

Fighting crime while promoting human rights in the police, the court and the prisons in South Africa

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1 INTRODUCTION

That South Africa is beset by crime is beyond question.¹ It continues to be a considerable impediment to the development of a human rights culture. It often undermines good governance and democratic principles and has a very dire impact on the economy.² At the same time the criminal justice system continues to be in crisis. It appears to many to be far from competent. Relatively few suspected criminals appear before the courts and many are acquitted. This sends the message that crime does pay. The norm of few and failed prosecutions also perpetuates a lack of respect among citizens for the rule of law³ and human rights. This further undermines the legitimacy of the courts. While laws are being enacted that appeal to populist “get tough” notions they do little to curb crime itself. These measures fail to address the real causes of crime and do little to stop crime. They are aimed primarily at appeasing public sentiment, which they hardly achieve, at the expense of human rights and freedoms. This article examines examples of the tensions that exist in South Africa in the areas of crime, human rights and policing, crime, human rights and the courts and crime, human rights and prisons. It makes recommendations of what could be done to try and resolve some of these difficulties.

2 CRIME LEVELS IN SOUTH AFRICA

Crime increased dramatically in 1990, the year when the transition to democracy began (Shaw, in press). Levels of crime increased across the board between 1990 and 1994. The only crime to have decreased is the murder rate that fell because of a reduction in political violence in the country (Shaw, in press; Sarkin 1993b). Deaths fell from 16 042 in 1990 to 14 920 in 1994 (Sarkin 1993b). However, assaults rose by 18 per cent, rape by 42 per cent, robbery by 40 per cent, vehicle theft by 34 per cent, and burglary by 20 per cent (Sarkin 1993b). Crime does not occur in similar patterns all over South Africa. Although crime generally increased in the last decade, not all types of crime have risen in every area of the country.

1 See Sarkin 1998c.

2 See, for example, *Sunday Independent* 1995 and Sarkin 1996a.

3 See *Cape Times* 1996.

In 1993 there were 1 852 223 crimes reported to the police. However, in 1994 (when most of the cases arising from these reports would have come to court), there were only 413 472 prosecutions and only 318 068 convictions. While the numbers of reported crimes have been rising, the number of convictions has been falling – for example, 375 572 people were convicted in 1988/9 and only 318 068 in 1993/4. Problematically, the numbers of reported crimes has increased since then. After 1997 crime levels began to increase at an alarming rate (*Nedcor/ISS Crime Index 1999*). Thus, between 1994 and 1999 violent crime increased by 21.6 per cent. Property crime increased by 14.9 per cent over the same period, followed by commercial crime, 6.7 per cent, and violent crime against property 6.6 per cent (*Nedcor/ISS Crime Index 1999*). In 1998 2 154 570 crimes were reported (Marais 1999). The current crime rates are indeed alarming and victims, particularly of violent crime, are not receiving the support and protection that is needed. In this regard, a Human Science Research Council (HSRC) survey has found that three times as many South Africans felt unsafe in 1999 than was the case in 1994. Threatening to further undermine respect for the rule of law and human rights is the disturbing rise of community vigilante groups. The vigilante phenomenon underlines the fact that curbing crime is vital to building a human rights culture because frightened citizens increasingly reject notions of fair trial rights and other rights in a context of perceived rampant crime.

As far as corruption is concerned Transparency International's corruption perception index rates South Africa number 34 of 90 countries, and gives the country a score of 5.0 on a scale of 10 where 0 is 'clean' and 10 is very corrupt (TI 2000). Misappropriation, mismanagement and wastage of public funds are a serious problem, as is corruption (Bauer 1999). Officials in many government departments have been accused of corruption (Sayed & Bruce 1998) as well as those in regional government (Lodge 1998). Hundreds of officials in the Department of Justice are facing charges of misconduct, corruption or fraud (*Pretoria News* 10 May 2000). High-ranking officials in the Department of Correctional Services are also facing corruption charges (*City Press* 19 March 2000) and the Auditor-General found that the former Commissioner of Correctional Services gave himself undeserved bonus payments, wasted money on unnecessary overseas trips, used public money to fund a scholarship programme in the US named after himself, and hired members of his professional soccer team to work in his department (*Business Day* 17 April 2000). The Minister of Welfare told Parliament in November 1998 that, of the R6 million worth of welfare cheques stolen in South Africa between 1996 and August last year, more than 90 per cent were lost through fraud or staff negligence.

The Heath Special Investigating Unit has been investigating hundreds of thousands of cases of fraud and corruption involving public funds and has engaged in investigations into approximately 100 organs of state (*Saturday Star* 22 August 1998). The investigations extend over all nine provinces and include 12 national investigations. More than R3 billion is thought to have been involved.

These are important issues as a culture of bribery and corruption of public officials undermines stability, democracy, good governance, the

rule of law and development. The authorities are still too slow to take action against corrupt public officials, something which undermines public confidence in the organs of state.

A number of positive steps have been taken against corruption since 1998 (Heath 2000). Resolutions to combat corruption, fraud and maladministration in the public sector were adopted at the Public Sector Anti-Corruption Conference in November 1998. This was followed up in April 1999 by a National Anti-Corruption Summit involving the public and private sector, NGOs, community leaders, opinion-makers and other elements of civil society. The Public Service Commission is co-ordinating a task team of public and private sector representatives and representatives of the anti-corruption bodies, NGOs and civil society to look at aspects of co-ordination, legislation and communication of the national anti-corruption strategy. A group of high-profile businesspeople are in the process of developing the South African National Code of Ethics (SAN-CODE) as a basis for ethical and honest business practice in the country. As the recently enacted Public Finance Management Act is gradually introduced, it will help to prevent corruption, fraud and maladministration of public money. Public accounts committees in Parliament and the provincial legislatures are playing an ever-increasing role in holding government accountable.

