

The pathological malaise within the criminal justice system: Why the courts are not seen to be delivering

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1 INTRODUCTION

In 1997, the Ministry of Justice published a document entitled Justice Vision 2000. This document is a strategic plan for the transformation and restructuring of the justice system in South Africa. Justice Vision 2000 identifies seven key result areas, namely the Department of Justice; courts and the administration of justice; crime, safety and security; access to justice; human resources development; the legal profession; and state legal and legislative services. This paper focuses on the key result area 'crime, safety and security', more generally known as the criminal justice system. This is an area of the administration of justice which has been severely criticised by the public and the media for its inability to deal effectively with the soaring crime rate. The main thrust of the criticism has been and still is directed at the magistrates' courts, which handle over 97 per cent of all criminal cases brought to court. This paper studies the reasons underlying public disenchantment with the courts and looks at suggestions and initiatives aimed at making the criminal justice system more responsive to the needs of the public.

The paper draws heavily on the author's two-year experience (1996–1997) in the Planning Unit of the Department of Justice.¹ In addition, it is based on interviews conducted by the author in 1998 with functionaries in the justice sector.²

1 DoJ.

2 Namely the Minister of Justice, the Hon Dr Penuell Maduna MP; Deputy Minister of Justice, the Hon Ms Cheryl Gildwall MP; National Director of Public Prosecutions Bulelani Ngcuka; then-acting Director General (now Director General), Department of Justice, Vusi Pikoli, Chief Director of Legal Services, DoJ; Pieter Du Randt; Deputy Director General for Legislation and Research, DoJ; Deon Rudman, Director of Legislation and Research, DoJ; Lawrence Basset, Secretary of the South African Law Commission; Willie Henegen, Chairperson of the Corporate Planning Team, DoJ; Clive Barrows, Director of Finance in Corporate Services, DoJ; Henry Isaacs, Chief Magistrate of Pretoria; Heinrich Moldenhauer, Chief Magistrate of Cape Town; Bertus Jooste, Chief Magistrate of Johannesburg; Anderson Bashe, Chief Magistrate of Port Elizabeth; Mr Rothman, Senior Magistrate charged with provisioning in Port Elizabeth; Mr Schutte, Director of Public Prosecution for the Western Cape; Adv Frank Kahn SC, Chief Director of Justice College; Cecille van Riet, President of the Black Lawyers' Association; Jake Moloi, Chief Prosecutor of Durban; Benny Schoenfeldt, Senior Prosecutor of Durban; Amy Kitsnasamy, National

[continued on next page]

2 THE LACK OF PREDICTABILITY IN THE CRIMINAL JUSTICE SYSTEM

Perhaps the most practical and realistic expectation that one can have of the criminal justice system is that it should be predictable in its outcomes. In other words, from the point of view of the potential offender it should be quite clear to the intending offender that if he or she commits a crime, there is a very strong possibility that he will be arrested, tried, convicted and sentenced to serve a very substantial period of the sentence. In sum, the outcome of the criminal conduct should be certain. Equally, the process and the time within which the case will be disposed of in court should be predictable.

The problem in South Africa today is that the criminal justice system is far from predictable. In fact, over the past four years, the degree of unpredictability has increased. To give an example, of the 244 263 criminal cases reported in December 1995, a total of 71 549 (29.3%) were closed unsolved. Of the 244 064 cases reported in June 1999, a total of 117 622 (48.2%) were closed unsolved. Of the same 244 263 cases reported as at 31 December 1995, only 17 937 (7.3%) ended with a verdict of guilty. The rest were either withdrawn or the accused were acquitted, or the cases were still open, or being still investigated or were still in the courts. In June 1999, a total of 9.2 per cent ended in a guilty verdict.³

Whichever way one looks at these statistics, it is apparent that there are seepages and blockages in the system, be it on the side of the police or on the side of justice. Leaving aside the inadequacies in the policing sector, what matters most to the public is what happens in court, especially the magistrates' courts, which try over 97 per cent of all the criminal cases. In essence, the image of justice in the eyes of the public is thus moulded mainly by what takes place in the courtroom. The fact of the matter is that the courts are not seen to be delivering.

3 PRIORITY AREAS OF INTERVENTION

3.1 The pre-trial arena

The most pervasive flaws at the post-arrest/pre-trial level, which also impact adversely on the way the case is finally disposed of, can be subsumed under the following headings:

- poor information flow between arresting officers and public prosecutors (disharmony in information cycle)
- sloppy case preparation based on: lack of experience/skill in the prosecution service; poor resource scheduling; poor court scheduling
- lack of easily and readily accessible information/criminal profile of suspect
- poor court scheduling by prosecutors.

Manager of Business Against Crime: Willie Scholz, Project Director of the Integrated Justice Project; Hardy Fourie, Co-ordinator of Pretrial Services (Durban); Thulani Ntombela, fingerprint expert of the South African Police Service, Durban; Sergeant Odayar.

³ Statistics sourced from Integrated Justice System database.

These inadequacies are located in the justice sector. There are other flaws located in the South African Police Service⁴ (for example, poor detective skills) and in the Department of Correctional Services⁵ (for example, poor identification/inmate tracking of suspects held in the awaiting-trial sections of prisons, as well as logistical problems encountered in the transport of suspects from prisons to courts). Although these, too, are a function of how the case is disposed of, the focus here is purely on justice.

3.1.1 *Intervention strategies*

Rolling out of pre-trial services

At present this service is in operation in Johannesburg, Mitchells Plain, Port Elizabeth and Durban. From all accounts, the pre-trial services⁶ project has proven to be very effective for the simple reason that it is highly information-driven and because it is the product of the combined effort of all the departments involved in the National Crime Prevention Strategy,⁷ that is, DoJ, SAPS, DCS and the Department of Welfare.

