having served only four years in the Appellate Division, Steyn — "the person who had clearly been groomed for the post" — was then elevated chief justice, again above more senior appellate

judges (Dugard, 1978: 286). Two examples of the NP's emphasis on political considerations, the appointments of Steyn and Fagan indicate that government did not want to foster an independent judiciary and instead tried to create a bench that would support the official programmes.

The government also used some creative methods to retain judges sympathetic to its views. In 1987 when Chief Justice Pierre Rabie reached the mandatory retirement age of 70, he did not retire but became "acting chief justice", a position the government ostensibly created at the time, for another two years. While the government never explained its rationale for or otherwise justified this "constitutionally unprecedented appointment" (Cameron, 1987: 344), it is reasonable to guess that the NP wanted to keep as chief justice an individual who was likely to uphold apartheid legislation. As the following section will explain, in numerous cases concerning challenges to controversial emergency regulations, the Appellate Division under Justice Rabie decided in favour of the government. In June 1986, soon before Rabie was supposed to retire, the government had declared a state of emergency and one could reasonably infer that the government created the position of "acting chief justice" to essentially guarantee that the Appellate Division would not invalidate any of the emergency regulations.

3.4.3 Assignment of judges to cases

Within the judiciary itself, the assignment of judges to cases, particularly those concerning apartheid regulations, also undermined the independence of the courts and reduced the ability of courts to effectively check government action. By the mid-1980s there were "substantiated suggestions" that in the provincial divisions, especially the Transvaal, more liberal judges were intentionally *not* assigned to security trials (Forsyth, 1985: 50). Likewise, in 1978 John Dugard noted that "misgiving have been expressed in professional quarters about the regularity with which a few judges who are popularly regarded as being sympathetic to Government policies have happened to preside over political trials to the exclusion of other judges" (233). English-speaking judges were rarely appointed to political trials in the Transvaal, the province in which most important political trials occurred (ibid). There appears to be little doubt that political considerations were taken into account in assigning judges to cases.

Perhaps the most blatant illustration of the politically motivated assignment of judges occurred during Justice Rabie's tenure, from June 1982 to January 1989, as chief justice of the Appellate Division. Consisting of an average of 17 judges during the period in question, the Appellate Division sat in five-judge panels to hear emergency law cases, and the chief justice had the power to draw up the roll for each court term. While Rabie was chief justice, at least three of the five judges assigned to every emergency case were members of what Stephen Ellmann (1992) has called the "emergency team" (4). Agreeing on the result in every emergency case, the team consisted of five judges — Rabie and four others — who without fail found in favour of the government. Moreover, despite having at least three emergency team judges on each panel and thus a majority in every emergency law case, when other judges dissented from emergency team decisions, Rabie never again assigned them to sit on an emergency case (Ellmann, 1992: 65).

Although the domination of the five judges in emergency decisions did not technically violate the law, it did "fly in the face of the norms of judicial objectivity that South African law holds dear" (Ellmann, 1992: 57). Given that the Appellate Division was already unrepresentative — demographically and politically — of the people of South Africa, the domination of five judges over all emergency-related decisions for six-and-a-half years "made the court's jurisprudence the expression of an even smaller range of South African understanding..." (Ellmann, 1992: 113). By preventing all except the emergency team judges from having any meaningful role in assessing emergency regulations, Rabie's method of assigning judges to cases undermined court's independence and the legitimacy of its decisions and arguably turned the Appellate Division into a political rubberstamp.

3.4.4 Other attempts to weaken the courts

Aside from actions that undermined the ability of the judiciary to operate independently, the government's reaction to unfavourable decisions also underscores the judiciary's inability to significantly impact on government policies. One way in which the government reacted to the potential activism of independent courts was with so-called "ouster clauses". These clauses sought to prevent courts from reviewing the validity of a regulation passed under, or an official action taken under, the enabling legislation. One example of many ouster clauses, a 1986 addition to the Public Safety Act (3 of 1953) stated:

> No interdict or other process shall issue forth staying or setting aside any proclamation issued by the State President [under the Act] ... and no court shall be competent to inquire into or give judgment on the validity of any such proclamation, notice or regulation (section 5B).

Because the President's power to declare a state of emergency stemmed from the Public Safety Act, any actions taken by state officials under the emergency regulations were, according to the law, not subject to judicial review. The attempt to "exclude the supervision of executive powers by legal institutions" (Haysom & Plasket, 1988: 306) is another example of the government's attempts to weaken the power of the judiciary.

It is important to note that courts often refused to allow their jurisdiction to be thrown out completely and "always held that for the ouster clause to be operative, the action must be taken "under" or "in terms of" the relevant statute, which includes the implied limitations imposed by the statute" (Haysom & Plasket, 1988: 327). By looking at whether an act was *ultra vires* or void for vagueness and thus outside the ambit of the enabling statute, courts circumvented the ouster clauses and empowered themselves to decide cases (ibid). However, in the United Democratic Front case, the Appellate Division for the first time "gave effect to one of these clauses, when it found that the Public Safety Act's ouster clause precluded it from reviewing or invalidating emergency regulations which were challenged as being incomprehensibly vague and therefore invalid" (Ellmann, 1995: 98). Notwithstanding judges' reluctance to act upon ouster clauses in most cases, the ouster clauses underscore the government's lack of respect for the judiciary.

The second way in which the government reacted to "liberal" decisions was with the passage of new legislation. By passing explicitly worded legislation that was ostensibly not open to interpretation, the legislature often overruled decisions of the courts. In an article in the *South African Journal of Human Rights* in 1987, Dion Basson, then a professor of public law at the University of Pretoria, discussed four areas — legislation authorising arrest and detention that relies on the subjective opinion of arresting officers; legislation that expressly excludes the *audi alteram partem* rule; subordinate legislation authorising certain infringements of individual rights; and ouster clauses — in which the courts, by taking advantage of imprecise or questionable wording, had issued judgments to "control the exercise of (executive) government power in order to protect individual rights and freedoms" (41–43). Basson noted, however, that in reaction to many of these judgments, the legislature passed unambiguously worded legislation that "destroy[ed] the benefits of many of" the decisions (42).

It is important to note that throughout the apartheid-era, liberal judges — judges who prioritised protecting individual liberties against intrusion by the government — continued to exist within the judiciary and at times managed to interpret laws so as to minimise their otherwise harsh and unjust effects. While liberal judges presided over courts in many parts of the country, the Natal provincial division of the Supreme Court was particularly well known for liberal decisions and for having a "propensity for overcoming the apparent legislative will" (Hoexter, 1986: 446). One of the most outspoken opponents of apartheid legislation, Justice Didcott of the Natal provincial division tried whenever possible to interpret legislation in a manner that provided maximum protection for human rights. For instance, in *Re Dube* (1979 [3] SA 820 [N]), Justice Didcott had to determine "the validity of a decision that a black man was 'idle and undesirable' and should for that reason be ordered to leave the city" (Chaskalson, 1999: 131). In assessing whether the earlier proceedings were in "accordance with justice", Justice Didcott said:

> It may have been in accordance with the legislation and, perhaps because what appears in the legislation is the law, in accordance with that too. But it can hardly be said to have been in 'accordance with justice'. Parliament has the power to pass statutes that it likes, and there is nothing that the courts can do about that. The result is the law. But that is not always the same as justice. The only way that Parliament can ever make legislation just is by making just legislation (quoted in Chaskalson, 1999: 132).

Justice Didcott thus set aside the order on grounds that the proceedings were contrary to justice and thus that the decision had not been made correctly.

Re Dube is one of several cases in which liberal judges used creative interpretation to overcome the will of Parliament and interpret legislation in a way that protected individual liberties and prevented the application of unjust laws.[5] While these judges undeniably lessened the oppressive effects of apartheid legislation and while their existence helped provide a foundation for the building of an independent and legitimate judiciary post-apartheid, most members of the judiciary, ostensibly interpreting legislation according to parliamentary will, upheld unjust and oppressive laws and contributed to allegations that the judiciary was complicit in maintaining the apartheid legal order.

3.5 Perception and role of the judiciary in the apartheid legal order

Despite the government's claims that the judiciary was independent and despite the continued functioning of the courts throughout apartheid, by the 1980s after judges had repeatedly upheld discriminatory and repressive legislation, public perception of the judiciary was increasingly unfavourable. For many of the reasons discussed above, judges were more and more "seen as willing and obedient servants of a repressive legislature rather than impartial and objective arbiters of and dispensers of justice, stepping in to protect the individual citizen from legislative and executive excesses" (Cowling, 1987: 181). For instance, in his submission to the TRC, Pius Langa, the chief justice at the time of writing, affirmed that the "role of the courts in implementation of the pass laws contributed to a diminishing of the esteem which ordinary people might have had for institutions set up to administer justice" (Dyzenhaus: 61). Similarly, in a speech in 1983 in which he argued that resignation was the only moral option open to judges, Raymond Wacks (1984) insisted that "[t]alk of independence of the judiciary rings decidedly hollow" in an environment in which an "exclusively white judiciary applies the essentially unjust laws of an exclusively white legislature to an unconsenting majority" (281). Given the composition of the judiciary, the illegitimacy of the government that appointed the judges and the fact that the laws the judiciary was asked to enforce were enacted by an unrepresentative legislature, the majority of South Africans by the 1980s doubted the legitimacy of the judiciary and viewed the courts as more aligned with the interests of the ruling party than the people it was supposed to protect.

The very people for whom independent review of government action was most necessary — the black majority whose interests were not represented by either the executive or legislature — increasingly lost confidence in the judiciary as an independent institution. Moreover, by upholding apartheid laws the judiciary helped legitimise the apartheid legal order. Failing to declare invalid racist, oppressive and unjust legislation, the judiciary "put the stamp of legality on a legal framework structured to perpetuate disadvantage and inequality" (Dyzenhaus: 61, quoting Pius Langa). Had the apartheid laws never been subject to judicial review or had the courts declared the laws invalid and the executive enforced them regardless of the judicial pronouncements, the government might have had a harder time claiming that the apartheid system was a valid political and legal order. Similarly, as the TRC concluded, "those both inside the country and abroad who might have been embarrassed by the gross racism and exploitation of apartheid could seek some comfort in the semblance of an independent legal system" (paragraph 38). Thus, the judiciary's failure to invalidate unjust laws or interpret them so as to minimise their harsh effects coupled with official claims of judicial independence helped the government legitimise and perpetuate the apartheid legal order.

At the same time, it is important to note that the judiciary's traditions of independence and pride in its history may have in some ways tempered what otherwise might have been an even more conservative and executive-minded response to apartheid. Stephen Ellmann (1995) contended that although the government and certain judges exploited "gaps in the legal structure" that allowed them to partially undermine whatever formal independence existed, "traditions of independence of lawyers and judges in South Africa may well have helped insulate the courts from the full distorting force of white political sentiment" (245). While the judiciary's history of independence was undermined it was not completely corrupted or destroyed and provided at least part of a foundation upon which a substantially independent judiciary could be built in post-apartheid South Africa.

[5] For examples of other cases in which liberal judges prevailed and prevented the application of unjust laws, see: S v. Ramgobin & Others, 1985 (3) SA 587 (N); S v. Meer & Another, 1981 (1) SA 739 (N), reversed on appeal 1981 (4) SA 604 (A); Magubane v. Minister of Police, 1982 (3) SA 542 (N).

4. INDEPENDENCE AND JUDICIAL TRANSFORMATION IN DEMOCRATIC SOUTH AFRICA

The opening chapter of the Constitution (1996) states that South Africa is a sovereign, democratic state founded on the values of human dignity; equality; advancement of human rights and freedoms; non-racialism and non-sexism; supremacy of the Constitution and the rule of law; and a multi-party system of democratic government, to ensure accountability, responsiveness and openness (section 1). Tasked with the role of interpreting and applying the Constitution, the judiciary has a particularly important role to play in protecting and promoting these values which are intended to provide a framework for the transformation of the entire country and of institutions such as the judiciary. Taking into account the role of the judiciary during apartheid and its resulting lack of legitimacy among many South Africans, transformation is fundamental to the creation of a legitimate and effective judicial branch.

Judicial transformation involves the creation of a judiciary that is appropriate to a democratic South Africa. This embraces a variety of factors including building a bench that is demographically representative of the population, appointing judges who identify with and are dedicated to the new constitutional order, increasing access to justice for all sectors of society, promoting a culture of judicial accountability, reorganising the court system to better reflect changes in the country's provincial and demographic make-up, and creating the structures necessary to foster judicial independence. In addition to the specific facets of transformation, MK Moerane, an advocate and member of the Judicial Service Commission, explained in a 2003 speech at the National Judges Symposium that judicial transformation is also "part and parcel of the 'reconstruction of society' mentioned in the Postscript to the Interim Constitution" and "carried forward in the Preamble to the Constitution" (711). In part the Preamble states:

> We, the people of South Africa ... through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to
> - Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
> - Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
> - Improve the quality of life of all citizens and free the potential of each person; and
> - Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

The need to address the racial inequalities resulting from apartheid and diversify the judiciary are fundamental elements of transformation due to the overwhelming predominance of white males in the apartheid-era judiciary. In 1994 at the start of the transition, out of 166 high court judges there were three black males, two white females and 161 white males (Symposium Statement, 2003: 650). The need to create a judiciary that was more representative of the people of South Africa along both race and gender lines was thus indisputable. As examples from apartheid courts reveal, the composition of the bench impacts on various aspects of judicial activity and influences public opinion about the independence and legitimacy of the courts. For instance, the tendency toward executive-mindedness stemmed in part from the fact that almost all judges were white males from the same strata of society and with the same backgrounds as the members of the minority government. The judiciary thus tended to agree with and support the executive's political and social views and could not relate to the experiences and struggles of the majority of South Africans. The attempt to increase race and gender representivity aims to rectify this situation and ensure that the judiciary as a whole is better able to understand and relate to the people of South Africa. As Geoff Budlender (2005) observed, it is an "inescapable fact that in general, black judges are more likely than white judges to understand and have some connectedness with the life experiences and concerns of the people who constitute the majority" of South Africa. Along with creating a judiciary better able to respond to the needs of the people, increased diversity helps foster public confidence in the judiciary and thus in the government as a whole.

In addition to demographic representivity, judicial transformation involves creating a bench that is dedicated to protecting and promoting the new democratic dispensation. During apartheid, the doctrine of parliamentary supremacy meant that judges

had only limited power to protect individual rights against violations by the government, and judges had no bill of rights against which the legality of official acts could be measured. Thus, transformation demands that all judges accept "the values and precepts of the Constitution as the founding principles of [the] legal order" (Symposium Statement, 2003: 650) and integrate these values into their decision-making. Similarly, all judges must try to "understand the social context that exists in South Africa" (Kollapen, 2006: 12), a context which impacts on all facets of life and politics in the country. As Morné Olivier, a law lecturer at the University of Port Elizabeth, explained, "[j]udicial officers may perhaps not fully appreciate the importance of their role in delivering on the promises and ideals recorded in the Constitution unless they are made aware of the deplorable socio-economic conditions under which many South Africans are living" (2001: 462). While increased diversity on the bench will help ensure that more judges are able to relate directly to the experiences of litigants before them, a litigant is in no way assured that a judge of the same race, gender or background will hear his or her case, so all judges must be cognisant of the history and current social environment in South Africa.

Another important aspect of judicial transformation is increasing access to justice for all South Africans, particularly the poor, marginalised and otherwise disempowered sectors of society whose situations in part reflect the legacy of apartheid policies. Access to justice includes various factors such as physical access to courts, the existence of multi-lingual courts and interpreters so all litigants can understand court proceedings, and the provision of lawyers or legal aid so that lack of resources does not become a barrier to accessing the justice system. However, ensuring justice for all people requires not only providing the poor and marginalised with access to courts but also ensuring that judges are sensitive to social and economic matters and are dedicated to protecting the constitutional rights of all people. Thus, increased access to justice is intertwined with the above requirements of representivity and a commitment to democratic values. Emphasising the importance of a commitment to constitutional values, Geoff Budlender (2005) declared that the "transformative approach has to permeate everything judges do — not just the great constitutional cases, but also the 'routine' cases". By focusing in each case on promoting equality, dignity, human rights and the rule of law, judges will be more likely to ensure that all litigants receive fair and equal treatment and thus that justice is increasingly available and provided to all South Africans.

In addition to improving access to courts and to promoting awareness of and commitment to remedying the problems of all South Africans, transformation should aim to increase the sense among all people that the justice systems belongs to them and is not merely a tool in the hands of the elite. Feelings of belonging and of ownership are arguably as important as structural guarantees in promoting the use of courts as a means of solving disputes and of improving qualify of life for all people. While not as concretely defined as some of the other elements of transformation, changing the culture of the courts so as to foster a greater sense of belonging among all groups in South Africa seems critical to creating a judiciary that can effectively protect the rights of all people and promote the democratic transformation of the country as a whole. Perhaps improving the demographic representivity of the judiciary will help promote a view of the courts as champions of the people rather than of a particular powerful segment of society. However, given the history of the judiciary, improving racial representivity may not be enough on its own to transform the culture of the courts in a way that creates a belief among all people that they have a stake in and can benefit from the justice system.

Related to improving access to justice and promoting the values enshrined in the Constitution, developing a culture of accountability among judges is another aspect of transformation. Whereas the actions and decisions of judges during apartheid often evidenced greater allegiance to the ruling party than to the people the courts were supposed to serve, judges should now realise that they are "equal to all other citizens and are accountable to society in general for the manner in which they discharge their judicial functions" (Moerane, 2003: 714). While they must base their decisions on the law and not on public opinion, judges should be aware that their actions affect individual people and influence public perceptions of the judiciary.

Structural and institutional reforms are also necessary for a successful transformation of the judiciary. On a practical level, the configuration of court divisions should reflect the country's new provincial make-up and any changes in the names of provinces or cities and should "take account of the practical realities and demands on the courts" (Van de Vijver, 2006: 149). Institutional transformation, on the other hand, involves the enactment of legal provisions and the creation of structures that enable the judiciary to operate independently within a tripartite system of government. Particularly given the judiciary's position and powers during apartheid, legal provisions protecting the judiciary's independence and granting to the courts the power of review over governmental actions are essential components of the creation of an effective judicial system. Moreover, because

political and social conditions change and because judicial reform is an ongoing process, the need to cultivate and defend the independence of the judiciary will never disappear, regardless of the existence of constitutional and other formal guarantees.

4.1 Judicial independence

The strengthening of judicial independence is a crucial element of the transformation of the judiciary and is fundamental to the creation of a democratic state. From the beginning of the process in the early 1990s to end apartheid and transfer power to an elected government, the negotiators viewed an independent judiciary as an essential component of the new constitutional democracy. Expressing those values and changes that were most critical to the creation of a new state, the 1993 Interim Constitution included 34 principles with which the final Constitution had to comply in order to be certified by the Constitutional Court Act (200 of 1993). Two of these principles ensured that the final Constitution would create an independent judiciary that could prevent abuse of power by the other branches of government. Specifically, Principle VI provided that there would be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness. Principle VII stated that the judiciary must "be appropriately qualified, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights".

4.1.1 Separation of powers and the power of the judiciary

In accordance with the Constitutional Principles, the 1996 Constitution created a legal order in which an independent judiciary is empowered to review the legality of all official acts. Whereas the legislature was supreme under the Westminster system and the courts thus had only limited power to decide on the validity of legislation, the Constitution is now "the supreme law of the Republic" and "law or conduct inconsistent with it is invalid" (section 2). As the courts have the power to determine whether legislation is consistent with the Constitution, the judiciary no longer must defer to but actually has power over the legislature and executive. The Constitution in fact requires that a court "declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency" (section 172[1][a]). During apartheid, the lack of a bill of rights or other legal norms against which to measure official acts was often seen as an obstacle to a court's effective protection of individual rights; the 1996 Constitution removes this hurdle by insisting that courts invalidate legislation that is inconsistent with the constitutional standards.

The Constitution (1996) also codifies the separation of power among the three branches by requiring:

> ... all spheres of government and all organs of state within each sphere must ... respect the constitutional status, institutions, power, and functions of government in the other spheres; not assume any power or function except those conferred on them in terms of the Constitution; [and] exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere (section 41).

Specifically addressing the role of the judiciary, section 165 of the Constitution vests the "judicial authority of the Republic" in the courts and provides that courts are independent and must apply the Constitution and the law "without fear, favour, or prejudice" (section 165[2]). This section, while prohibiting other organs of state from interfering with the "functioning of the courts", also requires that other organs "assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts" (section 165[3] and section 165[4]). The Constitution thus empowers courts to exercise their judicial authority, including the power to review official acts, independently and impartially.

4.1.2 Justiciable bill of rights

During apartheid, the lack of codified rights and standards by which to measure official action was a barrier to the judiciary's effective protection of civil liberties. While some judges argued in favour of applying Roman–Dutch common law principles — such as the right to be free from cruel and inhuman treatment — when interpreting statutes, the fact that these norms existed only in common law and not in statutory form made their application difficult and subject to the will of the judge in any given

trial. The existence of a bill of rights in the 1996 Constitution (chapter 2) not only illuminates to the general public the values to which South Africa now strives but also provides judges with a legal framework to guide their decisions and clarify the limits of government power and the extent of government obligations.

Similarly, a justiciable bill of rights plays a fundamental role in the broader transformation agenda, particularly in trying to achieve the goals of increased access to justice and an integration of human rights priorities into judicial decision making. As Dyzenhaus observed, "the new legal order differs from the old mainly in that it entrenches the rights of those subject to the law in a written constitution, thus making it very explicit that fidelity to law is also fidelity to such values" (77). Whereas discriminatory regulations were not illegal under South African law and judges thus decided that courts were justified in upholding them, the bill of rights renders any such claims meaningless by providing concrete standards. Instead of having little power to significantly affect actions of the executive or legislature, the judiciary now has not only the power but the duty to ensure that all government acts conform to the requirements and obligations set forth in the Bill of Rights.

A "cornerstone" of South Africa's democracy, the Bill of Rights "enshrines the rights of all people ... without any distinction and affirms the democratic values of human dignity, equality and freedom..." (Maduna, 2003: 664). Requiring that the state "respect, protect, promote and fulfil" the enumerated rights (section 7[2]), the Bill of Rights includes certain provisions that address directly the role of the judiciary. For example, everyone has the rights to "equal protection and benefit of the law" (section 9[1]) and to "have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum" (section 36[2]). Moreover, section 33 of the Bill of Rights provides that "[e]veryone has the right to administrative action that is lawful, reasonable and procedurally fair", thus empowering the courts to review administrative action.

In addition to provisions addressing access to justice, a limitations clause helps guide judges by requiring that rights be limited only by laws of "general application" and only "to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom" (section 36[1]).[6] The government often used claims about the existence of a "state of emergency" to justify the violation of people's rights during apartheid, and largely as a result of executive-mindedness, the judiciary often agreed with the alleged rationale. However, a constitutional clause outlining the circumstances in which limitations are valid now enables courts to better assess purported justifications for government restriction of rights. Given that individual rights are entrenched in the Constitution — the supreme law of South Africa — and given that the courts are entrusted with the role of applying and interpreting the Constitution, the judiciary now occupies a completely different and much more powerful position than it did in the apartheid legal order.

4.1.3 Constitutional and legislative guarantees

To successfully fulfil its new role as protector of the Bill of Rights, the judiciary must have both institutional and individual independence.[7] Consequently, in addition to codifying the doctrine of separation of powers and empowering courts to invalidate illegal acts, the Constitution created the institutional framework necessary to enable the judiciary to function independently (chapter 8).

4.1.3.1 Appointment of judges

The Constitution includes various provisions that facilitate the appointment of diverse, well-qualified individuals in an open and fair process. Anyone who is "appropriately qualified" and is a "fit and proper person" may be appointed as a judge (section 174[1]), and the "need for the judiciary to reflect broadly the racial and gender composition of South Africa" should be considered in appointing judicial officers (section 174[2]). The aspiration for increased diversity is a reflection of the apartheid past and the need to create a more representative bench that enjoys the confidence of all South Africans. The pool of candidates

[6] The clause also enumerates factors that the court should consider in determining the validity of a limitation.

[7] For an explanation of institutional and individual independence, see the overview of judicial independence at the beginning of this report.

from which judges are appointed has increased since 1994 to include not only senior members of the bar but also practising attorneys and academics, thus facilitating that appointment of more women and blacks judges, two groups which traditionally have not been as active in the bar.

Other constitutional provisions also help ensure that competent judges are appointed according to transparent and fair procedures. The JSC, a constitutionally mandated body made up of judges, practising advocates and attorneys, academics, members of the legislative and executive branches and presidential appointees (section 178),[8] plays a large role in the appointment of judges to all courts in South Africa. Depending on the vacancy, the JSC researches and interviews candidates, writes lists of nominees and gives advice about appointments. A diverse body made up of legal and non-legal governmental and non-governmental members and required to include representatives from opposition parties, the JSC is supposed to provide protection against appointments of the sort seen during apartheid — politically motivated appointments made behind closed doors without any participation by the public or legal profession. According to the Constitutional Court, "as an institution it [the JSC] provides a broadly based selection panel for appointments to the judiciary and provides a check and balance to the power of the executive to make such appointments" (*Re Certification of the Constitution*, paragraph 124).

Regarding specific procedures for appointing judges, section 174 of the Constitution provides that the President, after consulting the JSC, appoints the chief justice and deputy chief justice of the Constitutional Court and the president and deputy president of the Supreme Court of Appeal (section 174[3]). Other Constitutional Court judges are appointed by the President from a list of recommendations compiled by the JSC (section 174[3]). The President appoints judges to all other courts "on the advice of" the JSC (section 174[6]). Not addressed by any constitutional provisions, the appointment of judges president and deputy judges president to the high courts is governed by the Supreme Court Act 59 of 1959 (section 3). Although this Act does not have constitutional status, according to the General Council of the Bar of South Africa (2006), "it has been accepted ever since the establishment of the JSC that" appointments as judge president or deputy judge president are made "under section 174(6) of the Constitution by the President on the advice of the JSC", advice upon which the President is "bound to act" (24). Also providing some guarantees that the executive branch does not have undue control over the naming of judges, the Constitution provides that when appointing acting judges to the Constitutional Court, the President must have the concurrence of the chief justice. However, the Minister of Justice appoints acting judges to all other courts after consulting the senior judge of that court on which the acting judge will sit (section 175).

As a result of the tension between the need for racial transformation and the need for a well-qualified and experienced judiciary, the JSC has come under attack for allegedly focusing more on race than on merit when making appointments. Additionally, some people believe that the JSC includes too many politicians and political appointees and thus permits excessive political influence in the appointment of judges. The minister's power in appointing acting judges has also led to some concern about executive infringement in the judiciary. The final section of this report will address these issues in greater detail.

4.1.3.2 Terms of office and salary

Once judges are appointed to the bench, additional safeguards must ensure that they can operate in an environment conducive to maintaining impartiality and independence. Regulations concerning terms of office, the removal of judges from the bench and remuneration play a large role in allowing judges to act without fear of repercussions for decisions that are contrary to what the governing party or other powerful interests desire. According to the Constitution, a Constitutional Court judge holds office for one 12-year term or until he or she reaches the age of 70, whichever occurs first (section 176[1]).[9] The Judges' Remuneration and Conditions of Employment Act (2001) sets out the terms of office for judges in other courts: a judge serves until age 70, assuming he or she has served at least 10 years active service by that time; if the judge has not yet served 10 years, he or she continues to serve until doing so (Act 47 of 2001, section 3[2][a]).[10]

[8] Section 178 lists the membership of the JSC and details procedures for appointing the members.

[9] This provision also allows for an act of Parliament to extend the term of office of a Constitutional Court judge.

[10] Also, if a judge reaches the age of 65 and has performed active service for at least 15 years, he or she has the right to retire then (section 3[2][b]).

The question of why and how a judge can be removed from the bench before the expiration of his or her term of service is also critical to promoting independence. If the executive or legislature could remove a judge without cause or if the process for impeachment were ill-designed or opaque, the risk of removal would loom over judges and potentially influence, at least subconsciously, their decisions. Consequently, the Constitution sets out guidelines for removal and requires that a variety of actors, rather than only the executive, play a role in the ultimate decision. According to section 177, if the JSC finds that a "judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct" and if at least two-thirds of the National Assembly votes for that judge's removal, the President must remove the judge from office. Thus, judges have the security of knowing that their removal requires agreement by both the JSC and a supra-majority of the National Assembly; judges do not have to fear that decisions unfavourable to the government or to other influential parties will lead to impeachment.

Currently no system or procedures exist to deal with complaints against judges of non-impeachable conduct. The Constitution states that national legislation should provide for "procedures for dealing with complaints about judicial officers" (section 180[b]), but thus far such complaints have been dealt with informally by the senior judge of the court involved (interview). Judges, however, recognise the need for a more formal mechanism and in 2000 a committee of senior judges gave to the Department of Justice a draft "Bill to Amend the Judges' Remuneration and Conditions of Employment 88 of 1989 to Create a Judicial Council" (Anonymous, 2000). Approved by the JSC and the heads of courts, the bill proposes setting up a body and formal procedure to deal with complaints of misconduct. In 2005, the Department of Justice introduced it own set of draft bills that dealt with the same issue but included several provisions that differed markedly from the judges' proposal. The following section will address the controversy that ensued surrounding the minister's draft bills and will discuss more comprehensively the question of judicial accountability.

Along with defining the terms of service and the process for impeaching a judge, the Constitution states that the "salaries, allowances, and benefits of judges cannot be reduced" (section 176[3]), so other state organs are not able to use threats of salary reduction as a means of influence or punishment. Moreover, the Judges' Remuneration and Conditions of Employment Act (2001) established other mechanisms that help ensure judges will not be influenced by financial concerns. For instance, after they retire from active service judges receive a reduced salary (section 5), and surviving spouses of judges' are also paid a salary (sections 9 and 10). Also in the interests of fostering impartiality, by law no judge may, "without the consent of the Minister, accept, hold or perform any other office of profit or receive in respect of any service and fees, emoluments or other remuneration apart from his salary and any allowances which may be payable to him in his capacity" as a judge (Supreme Court Act [59 of 1959], section 11; Judges Remuneration and Conditions of Employment Act 2001, as amended in 2003, section 2[6]).[11] Given that judges have financial security, the prohibition on their receiving outside remuneration is a reasonable measure that helps prevent conflicts of interests from arising.

4.1.3.3 Court rules and administration

The administration and funding of courts and the rules governing court procedure are intimately connected to the ability of courts to administer justice in an efficient, timely and fair manner. Likewise, these issues influence judicial independence insofar as a judge must have some control over the functioning of his or her own courtroom and over the way in which he or she manages cases. Under the Constitution, the Constitutional Court, the Supreme Court of Appeal and the high courts "have the inherent power to protect and regulate their own process ... taking into account the interests of justice" (section 173), and national legislation must provide for court rules and procedures (section 171). Court rules govern issues such as the schedule of court terms, powers and duties of the registrar, guidelines for compiling the case record, and court fees. At present, rules for the Supreme Court of Appeal, the high courts and the lower courts are made by the Rules Board, which was established in 1985 by the Rules Board of Courts of Law Act (107 of 1985). The Board consists mainly of members of the legal profession,[12] and while

[11] Supreme Court Act (59 of 1959), section 11 (applying only to judges on the Supreme Court of Appeal and high courts); Judges' Remuneration and Conditions of Employment Act (2001) section 2(6) as amended in 2003 (extending application of the law to Constitutional Court and all other judges).

[12] The Rules Board Consists of a judge of the Constitutional Court, the Supreme Court of Appeal or a high court as chairperson and vice-chairperson; a magistrate, two advocates; two attorneys; a law lecturer; an officer of the Department of Justice; and three people who in the opinion of the minister have experience to serve as members.

the Minister of Justice must approve the rules, he or she does not have the power to make any rules (Chaskalson, 17 February 2006), thus preserving the separation of powers. Likewise, according to the 1997 Amendment to the Constitutional Court Complementary Act, the Constitutional Court has the power to make its own rules (Act 13 of 1995, section 16).

4.1.3.4 Code of conduct

South Africa currently does not have a legally binding code of conduct for judges, although for several years the judiciary and Department of Justice have discussed the writing and adoption of such a code. In 2000, the same committee of judges that wrote the draft bill on mechanisms to deal with judicial misconduct formulated a "Code of Judicial Ethics" which the JSC and heads of court approved. The Code recognises that "[i]ndividual judges must be free from personal influence or private interest and that the judiciary must be beyond the undue influence of the legislative or executive branches of government and removed from the direct influence of popular majorities" (Anonymous, 2000: 405). Moreover, given that public confidence is crucial to upholding the rule of law and the independence of the judiciary and that "lapses or questionable conduct by judges tend to erode that confidence", the Code provides standards for judges concerning both their judicial duties and their non-judicial activities (ibid). The Code has not yet been enacted as law, and the Department of Justice in 2005 released a draft bill that included provisions for the adoption of a code of ethics but did not acknowledge the judges' proposed code. This paper addresses the various proposals and provides a more detailed discussion of the Code of Judicial Ethics below.