While, the Constitution provides for at least two constitutionally-entrenched institutions to ensure clean administration government: the Public Protector and the Auditor-General,⁴ Parliament in 1996 enacted the Special Investigating Units and Special Tribunals Act⁵ which came into force in November 1996. The purpose of the Act is to 'provide for the establishment of Special Investigating Units for the purpose of investigating serious malpractices or maladministration in connection with the administration of State institutions, State assets and public money as well as any conduct which may seriously harm the interests of the public, and for the establishment of Special Tribunals so as to adjudicate upon civil matters emanating from investigations by Special Investigating Units; and to provide for matters incidental thereto'.

3 CONSTITUTIONAL NEGOTIATIONS AND THE 1996 (FINAL) CONSTITUTION

While many see the final Constitution as the most advanced in the world, it is regressive in some respects. This retreat reflects the impact that fears relating to crime have had on the drafting process. The negotiations to draft the final Constitution took place against a background of public concern about a rising criminal justice system that fails to protect society against crime (Sarkin 1998a). These concerns were heightened when

4 In the words of the Constitutional Court 'where the focus of the Public Protector's attention is efficient and proper bureaucratic conduct, the Auditor-General is concerned with proper management and use of public money'.

5 Act 74 of 1996.

issues around crime found its way into constitutional negotiations, threatening to undermine the Bill of Rights as a whole (Sarkin 1998b).

The continuing debate on whether the death penalty should be reinstated gives some indication of the emphasis on crime-related fears that diluted the full realisation of the drafters' human rights ideals. The debate around the constitutional provision that impacts on bail is an example of this dilution.

As a result of the issues around crime and bail, conflict occurred about how the right to be released on bail should be protected or provided for in the final constitution so as to insulate the 1995 bail law from constitutional challenge. Various options were debated, one of which aims to phrase the right in such a way that would allow legislation relieving the state of its duty to prove that it is not in the interests of justice that a person be released on bail. This option was introduced into Constitutional Assembly debates at a late stage and was an attempt to ensure that a court could not strike down the 1995 legislation that shifted the onus of proof onto the accused in bail proceedings for serious offences. The legislation and the option was opposed by human rights organisations.

Another option in the draft would have preserved the position in the interim Constitution that was interpreted to mean that the accused does not have the onus of proof in bail proceedings. This position would have been more consistent with the presumption of innocence. Another proposal was to water down the limitations clause so that government could limit rights more easily. Eventually, both these proposals were introduced in the name of fighting crime.

Thus, section 35(1)(f) of the 1996 Constitution states:

Everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit, subject to reasonable conditions.

Unlike the corresponding provision in the interim Constitution,⁶ this formulation also has implications for the burden of proof in bail proceedings. The intention was to ensure that bail legislation, which reversed the burden of proof by placing it on the accused, survived constitutional scrutiny.

4 A HUMAN RIGHTS CULTURE

The most important issues that continue to militate against a widespread public acceptance of human rights issues and continue to undermine the achievement of a human rights culture are crime and criminal violence.⁷ Respecting the rights of accused persons, seen by many people as being 'soft on criminals', is critically important because any person could be accused of a crime and protecting human rights protects every single person in the society. Some new laws do not take into account the poor conditions that prevail in the legal system, and they go against the norms

6 Ch 3, 25(2)(d).

7 See, for example, Judge Kees Van Dijkhorst 1998.

protected in other democracies by international human rights instruments and by the Constitution. Many accused individuals (who are innocent until proven guilty in terms of the Constitution, and may have been unjustly brought before the courts), do not understand the legal system, court procedures or language used. Yet, they are now required to prove to a court that they should be granted bail. They may be incarcerated simply because they have been accused of a serious offence for which there may not even be a convincing case.⁸ Given an average court cycle of 140 days, and given the kinds of abuse that occur in prisons, the chance of an accused person's rights being violated is frighteningly high. Poor and relatively less well-educated people, the vast majority of whom are black, are especially vulnerable.

Millions of South Africans are unemployed, destitute and in need of adequate shelter. The development of a human rights culture depends on the state giving substantive meaning to the socio-economic rights in the Constitution.⁹ Meaningfully addressing the inequalities, which continue to prevail in South African society, is not only a constitutional imperative,¹⁰ it is essential to secure public acceptance of civil and political rights for all. Judge President of the Constitutional Court Arthur Chaskalson 2000 has stated:¹¹

Millions of people are still without houses, education and jobs, and there can be little dignity in living under such conditions. Dignity, equality and freedom will only be achieved when the socio-economic conditions are transformed to make this possible. This will take time. In the meantime government must give effect to its obligations under the Constitution to show respect and concern for those whose basic needs have to be met. The courts must give meaning to and apply the Bill of Rights and other provisions of the Constitution in the context of our history, the conditions prevailing in our society, and the transformative goals of the Constitution. . . .

The Constitution offers a vision of a future. A society in which there will be social justice and respect for human rights and the basic needs of all our people will be met. We seem to have lost our way to establishing such a society, in which we will live together in harmony, showing respect and concern for each other. We are capable of realising this vision but are in danger of not doing so. We seem to have temporarily lost our way. Too many of us are concerned about what we can get from the new society, too few with what is needed for the realisation of the goals of the Constitution. What is lacking is the energy, the commitment and the sense of community that was harnessed in the struggle for freedom.

5 THE POLICE

While there have been some positive developments in the South African Police Service (SAPS), many major problems remain. There are too few well-trained detectives, morale is low, absenteeism is high, the number of

8 See Sarkin, Steyn *et al* 2000.

9 See Mureinik 1992.

10 See further Van Bueren 1999.

11 Arthur Chaskalson 'The Third Bram Fischer Lecture: Human Dignity as a Foundational Value of our Constitution' delivered in May 2000.

police suicides is high and very high numbers of police officers are being killed in the line of duty. Poor salaries and benefits see well-qualified and experienced personnel resigning and taking up employment elsewhere. In fact it is estimated that over 400 police members resign each month.

