

CRIMINAL JUSTICE POLICY AND HUMAN RIGHTS IN THE NEW SOUTH AFRICA*

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I INTRODUCTION

The post-1994 transition in South Africa brought about a restructuring of the criminal justice system, the abolition of a number of laws, policies and operating procedures and the rapid formulation of a plethora of new ones. A range of institutional and other constraints mitigated against the success envisaged for these interventions and programmes. Chief amongst these was the lack of assessment of the actual requirements for implementation – in short, the gap between the development of new and ambitious policy, and the managerial capacity, skill and resource requirements available for its implementation. This, as well as the increase in the number of cases processed in the South African criminal justice system, has resulted in the operational weakening of a number of criminal justice functions.¹

One of the major flaws in the South African government's approach lies in its inability to expeditiously rectify glaring weaknesses in the criminal justice system. Yet, how well the criminal justice system functions is important for several reasons. Firstly, a relatively small proportion of offenders are believed to commit the majority of serious crimes, and especially organised crime. If these perpetrators are apprehended and convicted, certain crimes can be reduced. Secondly, a functional system helps to deter some potential offenders from committing a crime. Thirdly, an effective and efficient justice system inspires confidence among victims and witnesses and encourages them to participate in the criminal justice process, thereby leading to the arrest and conviction of offenders. Finally, criminal justice successes – especially if well publicised – are essential for boosting public confidence in the government's ability to reduce crime and make people feel safer.

Governmental policy makers – partly as a reaction to public pressure and demands made by the operational personnel of the criminal justice system – have responded to

* This article is an updated version of a paper presented by the author, entitled 'A New Authoritarianism? Criminal Justice Policy and Human Rights in the New South Africa' (2nd World Conference on Modern Criminal Investigations, Organised Crime and Human Rights, Durban, December 2001).

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¹ See Eric Pelsler, Janine Rauch and S Henkeman, 'DFID Review: Safety, Security and Access to Justice' (unpublished discussion document) Institute for Security Studies, Pretoria, 30 March 2001, 11.

increasing levels of lawlessness with tougher laws and a shift away from crime prevention to law enforcement. This, coupled with a criminal justice system incapable of meeting the increasing operational demands placed upon it, is resulting in the sidelining of civil liberties and the constitutional rights of crime suspects and convicted offenders.

II RISING CRIME LEVELS: STATE AND PUBLIC RESPONSES

The expectation which many South Africans had at the time of their country's transition to democracy in 1994, that crime would decrease, has not materialised. According to the South African Police Service (SAPS), two million crimes were recorded in the 1994/95 financial year. During the 2001/02 financial year 2.5 million crimes were recorded – an increase of 25% over a seven year period.²

The latest available recorded crime figures at the time of writing (ie, for the 2001/02 period) indicate a slowing down in the rate of increase of recorded crime. This is, however, occurring at a point where recorded levels of violent crime are extraordinarily high. Thus, over a 12-month period during 2001/02, some 21,500 murders, 54,000 rapes, 118,000 aggravated robberies and 265,000 serious assaults were recorded. The time period is too short, moreover, to conclude whether the increase in recorded crime will continue to slow down.

Consistently high levels of crime – and the media coverage of it – have had a profound impact on the South African public's feelings of insecurity. Annual Human Sciences Research Council (HSRC) public opinion surveys ask a nationally representative sample of respondents about their feelings of personal safety. In 1994 almost three-quarters of respondents said they felt safe, while less than one-fifth felt unsafe. At the end of 2000, respondents were almost equally divided with 44% feeling safe and 45% feeling unsafe.³ A different national survey found that in 1994 only 6% of respondents thought that crime was 'the most important problem facing the country that government should address'. In 1999 almost two-thirds (65%) of respondents thought so.⁴

The South African criminal justice system has not been successful in alleviating public concerns that it is able to deal effectively with the crime situation. In 2000, some 2.6 million crimes were recorded by the SAPS. During the same year the SAPS' detective service referred 610,000 cases to court.⁵ Of these, the National

² Department of Safety and Security, *Annual Report of the National Commissioner of the South African Police Service, 1 April 2001 to 31 March 2002* (2002) 24-5.

³ Human Sciences Research Council, *Attitudes to National Issues in South Africa* (1994 and 2000).

⁴ H Taylor and B Mattes, 'Public Demands on Government: The People's Agenda' (1998) 5 *Idasa Public Opinion Service Reports*.

⁵ Caution needs to be exercised when comparing the annual number of cases recorded with the annual number of cases undetected, withdrawn, sent to court, and prosecuted and convicted (also called the 'yearly-review' method). Cases recorded during one year, are often investigated and prosecuted during the following year. For example, the investigation of a complicated murder case reported in December 1999 might be finalised in mid-2000. The prosecution of the case may occur only in 2001. Rates based on the yearly-review method are premised on the assumption that the statistics are stable from year to year and that there is no growth or decline in backlogs. The advantage of the yearly-review method is that it is quick to collect data for an

Prosecuting Authority (NPA) took on 271,000 cases resulting in slightly more than 210,000 convictions. Thus, as a proportion of recorded cases just over 8% result in the conviction of the perpetrators. For some serious crimes the number of convictions as a proportion of recorded cases is even lower: for car hijacking it is 2%, aggravated robbery 3% and residential burglary 5%.