The pre-trial service operates as follows: Once a suspect is arrested, his or her personal data is captured and verified immediately. The PTS officers check the information given by the accused, by making phone calls, talking with family members, and visiting homes to check on addresses and places of employment. The suspect's fingerprints are taken and a criminal history record is requested from the SAPS Criminal Record Centre in Pretoria. This information is stored in a custom-built computer database and is used to recommend to the court whether or not bail should be granted. Those suspects who are granted bail are assisted in posting the bail amount and are monitored by both the pre-trial service and the police to ensure that they adhere to the bail conditions.

This exercise yields several benefits:

- information needed to accelerate the trial and to grant bail is timeously available
- the number of awaiting-trial suspects is reduced
- the ages of suspects are assessed correctly
- the diversion of juvenile suspects is facilitated
- suspects who pose little danger to society are released on affordable bail
- dangerous suspects and those who may intimidate witnesses are denied bail
- suspects return to court when required
- courts become more productive in terms of the disposal of cases and backlogs.

4 SAPS.

5 DCS.

6 PTS.

7 NCPS.

At present, pilot projects are being funded by the New York-based Bureau of Justice Assistance of the Vera Institute. The project is executed under the auspices of the Integrated Justice System⁸ user board, with DoJ as the lead department. The structures involved at a provincial level are the provincial secretariats for safety and security, heads of regional offices of the DoJ, Provincial Commissioners of the SAPS, Provincial Commissioners of Correctional Services, the National Director of Public Prosecutions, the Department of Welfare, and the relevant Cluster Head/Chief Magistrate/Regional Court President.

Plans are afoot to roll out this project to other centres. However, at the time of writing, there has been no comprehensive empirical evaluation of the project at the pilot sites.

Establishing reception courts for new cases

The main cause of the congestion of cases once they get to court is the fact that the docket is incomplete. This is what causes delays, postponements, backlogs and also the withdrawal of what otherwise would be eminently prosecutable cases with a high prospect of success. The trial of cases based on incomplete dockets is due mainly to the inability of inexperienced prosecutors to make an informed decision. According to the summary report on the Integrated Justice System (November 1998), criminal courts deal with an average of five adjournments per case. Hundreds of court hours are wasted every year because officers of the court must first complete tedious administrative tasks before the court day can begin. (It ought to be noted that, for no known reason and unlike other Commonwealth and common law jurisdictions, only in South Africa are prosecutors the ones who determine when court proceedings start.

A few years ago, prosecutors in the Durban Magistrates' Court conceived of the idea of creating reception courts, which would act as clearinghouses for unprosecutable or divertable cases and as courts for ensuring that cases are ready for trial before they are scheduled on a trial court roll. The proposal fell flat due to lack of funds to secure the software for the computers, which have already been purchased.

The system, as conceived for Durban, would operate as follows: All new cases would be rotated among four reception courts situated on the first floor of the court building. These courts would be staffed by the most experienced prosecutors, who would be able to make informed decisions on whether or not a case is prosecutable and whether or not it is ready to be placed on the court roll. They would ensure that all the necessary evidence is gathered and that the witnesses are identified and informed in good time about the trial date. This would mean that, once the case goes to trial, it is dealt with speedily and without interruption.

From an Integrated Justice System point of view, this exercise would benefit all NCPS Departments. For the DoJ, it would result in improved productivity levels of prosecutors and magistrates (by an estimated 40%);

8 IJS.

validation of investigation checklists; timeous availability of resources; saving on witness fees; improved daily activity planning and work-flow; and provide an excellent training ground for developing prosecutors and magistrates.

For the SAPS it would mean improved management of human resources; reduced unproductive hours spent in court; and reduced number of awaiting-trial prisoners transported between prisons and courts. For DCS it would mean only court-ready cases will have to be scheduled. As for Welfare, it would reduce the number of unproductive hours spent in courts by probation officers (social workers attached to the courts). Above all, from the point of view of the public, it would have a high-visibility impact because people will begin to see concrete output by the courts.

The chief inhibiting factors affecting implementation have been identified as lack of funds to secure appropriate software and the lack of trained users.

Running joint training projects for prosecutors and police investigating officers

In most of the interviews, the lack of proper and intelligent communication between the public prosecutor and the police was regarded as one of the most pronounced drawbacks in the criminal justice chain of events. Although this weakness in the system has been pinpointed several times in the past, no comprehensive action has been taken to remedy this defect.

Perhaps the most disturbing feature of the criminal justice system is that, whereas in some areas criminals are developing and mastering novel and sophisticated means of plying their trade, police officers and public prosecutors are generally under-skilled in the execution of their routine tasks. With the high personnel turnover rate within the prosecution service, the average level of experience has now dropped to between six months and one year. On the side of the SAPS, investigative and detective skills are rare. In 1994 criminologists estimated that only 12 per cent of SAPS officers were trained in detective work, 23 per cent semi-trained, and the rest untrained. This was attributed to the fact that South Africa had shifted suddenly and radically from an unofficial confessions-based evidence culture to an official evidence-based one. This lack of skills has considerably compounded the difficulty of securing convictions.

The fact of the matter is that there is a serious lack of crime-fighting skill in the SAPS and the prosecution service. Admittedly, since the appointment of the National Director of Public Prosecutions⁹ in July 1998, we have witnessed a concerted and successful effort at increasing co-operation between police and prosecutors by way of establishing several special investigative directorates that deal mainly with syndicated crime. However, as far as the run-of-the-mill criminal offence is concerned (murder, rape, robbery, housebreaking, assault with intention to do grievous bodily harm, theft and so on), the situation leaves much to be

⁹ NDPP.

desired. The regrettable aspect is that the latter are the crimes that affect the public on a regular and daily basis, and it is the general failure of the system to bring the criminal to book in respect of this category of crime that determines the level of public trust in the criminal justice system.

Since his appointment as NDPP in 1998, Bulelani Ngcuka, has drafted a National Prosecution Policy, a Code of Conduct for the prosecution service and the Policy Directives. In addition, with the material assistance of the Canada-South Africa Justice Linkage Project, a Prosecution Manual (or so-called *Handy Hints Manual*) is currently being developed to assist prosecutors on a hands-on basis in the interactive courtroom scenario.