It is thus necessary to allocate more funds to the police force. The strategy should not be simply to throw money at the problem but rather to use increased funding to ensure effective results. Community policing initiatives need to be strengthened and extended. Good relations between communities and local police officers must be nurtured, with cognisance taken of the reality that a poor record has seriously undermined the credibility of the police.

The incidence of human rights abuse by members of the SAPS continues to be a major problem, just as it was in the pre-democracy era.¹² The world's television news audiences were shocked in November 2000 to see images of SAPS members actively encouraging their dogs to savagely bite suspected illegal Mozambican immigrants (*Mail & Guardian* 10 November 2000). Former civilian secretary for safety and security Azhar Cachalia has stated bluntly 'we used to think the police were brutal but competent. Now we know they were brutal because they are incompetent' (*Mail & Guardian* 29 September 2000). The incidence of crime, misconduct and corruption among police members is also unacceptably high (Sayed & Bruce 1998). About 700 people die in police custody every year.¹³ Since 1994 there have been almost 3 000 deaths in police custody.¹⁴ Between March 1997 and March 2000 police killed about 1 550 people almost 60 per cent of the 2 700 deaths attributed to the police by the Truth and Reconciliation Commission in its review of the period between 1960 and 1994.¹⁵ Civil claims against the police in 1996 amounted to a staggering R409.6 million¹⁶ and during the 15-month period ending July 1996, the SAPS paid out R66 million in civil claims.¹⁷ Some R40 million was paid out to 1 562 claimants by the SAPS in the 1999/2000 financial year (ICD 2000a).

An analysis of Ministry of Safety and Security statistics has revealed that police are three times more likely to be involved in crime than the general public (Pigou 2000). The report's findings about action taken in cases of complaints are not encouraging. Of the 17 500 complaints lodged against the police which are under investigation, there have been only 1 355 convictions, and the authorities failed to prove criminal action in 94 per cent of cases. In addition, only 4 300 have resulted in disciplinary

12 See, for example, ICD 1997; ICD 1998; ICD 1999a; CSVR/ICD 2000; *Business Day* 13 July 2000.

13 See the comments in relation to the systemic problems in policing that cause these huge numbers of deaths in Sarkin 2000b.

14 Minister of Safety and Security Steve Tshwete noted in the National Assembly on 18 May 2000 that deaths in custody decreased from 756 in 1998/99 to 681 in 1999/2000 (Tshwete 2000).

15 David Bruce quoting ICD statistics in *Mail & Guardian* 10 November 2000.

16 *Pretoria News* 20 March 1997.

17 *The Star* 21 January 1997.

measures.¹⁸ However, this poor record of convictions may be improving. The Minister of Safety and Security announced in Parliament in June 2000 that the number of police officers convicted of crimes increased from 793 cases in 1998 to 1 551 in 1999¹⁹ and there are at least 14 000 criminal cases against police officers.²⁰ He reported that the cost of these cases to the state was R29 million in the 1998/99 financial year.²¹ Recent media reports indicate that more than 14 600 police officers around the country are facing criminal charges ranging from murder, rape, theft and assault to bribery and reckless driving (ICD 2000a). Corruption among police is another serious problem (Sayed & Bruce 1998). All of these things tarnish the image of the SAPS and undermine public confidence in this critical state institution (Sarkin 1998c). A disturbing event was the call by Minister for Safety and Security in January 2000 to the police to use all means possible, constitutional and otherwise, to combat crime (*Business Day* 17 January 2000). This followed on comments he made in 1999: 'criminals are animals'; 'we must show them no mercy' (*Mail & Guardian* 10 November 2000). One such statement by a senior Cabinet minister is a serious setback to attempts to inculcate respect for the protection of the human rights of all, especially amongst police. When such utterances become a pattern, there is plenty of cause for concern.

This is the backdrop against which the Independent Complaints Directorate (ICD) was established. Provision for the creation of the ICD, an independent mechanism under civilian control to deal with complaints against the police, was made under Section 222 of the 1993 'interim' Constitution²² and Chapter 10 of the South African Police Service Act.²³ The ICD, according to its mandate, considers complaints or allegations relating to deaths of persons in police custody or deaths which are a result of police action.

The increasing importance of the ICD appeared to have achieved some recognition in the Budget when its allocation increased from R15.491 million in 1997/98 (ICD 1998a) to R27.76 million for the 1998/99 financial year (ICD 1999a). However, this was short-lived. In the 2000/01 financial year, the ICD budget was *reduced* to R25.242 million (ICD 1999a). This occurred in spite of an increase of 52 per cent in complaints referred to the ICD between 1998/99 (2 874 complaints) and 1999/2000 (4 380 complaints) (ICD 2000a).

The ICD has consistently complained about the lack of available resources to fulfil its mandate (ICD 1998b). It has not had much impact on the problems in the police as its investigative capacity is greatly strained – there are only 45 investigators for the entire country²⁴ who have the Herculean task of monitoring a police force of approximately 128 000

18 Human Rights Committee report cited in *Mail & Guardian* 22 May 1998.

19 *Sowetan* 17 April 2000.

20 *Saturday Star* 24 June 2000.

21 *Saturday Star* 24 June 2000.