4.1.4 Relevant Constitutional Court cases

While not directly related to judicial independence, the creation of the Constitutional Court impacted on the ability of the judiciary to effectively execute its power of review and to promote the values and freedoms to which the country had agreed during the transition. As the "highest court in all constitutional matters" (Constitution, 1996, section 167[3][a]), the Constitutional Court makes the final decision on any issue "involving the interpretation, protection or enforcement of the Constitution" (section 167[7]). Because the Court is empowered to decide, among others, the constitutionality of any amendment to the Constitution; disputes between organs of state concerning their powers or functions; and the constitutionality of acts of Parliament, provincial acts or the conduct of the President, its decisions impact on all South Africans.

Various factors informed the decision to create a new court to deal with constitutional matters. For instance, many people believed that a court that "had to adjudicate human rights and constitutional issues had to be representative of SA's demography" (Lewis, 2006), and none of the existing courts was remotely representative in 1994. Additionally, according to Justice Lewis, rather than rely on the existing Appellate Division to act as the guarantors of the Constitution, the negotiators of the interim constitution established a new court because of the unspoken belief that old-order judges could not "be relied upon to give effect to the fundamental rights enshrined in the new Constitution" (Lewis, 23 January 2006). The creation of the Constitutional Court thus represents an effort to promote the development of constitutional values, many of which where not recognised during apartheid, by a legitimate body that is demographically representative and composed of judges who are dedicated to and knowledgeable about the new democratic dispensation.

In various cases the Constitutional Court has recognised the importance of and clarified the meaning of an independent judiciary and the separation of powers in the South African context. The *First Certification* judgment (1996), in which the Constitutional Court refused to certify the new Constitution, sheds some light on the court's interpretation of judicial independence and separation of powers. The court explained that the principle of separation of powers "recognises the functional independence of branches of government", while the principle of checks and balances "focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another" (paragraph 109). Importantly, however, the court insisted that no constitutional system of government can have an absolute separation of powers and that one branch of government will inevitably intrude to some degree on the "terrain of another" (paragraph 109). Furthermore, recognising the need for both individual and institutional independence, the court stated that "[w]hat is crucial to the separation of powers and the independence of the judiciary is that the judiciary should enforce the law impartially and that it should function independently of the legislature and the executive" (paragraph 123). The court cited section 165 of the Constitution as providing the protections necessary for the judiciary to operate in this manner (ibid).

In the 1998 case of *De Lange* v. *Smuts* (1998 [3] SA 785 [CC]), the court expanded on its view of judicial independence. Explaining that independence is "foundational to and indispensable for the discharge of the judicial function in a constitutional democracy based on the rule of law", the court endorsed the Supreme Court of Canada's view that the minimum criteria of judicial independence are: judges' security of tenure, financial security and institutional independence (paragraphs 59 and 70). In the 2002 case of *Van Rooyen* v. *The State* (2002 [5] SA 246 [CC]), the court again addressed the issue of institutional independence and, citing section 165 of the Constitution, explained that the Constitution "not only recognises that courts are independent and impartial, but also provides important institutional protection for courts" (paragraph 18). Importantly, the court stated that judicial independence "is a constitutional principle and norm that goes beyond and lies outside the Bill of Rights" and thus is not subject to the limitation (paragraph 35).

In the *Van Rooyen* case, the court also set forth a test for assessing whether the courts were sufficiently independent in their relationships with other branches of government. Writing on behalf of a unanimous court, Justice Chaskalson adopted an objective test that asks whether from the viewpoint of a "reasonable and informed person", the court or tribunal will "be perceived as enjoying the essential conditions of independence" (paragraph 32). This test acknowledges that the "appearance of perception of independence plays an important role in evaluating whether courts are sufficiently independent". Clarifying the meaning of an "objective test", Justice Chaskalson stated that the test must be "properly contextualised", meaning that the objective observer should not be cynical and overly critical but "must be sensitive to the country's complex social realities, in touch with its evolving patterns of constitutional development, and guided by the Constitution…" (paragraph 34). Thus, the court's test for independence takes into account a variety of factors including formal guarantees, public perceptions, social context and constitutional norms.

The Constitutional Court has also addressed the question of whether a judge's performance of non-judicial functions impacts on judicial independence. In the case of *South African Association of Personal Injury Lawyers* v. *Heath and Others* (2001 [1] SA 883 [CC]), the court considered whether appointing a judge to head the Special Investigation Unit (SIU), a unit designed to investigate serious malpractice in the administration of state institutions, state assets and public money (paragraph 1), would undermine the separation of powers. The court recognised that judges could sometimes perform non-judicial functions, such as presiding over commissions of inquiry or sanctioning search warrants, without infringing on the separation of powers, but explained that "[c]ertain functions are so far removed from the judicial function, that to permit judges to perform them would blur the separation that must be maintained between the judiciary and other branches of government" (paragraphs 34–35). Rather than create a strict test to determine whether a particular function was "incompatible with the judicial office", the court said that it would assess facts on a case-by-case basis and look at:

> … whether or not the functions that the judge is expected to perform are incompatible with the judicial office, and if they are, whether there are countervailing factors that suggest that the performance of such functions by a judge will not be harmful to the institution of the judiciary, or materially breach the line that has to be kept between the judiciary and the other branches of government in order to maintain the independence of the judiciary" (paragraph 31).[13]

The court acknowledged that while judges have skills and experiences that are useful in a variety of contexts, the need to protect the separation of powers and judicial independence is of overriding concern and must inform any functions that a judge performs.

Applying its ad hoc test, the court decided that appointing a judge as the head of the SIU would blur the line separating the branches of government. The responsibilities of the head of the SUI included functions that "are ordinarily performed by the police, members of the staff of the National Prosecuting Authority or the state attorney" and are "inconsistent with judicial

[8] The court said that in determining whether the non-judicial function threatened the separation of powers, it would consider various factors including whether the performance of the function: (a) is more usual or appropriate to another branch of government; (b) is subject to executive control or direction; (c) requires the judge to exercise a discretion and make decisions on the grounds of policy rather than law; (d) creates the risk of judicial entanglement in matters of political controversy; (e) involves the judge in the process of law enforcement; (f) will occupy the judge to such an extent that he or she is no longer able to perform his or her normal judicial functions" (paragraph 29).

functions as ordinarily understood in South Africa" (paragraph 39). Additionally, the SIU tries to recover money for the state, a function which is necessarily partisan and thus inappropriate for a judge to perform (paragraph 40). The court also considered the importance of public perception of judicial independence, and contended that if judges were able to perform executive functions, the public could "come to see the judiciary as being functionally associated with the executive and consequently unable to control the executive's power with the detachment and independence required by the Constitution" (paragraph 46). This lack of confidence would then weaken the separation of powers and the ability of the judiciary to effectively perform its constitutional functions. Overall, this case underscores the importance of preserving the separation of powers and the need to foster public confidence in judicial independence.

Along with preventing the blurring of the separation of powers, recusal of judges is fundamental to the impartial adjudication of cases and to public perception of a fair trial. Neither the Constitution nor other legislation provides guidelines for recusal, but the Constitutional Court has addressed this issue in various cases. In *President of the Republic of South Africa and Others* v. *South African Rugby Football Union and Others* (Sarfu) (1999 [4] SA 147 [CC]), the court dealt with a motion for recusal against five of its own judges. The court first reiterated the importance of "impartial adjudication of disputes" in "any fair and just legal system" and explained that "[n]othing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on disputes" (paragraph 35). According to the court, the proper test for recusal is an objective one based on a "reasonable apprehension of bias" (paragraphs 36–38).

While acknowledging the importance of recusal when appropriate, the decision stressed that various factors influence what constitutes a "reasonable" apprehension of bias. First, there is a presumption that judicial officers are impartial due to their legal training and experience (paragraph 40). Second, given that all people have emotions, experiences and beliefs, it is virtually impossible for judges to be absolutely neutral, and it is appropriate for judges to draw on their own life experiences, thereby adding diversity of perspectives, when adjudicating cases (paragraph 42). Moreover, given that South Africa is multiracial, multilingual and multicultural, litigants cannot expect judges to share their views and cannot demand recusal based on a judge's race or other personal characteristics (paragraph 42). Similarly, the court acknowledged that many judges were active politically before taking seats on the bench and that judges have "political preferences" and views on "law and society" (paragraph 70). At the same time, when they accept judicial appointments and take the oath of office, judges put "any party political loyalties behind them" (paragraph 75); thus a "a reasonable apprehension of bias cannot be based upon political associations or activities of judges prior to their appointment to the bench unless the subject matter of the litigation in question arises from such associations or activities" (paragraph 76).

Summing up the test for recusal, the court stated that the "question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel" (paragraph 48). The applicant has the burden of proving a reasonable apprehension of bias, and the question of reasonableness must take into account the judge's oath of office and their training and experience that enable them to carry out the oath and decide cases free from the influence of their own beliefs or predispositions (ibid). In spite of the various considerations influencing a "reasonable apprehension", the court stressed that when reasonable apprehension of bias in fact exists, in the interests of guaranteeing the right to a fair trial and preserving public confidence, a judge should not hesitate to recuse himself or herself (paragraph 48).

Dismissing the application for recusal in the *Sarfu* case, the court also discussed the relationship between transformation and public perception of impartiality. Under the new Constitution and in accordance with the aims of transformation, the judiciary is now much more diverse in terms of the race, gender and social and economic background and in terms of the sectors of the legal profession from which judges are drawn. Thus, litigants may find themselves before a judge of a different race or from a different background than themselves. However, the court explained, litigants do not have the "right to object to their cases being heard by particular judicial officers simply because they believe that such persons will be less likely to decide the case in their favour, than would other judicial officers drawn from a different segment of society" (paragraph 104). Along with the transformation of the judiciary will come more interaction among litigants and judicial officers of different races, backgrounds, genders, and political leanings; however, according to the oath of office and to the constitutional, judges must put aside their

personal prejudices and decide cases based on the facts presented to them. While judges must recuse themselves when conflicts of interest occur, litigants must have faith in the ability of judges to act impartially.

In addition to above-mentioned judgments, the Constitutional Court in other cases has given its views on matters relating to judicial independence. While the issues differed, underlying all of the decisions is the notion that if separation of powers is not upheld, "the role of the courts as independent arbiter of issues involving the division of powers between the various spheres of government, and the legality of legislative and executive action measured against the Bill of Rights, and other provisions of the Constitution, will be undermined" (2002 [1] SA 883 [CC], paragraph 25).

4.1.5 The impact of history and traditions

While the Constitution and various legislative acts help protect the independence of the judiciary, other non-legal factors have also played and will continue to play an important role in the successful creation and maintenance of a truly independent South African judiciary. Notwithstanding the role that the judiciary played in upholding and legitimising the apartheid legal order and the fact that the independence of the judiciary was corrupted, South Africa has had a history of judicial independence. Unlike in other countries that have tried to rebuild their governments after periods of conflict or authoritarian rule, the fact that there is tradition of judicial independence in South Africa, though tarnished, has helped lay the groundwork for the independence of the judiciary in its new democracy.

In his submission to the TRC, Justice Chaskalson explained that during apartheid the "principles and values central to the rule of law and a just legal system were not entirely lost" and that the "maintenance of such values ... facilitated the transition to a constitutional democracy and provided an important foundation for the legal system in that democracy" (Dyzenhaus: 109). While questions existed during the negotiations in the early 1990s as to specific characteristics and structures of the new South African judiciary, the negotiators and framers of the constitution presumed that there would be a separation of powers and that the judiciary would operate as an independent check to ensure that abuses of power did not occur.

Despite allegations of executive-mindedness and despite ouster clauses and various other roadblocks to an independently functioning judiciary, lawyers during the apartheid-era continued to bring cases challenging discriminatory, oppressive and otherwise unjust official acts. For example, even though Chief Justice Rabie's "emergency team" upheld every emergency regulation challenged before the court, lawyers continued to bring cases. Although the continuing litigation may have in some ways helped legitimise the legal system, Ellmann (1995) hypothesises that "the possibility that anti-apartheid lawyering might have encouraged South Africans to see virtue in the ideals of fearless advocacy, independent judging and the rule of law offered promise that these same ideals would be honoured in a post-Apartheid South Africa" (409). Writing in 1995 when the country's transition was just beginning, Ellmann observed that despite the often criticised role of the judiciary during apartheid, the continued existence of ideals — albeit unattained in many respects — of independence and rule of law could help contribute to the building of an independent judiciary.

Perhaps owing in part to the traditions of judicial independence, the negotiators of the new democracy agreed that judges who had been appointed by the old regime could retain their positions after the 1994 transition, subject to their taking the new oath of office, and all of the judges did so (Harms, May 2003: 20–21). Underscoring the importance of impartiality and of adherence to the constitutional values, the oath provides that all judges must:

> ... be faithful to the Republic of South Africa ... uphold and protect the Constitution and the human rights entrenched in it, and ... administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law" (Constitution, schedule 2).

Given that the pledge itself cannot guarantees that judges will abide by its commands, the argument that the judiciary already had an appreciation for and understanding of independence must have played a role in the decision to trust apartheid-era judges with applying the new Constitution. At the same time, during apartheid, judges functioned in a system in which the legislature was supreme and the judiciary had little power to affect government actions; consequently, talk of judicial transformation virtually always includes the need for judges commit to the new constitutional order and focus on human rights and put aside

prejudices that contradict this. Overall, the history of the South African judiciary and the pride that many judges have in the judiciary's traditions of independence aided in the creation of and transition to a new democratic state.

4.2 Independence as an element of judicial transformation

Important in every constitutional democracy, judicial independence is perhaps even more critical in South Africa because of the apartheid past and the critical role that the judiciary must play in the overall transformation of the country. A fundamental component of democratic transformation, independence both complements and in some ways exists in tension with the other elements of transformation. Not only is independence essential to creating a transformed judiciary but accomplishing overall transformation will also help strengthen and protect judicial independence. However, in attempting to achieve important goals, such as racial representivity or improved court administration, one must be conscious of protecting the independence of the judiciary and not permit measures that, while furthering other goals of transformation, will weaken or otherwise threaten judicial independence.

One example of the relationship between independence and other elements of transformation, the racial composition of the judiciary influences public perception of the judicial independence. As former Chief Justice Chaskalson pointed out when opening the 2003 National Judges' Symposium, "[t]he impartiality of the judiciary is more likely to be respected by the public if it is seen to be drawn form all sectors of our community than will be the case if it is drawn from one race and one gender..." (662). According to a July 2005 survey of 2000 South Africans, 52% of respondents, with no difference between race groups, agreed with the statement that a judge's race influences how he or she judges a case (Research Surveys, July 2005). Given that, as these results indicate, the racial composition of the judiciary impacts on public perception of judicial independence, any discussion of independence must include an examination of racial representivity.

Although diversity affects public perception of the judiciary, it is not a precondition of actual independence. More than the race of the judges, what nurtures independence and impartiality are factors such as selection procedures, security of tenure, structural protections, education and other more intangible qualities including such as judicial traditions, concern for legitimacy, and integrity. Diversity may give greater depth and a greater range of perspectives to judicial decisions, but diversity does not necessarily ensure independence. However, because of the importance of public perception in the judiciary, one cannot ignore the impact of racial representivity on transformation in general and independence in particular.

As with racial transformation, independence goes hand-in-hand with the goal of transforming the underlying attitudes and values of the judiciary. Budlender (2005) argued that focusing on underlying attitudes is crucial because South Africa needs a "transformative jurisprudence which is firmly anchored in the fundamental constitutional values — human dignity, the achievement of equality, and the advancement of human rights and freedoms". To produce this type of jurisprudence, the judiciary must be free to interpret the Constitution without outside interference and to invalidate government action that infringes on the constitutional values. At the same time, to create a bench willing to objectively and impartially evaluate each case, when appointing judges it is reasonable to consider a candidate's attitude toward and dedication to the new human rights culture and to the Constitution.

Furthermore, independent courts are vital to ensuring access to justice for all members of society. One of the goals of transformation and one of the purposes of a judiciary is to ensure that "all citizens, particularly the vulnerable and impoverished, have a means to ensure that we are run by a government that can be called to account and be compelled to justify its action" (Serjeant at the Bar, 2005). To call the government to account and to defend the rights of all people against unjust government action, the judiciary must be independent. The rule of law demands that those who hold public power are subject to the law and are accountable for use of their power; one of the goals of judicial transformation is the creation of a body that is wiling and able to provide this accountability. Moreover, an independent judiciary is necessary to fairly adjudicate disputes between any two litigants. Because individuals often face powerful, wealthy and sometimes politically influential corporations in court, it is crucial that the judge is not only impartial in fact but also perceived by both parties to be impartial. In pursuing the goal of providing justice for all South Africans — a fundamental aim of democratic transformation — judicial independence is critical.

Overall, judicial independence, itself an element of democratic transformation, facilitates the achievement of many of the other transformation goals. At the same time, it is important to note that independence is sometimes in tension with these other elements. Efforts to address other aspects of transformation, particularly where they do not take full cognisance of the need to maintain independence, can at times encroach on judicial independence. The following part of this report will illustrate this.

5. CURRENT ISSUES RELATING TO JUDICIAL INDEPENDENCE

A vital part of the creation of a constitutional democracy in South Africa was the transformation of the judiciary into a fully independent branch of government. Although the tradition of independence had been undermined during apartheid, some remnants of this tradition served as a foundation for rebuilding the judiciary. The Constitution and various legislative acts now provide the formal support necessary for maintaining independence. Various statements and events over recent years have raised questions, however, about the attitude of government to the independence of the judiciary. The most prominent of these statements and events are discussed below.

5.1 The government's attitude towards the judiciary

South Africa's constitutional democracy is little more than a decade old. As in countries such as the US with centuries-old democracies, tensions exist among the branches of government over their powers and functions. Political life in South Africa is dominated by the ANC. The ANC dominates political life insofar as it controls the executive branch, the national legislature, all of the provincial legislatures and executives, and the bulk of local governments. Thus, any analysis of the relationship among the judiciary and other branches of government is largely an analysis of the ANC's attitude toward the judiciary and its belief about the role that the judiciary should play. At the same time, discerning a single attitude on the part of the ANC is near impossible given that the party is comprised of a diverse group of people with different interests and beliefs about the way in which the state should be organised. The ANC was a key author of the 1996 Constitution that clearly establishes and tries to protect judicial independence, and since 1994, the judiciary has functioned independently and the courts have been free to render judgments that conflict with the preferences of the executive. However, several recent incidents have raised questions about the dedication of the current government to protecting judicial independence.

One of the more widely publicised incidents that raised questions about the ANC's attitude toward judicial independence was on 8 January 2005 at its 93rd anniversary celebration where the ANC's National Executive Committee made the following statement:

> We face the continuing and important challenge to work for the transformation of the judiciary... We are also confronted by the similarly important challenge to transform the collective mindset of the judiciary to bring it into consonance with the vision and aspirations of the millions who engaged in struggle to liberate our country from white minority domination. The reality can no longer be avoided that many within our judiciary do not see themselves as being part of these masses, accountable to them, and inspired by their hopes, dreams and value systems. If this persists for too long, it will inevitably result in popular antagonism towards the judiciary and our courts, with serious negative consequences for our democratic system as a whole (ANC statement, 8 January 2005).

Various legal practitioners and academics, members of the opposition Democratic Alliance (DA) and other critics reacted strongly to this statement, claiming that it indicated a desire on the part of the ANC to have a compliant judiciary that would not interfere with government policies. In a *Business Day* article, Nicole Fritz, a human rights lawyer, and David Unterhalter, a law professor, (2005) contended that "the ANC's position confuse[d] adherence to government policy for constitutional fidelity and so threaten[ed] the independence of the judiciary". The Constitution, they argue, does not require that the judiciary adhere to government policies but demands that the judiciary ensure that government policies conform to the bill of rights and other requirements of legality. Similarly, Mark Ellis, the director of the International Bar Association, (2005) acknowledged that "inherent tension" will occur whenever the judiciary makes decisions that conflict with government policy, but that the ANC's apparent desire for compliant courts "threatens the judiciary in that it creates the expectation of executive-mindedness from judges, holding out adherence to government policy as a worthy attribute of judicial office" (7).

Taking a less critical view of the ANC's comments and motives, then Chief Justice Chaskalson issued a public statement in which he interpreted the statement as referring to the need for judges to uphold and give effect to the values in the Constitution (Chaskalson, 2005). Reaffirming the need for judicial transformation and the importance of judicial independence, Chaskalson

said that the ANC's comments were aimed not just at white judges or judges who had given decisions unfavourable to the government but at the judiciary as a whole. According to Chaskalson, the ANC's statement reflected the widely agreed upon need for further judicial transformation, especially with regard to creating a more rights-oriented and socially conscious judiciary.

Assuming the statement referred to the need for a judiciary that is aligned with and dedicated to the overall transformation goals of equality, democracy and human rights protection, the ANC's comments were in line with constitutional demands and compatible with judicial independence. However, if the party were implying that judges should promote the government's policies regardless of whether the policies complied with the Bill of Rights and other legal standards, then the ANC could rightly be seen as endangering at least respect for if not actual judicial independence. The need to address the collective attitudes and values of the judiciary should not be confused with creating a judiciary that blindly accepts all government policies. At a minimum, the ambiguity of the statement and the absence within it of emphasis on judicial independence provided room for concern about the direction of thinking within the ANC.

The tension between governing parties and the judiciary is not unique to South Africa and must be assessed in the broader context of the structure and nature of democratic government. In any democracy in which the judiciary has the power to review and declare invalid government actions, tension will exist between the judicial and other branches. As one judge explained, it is "extraordinarily hard" to have a system based on constitutional supremacy; by virtue of this design, judges who interpret and apply the constitution are in a sense supreme over the other organs of government, and this fact does "not fit well with any government" (Interview, 4 July 2006). Given that South Africa's democracy is young and that all of those involved in government are still learning how the system works in practice, the ruling party's somewhat ambiguous statements about the judiciary are not necessarily indicative of sinister intentions or of a desire to control the courts. While such statements merit reaction from the community and while protecting judicial independence is imperative, it is important to keep in mind that, particularly in a healthy democracy where the courts are performing their functions, the tension between the executive and judiciary will never disappear.

The ANC's statement notwithstanding, the government has responded relatively well to judicial decisions, even those that conflicted with the government's policies. The executive has not attempted to actually interfere in and influence the outcomes of cases, and "there is not significant evidence of deliberate non-compliance with orders made by" the courts, even orders made in controversial Constitutional Court cases that invalidated or altered government programmes (Budlender, 2005). There have been some cases of less-than-perfect compliance, however. For instance, the Treatment Action Campaign "has repeatedly complained that the government only partially complied with the Constitutional Court's 2002 order to make the anti-retroviral drug Nevirapine, available in public hospitals" to reduce the risk of HIV transmission form mother to child (AfriMAP, 2005: 29). Additionally, "contempt proceedings had to be brought to compel the Mpumalanga government to comply with the judgment in the *Treatment Action Campaign* case" (Budlender, 2005).

In many cases where compliance was not exemplary, administrative inefficiency rather than intentional refusal to abide by the judgments is usually blamed. For instance, the government has not complied fully with the *Grootboom* decision in which the Constitutional Court determined that the right of access to adequate housing imposed on the government the obligation to provide housing for people in crisis situations (AfriMAP, 2005: 31). However, Budlender contends that the government's slow and less than adequate response was due more to "lack of attentiveness and a lack of competence in some areas" than to deliberate non-compliance. Similarly, while many people point out that the Eastern Cape provincial government repeatedly fails of to comply with court judgments, most people blame bureaucratic and administrative inefficiency rather than deliberate defiance (Budlender, 2005). Overall, despite examples of non-compliance, the government has generally respected and fulfilled or at least tried to fulfil court orders.

In any democracy in which courts have the power of review, and particularly in a country where the Constitution is supreme over all governmental organs, tension will exist between the government, that is, the governing party, and the judiciary. As a young country still struggling to define the roles of the various branches of government, South Africa is in some ways particularly prone to such tensions. Moreover, one cannot ignore the history of the ANC and the tremendously difficult challenge the ANC

undertook in 1994 when it began the transformation of all aspects of South African government and society. Given that the ANC struggled for decades to come to power and create a democratic, human rights-based state, one can understand why the government would be frustrated when judicial decisions seemingly derail its policies. Understanding, however, should not excuse government attempts to weaken the power or independence of the judiciary.

Opinions differ as the underlying attitudes and motivations of the ANC with respect to the judiciary. One judge explained that there is "both documentary and personal support for" many different views within the ANC (18 July 2006). The ANC is a diverse party composed of people from different social, political, and economic backgrounds, and while some members believe in the need to instrumentalise the judiciary, others believe in the separation of powers and some take a more bureaucratic view of the judiciary. Despite the existence of a variety of views within the ANC, the judge believes that the "preponderant view within the ANC — the business section and the popular section — remains a commitment to an independent judiciary". While the business sector "understands that an independent judiciary is a prerequisite for an efficient and modern state, the populist arm is committed to securing an independent judiciary" because of the belief that courts are a safeguard for the values that the ANC treasures.

Moreover, the ANC was instrumental in writing the 1996 Constitution that provides the important structural guarantees for an independent judiciary. Perhaps the ANC feels in some ways constrained by the powerful judiciary that it created, but evidence does not support a contention that the majority of the ANC's now wants to undermine the Constitution that it wrote only a decade ago. Despite some indications that the party desires a more compliant judiciary, the ANC has not actively interfered in the judicial process and has respected court decisions that conflict with the desires of the ruling party.

It is also important to recognise that even in countries with much older and much more established democracies, debates continuously flare up about the role of the judiciary. For instance, Budlender (2005) cited a recent example from the UK in which the House of Lords reaction to anti-terrorism legislation led to tension between the executive and the judiciary. The House of Lords had held that a statute authorising internment or detention without trial was irrational and discriminatory because it applied only to foreigners, and the prime minister reacted by warning the judges who had been "blocking" parts of his anti-terrorism legislation that they would face many battles if they prevented the deportation of terrorists. The prime minister's warning could be viewed as an attempt to influence judicial review of the government's legislation. Although some statements by the ANC and government officials might indicate a desire for a more "executive-minded" judiciary, there is no evidence that government official have tried to influence the outcome of trials by interfering directly in proceedings or by threatening judges.

Aside from the general attitude of the government toward the judiciary, recent attempts at judicial reform have sparked controversy and led to allegations that the Department of Justice and Constitutional Development and the executive branch in general were trying to gain control over and undermine the independence of the judiciary.

5.2 Judicial reform

Although the Constitution went far in creating an independent judiciary that is responsive to the needs of a new South Africa, structural and administrative changes are still necessary. As it was impossible for the framers of the Constitution to predict and address every issue that might arise concerning the judiciary, the Constitution itself requires that "as soon as is practical ... all courts, including their structure, composition, functioning and jurisdiction, and all relevant legislation, must be rationalised with a view to establishing a judicial system suited to the requirements of the new Constitution" (section 16[6]). For example, although South Africa currently has nine provinces, the jurisdiction of the high courts is still based on pre-1994 provincial and homeland boundaries and jurisdictions and is not aligned with the demarcation of provinces (AfriMAP, 2005: 17–18). As a result, as Hugh Corder noted (2006), "we still speak of officials of the High Court of the Transvaal" and "there are still traces of the bantustans in the court structures". Many judges also agree that judicial education, mechanisms for dealing with complaints against judges and a code of conduct are important reforms needed to create a transformed judiciary. While the need for reform is widely accepted by all branches of government, government's efforts to address some of these challenges have proved controversial.

5.2.1 The "justice bills"

For the past several years, judges and representatives of the Department of Justice have discussed judicial reform and tried to come up with mutually satisfactory proposals. After a series of consultations starting in the late 1990s, the judiciary and the Ministry of Justice, under the leadership of Dullah Omar, agreed by 2003 "on a series of draft bills dealing with superior court structures and processes, judicial educations, disciplinary and ethical issues", and other issues (Corder, 2006). Although the bills reached Parliament's portfolio committee on justice by late 2003, with the June 2004 election and the change in leadership of the Ministry of Justice, progress on the bills stopped. In December 2004, the ministry, led by Brigitte Mabandla and Deputy Minister Johnny De Lange, released a new set of bills that reflected "changes which struck at the heart of some of the key elements on which agreement had been reached" (Corder, 2006). Composed of the Superior Courts Bill, the National Justice College Bill, the Judicial Services Commission Amendment Bill and the Judicial Conduct Tribunal Bill, the so-called "justice bills" incited a strong reaction from the leadership of the judiciary. In response to the outcry, the minister agreed to reconsider the bills.

Despite some changes to the package of bills, in mid-December 2005 after having received Cabinet approval, the minister gazetted for public comment the Constitutional Fourteenth Amendment Bill, which proposed altering various aspects of court administration and functioning and reintroduced the "justice bills" with little change. Although many judges and legal practitioners agree that various features of the bills are appropriate and necessary, certain proposals proved very controversial and gave rise to allegations that the executive was trying to gain more control over the courts. Additionally, many judges criticised the ministry's failure to consult the judiciary while the bills were being prepared, the way in which the bills were proposed, and the continued lack of communication between the ministry and members of the judiciary.

After months of opposition by and discontent within the judiciary, in late July 2006 President Mbeki announced that the Superior Courts Bill and the Fourteenth Amendment Bill would be processed only after the buy-in of judges into a new policy on transformation of the judiciary (*Cape Times*, 31 July 2006).[14] The National Justice College Training Bill had similarly been withdrawn earlier in 2006 in response to opposition from the judiciary and has now been replaced by the South African Judicial Education Institute Bill (B4 – 2007). The Judicial Conduct Tribunals Bill and the JSC Act Amendment Bill have been combined into a new Judicial Service Commission Amendment Bill (not numbered).

A discussion of the conflict surrounding the bills provides useful insight into current debates about the role of the judiciary and about judicial independence. Given that efforts at reform continue, it is important to understand the controversial aspects of the previous bills and ensure that any future bills do not include similar threats to independence. However, because numerous organisations and individuals have already written detailed analyses of the legal aspects of the bills and of their potential impact on judicial powers and independence, this report will give only a broad outline of the major issues involved with each of the proposals, focusing on those aspects that most implicate questions of judicial independence and the question of the relationship between independence and other aspects of transformation.[15]

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[14] At the time the President said government would release a white paper, outlining a "broad policy framework", on the transformation of the judiciary to generate public debate on the topic. The President said the white paper would hopefully be completed by the end of 2006 (*Cape Times*, 31 July 2006). As of July 2007 no white paper has been published. It is not clear if the idea has now been abandoned or whether a white paper is still to be expected. A press report published in May 2007 indicated that Chief Justice Pius Langa had motivated for the contested clauses to be removed from the Superior Courts Bill and the Constitutional Fourteenth Amendment Bill so that the other aspects of the bills could go ahead, but that Minister of Justice Mabandla had indicated her opposition to this idea (*Business Day*, 30 May 2007).

[15] For more comprehensive analysis of the "justice bills", see: the "General Council of the Bar of South Africa's Submission to the Portfolio Committee on Justice and Constitutional Development", 2006, available at <http://www.legalbrief.co.za/filemgmt_data/files/GCB%20justice%20bills%20submissions.pdf>; the transcript of the "General Council of the Bar's Conference on the Justice Bills, Judicial Independence and the Restructuring of the Courts", 17 February 2006, available at <http://www.sabar.co.za/conference_transcript.pdf>; Idasa's submissions to the portfolio committee on the Constitutional Fourteenth Amendment Bill, 25 May 2006, available at <http://www.idasa.org.za/>; Legal Resources Centre "Comments on Clause 1 of the Constitutional Fourteenth Amendment Bill", 1 February 2006, and "Comments on the Constitution Fourteenth Amendment Bill", 14 January 2006, available at <http://www.lrc.co.za//Focus_Areas/Submissions_to_Justice.asp>; and the "CALS Discussion Paper on the Constitutional Amendment Bill", February 2006, available at <http://www.law.wits.ac.za/cals/>.

While all of the bills sparked controversy, the most contentious were the Constitutional Amendment Bill and the Superior Courts Bill. The Constitutional Amendment (Constitutional Fourteenth Amendment Bill, Notice 2023 of 2005, DoJCD,14 December 2005) sought to:

- Give the Ministry of Justice responsibility over the administration and budget of all courts;
- Make the chief justice the head of the "judicial authority";
- Give the President more power over appointing acting judges to the Constitutional Court, and judges president and deputy judges president to the high courts;
- Take away the power of the Constitutional Court to suspend the commencement of an act of Parliament; and
- Redefine the Constitutional Court as the single apex court in the country.

In line with the Constitutional Amendment Bill, the Superior Courts Bill proposed giving the minister increased rule-making power over the courts and increased control over certain day-to-day aspects of court operations and procedures. The bill also integrated into the high court system some of the specialised courts, including the Competition Tribunal, the Land Claims Court, Electoral Court, Income Tax Court and the Labour Court. According to Deputy Minister of Justice De Lange (11 May 2005), "[t]he two bills ... are aimed at improving the functioning and administration of courts; the establishment of governance provisions within the judiciary for and by the judiciary; the improvement of service delivery in our courts; and ensuring more access to justice". Although these aims are ostensibly aligned with goals of judicial transformation, many judges and other critics disputed De Lange's characterisation of the bills and argued that the proposals represented an attempt by the executive to gain more control over the courts.