Granted, all this will certainly improve the quality of prosecutions but, frankly put, it will have only a very slight positive impact on the effectiveness of the criminal justice process for as long as the exercise does not actively involve the SAPS. The fact of the matter is that both the prosecution service and the police are dependent on each other at the functional level. In practice, however, there is no convergent training on the investigation of cases. In some local jurisdictions, for example, investigation officers simply fail to appear in court on the day of the trial.

In 1998, the Justice College in Pretoria conducted a joint training course for prosecutors and police officers. This was a one-off event, with no follow-through. Also, in 1998 a Detective Academy was established in Silverton, Pretoria, to train police in detective work. This training is confined to police. Prosecutors, on the other hand, undergo a six-week training course at the Justice College in Pretoria. But again, this training is confined to prosecutors.

A number of interviewees emphasised the need to run joint training courses for both police and prosecutors. Some suggested that such courses be conducted on a decentralised basis as this would be less expensive than centralised training and less disruptive of the day-to-day duties of both prosecutors and police officers. The advantage of such an exercise is that the skills acquired in the training could be passed on to new recruits to either profession at no extra cost.

3.2 The trial arena

The most recurrent observation made by the interviewees was that, no matter which way one looks at it, the courts are the frontispiece of the criminal justice system, for it is in the courts that the public witness the system in action. Put more pointedly, from the point of view of the ordinary person, the criminal justice system stands or falls by what happens in court.

In theory, criminal courts of law exist to serve the needs of the community and to protect them from harm. In South Africa, however, the magistrates' court buildings are generally perceived by the ordinary public as intimidating institutions. These court buildings have a harsh and hostile atmosphere about them. This phenomenon dates back to the apartheid era when criminal courts were conceived as no more than passages to process black people who had fallen foul of the myriad of racially

victimising laws. From the point of view of the government of the day, it was essential that court buildings and those who worked in them have an ominous air about them.

Notwithstanding the fundamental political transformation that has taken place since the first democratic elections in 1994, most of the magistrates' courts are, with few exceptions, user-unfriendly and far from orientated towards being sensitive to the needs of the public. This is particularly the case with regard to the treatment of witnesses and victims, especially when they are women or children. It is regrettable that this user-unfriendliness has a negative impact on the routine administration of criminal justice.

As far as the criminal courts are concerned, the common strands teased from the interviews as well as the justice sector literature point to a number of deficiencies, namely:

- poor public relations
- the absence of a functional witness management scheme
- a lack of essential professional and infrastructural resources
- inadequate court and case management
- huge case backlogs
- wastage of time
- a lack of well-trained professional personnel.

3.2.1 *Intervention strategies*

Professionalisation of the Prosecution Service

The high level of personnel turnover within the prosecution service is essentially caused by onerous caseloads borne by prosecutors, the lack of administrative assistants for prosecutors, and public pressure to secure convictions. These stress-causing factors take a heavy toll on the productivity of prosecutors. Equally disconcerting within the prosecution service is the fact that prosecutors are not accorded a professional status and have traditionally not been treated as professionals by DoJ. This undermines their image in the eyes of the public and affects their self-esteem and confidence.

Accordingly, the Office of the National Director of Public Prosecutions regards it as an absolute priority that a national strategy be implemented which is aimed at promoting the prosecutor as a professional and as a leader in the community. As Mr Ngcuka puts it, prosecutors are the people's lawyer and should be regarded as such. The need to enhance the professional status of the 'people's lawyer' in a democratic South Africa should also be seen in the light of the fact that, in the indigenous African languages, the vernacular word for prosecutor is the pejorative appellation *persecutor*.

The NDPP proposes to meet this goal by doing the following:

- instituting an effective and efficient prosecutions management system (to include docket management, case flow, resource allocation, and personnel utilisation)
- strengthening the trial advocacy skills at all levels of experience within the prosecution service
- increasing the level of awareness of ethics and professional responsibility in all levels of the prosecution service and ensuring adherence to a code of conduct
- developing the prosecutorial skills essential to the litigate human rights and constitutional issues
- enhancing the capacity of prosecutors to prosecute cases of sexual violence against women and children humanely and effectively
- establishing distance learning and technological media programmes for prosecutors, thereby strengthening decentralised training programmes aimed at providing essential training while using the time of prosecutors efficiently
- implementing an internship programme to continue to “fast track” the development and skilling of new prosecutors
- implementing an internship programme to assist in recruiting and developing new prosecutor candidates, and simultaneously using their skills to provide intern support to the current incumbent prosecutorial staff in meeting their responsibilities
- implementing an internship programme to develop the skills and capacity of current professional staff through both domestic and professional learning opportunities
- enhancing English language proficiency within the ranks of prosecutors, thereby strengthening their professional capabilities by enhancing legal writing and other language skills central to their responsibilities; and training prosecutors and support staff in basic computer skills in order to increase their efficiency and professional quality of work performed at all levels.

In order to achieve sustainable institutional development, project implementation is estimated to take five years. This time frame will have three phases: a short-term (one year) phase to design curricula and other basic programmatic components, and to initiate those activities not requiring development (for example, computer training); a medium-term (three year) phase to present training at both basic and advanced levels, and a long-term (five year) phase to realise institutional capacity for sustaining these programmes with South African resources.

The need to implement a witness management scheme

Many criminal cases are withdrawn in court or the accused is acquitted simply because witnesses fail to turn up in court. It is estimated that a substantial number of witnesses refuse to go to court because courts are insensitive to their needs. When witnesses arrive at the court building they usually do not know where to go to, how to locate the prosecutor,

what to expect in court, how to address the court, where to collect their witness fee (if they know that they are entitled to one), and generally how to behave in court. In a large number of cases, prosecutors see the witnesses for the first time in court. Witnesses are usually required to wait outside the courtroom in draughty passages until they are called in. They are told not to go anywhere but to remain seated on the hard benches till they are called. It often happens that, because of poor case scheduling, witnesses remain seated in the passages the whole day only to be told that they are not required to testify but that they will be informed when to return to court. This discourages witnesses from going to court, as does the fact that courts very seldom have any facilities where snacks and refreshments may be bought.