22 Act 200 of 1993.

23 Act 68 of 1995. See Manby 1996; Bruce *et al* 2000; Melville 1999.

24 ICD 2000c.

members.²⁵ The ICD had to refer more than 70 per cent of its cases to the police to investigate because it did not have the human and financial resources to do so itself (*Saturday Argus* 11/12 March 2000). The ICD has stated that it knows that many of its stakeholders in the police and the general public are not aware that it exists. Another constraining factor is the fact that the ICD's offices are in the larger urban centres,²⁶ and then in only seven of the nine provinces. The more the public becomes aware of what the ICD is and what it does, the more complaints are likely to be filed, exacerbating the already serious lack of resources hampering the work of this body. More than 5 300 complaints of assault were lodged against the police in 1997 alone (*Mail & Guardian* 17 June 2000).

The ICD had managed to deal with 3 891 complaints and inquiries by the end of 1998 (ICD 1999b). Of these, 1 292 were complaints related to deaths in custody or police action – 32 per cent of all the complaints received by the ICD (ICD 1999b). About 20 per cent of these (778 complaints) were complaints of serious criminal offences ranging from ordinary assault to assault with intent to cause grievous bodily harm. A total of 1 478 complaints (38%) had to do with SAPS misconduct and less serious offences. The ICD referred 222 complaints (about 6%) falling outside its functions to organisations such as the Public Protector. The remaining 121 complaints (about 4%) were referred to the ICD by the Minister for Safety and Security or MECs²⁷ responsible for policing in the provinces.

The ICD recommended that the Directorate of Public Prosecutions institute a prosecution against certain SAPS members in 147 of the cases which it had completed. Prosecutions were instituted in 57 cases, inquests were ordered in 55 others, and the relevant directors of public prosecutions declined to prosecute in the rest. The ICD recommended disciplinary action against police in 64 cases, and this was done in 19 cases. Nine convictions for misconduct were secured (ICD 1999b).

The pressure is increasing on the ICD. It had to deal with 1 566 new complaints in the first four months of the 1999/2000 financial year, an increase of about 45 per cent on the previous year (ICD 2000c). During this time the unit was able to finalise about 962 cases, 211 of which ended in recommendations to prosecute (ICD 2000c). A disturbing trend is emerging here – prosecutions were instituted in only 18 cases and the SAPS took successful disciplinary action in only five cases (ICD 2000c).

The ICD is currently actively investigating approximately 1 200 cases, and has taken over approximately 350 case dockets from the SAPS for full investigation. This suggests each of the 45 ICD investigators is dealing with 40 cases. In fact, some investigators are dealing with as many as 200 cases at a time (ICD 2000a).

Regardless of the quality and commitment of its investigative personnel, the workload of the ICD is extreme and its resources are very limited. This has forced the unit to review its priorities and disregard a number of

25 ICD 2000a.

26 ICD 2000c.

27 Members of the (provincial) executive councils.

complaints (ICD 2000b). It has also used mediation techniques as a cost-cutting measure. There is no question that the ICD should not have to refer a substantial number of complaints back to the police²⁸ due to resource constraints because this undermines the whole idea of having an independent investigation of irregular police conduct. As the directorate itself states, this causes members of the public to become disillusioned with the complaints mechanism, but it has no choice under its current budget. Unless the National Treasury takes note of the issue at hand and substantially increases the budgetary allocation so that the ICD can employ more investigators, the situation is likely to get worse.

The ICD has recognised that the internal SAPS complaints system needs to be improved. Ideally the ICD should investigate all complaints against the police to ensure that there is independent scrutiny of police action and reign in those members of the police who commit human rights abuses, safe in the knowledge that there is very little risk of action being taken against them.

Public awareness of the ICD is limited, but the increasing number of complaints suggests this may be changing. A more serious problem is the lack of human rights awareness among SAPS members and the reticence of police management to discipline members and institute prosecutions. The ICD has contributed to the human rights content of the training programmes of the SAPS, but more needs to be done to ensure a broad awareness of what constitutes acceptable conduct in a society based on respect for human rights. SAPS members also need to know that disciplinary measures will be taken without fail against transgressors, and that prosecutions will follow criminal conduct. In addition, all SAPS members should be made to sign the code of conduct, a sound policy which only new recruits are currently required to sign (*Mail & Guardian* 10 November 2000). At the political level, the provincial and national Cabinet members responsible for policing must promote a human rights approach to police work, rather than justifying shortcuts in order to be seen to be 'getting tough on crime'. The ICD should work with the SAHRC, human rights advocacy NGOs and others to educate the public and the police about what police can legitimately do in a democracy.

Documentation about the ICD and its role in protecting human rights in policing should be more widely available. Its website is quite well maintained, but more could be done to enhance the profile of the institution and the values for which it stands. Many of the reasons for police misconduct are well known, but there is scope for further research into making the legislative, budgetary, information and policy environment more conducive to achieving the broad aims of the ICD.

The ICD's ability to restore confidence in the SAPS, especially where there has been criminal conduct by police members, is currently hampered by the lack of action on its recommendations. Public confidence in the ability of the ICD to do something about unacceptable police conduct

28 71 per cent of all cases are returned to the SAPS to investigate. See *Pretoria News* 10 March 2000.

will be measured not only by the directorate's capacity to finalise investigations into complaints, but also by the extent to which the SAPS and the National Directorate of Public Prosecutions acts on its recommendations.

ICD executive director Advocate Neville Melville has recently resigned to take up a post with the Banking Council. His place has been taken up by Karen McKenzie, a graduate of the University of the Western Cape's Law Faculty, who will hopefully prove to be fearless and robust and have a major impact on the promotion and protection of human rights in policing. The primary obstacle, however, is a severe lack of resources. In spite of an increase in the number of complaints, the ICD's budget is declining. This calls into question how seriously the state is taking its obligation to prevent police committing human rights violations.