5.2.1.1 Constitutional Fourteenth Amendment Bill

Proposed after absolutely no consultation with the judiciary, the Constitutional Fourteenth Amendment Bill included various provisions that judges and other members of the legal professional feared would weaken judicial independence and hamper efforts at transformation. For instance, the bill sought to remove the power of the Constitutional Court to suspend the commencement of an act of Parliament or of a provincial act (section 172[3]). Arguably reminiscent of apartheid-era ouster clauses, the bill's attempt to reduce the constitutionally mandated powers of the court potentially conflicts with the separation of powers and the requirement that all branches of government aid the judiciary in protecting its independence. Moreover, the ouster clause in some ways hampers judicial transformation, particularly efforts to provide increased access to justice and protect the rights of all people. The power to suspend the commencement of an act of Parliament is "an important weapon" because it enables courts "to protect the public, especially minority groups, in the interim against harm that can be caused by potentially unconstitutional legislation" (Steyn, 2006). Particularly in a government dominated by a single party and in a country trying to impress on its judiciary and the people in general a new rights-oriented, equality-based outlook, it is important that courts have the power to protect the rights of all groups.

Furthermore, in the case of *President of the Republic of South Africa* v. *United Democratic Movement* ("*Floor Crossing*" case) (2002), the Constitutional Court recognised that because suspending the commencement of an act of Parliament is a drastic measure, it should use the power only in very limited circumstances. Balancing the deference with which the court must treat the legislature against the judiciary's need to ensure that the government acts within the law, the court determined that it would suspend the commencement of an act only when there was prima facie evidence that the act was unconstitutional and when suspension was "absolutely necessary to avoid likely irreparable harm" (paragraphs 31–33). Additionally, the court would act "in the least intrusive manner possible with due regard to the interests of others who might be affected by the impugned legislation" (paragraph 31). The court's understanding of its role in relation to that of the legislature and its reluctance to act except when absolutely necessary further support the argument that the Constitutional Fourteenth Amendment Bill's ouster clause is not only unnecessary but potentially detrimental to the court's ability to protect people from unjust legislation, an ability that is crucial to achieving the goal of increased access to justice for all South Africans.

Another controversial provision of the Constitutional Fourteenth Amendment Bill attempted to give more power to the President in appointing acting judges to the Constitutional Court (section 175[1]). Currently, the President must have the "*concurrence* of the Chief Justice" before naming an acting judge (Constitution, section 175[1]). The requirement of concurrence acts a safeguard against the executive's exerting excessive influence on the judiciary by appointing like-minded judges. The draft amendment, however, eliminates the need for concurrence and empowers the President to appoint a judge "*after* consultation with the Chief Justice" (section 175[1]). Because the executive is often a litigant before the Constitutional Court and because the Court sits *en banc* when hearing all cases, giving the "executive *de facto* sole power in appointing acting judges … could lead to a suspicion of undue influence in decisions of the Court" (Idasa, 25 May 2006).

In addition to changing the appointment procedure regarding acting judges, the amendment proposed giving the President more power with respect to the appointment of judges president and deputy judges president of the high court divisions. Although the Constitution does not provide a procedure for selecting these judges, "since 1994 the JSC has recommended appointments to the President and he has acted on them" (Corder, 2005). The amendment proposes altering this accepted procedure by empowering the President to select judges president and deputy judges president *after consulting* the chief justice and Minister of Justice (section 174[5]). As consultation does not bind the President, in reality the provision gives complete authority to the President to name the heads of the high courts. One judge argued that this part of the amendment was "incontestably damaging to the independence of the judiciary" (Interview, 18 July 2006), and Professor Corder (5 June 2005) thought that the phrase "after consultation with" is "redolent of language of late-apartheid Parliament". As the decisions of the Rabie "emergency team" during apartheid revealed, the selection of judges, particularly senior judges, can impact on the outcome of cases and the perceived impartiality of the judiciary. Giving the President's sole power over judicial appointments increases the executive branch's influence in the judiciary, blurs the separation of powers and impacts on public perception of independence.

Also inciting widespread objections, the amendment proposed giving the Minister of Justice authority over the administration and budget of all courts (section 165[7]). Although the provision purported to distinguish between administrative and judicial functions, judges and lawyers have argued that making such a distinction is impossible. George Bizos (February 2006) explained that because many "functions that may be described as administrative bear directly on the exercise of judicial functions, a clean severance of the two is not possible". Justice Ngcobo (2003) similarly argued that the "regulation of practice and procedure in courts is so fundamental and necessary to a court … that to divest courts of control in this sphere is to undermine the very phrase 'judicial authority' contained in section 165(1)" of the Constitution" (704). Given that day-to-day courtroom procedures and higher level administration of courts impact significantly on a court's ability to carry out its judicial functions, separating administrative and judicial spheres is impossible on a practical level.

In addition to the impossibility of distinguishing administrative and judicial functions, giving the minister increased control over court practice and procedure could weaken the institutional independence of the judiciary by allowing improper executive influence. Administration by the judiciary, as opposed to an outside body, "protects the courts against outside efforts to make the judicial function unduly dependant on improper forces" (Justice Ngcobo, 2003: 697–8). Largely because separating judicial and administrative functions is difficult on a practical level, giving the minister control over the court administration creates the risk that the minister, either intentionally or unintentionally, will use this power to exert influence over the judiciary and thus affect the outcome of cases. Control by the minister of court budgets similarly creates the potential for executive infringement on the judiciary's institutional independence. Threats by the executive to withhold or reduce resources and even the mere knowledge that the judiciary is dependent on the executive for its resources could put pressure on judges and impair the ability of courts to effectively and impartially watch over the other branches of government.

In terms of transformation, most critics argue that putting administrative power in the hands of the minister will not improve the functioning and efficiency of the courts or enhance access to justice, two goals that Deputy Minister De Lange has repeatedly cited as justifications for the amendment (Corder, 5 June 2005). Despite the ministry's claims, Justice Ngcobo believes that "self-administration by courts is one of the most important, if not the most important means of achieving the highest level of operational efficiency of courts and ultimately the delivery of justice". Judges have intimate knowledge of courtroom practices and procedures and of the measures necessary to run an efficient trial; consequently, as former Minister of Justice Maduna stated at a conference in 2003, "[a]t the end of the day, each judicial officer should be in control of his or her own court and see to it that the court functions effectively and efficiently" (668). Judges must be able to request interpreters, give instructions

to the court staff, repair broken equipment and perform all of the other functions associated with running a courtroom. Efficient court administration improves public perception of the judiciary and helps increase access to justice; pursuit of these transformation goals, however, should "strengthen both the judiciary and the system, and not [...] detract from the principles of the separation of functions and independence of the judiciary" (Maduna, 2003: 670). At the very least it may therefore be said that transferring authority over court administration to the minister was not clearly motivated for and runs contrary to a range of opinion which appears to favour judicial control of court administration both on technical grounds and on the basis that ministerial control may undermine judicial independence. Thus, not only are judges arguably in the best position to run courts efficiently and effectively but transformation should also fortify rather than undercut judicial independence.

Along with vesting administrative and budgetary authority in the Minister of Justice, the amendment established the chief justice as head of the "judicial authority" and gave him responsibility "over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts, other than the adjudication of any matter before a court of law" (section 165[6]). The provision sought to centralise control of the courts in the chief justice, although under the existing system courts operate in a horizontal not a hierarchical fashion: each high court division operates independently and the head of court in each division has the ultimate responsibility for running the courts (General Council of the Bar of South Africa [GCB], 2006: 17). The proposal to create a hierarchical structure with the chief justice at the top is thus inconsistent with the existing system. Moreover, one individual should not have excessive control or influence over the creation of norms and standards, and vesting so much power in the chief justice arguably conflicts with that idea that the judiciary as an institution must be independent and free from undue influence by *any* source.

5.2.1.2 Superior Courts Bill

In many ways complementing the Constitutional Fourteenth Amendment Bill, the Superior Courts Bill has proven similarly controversial in regard to judicial independence. At the same time, it is important to note that the judiciary supports and views as necessary many of the proposed reforms, and in 2003 after extensive consultations with and with the support of the judiciary, former justice minister Maduna proposed a Superior Courts Bills (Superior Courts Bill, B52 of 2003, Gazette No. 25282, 30 July 2003) that aimed to rationalise the structure of the court system to bring it more in line with post-1994 South Africa. However, in 2005 Minister Mabandla put before Parliament a new version of the Superior Courts Bill (Superior Courts Bill, Working Draft, 19 October 2005) that included several material changes and sparked debate inside and outside the judiciary. Many of the controversial provisions dealt with the same issues — giving the minster control over the administration and budget of all courts — as the Constitutional Fourteenth Amendment Bill, and some people allege that the proposed amendment was in party aimed at ensuring that the Superior Courts Bill would not violate existing constitutional norms concerning the judiciary.

In accordance with the proposal in the Constitutional Fourteenth Amendment Bill, the Superior Courts Bill proposed that the chief justice be recognised as the head of the judicial authority and gave him responsibility over the exercise of judicial functions (clause 11). To enable the chief justice to perform his new functions, the bill proposed an office of the chief justice that was comprised of an executive secretary named by the minister in consultation with the chief justice and other personnel appointed by the director-general of the Department of Justice in consultation with the chief justice (clause 12). Given that the office of the chief justice was supposed to deal with judicial functions, the executive branch's role in appointing personnel could constitute infringement on the judiciary's institutional independence. The General Council of the Bar (2006) explained that because judicial functions, such as the listing of cases for hearing and the assignment of judges to cases, are fundamental to the proper operation of courts, the "centralisation of these matters in a single office administered by public servants responsible to the Minister inevitably means that there is very considerable scope for the limitation of and interference with" the functioning of the courts (13–14).

Another provision of the Superior Courts Bill vested rule-making power in the Minister of Justice instead of the Rules Board (chapter 7). Established in 1985 by a legislative act and empowered to formulate the rules for courts, the Rules Board is composed of judges, lawyers, a law lecturer and representatives of the Department of Justice. While the Superior Courts Bill provided for the establishment of a similarly composed Board, the Board would have been a purely consultative body whose advice the minister was required only to consider before making, amending or repealing rules (clause 41). According to the bill, the minister would have had power to make all rules, including those regulating "the practice and procedure in connection

with litigation" and other important judicial processes. However, because rules impact on the course of a trial and affect the way in which the judiciary operates, it is important that neither the executive nor legislative branch have excessive influence in rule-making processes.

Along with control over rule-making, the Superior Courts Bill gave the minister extensive power to enact broader regulations regarding, for example, "any matter that may be necessary or expedient to prescribe regarding the administrative functions of courts and the efficient and effective functioning and administration of the courts, including the furnishing of periodical returns of statistics relating to any aspect of the functioning and administration of courts and the performance of judicial functions" (clause 66[a]). The requirement that judges provide reports to the minister regarding *judicial* functions erodes their independence by making them accountable to the executive. Furthermore, the bill allowed the minister to regulate the "periods of absence of judicial officers from courts" (clause 66[e]). Pointing out that even during apartheid "the Minister of Justice did not try to interfere to this extent with the daily operations of the courts", the General Council of the Bar (2006) contended that this provision would have enabled the minister to decide when specific judges were on duty and to "punish judges who make unpopular decisions" (59). Overall, the ability of the minister to make rules or regulations that directly impact on judicial functions and daily operations of the courts would severely weaken judicial independence and facilitate executive influence, both intentional and unintentional, in the judiciary.

5.2.1.3 Judicial education

Virtually all judges agree that "one of the most effective ways of achieving transformation of the judiciary is through training" (Corder, 5 June 2005). Judges and legal scholars generally point to two main reasons why judicial education is key to transformation: first, already sitting judges should continually be exposed to new ways of thinking about law and to recent developments in the domestic and international legal fields; second, training helps increase the pool of potential judges beyond the ranks of senior advocates, the traditional source of most judges (Interview, 23 June 2006). Education is crucial to building a judiciary that understands and is dedicated to constitutional values and that appreciates the complex social and historical context within which it must function. Explaining the need for "sensitivity training", former Chief Justice Mahomed (1998) stated:

> [P]roper judicial insights in many areas would involve training sensitive to the perspectives and the complaints of special groups, unfairly marginalised in the past, such as women, blacks, homosexuals and even illiterate an disabled persons, all disadvantaged by assumptions which might need review and discussion" (109).

Demonstrating on a practical level the importance of ongoing judicial education, in a child custody case in the Pretoria High Court earlier this year the court granted custody to the father rather than the mother who was well-suited to be a parent but HIV positive. The trial transcript indicated that the mother's HIV-status was influential in the decision and "effectively disqualified her from being a custodial parent and effectively disqualified her from her right to be considered a worthy custodial parent" (Kollapen, 2006). This case underscores the need for continuing education about the rights of HIV-positive South Africans, especially their right to non-discrimination, and the overall role of education in creating a human-rights oriented judiciary.

In terms of the practicalities of judicial education, judges agree that, as is the accepted practice in democracies, "judicial training should be organised and controlled by an adequately funded judicial body independent of the executive" (McQuoid-Mason & Wylie, 15 May 2005: 7). To maintain independence and cultivate an impartial bench, the judiciary must be able to control every aspect of its own education, from curriculum to appointing personnel to determining how the budget will be spent. Allowing other organs of government to control judicial training would potentially enable them to exercise an inappropriate influence on the perspectives and attitudes of judges, thus weakening the impartiality of individual judges and the independence of the judiciary as a whole.

Despite their belief in the importance of education, judges objected strongly to the National Justice Training College Draft Bill proposed by Minister Mabandla. The bill suggested that the Justice College, a state-run institution, would train judges along with the prosecutors and other judicial officials whom it already trains. Although the bill provided for a separate training facility for

judges and permitted judges to determine the curriculum, the Minister of Justice retained control over the resources, personnel and budgets (McQuoid-Mason & Wylie, 2005: 7) thus enabling the minister to dictate policy and control the operation of the institution. In response to the widespread objections by the judiciary, the minister withdrew the bill in late 2005 and agreed not only that the "judiciary would be responsible for its own training and education" but also that "magistrates who were currently being trained along with prosecutors and other officials at the Justice College would be removed and receive training along with judges under the proposed new regime" (*Sunday Independent*, 30 October 2005).

In contrast with the initial bill, the new South African Judicial Education Institute Bill (4 of 2007) provides explicitly for the envisaged institute to be under the direction of a council, chaired by the chief justice. The 21 members of the council will include nine judges (including one retired judge) and three magistrates. The other nine representatives will include teachers of law and representatives of attorneys and advocates, as well as the Minister of Justice (or her/his appointee) and a representative of the Judicial Service Commission (who may or may not be a judge). Funding for the institute will be allocated by Parliament in the annual budget. The authority of the minister over the institute will be fairly limited. For instance, the chief justice, with the concurrence of the minister, will issue guidelines regarding the functioning of the institute. The minister will have some authority in relation to the remuneration of the director of the institute, and the council will have to submit its annual report to the minister.

The issue of judicial education illustrates potential tensions between independence and the normative aspects of transformation. It also underscores the notion that attaining the goals of creating a well-qualified bench that understands the new legal framework within which it must work should not lead to a diminution in independence.

5.2.1.4 Judicial ethics and accountability

Many members of the judiciary agree with the need for a formal mechanism to deal with complaints against judges and for a code of conduct to guide judges. Fostering an atmosphere of judicial accountability is an integral part of the attempt to create a more people-focused judiciary and of overall judicial transformation. In recognition that they are supposed to serve the people of South Africa, judges should be held accountable for conduct that impedes the effective fulfilment of the judiciary's function. While the Constitution includes procedures for dealing with allegations of impeachable conduct, it requires that national legislation create "procedures for dealing with complaints [of non-impeachable conduct] about judicial officers" (section 180). As Justice Howie explained, one must distinguish between judicial decisions and judicial behaviour when discussing accountability. In terms of decisions they make in court, judges "are answerable only to the decisions of higher courts, to the law and their consciences". In terms of personal conduct, however, judges "are not above the law in any respect" and should be held accountable (2003: 682). While the appeals process is the only appropriate accountability mechanism for judges with regard to their judicial decisions, other methods should exist to ensure that judges are accountable to the public for conduct that seemingly influences their impartiality or reflects on their integrity.

Judges acknowledge that they must conduct themselves ethically and should be held responsible for failures to do so, but "striking a balance between independence and accountability is a tempestuous challenge" (Ellis, 2005). At the same time, fair and effective mechanisms for dealing with complaints can help promote and protect judicial independence. The objective of the constitutional provision establishing procedures for impeachment of judges is to "safeguard judicial tenure, thus shoring up the authority and independence of the judiciary" (Anonymous, 2000: 381). The provision ensures that judges will not be dismissed arbitrarily and that the executive cannot use impeachment or threats of impeachment to influence judges. The creation of a body that follows fair procedures to deal with allegations of non-impeachable misconduct could also help to ensure that judges are not punished unjustly and that threats of punishment are not used to pressure judges.

A complaints mechanism and formal code of conduct could also improve public perception of the impartiality of judges and the legitimacy of the judiciary as whole. Stressing the importance of public confidence, Justice Harms declared:

> We [the judiciary] need public acceptance of our moral authority and integrity. Our moral authority and integrity provide the real source of our power, not the Constitution. The Constitution may well command

> all organs of state to protect our independence but that is not enough. It is for us to maintain, protect and enhance the status of the judiciary (Harms, 2003*b*).

If an individual lodges a complaint against a judge and never hears any follow-up from the judiciary as to the status of or action taken in response to the complaint, he or she may question the judiciary's dedication not only to impartiality but also to the people whom it is supposed to serve. Thus, a process for dealing with complaints would illustrate the judiciary's commitment to the public and its appreciation for the importance of judicial conduct and would foster a climate of accountability among judges. Similarly, a code of conduct would promote and underscore the importance of impartiality, provide clear standards for judges, and educate the general public about appropriate judicial behaviour. Additionally, by clearly indicating what conduct is and is not proper, a code could potentially prevent spurious allegations of misconduct.

In terms of striking a balance between independence and accountability, a committee of senior judges chaired by Justice Harms began investigating accountability and ethics in the late 1990s. After consulting numerous judges and a myriad of outside sources, the committee developed a code of ethics and a draft bill establishing a disciplinary body. In 2000, all of the heads of superior courts and the JSC approved the documents, and the committee submitted the code and draft bill to the Department of Justice. To protect the independence of the judiciary and prevent the appearance that others organs of government were using the complaints procedure as a way to pressure judges, the committee determined that judges should control any complaints procedure with as little outside influence as possible. For instance, in terms of the composition of a body that would deal with complaints, the committee found that "the overwhelming view of the judiciary is that *all* the members are to be judges" (Anonymous, 2000: 395). Additionally, given that "judges are entrusted with the duty to interpret the Constitution and to consider the constitutionality of Acts of Parliament or actions of the executive or the legislature", it is reasonable to also trust judges with considering complaints against their colleagues (ibid).

One may question why the judges' opinion regarding the establishment of a complaints procedure should trump that of other branches of government, Because some types of professional conduct bodies, such as those that deal with complaints against doctors, encourage the participation of outsiders, it is reasonable to ask what distinguishes judges from other professionals and what justifies an internally controlled complaints procedure. One of the most distinctive features of judges as individuals and of the judiciary as a general professional body is the need for complete independence. This need influences many aspects of a judge's job, including salary, tenure and dismissal procedures, and a complaints procedure must similarly be sensitive to the need for independence and must not open the door to undue influence by other branches of government. If members of the legislature or executive controlled the complaints process or were permitted to sit on a committee that reviewed complaints and disciplined judges, the potential for either intentional abuse of this power or for unintentional influence over judicial activity would be unjustifiably high. Because other types of professionals do not face the same threat from involvement by outsiders, one cannot analogise the practices of these professional bodies to those of the judiciary. Moreover, although one may question whether judges will have the objectivity necessary to fairly address complaints against colleagues, given that judges are trusted to interpret the Constitution, review legislative and executive actions, and decide cases that impact on the litigants' lives, it seems reasonable to argue that judges also have the competence and personal integrity necessary to control a complaints process.

The practice of other countries lends support to the contention that such a model would is appropriate and justified partly because it is the model which best protects judicial independence.

Furthermore, it is worth noting that most common-law countries that have formal disciplinary processes for dealing with complaints — Canada and New Zealand — have adopted a model of judicial self-discipline (Anonymous, 2000: 395).[16] For instance, in Canada, the Canadian Judicial Council, which consists only of senior judges, has the power to investigate complaints against judges. The Council cannot discipline judges, but it can recommend that Parliament remove the judge from office and it can express publicly "its concluded opinion on the conduct of the judge who is subject of the enquiry" (SALJ,

[16] In most common-law countries, no formal procedure exists for dealing with complaints against judges. Instead, the judiciary relies on "self-discipline enforced through seniority and collegiality. The reasons for this are the reluctance to appear to interfere with the judiciary and the difficulty of devising a machinery which would satisfy all concerns" (Anonymous, 2000: 384).

2000: 386). However, in the US, judicial disciplinary organisations operating at the state level comprise not only judges but also lawyers and private citizens (Seedat, 2007: 9).

Despite the widespread approval by the judiciary of the code of judicial ethics and draft bill on disciplinary procedures, in December 2004 the Department of Justice proposed two new bills — the Judicial Services Commission Act Amendment Bill and the Judicial Conduct Tribunals Bill — that dealt with the same issues but differed significantly from what the judges had recommended. After widespread opposition by the judiciary and a promise by the ministry to rewrite the bills, in February 2006 the department re-issued the bills "essentially unaltered" (Interview, 13 July 2006). The JSC Amendment Act created a judicial conduct and ethics committee within the JSC and a subcommittee on judicial conduct, and proposed the establishment of a judicial code of conduct and a register of financial interests for judges. The Judicial Conduct Tribunals Bill provided for the formation of a tribunal to investigate and report on allegations of "incapacity, gross incompetence or gross misconduct" — impeachable conduct according to the Constitution. Both bills were controversial with the main objection stemming from the proposal that the executive and legislature play a role in the discipline of judges.

In his submission to Parliament concerning the bills, Justice Harms (2006) stated that "[i]t is wrong in principle and constitutionally offensive to subject the judiciary to the functional or ethical control of a non-judicial body, especially one in which executive appointees predominate". Additionally, the bills required that Parliament approve any code of ethics or amendment to the code. However, because judges are not subject to political control, it is "not constitutionally acceptable for the legislature to seek to prescribe ethical standards or dictate rules of conduct to the judiciary" (ibid). Moreover, the draft code to which the judiciary agreed in 2000 was based on internationally accepted norms and cited by the UN as a source for the *Bangalore Principles*. Thus, judges argue, the requirement that Parliament approve a code of conduct is unnecessary and could only serve to increase the possibility of legislative interference in the judiciary. Essentially, "judges are willing to be subject to the discipline of other judges in an open and transparent way but it must be within the judiciary" (Interview, 27 June 2006).

Concerning judicial discipline, the new 2007 draft Judicial Service Commission Amendment Bill provides in section 12 that the chief justice, "acting in consultation with the Minister" must compile a judicial code of conduct; there is no requirement for parliamentary approval. Section 8 of the bill provides for the Judicial Service Commission to include a judicial conduct committee comprised of the chief justice and deputy chief justice and three judges who are to be "designated by the Chief Justice in consultation with the Minister". These provisions therefore allow for substantial ministerial influence over the terms of a code of conduct and over appointments to the judicial conduct committee, though the provisions seem to require that the chief justice and minister work in a cooperative manner to negotiate the code and the appointments.

The question of whether judges should have to disclose their financial interests has received media attention recently, largely as a result of allegations earlier this year that Justice Hlophe of the Cape High Court, while receiving a retainer from the Oasis Group granted the group leave to sue Justice Desai for defamation (*Business Day*, 4 April 2006).[17] Both the old and new draft bills include a provision requiring judges to declare their assets, and in spite of the attention that the issue has received from the media, judges in general do not see this requirement as particularly threatening to judicial independence. Although judges do not agree unanimously as to the desirability of an asset register, most of their concerns have more to do with questions of degree and practicality. For example, given that a judge who takes a bribe is unlikely to disclose it regardless of the existence of a mandatory asset register, the requirement will likely accomplish little on a practical level to prevent corruption or dishonesty (Interview, 13 July 2006).

While some judges object to an asset register, none has cited threats to judicial independence as a basis for his or her objection. Conversely, many people who support mandatory disclosure believe that the obligation would strengthen judicial independence and public perceptions of impartiality. For example, Judith February of Idasa (26 April 2006) explained that the "basis for

[17] The JSC was due to meet early in October 2007 to discuss a request by a Cape Town advocate for Hlophe's impeachment (*Mail & Guardian,* 28 September 2007). The JSC had previously cleared Hlophe of conflict of interest charges saying that it could not contest his assertion that he had received oral permission from the late Minister of Justice Dullah Omar (*Mail & Guardian,* 15 December 2006).

disclosure is to prevent a conflict of interest between the public interest and a private interest which they may hold in a company or some such commercial entity". An asset register would increase the public's faith in the impartiality of judges and assure litigants that their judge is not being inappropriately influenced by outside interests. Additionally, mandatory disclosure would prevent selectiveness in "outing" of judges with business interests (*Business Day*, 16 May 2006).

In section 11 the new bill also prohibits judges from holding or performing any other "office of profit" or receiving any other remuneration apart from his or her salary and any other amount which may be payable to him or her in his or her capacity as a judge, though it makes provision for a specifically defined set of circumstances in which additional income would be allowed. A provision in terms of which retired judges are also only allowed to take on work for remuneration if they receive written permission from the minister, has been one provision of the new bill which has given rise to specific objections (*Weekender*, 24 March 2007).

Judicial accountability is crucial to public perception of independence and impartiality, and the topic often receives media attention when a judge is accused of misconduct. Accusations of and actual incidences of judicial misconduct occur in every democracy, and South Africa is not immune to this problem. The existence of a complaints procedure would both ensure that judges are held accountable for any misbehaviour and, by investigating and dismissing unfounded allegations, protect judges from unwarranted criticism. A complaints mechanism and a code of conduct would also help reassure the public that the judiciary is dedicated to impartiality and fair adjudication and willing to hold itself accountable for any lapses in its commitment.

5.2.2 Relationship between the ministry and the judiciary

Aside from the actual content of the bills, the process by which the bills were proposed and the attitude of the ministry toward the judiciary provoked strong reaction from many judges and has implications for strength of judicial independence. The ministry proposed the first set of draft bills (excluding the Fourteenth Amendment Bill) in December, 2004, and although the bills all included material changes to what the judiciary and previous Minister of Justice had agreed, Minister Mabandla consulted no one in the judiciary beforehand. In response to criticism from numerous judges, the minister agreed to rewrite the bills and did in fact change the National Justice Training College Bill to reflect judicial concerns. However, on 14 December 2005, the minister published for comment the Fourteenth Amendment Bill and the Superior Courts Bill, having made few substantive changes in response to the judiciary's concerns. Although later extended to May 15 on orders from President Mbeki, the original deadline for comments was only one month later, on 15 January 2005. Given that the bills involved complex and controversial issues and given that many judges, non-governmental organisations and other interested stakeholders were on Christmas recess when the bills were published, the timelines indicated dismissiveness on the part of the ministry to the need for meaningful involvement from the judiciary or civil society.

Several judges have expressed disappointment and frustration at the process by which the minister proposed the bills. Justice Lewis (23 January 2006) believes that the "proposal of such a radical change without a proper process of consultation is contrary to the democratic principles" that the country has embraced. The Constitution demands that each organ of government respect the powers and functions of one another and explicitly states that organs of state "must assist and protect the courts to ensure independence, impartiality, dignity, accessibility and effectiveness of the courts" (Constitution, 1996: section 165[4]). Thus, in furtherance of constitutional values and in the interests of strengthening the judiciary, the executive should respect the right of judges to, at the very least, have meaningful input into changes to judicial structures, functioning and powers. In addition to implying a lack of respect for the views of judges, the ministry's failure to consult the judiciary, and the short window for comment on the draft bills, does not respect constitutional commands and norms. Underscoring the importance of involving judges in the judicial reform process, Professor Corder (24 January 2006) said that "[i]t would seem to be a matter of common sense and good government to ensure broad agreement by the leadership of the judiciary with changes to the law pertaining to the courts, for the judges are in a unique position to advice on the constitutionality, practicability and desirability of such reforms".

Not only did the minister introduce the bills in an arguably inappropriate manner, but when members of the judiciary attempted to give input into and voice objections to various aspects of the bills, the minister and deputy minister refused to engage in any meaningful discussions or debates. When asked about the relationship between the judiciary and the ministry, one judge

said that he felt like he was on a desert island throwing bottles filled with message into the ocean and having no idea whether anyone would ever find the messages and respond (Interview, 23 June 2006). Although no one has provided an explanation for the continual lack of communication between the two bodies, various judges have pointed out that the problem is complex and "multifaceted" and involves issues including the history of the Department of Justice and its leadership, the ANC's attitude toward the judiciary, and the individual personalities involved in the current judicial reform debate (Interview, 13 July 2006).

5.2.3 The motivations of the ruling party

Considering that the judicial bills seem to be consistent with the 8 January 2005 statement of the ANC, it would appear that the bills in some way reflect the political objectives that the ANC is trying to pursue. But opinions differ regarding the exact intentions behind the bills and the degree to which the ANC consciously tried to give the executive more power over the judiciary. Some people believe that the drafters of the bills must have tapped into "a body of opinion within the ANC that either doesn't care about the courts or is hostile to them" (Interview, 31 July 2006). Human rights activist Rhoda Kadalie (12 May 2005) asserted that the bills reflected "government's frustration with the many court rulings that went against it over the past years". On the other hand, one judge believes that motivations behind the bills were not necessarily sinister and explained that due to the nature of power and of a bureaucracy, the "executive at the administrative level will always seek to expands its influence and control" (Interview, 23 June 2006).

While some critics attribute to ruling party, malicious intentions to increase its control over the judiciary, it is important to note that President Mbeki intervened early in the process to extend the deadline for comment and intervened again to axe two of the bills entirely. Explaining that he was confused about the judiciary's opposition to the draft legislation, in February 2006, President Mbeki said that he wanted to slow down the process and "engage the judiciary to understand properly what it is that leads them to this conclusion" (*Business Day*, 23 February 2006). The President's statement that he was "quite certain that the cabinet never approved any legislation which had the intention of compromising the independence of the judiciary as provided for in our constitution" (ibid) also implies that he wished to align the government and the ruling party with the concern to uphold the independence of the judiciary. Whether motivated by a genuine concern about protecting judicial independence or by a desire to avoid bad publicity, President Mbeki's reaction to the situation indicates that the government and the ANC are willing to listen to and act on outside concerns and advice and that the ANC might not have had the sinister intentions that some critics attribute to it.

As various judges and commentators have pointed out, the introduction of and debate about the bills took place in a complex context. A myriad of factors — including history, individual personalities, politics and possibly misunderstandings — influenced the situation, and people disagree as to which factor was most significant. Moreover, the government's stated intentions behind the bills — rationalising the court system and improving court management and general service delivery — are valid and important goals.

Whether the government did not realise that the bills would have unintended consequences for judicial independence or whether the government used legitimate objectives as an excuse for gaining more control over the judiciary, the eventual withdrawal of the proposals indicates that the most influential segments of the ANC and the government were at least willing to listen and respond to concerns about judicial independence. If the bills' impacts on independence were inadvertent, then perhaps the judiciary's reaction helped educate the government about the importance of and need to protect independence. If the bills represented an underhanded attempt to create a more compliant judiciary, then perhaps the strong opposition by judges and parts of civil society will force the government to reconsider its approach and recognise that an independent judiciary is not an impediment to, but actually a crucial component of, building the type of democratic and values-based society to which the government has dedicated itself.

5.2.4 The importance of protecting judicial independence

While each of the five "justice bills" contains provisions that allegedly infringe on judicial independence and while some aspects of the bills could hinder rather than advance transformation, opinions differ as to the level of threat that the bills and related conflicts actually posed to the integrity of the South African legal system. At the same time, most judges would probably agree

that regardless of the intensity of the threat, protecting the judiciary's independence is extremely important. Some judges believe that although the bills posed some danger to the judicial branch, the judiciary's resistance to the bills prevented their becoming an actual threat and forestalled a crisis between the various branches of government (Interview, 23 June 2006; interview, 27 June 2006; interview, 4 July 2006). In essence, most people agree that while the bills threatened judicial independence and could have frustrated some of the progress that has already been made in transforming the judiciary, the widespread opposition — by members of the judiciary, legal scholars and by civil society — to the bills prevented the threats from becoming a reality.