While the NPA is able to obtain a conviction for most offenders it prosecutes, the number of cases taken on by the prosecution service has declined at a time when recorded crime is increasing. In 1994/95, some 350,000 prosecutions and 261,000 convictions took place. This decreased to 271,000 prosecutions and 212,000 convictions in 2000. Yet the number of serious crimes, as recorded by the SAPS, increased by almost 500,000 between 1994 and 2000.⁶ There has, however, been an increase in the number of prosecutions and convictions since 2000.

Many communities in South Africa are increasingly engaging in vigilante activity. This is largely as a result of popular perceptions that the country's post-1994 constitutional order and criminal justice system are at best ineffectual when it comes to fighting crime or, at worst, afford greater protection to criminals than law abiding citizens. In its annual report for 2000 the Independent Complaints Directorate (a statutory body with the responsibility of investigating police conduct, and offences committed by members of the police service) described a 'dramatic' hardening of public attitudes towards the rights of criminals. 'There seems to be a growing, popular perception that the constitutional rights of criminals are being protected above those of their victims,' the Directorate reported.⁷

Most vigilante actions are localised and disorganised affairs. There are important exceptions to this, however. Mapogo-a-Mathamaga, for example, which openly advocates corporal punishment for suspected criminals claims to have 40,000 fee paying members. Notwithstanding the fact that some of Mapogo's leaders are facing charges of murder, assault and kidnapping, the organisation enjoys wide-spread support among middle class suburbanites in cities such as Pretoria and Johannesburg.⁸ A poll amongst commercial farmers in early 2001 found that almost two-thirds of respondents would 'take the law into their own hands' if farm violence was not stopped.⁹

III TOUGHER LAWS

entire population. The yearly-review method is widely used both in South Africa and internationally. Moreover, a study which tracked the outcome of individual cases (also called the 'individual case tracking' method) came to similar results as the yearly-review method. See Ron Paschke, South African Law Commission, *Conviction Rates and other Outcomes of Crimes Reported in Eight South African Police Areas*, Research Paper No 18, Project No 82 (undated).

⁶ Crime Information Analysis Centre, *The Incidence of Serious Crime in South Africa between January and December 2000* (2001).

⁷ Brian Stuart, 'Crime – Joe Public has had enough', *The Citizen* (Johannesburg, South Africa), 23 January 2001. For survey data which indicates widespread sympathy for the actions of vigilante groups in South Africa see Martin Schönsteich, 'Justice versus Retribution: Attitudes to Punishment in the Eastern Cape' (2000) 45 *ISS Monograph Series*.

⁸ Makubetse Sekhonyane and Antoinette Louw, 'Violent justice. Vigilantism and the state's response' (2002) 72 *ISS Monograph Series*.

⁹ C Thompson, 'Militant farmers' myth', *The Citizen* (Johannesburg, South Africa), 2 April 2001.

Government efforts to combat crime since 1994 have placed much emphasis on adding to the statute book. Much of the legislation seeks to adopt a tough approach on crime suspects and criminals, and enhance the state's effectiveness to combat crime. For example, since 1994 the bail laws have been tightened twice, minimum sentencing legislation has been enacted, a comprehensive law against organised crime with civil forfeiture provisions, and a law establishing a centralised prosecuting authority with wide-ranging investigative powers has been passed. Legislation to restrict the release of convicted prisoners on parole has been placed on the statute book. During 2003 an omnibus *Anti-Terrorism Act* is to be promulgated. Some of these legislative initiatives are discussed below.

A *Bail Legislation*

In 1995 the South African Parliament amended the bail provisions contained in the *Criminal Procedure Act*.¹⁰ The amendment was enacted to bring the law affecting bail in line with the Bill of Rights (contained in the 1993 interim Constitution), and to clarify the legal position regarding bail and bail procedures.¹¹ A number of academics, concerned about some of the tough provisions contained in the amendment, commented:

By international standards, the 1995 amendments were strict measures. They provided, for example, for the continued detention of someone who might commit further crime rather than limiting pre-trial detention only to those who might not stand trial or who might interfere with witnesses or other preparations for the trial.¹²

Notwithstanding the tougher bail law, the public remained convinced that the right to bail, per se, was to blame for the high levels of violent crime. This perception was primarily based on a few well publicised cases where bail was granted because of lapses in the criminal justice process, and not because of weaknesses in the bail law.¹³ Public and media pressure, and the fear that high crime levels could undermine investor confidence in the country and keep foreign exchange laden tourists away, persuaded policy makers that further action was needed.

In 1996 the then President, Nelson Mandela, expressed the need for 'legislation to tighten bail conditions despite threats by idealists to take the government to the Constitutional Court'.¹⁴ At the beginning of 1997 the Minister of Justice at the time, Dullah Omar, stated:

¹⁰ *Criminal Procedure Second Amendment Act* No 75 of 1995.

¹¹ *Constitution of the Republic of South Africa Act* No 200 of 1993.

¹² Jeremy Sarkin, Esther Steyn, Dirk van Zyl Smit and Ron Paschke, 'The Constitutional Court's Bail Decision: Individual Liberty in Crisis? *S v Dlamini*' (2000) 16 *South African Journal of Human Rights*, 297.