6 THE COURTS

As far as the courts are concerned, prosecutorial staff is also in general under-resourced, understaffed, under trained and inexperienced in the investigation and presentation of criminal cases, particularly large complex ones.²⁹ The average experience of prosecutors is believed to be six months and few initiatives have occurred to alleviate the problems arising from inadequate prosecutions. The need for a professional, adequately resourced and well-skilled prosecutions system has thus been identified as a priority.

In spite of the advent of equality before the law under the Constitution, the reality is that access to legal representation is the privilege of the wealthy few. The vast majority of accused are still indigent and often unrepresented,³⁰ and most people are denied justice for purely economic reasons.³¹ In 1995/1996 alone, approximately 700 000 people charged with serious offences were not legally represented (LAB 1996).

The Legal Aid Act of 1969 created the Legal Aid Board (LAB) whose function it was to provide legal aid at state expense to indigent persons (identified by a means test). Traditionally, private lawyers paid for by the LAB have provided legal aid. The LAB is there to carry out the state's obligation to ensure that all people in criminal cases are represented, including appeal cases, but in practice the institution is unable to meet and fulfil all the presenting needs. The increase in demand has been striking. In 1972, 4 500 legal aid applications were granted; this figure more than doubled by 1982 to 9 100 cases. Only ten years later in 1992, 67 100 defences were provided. During the 1997/98 financial year a massive 196 749 people received legal aid at a cost of R210 million to the state, 193 177 of whom were represented by private lawyers (*Business Day* 16 February 1999). In 1998/99 the number of new applications increased to 210 927, but in the 1999/2000 year the number dropped to

29 See Sarkin & Cowen 1997.

30 The Constitutional Court had an opportunity to delineate, and ensure compliance with, the constitutional right to representation in certain cases in the case of *S v Vermaas*. It failed to do so. See Sarkin 1996b.

31 See further Sarkin 1993a.

148 519 because the LAB decided to stop accepting requests for legal aid for petty criminal offences (LAB 1999).

The provision of criminal and civil legal aid to the indigent in South Africa is in a mess – it is under enormous pressure and has huge debts (*Business Day* 31 August; 4 October 1999). An increasing number of private lawyers no longer want to do legal aid work because the LAB has a backlog of unpaid accounts dating back many years, and because the tariffs paid to private lawyers have recently been significantly reduced (*Cape Argus* 31 July 2000). One effect of this is that many cases are being thrown out of court because no legal representation is available and anyone facing serious charges is constitutionally entitled to legal representation.

In response to the imperative for, among other things, publicly-funded institutions to be more representative of the South African population, the Legal Aid Act was amended in 1991 and 1996. The LAB is now an independent body with revised aims. An 18-member board of directors and an executive committee runs the LAB and is responsible for setting its objectives. Its money comes from the government, via an allocation to the Department of Justice. Like all national publicly funded institutions, it reports to Parliament and the Auditor-General annually.

In addition to its use of private lawyers, the LAB has 13 branch offices, operates a small public defender's office and uses a network of 22 university legal aid clinics to provide legal services. Each of these clinics receives funding to employ articled clerks and supervising attorneys. The LAB employs 501 people (LAB 1999).

The debate regarding the cost and effectiveness of salaried versus judicare systems of legal aid is an international one. Factors in favour of a salaried lawyer system include lower costs because of lower staff costs and the economies of scale that are made possible by sharing facilities, a higher possible caseload, and the special expertise practitioners gain in these matters in the course of their work. Weaknesses of a salaried programme are restrictions on the choice of lawyer, the fact that salaried lawyers will tend to be younger and less experienced, and the fact that the staff will suffer 'burnout' as a result of their heavy caseloads. On balance, many commentators regard a comprehensive salaried public defender and civil legal aid programme as the appropriate vehicle to meet the needs of indigent South Africans for legal representation.

Plans are being made to create justice centres around the country with salaried staff, providing services that include defence in criminal trials and representation in civil matters (*De Rebus* 2000b). By moving away from the judicare system of paying private lawyers to provide legal aid for the indigent,³² legal aid will become far more accessible to the poor in all areas of the country.³³

It is strongly suggested that the university law clinic network should remain an important feature of the new system because the interests of

32 Department of Justice 1999.

33 LAB 2000.

students, candidate attorneys and the poor converge at these places. Clinics offer legal students and candidate attorneys the opportunity to gain practical experience. They also offer a useful, cost-effective service, provided staff receive adequate, ongoing training and good backup to ensure a high standard of work. Many university law clinics are at historically black institutions and several are located in rural areas. There are currently no justice centres in smaller centres or in rural areas and, given resource constraints, it is likely that the current situation will prevail for some time to come. The LAB should therefore provide financial support to university clinics. A possible spin-off of exposure to this kind of client work at an early stage in an aspiring lawyer's career may well be an abiding interest in meeting the legal needs of the indigent.

The LAB and Lawyers for Human Rights (LHR) are engaged in a programme to achieve similar goals by placing candidate attorneys, mainly from disadvantaged backgrounds, with attorneys in private practice. The salaries of these practitioners and a contribution towards the overheads of the firm where they are placed are paid by LAB. In return, these candidate attorneys must take on ten legal aid cases per year and spend one afternoon a week doing community work, mainly in para-legal advice centres operated by LHR. The project will have a dramatic effect on the number of opportunities for black lawyers. At the same time, because it aims to provide incentives for lawyers to work in rural areas, the number of lawyers available to work on rural matters such as farm worker evictions is likely to increase. Because the policy requires the attorneys in question to do community work under the guidance of LHR, paralegals and advice centres operating all over the country will benefit from the aid and training which this will provide. All of this will improve the access to justice of a wide variety of people who are currently unable to access legal services.

The LAB has already established one justice centre in Kimberley in which 13 lawyers are paid to provide mostly free criminal legal assistance to people who qualify. Consideration should be given to providing assistance to other justice centres, even if this is limited to paying certain operational expenses.