Aside from the immediate and specific impact of the bills, many judges discussed the long-term ramifications of seemingly small encroachments on judicial independence. Summing up this argument, Justice Chaskalson (2006) explained:

> It's the early incursions into checks and balances which historically have been shown to open the way for later incursions to be made. Nobody knows what the future holds for us, but once you accept you can eat into protections which are there, and that you can erode fundamental principles of the Constitution, sometime, somebody else can take it further. So any attempt to do so, no matter how small, is open to objection.

Justice Ngoepe (12 October 2005), the Judge President of the High Court of the Transvaal, similarly contended that "judicial independence can be whittled away through a subtle process". Thus, even a slight weakening of the structural protections of independence should be avoided so as to not open the door to more drastic measures in the future. Additionally, even if the current government does not have sinister motives and would not take advantage of diluted judicial independence to push through unconstitutional or otherwise illegal programmes, it is important to recognise that any institutional and structural changes to the judiciary would last beyond this administration. No one knows who will govern the country in the future, so reducing the opportunity for governmental abuse of power and ensuring that the judiciary is strong enough to defend the Constitution are imperative to the long-term maintenance of democracy and the rule of law.

The need to protect the judiciary also arises from the notion that threats to independence "always come in little steps, each taken on ostensibly good grounds" (Interview, 27 June 2006). Although the minister's stated motivations for the bills — improving service delivery and management of the courts and rationalising the judicial system — are valid and important goals, achieving these goals should not excuse intrusions into independence. As South Africa's history has revealed, a judiciary that is not independent is not able to function properly as a check on the other branches of government or as an impartial arbiter in disputes between individuals and that state. Consequently, allowing the demands of transformation or the achievement of other important objectives to justify even the smallest weakening of judicial independence would defeat the overarching aims of promoting and protecting the new constitutional democracy and ensuring the rights of all people.

5.3 Appointment of judges

An important factor in promoting judicial independence and in fostering transformation, the appointment of judges to all of the courts has given rise to controversy on several levels. Although the Constitution established a much more transparent and fair appointment process than existed during apartheid, various issues have surfaced in the past decade that potentially challenge the independence of the judiciary and suggest that certain reforms might be necessary. The main concerns involve: the tension between the need for demographic transformation and the need for an experienced and well-qualified judiciary; the influence of politicians on the Judicial Service Commission, the body that nominates judges; and the appointment of acting judges.

5.3.1 Race and gender transformation

Along with questions of how to accomplish necessary judicial reform without compromising the independence of the judiciary are difficult questions of how best to achieve racial and gender transformation of the bench. As stated in the Constitution, one of the goals of transformation is the creation of a judiciary that "reflect[s] broadly the racial and gender composition of South Africa" (Constitution, section 174.2). Although the percentage of white judges is still disproportionately high compared to the percentage of the South African population that is white, the judiciary has made a lot of progress in the past decade in racial transformation. According to the 2004 JSC Annual Report, "[p]rior to 1994 there were two black male judges, two white female

judges and the rest were all white male judges. As at June 2004 there were 76 black judges, 126 white judges and 26 women judges of whom 13 are white and the rest black" (Judicial Service Commission, 2004: 2). Although the composition of the judiciary has changed significantly since 1994 and although the majority of new judges appointed are now black, the bench is sill not demographically representative of South Africa and the issue of racial transformation continues to spark debate.

Explaining the constitutional requirement that the JSC consider race and gender in making judicial appointments, the JSC has said that diversity "is a quality without which the Court is unlikely to be able to do justice to all the citizens of the country. ... The court will not be competent to do justice unless, as a collegial whole, it can relate fully to the experience of all who seek its protection" (Rickard, 4 October 2003). Moreover, the composition of the judiciary affects public perception of judicial independence thus contributing to its legitimacy. According to a 2005 survey of 2000 South Africans, 52% of respondents agree with the statement that a judge's race influences how he or she decides a case (Research Surveys, 2005). Supporting this finding, a report by AfriMAP and the Open Society Foundation for South Africa found that in some criminal cases, "white male judges and magistrates have been accused of wrongly failing to convict persons charged with inter-race crimes, or failing to impose adequate sentences" (2005: 60).[18]

The reaction to the verdict in the 2005 corruption trial of Durban businessman Schabir Shaik illustrates the ways in which race, and a judge's background, may be used to undermine popular judicial decisions, even where these are based on careful reasoning. In June 2005, Justice Hillary Squires of the Durban High Court handed down a guilty verdict against businessman Schabir Shaik, finding that he was guilty of two counts of corruption and one count of fraud relating to deal with a French arms company. Shaik was sentenced to 15 years in jail. Although then Deputy President Jacob Zuma was not also on trial, Justice Squires found, among other things, that a "mutually beneficial symbiosis" had existed between Zuma and Shaik, his former financial adviser (*S v. Shaik*, 2005: 76).[19] Presiding over a widely publicised trial against a close friend of an ANC leader, Justice Squires is a white man who served as a judge during apartheid and was a member of the Rhodesian Parliament under Ian Smith: his race and political background quickly became fodder for criticism of his suitability to preside over the case.[20]

The ANC Youth League (ANCYL) and the Young Communist League (YCL) attacked Justice Squires based on his race and his past membership of the Rhodesian Parliament. The president of the ANCYL called Justice Squires an "apartheid judge", while the national director of the YCL said that he was "a cynical, mad person who is still raw because his apartheid existence came to an end" (*Mail & Guardian Online*, 6 June 2005). In a press statement five days after the verdict, the Cosatu reacted to the Shaik verdict and to demands that Zuma resign as deputy president; it stated:

[18] A recent instance concerns the case of a farmer who shot and killed an 11-year-old boy, Sello Pete, claiming that he had mistaken the boy for a dog. The magistrate said that the prosecution had failed to substantiate the charge of murder and found the farmer, Marcel Nel, guilty of culpable homicide, sentencing him to a fine of R10 000. Pan Africanist Congress spokesman Mudini Maivha responded to the judgment saying, "The justice system is still what it used to be under apartheid. Our people are still subjected to callous murders without any recourse from the courts" (*Sowetan*, 19 January 2007).

[19] The full paragraph from which this phrase is taken reads: "It would be flying in the face of common sense and ordinary human nature to think that he did not realise the advantages to him of continuing to enjoy Zuma's goodwill to an even greater extent than before 1997; and even if nothing was ever said between them to establish the mutually beneficial symbiosis that the evidence shows existed, the circumstances of the commencement and the sustained continuation thereafter of these payments, can only have generated a sense of obligation in the recipient."

[20] Squires was in general careful not to make specific findings against Zuma, who was not one of the accused in the trial. However, from shortly after the judgment it became commonly established in the press and society more generally that Squires had said that there was a "generally corrupt relationship" between Shaik and Zuma, though, in fact, Squires had not used the phrase (see for instance *Mail & Guardian*, 5 June 2005; Sapa, 12 June 2005). Many people, including the Supreme Court of Appeal in its judgment rejecting Shaik's appeal, referred to the phrase as if it were part of Squires's judgment. Despite the fact that the exact phrase does not feature in the judgment, it seems clear that many people felt that the phrase reflected the gist of the judgment in relation to its implications for Zuma. In turn, the widespread use of the phrase fed into the generalised perception that the court had in effect made a finding against Zuma.

> The events of the past week confirm a long held view by Cosatu that the trial of Schabir Shaik was nothing but a political trial of the deputy president in absentia. The choice of a long retired judge who is a former justice minister of the then Rhodesia indicates the extent to which the country have not succeeded to transform its judicial system (Cosatu, 2005).[21]

Zuma also compared the trial to his own 1963 political trial in which Justice Steyn sentenced him to ten years in jail (Agence France Press, 17 June 2005).

At the same time that some sectors of society questioned Justice Squires's impartiality, other groups defended the rule of law and the need to respect court decisions. In a media release several days after the verdict, the South African Human Rights Commission (SAHRC) (6 June 2006) denounced the race-based attacks on Justice Squires. Acknowledging that judicial transformation is an ongoing process and that the judiciary is not yet demographically representative of the people, the SAHRC argued that is unacceptable to use issues of race to "cast doubt on the work of the Court". While "considered arguments demonstrating how the judge's race or origins unduly influenced his conclusions" are acceptable, the SAHRC explained, arguments that a judge is "biased purely on account of his race or origins" are inappropriate.

Despite widespread agreement about the need for a representative judiciary, many people warn that efforts at transformation could undermine judicial independence. Owing to "South Africa's apartheid legacy, there are a limited number of black, coloured and Indian legal practitioners who have the necessary skills and qualifications for appointment to the bench. These potential candidates often have lucrative legal practices and may be reluctant to take significant salary decreases" to accept appointments as judges (AfriMAP, 2005: 62). Similarly, for a variety of reasons including traditional gender roles, the difficulty of balancing a full time legal practice with raising children, and lack of flexibility in many firms about issues such as maternity leave, there are fewer qualified and experiences women who are willing to make themselves available for appointment to the bench. Thus, balancing the need for racial and gender representivity with the need for a competent, well-qualified judiciary poses a difficult challenge.

Many people both inside and outside the judiciary believe that the JSC has not adequately met the challenge and has focused more on race and gender than on legal competence when making judicial appointments. As evidence of the JSC's attitude, some people point to cases in which experienced and highly-qualified white male candidates have been overlooked in favour of less qualified and experienced black or women candidates. For instance, some people refer to the case of Geoff Budlender, who co-founded of the Legal Resources Centre and has been involved "in some of the most important cases in modern legal history" (Rickard, 18 July 2004). In July 2004, Budlender was rejected for appointment to the Cape High Court in favour of what some people argue was a less-qualified black candidate (ibid). Various commentators and judges have also expressed concern that competent while male judges will stop accepting nominations to the bench due to concerns that they will not be fairly considered, thus impacting on the number of qualified candidates available and reducing the overall competence of the judiciary.

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[21] It is worth noting the entirely different response to the judgment of Justice Van der Merwe, also a white Afrikaans judge, when he acquitted Zuma of rape in May 2006. Because they agreed with the verdict, groups like Cosatu and the ANCYL voiced support for the entire legal process and did not mention the judge's race or background. The different reactions to these two cases demonstrate a cynicism about the judiciary where the response to court judgments and criticism of judges is dependent not on the merits of the judgement but on whether the judgment supports a specific political agenda. Rather than genuinely believing that the impartiality of the judge had been compromised, people used race as a convenient means of attack because the judgment threatened their political agenda. Had circumstances been different and the judge reached a guilty verdict in the rape trial, it is reasonable to assume that attacks would have been made on the judge, similar to those following the Shaik judgment. It also appears that a guilty verdict might have sparked demonstrations, potentially violent, against the findings of the court. While the alacrity with which political role-players attacked Justice Squires is of concern, it needs to be acknowledged that these attacks reflect an underlying perception that the criminal justice system is being used selectively to settle political scores, and that whether the judiciary is impartial or not, it is giving judgment on prosecutions that are being entered into selectively, so as to favour particular interests in the ANC. At the same time that they appear to reflect a cynical attitude toward the judiciary, these attacks may be interpreted to reflect a concern that the criminal justice system is not an independent and impartial instrument of justice.

Aside from the possibility that certain judges will no longer accept nominations, an Idasa report cites two ways in which the focus on transformation could undermine judicial independence: first, appointments based more on a candidate's race or gender than on merit could lead to a situation "in which the new appointees are loyal to those who appointed them", and, second, "attacks on a slowly transforming judiciary can be perceived as attempts to undermine judicial independence, pressuring judges to align with government programmes and policies through their rulings" (Idasa, undated: 60). Having clearly defined criteria according to which judges are appointed provides transparency and helps ensure that political motivations do not play a large role in the process. However, elevating the importance of the race or gender of a candidate above other qualifications could potentially undermine the appointments process and lead to the appointment of judges who, though otherwise unqualified for the job, feel obligated to support the government that appointed them.

Some judges have also argued that appointing less competent judges will actually hinder other aspects of transformation, such as increasing and improving access to justice. One judge believes that the main problem with appointing less experienced judges has to do with "management of cases not with decision-making". Stating that delayed trials are a tremendous barrier to justice, the judge explained that only through experience can judges learn how to manage cases and make decisions quickly (Interview, 27 June 2006). Another judge argued that "people who are appointed without experience and qualifications do no service to people who come before them and can be destructive of the system" (Interview, 4 July 2006). While representivity and public perception of impartiality are important, appointing judges who are unable to perform the job effectively could lead to badly reasoned decisions that do a disservice to the litigants and to the reputation of the judiciary as whole.

Several judges also stressed the need to focus on attitude and dedication to the Constitution in addition to competence. For instance, one judge asserted that instead of making "special efforts to recruit women just because they are women", the JSC should focus on finding well-qualified candidates who are informed about and concerned with women's issues" (Interview, 4 July 2006). Similarly, noting his belief in non-racialism as opposed to multi-racialism, another judge asserted that the JSC should focus on finding people who are committed to the values in the Constitution and look at "what a person stands for and what his belief system is" not at the colour of his skin (Interview, 31 July 2006). Focusing more on an individual's underlying attitudes, understanding of the past and dedication to the new legal order will arguably do more to promote overall transformation and improve access to justice and the protection of the rights of all people than will appointing judges based on their race or gender.

Moreover, some people have alleged that certain elements within the government have used transformation as an excuse for creating a more compliant judiciary. According to these claims, the government's assertions that judicial appointments are based on the need to increase diversity and promote a more rights-oriented judiciary are really pretexts for appointing individuals who are less likely to challenge official policies and programmes. Geoff Budlender (2005) explained that while the government has not directly attacked the judiciary in response to unfavourable judgments, "it is difficult to avoid the uncomfortable feeling that the response of some is ... to try to see to it that judges are appointed who will not rock the boat, and who will be deferential when a case involves what they regard as 'policy' questions which are the exclusive preserve of the executive and legislature". While members of the JSC likely have different motivations for choosing any particular candidate, the "risk that the need for transformation may be manipulated by those who in fact seek a compliant judiciary" (Budlender) plays a role in the debate about judicial transformation and independence.

Judges and others have different opinions regarding the job that the JSC has done thus far in appointing judges, but virtually everyone agrees that race or gender should be only one of many factors that the JSC considers. One judge believes that "on the whole, appointments have reflected a capacity to do the job" but warns that the biggest challenge facing the judiciary is "attaining greater representivity while maintaining what is currently a high degree of professional competence" (Interview, 18 July 2006). Similarly, Norman Arendse, the chairperson of the General Council of the Bar of South Africa, worries that the transformation process will turn into a "pure numbers game" and believes that nominees must meet the JSC's criteria regardless of their race (*Mail & Guardian*, 7 April 2006). Acknowledging that it "takes time for people to have the necessary experience and be in a position where they can accept a place on the bench, former Chief Justice Chaskalson stated in a 2002 interview that the judiciary has "already drawn deeply into the pool of existing candidates" and that transformation "is proceeding as quickly as it can".

In sum, as Justice Mpati (6 October 2004), deputy president of the SCA, explained: "To achieve the objectives of the Constitution we [the judiciary] need to strike a balance — gender and race representivity on the one hand, and competence, integrity and skill on the other." Striking this balance, however, has proved difficult and has sparked controversy that most likely will continue for the indefinite future. While diversity is crucial to creating a judiciary that is perceived as independent and that has a wide range of perspectives and is more attuned to the problems of all South Africans, race and gender alone do not qualify a candidate for appointment to the bench. In many countries, balancing the need for a judiciary that the public perceives as representative against the need for qualified and experienced judges who have a professional commitment to impartiality and who can manage cases efficiently and make well-reasoned and fair decisions is a challenging task. Under apartheid, the all white and virtually exclusively male judiciary was prone to systematic biases. Reflecting the legacy of apartheid, South Africa's disproportionately white judiciary suffers from a lack of legitimacy undermining public confidence in the judiciary. At the same time, apartheid has impacted on the pool of candidates now available for appointment to the bench. Thus, while apartheid made the need for diversity on the bench even greater it simultaneously made achieving such diversity difficult. The government, JSC and judiciary must now try to tackle this challenge and create a demographically representative bench while maintaining the high level of competence necessary to fulfil the other demands of transformation.

5.3.2 The Judicial Services Commission

The judicial appointment process, which should be transparent and based on well-defined criteria, is an important factor in creating an independent judiciary. To aid in appointing judges, the Constitution established the JSC, a body composed of the chief justice, the president of the SCA, one judge president, the Minister of Justice, two practising advocates, two practising attorneys, one law teacher, six members of the National Assembly, four delegates to the National Council of Provinces, and four persons designated by the President after consultation with the leaders of all the parties in the National Assembly (section 178[1]). At least three of the representatives from the National Assembly must be members of opposition parties, and the National Assembly chooses its representatives (section 178[1][h]). Also, if the JSC is considering matters related to a specific high court, the judge president and premier of the province join the commission (section 178[1][k]). The Judicial Service Commission Act of 1994 regulates matters such as the terms of office and remuneration of the commissioners (Judicial Service Commission Act, 9 of 1994).

The JSC's role in the appointment process differs depending on the position at stake. When appointing the chief justice and deputy chief justice and the President and deputy President of the SCA, the state President must first consult the JSC (section 174[3]). For appointing other Constitutional Court judges, the Constitution provides that the JSC prepare a list of nominees from which the President must choose his candidates; if the President does not think that any of the nominees is acceptable, he must inform the JSC which will then supplement the list (section 174[4]). Thus, the JSC plays a crucial role in the naming of judges to the Constitutional Court. Similarly, when appointing the judges of all other courts, the President must do so "on the advice" of the JSC" (section 174[6]).

On 27 March 2003, the Minister of Justice published in the Government Gazette the most recent version of the commission's procedures for nominating judges (Government Notice R. 423, Government Gazette No. 24596). When a vacancy occurs on the Constitutional Court, the JCS announces it publicly and solicits written nominations (section 2[b]). Each letter of nomination along with the candidate's written acceptances of the nomination, and his or her curricula vitae are then given to the "screening committee", an ad-hoc sub-committee of the JSC, which prepares a short list of candidates (section 2[c]). At this time, all members of the JSC may also nominate additional candidates and inform the selection committee of the names of candidates who they feel strongly should be included on the short list (section 3[d]). The screening committee then prepares the short list which must include all candidates who qualify for appointment, all candidates placed on the list by a member of the JSC, and all candidates who, in the opinion of the screening committee have a "real prospect of recommendation for appointment" (section 3[e]). All members of the JSC then review the list, and any member may add the name of any candidate who was nominated but not included by the selection committee (section 3[f]). Once the JSC has approved the short-list, the names of nominees are published and the list is distributed to various interested institutions such as the Law Society of South Africa, the Black Lawyers Association and the General Council of the Bar of South Africa (section 3[g]). After interested parties have had an opportunity to submit comments, the JSC conducts public interviews of each nominee (section 3[i]). The commission then deliberates privately and, based on either consensus or majority vote, selects candidates for recommendation (section 3[k]). The JSC then

informs the President of its recommendations, explains the reasons for choosing each candidate and announces publicly its list of recommendations (section 3[m, n]). The procedures for recommending candidates for vacancies on the Supreme Court of Appeal and the high courts is essentially the same except that the regulations do not require the JSC to give the President reasons for its recommendations (section 3[l]).

As the procedure for recommending candidates reveals, the JSC as whole and individual commissioners have a lot of power and influence over who is appointed to the bench. Given the commission's role, some people argue that the inclusion of a significant number of politicians and political appointees is inappropriate and will lead to politically-motivated appointment of judges. Of the 23 members of the JSC, 15 — the Minister of Justice, the members of the National Assembly, the delegates to the National Council of Provinces and the presidential appointees — are politicians while the remaining members are judges, advocates, attorneys and one law teacher. The domination of politicians and political appointees in the JSC has driven allegations that the judicial appointments process gives too much power to the executive and legislature and infringes on the separation of powers. Additionally, because the ANC currently controls the executive, the National Assembly and the National Council of Provinces, it is possible that the ANC would have control over the appointment of a majority of the commissioners.

The Constitutional Court addressed the composition of the JSC and its possible impact on the separation of powers in the *First Certification* judgment. Acknowledging the importance of judicial independence, the Court stated that the "mere fact … that the executive makes or participates in the appointment of judges is not inconsistent with the doctrine of separation of powers or with the judicial independence" required by the Constitutional Principles in the interim Constitution (paragraph 123). According to the Court, the Constitution's vesting of judicial authority solely in the judiciary and its protection of the courts against interference from other branches of government are sufficient safeguards of judicial independence (paragraph 123). Recognising that the JSC includes representation from the judiciary, the legal profession and opposition parties, the Court determined that the body "provides a broadly based selection panel for appointments to the judiciary and provides a check and balance to the power of the executive to make such appointments" (paragraph 124). Thus, the court agrees that the executive should not have unfettered power to name judges to the bench but believes that the JSC as set out in the Constitution is a sufficient check on the executive's power and does not itself threaten the separation of powers.

Although few people argue that the judiciary should have sole control over the appointment of judges, finding the right balance between politicians, judges, and lay people can be difficult and controversial. As discussed in the section on racial transformation, many people have criticised the JSC for focusing too much on race and too little on merit when making judicial appointments. In tandem with the ANC's statement in January 2005 about the slow pace of transformation and the need to change the "collective mindset" of the judiciary, the JSC's alleged emphasis on race could be seen as indicative of the ANC's influence in the commission, though it may also reflect broader attitudes about the need to prioritise representivity.

The lack of clear standards for assessing the suitability and competence of candidates also increases concerns about the JSC's motivations in appointing judges. The Constitution requires only that judges are "appropriately qualified" and "fit and proper persons" (section 174[1]) but does not include more specific guidelines. According to Advocate Moerane, a member of the JSC, when making appointments the commission considers a variety of factors including the candidate's ability to perform judicial functions, his or her commitment to constitutional values and the symbolic value of the appointment (2003: 713–714). The role of symbolism refers to the notion that when a "candidate otherwise qualifies for appointment, the fact that a particular appointment will have a symbolic value that gives a positive message to the community at large, may tip the scales in favour of a particular candidate" (714). While each of these considerations is important for creating an efficient, effective and transformed judiciary, the way in which the JCS assesses and weighs the factors is not entirely clear and has given rise to many of the previously mentioned concerns about the JSC's standards and about the quality of its nominations. Moreover, during interviews with nominees the JSC often asks about political party affiliation, an inappropriate question that implies considerations other than competence, values and diversity inform the appointment of judges.

Assessing a candidate's ability to perform judicial functions involves a variety of factors, such as technical proficiency, management skills and legal experience, which can be difficult to measure. Consequently, to facilitate the evaluation of a candidate's judicial competence, the JSC generally considers only candidates who have previously served as acting judges,

preferably in the Division to which they are seeking appointment (Moerane, 2003: 713). Acting judges fill temporary vacancies on the bench. For appointments to all courts except the Constitutional Court,[22] the Minister of Justice is empowered to appoint acting judges "after consulting the senior judge of the court on which the acting judge will serve (Constitution, 1996: section 175[2]). Not only does the minister has unfettered control over the appointment of acting judges, but the process involved in making the appointments is not transparent.

The JSC's emphasis on experience raises some concerns about judicial independence and the separation of powers. First, if acting judges know that the JSC is evaluating their actions on the bench, they may feel pressured — consciously or subconsciously — to make decisions that meet with the JSC's approval. Moreover, because the minister has unfettered control over acting appointments, the JSC's virtual rule that candidates for permanent appointment must have had experience as acting judges increases the influence of the minister in judicial appointments: the fact that the minister determines who is able to receive this experience means that the executive indirectly determines who is eligible to be considered for permanent appointment. Perhaps more transparency in the appointment process for acting judges or some role for the JSC in the process would help mitigate the influence of the executive and protect judicial independence. On a practical level, acting appointments often have to be made suddenly and quickly, and the JSC could not reasonably be expected to approve of each individual appointment, but it is possible for the JSC to play some part, for instance by pre-approving lists of candidates from which the minister could then choose when a temporary vacancy occurred.

Concerns about the JSC's standards and motivations for appointing judges combined with the commission's high proportion of politicians and presidential appointees have stirred some calls for reform. While he believes that the commission should include politicians and lay people, one judge stated that because the body is heavily dominated by politicians, it is "open to doubt if the JSC has the right balance" (Interview, 18 July 2006). Moreover, because the ANC currently dominates both the executive and legislature, it also controls close to a majority of the positions on the JSC and thus can exert a lot of influence over the appointment of judges.

Despite various concerns about the influence of politics on judicial appointments, in many countries with independent judiciaries and a separation of powers the executive or legislature or both play instrumental roles in appointing judges. According to the AfriMAP (2005) report on the Justice Sector, "there are very few countries in the world where judicial appointments are not politically controlled, and the ANC's *de facto* control of judicial appointments is therefore not, on its own, a reason to question the independence of the judiciary in South Africa" (57). Although political influence on judicial appointments is not necessarily a threat to judicial independence, concerns about the influence of the ruling party in appointing judges are legitimate and should inform the debate about judicial appointments. Moreover, as Geoff Budlender (2005) explained:

> The Constitution requires that government have the self-confidence and courage to appoint people who will read the law honestly and independently, within the framework of a commitment to the transformation goals of the Constitution. The result will, on occasion, be judgments which the government finds uncomfortable or annoying. That is part of the commitment to accountable democratic government.

Thus, to demonstrate its dedication to building a truly democratic state that prioritises the protection of human rights, the government must be willing to appoint judges who will fairly and impartially asses all cases against the backdrop of constitutional values and the goals of transformation.

In spite of formal structural guarantees of judicial independence, judges — through their conduct, impartial decision-making and dedication to the Constitution — ultimately determine the legitimacy and ensure the independence of judiciary. Thus, the judicial appointments process is crucial to maintaining an effective judiciary that enjoys the support and confidence of the people. However, although broad guidelines exist regarding judicial appointments, assessing and deciding among candidates

[22] The President is empowered to appoint an acting judge to the Constitutional Court "on the recommendation of" the Minister of Justice and "with the concurrence of the Chief Justice" (Constitution, 1996, section 175(1]). The requirement of the chief justice's concurrence prevents excessive executive influence in the court.

can be difficult and somewhat subjective. Members of the JSC, judges, politicians and the general public will likely have different and equally valid opinions about which candidate is the best choice. Moreover, often conflicting demands from many segments of society may pressure members of the JSC and either consciously or subconsciously influence the commissioners' decisions. Claims that racial transformation is not happening quickly enough compete with claims that the JSC routinely places race about other equally important factors and overlooks well-qualified white males. Similarly, comments by the government or other politicians about the need to transform the mindset and attitude of the judiciary may add pressure to the already difficult appointment process. Moreover, in the background of all of these concerns is the need to appoint properly qualified candidates who will be able to manage a courtroom and provide not only fair and effective but also efficient justice. Balancing the competing demands is difficult, but given the importance of the judiciary in the democratic government, it is crucial to make appointments that will promote the transformation not only of the judiciary but of the country as a whole.

6. CONCLUSION

In the past twelve years, the transformation of the South African judiciary has progressed relatively rapidly: race and gender diversity have improved, judges for the most part have proven themselves dedicated to promoting constitutional values, and various courts have made decisions reflecting the independence of the courts within the system of separation of powers. At the same time, there are still major challenges to the transformation of the judiciary. In addition to the question of representation of all sectors of South Africa society, there are barriers to accessing the justice system, poor court management and lack of efficiency affect the delivery of justice, and many people have a sense that the justice system still reflects South Africa's colonial and apartheid legacy and does not as yet, in the cultural sense, fully belong to all South Africans. Moreover, as recent events have revealed, efforts to transform the judiciary can potentially threaten judicial independence; measures aimed at improving service delivery in courts or creating more diversity on the bench and the government's attempt to enact programmes aimed at achieving legitimate and important transformation objectives can inadvertently infringe on judicial independence, itself a crucial component of democratic transformation. Additionally, in any democracy with an independent judiciary, tension will exist between the judicial and the executive and legislative branches. In South Africa, where the social, economic and political legacies of apartheid have created difficult problems that the government must tackle and where the practice of judicial review and the notion of constitutional supremacy are still being developed and are not yet fully entrenched, this tension is perhaps even more pronounced.

Questions of judicial independence have existed since the early days of democracy in South Africa. For example, in 1997 after the Constitutional Court had declared the death penalty unconstitutional and in response to rising levels of violent crime, demands by the public for more rigorous anti-crime programmes and for more severe sentences for convicted criminals increased. Consequently, the legislature passed the Criminal Law Amendment Act (CLAA) (105 of 1997), which created compulsory minimum sentences ranging from five years imprisonment to life imprisonment (section 51[1–2]) for a variety of crimes such as murder, rape, robbery, drug trafficking, corruption, fraud and assault (Schedule II). However, recognising that sentencing is a judicial function and that sentencing officers must have some degree of independence in tailoring punishments to individual circumstances, the government included in the Act a provision that stated:

> If any court … is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence (section 51[3][a]).

While the legislature and executive have legitimate interests in protecting the people and in reducing crime, the government recognised when drafting the CLAA that any legislation aimed at achieving these goals could not infringe on judicial independence.

Moreover, according to the Constitutional Court, which adopted the SCA's interpretation and upheld the constitutionality of the CLAA, the "substantial and compelling circumstances" clause permits a relatively broad degree of discretion by the sentencing court. Interpreting the provision, the Court stated: "If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence" (*Dodo* v. *The State*, 2001: paragraph 11). Thus, despite claims by some members of the judiciary that mandatory minimum sentences infringe on the independence of sentencing officers and on the separation of powers between the judiciary and legislature, the Act provides for a degree of discretion in sentencing. Passed in response to public pressure, the minimum sentencing legislation is an example of the government's successfully balancing the demands of the public and its legitimate role as protector of public safety against the requirements of judicial independence and of its sensitivity to the need for legislation to conform to the requirements of the Constitution.

In contrast to the minimum sentences legislation, the "justice bills" appeared to reveal a lack of sensitivity on the part of the government to questions of judicial independence. Although the goals of the "justice bills" — improving court efficiency and management, creating a complaints mechanism and a code of conduct, providing judicial education and rationalising the court

system — are crucial to creating an effective judiciary and promoting judicial transformation, achieving these objectives should not excuse and does not require intrusions into judicial independence. Referring to problems of case backlogs, delays, and wasted court hours, former Minister of Justice Maduna (2003) emphasised that in the course of discussing solutions to these problems, one must "guard against undermining the independence of the judiciary and must guarantee the integrity of this arm of state" (669). Transformation, the Minster explained, is meant to strengthen judicial independence and the system as a whole, not detract from the separation of powers (670).

By remaining aware of the potential impact on independence and by consulting the judiciary and other legal groups before making any changes that would affect the judicial branch, the government could help ensure that reforms do not infringe on independence or otherwise weaken the judiciary. Relations between the judiciary and Department of Justice under ministers Omar and Maduna suggest a more appropriate framework for developing legislation and other interventions relating to the judiciary. The recent bills on judicial education and judicial ethics and conduct suggest something of a return to a more consultative style of working, a style which places a strong emphasis on retaining the independence of the judiciary.

Moreover, although an independent judiciary will sometimes rule against the government and frustrate government programmes, the ruling party should recognise that despite temptations to create a more compliant judiciary, preserving independence serves its own interest as well: the ruling party might not always hold power in the country and it "will want to the bulwark of the judiciary to lean against" when another group is in control (Interview, 31 July 2006). Diluted judicial independence and increased scope for executive influence will not disappear when the next administration takes over, and the government must be cognisant of the long-term effects of its policies and the potential that a future government will take advantage of a weakened judiciary and undermine some of the progress that the country has already made in promoting and building a true democracy.

In addition to the need for the executive, legislature and other non-judicial bodies to understand the importance of and protect judicial independence, individual judges must ensure that they decide cases impartially and that all of their decisions are informed by constitutional values and the needs of transformation. Especially in light of the executive-minded apartheid-era bench and resulting lack of trust in the judiciary's independence, fostering public confidence in the impartiality of judges is critical to building a legitimate and effective judicial branch. Judges must make every effort to conduct themselves, both in and out of the courtroom, in a manner that does not raise questions about their impartiality or suitability for the bench. Judges must also strive to make decisions that promote the transformation of South Africa as a whole and that illustrate their dedication to protecting all individuals. If people do not have faith in the ability of courts to decide disputes impartially or to independently assess the validity of government actions, they will lose faith in the legitimacy of the government as a whole. The rule of law depends on a judicial system that is not only structurally independent but also perceived by the vast majority of the people to be independent.

