

South Africa

There have been several controversies over judicial appointments as the judiciary is faced with the challenge of developing itself to represent the modern South Africa. Calls were also made during the year to increase judicial accountability. Substantial efforts are being made to correct the injustices of the past, however, serious human rights violations still remain. However, the respect for human rights remains fundamental to South Africa's new constitutional system. The judiciary is independent and has issued several landmark judgements on human rights.

In April 1994 South Africa held its first democratic and universal elections. This marked the end of the era of apartheid that had subjected non-white residents of South Africa to a policy of systematic discrimination and segregation. The elections were the culmination of a process that commenced in 1990 with the legalisation of the African National Congress (ANC), the Pan Africanist Congress (PAC), the South African Communist Party (SACP) and the release of political prisoners by the then President, F W de Klerk. Mr Nelson Mandela was elected as the President and the ANC obtained 62% of the vote. Elections were held again in 1999 where the ANC extended their majority in the National Assembly and Mr Thabo Mbeki was elected as the new President.

The 1997 Constitution of the Republic of South Africa contains an extensive bill of rights and is based on the principles of democracy, human rights and the Rule of Law. It creates a government structure based on a separation of powers between the legislature, the executive and the judiciary.

Although the Republic of South Africa is not a federal state the Constitution creates three levels of government, national, provincial and local. The National and Provincial levels share legislative power. The main legislative power is vested in the parliament, consisting of the National Assembly and the National Council of Provinces. The National Assembly contains four hundred members elected in popular proportional elections for a term of five years. The National Council of Provinces contains ten delegations from each of the nine provinces. These delegations consist of the Premier of the province or a member of the provincial legislature, three special delegates and six permanent delegates. The permanent delegates cannot be members of the provincial legislature. Legislation requires the assent of both houses of parliament and the President before it enters into effect.

Each province has a legislature that is competent to pass a Constitution for its province and legislation in certain limited areas, generally related to issues that are purely of concern to the province. It is also elected for a period of five years.

The executive authority of the Republic of South Africa is vested in the President. The President is elected by the National Assembly for a term of five years and can only hold office for a maximum of two terms. The Cabinet, consisting of members of the National Assembly, are appointed by the President and assists he or she in exercising this power. The executive authority of the provinces is vested in the Premier assisted by a provincial executive council. In cases of conflict between national and provincial action, national action takes precedence. Local governments have some executive power over municipal issues.

Human Rights Background

After decades of systematic discrimination against the non-white population of South Africa the country has moved forward into a new period where the respect for human rights takes a pre-eminent position within the social and political context. The 1997 Constitution contains an extensive Bill of Rights and places the protection and promotion of human rights as the "cornerstone of democracy" within South Africa.

Chapter 2 of the Constitution contains the Bill of Rights which protects many fundamental civil, political, economic, social and cultural rights. A positive responsibility is placed on courts to develop the common law to give effect to rights contained in the Constitution, to the extent that they are not effectuated through legislation. In giving effect to these rights courts are required to consider international law and must promote the spirit, purport and object of the Bill of Rights.

The Constitution creates several institutions to ensure the promotion and protection of human rights. The Human Rights Commission (HRC), created by Chapter 9, Title 2 of the Constitution, is responsible for the promotion and monitoring of human rights issues and is empowered to investigate and to take steps to secure appropriate redress where human rights are violated. Under the terms of Section 38 of the Constitution, the HRC can take legal action on behalf of a person to ensure that their rights are enforced. Two other commissions have been created for specific rights issues, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities and the Commission on Gender Equality.

The government has ratified many of the basic human rights treaties. In December 1998, the government ratified the International Covenant on Civil and Political Rights; the International Convention on the Elimination of All forms of Racial Discrimination; the Convention on the Prevention and Punishment of the Crime of Genocide and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Regionally, South Africa is a party to the African Charter on Human and Peoples' Rights. It also has signed the Statute of the International Criminal Court

Despite this structure for the protection of human rights, violations are still prevalent and are of concern. The police and security forces use excessive force and commit extra-judicial killings. The Independent Complaints Directorate (ICD), which investigates complaints against the police, reported that 450 deaths occurred in 1999 because of police action, with 192 of those occurring in police custody. The ICD also reported that between April and November 1999 there were 24 cases of torture and 8 cases of rape by police and security forces. Political violence between the ANC and the IFP also continues to be a problem.

Crime also continues to be a serious problem. There are high levels of murder, theft and assault. Women routinely face discrimination and violence. Incidents of female rape are extraordinarily high, with the South African Police Service reporting that between January and June 1999 there were 23,900 reported cases of rape. Also, although the official policy of apartheid has ended, massive social and economic inequalities resulting from that era still exist between the white and black populations.