The pressing need to implement a comprehensive witness management project was identified as early as 1996. In that year, the planning unit of the DoJ submitted a business plan on court management and witness management to the NCPS, which was approved by the NCPS Directors-General Committee and the Department of State Expenditure. However, to avoid a duplication of costs and effort, the court management business plan was integrated with the NCPS Enterprise Process Information Management (EPIM) business plan drafted by SAPS. A user board, established in terms of a decision of the NCPS Directors-General Committee managed this integration. The outcome was that all aspects dealing with court management in the DoJ's original plan are now executed in terms of the EPIM (now called Integrated Justice System Project) business plan. All that is left of the original plan is the business plan on witness management, which itself is currently being redrafted in view of the changed circumstances.

The witness management business plan provided, amongst other things, for the setting up of a Citizen's Advice Desk at six pilot sites. At present, there are a few courts in the country where these desks have been set up with the aid of Irish donor funds (R500 000). They are running very well and the services they offer to users of the court are in high demand.

According to Hardy Fourie, Project Director of the Integrated Justice Project, the witness management programme has been brought under the overarching court processing project, which also embraces court management. However this has yet to be implemented.

The need for an operations room in the Office of the National Director of Public Prosecutions

One of the most inexplicable things is that DoJ requires magistrates and prosecutors to record statistics on a daily basis and forward them to the department, yet in practice the statistics stored at head office are of very little use for assessing court performance. The statistics kept are merely anecdotal and cannot be used to correlate variables and establish chi-square significance ratios. For example, departmental statistics can tell how many hours a court sat per week or year, but they do not tell how many cases were disposed of by that court in a given time period. Also,

the statistics reflect the number of appeals, but they do not say which party appealed and whether the appeal was successful. It is therefore almost impossible to establish productivity levels. This, in turn, makes it impossible to plan properly or to allocate resources equitably to the various district courts.

The need for setting up an operations room project in the Office of the NDPP was mooted by both the National Managing Director of Business Against Crime Willie Scholz and the Project Director of the IJP, Hardy Fourie. Both of them could not emphasise enough the extreme usefulness and value that it would have in terms of, for example, analysing performance and productivity, workloads, geographical incidence of the various forms of crime committed, conviction rates, case withdrawals and the reasons for withdrawals.

The operations room would have all forms of charts, graphs, statistical trends and so on. The walls in the head office of Business Against Crime are themselves covered by such flow charts and graphs. In fact, BAC has more telling statistics on the criminal justice system than the DoJ itself.

4 CONCLUSION

From whichever way one looks at it, the main current of criticism is directed at the way the courts function. Any meaningful intervention will necessarily have the courts as starting point. In particular, one will have to focus on the prosecutorial function. The prosecutor is the gatekeeper of the criminal justice system. No other official has greater power over the liberty of the individual than the prosecutor. Yet, within the South African context, the office of the prosecutor has been unable to profile itself as an independent professional unit. This has to do with the fact that until now the prosecutor has a divided accountability. Employment-wise, prosecutors are accountable to the DoJ. Professionally, they are ultimately accountable to the NDPP. At the administrative level, they are accountable to the senior magistrate of the district court in which they work. This splitting of accountability has adversely affected the way in which prosecutors are seen by the public.

NDPP Bulelani Ngcuka is serious about his intention to transform the prosecution service into a crack delivery service. If the vision that he has spelt out can be translated into practice, it will indeed have a very high impact on the way the public perceive the administration of justice.

More importantly, however, is that the DoJ needs to assume financial responsibility for a number of the pilot projects that are presently being run on foreign donor funds. Once the donor aid ceases, which is bound to happen in a few years time, all good intentions would come to nought if the department itself does not budget for their continuation on an ongoing basis.

Pre-trial detention: Its impact on crime and human rights in South Africa

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1 INTRODUCTION

Restriction of liberty of the unconvicted, and accordingly presumed innocent, presents a challenge to every legal system that attempts seriously to balance the concerns of crime control and due process. In any new constitutional dispensation, this balance has to be re-appraised. This is particularly so because constitutions tend to emphasise the right to liberty of the individual and that in itself challenges anew those who wish to restrict this right. South Africa has recently faced this challenge in respect of its regime for releasing criminal suspects on bail and, by enacting the 1997 Criminal Procedure Second Amendment Act,¹ has opted for extraordinarily restrictive bail measures. These amendments were to be the subject of a recent judgment by the Constitutional Court.²

To understand the impact of the amendments to the Criminal Procedure Act³ consideration should be given to the concept of bail, the statutory provisions that govern bail in the South African system,⁴ and finally the case law pertaining to bail. Since the adoption of a new constitutional order in 1994, a perception has arisen amongst the South African public that bail is granted too readily by the courts and that those accused that are released on bail are committing serious offences once they are released from custody.⁵ This belief has been strengthened by the fact that the justice system is in a state of collapse. Bail has also been blamed by many for the chaotic state of the criminal justice system and for the unacceptable increase in violent crimes in the country.

Those of us that have been involved in the criminal process as practitioners know too well that bail was not the real reason for the collapse of the system, but that the system failed because of systemic failures⁶ like

1 Act 85 of 1997.

2 *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC); 1999 (4) SA 623 (CC). See a critical review of the judgment in Sarkin J. Steyn E. van Zyl Smit D and Paschke R 2000.

3 Act 51 of 1977, referred to here as the CPA.

4 Bail is statutorily defined in terms of s 58 of the CPA and is regulated by s 58–71 of the CPA and s 35 of the Constitution.