The rape trial of Jacob Zuma, the former deputy president of the ANC, illustrates the pressures which judges may face from different constituencies, and the need for judicial decision-making of a high quality, if public trust in the judiciary is not to be premised on the racial identity of individual judges. Accused by a 31-year-old family friend of raping her at his home in Johannesburg in November 2005, Zuma stood trial in the Johannesburg High Court and was acquitted on 8 May 2006. While there are some who have raised concerns about specific aspects of the judgment, it nevertheless seems clear that the trial served to demonstrate judicial independence and impartiality in practice. A white man who was in some ways emblematic of the old regime, Justice Van der Merwe presided over the case against Zuma, a black man who was instrumental in the fight against apartheid and in the ANC and was himself symbolic to many people of the new regime. In presenting a clearly written and reasoned decision, Justice Van der Merwe provided an excellent example of how judges should not act on their gut instincts or allow their personal biases to influence their decisions but should follow a procedure in which they apply the law to the facts

presented to the court. Under pressure from Zuma supporters, women's rights activists, political parties and a variety of other sources, the Judge remained impartial and proved that he could apply the law without regard for the race, political affiliation or background of the defendant.[23]

The call for immediate transformation and pressure from all segments of society to remedy the myriad problems left behind by apartheid have sometimes proved difficult to balance against the need to build and protect an independent and empowered judiciary. When analysed in terms of their underlying goals, however, none of the elements of transformation actually conflicts with judicial independence. Transformation is aimed at creating a democratic state based on dignity, equality, human rights, constitutional values and the rule of law; each dimension of transformation — racial and gender representivity, increased access to justice, judicial accountability, the appointment of judges whose underlying attitudes are consistent with constitutional values, and independence — is similarly aimed at achieving these same goals. By upholding constitutional supremacy, ensuring that the rights of all people are protected and guaranteeing that the government will be held accountable for its actions, independence plays a central role in the process of democratic transformation and supports each of the other elements. When the need for racial transformation is used as an excuse for creating a more compliant judiciary — an illegitimate use of transformation — independence is compromised. Similarly, if the need for improved court administration is used to justify unnecessary executive interference in the judiciary, independence is also compromised. However, if one takes as a given that judicial independence must not be compromised and views issues in light of this assumption, conflicts and tensions could be largely avoided. Thus, when making interventions into the judiciary, the government must consider not only the content of the intervention – improving administration, increasing representivity — but also the manner in which the intervention is carried out.

Despite the challenge of balancing different elements of transformation and despite the ongoing need for judicial reform, the South African judiciary has managed not only to defend but also to effectively employ its constitutionally-guaranteed independence. Not only does the judiciary enjoy formal guarantees of institutional independence, security of tenure and financial security, but the judiciary benefits from judges who, as proven by their reaction to the "justice bills", are willing to defend and fight for judicial independence. Recent events have given rise to legitimate concerns about the government's attitude toward judicial independence and about how to resolve the tensions between independence and other aspects of transformation. So far, however, resistance by the judiciary and other concerned groups and individuals seems to have stopped any potential threats from actually damaging judicial independence or otherwise weakening the judiciary. Although the "justice bills" crisis seems to have ended, the need for judicial reform has not disappeared and the withdrawal of the bills did not eliminate the other possibly less urgent but still relevant challenges to judicial independence. All branches of government and the public at large must thus remain mindful of the importance of judicial independence. They should resist the temptation to weaken independence in the name of transformation, and focus on aligning other aspects of transformation with the need to strengthen judicial independence.

[23] See, however, the discussion of the different reactions to the judgements in the Shaik and Zuma trials in the section on Appointment of Judges (see Race and Gender Transformation and footnote 20). In the Shaik trial, Justice Squires gave a judgment which was equally carefully reasoned and presented. But the reaction from Zuma's supporters was entirely different. One of the factors which added to the animosity of these responses was a phrase (see footnote 19) which was attributed to Squires but was not actually in the judgment. This indicates that a judge's ability to present him or herself as impartial may only partly be related to the finer details of the judgment and highlights the role of the media in shaping perceptions of public events.

APPENDIX A

INTERVIEWEES

Names are listed in alphabetical order:

Justice Edwin Cameron

Professor Hugh Corder

Justice Siraj Desai

Justice Nathan Erasmus

Justice Louis Harms

Justice Johann Kriegler

Justice Carole Lewis

Justice Robert Nugent

Justice Kate O'Regan

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RECONCILIATORY JUSTICE

Amnesties, indemnities and prosecutions in South Africa's transition

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CONTENTS

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ABBREVIATIONS

CSVR	Centre for the Study of Violence and Reconciliation
CONADEP	Commision Nacional para la Desaparicion de Pesonas (National Commission on the Disappearance of Persons)
ICTJ	International Centre for Transitional Justice
IFP	Inkatha Freedom Party
NPA	National Prosecuting Authority
NDPP	National Director for Public Prosecutions
PAC	Pan Africanist Congress
PCLU	Priority Crimes Litigation Unit
TRC	Truth and Reconciliation Commission
TRC Act	Promotion of National Unity and Reconciliation Act, 34 of 1995
UN	United Nations

1. INTRODUCTION

The recent court case of former Minister Adriaan Vlok and General Johannes van der Merwe[1] has once gain brought the issues of accountability, in particular the issue of prosecutions, for violations committed during apartheid into the public discourse. The form of accountability was one of the most contested issues during the transition period in South Africa, beginning with the passing of indemnities in the early 1990s, to the highly contested issue of amnesty at the multiparty negotiations which took place between 1992 and 1993 (Rauch, 2004; TRC, 1998). The Truth and Reconciliation Commission, and its conditional amnesty provisions, was borne out of these contestations, with the foundations for its establishment captured within the "Postamble"[2] of the Interim Constitution, and later captured within the passage of the Promotion of National Unity and Reconciliation Act (TRC Act).[3] The link between the amnesty process of the TRC and criminal prosecutions were there from its inception, with Varney (2007) noting that South Africa embarked on an integrated approach "by design", in that "in theory those perpetrators who were denied amnesty or who did not apply for amnesty should have been investigated and prosecuted". The continued debate about the validity of prosecutions, six years after the completion of the TRC amnesty process, is indicative of the shortfalls of the "integrated" strategy, as well as the various political and legal challenges around taking forward prosecutions. The 2007 Vlok case is not the first to have resurfaced the debate.

This report was written with the intention of providing information and enhancing the debate around accountability processes, and in particular further prosecutions in South Africa. The report begins with an overview of the international obligations around holding perpetrators accountable within post-conflict societies. This overview also includes a description of attempts in Argentina and Chile to pursue prosecutions in conjunction with (or following upon) a truth commission.[4] The next section of the report focuses specifically on South Africa, and consolidates the information on indemnities, amnesties and prosecutions from the 1990s to present. A legal analysis of the amended prosecution guidelines, passed in 2005 is then provided. This analysis is provided in that it is deemed as a policy which has, and will continue to, affect prosecutions for "conflicts of the past". The report then continues with a case study of the Highgate Massacre of 1993, which explores the opportunities and challenges for further investigations and prosecutions. Finally, some concluding remarks are made which highlights some of the key points outlined through the report.

2. INTERNATIONAL OBLIGATIONS FOR ADDRESSING IMPUNITY AND EXPERIENCES AT PROSECUTIONS[5]

In the context of this report, it must be emphasised that post-conflict accountability for crimes of the past is not a phenomenon that has been unique to South Africa. Frameworks and mechanisms of transitional justice, of which accountability has been a key feature, have arisen in countries in Latin America, Europe, Asia, and throughout the African continent, with the "early days" unfolding in the 1980s in Latin America (Orentlicher, 2007). The experiences over time, has developed the contemporary discourse regarding the need to hold perpetrators accountable while striking a proper balance between truth-seeking, accountability and justice.

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[1] *The State* v. *Johannes Velde van der Merwe, Adriaan Johannes Vlok, Christoffel Lodewikus Smit, Gert Jacobus Louis Hosea Otto and Hermanus Johannes van Staden*, High Court of South Africa (Transvaal Division).

[2] The "Postamble" provided "that there would be amnesty for politically motivated offences, and that future legislation would provide the criteria and procedures to regulate the process."

[3] Act 34 of 1995.

[4] Argentina and Chile were chosen not as indicative of similar transitions to South Africa, but as case studies for enumerating the protracted nature of prosecutions after a transition, and after a truth commission in particular. Varney (2007) provides examples of the challenges experienced in East Timor and Sierra Leone, where prosecutions and truth commissions were part of an "integrated" strategy.

[5] This section of the report was drafted by Ken Oh and edited by Carnita Ernest.

In light of this historical international background, it is difficult to ascertain a consensus regarding the extent of the requirement under international law to undertake prosecutions for crimes of the past. In the descriptive sense, there has been a broad spectrum of state activity, ranging from wholesale impunity to a wholly comprehensive prosecutorial approach. In practice we have also seen political, financial, and temporal considerations impact on the form of accountability pursued in different societies.

Several tenets regarding the need for and scope of holding perpetrators accountable exist in international law. Under the various multilateral human rights treaties,[6] there is a general requirement to institute criminal proceedings against those suspected of specific human rights violations, such as torture and extra-judicial killings. Under customary international law, the requirement is less stringent, in that States are not required to punish every offense but are prohibited from granting wholesale impunity.[7] However, even within the broader ambit of international law the scope of a state's obligation have developed over the last 15 years.[8] Increasingly, the use of multiple strategies — including "truth commissions; trials; institutional social and economic reforms; and reparations programmes" — is being advocated (Orentlicher, 2007: 16; United Nations, 2004).

In this regard the report by the United Nations Secretary-General in 2005, titled "The rule of law and transitional justice in conflict and post-conflict societies", holds that past abuses committed in a society that is mired in conflict should not and must not go unpunished.[9] International law, as adduced by the Charter of the United Nations and various international conventions such as the International Covenant on Civil and Political Rights, specifically reject impunity for such human rights abuses.[10] The UN has also indicated that while amnesty can be accepted especially at the end of a war or armed conflict, there cannot be "...any endorsement of amnesty for genocide, war crimes or crimes against humanity, including those relating to ethnic, gender and sexually-based international crimes" (UN, 2004: 21). Furthermore, with the plethora of ad hoc criminal tribunals and, in particular, the creation of the International Criminal Court, the "global norm in support of criminal accountability for atrocious crimes" have been affirmed (Orentlicher, 2007).

However, Orentlicher (2007) also highlights that even within this norm, international law and policy are increasingly supporting the principle that "the most serious crimes" and those who bear the most responsibility should not escape punishment.

2.1 Lessons from other post-conflict paradigms

South Africa's post-conflict progression is widely looked upon throughout the international community as a milestone for the potential of transitional justice. However, the Truth and Reconciliation Commission was not implemented in a vacuum, but rather was influenced by the experiences of other countries that implemented truth commissions after periods of prolonged conflict. Thus, an informed analysis of these preceding post-conflict transitions is beneficial in objectively assessing South Africa's own transition.

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[6] These human rights treaties exist at both the global and regional levels. They include, inter alia, the International Covenant on Political and Civil Rights (ICCPR), the UN Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), the UN Convention on the Prevention and Punishment of the Crime of Genocide, and the African Charter on Human and People's Rights.

[7] For further discussion of the role of customary international law, see, for example, Orentlicher (1991).

[8] See Orentlicher (2007) for a discussion of these developments.

[9] "…United Nations-endorsed peace agreements can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights…" (UN, 2005: 5).

[10] The UN report looks to various ad hoc criminal tribunals established under UN auspices, which have "…sought to advance a number of objectives, among which are bringing to justice those responsible for serious violations of human rights and humanitarian law, putting an end to such violations and preventing their recurrence, securing justice and dignity for victims, establishing a record of past events, promoting national reconciliation, re-establishing the rule of law and contributing to the restoration of peace" (UN, 2004: 13).

2.1.1 Argentina[11]

The case of Argentina provides a cogent example of the interrelation between politics and reconciliation, and between justice and the attainment of truth. In 1983, general democratic elections were held for the first time since military juntas ousted President Isabel Perón in 1976. Within that seven-year time period, between 10 000 and 30 000 Argentineans were killed, and many more were tortured, "disappeared" and raped in the name of protecting against domestic threats to sovereignty.

Within Argentina's territorial borders, the military juntas were able to suppress significant opposition through stringent public restrictions and the employment of security practices in violation of human rights. However, the decisive defeat by Great Britain in the Falklands war in 1982 served as a display, both domestically and internationally, of the ineffectiveness of the military regime. Envisioning the inevitability of their downfall, whether through political or more subversive means, the juntas hastened to create legislation granting themselves immunity before declaring democratic elections in 1983.

The subsequent election of Raúl Alfonsín marked an official end to the military regime's abusive rule. It also led to Argentina's accession to various international human rights instruments. In a demonstration of the end of military rule, Alfonsín also called for the establishment of a truth commission and prosecutions for abuses committed during that period. In one sense, the truth commission, known as the National Commission on the Disappearance of Persons (CONADEP) and which operated from 1983 to 1984, was successful in that it was able to obtain concrete figures regarding disappearances between 1976 and 1983.[12] The truth commission was also legitimised by its application of a principle that came to be known as the "theory of the two devils", by which both the military juntas and the far-left opposition were the subject of human rights investigations. This non-partisan approach was intended to ensure that the findings would not be biased in one direction.

However, the truth commission's report was also deficient in several ways.[13] First, by limiting the temporal scope of investigation to the period between 1976 and 1983, the report overlooked incriminating information regarding disappearances committed by the Perón government prior to the 1976 coup. This absence was intentional, as the Perónist Party was still a powerful political force in the country at the time of the report's drafting. Additionally, the report's conclusion creates an air of ambiguity regarding the desired aims of reconciliation and accountability. While the concluding chapters place much of the blame for the atrocities on US foreign policy during the Cold War, they are somewhat silent as to the culpability of the Argentine government prior to 1976.

In conjunction with the creation of a truth commission, the Alfonsín government also undertook the task of prosecuting the perpetrators of human rights abuses. Initially, many of these prosecutions were obstructed by the passing of two amnesty laws by the military prior to elections, presidential pardons in 1988–89, and other procedural constraints which inhibited the filing of complaints and limited the scope of legal culpability for lower-level soldiers and officials. The military had also ordered the destruction of all documents relating to military oppression.

The amnesty laws provided a particularly troublesome problem for prosecutions. Although the early amnesty legislation had been repealed shortly after Alfonsín's electoral victory, the military still retained considerable political power and used that muscle to enact new laws to limit prosecutions. It was only in 2001 that Argentine courts held that the laws were a violation of victims' constitutional rights and international law. Most notably following that court decision, six former military and police officers were extradited from Uruguay to stand trial for the abduction and murder of Maria Claudia Garcia, daughter-in-law of famed poet Juan Gelman. In 2004, the state also finally allocated a reparations program, setting aside $3 billion for victims and

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[11] The information in this section is compiled from the CONADEP report, and the country overviews on the International Centre for Transitional Justice's website <http://www.ictj.org/en/where/region2/509.html>, as well as the Justice in Perspective website of CSVR <http://www.justiceinperspective.org.za>.

[12] The Argentine National Commission's final report put that number at approximately 9 000. CONADEP final report, available at <www.nuncamas.org/english/library/nevagain/nevagain_002.htm>.

[13] See, for example, the International Centre for Transitional Justice overview <http://www.ictj.org/en/where/region2/509.html>.

their families. Although a handful of prosecutions had been effected during the period shortly after 1983, victims and their families were forced to wait nearly two decades before their rights were validated by the transitional democracy.

This account of Argentina's path toward reconciliation and justice highlights the pitfalls of permitting a disconnection between truth-seeking, reconciliation and accountability functions. Because these concepts are necessarily complementary of one another, it can be counter-productive to attempt to pursue one without the effective exercise of the others. The example of Argentina also serves to illuminate the necessity of considering the underlying political dynamics of transition. While the Argentine example is not an identical or interchangeable paradigm for South Africa, the deleterious effect of de facto amnesty study could serve to inform the shaping of current prosecuting policy in post-apartheid South Africa.

2.1.2 Chile

The post-Pinochet transition in Chile was in certain respects a more complicated process than that of Argentina. Both internal and external influences shaped the specific trajectory of reconciliation and justice. Based on this premise, the example of transitional justice in Chile provides a further informative lesson regarding the need to interpolate accountability mechanisms with a truth-seeking objective.

Prior to its decisively negative political turn in the 1970s, Chile had been a country with a strong history of democracy. Under Marxist President Salvador Allende, the country had boasted one of the most stable political foundations of Latin America. In 1973, however, General Augusto Pinochet staged a violent military coup that imposed a dictatorship until 1990. During these years the military engaged in systematic and widespread practices of assassinations and disappearances in order to consolidate the country's autonomy from what were perceived as domestic and foreign threats. Pinochet's authority permeated the various levels of government, as "[L]egal bodies acted in collaboration with the repression and military courts were given inordinate powers" (ICTJ, 2005: 6).

After a referendum removed Pinochet from office, the National Commission on Truth and Reconciliation[14] was established in 1990 by newly-elected President Patricio Aylwin. In its final report, published in February 1991, the Commission documented 3 428 killings and tortures that led to death and disappearances.[15]

But despite these ostensibly noble premises, the Rettig Commission was hindered by several political and legal obstacles. For various reasons, trials were not envisioned as part of the democratic transition. Pinochet still retained significant support during and after the election. The passage of the 1978 amnesty law barred prosecutions of the Pinochet regime. Also, although evidence against Pinochet's dictatorship was turned over to the judiciary, Aylwin's administration, influenced by the unrest that resulted from prosecutions in Argentina, were reluctant to follow down a similar path.

Pinochet's legal shield of amnesty was finally and officially pierced in 2000, when a divided court ruled that Pinochet's immunity as a former head of state was in contravention of international law and established human rights law. Subsequently, the Chilean Supreme Court held in 2004 that Pinochet's claimed mental defects did not preclude his prosecution for several separate mass abuses during the 1970s. However, Pinochet ultimately escaped legal condemnation for his human rights abuses, as he died in 2006 while approximately 300 criminal charges were pending against him.

Although Chile's transitional justice paradigm was a stratified process subject to delays in actualisation, it also serves as an example of the integration of several mechanisms of justice, including restorative, retributive, and reconciliatory principles.

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[14] Comisión Nacional para la Verdad y Reconciliación, also known as the Rettig Commission.

[15] <http://www.justiceinperspective.org.za>. Two other commissions were subsequently established. In 1992, the National Reparation and Reconciliation Corporation was tasked with examining 600 unresolved cases and administering reparations to victims. In 2003, the National Commission on Political Prison and Torture was established to focus on survivors of torture and political imprisonment, between September 1973 and March 1990. Along with providing tangible financial payments to victims, the Commission also led to the creation of a $9 million fund for Pinochet's victims, financed by the Riggs Bank, through which Pinochet had previously routed money.

3. HISTORICAL OVERVIEW OF INDEMNITIES, PROSECUTIONS AND AMNESTY IN SOUTH AFRICA

The following section of the report focuses our attention to South Africa, and provides an overview of accountability processes – indemnities, prosecutions and amnesties – from the beginning of the transition period in 1990.[16] The TRC is taken as the focal point as the current debates around prosecutions is firmly embedded in the framework out of which the TRC was established. Thus the timeline addressed in this section is defined as "pre-TRC", "TRC-period" and "post-TRC".

3.1 Pre-TRC indemnities and prosecutions

3.1.1 Indemnities

The definition and release of political prisoners was a highly contested issue during the initial pre-negotiation period in South Africa (see Savage, 2000). In 1990, after the unbanning of political organisations, about 150 political prisoners were released, but this did not end the disagreements between the state and the ANC around the definition of political prisoners. As late as 1991, there was still no clarity between the two parties on who was a political prisoner with the ANC claiming that there were still 5 000 in prison and the state arguing that there were only 200 (Savage, 2000). This was the case, even though a certain degree of consensus had been reached in May 1990, which culminated in the passing of the first Indemnity Act of 1990.[17] The Act permitted the state president to grant indemnity or temporary immunity from prosecution to individuals, if he was of the opinion that it was "necessary for the promotion of peaceful constitutional solutions in South Africa or the unimpeded and efficient administration of justice".[18] The Act's ostensible legislative purpose was to facilitate the return of ANC personnel from exile, in order to catalyse the ongoing negotiation process between the ANC and the National Party. Pursuant to the Act, 48 political prisoners were released in June 1990, in what the National Party described as a "gesture of sincerity" to both the ANC and the international community (Savage, 2000).

Within a year, the 1990 Indemnity Act had gained an irreversible momentum all its own. By March 1991, 4 804 individuals had been granted indemnity, although the release of prisoners did not necessarily follow in the same numbers (Savage, 2000).

Subsequently, the 1992 Further Indemnity Act[19] expanded the scope of the indemnities given. The 1992 Act created a national council on indemnity with which the state president had to consult. Nevertheless, the executive effectively retained sole discretion to grant indemnity to individuals who had committed an act with political intent, and whose release might promote the negotiations process.

More so than the initial indemnity legislation, the 1992 Further Indemnity Act exacerbated and engendered controversy. Victims of apartheid-era offences and their advocates were especially chagrined regarding the lack of transparency surrounding the indemnity process. Because the president was only required to publish the name, date of release and the act for which indemnity was granted, those who had suffered the impact of those offenses felt alienated and effectively excluded from

[16] Savage (2000) highlights prisoner releases which happened prior to 1990, in particular the conditional release (on the renunciation of violence), which saw only 25 political prisoners agreeing to such an offer by 1987.

[17] The Act used extradition law and the Norgaard Principles (which had been used in Namibia to define a political offence). The Principles take into account issues such as motive, context and determinants of a political objective, as well as the factual nature of the offence (TRC, 1998, volume 1, chapter 4).

[18] Act 35 of 1990. Although it was agreed that indemnity would be granted through a group consisting of three government and three ANC-appointed judges, the ANC nominees refused to participate because the deliberations would be in secret (TRC, 1998, volume 1, chapter 4).

[19] Act 151 of 1992. The Act, however, still did not allow for indemnity for acts of "murder".

providing input.[20] For this reason, as well as the expansive discretion bestowed upon the president, one of the houses of the tricameral parliament had attempted to block the passage of the act. This attempt was ultimately unsuccessful, as the legislation was alternatively pushed through the President's Council, a parliamentary body designed to resolve legislative issues.[21] Because the National Party had a clear majority in the President's Council, the Further Indemnity Act was able to survive broader parliamentary opposition.

Although the two Indemnity Acts were eventually repealed by implementation of the TRC Act, their legacy remains a palpable vestige of the years preceding the 1994 elections.[22] While the TRC Act superseded the authority of the Indemnity Acts, the indemnities that were previously granted were unaffected and remained in place despite the new amnesty paradigm promulgated through the TRC.

In the period preceding the formal end of apartheid, indemnities were presumably the order of the day, as the leaders of the key political parties viewed them as necessary to facilitate a less turbulent political transition. But despite the perceived necessity of indemnities, there were a handful of prosecutions for human rights abuses that were committed before the 1994 elections, largely due to the international pressure subsequent to the exposure of the operation of death squads and other covert operations, particularly through the Goldstone Commission.

3.1.2 Prosecutions

Prosecutions that were instituted concurrently, as the processes around the TRC was unfolding, resulted in a disparate array of results. While there has been some skepticism regarding the incompatibility of justice and reconciliation mechanisms, the existence of specific parallel prosecutions indicates that the two are not necessarily mutually exclusive.[23]

In the mid- to late-1990s, various investigations were underway under the auspices of the Transvaal Attorney-General (Jan D'Oliveira) and the Natal Attorney-General (Tim McNally). The D'Oliveira investigations led to three successful prosecutions (Ackerman, 2005). Eugene de Kock, former head of the counter-insurgency unit, Vlakplaas, was convicted in August 1996 on six counts of murder as well as scores of lesser charges, and was sentenced to life imprisonment in October that year (Hanna, 1996; Ackerman, 2005).[24] Ferdi Barnard, a member of the South African Defence Force's Civil Co-operation Bureau, was also convicted in 1998 on various counts, including two murder charges. He received two life sentences. Gideon Nieuwoudt, Wynand du Toit and Marthinus Ras were also convicted in 1996 for the murders of the "Motherwell 4" and sentenced to between 10 and 20 years' imprisonment.

The case led by the Natal Attorney-General ended in a controversial verdict. The case[25] of former Minister of Defence, Magnus Malan, charged with several other former senior military members with the murders of 13 people in an attack in KwaMakhutha township, resulted in all the defendants being acquitted.

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[20] Different sectors of society viewed certain contentious releases as nothing more than attempts to reach a larger political settlement. The latent political influences affecting this indemnity process are exemplified in the cases of Robert McBride and Barend Strydom. McBride was an operative of Umkhonto we Sizwe who had been jailed for a car-bombing in Durban that killed three people and injured 69. Convicted by the Durban High Court, he had been sentenced to death. In contrast, Strydom was a member of the right wing who had been convicted by the Pretoria Supreme Court in 1989 for the murder of eight people in the Strijdom Square Massacre of 1988. The indemnity granted to Strydom was viewed as a *quid pro quo* for McBride's indemnity. See Savage (2000).

[21] Van der Merwe, H. (1999), "The Truth and Reconciliation Commission and community reconciliation: An analysis of competing strategies and conceptualizations", chapter 5, <http://www.csvr.org.za/papers/paphd5.htm>.

[22] In April 1994, shortly before the elections, FW de Klerk authorised the indemnity and release of an additional 80–100 prisoners (TRC, 1998, volume 1, chapter 4).

[23] See, for example, Simpson, G. (2000), "Rebuilding fractured societies: Reconstruction, reconciliation and the changing nature of violence", <http://www.csvr.org.za/papers/papundp.htm>. Simpson suggests that the "carrot" and "stick" of the TRC process complemented one another in attracting compliance.

[24] Hanna, M. (30 October 1996), "South African apartheid assassin jailed for life", <http://edition.cnn.com/WORLD/9610/30/s.africa/index.html>.

[25] *State* v. *Peter Msane and 19 others*. Case number CC1/96, referred to in Varney (2005).

Many have argued that these trials, and in particular the De Kock and Malan trials, affected the amnesty applications of members of the apartheid security forces (TRC, 1998; Rauch, 2004; Varney, 2005). It is believed that the successful prosecutions motivated some individuals to apply for amnesty for fear of future prosecutions against them, while the Malan acquittal reassured particularly members of the military and the Inkatha Freedom Party (IFP) that prosecutions were not such a threat. Varney (2002) and Ackerman (2007) also point out the complex dynamics between various components of the prosecution team, which can impede prosecutions. They both identify the important role of the Attorney-General in taking forward prosecutions, as well as the need for both the investigation team and prosecuting team to be coordinated and have a similar agenda.

The trial of Wouter Basson, which began in 1997 and continued until 2005, is discussed below under post-TRC prosecutions. In April 2002, Basson was acquitted by a Pretoria court. He had been accused of involvement in Project Coast, which had allegedly spearheaded a number of plots to poison anti-apartheid activists.[26] The affidavit included 46 counts of poisoning, including such high-profile instances as the Rev. Frank Chikane and even the attempted poisoning of Nelson Mandela. Although the prosecution claimed that the trial judge was biased in favour of Basson, the Supreme Court of Appeal affirmed the acquittal. In September 2005, however, the Constitutional Court overturned the decision on separate grounds: the court reversed the ruling that the crimes Basson allegedly committed outside the territorial jurisdiction of South Africa could not be prosecuted within the domestic courts.[27] This landmark decision paved the way for the further pursuit of justice; however, at the time of writing the National Prosecuting Authority has yet to institute new charges against Basson for crimes against humanity.[28]

As evidence of the "stick" aspect of the TRC process, prosecutions were utilised as a means of ensuring that individuals participated in the TRC's amnesty process. However, despite this ambitious premise, the passage of time has tempered the political will for accountability.

3.2 TRC amnesties

As noted above the TRC, the basis for the amnesty process is encapsulated in the TRC Act. The amnesty process in South Africa allowed individuals to apply for amnesty for specific incidents in which they were involved. Applications had to be made to the Amnesty Committee of the TRC on the prescribed form, and the deadline for submission was set for 30 September 1997.[29] Further, the Act provided the criteria to be followed when the committee decided on amnesty. Briefly, the criteria were:

- that the act for which amnesty was sought had to occur during the mandate period;
- that it was an act associated with a political objective;
- that the act was proportional to the desired objective; and
- that full disclosure needed to be made.

The Amnesty Committee began its work in 1997 and completed it by June 2001.

A total of 7 115 applications for amnesty were received by the TRC. The majority of these applications — 5 489, according to the TRC (2003) — were dealt with administratively in chambers by the Amnesty Committee. The remaining applications were heard at public hearings. No information is available regarding the findings made in chambers. A summary of the information on the public hearings is provided in the table below.

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[26] Jasson da Costa, W., "Prosecuting apartheid soldiers divisive", 8 February 2007, at <http://www.iol.co.za/index.php?set_id=1&click_id=15&art_id=vn20070208054144964C214249>.

[27] Staff writers, "Retrial for SA's 'Doctor Death'", 9 September 2005, at <http://news.bbc.co.uk/2/hi/africa/4230148.stm>. The Constitutional Court relied on the principle that crimes against humanity, for which Basson had been charged, were not limited by territorial jurisdiction under international law.

[28] Idem.

[29] The original cut-off date for applications was 14 December 1996. This date was revised to 30 September 1997.

TABLE 1: Summary of amnesty applicants[30]

FORMER APARTHEID SECURITY FORCES 293 applicants applied for amnesty for 550 incidents. While the TRC does not indicate how many received amnesty, CSVR research found that approximately 81% received amnesty (Ernest, 2004). It is unknown how many applicants received amnesty. Most of the applicants were South African Police members (87.4%), largely from the former Security Branch, while only 10.6% were former South African Defence Force members.[31]
AFRICAN NATIONAL CONGRESS OR ALLIED ORGANISATIONS 998 applicants applied for amnesty for 1 025 incidents.[32] The TRC does not indicate how many received amnesty, but CSVR research found that approximately 70% received amnesty.
INKATHA FREEDOM PARTY 109 applicants applied for amnesty along with seven individuals that belonged to the police or right wing that professed to be acting for the IFP. Of these, 60 individuals received amnesty (57%).[33]
PAN AFRICANIST CONGRESS OR ALLIED ORGANISATIONS 138 applicants applied for amnesty for 204 incidents. Of these, amnesty was granted to 76% of these individuals.[34]
RIGHT WING 107 applicants applied for amnesty and 68% of all applicants received amnesty.[35]
AZANIAN PEOPLE'S ORGANISATION One applicant applied for amnesty and his application was refused.[36]

The information above challenges the usual perception that it was overwhelmingly former apartheid security forces who applied for amnesty. Indeed, the majority of *individuals* who applied for amnesty were from the ANC-aligned structures (61%). Security force applicants made up 18% (applying for approximately 28% of all incidents). Approximately 8% of individuals were from the PAC, and 7% from the IFP.

In 1998, when the TRC submitted the first five volumes of its report, it made a clear recommendation for prosecutions to take place against those who did not apply for amnesty and those who were denied amnesty, although also indicating that a time limit on such prosecutions should be considered, and arguing against any form of blanket amnesty.[37] Unfortunately, with its submission of volumes 6 and 7 in 2003, the Commission failed to make clear recommendations on the pursuit (and particularly, the lack of pursuit) of prosecutions. The recommendations are silent on prosecutions but address the issue of presidential pardons and a possible further amnesty, in reaction to the dynamics which were unfolding at the time (see below).

3.3 Post-TRC pardons, investigations and prosecutions

When the TRC concluded its mandate in 2001 and submitted the final two volumes of its report, it handed over a list of 300 names to the NPA for investigation and prosecution. However, prior to the submission of the report in 2003, there was a range of policy and legal processes that unfolded and which framed the discourse on accountability and further prosecutions.

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[30] This information was compiled by Wanenberg (2003) and Ernest (2004).

[31] Final TRC report, volume 6, section 3, chapter 1: 2–4. However, a CSVR analysis indicates that approximately 69% received amnesty (Ernest, 2004).

[32] Final TRC report, volume 6, section 3, chapter 2: 2–3.

[33] Final TRC report, volume 6, section 3, chapter 3: 2–3, 9.

[34] Final TRC report, volume 6, section 3, chapter 4: 2–4.

[35] Final TRC report, volume 6, section 3, chapter 5: 1–4.

[36] Final TRC report, volume 6, section 3, chapter 6: 1–3.

[37] Final TRC report, volume 5, chapter 8: 309.

In 2002, the high public profile of pardons granted by the President served to fuel public dissatisfaction with the post-TRC process. Pursuant to section 84(2)(j) of the South African Constitution, the President has the executive authority to pardon offenders and to remit any levied fines, penalties or forfeitures.[38] This authority was exercised in 2002, when President Thabo Mbeki pardoned and released 33 former liberation-movement fighters. Although then Justice Minister Penuell Maduna maintained that each pardon had been granted on a detailed, individual basis,[39] there were allegations that the families of victims had not been consulted about the decision. Also, the pardons were condemned as a display of political partisanship, because the executive discretion was exercised only for Umkhonto we Sizwe, APLA, and PAC members and not for individuals associated with the right wing; as well as the total lack of transparency around the process and decision (CSVR, 2002; Wanenberg, 2003). These contentious pardons also raised many other instances of requests for pardons that had been submitted, including requests from the IFP, and Clive Derby Lewis and Janus Walusz, as well as possible agreements with former apartheid generals on amnesty. These deliberations led to the recommendations of the TRC that any future amnesty should not undermine the rationale for the establishment of the TRC, should take account of victims' views and rights, and should be granted within the parameters of the Constitution (TRC, 2003).