The Judiciary

The structure of the South African judicial system is set out in Chapter 8 of the Constitution. Section 165 guarantees the independence of the courts and requires the organs of the state to

assist and protect the courts to ensure their "independence, impartiality, dignity, accessibility and effectiveness." Chapter 2 of the Constitution, in Articles 34 and 35, guarantees everyone the right to have a dispute or trial heard by a fair, impartial and independent court. There is a single national prosecuting authority responsible for the institution of criminal proceedings on behalf of the state. It is headed by the Director of Public Prosecutions who is appointed by the President. The Constitution provides that national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice. The Judicial Service Commission is empowered by Section 178(5) of the Constitution to advise the national government on any matter relating to the judiciary or the administration of justice.

The judiciary was not reconstituted along with the other organs of state at the end of the apartheid era. The judges that were appointed under an official policy of apartheid continued to serve as members of the judiciary and perform their functions under the new Constitution. This has led to a certain lack of faith in the judicial system and efforts to achieve a more equal racial balance, as there is a popular belief that the judiciary does not properly reflect post-apartheid South Africa.

The court structure consists of the Constitutional Court, the Supreme Court of Appeal, the High Courts, the Magistrate Courts and any other court established by an act of parliament.

The Constitutional Court

The Constitutional Court is the highest court in constitutional matters and was established in 1994 under the interim constitution and continued to operate under the 1997 Constitution. Its jurisdiction is limited to constitutional matters and issues connected with decisions on constitutional matters, i.e. any issue involving the interpretation, protection or enforcement of the Constitution. However, the court has the final power in determining whether a relevant subject matter concerns a constitutional question. In exercising this power it can, inter alia:

- decide on the constitutionality of any bill or legislation at the national or provincial levels: s164(4)(b) and (c)
- decide disputes between organs of state at the national or provincial level on issues concerning constitutional status, or powers and functions: s164(4)(a)
- decide that the parliament or the President has failed to fulfil a constitutional obligation: s164(4)(e)
- decide on the constitutionality of any amendment to the Constitution: s164(4)(d)

In any constitutional matter decided by a lower court, the Constitutional Court is required to confirm an order for invalidity issued by that court. The court consists of eleven judges headed by a President and Deputy President and any matter must be heard by at least eight judges. Judges of this court are appointed for a non-renewable term of 12 years but must retire at the age of 70. The current President of the court is Justice Arthur Chaskalson.

The court has gained international recognition with its landmark decisions in a number of human rights matters, including the death penalty and the area of economic, social and cultural rights.

The Supreme Court of Appeal

The Supreme Court of Appeal, created by Section 168 of the 1997 Constitution, is the highest court of appeal, except in constitutional matters. It replaced the Appellate Division of the Supreme Court. Its jurisdiction only covers appeals and issues connected with appeals and any other matters assigned to it by an act of parliament. The decisions of this court are binding on all courts lower than it. Civil cases are heard by five judges and criminal cases by a minimum of three. The court is headed by a President and Deputy President and as many other judges of appeal as determined by an act of parliament. Currently there are nineteen appellate judges, headed by Chief Justice Ismail Mahomed. Its seat is in Bloemfontein.

High Courts

The High Court is created under Section 169 of the 1997 Constitution. It has jurisdiction in any constitutional matter except those exclusively reserved to the Constitutional Court and in any other matter not assigned by an act of parliament to another court. This court usually exercises its general residual jurisdiction in civil or criminal cases of a serious nature not assigned to Magistrate or Regional Courts. Former provincial or local divisions of the Supreme Court of South Africa became High Courts under the 1997 Constitution. Currently there are 10 provincial High Court divisions and three local divisions.

A Commission on the Rationalisation of the Provincial and Local Divisions of the Supreme Court (the Hoexter Commission) was formed to reshape court structures and areas of jurisdiction. As a result of this commission legislation has been proposed to rearrange the geographical boundaries of the High Courts and to provide that appeals in the first instance shall be made to a provincial Court of Appeal. These courts shall be staffed by High Court judges and act as an intermediate appellate step to the Supreme Court of Appeal.

Magistrate Courts

Magistrates Courts are the courts of first instance and decide all matters as provided for by an act of parliament, but may not decide on the constitutionality of any legislation or on any conduct of the President. These courts have jurisdiction in civil matters where the value of the claim does not exceed 100,000 South African rand and in criminal matters where the sentence does not exceed three years imprisonment or a fine of 60,000 rand. A Magistrates Court cannot hear the offences of treason, murder or rape. There are 432 Magistrates Courts served by 1,453 magistrates.

Other Courts

Regional courts are created under the Magistrates Court Act and are divisions of Magistrate Courts consisting of a number of Magistrate Court districts. These courts hear cases involving serious criminal offences except treason. Cases are heard by a single regional magistrate who may impose a prison sentence of up to fifteen years imprisonment. There is no right of appeal from a Magistrate Court to this court.