¹³ One case which received much media coverage was that of a six-year old girl, Mamokgethi Malebane, who was killed by the accused, Dan Mabote, shortly before she was to testify against him for allegedly raping her. The accused was released on bail of R2,000 despite the fact that the police were investigating two other allegations of rape against him and that the police were opposed to the granting of bail. See 'Mamokgethi: and justice for all?', *Weekly Mail & Guardian*, 31 July 1998.

¹⁴ *The Citizen*, 27 September 1996.

There is a need to promote legislation which will compel courts to refuse bail under certain circumstances. Whilst I appreciate [that the judiciary opposes its discretion being tampered with], I believe that it is in the public interest ... This will probably mean that the relevant provisions of the Bill of Rights will have to be amended as well.¹⁵

In 1997 the *Criminal Procedure Act* was again amended.¹⁶ A well known University of Cape Town academic argued that, by adopting the amendment, Parliament ‘opted for extraordinary restrictive bail measures’.¹⁷ Writing in a legal journal, *De Rebus*, a senior advocate commented:

It seems that these Draconian measures have been enacted by way of a knee-jerk reaction of the legislature which has become alarmed at the increasing climate of lawlessness and anarchy which prevails in South Africa.¹⁸

These concerns about the 1997 amendment were not without foundation. Civil rights lawyers were especially concerned about provisions in the amendment which hold that:

- bail may be refused ‘where in exceptional circumstances there is a likelihood that the release of the accused will disturb the public order or undermine the public peace’;
- persons charged with certain serious offences have to adduce evidence that ‘exceptional circumstances’ exist which in the ‘interest of justice’ permit their release;
- access by the accused person to the investigation docket is restricted;
- a court may postpone a bail application for up to seven days at a time;
- the accused person at a bail proceeding is obliged to inform the court whether he or she has previously been convicted of any offence and whether there are other charges pending against him or her; and
- the record of bail proceedings is admissible as part of the record of the trial of the accused, and anything which the accused testifies to during the course of the bail proceedings may be used against the accused in evidence at the subsequent trial.

B *Minimum Sentences*

The *Criminal Law Amendment Act 1997* provides for minimum sentences to be imposed on persons convicted of certain offences. Judicial officers may only impose less than the prescribed minima if they are ‘satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence’.¹⁹ Moreover, judicial officers have to justify their decision by placing on record their reasons for imposing a lesser sentence than the prescribed minimum.

¹⁵ Abdullah Omar, Minister of Justice, *Media statement by Mr A M Omar* (12 January 1997).

¹⁶ *Criminal Procedure Second Amendment Act* No 85 of 1997.

¹⁷ Esther Steyn, ‘Pre-trial Detention: Its Impact on Crime and Human Rights in South Africa’ (2000) 4(2) *Law Democracy & Development*.

¹⁸ G Bursey, ‘Bail – time for a return to sanity’ (September 1999), *De Rebus*, 33.

¹⁹ *Criminal Law Amendment Act* No 105 of 1997, s 51(3)(a).

For example, the Act mandates life imprisonment for persons convicted of murder, where:

- it was planned or premeditated;
- the victim was a law enforcement officer, or a person likely to give material evidence in a criminal trial; or
- it involved rape or robbery with aggravating circumstances.

Murder which is not premeditated, aggravated robbery, vehicle hijacking, the illegal possession of semi-automatic and automatic firearms, and theft and corruption involving amounts of half a million rand or more also carry heavy penalties. Persons found guilty of such offences must receive a prison sentence of 15 years on a first conviction, 20 years on a second, and 25 years on a third or subsequent conviction. Even relatively minor offences such as theft and malicious damage to property carry a five year prison sentence (10 years on a third conviction) if at the time of the offence the accused had a firearm with the intention of using it in the execution of the crime.

The Act came into operation on 1 May 1998, and the minimum sentencing part of the Act automatically expired two years after it came into operation (ie, on 30 April 2000), unless its operation was extended, which the President with the concurrence of Parliament may do one year at a time. At the time of writing this had been done four times and the minimum sentencing provisions of the Act are still in force.

The South African judiciary has reacted negatively to the minimum sentencing legislation. In terms of South Africa's common law, courts weigh up three factors to come to an appropriate sentencing decision. These are the nature and seriousness of the particular crime; the personal circumstances of the offender when the crime was committed; and, the interests of society.²⁰ The minimum sentencing legislation permits the courts to consider the first factor only – the nature and seriousness of the offence.

South Africa's courts have always been critical of mandatory minimum sentencing legislation. In grudgingly applying the *Criminal Law Amendment Act 1997*, a number of judges referred to a 1990 comment by the then Chief Justice Corbett:

[t]he imposition of a mandatory minimum prison sentence has always been regarded as an undesirable intrusion by the legislature upon the jurisdiction of the courts to determine the punishment to be meted out to persons convicted ... and as a kind of enactment that is calculated in certain instances to produce grave injustice.²¹

C *Fighting Terrorism*

During 1999 numerous bombs exploded in Cape Town targeting well known shopping and tourist destinations, places of entertainment, police stations and court houses. As a result of these bomb blasts, and strong public pressure to act against the

²⁰ *State v Zinn* 1969 (2) SA 537 (A).

