



Assessing the Performance of South Africa's Constitution

Chapter 8. The performance of the security services

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The purpose of this chapter is to evaluate the performance of the security services. These vital features of any state had been centrally connected to the apartheid project and, as a result, there was a need to build up and develop their legitimacy in a South African constitutional democracy. This chapter covers all those facets of the state that deal with ensuring security and fighting crime: these include, the police, the defence force, the intelligence services and the national prosecuting authority. The chapter attempts to uncover general internal goals that the constitution sought to instantiate in relation to these institutions as well as their specific goals. Their performance is evaluated against both sets of objectives. The overall picture is one where the security services have successfully been integrated into the new democratic order which is an achievement in itself though certain features of their design are less than optimal. The performance of the police against many of the goals has been particularly poor whilst political interference has undermine the independence of the National Prosecuting Authority. A major omission from the constitutional design was also identified as being the lack of an institution set up to fight corruption whose institutional independence is constitutionally guaranteed.

8.1: Goals of the Constitution

The security services under apartheid

If the judiciary was Apartheid South Africa's austere and respectable left hand that lent the regime a veneer of legality and neutrality,¹ then the Security Services were Apartheid's firm right fist, ruthlessly enforcing the government's totalitarian and racist ideological objectives. The Security Services (consisting of the police, army and intelligence services) were known for their discriminatory enforcement of security goals, lack of legal or political accountability and the absence of transparency with respect to the majority of security-service activities. This chapter will pivot around these characteristics.

Security enforcement, following Apartheid ideology, was conducted in a discriminatory and partial manner. Police resources were grossly skewed in their allocation² and the police served and protected a narrow white portion of the citizenry. Compounding this lopsided resource allocation was the fact that the security branch, especially the intelligence and police service, were enforcing laws that required racial discrimination, such as the Reservation of Separate Amenities Act³ and the Group Areas Act.⁴ This meant that the security branches were the most direct and common point of interaction with the Apartheid regime and a site of conflict for many in South African society.

The Security Services fostered further political divisions by regarding even ordinary citizens as potential threats based on their political views or support. In this regard, the state passed the Suppression of Communism Act,⁵ which, as the name suggests, was designed to target and suppress suspected communists. In 1955 alone, 460 homes were searched.⁶ This insistence on policing even the political beliefs of ordinary South Africans meant that the populace was divided on political, as well as racial, lines. Not only did this result in illegitimacy on the Security Services' part, it ensured that security as a public good was not delivered to ordinary citizens.

The Security Services were also characterised by their lack of legal accountability. This of course meant that the security machinery was viewed as largely illegitimate by the majority of the population. The broad powers afforded to the Security Services were evinced by the fact that in the regime's first state of emergency of 1953, 18 000 people were arrested and 11 000 detained.⁷ Moreover, the Terrorism Act⁸ not only authorised the

¹ See chapter 6 of this Report.

² Ampofo-Anti et al, 2008: ch23B-5.

³ 49 of 1953.

⁴ 36 of 1966.

⁵ 44 of 1950.

⁶ Magubane, 2004:343.

⁷ Magubane, 2004:344.

⁸ 83 of 1967.

indefinite detention of anyone suspected of terrorism,⁹ but also the indefinite detention of anyone harbouring or assisting such a person.¹⁰ To make matters worse, the remedy of judicial review was simply not available.¹¹ The Terrorism Act also criminalised the conduct of anyone who conspired, incited, aided, instigated, advised or encouraged a main perpetrator of terrorism.¹² And even more disturbing was the fact that an accused charged with terrorism bore the onus of disproving the charges.¹³ In essence, arrestees and detainees were ‘at the mercy of the security police’.¹⁴

The determination to exempt the Security Services from legal accountability did not cease there. The state passed the Indemnity Act¹⁵ granting the security police and armed forces immunity from civil or criminal liability for actions undertaken whilst maintaining or restoring public order,¹⁶ which included the granting of *retrospective* immunity.¹⁷ This covered the infamous ‘Sharpeville Massacre’ of 1960 that resulted in the death of 69 people after police opened fire on protestors demonstrating against pass laws.¹⁸ Therefore, the Security Services managed to evade legal accountability, and possible civil claims brought by victims, through broad and retrospective indemnities provided by statute.

However, even with such expansive powers, the security apparatus still operated outside the bounds of even Apartheid statutes and regulations. A programme of illegal torture, kidnapping and rendition from foreign states was executed with impunity.¹⁹ These grisly methods included electrocution.²⁰ The programme was so well organised that a special unit known as the ‘Sabotage Squad’ was established to handle interrogations.²¹ Illegal enforcement methods were not restricted to the police: the South African Defence Force (SADF), through its notorious ‘32 Battalion’, also performed assassinations and engaged in chemical and biological warfare.²²

This abuse of power persisted throughout the 1970s. In particular, following the ‘1976 Soweto Uprisings’, involving a protest in South Africa’s largest black-only township against the mandatory imposition of Afrikaans in schools, a large number of students were charged with sedition and even non-participants merely in the vicinity of the protests were killed. A notable case is the killing of 8 year old Lilly Mithi who, according to a medical examiner’s autopsy, was shot in the back during the police crack-down whilst returning from a shopping trip with her mother.²³ This heavy-handedness and illegal enforcement deprived the security branches of any semblance of legitimacy.

The political accountability of the Security Services was also limited. There was very little formal or informal oversight exercised by Parliament over the security branches. There were no other independent bodies with powers of review over security agencies either.²⁴ In fact, the central decision-making body on all security matters, the State Security Council (SSC), was almost entirely autonomous.²⁵ This body included the heads of the military, police, intelligence agencies, certain cabinet ministers and the President.²⁶ The composition of the SSC, melded with the precarious political climate, meant that all government policies were seen as potential security issues that could be subjected to scrutiny and control by the SSC.²⁷ Thus, not only were the Security Services autonomous, their reach extended into areas of non-security, such as policy-making.²⁸ The intelligence service

⁹ Section 6(1) of the Terrorism Act.