5 See South African Law Commission 1994: par 1.8.

6 See Bursay 1999:33.

prosecutors who work according to rule and are inexperienced and over-worked; police investigations that are inadequate, incomplete or of a sub-standard quality; prison warders who do not bring prisoners to the courts, magistrates who are inexperienced and fail to use the court hours effectively; and, finally, not having sufficient courts to hear all criminal matters.⁷ In my view it was unfair to blame bail for the state of affairs and I will support this contention by showing that the draconian bail measures did not have an impact on crime, nor did they improve the justice system.

What should not be overlooked is that, in any consideration of bail, a court must weigh two opposing interests. On the one hand, the interests of an accused, who is to be presumed innocent until proven guilty and, on the other, the rights of witnesses and society at large to be protected against hardened criminals and to see that cases reach their conclusion without any undue delay.

The detention of criminal suspects raises the issue of the right to liberty in any criminal process. The new democratic order in South Africa, in which freedom and individual liberty are specifically protected by a justiciable Bill of Rights,⁸ has brought the question of the granting of bail to the fore. The guarantee of liberty and other provisions governing bail has been attacked as an 'unnecessary' constraint on crime control.

This paper considers the right of a suspect to liberty⁹ whilst awaiting trial, and the constitutionally recognised limitations on this right. It will outline legislative attempts to introduce procedures for deciding on the release of suspects. It then analyses critically the recent decision by the Constitutional Court in *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat*¹⁰ on the constitutionality of this legislation. This analysis finally pays attention to impact, if any, of the legislative measures on crime in South Africa and the effect that these measures may have on human rights, particularly the right to liberty, in future.

7 See comments made by Director of Public Prosecutions of the Western Cape, Adv. F Kahn SC, "Net nog howe sal sake versnel" *Die Burger* 28 July 2000:4.

8 Under a justiciable bill of rights a court has the power to test not only executive acts but also legislation against the norms laid down in the bill of rights and to annul any such acts and legislation which is contrary to the said norms. See generally Capeletti 1992:256 and Ruppel 1992:51.

9 The right to liberty and to be released on bail is recognised in article 9(3) and article 14 of the International Covenant on Civil and Political Rights, Article 11 of the United Nations Universal Declaration of Human Rights and Article 6(2) of the European Convention of Human Rights and Fundamental Freedoms. Article 14 of the International Covenant on Civil and Political Rights is the perhaps the most important international provision in this context as it is widely seen as a statement of the international law rules governing a fair trial. Article 14(2) provides "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law". The right to bail before trial is rooted ultimately in chapter 39 of the *Magna Carta*, which states "No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land". See Howard 1964:45.

10 1999 (2) SACR 51 (CC), 1999 (4) SA 623 (CC).

2 FREEDOM AND LIBERTY

It can be said that the South African Constitution¹¹ has established the fundamental common law principle of freedom by requiring that an accused person be released from detention if the "interests of justice" permit such release.¹² Such personal freedom is acknowledged internationally¹³ together with the fact that every person is presumed innocent until proven guilty. The 1993 and 1996 Constitutions that ushered the South African criminal justice system in a new direction by establishing a new constitutional democracy, also provided for the Constitution to become the supreme law of the land,¹⁴ binding all executive and judicial organs of the state. More significantly, in the context of this discussion, the Constitution grants comprehensive protection of the right to freedom in terms of section 12 and section 35(1)(f).¹⁵

Since a constitutional rights analysis requires that the content of a right be determined in order to examine the scope to be given to it, an evaluation of the right to freedom and liberty will be considered as part of the analysis. This is an essential precursor to an evaluation of the Constitutional Court's *Dlamini*¹⁶ judgment, in which the Court interpreted the right

11 The Constitution of the Republic of South Africa Act 108 of 1996.

12 See s 25(2)(d) of the 1993 Constitution provided as follows:

"Every person arrested for the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right –
(d) to be released from detention with or without bail, unless the interests of justice require otherwise"

13 Cf. Article 11 of the United Nations Universal Declaration of Human Rights, Article 6(2) of the European Convention of Human Rights and Fundamental Freedoms. Article 14 of the International Covenant on Civil and Political Rights is the most important international provision as it is widely seen as a statement of the international law rules governing a fair trial. For this reason its provisions have been adopted by the international tribunals established to try persons for human rights violations in the former Yugoslavia and Rwanda and by the International Law Commission in its proposals for a permanent International Criminal Court. Article 14 provides: "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law".

14 S 2 of the Constitution provides for its supremacy.

15 S 12 of the Constitution provides:

"Freedom and security of the person –
(1) Everyone has the right to freedom and security of the person, which includes the right –
(a) not to be deprived of freedom arbitrarily or without just cause;
(b) not to be detained without trial;
(c) to be free from all forms of violence from either public or private sources;
(d) not to be tortured in any way; and
(e) not to be treated or punished in a cruel, inhuman or degrading way.
(2) Everyone has the right to bodily and psychological integrity, which includes the right –
(a) to make decisions concerning reproduction;
(b) to security in and control over their body; and
(c) not to be subjected to medical or scientific experiments without their informed consent."

16 It is submitted that the scope of a right should always be determined in order to qualify its essential content. See Van Wyk *et al* 1994:650.

to liberty restrictively. The right to freedom and security which is protected in terms section 12(1) of the Constitution seems to outlaw or, at the very least, require that restrictions on liberty which may result from arbitrary pre-trial incarcerations or restrictive bail conditions be minimised as far as possible. However, in the *Dlamini* case, the Constitutional Court restricted the right to liberty so severely by the application of the general limitation clause¹⁷ of the Constitution, that pre-trial detention will invariably become the norm in the South African criminal justice system rather than the exception.¹⁸ The interpretation adopted by the court is in stark contrast to the way the Constitutional Court itself has interpreted the right to freedom and liberty in the past.¹⁹ In fact, not so long ago the Constitutional Court considered personal freedom as such an important right in the protection of human dignity, that it held that the right had an intrinsic constitutional value of its own.²⁰ Viewed, therefore, against the background of the Court's earlier decisions, it seemed reasonable to expect that the Court would give a broad interpretation to the right to liberty in order to give true recognition to the right.²¹ However, in *Dlamini* the court failed to do so.²²

History has shown that our bail process has been consistent with the presumption of innocence.²³ Because of this presumption, courts have

17 See s 36 of the Constitution.

18 The most recent statistics released by the Department of Correctional Services show only 22 000 of the 62 000 prisoners awaiting trial are entitled to bail.