²¹ *State v Toms, Bruce* 1990 (2) SA 802 (A), 822C.

perpetrators of acts of terror, governmental policy makers announced their intention to promulgate tough anti-terrorism legislation for South Africa.²²

The acting premier of the Western Cape at the time (of which Cape Town is the provincial capital), Peter Marais, called for constitutional amendments, in particular, to provisions that give terror suspects the right to remain silent and that require them to be released within 48 hours or be charged. 'The police could not be expected to build watertight cases against terrorists in such a short period', and 'you can't tell me that a terrorist who has killed 100 people with a bomb deserves the right to silence after being arrested', Marais said.²³ The then Minister of Safety and Security, Steve Tshwete, also called on Parliament to amend the Constitution to extend the 48 hours rule, and to restrict suspected terrorists' access to legal representation during this period.²⁴

In August 2002 the South African Law Commission, a statutory law reform agency, released a draft *Anti-Terrorism Bill* for comment. This is the second draft of the Bill the Commission has released for comment. The first draft was released in July 2000.²⁵ The Commission proposes an omnibus Act addressing the issue of terrorism on a broad basis. The draft *Anti-Terrorism Bill* is worrying on a number of accounts.²⁶

The definition of a 'terrorist act' is broad and could conceivably include lawbreakers who would not be terrorists in the normal meaning of the word. For example, the draft Bill includes in its definition of a terrorist act 'an act that is committed in whole or in part for a political, religious or ideological purpose to intimidate a segment of the public with regard to its security, including its economic security,' and that 'causes substantial property damage, whether to public or private property,' which is likely to result in 'a serious risk to the health or safety of the public'.²⁷

Bus drivers, protesting the privatisation of municipal public transport services, who violently blockade taxi ranks to prevent the public using private taxi services, and whereby some occupied taxis are damaged, could be guilty of committing a terrorist act as defined by the Bill. People who violently block taxi ranks, cause damage to property and risk people's safety need to be punished. It is, however, questionable

²² D Abdinor, 'Support for iron fist', *Cape Times* (Cape Town, South Africa), 5 January 1999.

²³ F Chothia, 'Tshwete seeks new terror laws', *Business Day* (Johannesburg, South Africa), 30 November 1999.

²⁴ Jonny Steinberg, 'Irate Tshwete playing to the crowd', *Business Day* (Johannesburg, South Africa), 7 January 2000. See also Adrian Hadland, 'Move to draft anti-terror legislation', *Sunday Argus* (Cape Town, South Africa), 31 January 1999.

²⁵ South African Law Commission, *Review of Security Legislation (Terrorism: Section 54 of the Internal Security Act, 1982)*, Discussion Paper No 92, Project No 105, Part 2 (2000).

²⁶ For more information and a critique of the first draft anti-terrorism bill, on which the draft bill released in August 2002 is based, see Martin Schönteich, 'Laws as Weapons: Legislating Against Terrorism', in: 'Fear in the City: Urban Terrorism in South Africa' (2001) 63 *ISS Monograph Series*, 127-137.

²⁷ Clause 1, *Anti-Terrorism Bill 2002* contained in: South African Law Commission, *Review of Security Legislation (Terrorism: Section 54 of the Internal Security Act, 1982)*, Project No 105 (2002), 981-2.

whether they deserve life imprisonment as mandated by the draft Bill for anyone convicted of a ‘terrorist act’.²⁸

According to the draft Bill, the Minister of Safety and Security may declare an organisation to be a ‘proscribed organisation’. The minister may do so provided he is satisfied on reasonable grounds that the organisation has committed, or is committing, a terrorist act. In terms of the draft Bill it is irrelevant whether the organisation has been charged with, or convicted of, the terrorist act; or, whether a member of the organisation has committed a terrorist act on behalf of the organisation.²⁹ The minister’s decision to proscribe an organisation may be taken on judicial review. However, the judge undertaking the review can peruse and listen to the state’s evidence in private (ie, without the applicant being present). The judge must provide the applicant with a statement summarising the information that was made available to the court. The judge is, however, not obliged to disclose information to the applicant which may ‘injure national security’.³⁰

The draft Bill proposes that any person who is a member (including an informal member) of a ‘proscribed organisation’ is liable on conviction of imprisonment for a period of up to 10 years, to a fine or both.³¹

Moreover, anyone who knowingly possesses information which may be essential to investigate any terrorist act which is being committed, has been committed, or is being planned, and who intentionally withholds such information from law enforcement agencies commits an offence. Persons convicted of such an offence are liable to imprisonment for up to five years without the option of a fine.³²

The draft Bill further provides that a person may be detained where a police officer believes on reasonable grounds that a terrorist act will be carried out, and that the arrest of the person in question is necessary to prevent it being carried out.³³ The detainee may be kept in custody for up to 48 hours provided the police officer can show to a court that the detention of the detainee is justified on one of the following grounds:

- for the protection or safety of the public or any witnesses; or
- any other just cause where the detention is necessary in order to maintain confidence in the administration of justice.

If the police officer succeeds in the application, the matter is postponed for an ‘investigative hearing’. At the hearing the judicial officer may, if satisfied by the evidence adduced that the police officer has reasonable grounds for his or her suspicion, order that the detainee enter into an undertaking to keep the peace and be of good behaviour for up to 12 months, and to comply with any other reasonable

²⁸ Ibid, clause 2.

²⁹ Ibid, clause 4(4).

³⁰ Ibid, clause 4(10).

³¹ Ibid, clause 4.

³² Ibid, clause 17.