¹⁰ Section 3 of the Terrorism Act.

¹¹ Section 6(5) of the Terrorism Act.

¹² Section 2(1)(a) of the Terrorism Act.

¹³ Section 2(1)(b) of the Terrorism Act.

¹⁴ Magubane, 2004:347.

¹⁵ 61 of 1961.

¹⁶ Section 1(c) and (e) of the Indemnity Act.

¹⁷ Section 2 of the Indemnity Act.

¹⁸ South African History Online – Sharpeville.

¹⁹ Magubane, 2004:350.

²⁰ Magubane, 2004:356.

²¹ Magubane, 2004:356.

²² Cawthra and Luckham, 2003:34.

²³ Magubane, 2004:349.

²⁴ Ampofo-Anti et al, 2008:ch23B-6.

²⁵ Ampofo-Anti et al, 2008: ch23B-5.

²⁶ Stack, 1998:19.

²⁷ Ampofo-Anti et al, 2008:ch23B-p5.

²⁸ Kuzwayo, 1998: 55–56.

was particularly shielded from oversight by independent bodies, which, according to authors such as Stack, was primarily due to the secret nature of their work and the persistent denial of illegal conduct on the part of individual politicians.²⁹ This total absence of oversight and whitewashing of unlawful conduct increased agency costs during that time.

Aiding this lack of accountability was the Security Services' stubborn resistance to any measure of transparency as well as the executive arm's wilful ignorance of the illegal activities of the security branches.³⁰ This lack of transparency facilitated the birth of a 'parallel government' that operated under guidelines known only to a select few,³¹ and which resulted in a failure to deliver security as a public good to the general populace. According to Stack, the Executive was involved in a 'conspiracy of ignorance' by wilfully ignoring the unlawful actions of the Security Services. In doing so, government failed to protect its citizens from a programme of organised violence perpetrated by an unaccountable agency. There was also a 'veil of secrecy' around the activities of the Security Services, which increased the illegitimacy of the Apartheid state. As a consequence, it is not surprising that the framers of the South African Constitution chose specifically to address some of these serious failures of the past Security Services in the constitutional text, which have in turn shaped the internal goals set by the Constitution. Thus, in evaluating the constitutional performance of the Security Services, we have identified the following general, internal goals that apply across these institutions: transformation, impartiality, legal accountability, political accountability, and transparency. These are identified and connected as well with the external criteria identified by Ginsburg, which will be elaborated upon where relevant.

Of course, each institution has its own purposes which are expressly outlined in the Constitution. For example, the object of the Defence Force is 'to defend and protect the Republic, its territorial integrity and its people';³² that of the police force is 'to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property and to uphold and enforce the law' and;³³ it is the duty of the National Prosecuting Authority's (NPA) 'to institute criminal proceedings on behalf of the state'.³⁴ An obvious oversight is the lack of a stated constitutional objective for the intelligence services, which the Constitution defers to national legislation.³⁵ We focus our analysis on the more general goals identified above, which represent key changes the Constitution wished to bring about in relation to the Security Services. Obviously, the more specific goals of each institution will play a part in our evaluation of the performance of these more general goals.

Transformed, impartial protection

As a result of South Africa's discriminatory history, the Constitution in chapter 7 begins by stating that a governing principle of national security is that it must reflect the resolve of South Africans to 'live as equals'.³⁶ This equality principle is not merely a prohibition of discrimination on grounds that concern general anti-discrimination law,³⁷ but also extends to non-discrimination on the grounds of political belief. National Security Services cannot, for example, be partial in law enforcement relating to political-party affiliation.³⁸ The police are particularly enjoined 'to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law'.³⁹ Given the racial disparities of the pasts, it is important that they exercise this power in a manner that clearly does not discriminate on grounds of race. This broad, general language with respect to identifying the beneficiaries of police protection is telling. In proscribing discriminatory or partial treatment in the manner in which the police exercise this protection and security function, the constitutional text prescribes a transformed and impartial protection function.

²⁹ Stack, 1998:20.

³⁰ Stack, 1998:19.

³¹ Stack, 1998:21.

³² Section 200(2) of the Constitution.

³³ Section 205(3) of the Constitution.

³⁴ Section 179(2) of the Constitution.

³⁵ Section 210 of the Constitution.

³⁶ Section 198(a) of the Constitution.

³⁷ See section 9(3) of the Constitution, which prohibits unfair discrimination on the basis of "race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

³⁸ Section 199(7) of the Constitution.

³⁹ Section 205(3) of the Constitution.

This helps address Ginsburg's legitimacy criterion in two ways. First, it attempts to forge a common identity among diverse people by creating shared normative standards.⁴⁰ It identifies equal treatment by Security Services as an overarching norm that could notionally transcend different sections of South African society and knit together a broader, unified polity. Second, the constitutional text facilitates participatory politics by ensuring that those who engage in the activities of a political party are not targeted by Security Services as they once were.⁴¹

Legal accountability

Section 198(c) of the Constitution entrenches the rule of law by prescribing that 'national security must be pursued in compliance with the law, including international law'. It provides: 'The Security Services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.'

Notably, there is an express constitutional obligation on all the Security Services to adhere to norms created by customary international law and international agreements. This is important when considering the South African National Defence Force's (SANDF) obligations when it engages in peace-keeping missions abroad. The Republic has engaged in 16 UN peacekeeping missions since 1994 and contributes 1500-2500 troops per mission.⁴² The constitutional text specifically reiterates the Defence Force's international rule-of-law obligations even as it applies to defence of the realm by stating that 'the primary object of the Defence Force is to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international law regulating the use of force'.⁴³ These provisions bind the SANDF not only to international legal standards in regulating troop conduct, but endow these international obligations with a constitutional character. The rule of law is further underscored by the injunction that no member of the security service may 'obey a manifestly illegal order'.⁴⁴ Finally, the Constitution states that 'the security services must be structured and regulated by national legislation'.⁴⁵ Once again, all powers, organisation and actions of the Security Services must adhere to the rule of law.