19 See Sarkin J, Steyn E, van Zyl Smit D and Paschke R 2000.

20 See *Ferreira v Levin NO and Others* 1996 (1) BCLR 1 (CC) at par 49, in which Ackermann J interpreted the meaning freedom as follows:

"Although freedom is indispensable for the protection of dignity, it has an intrinsic constitutional value of its own. It is likewise the foundation of the other rights that are specifically entrenched. Viewed from this perspective, the starting point must be that an individual's right to freedom must be defined as widely as possible, consonant with a similar breath of freedom of others."

21 In the matter of *Bernstein and Others v Bester NO and Others* 1996 (4) BCLR 449 (CC) par 145; O' Regan J interpreted freedom as having two inter-related constitutional aspects:

"[t]he first is a procedural aspect which requires that *no-one be deprived of physical freedom unless fair and lawful procedures have been followed*. Requiring deprivation of freedom to be in accordance with procedural fairness is a substantive commitment in the Constitution. The other constitutional aspect of freedom lies in a recognition that, in certain circumstances, even when fair and lawful procedures have been followed, the deprivation of freedom will not be constitutional, because the grounds upon which freedom has been curtailed are unacceptable." [Emphasis added]

22 Sarkin J, Steyn E, van Zyl Smit D and Paschke R 2000.

23 It is important to note that this presumption has been recognised since 1789. Article 9 of the French Declaration *des droits de l'homme et du citoyen* for example began with the words: "Every man being counted innocent until he has been pronounced guilty, if it is thought indispensable to arrest him, all severity that may not be necessary to secure his person ought to be strictly suppressed by law". Scholars like HJ Berman (1980:73) maintain that this French doctrine was originally intended to operate, primarily, at the stage of investigation. In *Krause v Switzerland* (7986/77) DR 13.73 the European Commission of Human Rights stated in a similar vein that the principle of the presumption of innocence is, in the first instance, a procedural guarantee applying in any kind of criminal procedure, therefore its application reaches much further than just the trial. See *Stack v Boyle* 342 US 1 (1951):6 where Vinson CJ stated with reference to the right of bail:

[continued on next page]

traditionally granted bail whenever possible and try to lean in favour of the liberty of the accused, provided that it is in the "interests of justice" to do so.²⁴ The most important statutory provision to consider for purposes of this discussion would be section 60 of the CPA.

Any confusion that reigned since the inception of the 1993 Constitution was clarified by the legislature in 1995. This was enacted through amendment of section 60 of the CPA to fit with the constitutional norm, expressed in section 25(2)(d) of the 1993 Constitution.²⁵ In the amended section, the legislature did not set a *numerus clausus*²⁶ of instances defining "interests of justice" but left the list open-ended to allow room for judicial interpretation. The 1995 amendments were innovative and sound law. They prescribed that presiding officers must conduct themselves in a more inquisitorial fashion and spelt out the criteria for dealing with bail applications.²⁷ Significant, from the perspective of crime control, was that it was no longer required of them to act as neutral umpires in bail hearings but that they were obliged to investigate each matter.²⁸

The 1995 legislation also introduced subsection 60(11). This new subsection sparked controversy because it created a reverse onus whereby accused persons were required to satisfy the court, in cases in where a schedule 5 offence had been committed or a schedule 1 offence had been re-committed whilst they were out on bail, to convince the court that the "interests of justice" did not require their detention. The wording of the legislation made it clear that in all other instances the state bore the onus to prove that the accused should not be released from detention. The 1995 amendments were considered to be good law. In a positive sense, the law now offered sufficient protection to all, including victims and witnesses, that had been lacking after the inception of the 1993 Constitution. Moreover, it was widely believed that the law as amended was constitutionally sound.

Despite the fact that adequate legislation was in place to protect the rights of the community, the South African public remained convinced that the right to bail was to be blamed for the rise in crime. This belief was strengthened by one case in particular, that of Mamokgethi

"this traditional right to freedom before conviction permits the unhampered preparation of a defence, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before the trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning".

24 *S v Smith* 1969 (4) SA 175 (N); 177E: F.

25 S 25(2)(d) of the 1993 Constitution provides:

"(2) Every person arrested for the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right –
(d) to be released from detention with or without bail, unless the interests of justice require otherwise."

26 *Bekker* 1994:490.

27 See *Ellish en Andere v Prokureur-Generaal, Witwatersrandse Provinsiale Afdeling* 1994 (2) SACR 579 (W). This approach is confirmed by s 60(3) as introduced by the Second Criminal Procedure Amendment Act 75 of 1995.

28 This approach is confirmed by s 60(3) as introduced by the Second Criminal Procedure Amendment Act 75 of 1995.

Malebane.²⁹ In response to the public pressure to tighten the bail law and to make it more difficult for accused persons to apply for bail, government adopted the controversial sections, namely subsections 60(8A), 60(11), 60(11A) and 60(11B)(c) of the CPA as amended.³⁰ Particularly controversial were those provisions that in essence require that an accused adduce evidence that “exceptional circumstances”³¹ exist which in the “interests of justice” permit his or her release, or require that an accused adduce evidence which will satisfy the court that the “interests of justice” permit his or her release.³²

As the term “exceptional circumstances” was not defined in any way, it created a lot of uncertainty and caused many problems of interpretation for the courts. The new legislation requires that courts consider not only the conventional factors of whether the accused will stand trial and/or interfere with witnesses, but also binds courts to consider whether the release of an accused person will undermine the public’s sense of peace and security or its confidence in the criminal justice system.³³

3 REFLECTIONS ON *DLAMINI*

The decision of the Constitutional Court in the *Dlamini* case should be considered against the background of the South African bail process. This has always recognised the general principle of the presumption of innocence as a substantive principle of fundamental justice and has protected the fundamental rights of liberty and human dignity of any person accused

29 The victim in this case, Mamogetheri Malebane, was killed by the accused, Dan Mabote, shortly before she was to testify against him for allegedly raping her. The accused was released by the court on bail of R2 000 despite the fact that the police were investigating two other allegations of rape against him and that the police had opposed the bail application.