³³ Ibid, clause 27(1).

conditions. If the detainee agrees to abide by the set conditions he or she is released.³⁴ Alternatively (where the detainee does not give an undertaking to abide by the court's conditions), the detainee may be kept in custody for up to 12 months.³⁵

D *Clampdown on Parole*

A new parole system is likely to come into operation during 2003/04 with the placing into operation of the relevant provisions of the *Correctional Services Act 1998*.³⁶ The new provisions do not permit the granting of parole as readily as the present regime, especially if the sentencing court is opposed to the early granting of parole. In summary, the new provisions provide for the following:

- A prisoner serving a determinate sentence (ie, a sentence of imprisonment for a definite period, such as 10 years) may not be placed on parole until the prisoner has served the stipulated non-parole period (as stipulated by the sentencing court). However, parole must be considered whenever a prisoner has served 25 years of a sentence or cumulative sentences.³⁷ If a non-parole period is not fixed, prisoners will have to serve half of their sentence, or 25 years, whichever is the shortest, prior to parole being considered.³⁸

The *Criminal Law Amendment Act 1997* provides for minimum sentences to be imposed on persons convicted of certain serious offences (see above).³⁹ Prisoners sentenced in terms of the Act may not be placed on parole unless they have served at least four-fifths of the term of imprisonment imposed or 25 years, whichever is the shorter. However, the court when imposing imprisonment, may order that the prisoner be considered for placement on parole after he or she has served two-thirds of such term.⁴⁰

In terms of the present parole provisions, a prisoner serving a determinate sentence, may be considered for placement on parole after serving at least half of his or her sentence.⁴¹ However, if a prisoner earns sufficient credits this period may be brought forward, so that a prisoner can be released on parole after serving at least one-third of the sentence.⁴² Prisoners earn credits by observing the rules which apply in the prison and by actively taking part in the programmes which are provided for their treatment, training and rehabilitation.⁴³ The new parole provisions will repeal the credit system.

³⁴ Ibid, clause 28(1).

³⁵ Ibid, clause 28(2).

³⁶ *Correctional Services Act* No 111 of 1998, Chapter VII.

³⁷ Ibid s 6(a).

³⁸ Lulamile Mbete, National Commissioner of Correctional Services, *Briefing to the Correctional Services Parliamentary Portfolio Committee*, Press Release (10 October 2000).

³⁹ *Criminal Law Amendment Act* No 105 of 1997, s 51(3)(a).

⁴⁰ *Correctional Services Act*, above n 36, s 73(6)(b)(v)

⁴¹ *Correctional Services Act* No 8 of 1959, as amended, s 65(4)(a).

⁴² Mbete, above n 38.

⁴³ *Correctional Services Act* No 8 of 1959, as amended, s 22A(1).

- A prisoner sentenced to life imprisonment may not be placed on parole until he or she has served at least 25 years of the sentence, but on reaching the age of 65 years the prisoner may be placed on parole if he or she has served at least 15 years of such sentence.⁴⁴

According to the present parole policy, upon receipt of a report from a parole board regarding a prisoner who has been sentenced to life imprisonment, the National Council for Correctional Services⁴⁵ may, after ‘considering the report of the parole board, and having regard to the interests of the community’, recommend to the Minister of Correctional Services whether such a prisoner should be placed on parole.⁴⁶ No minimum period of imprisonment is defined by the relevant legislation.

IV TOUGH POLICE ACTION

The Independent Complaints Directorate investigated 214 deaths in police custody between April 2001 and March 2002 (the latest 12-month period for which figures were available at the time of writing). According to the Directorate the cause of death in these cases were: natural causes (75 deaths), suicides (76), injuries in custody (25), injuries prior to custody (28), and possible police negligence (10).⁴⁷

During the same period the Directorate investigated a further 371 deaths as a result of police action. Of these most occurred as a result of a shooting during the course of an arrest (160). Some 16 deaths were attributed to possible police negligence, 20 were innocent bystanders who were shot inadvertently by the police, and one death was caused by alleged police torture.⁴⁸

As long ago as November 1998 the South African Parliament passed an amendment to the *Criminal Procedure Act* which seeks to restrict the police’s right to use lethal force to apprehend suspects.⁴⁹ At the time of writing the amendment has not been promulgated, primarily because of opposition from the Ministry of Safety and Security. At a meeting of police officers in 1999 the then Minister of Safety and Security, the late minister Steve Tshwete, indicated his opposition to the amendment: ‘We are not going to have a police service with its hands tied behind its back.’ At the same meeting the minister also reportedly encouraged police officers to deal with

⁴⁴ *Correctional Services Act*, above n 36, s 73(6)(b)(iv)

⁴⁵ The National Council for Correctional Services is comprised of two High Court Judges, a Regional Magistrate, a Director (or Deputy Director) of Public Prosecutions, two high ranking officials of the Department of Correctional Services, one high ranking member for both the SAPS and the Department of Welfare, two non-state employees who are experts of the correctional system, and four or more other non-state employees. Decisions of the National Council are determined by a simple majority.

⁴⁶ *Correctional Services Act* No 8 of 1959, s 65(5). At the time of writing the *Correctional Services Act* of 1959, as amended, governs the law as it applies to parole. This is likely to change in late 2003, with the implementation of the parole provisions contained in the *Correctional Services Act* of 1998.