This central constitutional norm seeks to limit agency costs in two ways. First, it places legal limits on the Security Services' use of force – a manifestation of one of the forms of Ginsburg's agency-cost limitation criterion.⁴⁶ Second, the rule of law ensures regulation of the manner in which force is used by, for example, outlawing acts of torture – a tactic commonly invoked by the Apartheid security personnel. The fact that international legal standards also impose similar limits is a further constraint on the powers of security agencies. This reduces agency costs since there is no longer an assumption that all measures taken in combating threats to security, such as arrests and detention, are lawful by default.⁴⁷ It also limits the protection afforded to individual officials who abuse their powers.

Political accountability

The Constitution goes beyond enshrining legal accountability as a norm. It guarantees political accountability too: 'national security is subject to the authority of parliament and the national executive'⁴⁸ and applies to each security agency in the Constitution, namely, defence,⁴⁹ the police,⁵⁰ and intelligence.⁵¹ This emphasis on political accountability is understandable considering the secretive and unaccountable nature of the 'parallel' security

⁴⁰ Ginsburg and Huq, 2015a:8.

⁴¹ Ginsburg and Huq, 2015a:8.

⁴² Lotze, 2015.

⁴³ Section 200(2) of the Constitution.

⁴⁴ Section 199(6) of the Constitution.

⁴⁵ Section 199(4) of the Constitution.

⁴⁶ Ginsburg and Huq, 2014: 10.

⁴⁷ See *S v Zuma* 1995(4) BCLR 401 SA (CC), which abolished the reverse onus in criminal law and effectively brought an end to the pro-State position of the law under Apartheid with respect to criminal offences such as terrorism.

⁴⁸ Section 198(d) of the Constitution.

⁴⁹ See section 201(1) and (2), which requires a cabinet member to be responsible for defence and vests the power to deploy the Defence Force solely within the President's hands.

⁵⁰ See section 206(1), which requires that national policing policy rest with a cabinet member. Interestingly, section 206(2) and (4) devolves further police-monitoring power within provincial executives in accordance with the principle of concurrent competence in terms of Schedule 4 of the Constitution.

⁵¹ Section 209(2) provides that the President must 'either assume political responsibility for the control and direction of any of those services, or designate a member of the cabinet to assume that responsibility'.

government of the pre-constitutional era.⁵² Specifically, during the constitutional negotiations, this shadowy arm of government manifested itself as the infamous 'Third Force' – a term coined by Nelson Mandela. It referred to an unknown third party – separate from the African National Congress (ANC) and the National Party (NP) – that sought to destabilise the fragile constitutional negotiations and that was responsible for many instances of sporadic violence during that time.⁵³ But the truth was more sinister: the SSC had formed a paramilitary arm to engage in counter-insurgent tactics against so-called terrorist groups, including the ANC.⁵⁴ Destabilising the negotiations was a part of this.⁵⁵ However, there was a power tussle between the police and the army as to who should spear-head this group,⁵⁶ resulting in both the police and army undertaking separate counter-insurgency missions.⁵⁷ This also gave senior politicians an easy scapegoat by essentially permitting the transferral of blame onto lower level security personnel who 'misunderstood' them or perhaps simply allowed for plausible deniability.⁵⁸ This experience demonstrates the dangerous consequences that flow from the absence of political accountability.

The Constitution addresses this by specifying the individual or entity with whom the buck stops. The South African Constitution is not unique in this respect. As the US Federalist Papers express: '[o]ne of the weightiest objections to a plurality in the executive ... is that it tends to conceal faults and destroy responsibility.'⁵⁹ Further, political accountability requires elected officials to exercise a supervisory role over a historically unsupervised and secretive arm of government, which addresses legitimacy concerns.⁶⁰ Lastly, political accountability encourages the development of more coherent policies to govern and co-ordinate the Security Services, which in turn improves the quality of their services to the public. This speaks to Ginsburg's last criteria relating to the importance of providing public goods.

Transparency

The Constitution intimately ties transparency with accountability. It expressly states that 'to give effect to the principles of transparency and accountability, multi-party parliamentary committees must have oversight of all Security Services in a manner determined by national legislation or the rules and orders of parliament'.⁶¹ Entrenching transparency as a principle of governmental oversight protects the rights of citizens who expect government to exercise its rule by justification. Even the President as an elected official must provide information to parliament subsequent to deploying the Defence Force,⁶² including the reasons for and duration of the deployment.⁶³

Besides the expressly-stated disclosure obligations in the Constitution, there are also implicit transparency goals that flow from the monitoring and oversight exercised by civilian bodies over the Security Services. A case in point is that the Constitution requires that a Defence Civilian Secretariat under the cabinet member responsible for defence be established.⁶⁴ Equivalent secretariats are also mandated for the police⁶⁵ and intelligence services.⁶⁶ For the police service, the Constitution has included an additional layer of accountability by establishing an independent-oversight body specifically to deal with complaints of police misconduct.⁶⁷ These civilian oversight bodies would not be able to exercise their function without access to vital information about the operation and decision-making of the Security Services. This public accounting role is impossible to fulfil without transparency as a guiding principle imposed on the Security Services. Naturally, incorporating transparency as an institutional

⁵² Stack, 1998:20.

⁵³ Ellis, 1998:261.

⁵⁴ Ellis, 1998: 273-274.

⁵⁵ Ellis, 1998: 274-275.

⁵⁶ Ellis, 1998: 274.

⁵⁷ Ellis, 1998: 274.

⁵⁸ Ellis, 1998: 274 and Stack, 1998:20.

⁵⁹ The Federalist Papers, No 70.

⁶⁰ See Ginsburg and Huq 2015a: 8.

⁶¹ Section 199(8) of the Constitution.

⁶² Section 201(3) of the Constitution.

⁶³ Section 201(3)(a) and (d) of the Constitution.

⁶⁴ Section 204 of the Constitution.

⁶⁵ Section 208 of the Constitution.

⁶⁶ Section 210(b) of the Constitution.

⁶⁷ Section 206(6) of the Constitution.

norm within the Security Service fosters the legitimacy of these institutions and corresponds with Ginsburg's legitimacy criterion.