30 Sarkin J, Steyn E, van Zyl Smir D and Paschke R 2000.

31 S 60(11)(a) of the CPA provides:

“(11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to –

(a) In Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release.”

32 S 60(11)(b) of the CPA provides:

“(11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to –

(b) In Schedule 5, but not Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release.”

33 S 60(4)(e) of the CPA reads as follows:

“(4) The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or where one or more of the following grounds are established:

(e) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.”

by the state of committing a crime.³⁴ Such recognition is evident from the judgment of Mohamed AJ in the decision of *S v Acheson*:³⁵

"An accused person cannot be kept in detention pending his trial as a form of anticipatory punishment. The presumption of the law is that he is innocent until his guilt has been established in Court. The Court will therefore ordinarily grant bail to an accused person unless this is likely to prejudice the ends of justice."³⁶

Despite the recognition given internationally to the right to be presumed innocent, the Constitutional Court preferred to define the right so narrowly in the South African context as to deny itself a role in the interpretation of rules relating to liberty.³⁷ Based on the Court's interpretation of the right, the right will never operate at the pre-trial stage of the criminal process at all.³⁸ In view of the interpretation adopted by the Court, it is feared that the right to liberty will soon become meaningless if an accused can no longer be cloaked by this presumption in order to claim his or her personal freedom.³⁹ It is acknowledged that the right to bail is not an absolute right and that accused persons should be incarcerated in instances where the state may have strong countervailing considerations that call for their incarceration, but this should not translate into pre-trial detention whenever it is alleged that an accused has committed a serious offence.

The sad reality is that delays in bringing accused persons to trial have increased dramatically in South Africa. South Africa's criminal justice system is in a crisis, which in turn causes systemic delays. These delays not only affect the quality of the testimony of state witnesses in the long run, but if an accused is detained, such delay also affects the fairness of his or her trial. So the effect of the 1997 amendments is particularly harsh for people accused of committing a crime.

34 See *S v Fourie* 1973 (1) SA 100 (D).

35 1991 (2) SA 805 (Nm). Although this is a Namibian High Court decision, it has relevance for the South African courts, since the law is essentially the same in both countries.

36 At 822A–B.

37 Sarkin J, Steyn E, van Zyl Smit D and Paschke R 2000.

38 Cf. Statement by Dickson CJC in *R v Oakes* 26 DLR (4th) 200 at 212–213:

"The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial."

39 Cf. Article 11 of the United Nations Universal Declaration of Human Rights and Article 6(2) of the European Convention of Human Rights and Fundamental Freedoms. Article 14 of the International Covenant on Civil and Political Rights is the most important international provision as it is widely seen as a statement of the international law rules governing a fair trial. For this reason its provisions have been adopted by the international tribunals established to try persons for human rights violations in the former Yugoslavia and Rwanda and by the International Law Commission in its proposals for a permanent International Criminal Court. Article 14 provides "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law".

4 LIMITATION ANALYSIS

4.1 South Africa's limitation clause

The South African Constitution, like the Canadian Charter⁴⁰ and the German Constitution,⁴¹ sets out explicitly how limitations on fundamental rights are to be justified (Cachalia 1994:109). The limitation clause sets out the criteria for the restriction of the rights contained in the Bill of Rights. One could almost say that section 36 of the Constitution provides a limitation mechanism of all the fundamental rights enshrined in the Bill of Rights. The effect of this clause, however, is that a statute or law that infringes upon a specific right of the Constitution may be saved as being constitutional by way of application of the limitation clause. The reasons for limiting a right need to be exceptionally cogent and be within the criteria set by section 36(1) of the Constitution.

The South African courts have adopted what can be described as a "two-stage" approach in determining the constitutionality of an Act. As Kentridge AJ pointed out in *S v Zuma and Others*:⁴²

"The single stage approach (as in the US Constitution or the Hong Kong Bill of Rights) may call for a more flexible approach to the construction of the fundamental right, whereas the two-stage approach may call for a broader interpretation of the fundamental right, qualified only at the second stage."⁴³

The limitation clause fulfils a particularly important function at the second stage of the constitutional inquiry, since it will determine whether a provision that is in conflict with the Constitution could be justified in terms of the limitation clause.⁴⁴

4.2 Limitation analysis by the Court in *Dlamini*

In *S v Makwanyane and Another*⁴⁵ Chaskalson P stated that any inquiry that considered whether the limitations criteria of section 33⁴⁶ were met involved the weighing up of competing values and ultimately an assessment based on proportionality. He stated:

"In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question."⁴⁷

40 See s 1 of the Canadian Charter of Rights and Freedoms.

41 See s 19 of the German Constitution.

42 1995 (2) SA 642 (CC).

43 At 654G-H.

44 Kentridge AJ in *S v Zuma and Others*, gives a clear exposition of the approach to be adopted in determining the constitutionality of a statutory provision.

45 1995 (3) SA 391 (CC).