When a person is charged with an offence relating to the security of the state or the maintenance of public order, a Special Superior Court may be constituted to hear the case. This court can only be formed if the Minister of Justice is of the opinion that the interests of justice or of public order would be better served if the accused were tried in such a court. The court will then be constituted by the President and a bench of three judges from the High Court appointed by the judge President of the Court. These courts have rarely been created,

usually only for the offence of treason, and no such court has been constituted since the 1950's.

Several other courts exist to hear specific subject matters. The Land Claims Court was established in 1996 to hear disputes arising from the Restitution of Land Rights Act 1994 and the Land Reform (Labour Tenants) Act of 1996. The court decides appropriate forms of restitution for people who have been dispossessed of their land under racially discriminatory laws and practices, and protects labour tenants from eviction without an appropriate court order. This court has the same status as a High Court and appeals lie from it to the Supreme Court of Appeal. Other courts, such as Labour Courts and Small Claims courts, also exist.

Judges

Varying procedures exist for the appointment of judges, depending on the court and seniority of the position, but the President, as head of the executive, officially appoints all judges. Section 178 of the Constitution creates a Judicial Service Commission to assist the executive in the appointment of judges. This commission consists of 23 representatives from the judiciary, the legal profession, parliament and other members designated by the executive. Members of the Commission are selected by the respective bodies that they represent which generally ensures that the Commission is independent and bipartisan. There is also a constitutional requirement, in Section 174, that when a judicial officer is appointed consideration must be given to the need for the judiciary to broadly reflect the racial and gender composition of South Africa.

The President appoints judges to the Constitutional Court after consulting the leaders of the parties in the National Assembly and the President of the Constitutional Court. The Judicial Services Commission supplies the President with a list of nominees from which the President may make an appointment. The President and Deputy President of the Constitutional Court are appointed by the President, after consultation with the Judicial Service Commission, and the leaders of the parties represented in the National Assembly. The Chief Justice and Deputy Chief Justice are appointed by the President after consultation with the Judicial Service Commission. The judges of all other courts are appointed by the President on the advice of the Judicial Service Commission.

The tenure and remuneration of judges is guaranteed by Section 176 of the Constitution. All judges, except for Constitutional Court judges, hold office until discharged from active service under the terms of an act of parliament. Constitutional Court judges hold office for non-renewable terms of 12 years. A judge may only be removed if the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct. The President may also remove a judge on the basis of a resolution adopted by at least two thirds of the members National Assembly.

Controversial Appointments

There has been a perception by some members of the judiciary that less qualified candidates are being appointed before more senior members of the judiciary. As noted earlier, there is a constitutional requirement that the judiciary broadly reflect the ethnic and gender diversity of South Africa and that this should be considered during the appointment process. Due to the policy of apartheid the current judiciary does not fulfil this criteria, although progress is being

made. This approach often conflicts with the traditional policy of promotion based on seniority.

In 1997, during the selection process for the Chief Justice, many judges came out publicly in favour of Justice Van Heerden, the most senior judge in the Court of Appeal. The main alternate nomination was Deputy President of the Constitutional Court, Justice Mahomed, who was supported by President Mandela. It appeared that many regional judges had called meetings to encourage support for Justice Van Heerden. A judge of the Court of Appeal, Justice Hefer, also publicly called for Justice Mahomed to withdraw his candidature.

In April 1998, several judges from the KwaZulu-Natal bench petitioned the JSC to appoint Justice William Booysen over Justice Tshabalala alleging that the latter judge would fail to command the respect of the other judges due to a lack of experience. On 1 June 1999 it was also reported that Deputy President Mbeki, who was to be appointed as President on 11 June 2000, vetoed the appointment of Justice Erwin Cameron to the Constitutional Court in favour of Justice Sandile Ngcobo.

A perception that less qualified candidates are being appointed has also led to some judicial retirements. In 1996 Justice Rex Van Schalkwyk resigned citing the policy of affirmative action as having a deleterious effect on the bench. Justice Piet van der Walt announced his retirement in October 1998 after a less senior judge was appointed over him to be President of the Transvaal High Court.

Magistrates

The Magistrates Act 1999, in Sections 2 and 4, establishes a Magistrates Commission responsible for, inter alia:

- ensuring that the appointment, promotion, transfer or discharge of, or disciplinary steps against, judicial officers in the lower courts takes place without favour or prejudice;
- ensuring that no influencing or victimisation of judicial officers in the lower courts takes place;
- carrying out investigations and making recommendations to the Minister of Justice regarding disciplinary action of judicial officers in the lower courts;
- advising, or making recommendations to the Minister of Justice, regarding the requirements for appointment and the appointment of judicial officers;
- advising or making recommendations to the Minister of Justice on any matter which, in the opinion of the Commission, is of interest for the independence and efficiency in the dispensing and administration of justice.