Ostensibly, the government of South Africa reiterated that presidential pardons would not pave the way for a general amnesty for the perpetrators who were either refused amnesty by the TRC or chose not to avail themselves of the process altogether.[40] However, while the President, in his address to parliament on the TRC report, stated that the NDPP would be responsible for dealing with the dilemmas of prosecutions, he implied that this could possibly be through the incursion of immunity parameters (Wanenberg, 2003). Similar statements were made by the Minister of Justice.

In March 2003, in line with the restructuring of the NDPP, the Priority Crimes Litigation Unit was established, and was subsequently mandated to be responsible for "matters emanating from the TRC process", with an emphasis on prosecutions and missing persons (Department of Justice, Undated *a*). One of the difficulties facing the Unit was that it "has no investigative capacity and is reliant on the South African Police Services and the DSO [Scorpions] in this regard" (Department of Justice, Undated *a*). The Unit indicated that an audit of around 300 cases had resulted in a decision that 167 could not be prosecuted (Department of Justice, Undated *b*). Further, Anton Ackerman, head of the Unit, noted that, using criteria already within its policy guidelines, it had determined that 21 cases were worthy of investigation (Ackerman, 2005). Three prosecutions were taken forward between 2002 and 2003, namely, that of *The State* v. *Terre'blanche*, *The State* v. *Blani*, and *The State* v. *Nieuwoudt and Two Others* in relation to the Pebco 3 murders.

Prosecutions that have been initiated subsequent to the TRC process have largely been met with procedural obstacles and institutional lethargy. The trials of Johannes van Zyl and Johannes Koole, for example, have been postponed several times, most recently in April 2007.[41] The trials, in which the defendants were charged in the Pretoria High Court in connection with the Pebco 3 killings, were seen as a landmark case because it was to be one of the first brought by the NDPP against those who had been denied amnesty. However, more than two years of delays have diluted the obtainment of justice. A key factor impacting on the Pebco 3 prosecution was the amnesty review of the Motherwell case.[42] Even for those trials in which a final disposition

[38] Constitution of the Republic of South Africa Act (7 of 1996).

[39] SAPA staff writers, "South African Justice Minister defends controversial presidential pardon", *BBC Monitoring Africa*, 22 May 2002.

[40] In this regard, Mbeki maintained in an April 2003 address that "It [a blanket amnesty] would also subtract from the principle of accountability, which was vital not only in dealing with the past but also in the creation of a new ethos within South African society" (staff writers, "Mbeki rules out general TRC amnesty", iafrica.com, 15 April 2003; Wanenberg, 2003; Terreblanche, C, "New deal stops short of general amnesty", *Sunday Independent*, 18 May 2003, <www.iol.co.za>).

[41] US Department of State, "Country reports on human rights practices: South Africa", <http://www.state.gov/g/drl/rls/hrrpt/2006/78758.htm>, 6 March 2007.

[42] A number of amnesty decisions were taken on review. The review which had the most significant impact on prosecutions was that of Gideon Nieuwoudt and others who challenged the denial of amnesty by the TRC for the Motherwell 4 murders. In 2001, after the closure of the TRC, the Cape High Court found that they had grounds for a review, and a new Amnesty Committee had to be constituted.

was reached, the results have been less than satisfactory for victims and their families. Vakele Archibald Mkosana and Mzamile Thomas Gonya were acquitted in March 2002.[43] Mkosana and Gonya were Ciskei Defence Force soldiers charged with murder and culpable homicide in connection with the Bisho Massacre in 1992.[44] Ronnie Blani, a former ANC Youth League member, was convicted in 2005 on two counts of murder, one count of robbery with aggravating circumstances, and one count of housebreaking with the intent to commit robbery in relation to the murder of the Kirkwood farming couple, Koos and Myrtle de Jager. Blani was subsequently sentenced to five years' imprisonment, four of which were suspended.[45] Further prosecutions were put on hold in late 2004 pending the formalisation of new guidelines for the prosecution of cases arising from the TRC process.

Most recently, in June 2007, former Minister of Law and Order Adriaan Vlok and four others were charged with the attempted murder of the Rev. Frank Chikane in 1989.[46] The case was concluded on 17 August through a plea-bargain agreement, which was accepted in the space of a few minutes by the Pretoria High Court. The accused pleaded guilty to the charges and received suspended sentences of 10 years (Van der Merwe and Vlok) and five years. The plea bargain sparked controversy given the minimal sentences, the legal procedure followed, and the questions it continues to pose about notions of truth and the possibilities of future prosecutions. The accused had given false testimony during previous processes (in particular during the TRC process in relation to the existence of a hit list). In addition, the plea agreement implies that additional evidence may have been provided which could have been used in trials against General Basie Smit, in particular.[47] The plea agreement also makes reference to the amended prosecution guidelines under "mitigating factors", noting that the accused came forward to make full disclosures.[48] While the charges against Vlok raised hopes for further prosecutions, only time will tell to what extent these would be forthcoming, and whether these could be conducted in a more efficient and effective way than previous prosecutions. Much debate has ensued subsequent to this case, including calls for an even hand in prosecutions. The Vlok case also did not address some of the broader issues affecting prosecutions.

3.4 Factors affecting effective prosecutions

Prosecutions have been affected by a range of issues.

Wanenberg (2003), in an analysis of the Basson trial, notes that the disparate, rather than coordinated, operation of the two lead prosecutors (one focusing on fraud, the other on human rights violations), the limited resources available to the full team, and the range of charges, affected the outcome of the case.

Also, Ackerman (2005) noted that obstacles to prosecutions include:

- the PCLU's lack of investigative capacity, and that neither the Scorpions nor the South African Police Services are keen to take on cases due to "the political dimensions attached to them, as well as the heavy workload" (4);
- legal obstacles, including the use of review proceedings to obfuscate prosecutions (in the Pebco 3 case), and the prescription of crimes;

[43] Flanagan, L, "2 apartheid cases back in EC courts", 5 April 2005, at <http://www.dispatch.co.za/2005/05/04/Easterncape/bcase.html>.

[44] The Mkosana and Gonya cases were not taken forward by the NDPP, but by the Eastern Cape Prosecutions Division.

[45] Flanagan, L, "Vlok not the first to be charged", 2 August 2007, at <http://www.iol.co.za/index.php?set_id=1&click_id=6&art_id=vn20070802031109337C422792>.

[46] The accused faced two charges: for the attempted murder of the Rev. Frank Chikane, and for contravening the Riotous Assembly Act of 1956. Although both Vlok and Van der Merwe had appeared before the TRC, they had not applied for amnesty for this specific incident.

[47] Paragrahps 41–42 and 68 of plea agreement. The plea also appears to highlight a tension between those who belonged to the former SA Police and former generals of the SA military.

[48] Paragraph 80 of the plea agreement.

- the introduction of new guidelines for the prosecution of cases arising from the TRC process;[49] and
- the passage of time, especially with the illness or death of perpetrators.

Another issue that no doubt impacts on prosecutions is the availability of evidence. The TRC, in 1998 already, noted the destruction of records by apartheid security forces, resulting in more evidence being available on the former liberation movements than on the apartheid state security forces.

4. A LEGAL ANALYSIS OF THE AMENDED PROSECUTING POLICY[50]

In South Africa, the substantive and procedural requirements for the development of a prosecution authority are found in the 1996 Constitution of the Republic of South Africa.[51] The Constitution contains several components that preserve and protect the rights and liberties of all South African citizens, without prejudice to race, sex, creed, or religion. These protections are especially significant in light of the country's transition from a striated and conflict-riddled society to an open, democratic and multicultural one.

4.1 National Prosecuting Authority Act and the prosecuting policy

The duty to effectively implement criminal justice falls upon the National Prosecuting Authority (NPA). The NPA, which is responsible for implementing criminal proceedings on behalf of the state, is prescribed by chapter 8 of the Constitution and came into effect with the National Prosecuting Authority Act.[52] The NPA is headed by the National Director of Public Prosecutions (NDPP), which exercises general control over the conduct of prosecutions in South Africa.

Section 179(5)(a) of the Constitution provides that the NDPP must determine, with the concurrence of the Cabinet member responsible for the administration of justice and after consulting the directors of Public Prosecutions, prosecuting policy, which must be observed in the prosecution process. To assist the prosecutors at arriving at a decision whether to prosecute or not, the NDPP has had general criteria governing such a decision (that is, to prosecute or not) which provides for the "fair and even-handed administration of the criminal laws".

The prosecuting policy reflects both domestic and international influences. The National Prosecuting Act, for example, requires that the UN's guidelines on the role of prosecutors be observed. The criteria governing a decision to prosecute are captured in paragraph 4 of the prosecuting policy. Broadly speaking, the guidelines identify that a decision should be based on:

- whether strong evidence exists (and outlines ways in which evidence can be evaluated); and
- whether the prosecution would be in the public interest (including evaluating the seriousness of the offence, the interests of the victim and broader community, and the circumstances of the offender).[53]

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[49] It is interesting to note that in the 2005 presentation, Ackerman noted the obstacle the guidelines posed, after having been told on the morning of 11 November 2004, when the arrest warrants for Vlok were to have been arrested, that all prosecutions should be put on hold.

[50] This section of the report was developed with the support of Howard Varney, who provided the draft on the legal analysis. The section was further edited by Ken Oh and Carnita Ernest. The legal analysis is based on the Constitutional Challenge to the Amended Prosecuting policy which was instituted by survivors of human rights violations and NGOs

[51] Constitution of the Republic of SA (108 of 1996).

[52] Act 32 of 1998.

[53] Prosecuting policy of South Africa. The policy states that "[T]he decision whether or not to prosecute must be taken with care, because it may have profound consequences for the victims, witnesses, accused and their families. A wrong decision may also undermine the community's confidence in the prosecution system" (paragraph 4).

In December 2005, the NDPP amended its prosecutorial policy with respect to offenses committed during the conflict of the past. The amendment effectively revives the amnesty process of the TRC and adds several criteria for consideration that were not applied during the TRC process. Specifically, the NDPP will exercise the discretion not to prosecute when an accused makes full disclosure and satisfies the same tests as applied by the TRC's Amnesty Committee. This amendment was deemed necessary in order to take forward the call by President Mbeki for due consideration around future prosecutions for crimes of the past, especially noting that many did not apply for amnesty.

Although the NDPP possesses the discretion to amend its prosecutorial policy, this discretion is not absolute and is confined by the law of South Africa and international law. The amended guidelines were therefore legally challenged by a group of survivors of human rights violations and non-governmental organisations.[54] The next chapter highlights the arguments made against the prosecution guidelines. Generally, it is argued that the amendment is, inter alia, unconstitutional; in breach of international law; in breach of the principle of the rule of law; and in breach of the principles of administrative fairness and justice. What such an approach accomplishes is a de facto rerun of the original amnesty procedure of the TRC, thereby providing those who were refused amnesty[55] and those who failed to apply[56] a second opportunity for impunity.[57]

4.2 Amendment of the prosecuting policy: Prosecution of criminal matters arising from the conflicts of the past and which were committed before 11 May 1994

The prosecuting policy was amended through the insertion of a new paragraph (8A). In terms of this amendment the NDPP may supplement or amend the prosecuting policy so as to *determine prosecutorial policy and directives in respect of specific matters*, for example, in respect of new legislation and matters of national interest. In accordance with this amendment, the NDPP determined the criteria in appendix A, relating to the prosecution of cases arising from conflicts of the past, and which were committed before 11 May 1994. Appendix 1 of this report includes the full text of appendix A of the prosecution guidelines.

Part A of the amended policy provides the legal argument for the policy, while Part B of the amended policy sets out certain procedural arrangements in respect of persons wanting to make representations to the NDPP, and in respect of those cases already received by the office of the NDPP, relating to alleged offences arising from conflicts of the past, and which were committed before 11 May 1994. In relevant part, these procedural arrangements are triggered by submission to the NDPP of an affidavit or affirmation by a person who faces prosecution and wishes to enter into arrangements with the NDPP.[58] Such an affidavit must contain a full disclosure of all the facts, factors or circumstances surrounding the commission of the alleged offence.[59] Further, the NDPP must obtain the views of any victims, as far as is reasonably possible, before arriving at a decision not to prosecute.[60] Any such decision not to prosecute must be made public.[61]

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[54] *Nkadimeng and Others* v. *the National Director of Public Prosecutions*, Case 32709/07, in the High Court (Transvaal Division), launched on July 19, 2007.

[55] The majority of individuals were refused amnesty. Truth and Reconciliation Commission (November 1997), "Frequently Asked Questions", amnesty statistics, at <http://www.truth.org.za./faq.htm>. Some did not fall within the delineated timeline of events between 1960 and 1994, from the date of the Sharpeville Massacre to the first democratic elections. Others failed to proffer a political objective behind their acts. Still others were refused amnesty because the nature of their acts was wholly disproportionate to any political objectives that were proffered.

[56] There are various reasons why individuals did not apply for amnesty. Some political leaders did not provide support for the amnesty process because they claimed that their group's official policy was that of a non-violent struggle consistent within the parameters of law. Others took the calculated risk that the lack of investigative interest and the low possibility of prosecution would insulate them from criminal or civil liability.

[57] Staff writers, "New Bid to Reveal Old Secrets", at 08h10 on 28 November 2004 at <http://www.news24.com>, 28 November 2004.

[58] *Idem*, at paragraph B1.

[59] *Idem*, at paragraph B3.

[60] *Idem*, at paragraph B9.

[61] *Idem*, at paragraph B11.

Part C of the amendment sets forth the criteria for this exercise of prosecutorial discretion. Specifically, 10 factors are to govern decisions not to prosecute: (1) whether the applicant has made full disclosure relating to the alleged offence; (2) whether the alleged act, omission or offence is an act associated with a political objective committed in the course of conflicts of the past; (3) where the alleged offence and is proportional to the political objective in question; (4) the degree of the applicant's cooperation; (5) the personal circumstances of the applicant; (6) the seriousness of the offence; (7) the extent to which prosecution or non-prosecution would facilitate or undermine nation-building; (8) whether the prosecution would lead to the further or renewed traumatisation of victims; (9) the alleged offender's role during the TRC process; and (10) the consideration of any views obtained for the purposes of making a decision.[62]

In conjunction with the preexisting criteria used during the TRC's amnesty process, the NDPP is also allowed to take several other factors into account. These other relevant factors include "the degree of cooperation on the part of the alleged defender"; "the personal circumstances of the alleged offender", including the degree of remorse exhibited; and "the extent to which the prosecution or non-prosecution of the alleged offender may contribute, facilitate or undermine our national project of nation-building through transformation, reconciliation, development and reconstruction within and of our society".

4.2.1 Constitutional precedent

The legal precedent for settling conflicts arising from the apartheid era is governed by the Constitutional Court's judgment in *Azanian People's Organisation (AZAPO) and Others* v. *the President of the Republic of South Africa*. In that case, the applicants applied for direct access to the Constitutional Court for an order declaring section 20(7) of the Promotion of National Unity and Reconciliation Act (23 of 1995) unconstitutional. Section 20(7), read in conjunction with other sections, permits the Amnesty Committee to grant amnesty to a perpetrator of an unlawful act associated with a political objective. The Constitutional Court upheld the constitutionality of the section. It ruled that although the section limited the applicants' right in terms of section 22 of the Interim Constitution to "have justiciable disputes settled by a court of law", amnesty from criminal liability was nevertheless permitted for the purposes of national reconciliation and unity.

Without the provision for amnesty, the Court held that offenders would not be willing to come forward to disclose the entire truth. Additionally, the Court was influenced by its conclusion that the negotiated settlement and the new Constitution itself may not have been implemented without such amnesty provisions. The Court also found that the provisions were not inconsistent with international norms and did not breach any of the country's obligations with respect to public international law instruments. As such, although the Constitutional Court did indeed find a limitation on the rights of victims of apartheid-era abuses and offences, it nevertheless held that, because of the underlying national circumstances, Parliament was permitted to create such limitations as were embedded in the Promotion of National Reconciliation and Unity Act.

4.2.2 Violations of national and international law

Ostensibly, the 2005 amendment of the prosecuting policy appears to be an attempt on the part of the NDPP to efficiently resolve the residual issue of prosecuting apartheid-era crimes and abuses. However, the amended policy effectively reinstitutes the amnesty process of the TRC, while simultaneously limiting both the transparency of the process and the role of victims, in a context where the same extenuating national circumstances that justified the TRC's Amnesty Committee are no longer present. Therefore, it is argued that the amendment of the prosecuting policy represents an unconstitutional infringement on the rights of the victims, which derive not only from the Constitution of the Republic of South Africa but also from international and regional legal instruments.

The amended policy effectively allows the NDPP to conduct a "re-run" of the TRC amnesty process in respect of those perpetrators who either failed to apply for amnesty for their offenses or who applied for amnesty but were refused. The TRC

[62] *Idem,* at paragraph C3.

amnesty process was established by a constitutional[63] and statutory[64] scheme for a clearly delineated and limited opportunity for amnesty. In order to secure the passage of a transition to democracy, national unity and reconciliation, victims were required to endure a severe limitation of their fundamental rights. However, the constitutional and statutory designs explicitly emphasised that the afforded amnesty was not a blanket one and would only be extended to select applicants.[65]

However, in contrast to the TRC Act, the amended policy allows the NDPP to overlook several factors that were deemed integral to the TRC process. Unlike the amnesty regime in the TRC, which provided for open hearings, the procedure envisaged in Part B of the amended policy is to be implemented in private sessions. Although the amended policy requires the public disclosure of indemnities granted and the reasons for such indemnities, the actual deliberation process does not require such transparency. The NDPP is not required to publish applications for indemnity from perpetrators; as a result, interested parties such as victims' families may be unaware that such an application has been made. The amended policy also does not oblige the NDPP to disclose any information learned from the perpetrators during this process.

The amended policy also permits the NDPP to consider certain factors that were not part of the criteria of the TRC's amnesty process. Specifically, in addition to the criteria of the TRC Act, the NDPP is permitted to consider the degree of the applicant's cooperation,[66] the personal circumstances of the applicant,[67] the seriousness of the offence,[68] and the extent to which indemnity would facilitate nation-building and reconciliation.[69] The effect of these additional factors is an impermissible emphasis on the interests of those applicants who did not previously receive amnesty and the nation as a whole, at the expense of those victims and their families who have been awaiting redress even before the original TRC process was established.

4.2.3 Violation of the right to dignity

It is also argued that the amended policy constitutes a violation of the right to human dignity. Under section 10 of the Constitution, this is a fundamental right that is guaranteed to all citizens.

Because many perpetrators were refused amnesty, they were subject to prosecution under the terms of the Promotion of National Unity and Reconciliation Act. However, despite this eligibility for criminal and civil liability, and despite calls from victims to seek redress, prosecution of the perpetrators has remained a non-occurrence, one that has been institutionalised by the amended policy. This inaction persists, despite the existence of evidence such as sworn witness statements, recordings of subsequent conversations, and forensic evidence. This refusal to prosecute exists despite the absence of the national political exigencies that motivated the implementation of the TRC and were at the heart of the constitutional compact made between government and victims in the epilogue to the Constitution of the Republic of South Africa Act (200 of 1993).

For victims of apartheid-era abuses, the deprivation of the right to dignity is a continuing violation. Although the actual occurrence of the apartheid-era human rights violation occurred in the past, the absence of criminal liability for perpetrators is a practice that is occurring in the present. Prosecutorial ignorance of the victims undermines their status as citizens of South Africa and creates the effect of ignoring the suffering of victims of the apartheid era.

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[63] The postscript to the Interim Constitution authorised an amnesty process through the establishment of mechanisms, criteria and procedures.

[64] The statutory authorisation exists in the Promotion of National Unity and Reconciliation Act (34 of 1995).

[65] The Constitution of the Republic of South Africa specifically protects the rights of all South African citizens, including victims of apartheid-era human rights abuses. Therefore, there is no authority for the suspension of the rule of law or the denial of rights to justice for victims.

[66] Amended Policy, paragraph C(3)(c).

[67] *Idem*, at paragraph C(3)(d).

[68] *Idem*, at paragraph C(3)(e).

[69] *Idem*, at paragraph C(3)(f).

4.2.4 Violation of the right to freedom and security of the person

The amended policy is a violation of the right to freedom and security of the person, enshrined in section 12 of the Constitution. Through the commission of murder, torture, and other acts of violence, victims were deprived of their right to freedom and security of the person. When this right is violated, criminal prosecutions are the mechanism for providing redress to the victims. Prosecutions ensure the sanctity of the right to freedom and security of the person and act as a signal that these rights of citizens shall be protected by the state. When the prosecutions of perpetrators do not occur, the enshrinement of these rights in the Bill of Rights of the South African Constitution is obviated.

4.2.5 Violation of the right to equal protection before the law

The amended policy violates the rights of victims to equal protection before the law, enshrined in section 9 of the Constitution. Equal protection entails ensuring that the law applies consistently to all citizens of South Africa, and that all victims of criminal acts are able to obtain redress through the appropriate governmental channels. In terms of criminal prosecutions, the NDPP is constitutionally bond to apply prosecutorial policy in a reasonable manner that does not discriminate against a particular group of victims.

As applied, the amended policy acts to discriminate against persons who were the victims of offenses committed before 11 May 1994. The amended policy allows the NDPP to decline to prosecute, even when the particular circumstances would reasonably dictate the attachment of criminal sanctions.

In *AZAPO*, the Constitutional Court permitted the limited restriction of the right to equal protection for victims of apartheid-era abuses because of the underlying need for a negotiated settlement. While the Promotion of National Unity and Reconciliation Act was viewed as a necessary compromise for a successful democratic transition, that Act still recognised the need for prosecutions of those who did not come before the Amnesty Committee and those who were refused amnesty. To be sure, the Act specifically rejected the notion of a blanket amnesty. The amended policy nevertheless perpetuates the limited temporal framework mandated for the TRC amnesty process. Further, this perpetuation is not grounded in the same national exigencies that necessitated the prior amnesty process. As a result of the open-ended perpetuation of the amnesty process, many victims of past abuses are not accorded equal protection by the national government, and specifically by the NDPP.

4.2.6 Constitutional limitations on the Bill of Rights

Because the amended policy is not a law of general application, it cannot be applied in a manner that would violate the constitutional rights of victims and their families. At a threshold level, the rights contained in the Bill of Rights of the Constitution enjoy broad application and generally cannot be limited. In section 36 of the Bill of Rights, it is stated that the rights enshrined in the Bill of Rights may be limited only by laws of general application, to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom. As such relevant factors must be taken into consideration, such as the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and whether less restrictive means exist. In light of the specific history of South Africa, in emerging from a history in which fundamental rights and freedoms were frequently and systemically violated, the section 36 limitations provision was intended to protect the rights found in the Bill of Rights.

The amended policy does not constitute such a law of general application. Rather, it is an internal policy that is implemented by a state official and which has not been authorised by the Constitution or by subsequent legislation. In this sense, the amended policy is legally distinguishable from similar provisions in the Promotion of National Unity and Reconciliation Act. That Act was implemented by Parliament, the legislative body of the Republic of South Africa, and it was a law of general application. In *AZAPO*, the Constitutional Court held that, in light of the pressing need to engender a successful democratic transition, Parliament was entitled to adopt a wide concept of reparations. In contrast, because it is an internal policy and not a law of general application, the amended policy promulgated by the NDPP is required to be in respect of the rights that are contained in the Bill of Rights. Although the NPA and individual prosecutors are accorded certain discretion in performing their functions,

exercising their powers and carrying out their duties, this discretion must nevertheless be exercised according to the law and within the spirit of the Constitution. Therefore, pursuant to section 36 of the Constitution, it is not permissible for the amended policy to operate so as to create limitations on the enjoyment of the constitutionally provided rights of individuals.

4.2.7 The amended policy as a violation of international law

The amended policy is substantively unconstitutional in that it is an abandonment of the international law obligations of the Republic of South Africa, as set out in sections 231 to 233 of the Constitution, read with section 39(b), to uphold the right of justice and to investigate, prosecute and punish violations of human rights. These constitutional provisions incorporate certain international legal instruments into the domestic law of South Africa, including the International Covenant on Political and Civil Rights (ICCPR) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT).

Article 2(3) of the ICCPR[70] creates an obligation on state parties to "ensure that any person whose rights or freedoms ... are violated shall have an effective remedy". Article 6(1) affirms every individual's right to life, which must be protected by law. Article 7 imposes a duty on state parties to hold the perpetrators of torture or cruel, inhuman or degrading treatment responsible for their actions.

Because the amended policy would grant indemnity to perpetrators who would otherwise be criminally liable, the applicants are precluded from an effective remedy for the violations of the rights and freedoms of the victims. This preclusion directly contravenes the obligation imposed on state parties by article 2(3). Because the perpetrators are allowed to escape justice for their crimes of the past, their victims' right to life, which must be protected by law, is not affirmed but rather rejected. This rejection contravenes the affirmation set forth in article 6(1). Additionally, the perpetrators of torture or cruel, inhuman or degrading treatment are released from legal responsibility for their actions. This impunity is a violation of the duty imposed on state parties in article 7.

The CAT[71] also contains several provisions relevant to the amended policy. The CAT defines "torture" in article 1 as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. Article 4 requires state parties to make all acts of torture punishable by appropriate penalties. Article 7 requires state parties to submit all acts of torture to the competent authorities for the purposes of prosecution. Article 12 requires state parties to ensure that competent authorities promptly investigate, wherever there are reasonable grounds to believe that an act of torture has been committed. Article 13 requires state parties to ensure that individuals who allege to torture shall have their cases promptly and impartially examined by competent authorities.

South Africa's specific obligations under the CAT are highlighted by the Committee Against Torture, a UN organ charged with reviewing reports submitted by state parties. In its 2005 conclusions, the Committee Against Torture noted with disapproval that de facto impunity persists for persons responsible for acts of torture during apartheid. The Committee's conclusion strongly suggested that South Africa consider bringing to justice those persons responsible for the institutionalisation of torture as a mechanism of oppression to perpetuate apartheid.

Contrary to the recommendations of the Committee Against Torture, the amended policy provides for the indemnification from criminal penalties of perpetrators of human rights violations. The amendments also operate so as to selectively foreclose the opportunities for victims and their families to have their allegations and reports promptly investigated, examined and prosecuted by the NDPP.

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[70] The Republic of South Africa ratified the ICCPR on 10 December 1998.

[71] The Republic of South Africa ratified the CAT on 12 October 1998.

For the foregoing reasons, the amended policy is in violation of South Africa's international law obligations as ratified in the ICCPR and CAT.

4.2.8 Violation of the Promotion of Administrative Justice Act

Section 6(2)(e)(i) of the Promotion of Administrative Justice Act permits any person to institute proceedings in a court or a tribunal for the judicial review of an administrative action if the action was taken for a reason not authorised by the empowering provision. The National Prosecuting Authority Act empowers the NDPP to pursue the effective prosecution of crime without fear, favour or prejudice.[72] All other matters concerning the prosecuting authority are to be determined by national legislation.[73] In selectively granting indemnities to perpetrators who were refused amnesty or refused to participate in the amnesty process, the amended policy purports to take into account the goals of "nation-building" and "reconciliation". Because these broad-based goals are not authorised by the empowering provisions of the NDPP, they are inconsistent with section 6(2)(e)(i) of the Promotion of Administrative Justice Act.

Additionally, section 6(2)(e)(iii) of the Act permits any person to institute proceedings in a court or a tribunal for the judicial review of an administrative action if irrelevant considerations were taken into account. The purpose of the NDPP is to pursue the effective prosecution of crime without fear, favour or prejudice. As a result, the NDPP acted in conflict with this section of the Promotion of Administrative Justice Act by taking into account the goals of "nation-building" and "reconciliation". As a result, the amended policy is inconsistent with section 6(2)(e)(iii) of the Act.

Section 6(2)(f)(ii) further mandates that an administrative action such as the amended policy must be rationally connected to the purpose of the NDPP's powers to formulate it. Because the amended policy indemnifies perpetrators of past abuses, even when the evidence and underlying circumstances warrant prosecution, there is no rational relationship between the amended policy and the NDPP's purpose of prosecuting crime without fear, favour or prejudice. As a result, the amended policy is inconsistent with section 6(2)(f)(ii) of the Promotion of Administrative Justice Act.

Section (6)(2)(h) permits any person to institute proceedings in a court or tribunal for the judicial review of an administrative action if the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function. The amended policy amounts to a re-run of the TRC process; however, none of the safeguards present during the TRC process, such as public transparency and victim and witness input, are present in the NDPP's amended policy. The TRC process was judged reasonable, insofar as it was deemed to be necessary to effect a peaceful democratic transition. In the current context, the mitigation of violent sociopolitical volatility, coupled with the absence of transparency and public input in the application of the amended policy, mandate that the NDPP's re-run of the TRC process is an unreasonable exercise of administrative power.

Section 3(2)(b) of the Promotion of Administrative Justice Act requires that, in order to give effect to the right to procedurally fair administrative action, an administrative body such as the NDPP must provide for representations from any affected parties. With respect to the amended policy, the affected parties are the victims and families of victims of apartheid-era abuse. Although the amended policy ostensibly provides for input from these affected parties prior to indemnity decisions, these affected parties were never consulted before the amended policy was instituted. As a result, the neglect of representations from the affected parties constitutes a procedurally unfair administrative action that is inconsistent with section 3(2)(b) of the Promotion of Administrative Justice Act.

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[72] Preamble, National Prosecuting Authority Act (32 of 1998).

[73] *Idem.*

5. THE HIGHGATE MASSACRE: A CASE STUDY ON THE OPPORTUNITIES AND CHALLENGES FOR FURTHER INVESTIGATIONS AND PROSECUTIONS[74]

5.1 Background to the case

On the evening of 1 May 1993, gunmen armed with automatic rifles and hand grenades teargassed and shot at patrons of the Highgate Hotel in East London, Eastern Cape.

Five people were killed:

- Douglas Gates
- Stan Hacking
- Deon Harris
- Dave Boyce Wheeler
- Deric Whitfield

Seven people were injured, three of whom remain permanently disabled:

- Billy Baling
- Neville Beling
- Charles Bodington
- Megan Boucher
- Nkosinathi Alfred Gontshi
- Doreen Rousseau
- Karl Weber

While there was a phone call several days after the attack from someone alleging to represent the Azanian People's Liberation Army (APLA), both police and APLA representatives doubt the validity of this caller and neither has been able to identify who the caller was.

In 1994, APLA did attack the Highgate Hotel with hand grenades without causing injuries. Amnesty was granted to APLA cadres for this attack.

One of the survivors of the 1993 Highgate Hotel massacre testified to the TRC's Human Rights Violations Committee on 16 April 1996. Four Highgate Hotel survivors testified to the same committee a year later, on 10 July 1997.

It was assumed that the attack was part of a national APLA campaign at the time – an assumption strengthened by the confusion of the 1993 and 1994 attacks in the final TRC report.[75] The fact is, nobody has ever directly claimed responsibility for

[74] This section of the report was written by Theresa Edlmann, of the Spirals Trust. Thanks to members of the Highgate Survivors' Support Group, who participated in interviews in preparation for this paper, and stakeholders and support organisations that have given their time, insight and compassion to the Highgate Survivors' Group.

[75] In the TRC report, volume 2, chapter 7, pages 689, 690, paragraphs 483, 485 and 486, the 1993 Highgate attack and the amnesty applications by Mbambo and Ncamazana were conflated. Unlike the 1993 attack, the APLA attack in 1994 only involved hand grenades and nobody was killed or injured. No mention of this is made in the TRC report.

the attack, nobody has applied for amnesty and nobody has been prosecuted. The survivors have therefore lived with questions and uncertainty about the case for almost 15 years.

In February 2005, Frances Morris, a psychologist from the UK affiliated to the University of Cape Town's Department of Psychology, initiated a narrative interview and mediation process with Neville Beling, one of the survivors, and his family. During this process, it came to light that the APLA command never authorised the 1993 Highgate attack, and was not aware of who the perpetrators were.

Shortly after this process, Neville Beling was given information that shed light on who might actually have been responsible. He wanted to follow up on this and possibly share what he had discovered with other survivors. However, the information was sensitive and needed verification, and Frances Morris's time in South Africa was coming to an end.

The Spirals Trust was approached to be the local coordinating organisation in assisting Neville Beling to call the survivors together to meet each other and hear about the information that had come to light.

The Highgate survivors' information-sharing meeting was held at the Kennaway Hotel, East London, on 28 November 2006. The meeting was held in a very positive spirit that enabled the survivors to meet each other in a safe space and provided an opportunity for most of those present to dialogue about the Highgate Massacre for the first time in more than 13 years. It was a time of profound and painful shifts as the 11 survivors and family members present talked about the events of 1 May 1993 and their experiences since then.

Ginn Fourie of the Lyndi Fourie Foundation facilitated the meeting. Support organisations were present to witness and support the event, including the Centre for the Study of Violence and Reconciliation, the University of Cape Town's psychology department, the University of Fort Hare Psychological Services Centre and FAMSA. Key people who had information to share with the survivors made a significant effort to be present and to speak about what they knew. These were:

- Letlapa Mphahlele of the PAC, who was a commander in APLA at the time of the attack;
- Daryl Els, who was one of the original police investigating officers at the time of the attack, and later a member of a police task team which specialised in investigating APLA attacks; and
- Louise Flanagan, a researcher with the TRC and a journalist who had conducted detailed investigations into *askari* activities in Eastern Cape.