46 The limitation provision under the 1995 Constitution.

47 At par 104.

Considering the way that the Constitutional Court went about in applying the limitation clause in *Dlamini* it appears that a lot has changed since *Makwanyane* was decided.⁴⁸ One of the main justification grounds used by the court in saving the legislation was the high level of crime. This is evident from the court's finding that:

"There can be no quibble with Mr D'Oliveira's submission that over the last few years our society has experienced a deplorable level of violent crime. . . . Mr D'Oliveira was correct when he argued that it is against this background that we should assess the provisions of s60(1)(a)."⁴⁹

It is astonishing that Kriegler J, who wrote the unanimous decision of the court, could accept the argument on behalf of the government on such a crucial issue to save the legislation whereas the very same judge in *Makwanyane* almost required an empirical study to gauge the deterrence effect of the death penalty on crime.⁵⁰

The difference in the court's approach to constitutional interpretation from *Makwanyane* to *Dlamini* is evident in Mohamed DP's reasons for not accepting deterrence in the former case as a worthy factor limiting the rights of accused.⁵¹

4.3 Public opinion

The Constitutional Court in its consideration of the constitutionality of subsections 60(4)(e) and (8A) of the CPA held that the provisions do infringe upon an accused's right to be released on reasonable conditions, but that the provisions pass constitutional muster through the application of the limitation clause.⁵² Most disturbing is the fact that the Court regards the prevalence of crime in this country and the public's response as sufficient for limiting the accused's right to be released before trial. Having made the finding that the provisions infringe upon the right as set out in terms of section 35(1)(f) of the Constitution, it is baffling how the court

48 Sarkin J, Steyn E, van Zyl Smit D and Paschke R 2000.

49 At par 67.

50 Kriegler J in *Makwanyane* stated at par 212 "no empirical study, no statistical exercise and no theoretical analysis has been able to demonstrate that capital punishment has any deterrent force greater than that of a really heavy sentence of imprisonment".

51 We were not furnished with any reliable research dealing with the relationship between the rate of serious offences and the proportion of successful apprehensions and convictions following on the commission of serious offences. This would have been a significant inquiry. It appears to me to be an inherent probability that the more successful the police are in solving serious crimes and the more successful they are in apprehending the criminals concerned and securing their convictions, the greater will be the perception of risk for those contemplating such offences. That increase in the perception of risk, contemplated by the offender, would bear a relationship to the rate at which serious offences are committed. Successful arrest and conviction must operate as a deterrent and the state should, within the limits of its undoubtedly constrained resources, seek to deter serious crime by adequate remuneration for the police force; by incentives to improve their training and skill; by augmenting their numbers in key areas; and by facilitating their legitimacy in the perception of the communities in which they work. See *Makwanyane* at par 290.

52 See *Dlamini* at par 55.

could attach so much weight to public opinion in light of its earlier pronouncements on the subject.⁵³

The Constitutional Court held in *Makwanyane*⁵⁴ that public opinion should not be used as a constitutional yardstick in a democratic society. Chaskalson P explained:

“Public opinion may have some relevance to the enquiry, but, in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution. By the same token the issue of the constitutionality of capital punishment cannot be referred to a referendum, in which a majority view would prevail over the wishes of any minority. The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us that all of us can be secure that our own rights will be protected.”⁵⁵

Chaskalson also held that the Constitution exists so as to protect the minorities from the whims of public opinion.⁵⁶ In support of this view he cited the reasons advanced by Justice Powell in *Furman v Georgia*:⁵⁷

“... [T]he weight of the evidence indicates that the public generally has not accepted either the morality or the social merit of the views so passionately advocated by the articulate spokesmen for abolition. But however one may assess amorphous ebb and flow of public opinion generally on this volatile issue, this type of inquiry lies at the periphery – not the core – of the judicial process in constitutional cases. The assessment of popular opinion is essentially a legislative, and not a judicial, function.”⁵⁸

5 SELF-INCRIMINATION

It is submitted that the court, in its interpretation of the right not to incriminate oneself and the right to remain silent, has lost sight of the fact that an accused is not merely exercising a choice when deciding to testify in his or own bail application. The accused has no choice. Without testimony to support the application, he or she would be denied bail. Subsection 60(1)(a) creates an onus which should be discharged, and the only way it can be discharged is to tender testimony. In my mind, there is no choice given the circumstances. Kriegler J justifies the infringement upon

53 Sarkin J, Steyn E, van Zyl Smit D and Paschke R 2000.

54 At par 55.

55 At par 88.

56 At par 88.

57 408 US 238 (1972).

58 Cited in *Makwanyane* par 89 at 432A–B.

the right to remain silent by using other comparisons of the trial process. I am not convinced that the choice exercised by an accused whether to volunteer to give a statement to the police or to respond to their questions can be compared with the choice exercised to apply for bail. An accused who exercises the right to remain silent by not giving a statement to the police will not be "punished" by being detained. An accused who wishes to exercise this right when applying for bail is more than likely to be detained. The other examples used by Kriegler J are by no means more persuasive.⁵⁹

The court relied on an earlier judgment of the Supreme Court of Appeal in *S v Nomzaza*⁶⁰ to demonstrate that an accused could never, not even under common law, succeed in a claim that incriminating evidential material furnished by himself or herself could be excluded.⁶¹ What the court failed to recognise is the difference between the element of implied compulsion to testify under the 1997 legislation, and incriminating statements made freely and voluntarily by an accused in the course of a ordinary criminal trial under common law. The decision of *Nomzaza* is to be distinguished from what section 60(B)(c) is regulating and cannot be used in support of saving the provision.

6 CRIME STATISTICS

The question that remains is whether the purported legislation succeeded in combating crime, as some politicians naïvely thought it would. Without labouring the point, South African Police Service crime statistics clearly demonstrate that such belief was naïve. The Act came into operation on 1 August 1998 and violent crime in South Africa has not decreased or stabilised since that date.⁶²

In conclusion it is submitted that the Constitutional Court which should act as the primary protector of liberty as enshrined in the Constitution has failed in its duty to protect the fundamental right to liberty of persons accused of committing offences, not convicted of, when it had the opportunity to do so in *Dlamini*. It is sad that the Court which has proved itself to be progressive has finally given in to public pressure by upholding draconian legislation whereas it could have seized the opportunity to educate the South African public to accept that a fair trial means that the procedure leading up to it, must be fair.

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