8.2. Constitutional design flaws

There are two primary design flaws in the Constitution with respect to the Security Services. Both are omissions. The first is the failure to include an institutionally independent corruption-busting agency and the second is the failure to specify the procedure to be followed in dismissing the Inspector General of Intelligence.

An independent corruption agency

The failure to include an independent corruption-busting agency poses a genuine threat to the security of a nation. In particular, the major security threat lies with the endemic kind that captures the critical levers of government and repurposes the state to benefit a few elite networks.⁶⁸ This manifests in two ways. First, there is structured corruption, where governing systems are bent to benefit a select network of people.⁶⁹ These kleptocratic networks tend to control government institutions such as the armed forces or police.⁷⁰ Prime examples of this include Egypt under Mubarak's rule and Tunisia under Ben Ali.⁷¹ In Egypt, Gamal's crony-capitalist network captured its own security agency, the Amn al-Shurta, or auxiliary police⁷² and in Ben Ali's Tunisia, the police provided the ruling network with muscle.⁷³ Further, corruption by extortion of 'petty' bribes or the purchasing of political influence by officials,⁷⁴ fuels civilian dissatisfaction and increases the risks of popular unrest and protest.⁷⁵ The second manifestation of endemic corruption is less consolidated and involves competing networks⁷⁶ that have control over different security agencies.⁷⁷ In acute cases, this rivalry can spillover into violence between competing security agencies,⁷⁸ which has been the case with electoral violence in the Ivory Coast and Colombia.⁷⁹ However, this still does not justify the inclusion of an independent-corruption investigation agency in a Constitution – much depends on what the particular context requires.

In South Africa specifically, one must consider institutional and political factors. At an institutional level, the South African framers designed particular agencies, such as the Public Protector⁸⁰ and the Auditor-General (commonly known as the chapter 9 institutions),⁸¹ to investigate mismanagement of public funds. These agencies are endowed with both 'institutional independence' and 'decision-making independence'. The former attaches independence to the institutions themselves in the sense that they operate autonomously, are subject only to the law and the Constitution,⁸² and are accountable only to parliament, not the executive.⁸³ Decision-making independence does not relate to the institution but to the manner in which these institutions are required to exercise their powers and perform their functions, that is, 'without fear, favour or prejudice'.⁸⁴ In contrast to the chapter 9 institutions, the drafters of the Constitution did not establish an institutionally independent body to target organised crime, economic crime, corruption and other serious crimes. This function was initially assigned in terms of national legislation to the Directorate of Special Operations, 'the Scorpions', under the auspices of

⁶⁸ Carnegie Corruption Report 2014:6.

⁶⁹ Carnegie Corruption Report 2014: 7.

⁷⁰ Carnegie Corruption Report 2014:8.

⁷¹ Carnegie Corruption Report 2014:7.

⁷² Carnegie Corruption Report 2014:7.

⁷³ Carnegie Corruption Report 2014:7.

⁷⁴ Carnegie Corruption Report, 2014:8.

⁷⁵ Carnegie Corruption Report, 2014:7.

⁷⁶ Carnegie Corruption Report, 2014:8.

⁷⁷ Carnegie Corruption Report, 2014:8.

⁷⁸ Carnegie Corruption Report, 2014:8.

⁷⁹ Carnegie Corruption Report, 2014:9.

⁸⁰ Section 182 of the Constitution.

⁸¹ Section 188 of the Constitution.

⁸² Section 181(2) of the Constitution states that '[t]hese institutions are independent and subject only to the Constitution and the law'. Notably, reinforcing the institutional independence of these entities is section 183 of the Constitution, which guarantees the Public Protector security of tenure for 7 years and section 189 of the Constitution also guarantees the Auditor General security of tenure of 5 to 10 years. Both of these office-holders cannot be dismissed at the discretion of the President or any other member of the executive before this period has passed, which is not the case with, for example, the head of the Hawks or the NPA.

⁸³ Section 181(5).

⁸⁴ See section 181(2) of the Constitution.

the NPA⁸⁵ and currently rests with the Directorate for Priority Crime Investigation (DPCI), 'the Hawks', under the SAPS.⁸⁶ This failure of the drafters constitutionally to entrench the institutional independence of these agencies (in the same manner that it did the public-mismanagement investigating agencies) is a flaw in the constitutional design of these bodies.

South Africa's political context prior to, and at the time of, drafting is also significant. The Apartheid regime effectively operated as a structured, kleptocratic state between the mid-1960s to the 1980s.⁸⁷ This reached its height in the 1980s when Apartheid was on the brink of collapse and officials had nothing to lose by draining the state of whatever resources they could get their hands on.⁸⁸ Consider the infamous Broederbond – a group comprising of white Afrikaner men who came together to promote the welfare of the white-working class but in the end was a vehicle for advancing the economic interests of an elite group of members.⁸⁹ For instance, J.F. Klopper (leader of the Broederbond) and Nico Diederichs (minister of finance) endeared themselves to the Chamber of Mines when Genkor, the Afrikaner mining group, was given to them in exchange for not nationalising the 'English' mines during the 1960s.⁹⁰ To quote Hennie Van Vuuren: '[Members] were to be among the first to know of forthcoming large government procurements and of where universities and harbours were to be built (an advantage for property speculators). Efforts were made to stack the public service with broeders who shared similar values of racist nationalism.'⁹¹