The Commission is composed of a judge of the Supreme Court (now the High Court), a representative of the Department of Justice, two Regional Court Presidents, two Chief Magistrates, the Chief Director of the Justice College, one magistrate, one advocate, one attorney and one legal academic. The members of the Commission are officially appointed by the President but are nominated by their respective constituencies. The President may withdraw an appointment at any time, after consultation with the Commission if in his opinion there are sound reasons for doing so.

Section 10 of the Magistrates Act 1993 provides that the Minister of Justice appoints magistrates after consultation with the Commission. They hold office until the age of 65 years, and can be removed from office for misconduct, continued ill health, incapacity to carry out his duties of office efficiently, or in order to effect a transfer and appointment as contemplated by the Public Service Act 1994. The Minister can suspend if the Commission recommends to that effect and a report regarding the reasons for suspension is laid before parliament. If the parliament passes a resolution recommending removal, or fails to act, the Minister can remove the magistrate from office.

Magistrates are paid a salary according to rank as determined by the Minister of Justice, and publicly notified in the Gazette. A magistrate's salary can only be reduced by an act of parliament. Section 15 prohibits magistrates from performing other paid work without the consent of the Minister for Justice.

Draft White Paper on the Reform of the Judiciary

In July 1999, the policy unit of the Department of Justice produced a draft white paper on the reform of the judiciary. The white paper contained several proposals, including a removal of the distinction between magistrates and judges. This would enable magistrates to be directly promoted into higher judicial ranks. The proposal was greeted with some reservations due to a perceived lack of appropriate qualifications of magistrates for judicial office, concerns about funding and questions regarding the independence of the magistracy.

Threats to the Independence of the Judiciary

President of the Republic of South Africa and Others v South African Rugby Football Union and Others

On 4 June 1999, the Constitutional Court delivered its written judgement in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (Case CCT 16/98). The decision was regarding a recusal application, filed by Dr Louis Luyt, against five of the judges hearing a case on the constitutional validity of two notices issued by President Mandela. These notices established a commission of inquiry into the South African Rugby Football Union (SARFU) and gave it the power to subpoena, call witnesses and obtain documents.

Dr Luyt made several allegations against the entire court and specific allegations addressed to Chaskalson P, Langa DP, Sachs J and Yacoob J. The application against Kriegler J was withdrawn during argument. The petition for recusal contained numerous allegations generally related to a perceived close relationship between the members of the court and the President or the ANC. The court, in deciding on the application, applied the test of "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."

The court, in dismissing the application unanimously, stated that whilst litigants have the right to apply for recusal this "does not give them 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." The court also stated that "Decisions of our courts are not

immune from criticism. But political discontent or dissatisfaction with the outcome of a case is no justification for recklessly attacking the integrity of judicial officers."

Judicial Accountability

In October 1999, there was publicity surrounding an "invitation" by the Joint Monitoring Committee on the Improvement of the Quality of Life and Status of Women of the parliament, to Judge John Foxcroft of the Cape High Court to explain his reasons for a decision that he had given. The decision to question the judge had initially been widely reported as a summons. In response to the furore, the Chief Justice of South Africa and the President of the Constitutional Court issued a statement explaining that "a member of the judiciary cannot be properly summoned or even otherwise be required to explain or justify to a member of the legislature or the executive any judgement given in the course of his or her judicial duties" as this would clearly breach the separation of powers. The UN Basic Principles on the Independence of the Judiciary are clear that judicial decisions by the courts shall not be subject to revision.

In October 1999, the Department of Justice tabled before the JSC a document regarding the establishment of a judicial complaints mechanism. Section 180 of the Constitution provides that national legislation can be enacted on this issue, and the JSC had been considering this issue since 1997. Some judicial officers raised concerns in the press at the time that the mechanism would threaten judicial independence. The JSC has appointed a committee to ascertain the views of members of the judiciary and the matter will be further considered by the JSC in April 2000.

Problems in the Administration of Justice

The lower levels of the court system suffer from a lack of adequate funding. This is evidenced by concerns regarding the level of security in the court system. In January 2000, the Department of Justice reported that at the Phoenix Magistrate Court in Durban, four armed men held up a magistrate, a prosecutor and several members of the public. The men were able to bring weapons into the court as a weapons scanner had failed and sufficient funds had not been available to fix it. Adequate funding is essential to maintain the independence of the judiciary and to safeguard the judicial process from any inappropriate or unwarranted interference. The UN Basic Principles on the Role of Lawyers also requires that authorities must adequately safeguard the security of lawyers if it is threatened as a result of the discharge of their functions.