LAB staff members are in desperate need of training in a wide variety of areas including business administration, communication, information technology and management. Because the number of public interest lawyers fell along with apartheid in 1994, it is necessary to train a new cadre of legal professionals in human rights and all the skills necessary to effectively service the needs of poor people. The need for training will grow as the number of justice centres increases and the LAB employs more lawyers. A unit should be established with input from experienced public interest lawyers and academics to provide ongoing training to LAB staff, university aid clinics, advice offices and paralegals.

It has been proposed that the system which currently requires candidate attorneys to complete articles of clerkship with law firms be replaced with a requirement for community service similar to the one which applies to medical graduates (Sarkin 1993a). This proposal is currently under consideration by the Department of Justice (*Cape Argus* 31 July 2000). If adopted, law graduates would be required to work in a civil legal aid office

or in a public defenders' office for a period of time. The proposed programme will achieve two objectives simultaneously – providing legal aid for the indigent, and providing opportunities for graduates to gain practical experience.

Care will have to be taken to provide ongoing training and supervision to ensure a high quality of service, given the overwhelming demand, the limited available resources, and the relative inexperience of these trainee lawyers. Working under this kind of pressure will quickly hone the skills of law graduates. These people will also be exposed to areas of the law they might not otherwise become acquainted with. As a result, some may develop an interest in doing this kind of work instead of moving into the private sector or joining the prosecuting authority.

Another, complementary, strategy could be for the LAB to make greater use of paralegals and existing paralegal services, especially in areas where legal aid and public defender programmes are very thin on the ground.³⁴ For this to work properly, para-legals should be provided with nationally certified training, possibly established in conjunction with the law societies (*De Rebus* 2000a). A network of advice offices already exists, especially in rural towns, and they already deal with various problems of the poor and disadvantaged. Paralegals could possibly be deployed in these offices to provide communities in these areas with legal advice, and to provide legal rights awareness education. Such a scheme would increase the access of marginalised people to justice, especially in rural areas where there are very few lawyers.

The legal profession could also play a role in increasing access to justice by being required either to perform a certain number of hours of *pro bono* work for the indigent every year, or to make a financial contribution to organisations that provide legal aid services. Another possible *pro bono* contribution from lawyers in private practice could be to require lawyers to perform a certain number of hours acting as duty lawyers, working on a rotation basis in offices set up for this purpose. Offices could be established in courts to deal with criminal matters, and in other places to handle civil matters. A certification procedure could be put in place in terms of which lawyers are granted permission to practice for a year at a time, and renewal of such a licence could be made contingent on the practitioner submitting proof of having met such *pro bono* obligations to the community.

Implementing some of the suggestions here would require the Department of Justice to review the legislation around legal aid and legal practitioners and for Parliament to repeal, amend or replace the relevant legislation.

7 THE PRISONS

Conditions in South Africa's prisons are very serious. Even though prisons have been designed to house 100 000 prisoners, the daily prison population

³⁴ National Community-Based Paralegal Association 1998. See further National Paralegal Institute 1999.

is about 170 000 individuals across 231 prisons under the care of only 3 000 prison officers (DCS 2000). The number of awaiting trial prisoners continues to increase as the backlog in the courts gets more and more serious. In 1995 the average court cycle was 76 days; in August 2000 it was 140 days (DCS 2000). Prisons are becoming more overcrowded,³⁵ and the numbers continue to rise.³⁶ To relieve the pressure, in September 2000 the Department of Correctional Services released about 11 000 awaiting-trial prisoners whose bail had been set at less than R1 000 but were unable to pay.³⁷ In spite of this measure, there are still about 57 000 people awaiting trial in generally appalling conditions.

Human rights concerns about South African prisons include very high levels of violence,³⁸ high levels of corruption among officials,³⁹ the fact that the authorities are holding children in prison rather than in place of safety as they are supposed to do,⁴⁰ as well as inadequate health care.⁴¹ Present conditions in South African prisons promote criminality by exposing prisoners who may have been convicted of less serious crimes to hardened criminals without providing much in the way of efforts to rehabilitate offenders (Sarkin 1996a). Given the absence of an effective rehabilitation programme, recidivism is estimated to be as high as 80 per cent (Farren 2000).

The establishment of closed maximum security ('C-Max') prisons in South Africa signalled the determination of the authorities to make prison conditions harsher.⁴² In an apparent attempt to avoid scrutiny by Parliament and others, the building of the first C-Max facility in Pretoria Central Prison was kept secret until a week before it opened. The Department of Correctional Services has defended C-Max prisons by saying they are intended for dangerous prisoners who may injure others, and to make escape very difficult for high security prisoners. In fact they are a misguided attempt to deter crime by showing how harsh prison can be. Prisoners are kept isolated in their cells for all but one hour a day, their exercise yards are cordoned off, their cutlery is plastic, they are under constant video surveillance and they are not permitted to shave or smoke (SAIRR 1998:71). These prisons also help to satisfy a vengeful public by providing very harsh punishment for certain prisoners. C-Max cells have

35 The number of sentenced prisoners has grown slowly from 92 581 in January 1995 to 111 948 in July 2000, that is, it shows a growth of about 20 per cent. However, the number of unsentenced prisoners has more than doubled from 24 265 in January 1995 to 57 538 in July 2000, that is, 137 per cent growth. Of this population of unsentenced prisoners, 13 087 were juveniles.

36 Skosana 2000.

37 On the question of new bail laws and the constitutional interpretation of these, see Sarkin, Steyn *et al* 2000. On the role of the Supreme Court of Appeal (the highest court in the land for non-constitutional or human rights matters) in developing the common law see Sarkin 1999a.

38 Sarkin 1998.

39 *Business Day* 17 April 2000.