This rot also infiltrated the upper echelons of government when, for example, President Diederichs sold a piece of land for R125,000 (ZAR 2005=R3,2 million) amounting to 62 times the purchase price of two years earlier (R2,000).⁹² And arising from foreign sanctions and internal unrest in black townships, President PW Botha developed a 'Total National Strategy' (TNS) in the 1980s to counter opposing forces.⁹³ As Prof S. Terreblanche argues, 'If you could make a contribution to the TNS you [were] in the pound seats. This ideological ploy was a formula for corruption'.⁹⁴ This paranoia led to a R650 million foreign-exchange fraud scandal and 'various other multimillion rand scams'⁹⁵ that implicated cabinet ministers, parliamentarians, several government departments and 'multiple rungs of the state bureaucracy'.⁹⁶ This kleptomania also posed a threat to national security with funds designated for defence being ploughed into covert counter-insurgency missions⁹⁷ and used for setting up companies that were involved in anything from state propaganda and weapons trading, peddling in political influence,⁹⁸ to hiring hit men and bribing politicians.⁹⁹ Therefore, an independent corruption-busting agency was a clear national security necessity. To achieve institutional coherence and complementarity with the other institutions tasked with investigating maladministration, and to address the very real political reality of endemic corruption, this agency should have had its independence constitutionally protected. In particular, given the high levels of corruption under Apartheid and comparative experiences around the world, it could have been anticipated that corruption would have been a problem going forward. Anecdotally, one of the drafters remarked that the ANC felt that the proposal for such an authority by the NP showed a form of racist distrust in the new government. Whatever the reasons, the neglect of the framers has resulted in a court-created independent corruption-fighting body.

⁸⁵ *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (*Glenister II*) para 17.

⁸⁶ *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others* [2014] ZACC 32; 2015 (1) BCLR 1 (CC); 2015 (2) SA 1 (CC) (*Glenister III*) para 7.

⁸⁷ Van Vuuren, 2006:26-46.

⁸⁸ Van Vuuren, 2006: 26-29, 47.

⁸⁹ Van Vuuren, 2006: 26.

⁹⁰ Van Vuuren, 2006: 23.

⁹¹ Van Vuuren, 2006: 36.

⁹² Van Vuuren, 2006: 33.

⁹³ Van Vuuren, 2006): 37.

⁹⁴ Van Vuuren, 2006:37.

⁹⁵ Van Vuuren, 2006:41.

⁹⁶ Van Vuuren, 2006:41.

⁹⁷ Van Vuuren, 2006:51-60.

⁹⁸ Van Vuuren, 2006:55.

⁹⁹ Van Vuuren, 2006:55.

Glenister cases

The Glenister cases originate from a legal challenge to a decision by the ruling ANC at its 52nd national conference to disband the Scorpions.¹⁰⁰ This unit was located within the NPA and was tasked with investigating specialised crimes including corruption and racketeering.¹⁰¹ The ruling party expressed concerns over abuses of power by the unit and its allegedly overbroad mandate. As a result, the Scorpions were replaced with the Hawks, which had restructured powers and was located within the SAPS under the oversight of the Minister for Safety and Security.¹⁰² Mr Glenister challenged the constitutionality of this decision on the basis that it was unreasonable, unfair and irrational.¹⁰³ The Helen Suzman Foundation (HSF), a non-governmental organisation that joined proceedings as amicus, supported this challenge arguing further that the decision to disband the Scorpions violated South Africa's international obligations to establish an independent corruption fighting agency.¹⁰⁴

The Court in a majority opinion found that the state's obligation to respect, promote, protect and fulfill the rights in the Bill of Rights read alongside South Africa's international obligations to combat corruption required the creation of an adequately independent corruption-busting agency.¹⁰⁵ This independence did not depend on the agency's location within the NPA¹⁰⁶ since it had to be tested against the scope of conduct a reasonable decision-maker may adopt and result in what a reasonable member of the public would deem to be a sufficiently independent corruption agency.¹⁰⁷ Adequate independence comprises factors such as security of tenure as well as remuneration, and mechanisms for accountability and oversight.¹⁰⁸ The Court found that the new agency lacked adequate independence because of the absence of secure tenure protecting the employment of the members of the entity and because of a Ministerial Committee's direct political oversight of the entity's functioning.¹⁰⁹

The open-ended standard of 'adequate independence' meant that further litigation on the issue would be inevitable. The standard was necessarily elastic to allow policy-makers to exercise their discretion in crafting a framework that met the Court's requirements. However, the decision itself invited the executive and legislature to balk because it applied entirely novel constitutional interpretive methods and was troublingly unclear in certain respects. The Court's interpretation of, for example, the State's obligations to respect, protect, promote and fulfil the rights in the Bill of Rights had not been constructed in so radical a manner since the founding of the Republic seventeen years ago. The majority argued that the constitutional obligation to set up an adequately independent agency could be derived from domestic law alone, without the interpretive aid of international law.¹¹⁰ However, because it said that the Court was enjoined to consider South Africa's ratified treaties when considering rights in the Bill of Rights,¹¹¹ it essentially incorporated international obligations by particularising general and vague constitutional obligations through interpretation.

The Court's approach placed it in the position that it would unavoidably have to affix its judicial seal to the completed legislative amendments. This is because competing political preferences for greater independence of the proposed corruption-busting agency on one end, tugged against concerns of oversight over the agency on the other. This inherent tension meant that parties on either end of this policy tug-of-war would inevitably look to the Court to cut the Gordian knot.

The parties did not disappoint. Parliament passed a new draft of the legislation, and Mr Glenister dragged the government back to court.¹¹² The HSF was once again a party to the litigation as amicus.¹¹³ Mr Glenister alleged

¹⁰⁰ Glenister II para 8.

¹⁰¹ *Glenister II* paras 3-15.

¹⁰² Glenister II para 56.

¹⁰³ Glenister II para 17.

¹⁰⁴ Glenister II para 18.

¹⁰⁵ *Glenister II* para 177-178.

¹⁰⁶ *Glenister II* paras 126 and 192.

¹⁰⁷ *Glenister II* para 194.

¹⁰⁸ *Glenister II* para 210.

¹⁰⁹ *Glenister II* para 213.

¹¹⁰ *Glenister II* para 195.

¹¹¹ *Glenister II* para 195.

¹¹² See generally *Glenister III*.