None of those involved in the information-sharing event had anticipated the level of agreement between these three people about the fact that it is unlikely that APLA carried out the attack, and that it is more likely to have been state security force related operatives. The issues that were discussed were:

- Usually, APLA attackers shot widely and not accurately — they did not have much ammunition nor could they practise target-shooting for fear of being caught. The Highgate attackers' shooting was very accurate.
- The attackers wore black or dark blue with ski masks with only their eyes visible. Some witnesses said they wore paint as camouflage and were actually white men.
- Nobody claimed responsibility for the attack — there were not even rumours about people claiming to have carried out the attack.
- In all APLA attacks they would highjack a vehicle from their community, promising to return it. On the night of the Highgate attack, and a few days before and after, no vehicle was stolen or highjacked in East London.
- APLA cadres did not cover their faces or wear balaclavas.
- APLA did not use tear gas — the Highgate attackers withdrew under tear gas. It was the first time this strategy was used in such an attack.

- AK47s were used in the attack. APLA usually used South African weapons as they could steal them and obtain ammunition more easily; most commonly these were R1, R4 or R5 rifles.
- The AK47s used in the attack have never been linked to another crime, which indicates they were destroyed.
- APLA command never authorised the attack.
- APLA took a few days to claim responsibility for the attack. This was unusual — most claims were made almost immediately. The claim came from Zimbabwe, but APLA command was based in Lesotho.
- There is no record of the Highgate Massacre in the file of APLA attacks kept by the commander — all other attacks authorised and claimed by APLA are there.
- Nobody applied for amnesty or has been convicted for the 1993 attack — Ncamazana (assumed by many at the meeting to be one of the perpetrators) was a perpetrator in the 1994 attack.

The people presenting information agreed on the following possible theory about the attackers: that they were white members of the South African Defence Force (SADF) or police. They might have received the wrong intelligence; possibly, they were supposed to attack the Orange Grove, whose owner was a known Afrikaanse Weerstandsbeweging (AWB) supporter. The intention would have been to incite the AWB to stand up and fight against the freedom fighters. Eugene Terreblanche, the AWB leader, was in East London at the time and thousands of people were there in support of him and the AWB. If they were going from one hotel to the other, Highgate was a softer target and had better options for a quick getaway. The Orange Grove is well lit and near the airport.

Another issue was the alleged existence of a local *askari* unit based at a Vlakplaas-type farm nearby, a covert unit of mostly captured guerrillas. Some were used to get fellow freedom fighters or activists in jail and they could not go back to their comrades. They were paid by police "off the books" but they were not police members. The East London base for *askaris* was very near the Highgate Hotel. It is now a deserted farm. It is not known what operations they were part of. Louise Flanagan wrote up a report containing as much information as she could put together about this farm and the *askaris* who worked there, including a list of possible incidences members of this unit might have been responsible for.[76]

The discussions among those present at the meeting included conjecture that it was unlikely to have been five or eight attackers, rather two or three white commanders and the rest *askaris*, who would have been regarded as "expendable". The people present at the meeting agreed that a possible motive was clear and realistic: the Eastern Cape had always been a crucial base in the struggle against apartheid and was perceived as the potential flashpoint of the revolution at the time. The fact that security forces might have been trying to raise up right wing anger to destabilise the Codesa negotiations would make sense. None of these thoughts were concrete, but there were a lot of hints.

The information that emerged from the meeting and the media coverage that it received led to the NPA requesting a memorandum from the survivors to reopen the investigation into the attack. A memorandum was drafted at the follow-up survivors' meeting held on 9 December 2006:

> In response to your telephonic request of 30 November 2006, we as the survivors of the Highgate Attack hereby request a renewed investigation into the attack to clarify the motivation, organisation and identity of the perpetrators.
>
> We furthermore request transparency through regular updates on the progress of the investigation on at least a quarterly basis.

[76] The most comprehensive information the group received about this unit was from a report drafted by Louise Flanagan in December 2001 while she was working at the *Daily Dispatch* (the document is not for publication but is available from the author on request). A copy was given to the NPA at the beginning of the 2007 investigation. Other information was given to Neville Beling by a resident in the area on condition of anonymity.

> We offer our full support in your endeavours to investigate, but request that we are always approached as a group and not as individuals. The Spirals Trust will facilitate communication with the group.
>
> Given the sensitivity of the case, we trust that this investigation will be dealt with in the strictest confidence.

The survivors and family members present at the information-sharing meeting requested that the Spirals Trust coordinate voluntary monthly meetings at which follow-up activities could be discussed and coordinated. The University of Fort Hare Psychological Services Centre in East London kindly provided a comfortable and confidential space for the group to work in, and monthly meetings were held between December 2006 and April 2007.

On 15 February 2007, the investigator from the NPA assigned to the reopened case met with Daryl Els and other local police investigating officers. The following day he met with Neville Beling, supported by Karl Weber and Theresa Edlmann (Spirals Trust director). The investigator indicated that they were in Eastern Cape to conduct preliminary inquiries into whether the "new" information was substantial enough to proceed with a formal investigation. Although he could not indicate what the future would be, he seemed positive about the quality of information he had been given. At the time of writing this report the investigation is still ongoing.

During February 2007, the Highgate Survivors' Group began work on holding the first ever memorial ceremony at the Highgate Hotel on the anniversary of the massacre. This was held on 1 May 2007, 14 years after the attack took place. Approximately 150–200 people attended, including Ginn Fourie and Letlapa Mphahlele who had been at the meeting in November. Survivors spoke of their memories of the massacre, bereaved family members and friends honoured their loved ones, several guests spoke and read out messages of support, candles were lit in memory of those that died and a commemorative DVD was shown. A plaque was also unveiled and is now permanently mounted in the foyer of the hotel. Carte Blanche and SABC news filmed aspects of the proceedings; it was covered in all the national television news broadcasts that evening.

The memorial was the first time that people whose lives had been shattered by the events of 1 May 1993 were honoured in a public way and by their community. It was a significant event for all involved.

This was not the end of the journey of healing, however. Several members of the group travelled to Cape Town on 7 June 2007 to participate in a Healing of Memories workshop, along with survivors of other acts of political violence from the apartheid era.

During July and August 2007, members of the group started discussions about setting up their own survivors' support fund. Discussions about this are ongoing at the time of writing this report.

5.2 Reflections on the Highgate case

5.2.1 Gathering and use of evidence

5.2.1.1 Survivors' involvement in the investigation

One of the remarkable aspects of the Highgate case is the role that a survivor has played in gathering information. Neville Beling's determination to find out the truth of what happened in 1993 has been a significant factor in the case being reopened, the survivors finally gathering to support each other and a public memorial being held. In spite of fears for his personal safety and significantly limited resources, he has followed up on every possible lead that has come his way.

His ability to gather and synthesise information from various sources has been remarkable. He has also personally followed up on possible leads, from visiting the Group 8 police station (where he received very little support or information from the officer

in charge) to tracing a farmer who lived near the suspected *askari* farm close to the Highgate Hotel to personally verifying a police office phone number the farmer gave him.

It is very likely that the survivors would never have met and worked together nor would this case ever have been reopened without Neville Beling's efforts.

This raises many questions about the possible roles survivors can play in investigating crimes of this nature. While investigations are inevitably sensitive and need to be subject to both conjecture and careful analysis as to whether information is relevant or not, there is a unique web of relationships among survivors of an attack and the local community that could hugely assist any investigation.

It is interesting to note that the only meeting between the NPA and two of the survivors in February 2007 led to valuable information being passed on to the NPA. At the meeting in East London at which this information was given, the NPA investigator praised the survivor concerned for the quality of the information he had brought. This raises questions about whether survivors should not perhaps be more active agents on an ongoing basis in assisting investigators in gathering information.

While it is the responsibility of the state to follow up on investigating and prosecuting a violent political crime of this nature, the needs and resources of the "victims" should not be ignored or undervalued in any way. Part of the injustice of a crime of this nature is the way in which it strips people's lives of meaning and a positive future; playing a role in finding those responsible for what happened to them could be a valuable process that assists both the state and survivors in this regard.

5.2.1.2 The difference between information and evidence

The information about the Highgate Massacre that has come into the public domain in the last year has been both controversial and dramatic. Balancing the survivors' need for information and an understanding of why the massacre took place with the need to verify information has been a huge challenge.

Regular feedback would help with this, as would meetings with people who can help them understand the dynamics behind a case of this nature. Several survivors have expressed a need to engage with former Minister of Law and Order Adriaan Vlok, and former State President FW de Klerk as a way of understanding what these leaders' experiences were at that time, and whether they knew anything about the Highgate Massacre. For this particular group, there is also a perception that they would feel less isolated and abandoned if the leaders they had voted for at the time of the attack understood what they had gone through. The group is currently in a state of limbo in this regard, as they do not understand the technicalities behind Vlok's plea bargain and agreements with the NPA. There is a sense of confusion about whether the developments relating to Vlok and his co-accused will assist the investigation of their case or not.

A former security policeman, Eric Taylor, was spotted parked outside the Highgate during June 2007 at the same time that some of the survivors were meeting with a journalist for an interview. While this was communicated to the NPA, the survivors do not know what has happened with that information. Nor was there any support forthcoming from the police or the NPA in having their telephone lines checked for possible bugging devices when questions were asked about possible links between Taylor's arrival and the timing of the meeting with the journalist. They even mentioned the idea of asking to meet with Taylor themselves to try and have access to some information about why he was there and whether he knows anything about their case.

While the accumulation of evidence is a challenge in any investigation, information dissemination and an enabling of channels of communication would nevertheless seem an important component of an effective investigation. It would also assist in addressing the sense among the group that the Highgate victims have been invisible in the eyes of both the previous and current governments — victims of assumptions about their resilience by the old regime while at the same time being victims because of sensitivities in the eyes of the current government around the fact that the majority of the victims are white. There is a need to feel acknowledged and for their suffering to be recognised by leaders of both the previous and current governments.

5.2.1.3 Keeping survivors informed

In the memorandum submitted to the NPA in December 2006, the Highgate survivors requested regular updates as to the progress of the investigation.

The survivors often articulate a need for a more structured feedback system between them and the NPA. At the very least, this should take the form of written feedback or regular meetings with the group. Any system of formal communication or meeting would go a long way in giving the survivors a sense of being recognised as important stakeholders in the case and would alleviate the frustration and sense of being invisible that they currently feel. It would also help them process the information and work with the developments of the case so that any final decision or outcome does not come as a surprise that leaves them on the back foot, feeling at a disadvantage and therefore unable to articulate what they want from a possible prosecution.

The Highgate survivors requested that the Spirals Trust act as a conduit of information between the NPA and the group. While Spirals has the infrastructure to circulate information among members of the group, this strategy has resulted in members of the group feeling distanced from both the investigator and the process of the investigation. More direct interactions between survivors and investigators would seem in retrospect to be a more appropriate communication strategy, even if a non-governmental organisation or local structure acts as an information conduit and logistical base for the survivors.

5.2.1.4 Ensuring high-quality investigation

Another concern that has been articulated during interviews conducted for this report is how the NPA ensures that quality investigations are carried out.[77] Very little is known about the measures that the NPA takes to ensure that information is followed up on systematically and effectively. This ranges from the way in which people with possible information are handled through to the quality of forensic evidence that might still be useful to the investigation.

The perception of survivors and others that have been involved with the Highgate group is that there must be information "out there" that a high-quality investigation should be able to find. There is a growing concern that some of this information might have been lost because it has not been followed up on with sufficient rigour. Questions are also being asked about why the TRC's records are not being reopened and thoroughly reviewed for information that may have been overlooked in the past. There is confusion in survivors' minds about the extent to which the NPA's activities are about addressing injustices of past or somehow addressing current political dynamics and discourses. As mentioned earlier in this report, the NPA's motivation behind the Vlok plea bargain is not clear, while other investigations and prosecutions of current political leaders gives a muddled sense of the kind of understanding of justice that informs the work of the NPA. Survivors are left with questions about whether their own interests are central to any investigations or whether there are other agendas at work.

The limited information being given to the survivors only fuels these concerns, something that a more comprehensive system of communication would alleviate.

5.3 A cooperative approach to information gathering

At face value, the survivors' and investigators' need for information and sources would seem to be quite different in nature. It might be worth reflecting on whether there are ways to integrate these needs, however.

It could be highly advantageous in a case such as this to establish a task team led by the NPA but consisting of representatives of local police and intelligence units, survivors and family members, community and religious leaders, non-governmental organisations and other service providers. If well coordinated, the team could assist the NPA with information and sources while

[77] Interviews conducted with members of the Highgate Survivors' Support Group in East London on 19 August 2007, and with Daryl Els by telephone on 24 August 2007.

at the same time providing the sense of inclusion and agency for the survivors and local community that has been mentioned several times in this report. A greater level of openness and transparency within such a structure from the NPA about how it monitors the quality of its investigations and ensures that information is dealt with rigorously would also only strengthen both the investigation itself and any eventual outcome.

5.3.1 Decision-making around prosecutions

5.3.1.1 What does justice look like?

Discussions among Highgate survivors often revolve around the concept of justice. There is both a profound anger that so many people's lives were violated by this event and the perception that the perpetrators have been carrying on with their lives all these years without facing the consequences of what they did. Not having any idea of who the perpetrators might have been only fuels this rage and sense of injustice.

The length of time that survivors have been living with an impasse of justice makes any engagement with them about possible future scenarios very difficult. There are so many questions and unknowns that painting future scenarios seems to feel like a waste of time, at least partly because there is a perception that what they say will not be heard by the authorities anyway. There is still also a profound sense of shock that the perpetrators may have been white security force members, leading to many members of the group feeling that they may have been betrayed by their "own kind".

Within the group there are differing views about what they want and need from a process of justice. Some say they will never forgive the perpetrators — that they would like to meet them, look them in the eye and then know that they would spend the rest of their lives in jail.

Others have expressed regret that there is no death penalty in this country; the phrase "an eye for an eye" has been used on a number of occasions. There is a sense for some that the scales of justice will only balance when perpetrators' lives have been taken to balance the victims' lives that were taken.

Another view that emerges during conversations is one of having forgiven the perpetrators but still wanting to see them being held responsible for their actions and accounting for what they did.

5.3.1.2 Incorporating victims' needs

If there is a prosecution, survivors have expressed a desire to be present throughout proceedings. There is hesitancy about being too involved in proceedings as carrying out the prosecution is seen at the Department of Justice's responsibility.

There has been discussion about a possible mediation with perpetrators, but the overwhelming concern is that the perpetrator might lie to them. There is a sense that they have been lied to so often that they are reluctant to trust this kind of process. The idea of having a conversation with the perpetrators comes up again and again, though. Behind it seems to be a need to understand the perpetrator's actions and motivations in ways that a court case might not facilitate. There is also a hope that this will satisfy emotional needs that a court case would not and put to rest some of the many questions that have gone round and round in their minds and conversations during the last 14 years.

5.3.1.3 Dealing with conflicting needs

Any group of survivors consists of people with differing and sometimes conflicting needs. The size of the Highgate survivors' group makes these possible areas of contention and conflict particularly complex, as can be seen in the different perceptions of justice outlined by the members of the Highgate group who were interviewed.

Allowing space for the different needs within a group to surface, be aired and understood and then addressed in a compassionate and just way would seem to be an important issue to explore from the outset of an investigation. It might well be necessary to

set up a range of options or strategies that meet the needs of different members of the group, for example, a mediation with a perpetrator that some members of the group attend as well as a consultation about possible courses of action during prosecution that others might choose to support.

A situation as complex as the Highgate necessitates an openness to complexity on the part of those involved in supporting the survivors in their desire for justice. This complexity has been evident at every stage of the group's process so far and is likely to continue. When handled with a spirit of acceptance that this is the nature and consequence of working in such a situation, differences can be embraced and accommodated in ways that can be very creative and constructive. If they are seen as a problem and the group is asked to speak with one voice and be of one mind, hurtful divisions and splits will inevitably occur.

5.4 Linking prosecutions and other accountability mechanisms

5.4.1 What should perpetrators account for?

Quite apart from the criminal nature of the attackers' actions at the Highgate Hotel in May 1993, the social and personal impacts of the massacre have been massive. The Highgate survivors, their family and friends still live with many burdens and stresses as a result of the massacre.

The Whitfield and Wheeler families lost their breadwinners and struggled to house themselves and put their children through school. Deon Harris's sister was pregnant at the time he was killed and the family still lives with the trauma of that time.

The TRC promised Karl Weber a prosthetic arm, but that has never materialised. Neville Beling needs major reconstructive surgery which is currently financially impossible. Billy Baling has incurred significant medical expenses over the years and is still severely disabled as a result of his injuries. Fishing is his great solace in life, but he cannot walk on the beach due to his injuries and so needs to drive a quad bike to the water's edge. New legislation regarding vehicles on beaches resulted in his fishing licence being revoked. (Fortunately, as a result of pressure from Louise Flanagan, a limited beach access licence was granted in December 2006.) Other survivors who were injured, Nkosinathi Gontshi and Doreen Rousseau in particular, live with constant pain and trauma.

It is impossible for the effects of the massacre to be restored or redressed in full. The primary need that survivors articulate is to know who did it and to hold them accountable for their actions. The survivors have many, many discussions about what would happen if the perpetrators are identified and brought to trial. A common theme that weaves itself through these discussions is a desire for the perpetrators to finally face up to the consequences they ran away from the night of the massacre; to understand and acknowledge the horror and trauma they left the survivors and their families to face with very little support from broader society.

5.4.2 How could perpetrators account to survivors?

If the perpetrators are identified, there is a need for the survivors to see that the suffering they have experienced is being recompensed or acknowledged in some way.

One idea that survivors have mentioned is for the perpetrator to leave their prison cell and help those who were disabled in their homes with all the things they cannot do as a result of their injuries or losses.

Other discussions have revolved around the idea of the perpetrators washing dead bodies in a mortuary every day so that they have a sense of what it's like to be dealing with a dead body.

There is a concern among the survivors that the perpetrators will be given rights and protected from being traumatised in ways that the people at the Highgate Hotel had no protection from during the events and aftermath of the massacre.

However, any eventual prosecution and sentencing is carried out in case such as the Highgate Massacre, it is very important that the survivors are given an opportunity to express their feelings to the perpetrators and personally hold the perpetrators accountable for what they did. The reverse also needs to take place: the perpetrators need to see the impact of their actions firsthand and account to the people whose lives were affected by their choices that night.

The complexity of this case makes it very difficult to imagine what a suitable accountability mechanism might be for perpetrators. It would seem, however, that effective mechanisms are more likely to emerge if survivors are regarded as partners and important stakeholders from the outset of an investigation and prosecution process.

In conclusion, the Highgate Massacre investigation clearly still has a long way to go and there is no knowing whether there will eventually be a prosecution of the perpetrators in open court.

Even though the investigation has been under way for some months now, there are still many opportunities available to explore ways of strengthening how the NPA goes about an investigation of this kind.

The key issue is the role of the survivors. Are they regarded as victims who stand to hopefully benefit from knowing who the perpetrators are and seeing them brought to justice? Or are they seen as central role-players who can provide information, help to guide and support the investigation and find healing through being acknowledged and respected in this way even if the perpetrators are never identified?

An investigation of this nature needs to be seen as not only a legal process, but also one of social and psychological redress. The NPA cannot fulfil all these needs alone, but can act as the coordinating body in which a range of sectors and role-players can work together to achieve as much as possible in the midst of the opportunities and challenges of this case. The survivors and other local community structures can assist the NPA, police and intelligence structures with information gathering while at the same time staying on track with the progress of the investigation. Other structures, such as NGOs and university psychological centres, can provide support through facilitation, therapeutic services and assisting with community healing processes.

There are substantial opportunities for an investigation of this nature to provide healing from wounds and injustices of the past — not only for the survivors but also for South African society at large.

5.5 Concluding remarks on reconciliatory justice[78]

This chapter has attempted to highlight the still complex and contested issues of accountability and justice for apartheid-era violations that still plagues South Africa. Contrary to the international perception that the TRC resolved all the issues about the past, the issue of prosecutions in particular highlights the flaws of both the TRC and the "stick" in the transitional justice approaches in South Africa, namely, prosecutions. The range of dilemmas as evidence in other prosecution approaches in other countries in transition, also plagues the South African situation: in particular the delay in taking forward cases; the insertion of political agendas at critical moment; the limited degree of political will on the issues; as well as broader evidentiary concerns and investigative capacity.

I'd like to end this report with some questions, or issues of concern, which the various sections of the report raise.

- It appears as though much more exploration is needed of the motivations for individuals to apply for amnesty, or rather not to apply when the opportunity arises. While some arguments have been raised — including the fear that the TRC was not even-handed; that political leaders did not take responsibility or show the way forward, knowing there wasn't the interest or

[78] This section was written by Carnita Ernest.

likelihood of investigation (TRC, volume 6, section 3, chapter 1) — these are not very coherent. The link between potential prosecution and coming forward to seek amnesty or indemnity needs much more systematic exploration.

- Is "closure" ever possible? Currently, even around the possibility of prosecutions or a new process of amnesty, arguments are being made for finding a strategy to close the book on apartheid-era atrocities. The TRC also noted this in its 2003 report. However, seeing the length of time it has taken for prosecutions to move forward in Latin America, it does raise the question of whether "closing the book on the past" is possible. Perhaps a process that looks at prosecutions as having a possible end point — rather than the past having an end point — should be explored. Indeed, further truth-recovery options (through additional research, storytelling or mediated dialogue) are indicative of a society that is willing to grapple with its past while moving forward.
- Following from that, just as Varney (2007) argues that there should have been a more coherent strategy around amnesty and prosecutions, we may need to explore the synergies between the various forms of accountability (for example, between prosecutions and more restorative approaches, such as mediations). In particular, has South Africa addressed the need for accountability of those "who bear the greatest responsibility"? And, given that only a few prosecutions will ever go forward, what are the possibilities for defining strategies for priority prosecutions? It would be interesting to hear more about the Priority Crimes Litigation Unit's earlier categorisation of cases to take forward. Civil society could also play a role in determining such strategies.
- The section on the overview of amnesties, pardons and prosecutions, highlights the need for greater transparency around these issues. In what way can information be shared regarding decisions to prosecute, without jeopardising individual alleged perpetrators' rights? The lack of information about how decisions are made fuels mistrust in the justice process. One of the recommendations of the TRC was that an annual report is provided during the budget vote for at least six years after the publication of its Codicil in 2003. (TRC, 2003, volume 6: 727). This has not been done. In particular, the PCLU needs to provide more comprehensive information that can be publicly engaged with.
- Successful prosecutions require all the arms of the criminal justice system (investigators, the prosecutorial arm and the judiciary) to operate effectively and cohesively. As noted in the report, prosecutions have been hampered because these arms have not worked effectively. Greater attention needs to be given to this issue. The human resources — especially in terms of capacity for investigation and prosecution — as well as the financial resources needed for prosecutions must to be clearly articulated.
- The Highgate case study highlights the importance of including victims and citizens in empowering ways in processes of justice. Similar observations have been made around other investigations (for example, see Varney, 2005 on the Malan trial), as well as by the PCLU itself (see Department of Justice, Undated *b*). This is further underlined by international trends. By incorporating victims and citizens, greater appreciation for justice and the rule of law can be built.

APPENDIX 1

APPENDIX A OF THE PROSECUTING POLICY

PROSECUTING POLICY AND DIRECTIVES RELATING TO THE PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST AND WHICH WERE COMMITTED ON OR BEFORE 11 MAY 1994

A. INTRODUCTION

1. In his statement to the National Houses of Parliament and the Nation, on 15 April 2003, President Thabo Mbeki, among others, gave Government's response to the final report of the Truth and Reconciliation Commission (TRC). The essential features of the response for the purpose of this new policy, are the following:

(a) It was recognized that not all persons who qualified for amnesty availed themselves of the TRC process, for a variety of reasons, ranging from incorrect advice (legally or politically) or undue influence to a deliberate rejection of the process.

(b) A continuation of the amnesty process of the TRC cannot be considered as this would constitute an infringement of the Constitution, especially as it would amount to a suspension of victims' rights and would fly in the face of the objectives of the TRC process. The question as to the prosecution or not of persons, who did not take part in the TRC process, is left in the hands of the National Prosecuting Authority (NPA) as is normal practice.

(c) As part of the normal legal processes and in the national interest, the NPA, working with the Intelligence Agencies, will be accessible to those persons who are prepared to unearthing the truth of the conflicts of the past and who wish to enter into agreements that are standard in the normal execution of justice and the prosecuting mandate, and are accommodated in our legislation.

(d) Therefore, persons who had committed crimes, before 11 May 1994, which emanate from conflicts of the past, could enter into agreements with the prosecuting authority in accordance with existing legislation. This was stated in the context of the recognition of the need to gain a full understanding of the networks which operated at the relevant time since, in certain instances, these networks still operated and posed a threat to current security. Particular reference was made to un-recovered arms caches.

2. In view of the above, prosecuting policy, directives and guidelines are required to reflect and attach due weight to the following:

(a) The Human Rights culture which underscores the Constitution and the status accorded to victims in terms of the TRC and other legislation.

(b) The constitutional right to life.

(c) The non-prescriptivity of the crime of murder.

(d) The recognition that the process of transformation to democracy recognized the need to create a mechanism where persons who had committed politically motivated crimes, linked to the conflicts of the past, could receive indemnity or amnesty from prosecution.

(e) The *dicta* of the Constitutional Court justifying the constitutionality of the above process, inter alia, on the basis that it did not absolutely deprive victims of the right to prosecution in cases where amnesty had been refused (see *Azanian Peoples Organisation* v. *The President of the RSA, 1996 (8) BCLR 1015 CC*).

(f) The recommendation by the TRC that the NPA should consider prosecutions for persons who failed to apply for amnesty or who were refused amnesty.

(g) Government's response to the final Report of the TRC as set out in paragraphs 1(a) to (d) above.

(h) The *dicta* of the Constitutional Court to the effect that the NPA represents the community and is under an international obligation to prosecute crimes of apartheid (see *The State* v. *Wouter Basson CCT 30/03*).

(i) The constitutional obligation on the NPA to exercise its functions without fear, favour or prejudice (section 179 of the Constitution).

(j) The legal obligations placed on the NPA in terms of its enabling legislation, in particular the provisions relating to the formulation of prosecuting criteria and the right of persons affected by decisions of the NPA to make representations, and for them to be dealt with.

(k) The existing prosecuting policy and general directives or guidelines issued by the National Director of Public Prosecutions (NDPP) to assist prosecutors in arriving at a decision to prosecute or not.

(l) The terms and conditions under which the Amnesty Committee of the TRC could consider applications for amnesty and the criteria for granting of amnesty for gross violation of human rights.

3. Government did not intend to mandate the NDPP to, under the auspice of his or her own office, perpetuate the TRC amnesty process. The existing legislation and normal process referred to by the President, include the following:

(a) Section 204 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), which provides that a person who is guilty of criminal conduct may testify on behalf of the State against his or her co-conspirators and if the Court trying the matter finds that he or she testified in a satisfactory manner, grant him or her indemnity from prosecution.

(b) Section 105A of the Criminal Procedure Act, 1977, which makes provision for a person who has committed a criminal offence to enter into a mutually acceptable guilty plea and sentence agreement with the NPA.

(c) Section 179(5) of the Constitution in terms of which the NDPP, among others—

(i) must determine, in consultation with the Minister and after consultation with the Directors of Public Prosecutions, prosecuting policy to be observed in the prosecution process;

(ii) must issue policy directives to be observed in the prosecution process; and

(iii) may review a decision to prosecute or not to prosecute.

(d) The above process would not indemnify such a person from private prosecution or civil liability.

4. The NPA has a general discretion not to prosecute in cases where a *prima facie* case has been established and where it is of the view that such a prosecution would not be in the public interest. The factors to be considered include the following:

(a) The fact that the victim does not desire prosecution.

(b) The severity of the crime in question.

(c) The strength of the case.

(d) The cost of the prosecution weighed against the sentence likely to be imposed.

(e) The interests of the community and the public interest.

In the event of the NPA declining to prosecute in such an instance, such a person is not protected against a private prosecution.

5. Therefore, following Government's response, and the equality provisions in our Constitution and the equality legislation, and taking into account the above factors regarding the handling of cases arising from conflicts of the past, which were committed prior to 11 May 1994, it is important to deal with these matters on a rational, uniform, effective and reconciliatory basis in terms of specifically defined prosecutorial policies, directives and guidelines.

B. PROCEDURAL ARRANGEMENTS WHICH MUST BE ADHERED TO IN THE PROSECUTION PROCESS IN RESPECT OF CRIMES ARISING FROM CONFLICTS OF THE PAST

The following procedure must be strictly adhered to in respect of persons wanting to make representations to the NDPP, and in respect of those cases already received by the Office of the NDPP, relating to alleged offences arising from conflicts of the past and which were committed before 11 May 1994:

1. A person who faces possible prosecution and who wishes to enter into arrangements with the NPA, as contemplated in paragraph A1 above (the Applicant), must submit a written sworn affidavit or solemn affirmation to the NDPP containing such representations.

2. The NDPP must confirm receipt of the affidavit or affirmation and may request further particulars by way of a written sworn affidavit or solemn affirmation from the Applicant. The Applicant may also *mero moto* submit a further written sworn affidavit or solemn affirmation to the NDPP containing representations.

3. All such representations must contain a full disclosure of all the facts, factors or circumstances surrounding the commission of the alleged offence, including all information which may uncover any network, person or thing, which posed a threat to our security at any stage or may pose a threat to our current security.

4. The Priority Crimes Litigation Unit (PCLU) in the Office of the NDPP shall be responsible for overseeing investigations and instituting prosecutions in all such matters.

5. The regional Directors of Public Prosecutions must refer all prosecutions arising from the conflicts of the past, which were committed before 11 May 1994, and with which they are or may be seized, immediately to the Office of the NDPP.

6. The PCLU shall be assisted in the execution of its duties by a senior designated official from the following State departments or other components of the NPA:

(a) The National Intelligence Agency.

(b) The Detective Division of the South African Police Service.

(c) The Department of Justice and Constitutional Development.

(d) The Directorate of Special Operations.

7. The NDPP must approve all decisions to continue an investigation or prosecution or not, or to prosecute or not to prosecute.

8. The NDPP must also be consulted in respect of and approve any offer to a perpetrator relating to the bestowing of the status of a section 204 witness and all section 105A plea and sentence agreements.

9. The NDPP may obtain the views of any private or public person or institution, our intelligence agencies and the Commissioner of the South African Police Service, and must obtain the views of any victims, as far as is reasonably possible, before arriving at a decision.

10. A decision of the NDPP not to prosecute and the reasons for that decision must be made public.

11. In accordance with section 179 (6) of the Constitution, the NDPP must inform the Minister for Justice & Constitutional Development of all decisions taken or intended to be taken in respect of this prosecuting policy relating to conflicts of the past.

12. The NDPP may make public statements on any matter arising from this policy relating to conflicts of the past, where such statements are necessary in the interests of good governance and transparency, but only after informing the Minister for Justice and Constitutional Development thereof.

13. The institution of any prosecution in terms of this policy relating to conflicts of the past would not deprive the accused from making further representations to the NDPP requesting the NDPP to withdraw the charges against him or her. These representations would be considered according to the NPA prosecuting policy, directives, guidelines and established practice. The victims must, as far as reasonably possible, be consulted in any such further process and be informed, should the accused's representations be successful.

14. The NDPP may provide for any additional procedures.

15. All state agencies, in particular those dealing with the prosecution of alleged offenders and those responsible for the investigation of offences, must be requested not to use any information obtained from an alleged accused person during this process in any subsequent criminal trial against such a person. Whatever the response of such agencies may be to this request, the NPA records that its policy in this regard is not to make use of such information at any stage of the prosecuting process, especially not to present it in evidence in any subsequent criminal trial against such person.

C. CRITERIA GOVERNING THE DECISION TO PROSECUTE OR NOT TO PROSECUTE IN CASES RELATING TO CONFLICTS OF THE PAST

Apart from the general criteria set out in paragraph 4 of the Prosecuting Policy of the NPA, the following criteria are determined for the prosecution of cases arising from conflicts of the past:

1. The alleged offence must have been committed on or before 11 May 1994.

2. Whether a prosecution can be instituted on the strength of adequate evidence after applying the general criteria set out in paragraph 4 of the said Prosecuting Policy of the NPA.

3. If the answers to paragraphs 1 and 2 above are in the affirmative, then the further criteria in paragraphs (a) to (j) hereunder, must, **in a balanced** way, be applied by the NDPP before reaching a decision whether to prosecute or not:

(a) Whether the alleged offender has made a full disclosure of all relevant facts, factors or circumstances to the alleged act, omission or offence.

(b) Whether the alleged act, omission or offence is an act associated with a political objective committed in the course of conflicts of the past. In reaching a decision in this regard the following factors must be considered:

(i) The motive of the person who committed the act, commission or offence.