40 *Argus* 18 June 1997.

41 Sarkin 1999b; Sarkin 2000a.

42 See Legget 1997.

not only been used for high security prisoners – awaiting trial prisoners have also been put into these units at times. The number of prisoners in these cells, their identities, and details of the crimes they have been convicted for or are alleged to have committed is being kept secret, apparently to limit external scrutiny of C-Max.

Although new legislation restructured correctional services and overhauled the archaic prison law, many sections affecting the treatment of prisoners did not come into force immediately. While the new Correctional Services Act⁴³ conforms largely to the Constitution as well as domestic and international human rights obligations, the present practice of the Department of Correctional Services falls well short of these commitments and obligations.

It must be said that prisoners have had some success in promoting their own human rights. However, this is a result of successful court action rather than positive action on the part of the state. For example, the Constitutional Court overturned the Independent Electoral Commission's attempt to bar prisoners from voting in the 1999 national and provincial elections. In August 1999, the High Court ordered that various privileges that the Department of Correctional Services had withdrawn from awaiting trial prisoners be restored.⁴⁴

The Correctional Services Act establishes the Judicial Inspectorate, and appoints an Inspecting Judge and Independent Prison Visitors (IPVs). The Act provides that the Office of the Inspecting Judge must 'inspect or arrange for the inspection of prisons in order to report on the treatment of prisoners in prisons and on conditions and any corrupt or dishonest practices in prisons'.⁴⁵ Judge John Trengrove was appointed the first Inspecting Judge but he resigned in 1999. Judge Johannes Fagan was appointed to succeed him on 1 April 2000 (*Business Day* 7 April 2000). Nine inspectors, 10 administrative support staff and 22 IPVs have been appointed in terms of the Act to assist the Inspecting Judge.

IPVs are lay people appointed by the Inspecting Judge under section 92(1) of the Act in consultation with community organisations. Fifteen IPVs were appointed in consultation with community organisations to work on a three-month IPV Pilot Project in April 1999 (Judicial Inspectorate 1999). The project received financial support to the tune of R394 800 for training of IPVs through the United Nations High Commissioner for Human Rights. Acting in terms of section 94 of the Act, the Inspecting Judge approved the establishment of visitors' committees at Cape Town and for the Boland districts. Similar committees will be established when IPVs are appointed in other provinces. About 1 000 complaints were received from prisoners during that time. Since no IPVs had been appointed at the relevant prisons at the time, these complaints were investigated by members of the Judicial Inspectorate.

43 Act 111 of 1998.

44 In *Blanchard and Others v Minister of Justice, Legal and Parliamentary Affairs and Another* 1999 (4) SA 1108 (ZSC).

45 S 90(2).

The Office of the Inspecting Judge is at an early stage of development, so much of its time is being spent on getting policies and procedures and basic things in place. Generally speaking, there is a low level of experience among staff and they have little awareness of similar institutions in other countries. They have a low level of knowledge about human rights and do not have many skills in how to intervene when they suspect the human rights of prisoners may have been infringed. The fact that training on issues such as treatment of prisoners and conditions in prisons is done by the Department of Correctional Services, and that training on the new Correctional Services Act is being done by the legal services section of the department, is an obstacle to the independence of the Office of the Inspecting Judge. In order to be able to do its job independently, the Office should provide its own staff training, with suitable input from well-qualified academics in the field, leaders of human rights NGOs and others.

The office has conducted some inspections of prisons (Judicial Inspectorate 2000). By mid-2000 and with the assistance of IPVs, the office had dealt with approximately 8 500 complaints from prisoners including alleged assaults, hunger strikes, lack of adequate health care and poor quality food (Fagan 2000). The office investigated alleged assaults by correctional service officials on prisoners at Witbank and East London prisons and reported its findings to the Minister of Correctional Services. However, these reports have not been made public. The first commission of inquiry in terms of the provisions of section 90(5) of the Act was instituted by the Inspecting Judge into allegations of mass assaults upon prisoners at the Johannesburg Medium B prison. The report on the inquiry has also not been made public.

The IPV scheme is an excellent way of extending the ability of the Office of the Inspecting Judge to monitor and report on conditions in prisons. With its small staff and other resource constraints, the office could not possibly do regular unannounced inspections of every prison. However, the success of this strategy depends on the selection of appropriate people to do IPV work and on the receipt of appropriate training from skilled and independent people. In an environment where public sentiment towards criminals is very negative, IPVs must have unwavering integrity and the ability to resist being co-opted by the system. Given these conditions, IPVs could play a dramatic role in advancing the protection of human rights in the prisons.

It is well-known that human rights abound in prisons. As little sympathy as prisoners may enjoy from the general public, they enjoy the protection of the Constitution as much as anyone else, although they are deprived of their freedom for a time. Apart from the inherent rightness of protecting the human rights of all, it is in the broader interests of society that prisoners be protected from brutal and inhumane conditions since almost all of them will eventually be released from prison. The Office of the Inspecting Judge is one of the most sorely-needed human rights protection institutions in South Africa, but it is one of the least well-known. Its independence is hampered by the fact that the Inspecting Judge, already a judge of the High Court, is appointed by the President. In addition, reports are delivered to the Minister of Correctional Services and experience has

shown that these reports are not always publicly available. The Office should enhance its public profile by making information about itself available in a variety of languages and in plain language. It should further ensure that it is perceived to be independent and worthy of public trust by making its reports widely available.

Thus, in the Department of Correctional Services, progress over the past few years has been limited. Prisons, their staffing, their operation, their use of force and insufficient disciplinary procedures remain problematic. Other issues of concern include the high levels of violence in prisons, overcrowding, and inadequate health care systems. While efforts to close prisons that are beyond rehabilitation and to build new prisons are to be welcomed, the conceptual shift to the privatisation of prisons and the building of super-maximums may simply bring new problems. If the prison system is to assist in reducing crime, the focus of the penal system needs to shift from retribution to rehabilitation. Otherwise prisons will continue to be places that encourage criminality and reward the most brutal.