¹¹³ *Glenister III*.

that the SAPS were far too corrupt for it to be the home of the unit.¹¹⁴ He argued that the ANC was determined to suborn all state institutions to their narrow interests and this naturally included the police.¹¹⁵ Only a fiercely independent corruption-busting agency could weather this climate. Further, public perception was so decidedly set against the police that no reasonable member of the public would deem locating the agency in the ranks of the police a reasonable decision.¹¹⁶ The amicus argued that once again there was no security of tenure and that the oversight exercised by the Minister of Safety and Security and the National Commissioner impermissibly trammelled upon the independent functioning of the agency.¹¹⁷

The Court returned from deliberations with six separate opinions. Haggling over the meaning of what the elusive 'reasonable decision-maker' would deem to be sufficient independence, the Court eventually delivered a majority opinion which one author of the previous *Glenister* judgment (Mosenke DCJ) joined and the other (Cameron J) did not.¹¹⁸ The majority found that Mr Glenister should not be permitted to lead evidence that produced nothing but speculation concerning the nefarious motives of the ruling party.¹¹⁹ The Court constructed the reasonable decision-maker test as entirely precluding a challenge based on the location of the Hawks within the SAPS as a sole indication of a lack of independence.¹²⁰ However, the majority did follow the previous *Glenister* court's concerns over sufficient security of tenure¹²¹ and the expansive discretion exercised over the Hawks by the minister of safety and security and the national police commissioner.¹²²

In two partial dissents from this finding, Froneman and Cameron JJ found that Mr Glenister could indeed attempt to show that the SAPS was so corrupt as to disallow a reasonable decision-maker from concluding that the location of the Hawks in any way meets the required adequate independence threshold.¹²³ In two further separate dissents and concurrences in-part Nkabinde and Van der Westhuizen JJ quibbled with both the majority and the two partial dissents respectively.¹²⁴ Madlanga J filed a judgment that agreed with Froneman J's logic on including evidence of police corruption whilst concurring with the majority opinion on the grounds of unconstitutionality.¹²⁵

This plurality of divergent opinions serves to expose the danger of relying on judicial officers to craft constitutional necessities. Judges may not be best placed to navigate complex policy decisions, and plug the gaps in the constitutional order where significant disagreement exists. They may also lack the legitimacy granted by the ballot to shield them from political miscalculation in the event of electoral blowback. Nevertheless, South Africa now has a judicially created, independent, corruption-busting agency in order to remedy an omission the framers of the Constitution neglected to include.

The Inspector General of Intelligence

The Constitution requires that civilian monitoring of the intelligence services take place in the form of an Inspector General (IG) appointed by the President and approved by parliament.¹²⁶ According to section 2 of the Intelligence Services Oversight Act¹²⁷ (Oversight Act), an IG must be nominated by parliament and the President 'shall' appoint a person who has been duly nominated and approved by parliament.¹²⁸ This implies the President has no discretion on the appointment of an IG.¹²⁹ However, the procedure for removal of the IG contradicts this. The Oversight Act allows the President to remove the IG from office on the basis of 'misconduct, incapacity, withdrawal of his or her security clearance, poor performance or incompetence as

¹¹⁴ *Glenister III* paras 15-21.

¹¹⁵ *Glenister III* para 16.

¹¹⁶ *Glenister III* para 15.

¹¹⁷ *Glenister III* paras 61-91.

¹¹⁸ *Glenister III* paras 22-35.

¹¹⁹ *Glenister III* paras 34-35.

¹²⁰ *Glenister III* para 31.

¹²¹ *Glenister III* at par 77-82.

¹²² *Glenister III* paras 92-105.

¹²³ *Glenister III* paras 113-178.

¹²⁴ *Glenister III* paras 179-222.

¹²⁵ *Glenister III* paras 223.

¹²⁶ Section 210(b) of the Constitution.

¹²⁷ Act 40 of 1994.

¹²⁸ Section 7(1) of the Oversight Act.

¹²⁹ Ampofo-Anti et al, 2008: ch23B-57.

prescribed.¹³⁰ Parliament need not be consulted. In tension with this provision is a further section of the Oversight Act which provides that '[i]f the Inspector-General is the subject of an investigation by parliament he or she may be suspended by the President pending a decision in such investigation.¹³¹ Parliament would in these circumstances be empowered to undertake an investigation to establish whether the conduct of the IG satisfies any of the grounds for dismissal.

There is clearly a legislative contradiction – one procedure that requires parliamentary oversight for dismissal and the other that does not – which is made possible by the absence of a proper constitutional allocation of powers between the president and parliament. This imprecision also undermines the independence of the IG by permitting a textual interpretation that excludes any oversight over the president's decision to dismiss the IG. Ampofo-Anti et al argue that this tension can be resolved by making a parliamentary investigation into the IG's conduct a condition precedent to the president being able to dismiss the IG¹³² – an interpretation which he argues would be more in line with the constitutionally prescribed values of accountability and transparency.¹³³ The primary flaw is that the text of the statute does not support this reading and further, there is no real textual question as to who ultimately possesses the power to dismiss – it is the President. There also does not appear to be any obvious absurdity in having two possible processes of dismissal, which are not necessarily in conflict. Finally, unlike the language regulating the appointment of the IG, neither the language in the statute nor the Constitution expressly removes the president's discretion to dismiss the IG.

In summary, the absence of a check on the president's power to dismiss seriously threatens the ability of the IG to investigate abuses by intelligence agencies independently which in turn undermines the constitutional requirement that in order '[t]o give effect to the principles of *transparency* and *accountability*, multi-party parliamentary committees must have *oversight* of all Security Services in a manner determined by national legislation or the rules and orders of parliament.¹³⁴

8.3. Evaluation

We have outlined some of the key internal goals that the Constitution seeks to achieve in relation to the Security Services. We now turn to a discussion on the primary security institutions formed by the Constitution and evaluate their performance in relation to these goals. Each institution, as we have indicated, also has its own specific goals, which will be discussed with reference to the general internal goals identified above.

The South African Police Service

The Constitution provides that a specific goal of the police service is to 'prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law'.¹³⁵ We now reflect on how well the police services has performed in relation to the general goals identified above.