⁴⁷ Independent Complaints Directorate, *Annual Report 2001/2002* (2002) 41.

⁴⁸ *Ibid* 42.

⁴⁹ *Judicial Matters Second Amendment Act* No 122 of 1998, to amend s 49 of the *Criminal Procedure Act* No 51 of 1977.

criminals 'in the same way a bulldog deals with a bull'.⁵⁰ These words came back to haunt the minister when a videotape showing six policemen setting their dogs on illegal immigrants received extensive television coverage in late 2000.

V PRISON CONDITIONS

Systemic weaknesses in the criminal justice system are resulting in large scale violations of unsentenced prisoners' human rights. Most arrested accused persons are granted bail by the courts. In terms of the law, once a judicial officer makes a finding that an accused person should be granted bail, the bail amount set should be individualised so as to be affordable to the accused person before court. Yet, in many cases this does not happen because of the high workload judicial officers face, making individualised enquiries impossible.

Consequently – and effectively resulting in discrimination against the indigent – many accused persons cannot afford to pay bail and remain incarcerated awaiting the finalisation of their trials. In December 2002, there were some 18,000 such accused persons. Of these 6,500 accused had been granted bail of R500 or less.⁵¹ During their incarceration many awaiting trial accused are assaulted, sodomised and at risk of contracting tuberculosis and sexually transmitted infections including HIV.⁵² Thus, due to the slow processing of cases by the courts and the resultant high prison overcrowding levels, constitutionally protected rights of many accused persons – especially the poor – are infringed.

A consequence of the lacklustre performance of the detective and prosecution service, and the courts, is the increase in the number of unsentenced prisoners. The average length of time unsentenced prisoners remain incarcerated until the finalisation of their trials rose considerably after 1996. In December 1996 the average unsentenced prisoner spent 77 days in custody. This steadily increased to 143 custody days in late 2002. This means that, on average, accused persons are imprisoned almost five months awaiting the finalisation of their trial.

The number of unsentenced prisoners increased from 19,600 in June 1994 to 56,500 in December 2002 – a massive increase of 189%. Over the same period the number of sentenced prisoners increased from 80,000 to 128,700 – an increase of 61%. Unsurprisingly, South Africa's prisons are overcrowded. In December 2002 the country's prisons were holding some 185,000 inmates but had an approved occupancy level of only 110,000.⁵³

The high overcrowding levels place considerable strain on both the human and capital resources of the Department of Correctional Services to manage its prisons, and rehabilitate the prisoners in its care. According to the department, overcrowding has

⁵⁰ 'Tshwete takes 'no mercy' stance on crime', *Daily Dispatch* (East London, South Africa), 10 July 1999.

⁵¹ In April 2003, US\$1 was equivalent to R8.

⁵² See Kathryn Goyer, 'HIV/AIDS in Prison. Problems, Policies and Potential' (2003) 79 *ISS Monograph Series*.

⁵³ No author, 'Criminal Justice Monitor' (2001) 5(1) *Nedbank/ISS Crime Index*, 3-4.

an ‘adverse effect on offenders, staff and the safe custody of prisoners’.⁵⁴ Overcrowding exacerbates tension, hostility and aggression between prisoners, and between prisoners and prison personnel. During 2002, 2,429 assaults by prisoners on prisoners were recorded by the department, and 582 assaults by prison personnel on prisoners.

VI LESS PREVENTION, MORE ENFORCEMENT

Since mid-1999, after the appointment of new ministers responsible for safety and security and justice, there has been a notable shift away from long-term policy making and crime prevention towards improved, tough and visible law enforcement. This is illustrated by the high density, zero tolerance type police and army operations taking place in high crime areas since April 2000 in terms of the SAPS’ National Crime Combating Strategy (also known as ‘Operation Crackdown’).⁵⁵ Operation Crackdown has already netted a large number of crime suspects. Some 462,000 arrests were made during the first 12 months of the three year operation – an amazing figure representing in excess of 1% of the country’s population.⁵⁶ From the available information it appears, however, that few of the arrests have led to successful prosecutions.

Some of these tough measures are necessary given the high levels of public insecurity and the need for a clear show of the government’s commitment to combating crime. But the danger, already evident in the downgrading of the National Crime Prevention Strategy (NCPS) to a small centre within one police division, is that attention is being drawn away from longer term crime prevention strategies and from the need to fix the mundane organisational and structural problems facing the criminal justice departments.

VII OPERATIONAL WEAKNESSES

Many of the operational problems besetting the South African criminal justice system, and which policy makers are trying to address with tough laws and robust law-and-order rhetoric, are perennial weaknesses in individual criminal justice agencies and a lack of coordination between the departments making up the country’s criminal justice system.

Even the best legislation is ineffective if it is not properly implemented and used by the personnel (primarily the police and the prosecution service) of the criminal justice system. Many forms of crime can be effectively combated. What is needed is a well-run and adequately resourced criminal justice system staffed by trained and motivated personnel. Amending the constitution and restricting accused persons’ rights is not the answer. As the editorial of a national paper aptly commented: ‘The constitution is in no need of repair. Our policing strategies are.’⁵⁷

⁵⁴ Department of Correctional Services presentation to the Parliamentary Select Committee on Security and Constitutional Affairs, Cape Town, 7 June 2000.