(ii) The object or objective of the act, omission or offence, and in particular whether the act, omission or offence was primarily directed at a political opponent or State property or personnel or against private property or individuals.

(iii) Whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organisation, institution, liberation movement or body of which the person who committed the act was a member, agent or a supporter.

(iv) The relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act, omission or offence to the objective pursued, but does not include any act, omission or offence committed—

(aa) for personal gain; or

(bb) out of personal malice, ill-will or spite, directed against the victim of the act or offence committed.

(c) The degree of co-operation on the part of the alleged offender, including the alleged offenders endeavours to expose—

(i) the truth of the conflicts of the past, including the location of the remains of victims; or

(ii) possible clandestine operations during the past years of conflict, including exposure of networks that operated or are operating against the people, especially if such networks still pose a real or latent danger against our democracy.

(d) The personal circumstances of the alleged offender, in particular—

(i) whether the ill-health of or other humanitarian consideration relating to the alleged offender may justify the non-prosecution of the case;

(ii) the credibility of the alleged offender;

(iii) the alleged offender's sensitivity to the need for restitution;

(iv) the degree of remorse shown by the alleged offender and his or her attitude towards reconciliation;

(v) renunciation of violence and willingness to abide by the Constitution on the part of the alleged offender; and

(vi) the degree of indoctrination to which the alleged offender was subjected.

(e) Whether the offence in question is serious.

(f) The extent to which the prosecution or non-prosecution of the alleged offender may contribute, facilitate or undermine our national project of nation-building through transformation, reconciliation, development and reconstruction within and of our society.

(g) Whether the prosecution may lead to the further or renewed traumatisation of victims and conflicts in areas where reconciliation has already taken place.

(h) If relevant, the alleged offender's role during the TRC process, namely, in respect of co-operation, full disclosure and assisting the process in general.

(i) Consideration of any views obtained for purposes of reaching a decision.

(j) Any further criteria, which might be deemed necessary by the prosecuting authority for reaching a decision.

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POSTSCRIPT:
NEITHER LOYALTY, NOR FEAR
Some thoughts on building greater respect for justice and the law in South Africa

DAVID BRUCE

With the support of the Ford Foundation

CONTENTS

ABOUT THIS REPORT

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1. INTRODUCTION

In the midst of the current crisis of crime and violence, it seems almost trite to state that there is a need for greater respect for justice and the law in South Africa. As reflected in some recent studies on organised crime,[1] attitudes of ambivalence towards the law on the part of many South Africans contribute to an environment in which organised, and other crime, flourishes. Known criminals are widely tolerated, or even admired — notably if they are perceived as preying on people from other communities. This forms part of a culture which also condones other illegal practices, spanning everything from the buying of stolen goods and illegal reconnections, to corruption and white-collar crime.[2]

The fact that there is also a significant problem of vigilantism is also obviously a manifestation of a lack of respect for the law. Vigilantism is, in part, motivated by the sense that people have that they need to take the law into their own hands as they cannot rely on the criminal justice system to enforce the law. This belief in the ineffectiveness of the criminal justice system in turn provides vigilantes with the confidence that, in punishing the alleged perpetrators of the original crime, they themselves can violate the law with impunity.

This brief postscript is framed relative to the two other papers in this collection. It reflects on some of the issues raised by discussions of "the crimes of the past" and "the judiciary" relative to the somewhat elusive topic of respect for justice and the law.

2. UNPACKING THE CONCEPTS

2.1 "Respect for justice" and "respect for the law"

The two notions of "respect for justice" and "respect for the law" are slightly distinct. The former appears to refer to the confidence or trust that people have in the criminal justice system[3] — particularly the confidence that it will uphold principles of fairness and evenhandedness in the way in which it treats people and that it will contribute to the achievement of justice, in so far as this is possible, in criminal cases.

The latter idea of respect for the law would perhaps be located within the domain of civic morality.[4] It may be seen to refer to the degree to which members of the public subscribe to the idea that they should in general obey, or conduct themselves in a manner which conforms to, the law.

The notion of respect for justice and the law, while appearing merely to be a hybrid of the two, is perhaps better understood as weighted towards the latter idea. Respect for justice and the law might be said to exist principally if people honour not only the law itself but the institutions that are tasked with upholding it.

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[1] See for instance Irish–Qhobosheane, 2007: 60–63, 86–88, 135–137. Also, Standing, 2006: chapter 4, especially 194–231.

[2] See for instance the results of a global survey of white-collar crime, which indicates that South Africa "has the highest number of companies affected by economic crime in the world" (*Business Day*, October 16 2007*a*). On the opposite page the same newspaper reports that of the 12 million people receiving social grants in South Africa, up to one million are receiving them illegally (*Business Day*, 16 October 2007*b*).

[3] Here understood to refer primarily to the police, courts and correctional system (prisons).

[4] Some aspects of civic morality are directly related to the idea of respect for the law, such as observing the duty to report crime or to pay taxes. Civic morality also may be demonstrated by observing standards of civility towards other members of the public or volunteer activities for the public benefit.

It appears self-evident that respect for justice and respect for the law are intimately connected. This is also supported by evidence that the manner in which people are treated by agents of the criminal justice system contributes not only to respect for (the criminal) justice (system) but to respect for the law itself.[5] Essentially, this appears to mean that people are more likely to voluntarily obey the law if they believe that agents of the criminal justice system will act towards them in a fair way. Treating people fairly does not only contribute to respect for the criminal justice system but may contribute to respect for the law itself. Respect for the law may therefore be seen as the higher level concept which this paper is concerned with, and respect for justice as contributing to it.

2.2 "Crime prevention", "the rule of law" and "social cohesion"

Some of the strategies that form part of the arsenal of contemporary crime prevention do not rely on improving respect for the law.[6] For instance, "target hardening" or "environmental design" measures have the potential to contribute towards crime prevention but are not necessarily predicated on improved respect for the law. People may also be incarcerated, and thereby prevented from committing crime[7] without addressing the question of respect for justice.[8] Crime prevention is therefore possible without improving respect for the law.

However, improvement in levels of respect for the law, particularly among those vulnerable to offending, or vulnerable to colluding with (including "turning a blind eye to") offending, would appear to necessarily reduce crime in that those who respect the law are implicitly more likely to be "law-abiding". In so far as crime can be reduced through building respect for justice and the law this would also reduce the need for (other) forms of crime prevention. Furthermore, in so far as it can be achieved, greater respect for the law would appear to be a more sustainable way of reducing crime, along with other forms of crime prevention which contribute to reducing or removing the motivation to commit crime. In so far as it is viable it therefore appears preferable to crime prevention measures which are predicated on deterring or stopping people, who are motivated to commit crime, from doing so.

Building respect for justice and the law can no doubt be seen as contributing to the creation of a society based on the rule of law. The rule of law is often understood in terms of the adherence by officials of the state to the law, but no doubt is best understood in a more holistic way which includes the question of respect for justice and the law by the citizenry. It seems fairly straightforward to assert that the rule of law will be enhanced if there is greater respect for justice and the law by the broad population of the country.[9]

Finally, it seems reasonable to say that a society where there is a high level of respect for the law is more likely to be a cohesive one. Where respect for the law is limited this may tend to be related to other underlying divisions in society. Here it seems that the primary relationship may be that respect for the law is less likely in a society which is divided and that the potential for respect for the law is enhanced by greater social cohesion.

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[5] See the various sources quoted by Bayley (2002: 143–4). However, it is not clear to what extent this also requires a belief in the effectiveness of the criminal justice system. In other words, in order for people to respect the criminal justice system and, thus, thus the law, it may not be sufficient that criminal justice officials deal with them in a fair way. It may also be necessary that the law is enforced with a reasonable degree of vigour, so that there is a firm sense of the authority of the law.

[6] For a discussion of the range of contemporary crime prevention strategies, see for instance Sherman et al, (1998).

[7] While they are incarcerated they are prevented from committing crimes outside prison but not prevented from committing crimes inside prison, unless steps are taken to prevent this as well.

[8] Note that reporting by members of the public and their cooperation with the criminal justice system as witnesses are in general necessary for the effectiveness of law enforcement. There is likely to be more such reporting and cooperation where there are greater levels of respect for the law. In this sense then respect for the law is a necessary component of strengthened law enforcement. Following Sherman et al (1998*a*, chapter 2: 2), "law enforcement" is understood here as a form of crime prevention.

[9] See AfriMap and Open Society Foundation of South Africa (2005) for a discussion of the rule of law and the justice sector in South Africa. In yet another variation of this terminology, De Vos (2007) refers to "respect for the rule of law".

While they are complex, the principle way in these concepts are understood here is therefore that:

- respect for justice may be seen to be a contributing factor to respect for the law;
- respect for justice and the law may be seen as contributing to the reduction of crime and as displacing the need for (other) crime prevention measures;
- respect for justice and the law may also be seen as contributing to both the rule of law;
- greater social cohesion enhances the potential for respect for the law.[10]

3. RESPECT FOR THE LAW UNDER APARTHEID

In all societies the level of compliance with the law may be seen as reflecting a combination of fear of the adverse consequences of not complying with the law, and of respect for the law which is based on a belief in the law's legitimacy. It would thus be a mistake to say that in any society compliance with the law is essentially one or the other. The degree to which compliance is motivated by fear as opposed to a belief in the law's legitimacy is obviously a matter of degree.

The apartheid system discriminated against people in terms of their race, and the motivation for compliance with the law, were shaped by this factor. While whites tended to see the system as legitimate, black people, to a far greater degree, complied with the laws on the basis of fear. This fear was continually reinforced by the fact that the state relied to a major degree on violence, in exercising its authority, particularly over black people: The police were strongly associated with brutality and torture; capital punishment was used quite liberally;[11] and corporal punishment was also used widely and arbitrarily, both in schools and in the correctional system. From the 1960s onwards, harsh treatment, which contributed to fear, also took other forms such as use of detention without trial, and banning orders.

Nevertheless, the point made by the paper on the judiciary – that there was more than a nominal commitment to principles of independence – also applies to due process. The South African criminal justice system functioned under a system of law[12] and to a significant degree the actions of officials of the criminal justice system were guided by procedures provided for on the statute books, which in some ways reflected due process principles.

The fact that the apartheid system functioned under a system of law may in some ways have brought the rule of law into disrepute. In addition the courts (outside of the homelands) were invariably staffed by white officials, and the justice that was dispensed often reflected their racial prejudices. As a result the standards of justice as experienced by black South Africans were uneven, and there were likely to have been systematic miscarriages of justice.

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[10] On a theoretical level it is therefore possible to argue that there is a key causal relationship between each of these concepts (respect for justice, crime prevention, social cohesion) and the concept of respect for the law. For instance, one may argue that respect for justice is a component of "respect for the law". However, ultimately it would appear that the relationships between each of these concepts is in some ways "bi-directional", in that the causal relation relationship works both ways, for example:

- Respect for the criminal justice system ← contributes to → Respect for the law.
- Respect for the law ← contributes to → Crime prevention.
- Respect for the law ← contributes to → The rule of law.
- Social cohesion ← contributes to → Respect for the law.

[11] From the creation of the Union of South Africa in 1910 until the end of 1988 over 4 200 people were hanged in South Africa. From 1978 until the end of 1988 a total of 1 335 people were executed in South Africa (excluding the nominally independent 'homelands'), the number exceeding 100 each year except for 1981 and 1983. (Coleman, 1998:82).

[12] An analysis of periods of increasing repression such as that during the mid-1980s would no doubt note that the state sought both to widen the legal scope for repressive action, as well as resorting increasingly to extra-legal actions such as killings (including "disappearances" and overt assassinations) and the increased use of torture. See for instance Coleman, 1998.

Similarly, there was only the smallest of pretences towards investigating violations of human rights which were committed by officials of the state or their allies with only a handful of prosecutions ever undertaken by the state in this regard. Where inquests were held into deaths in detention, and stronger evidence or argument presented to the inquest court by the representatives of the family of the deceased person, magistrates would still go out of their way to exonerate the security policemen or other officials who might be implicated.[13] The rare state-appointed judicial commissions of inquiry into some of the more prominent police massacres during public protests, also systematically exonerated the police from culpability. A similar lack of vigour or enthusiasm permeated the criminal justice system in relation to the bulk of crimes to which black people were victims, whether this was at the hands of black, and, even more so, white people. Effectively therefore there was a wide variety of human rights violations and crimes in relation to which the state was largely disinterested in taking action, feeding into a broad culture of lawlessness and impunity.

Nevertheless, there was some level of law enforcement, and where black people were brought to court, also instances where innocent accused were acquitted or had the charges against them withdrawn. So, the operation of the system was not without its own ambiguities and contradictions, and there was an enduring pretence of fealty to the principles of due process. The system tarnished its own image. But within the system there was some flawed tradition of respect for basic principles of justice which, in a muted way, made its presence felt.

The establishment of a democratic South Africa in 1994 therefore took place on the foundation provided by political system which, while it was highly repressive, also contained some history of operating under the rule of law.

There are clearly many challenges in building a cohesive and law-abiding South African nation and some of these are in the domain of building greater respect for justice and the law. Nevertheless it appears clear that the current criminal justice system enjoys a certain level of respect and legitimacy[14] and that, notwithstanding widespread crime, there are also many South Africans who are essentially law-abiding. Notwithstanding the fact that the criminal justice system under apartheid was a key instrument of oppression, the fact that some level of respect for justice, and thus respect for the law, does exist, is not entirely an achievement of post-1994 South Africa, but also reflects the impact of a longer tradition of respect for the law and for legal process, in South Africa.

4. THE TRANSITION TO DEMOCRACY AND THE CRIMES OF THE PAST

One of the products of the negotiated transition to democracy in the mid-1990s was the Truth and Reconciliation Commission (TRC) which began operating in December 1995 and published the final volume of its final report in 2003.[15] Arguably the core component of the TRC was the amnesty committee, which had the power to grant amnesty to people who had been involved in human rights violations which were committed during the 1960 to 1994 period. The granting of amnesty depended on the applicants meeting certain conditions including full disclosure of the human rights violations which they had committed.

As is characteristic of most truth commissions, the period of operation of the TRC coincided with the first years of the newly established democratic government in South Africa. This therefore created the paradoxical situation that "apartheid's assassins

[13] See for instance Bizos, 1998.

[14] See for instance Burton et al (2004) especially pages 76, 84 and 86. Also see Kotze (2003) as quoted in Davis (2005).

[15] See for instance Hamber and Kibble (1999) for a fuller discussion of the background to and functioning of the Truth and Reconciliation Commission.

walked free" on the basis of TRC amnesties, thereby "breathing life into the culture of impunity"[16] at the very point where South Africa was trying to establish the foundations of the rule of law under the new democratic dispensation.

But if the TRC process did in some way reinforce impunity, it at least provided for a limited form of accountability, which was an improvement on the generalised absence of accountability under apartheid. In so far as dynamics relating to the (non-) prosecution of perpetrators of apartheid era human rights violations contributed to impunity, the more important factor is likely to have been the absence of any significant programme of prosecutions against the large number of such perpetrators who had failed to apply for amnesty.[17] It would seem reasonable to assume that, if it had been possible to engage in a programme of vigorous prosecutions of perpetrators of apartheid-era human rights abuses after the ending of the TRC, this would have contributed to the credibility of the law. But this would have required the state to feel that it had the political space, authority and resources to engage in such an endeavour.

In retrospect, it seems clear that there were substantial reasons why such a programme of prosecutions was not undertaken. The politics of the negotiated transition to democracy, which resulted in the establishment of the TRC process, themselves reflected the fact that "the 'losers' in the South African transition nevertheless retained the ability to overthrow [or] destabilize"[18] the new regime. This was no less the case after the window for amnesty applications[19] had been closed. The principal political danger of such a programme would have been that it would have strengthened the prospects of right-wing mobilisation, and even armed insurrection, against the new regime.[20] Increased political tension would also potentially have directly undermined the political focus on national reconciliation, seen as the crucible for binding together a previously deeply divided nation.

But even in the absence of such security and nation-building considerations there were other reasons why such a programme was not viable. This had to do with the capacity of the criminal justice system to undertake such prosecutions. The need for prosecutions for crimes of the past arose in South Africa at the very moment when the capacity of the criminal justice system to undertake such prosecutions would have been at its lowest. In a context of a South African nation entering a new era after decades of institutionalised racial discrimination, it seems inevitable that the concern with redressing the impact of discrimination and of improving the representation of black South Africans in state structures, should have been given priority. But rapidly changing the racial profile of state structures invariably destabilises, and undermines the effectiveness of, such structures.[21]

While affirmative action may be seen as having weakened the capacity of the criminal justice system, the alternative would have also presented its own problems. In the absence of a strong emphasis on affirmative action, a vigorous programme of post-TRC prosecutions would have implicitly required a reliance on the largely "untransformed" courts and prosecutions service, in effect relying on the functionaries of the old order, to prosecute and sit in judgment on their former colleagues.

At the time of the TRC and immediately afterwards, the upsurge in crime was placing the criminal justice system under a high level of stress. A decision to focus on prosecuting apartheid-era perpetrators of human rights violations would in effect therefore have been a decision to focus the resources of a weakened criminal justice system on the perpetrators of past human rights violations — in effect diverting the available resources away from dealing with the current crime crisis. But even in the absence of such an upsurge of violent crime, a state which had the will to carry out such prosecutions would have had to choose between the services of skilled and experienced state functionaries from the apartheid period, or those who, perhaps uncontaminated by their past associations, lacked the experience to take on this formidable task.

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[16] The quotes are from Simpson (2001: 216, 225).

[17] In addition to reinforcing impunity it of course also detracted from the credibility of the whole TRC process.

[18] Hamber and Kibble. See footnote 14 above.

[19] 30 September 1997. (TRC Final Report, 2003, volume 6.1.2: 24) Quoted in Rauch, 2004.

[20] See Sikkink and Walling (2007), who question the assumption that prosecutions and trials do in fact contribute to the likelihood of instability.

[21] See for instance Southall, 2007, especially 6–8.

While the prosecution of apartheid-era human rights violations would in theory have contributed to the authority of the law, it seems reasonable to assume, that this could really only have contributed to enhancing overall levels of respect for the law, if this had not been at the expense of similarly vigorous prosecutions directed at persons accused of engagement in "ordinary" criminal activity, particularly in the post-apartheid period. In other words, the core argument here appears to be that, in order to build the authority of the law in a credible way, part of what would have been necessary would have been a vigorous overall programme of law enforcement directed at those reasonably suspected of both past, and contemporary, violations of the law.

Instead of any large-scale programme of prosecutions for past human rights violations, the programme of prosecutions that was initially undertaken was relatively modest in scale. Of the main prosecutions that were launched, only one, the prosecution of Eugene de Kock, was successful, and this prosecution was obtained by giving a number of others indemnity against prosecution, itself a form of "back door" amnesty process. The two other big prosecutions, against Magnus Malan and Wouter Basson, were unsuccessful, partly defeated, it would seem, as a result of the role played by former apartheid-era criminal justice functionaries in crucial decision-making positions in these two trials.[22]

The defeat of these key efforts at holding officials of the apartheid regime accountable for apartheid-era crimes must have contributed to a sense of the potential difficulties involved in engaging in such prosecutions. These acquittals no doubt reflected the facts, referred to by the Constitutional Court in the Azapo judgement, that:

> Much of what transpired in this shameful period is shrouded in secrecy, and not easily capable of objective demonstration and proof.[23]

But piercing the veil of denial and secrecy is in many ways what criminal investigation and prosecution is all about. The lack of enthusiasm for such prosecutions not only reflected the perception that such prosecution would have a serious political cost, but also the weaknesses and paradoxes of the available investigation, prosecution and justice mechanisms in the post-apartheid period.

5. RESPECT FOR JUSTICE AND THE TRANSFORMATION OF THE JUDICIARY

From a perspective in terms of which building respect for justice and the law during the transition was seen as a priority, affirmative action, in the short-term at least, may be seen as having been something of a double edged sword. Both within the prosecution service and the judiciary, addressing issues of representation would have contributed to improving the credibility of the criminal justice system in the sense that people would feel a greater sense of identification and affinity with those presiding over criminal cases. Addressing issues of representation would therefore itself potentially contribute to the credibility of the law. At the same time it also involves bringing in many inexperienced personnel, thereby detracting from the quality of decision-making and efficiency of the overall system.

But, as reflected in the 8 January 2005 statement of the African National Congress, the issue of transformation was concerned not only with questions of representation, but also with questions to do with the values – what the ANC called the "mindset" – of the judiciary. As the ANC defined it, the problem here was that:

> ... many within [the] judiciary do not see themselves as being part of these masses, accountable to them, and inspired by their hopes, dreams and value systems. If this persists for too long, it will inevitably result in popular antagonism towards the judiciary and our courts, with serious negative consequences for our democratic system as a whole (ANC statement, 8 January 2005).

[22] Both trials are discussed briefly in Ernest (2007).

[23] *The Azanian Peoples Organisation (AZAPO) and Others* v. *The President of the Republic of South Africa,* CCT 17/96: 17.

The solution then, as the ANC framed it, was to:

> ... transform the collective mindset of the judiciary to bring it into consonance with the vision and aspirations of the millions who engaged in struggle to liberate our country from white minority domination.

As the ANC expressed it, the problem was purely one of the "consonance" of the judiciary with popular "vision and aspirations". It did not appear to acknowledge that these might not themselves be in concordance with the principles and values which the judiciary itself is compelled to uphold.

The potential for popular antagonism, which the ANC statement had warned of, was reflected a few months later at the beginning of June 2005, in the aftermath of the conviction of Schabir Shaik. Due to the fact that the court's judgment against Shaik was seen to implicate then Deputy President Jacob Zuma, the latter's supporters launched a vitriolic campaign aimed at discrediting the judge responsible for it. Rather than having substantive grounds for believing that the impartiality of the judge had been compromised, or that the judge had misinterpreted the law, Zuma's political allies chose to attack the judge and his judgment, because this was seen to threaten their political agenda. Had circumstances been different and the judge reached a guilty verdict in Zuma's rape trial a year later, it is reasonable to assume that similar attacks would have been made on this judge as well. It even appears that a guilty verdict might have sparked demonstrations, potentially violent, against the findings of the court.[24]

The subsequent endorsement of Shaik's conviction by both the Supreme Court of Appeal and the Constitutional Court would appear to provide confirmation of the fact that the judgment was wholly in line with the key values that the judiciary is supposed to uphold in terms of the Constitution, which includes an emphasis on the supremacy of the rule of law.[25]

In line with this it would seem that the judiciary must also be prepared to face popular antagonism in certain circumstances if it is going to be willing to uphold the core principles that it is supposed to stand for, and be willing to apply the law without "fear, favour or prejudice".[26] In fact, it would seem that one of the measures of the degree to which the judiciary has been transformed may be its willingness to incur popular antagonism, in circumstances where popular will would appear to require that it compromise its adherence to the principles of justice which it is supposed to apply.

If, as then Chief Justice Arthur Chaskalson explained it, the ANC's statement merely "reflected the widely agreed upon need for further judicial transformation, especially with regard to creating a more rights-oriented and socially conscious judiciary",[27] then it would seem that that popular antagonism should not be regarded as a necessary measure of whether the judiciary is acting in a manner which is consistent with these objectives.

There is then a tension within the idea of building respect for justice and the law, as a judiciary (and criminal justice system) which upholds the law and seeks to ensure that justice is done cannot simply align itself with popular opinion, and may sometimes incur popular antagonism. This may be in cases where popular political figures come into conflict with the law, or in other cases where the reading given to the facts by judges or other criminal justice officials are not in line with popular assumptions or prejudices. This tension is one that cannot be resolved by compromising the principles which the judiciary is intended to uphold.

Ultimately it must be hoped that there will be a growth and strengthening of popular acceptance and confidence in the need for an independent judiciary, in the authority of the courts, and in the fact that the law will be fairly and properly applied.

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[24] The episode is dicussed in Matshiqi (2007).

[25] See section 1 of the Constitution.

[26] See section 165(2) of the Constitution.

[27] Quoted in Gordon and Bruce, 2007.

This acceptance cannot be based on the judiciary compromising its principles to avoid popular antagonism. How to build and strengthen such acceptance and confidence is therefore a crucial issue.

An aspect of this would appear to be public confidence in the independence of the judiciary. It appears reasonable to affirm that, if public acceptance and confidence is to be built, it will also be of little service to tamper with the independence of the judiciary, in the belief that this is necessary to ensure proper "transformation". The constitutional provisions regarding the composition of the Judicial Services Commission ensure that persons appointed by or representing government are represented on the JSC, and that government is therefore able to contribute to JSC deliberations and have an influence on JSC decisions.[28] While the President is given special authority in appointing the members of the Constitutional Court, the Judicial Services Commission is effectively responsible for appointing all other judges.[29] These controls should essentially be regarded as a sufficient mechanism for ensuring that suitable people are appointed to the judiciary. It should therefore not be necessary for the government to control judicial education, or other aspects of the judiciary, in order to achieve the right kind of judiciary.

Public acceptance and confidence will also require confidence in the integrity of the judiciary which requires that judges themselves be held accountable in terms of proper ethical standards. This brings to the fore the current controversy over the decision of the Judicial Services Commission not to take action against the judge president of the Cape High Court, in relation to serious improprieties. It is to be hoped that the decision does not reflect a potentially racialised ambivalence or absence of will to hold judges accountable to high standards of conduct.[30]

Questions of representation also have to be addressed on an ongoing basis, though this must be accompanied by "systematic attention to human resource development, capacity building and training"[31] if they are not undermine judicial performance. Ultimately this is not to also to say that it is sufficient for the judiciary to be independent, observe high standards of integrity and be representative. While the judiciary cannot necessarily be guided by popular opinion, it must also work in a way which reflects a sensitivity to the perceptions and feelings of ordinary people.

The judiciary must carry out its work in line with the principles of the Constitution and the law. But the Constitution in its preamble expresses the commitment to "establish a society based on democratic values, social justice and fundamental human rights". Commitment to the Constitution therefore requires that judges transcend a mechanistic legalism and may be taken to imply too that judges should be, what Justice Chaskalson referred to as "socially conscious" and even that they be informed by what the ANC referred to as the "hopes, dreams and aspirations" of the people of South Africa.

6. CONCLUSION

The papers in this collection highlight issues that are directly relevant to the question of building respect for the law in South Africa. Greater respect for the law is clearly a profoundly important element of any attempt to build a South African society which is essentially law-abiding, and where daily life is not threatened by crime, and particularly violent crime, in the way that it is today.

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[28] As provided for in section 178(1) of the Constitution, the Judicial Services Commission is also supposed to include, among a number of other members, "four persons designated by the President as head of the national executive, after consulting the leaders of all the parties in the National Assembly" as well as "the Cabinet member responsible for the administration of justice, or an alternate designated by the Cabinet member.

[29] Section 174 of the Constitution gives the President an influence over the appointment of judges to the Constitutional Court but all other judges are to be appointed by the President "on the advice" of the Judicial Service Commission.

[30] For aspects of the issue see for instance Kriegler (2007) and *Business Day*, 19 October 2007.

[31] Southall, 2007: 8.

On one level the advent of a constitutional democracy in South Africa inherently holds the potential for building a society which is to a significant degree based on widespread support for the justice system and the law. The constitutional ideal that people can be accorded dignity by their society holds the potential that the recognition of dignity will be reciprocated, and translated into respect for justice and the law. On a practical level the emphasis on respectfulness is partly carried forward in government policy documents which emphasise that public servants should engage with members of the public in a polite and respectful way.[32] It is to be hoped that within the criminal justice environment, this focus will be given further emphasis, and that it will not be undermined notwithstanding the current emphasis on strengthening anti-crime measures.

But even in a democracy respect for the rule of cannot be obtained purely on the basis of the legitimacy of the state or the respectful manner in which people are treated. The rule of law must at least in part be created by the state demonstrating continuously that it has the will and the capacity to enforce the law against those who infringe it. "Respect for the law" is likely to be particularly inadequate unless there is at least some element of deterrence arising from probability of punishment if one commits crime, even if this probability falls short of absolute certainty.

The discussion in this paper of the state response to the crimes of the past highlights the problem of the lack of authority of the law in South Africa. The perception that one can engage in crime with impunity is partly a product of the history of impunity in South Africa under apartheid. It may also have been reinforced by the relative absence of any meaningful process of prosecution against perpetrators of past human rights violations who failed to apply for amnesty from the TRC. But, in turn, the relative absence of such prosecutions is not merely a symptom of the politics impediments to such prosecutions but also reflects the broader weaknesses of the South African criminal justice system, and the problem which it faces in establishing a sense of the authority of the law in the face of a major crime wave.

In terms of the judiciary, it would appear that the protracted dispute over the judicial bills — which reached a head in the middle of 2006 with the withdrawal by the State President of the key judicial bills — may be seen to have exacted no ultimate cost to judicial independence.[33] At the same time the dispute may be said to have deepened understanding about, and therefore strengthened, the independence of the judiciary. The resulting reinforcement of the independence of the judiciary stands us in good stead in building respect for justice and the law, as compromises to judicial independence are also likely to compromise public respect. The progress which has been made in improving representation of previously disadvantaged groups in the judiciary has also no doubt contributed to the potential for public acceptance of the judiciary and the law.

But in so far as respect for justice depends on public confidence in the integrity of the judiciary it is necessary to be more reserved. The introduction of the new Judicial Services Commission Amendment Bill, and its provision for a judicial code of conduct and a judicial conduct committee, are positive signs that questions of judicial ethics and accountability are being addressed.[34] But the recent response of the Judicial Services Commission to the allegations against the judge president of the Cape High Court raises questions about whether any committee which may be established will have the will to hold judges to the standards of conduct provided for in the yet-to-be-drafted code.

A further issue that is not addressed in the above discussion but that obviously has major implications for building respect for the law in South Africa, is the question of equality before the law, specifically whether there is a sense in South Africa that the law is enforced against people irrespective of the office which they hold, or how much wealth they have at their disposal. The Jacob Zuma saga has been, and continues to be, profoundly ambiguous in this regard.[35] At the same time that it seemed

[32] See for instance the Batho Pele principles first enshrined in the White Paper on Transforming Public Service Delivery (1997) which provide for instance under 'ensurign courtesy' that this 'requires service providers to empathize with the citizens and treat them with as much consideration and respect, as they would like for themselves'. Department of Public Service and Administration) as well as the Service Charter for Victims of Crime in South Africa (Department of Justice and Constitutional Development, 2004).

[33] This episode is discussed in more depth in Gordon and Bruce (2007).

[34] See also Gordon and Bruce.

[35] Discussed in more detail in Matshiqi (2007).

to demonstrate that those holding high office are not immune to being held accountable by the law, it was taken by others as proof that the criminal justice system was engaged in selective prosecution. In another notable case where a senior politician was convicted in court, that of Tony Yengeni, the impression in the public domain was that he was treated very leniently by the prison authorities, released from prison prematurely, and not held accountable for his misconduct while on initial day parole. Currently public perceptions are also that the suspension of the National Director of Public Prosecutions pending a commission of inquiry is primarily because of an arrest warrant drawn against the South African Police Services national commissioner, and that the suspension is intended to shield the national commissioner from being brought to account before the law.

There are therefore serious issues of authority, integrity and the application of the principle of equality before the law, which, if not properly addressed, will undermine the potential for building respect for the law in South Africa. But all of these issues also beg questions about the broader foundations of respect for justice and the law. In a society characterised by profound inequality where consumer status symbols have come to be seen as marks of personal worth, many people feel limited in their ability to be recognised by their fellow citizens as deserving of dignity and respect. Extravagant and conspicuous consumption in a context of high inequality therefore undermines the potential for social cohesion as well as contributing to dynamics that detract from the motivation that people may have to be law abiding.

In the 1990s South Africa underwent a profound process of political and social change as a result of which we now enjoy the benefits of living in a democratic order. But South Africa continues to reproduce the relationships of the apartheid era as a result of its profound inequalities. Black people have become full citizens politically but many are still excluded on other levels.[36] At the same time many whites, particularly those who are still invested in their apartheid era racial perceptions, feel excluded from the political system, feeding into an absence of the sense of obligation to observe standards of civic morality. Simultaneously large immigrant populations have been absorbed into the South African populace, some of them with limited or no commitment to the South African polity and from original contexts where the law anyway had limited traction. The potential for establishing a greater level of respect for the law in South Africa may therefore depend on whether South Africa is able to achieve a type of change which more effectively integrates these disparate elements into a single nation.

The weaknesses of the authority of the criminal justice system and of the law are therefore paralleled by social cleavages which combine with other dynamics which limit civic morality and feelings of citizenship. As a result the South African state is neither able to rely on authority, nor on loyalty of its subjects, to motivate respect for the law. There is clearly a need for increasing the effectiveness of the criminal justice system. But if a more profound level of respect for the law is to be established, this may also depend on achieving the level and type of social change which can create a more cohesive South African nation.

[36] See Young (2002) on the dynamics this type of combination of inclusion and exclusion contributes to.

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