Transformed policing

Thin compliance

Central to the creation of a new South African Police Service (SAPS) was the need to transform the relationship between the police and the general community.¹³⁶ To achieve this, the government was required to establish community-policing forums¹³⁷ that consist of community members that are *broadly representative* of the local community.¹³⁸ This legislative measure reframes the relationship between the police and the community from

¹³⁰ Section 7(4) of the Oversight Act.

¹³¹ Section 7(5) of the Oversight Act.

¹³² Ampofo-Anti et al, 2008: ch23B-57.

¹³³ Ampofo-Anti et al, 2008: ch23B-57.

¹³⁴ Section 199(8) of the Constitution, emphasis added.

¹³⁵ Section 205(3) of the Constitution.

¹³⁶ Section 198(a) avers as a principle governing the Security Services, the determination of the South African people to have a security branch that reflects their resolve to be free from fear, live as equals and in harmony. This is a deliberate shift to a community-oriented notion of policing and a reframing of the relationship between the police and society.

¹³⁷ Section 19 of the South African Police Services Act 68 of 1968 (SAPS Act).

¹³⁸ Section 19(3) of the SAPS Act.

one where the community is merely at the receiving end of policing, to one that regards the community as an integral part of the policing process. Central to this is the importance of policing in a way that reflects the priorities of different communities. The requirement that the forums be broadly representative is a mechanism for ensuring police responsiveness and guards against the discriminatory enforcement of policing.

The duties and functions of these forums are to establish a partnership and promote co-operation and communication between the police and the community.¹³⁹ This facilitates police responsiveness since it places an obligation on the police to go beyond ordinary crime prevention – a departure from the oppressive and discriminatory treatment black, coloured and Indian communities suffered at the hands of the Apartheid police. The community-policing forums are required to promote problem-solving and identification between the community and police,¹⁴⁰ which encourages the building of a culture of consultation and gives effect to the Constitution's vision of transformative, community-centered policing. In evaluating performance, the creation of these community forums suggests that there has been at least thin compliance with the constitutional goals that have been set for SAPS.

Thick compliance

On the question of thick compliance, community-policing forums have sadly struggled to guarantee the transformed model of policing that the Constitution requires. The forums have a mixed record of success. Police officers tend to see the forums as platforms for the community to criticise the police or view them as 'talk shops' that do not affect day-to-day policing.¹⁴¹ Also, members of the public who become involved in the forums do so on a voluntary basis. Not surprisingly, wealthy sectors of the community or specific-interest groups are sometimes overrepresented, with the poor and marginalised being generally under-represented.¹⁴² In 1990, South Africa had 140,000 police officers, of which 112,000 were members of the South African Police and the rest were reservists.¹⁴³ The new SAPS, therefore, consisted mainly of police officers who had operated under the Apartheid regime.¹⁴⁴ In 2002, the SAPS launched a new recruitment drive that increased the numbers of police officers substantially, decreased the numbers of previous SAP and homeland police officers, and therefore managed to successfully alter the composition of the service.¹⁴⁵ This is evidenced by the statistics in the SAPS Annual Report 2015 which states that of the 193 692 SAPS' employees: 96 472 (49.8%) are African men, 50 408 (26%) are African female; 13 367 (6.9%) are Coloured males, 7 395 (3.8%) are Coloured females, 3 497 (1.8%) are Indian males and 1485 (0.77%) are Indian women; and 12 587 (6.5%) are White men and 8481 (4.4%) are White women.¹⁴⁶

Positive obligations of transformed policing

Changing the demographic composition of the police service is not enough – more strenuous positive obligations are required to ensure police reform. Ampofo-Anti et al argue that the duty of the police to ensure that members of society are able to fully enjoy their right to be free from violence goes beyond the mere apprehension of suspects after crimes have been committed¹⁴⁷ since, in certain instances, it also gives rise to positive obligations to take reasonable steps to secure the safety of the public.¹⁴⁸ This goal has encouraged the courts to revise the substantive law – specifically the law of delict to bring about reform.

In a series of vicarious liability cases, South African courts have tried to impress upon the police the seriousness and weight of these positive obligations. The courts have endeavored to re-imagine principles used to hold employers liable for the acts and omissions of their employees in order to incentivise the police to take active and considered steps to deliver transformed and community-orientated policing. The difficulty is that this noble attempt to galvanise better policing utilises delictual law to hold the minister liable, which has resulted in victims

¹³⁹ Section 18(1)(a)-(c) of the SAPS Act.

¹⁴⁰ Section 18(1)(f) of the SAPS Act.

¹⁴¹ Ampofo-Anti et al, 2008: ch23B-41.

¹⁴² Newham, 2005: 173.

¹⁴³ Rauch, 2005:224.

¹⁴⁴ Ampofo-Anti et al, 2008:ch23B-10.

¹⁴⁵ Newham, 2005:162.

¹⁴⁶ SAPS Annual Report 2015:34.

¹⁴⁷ Ampofo-Anti et al, 2008: ch23B-20.

¹⁴⁸ Ampofo-Anti et al, 2008: ch23B-20.

being compensated by the institution of the police rather than individual police officers. Despite years of applying this approach, this has not brought meaningful change in the behavior of police officers since it fails to hold individual officers responsible for their omissions. This problem is illustrated with reference to the *Carmichele* case.¹⁴⁹

Carmichele

Ms Carmichele's attacker had been convicted of house breaking and indecent assault.¹⁵⁰ At the time of the attack, he was facing charges of rape and had been released on bail upon the recommendation of the investigating officer.¹⁵¹ Despite complaints about his suspicious behaviour, as well as evidence that he suffered from psychological problems, neither the police nor the prosecutor opposed his bail application.¹⁵² He then sexually assaulted Ms Carmichele¹⁵³ who brought a delictual action against the Minister of Safety and Security based on the failure of the police and prosecutor to oppose bail.¹⁵⁴ She argued that the authorities had a constitutional duty to safeguard her constitutional rights to dignity and freedom and security of the person.¹⁵⁵