⁵⁵ Eric Pelser, ‘Operation Crackdown: The New Policing Strategy’ (2000) 4(2) *Nedbank/ISS Crime Index*, 7-10.

⁵⁶ ‘New plan to “chop farm attacks”’, *Pretoria News* (Pretoria, South Africa), 14 February 2001.

⁵⁷ Editorial, ‘Short cuts take us into dangerous territory’, *Sunday Times* (Johannesburg, South Africa), 9 January 2000.

A *Detection and Prosecution Skills*

The success of a prosecution is largely determined by the way a crime is investigated by the police. A poorly investigated case, where no statements are taken from potentially corroborating witnesses, where incomplete or inaccurate statements are taken, or where evidence is obtained in an illegal manner, is likely to result in the acquittal of a guilty accused. Even a good prosecutor – let alone an inexperienced one – will find it difficult to salvage a case where crucial aspects of its investigation are flawed.

The investigation of crimes by the SAPS is largely inadequate. The average workload of a detective is the investigation of 140 separate cases simultaneously, making any proper and thorough investigation impossible.⁵⁸ Detectives argue that at the most, they can properly deal with ten serious cases at any one time. Officially, the ideal number of dockets per detective is 18.⁵⁹ On average, of every ten crimes that are reported to the police, only two are investigated sufficiently for the prosecution to take on the case.⁶⁰

Many prosecutors argue that the general quality of the police's detective work declined in the post-1994 period.⁶¹ This was partly to be expected. After 1994, the newly formed SAPS was burdened by coping with the amalgamation of the old South African Police (SAP) and a number of homeland police forces, and with having to adapt to a new constitutional order based on the rule of law. A liberal Bill of Rights granting constitutionally entrenched protection to those accused of having committed a crime requires that the police investigate all crimes in a procedurally and legally correct manner.

South Africa's post-1994 constitutional dispensation guarantees the right of every accused person to be presumed innocent.⁶² Thus, in any criminal trial, the onus is on the state to prove its case beyond a reasonable doubt. South African common law has long recognised this right. However, before 1994, a number of laws were on the statute books which sought to assist the state in the prosecution of certain offences. These laws created presumptions in the state's favour. The presumptions placed an onus on persons accused of certain offences, which they had to rebut by proof on a balance of probabilities to be acquitted of the charges against them. After 1994 the Constitutional Court declared a number of such presumptions invalid and unconstitutional.

⁵⁸ T van Vuuren, 'Private and Public Cooperation in the Restoration of Order in South Africa' (1997) 2 *Police Science Association of Southern Africa Bulletin*, 5.

⁵⁹ Steve Tshwete, Minister of Safety and Security, Written reply to Parliamentary Question No 1111, National Assembly, 15 June 2001.

⁶⁰ *The Nedcor Project on Crime, Violence and Investment (Executive Summary)*, June 1996, 2.

⁶¹ The majority (approximately 75%) of the prosecutors interviewed by the author in mid-2000, for the purposes of research on the South African prosecution service, expressed the view that the quality of the police's detective work declined after 1994. According to most interviewees, the decline in work quality is especially marked among general detectives, and less so among detectives working in specialised detective units such as the murder and robbery unit. See Martin Schönteich, 'Lawyers for the People: The South African Prosecution Service' (2001) 53 *ISS Monograph Series*.

⁶² *Constitution of the Republic of South Africa Act No 108 of 1996*, s 35(3)(h).

For example, the *Criminal Procedure Act 1977* provides that a free and voluntary confession by an accused person is admissible in evidence against such an accused. Where such a confession is made to a magistrate and reduced to writing, the confession is 'presumed, unless the contrary is proved, to have been freely and voluntarily made' by the accused.⁶³ In the past an accused who made a confession to a magistrate bore the onus of proving that his or her confession was not made freely and voluntarily. In 1995 the Constitutional Court ruled that such an onus violated the right every accused person has to a fair trial, which includes the right to be presumed innocent, to remain silent and not to testify during the proceedings.⁶⁴ The Constitutional Court's ruling has had a profound effect on the work of the prosecution service. Since the ruling it is common for defence lawyers to argue that their clients' confessions were made under duress. This necessitates the holding of a trial-within-a-trial whereby the prosecution has to prove that any confession before a magistrate was made freely and voluntarily.

In the past information contained in a police docket was considered privileged information which the prosecution did not have to reveal to the defence. This changed in 1995 when the Constitutional Court ruled that the 'blanket rule' prohibiting an accused person from obtaining access to the police docket was too wide and infringed on an accused person's right to a fair trial.⁶⁵ The ruling also had far reaching implications for the prosecution. On a practical level prosecutors are burdened with obtaining dockets from the police and photocopying large parts of the contents of a docket to make this information available to the defence. Moreover, some accused – especially professional criminals and those working in the organised crime milieu – misuse their right to access the information contained in the police docket. Such criminals familiarise themselves with the prosecutions' case so as to invent a defence which can exploit any weaknesses in the police's investigations. Unscrupulous criminals also use witness statements to identify witnesses which might testify against them and then see to it that such witnesses are intimidated not to testify, or to testify so badly so as to fatally weaken the prosecutions' case.