In the absence of any process of rehabilitation, the result will be simply that the number of people incarcerated will increase dramatically with little chance of this ever being reversed. It must be remembered that prisons are already bursting at the seams.

It is imperative that the prison environment itself is entirely overhauled. South Africa has much to learn from countries such as Denmark in this regard. In a nutshell, the focus of the penal system needs to shift from retribution to rehabilitation. Prisons must no longer be places that encourage criminality and reward the most brutal.

8 CONCLUSION

The criminal justice system continues to be in crisis, lacking legitimacy and appearing far from competent. Accused in criminal cases are often acquitted, sending the message that crime does pay. The norm of failed prosecutions also perpetuates a lack of respect among citizens for the rule of law and human rights, which further undermines the legitimacy of the courts.

The high rate of crime is thus a critical issue in South Africa and has major ramifications for human rights, particularly in view of the fact that many South Africans perceive the crime rate to be a reason why the rights in the Bill of Rights ought to be changed as it is an instrument which is used by criminals and is of no use by victims of crime. Threatening to further undermine respect for the rule of law and human rights is the disturbing rise of community vigilante groups.

It is vital that South Africans realise that respecting the rights of accused persons is not being 'soft on criminals' but rather a matter of protecting the countless numbers of South Africans who are accused of crimes they did not commit. It is surely time for South Africans to take on board the knowledge garnered from research and practice elsewhere in the world which boils down to this: the only approach that delivers a reduction in the

crime rate is a humane and holistic one. Cynical politicians may be content to tinker at the margins of an inadequate legal system, capitalising on community concern to convey the impression that they are 'tough on crime'. But such image boosting does nothing to curb crime. If we are serious about addressing the crime rate, we have to begin by realising that the causes of crime have to be tackled alongside the symptoms. It may be trite to say that apartheid damaged and impoverished the majority of South Africans, but it remains true. Reducing the crime rate therefore requires a renewed commitment to social justice, not a betrayal of the principles on which the 'new South Africa' was founded. And commitment alone is not enough. Concrete improvement to the lives of the suffering millions must occur and be seen to occur as soon as possible. Sweet talk must give way to delivery, particularly in relation to housing and employment. While it is argued that the state has few resources, can this argument really hold up when the state spends R47 million on a presidential inauguration, R20 million for cars for cabinet ministers, R300 million for a new aeroplane for the President, R30 billion for corvettes and helicopters, nearly R50 million to pay traditional leaders some of whom will earn over R350 000 when the unemployment rate is 40 per cent and the average income in South Africa is only (R2 000) a year?

If the state is really serious about addressing the crime rate, the causes of crime have to be tackled alongside the symptoms. Reducing the crime rate therefore requires a renewed commitment to social justice, not a betrayal of the principles on which the 'new South Africa' was founded. And commitment alone is not enough. Concrete improvement to the lives of the suffering millions must occur and be seen to occur as soon as possible. Sweet talk must give way to delivery, particularly in relation to housing and employment.

What will bring the crime rate down is the knowledge that those who break the law stand a good chance of being caught. Laws are only part of the solution. Without detection, successful prosecution and appropriate punishment, which redirects the offender away from criminal conduct, laws are simply paper.

Perhaps the most important factor in reducing the crime rate is finding ways to change the attitudes of citizens to issues around violence and respect for the law.⁴⁶ Reforming the legal system and addressing crime in a realistic and result-achieving way is the only way to foster a culture of respect for human rights, the rule of law and the legal system. Such an enterprise needs to go hand in hand with realistic and effective programmes aimed at delivering concrete improvement to the lives of the millions of poor South Africans, particularly in relation to housing and employment.

To make a real difference in the criminal justice system, urgent steps need to be taken to address shortages of well-trained staff and inadequate resources in the police, the courts, the prisons and the offices of the directors of prosecution.

46 See Sarkin & Varney 1993.

Curbing crime will require the allocation of more funds to the police force, which is under-resourced, understaffed and under-trained. Community policing initiatives need to be strengthened and extended. Good relations between communities and local police officers must be nurtured, with cognisance taken of the reality that a poor record has seriously undermined the credibility of the police. In this regard, there is also a need to set in place both short-term and long-term measures for adequately protecting witnesses. It is useless exhorting people to come forward to give evidence (or berating them for failing to do so) as long as they are vulnerable to assassination, intimidation and retribution. Related to the concept of community policing is the notion of community involvement in other aspect of the justice system. Forms of family participation in cases involving juveniles are being pioneered in Australia and New Zealand, for example, and such experiments should inform our own attempts at reform.

It is imperative that the prison environment itself is entirely overhauled. South Africa has much to learn from countries such as Denmark in this regard. Finally, and leaving aside matters of detail such as the obvious need for reform in the system for granting parole, we need to be creative about solving the problem of resource shortage. One idea would be to transfer idle soldiers from the bloated South African National Defence Force to the South African Police Service.

Critically, South Africans generally have a low level of awareness of human rights. Much more must be done to ensure that the person in the street develops a respect for the human rights of all. A massive education and information programme is needed to foster public knowledge, awareness and acceptance of human rights. National seminars, courses, meetings, debates, mock trials and conferences on human rights must take place. The country-wide community awareness programme undertaken by the Constitutional Assembly between 1994 and 1996 during the writing of the Constitution is an example of the kind of massive intervention on human rights which is needed. Human rights education could take place at grassroots level through the offices of a wide variety of existing groups and forums including religious, cultural, sports and community groups as well as trade unions, advice offices, police forums and local political structures.

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