B Resource Constraints

State spending on the South African criminal justice system has increased in real terms over the last decade.⁶⁶ Yet, a lack of resources has contributed to the poor performance of the criminal justice system. For example, partly for historical reasons, but also because of a lack of money for training purposes it was estimated that at the end of 1999, close to a quarter of SAPS members were 'functionally illiterate'.⁶⁷ Almost 35,000 police officers have a standard eight qualification (10 years of schooling) or lower.⁶⁸ The low educational levels of many police officers makes it difficult, and even impossible, for them to take down complaints, fill out investigation

⁶³ *Criminal Procedure Act* No 51 of 1977, as amended, s 217(1)(b)(ii).

⁶⁴ *S v Zuma and Others* 1995 (2) SA 642 (CC).

⁶⁵ *Shabalala v Attorney-General of the Transvaal* 1995(2) SACR 761 (CC).

⁶⁶ Martin Schönreich, 'The Rising Cost of Crime: State Spending on Criminal Justice' (1999) 3(4) *Nedcor/ISS Crime Index*, 18-21.

⁶⁷ Adrian Hadland, 'Many cops "illiterate"', *Natal Mercury* (Durban, South Africa), 24 September 1999.

⁶⁸ Steve Tshwete, Minister for Safety and Security, Written reply to Parliamentary Question, National Assembly, 10 March 2000.

dockets, give articulate testimony in court, or fulfil any but the most basic policing duties.

Salaries of prosecutors have been described as a 'national disgrace' by a government appointed commission.⁶⁹ Badly paid and under-resourced, many experienced prosecutors have left the prosecution service.⁷⁰ Between 1994 and 1998, some 630 prosecutors resigned (out of a total staff complement of about 1,800). Between them they had the equivalent of more than 2,000 years of work experience as prosecutors.⁷¹ Many prosecutorial skills are acquired and perfected through practice and experience. A rapid staff turnover, therefore, undermines the professional capacity of the prosecution service.

In 1995, the newly amalgamated SAPS employed approximately 140,000 people (functional police officers and civilians). Thereafter many police officers resigned and left the service. Only a few new recruits were employed because of a hiring moratorium over much of this period. In January 2003 the SAPS was left with 129,700 employees, of which 27,300 were civilians and approximately 21,000 detectives. Between late 1996 and early 2003 the number of functional police officers (uniformed personnel and detectives) declined by 12%. Over a similar period, recorded serious violent crimes increased by some 21%, and less serious violent crimes by 32%.⁷²

The government's medium-term expenditure framework for 2002/03-2005/06 does, however, provide for the appointment of an additional 30,200 entry-level police constables and 15,400 civilians over a three-year period. The budget also provides for the replacement of posts which should become vacant over this period. By early 2006, the SAPS should have 155,000 employees. Moreover, because of stringent hiring requirements the average education level of police officers should be substantially higher in 2006.

In late 2002 there was an average of one functional police officer for every 450 residents in South Africa. The ratio compares reasonably well with developing countries but poorly with many developed countries. Compared to more developed countries, South Africa's relatively low civilian to police officer ratio is exacerbated by the fact that the country has a high crime rate, especially in respect of serious and violent crime. According to the International Criminal Police Organisation (Interpol), South Africa has the highest per capita rates of murder, robbery and violent theft, and the second highest rate of serious assaults. Because of high levels of recorded crime, South Africa has a relatively low police officer to crime ratio. Thus, while South Africa has an average of only 6 police officers per recorded murder a year, Zambia has 12, Egypt has 93 and Malaysia almost 250.

⁶⁹ The Hoexter Commission, *First Interim Report of the Commission of Inquiry into the Rationalisation of the Provincial and Local Divisions of the Supreme Court* (1997) Vol 1, Chapter 6, 67.

⁷⁰ See M Schönsteich, 'Lack of Conviction: Prosecution's Poor Performance' (1999) 3(2) *Nedcor/ISS Crime Index*, 5-8.

⁷¹ Telephonic interview with Mr J J Swart, President of the National Union of Prosecutors of South Africa, 7 April 1997.

⁷² Serious violent crime: murder, attempted murder, rape, aggravated robbery, assault GBH. Less serious violent crime: common robbery and common assault.

VIII CONCLUSION

From the available evidence it would appear that since the mid-1990s South African policy makers, and the operational personnel of the country's law enforcement agencies, have adopted an increasingly cavalier attitude to protecting the rights of crime suspects and convicted offenders. Reasons for the change include consistently high levels of crime, operational demands and weaknesses of the criminal justice system, public pressure, and a general perception that the Constitution is overly protective of the rights 'of criminals' at the expense of law abiding citizens.

These reasons do not warrant the dilution of constitutional rights. The infringement of such rights inhibits the development of a free society and is unlikely to reduce crime levels or restore public confidence in the criminal justice system over the long-term.

Numerous pieces of legislation designed to combat crime, and strengthen the hands of the law enforcement agencies are on the South African statute books. Many of the laws are not being used fully because of operational weaknesses in the criminal justice system. Policy makers need to direct their efforts at these weaknesses, before advocating Draconian measures which could have the effect of curtailing the rights and liberties entrenched in the country's Constitution.

Tough legislation and law enforcement policies are likely to fail in their aims if they are not properly implemented and used by the personnel of the criminal justice system. Many forms of crime, especially serious premeditated crime of the kind committed by organised crime syndicates can be effectively combated. What is needed is a well-run and adequately resourced criminal justice system staffed by trained and motivated personnel.