The Constitutional Court recognised Ms Carmichele's claim and ordered the High Court to extend the existing duty of care owed by the police and the state prosecutor to Ms Carmichele.¹⁵⁶ Therefore, the Minister of Safety and Security, as the police officer's employer, could be held vicariously liable for the unreasonable failure by the police officer to oppose bail, which caused harm to the plaintiff.¹⁵⁷ The Court also said that the legal convictions of the community are consistent with the imposition of liability in this context.¹⁵⁸ Particular emphasis was placed on the consequences of the police officer not complying with this duty – the ultimate infringement of a woman's bodily integrity – describing it as the greatest risk to the self-determination of women.¹⁵⁹

Laudable as the Court's sentiments are, the *Carmichele* precedent seems not to have had any effect in changing policing strategies or in forcing police to take positive steps to protect communities. Studies stubbornly show that public trust in the police is still low. In a 2006 study, the reasons given for the low public confidence included the police's slow reaction time to complaints; poor detective work, a failure to follow-up on cases; and police corruption.¹⁶⁰ More recently, our commissioned study shows that only 46 % of the sample have confidence in the police's ability to arrest criminals. This can be broken down to show that, surprisingly, there is a higher confidence amongst black, coloured and Indian South Africans (50%, 49% and 42% respectively) than white South Africans (only 25%). This all points to a particular distrust that one would have hoped an institution fearing delictual litigation would have worked hard to stamp out. It has not. In fact, the public has so little faith in the police that they have increasingly turned to vigilantism and private security in the years since *Carmichele* was decided.¹⁶¹ Further, and disturbingly, in 2014 there were 124 instances of rape by police,¹⁶² which suggests that the *Carmichele* judgment was limited in its deterrent effects. If anything the high levels of violence against women argue in favour of holding individual police officers liable both delictually and criminally, rather than having the Ministry shield perpetrators from liability by footing the bill. The upshot is that the Court's approach to using the vicarious-liability mechanism to achieve thick compliance with the goal of community-centred, rights-based policing has been met with only limited success, if any.

¹⁴⁹ *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC) (*Carmichele*).

¹⁵⁰ *Carmichele* para 5-24.

¹⁵¹ *Carmichele* para 5-24.

¹⁵² *Carmichele* para 5-24.

¹⁵³ *Carmichele* para 5-24.

¹⁵⁴ *Carmichele* para 5-24.

¹⁵⁵ *Carmichele* para 25.

¹⁵⁶ *Carmichele* para 62.

¹⁵⁷ *Carmichele* paras 5-24.

¹⁵⁸ *Carmichele* para 44.

¹⁵⁹ *Carmichele* para 62.

¹⁶⁰ Baefele, 2006.

¹⁶¹ Masiloane, 2007:328.

¹⁶² IPID Annual Report, 2014: 55.

Legal accountability

With respect to the legal accountability of the police, the focus of our evaluation will be on the controversies surrounding the lawfulness of arrests and detentions and instances of excessive force being used by police.

Unlawful arrest and detention

Thin compliance

The Constitution requires that national security be secured in compliance with the law¹⁶³ and that the Security Services act in accordance with the law.¹⁶⁴ As arrest and detention are the most commonly used police powers, their lawful exercise shall be explored. An arrest is effected under section 39 of the Criminal Procedure Act¹⁶⁵ (CPA). Since the manner of arrest is fully regulated by the CPA, an arrest is lawful only when it complies with the statute.¹⁶⁶ Physical contact with the arrested person is required for a valid arrest, unless the person in question unmistakably subjects him or herself to the arresting officer.¹⁶⁷ Section 39(2) of the CPA requires that the person effecting the arrest shall at the time, or immediately thereafter, inform the arrested person of the cause of the arrest, and provide that person with a copy of the warrant authorising that arrest, if so requested. A person only becomes an arrested person upon formal notification of the reason for arrest.¹⁶⁸

Unlike arrests, the South African law of detention has not been statutorily codified. A detention occurs following an arrest where the accused is detained at a police station or other facility. The available common-law remedy is the writ of habeas corpus, which requires that the relevant authorities produce the accused and provide reasons justifying her continued detention is lawful. However, this is of no use to a detainee prior to their being detained. It gives no guidance as to when a detention will in fact be lawful. However if we construct a detention as an infringement on the right to physical liberty, the Constitution sheds light on the lawfulness of the process leading up to a detention. In this regard we must look to the jurisprudence concerning constitutionally impermissible deprivations of liberty to tease out what the grounds are for rendering a detention unlawful.

Thick compliance

According to the SAPS 2014/2015 Report a total number of 1 707 654 arrests were made across crime categories, most of which were in Gauteng (26, 6%) followed by the Western Cape (23, 2%) and then KwaZuluNatal (15%)¹⁶⁹ and of these 1 074 709 were for serious crimes. Of those arrested, 1 660 833 persons were charged during the reporting period, compared to 1 763 012 persons in the previous financial year.¹⁷⁰ And during this period 9 877 civil claims were lodged against the SAPS compared to 8 161 during the previous financial year (21% increase).¹⁷¹

In 2014-2015 there were 396 people who died as a result of police action,¹⁷² which made up 62% of police-related deaths.¹⁷³ The remaining deaths occurred in police custody,¹⁷⁴ including suicides and murder by other inmates.¹⁷⁵ Of the deaths as a result of police action, a striking 114 occurred in the course of arrest,¹⁷⁶ which were not deaths of anyone fleeing arrest.¹⁷⁷ And 106 of these deaths were caused by the discharge of a fire-arm.¹⁷⁸ Thus, considering the high incidents of mortality during arrests and detention, the lawfulness of these

¹⁶³ Section 198(b) of the Constitution.

¹⁶⁴ Section 199(5) of the Constitution.

¹⁶⁵ Act 50 of 1977.

¹⁶⁶ Snyckers and Le Roux, 2008: ch51-71.

¹⁶⁷ *S v Thamaba* 1979 (3) SA 487, 490 (O). See E du Toit, et al *Commentary on the Criminal Procedure Act* (2004) 39.

¹⁶⁸ *S v Matlawe* 1989 (2) SA 883 (BG) 884-885.

¹⁶⁹ SAPS Report, 2014/2015: 16.

¹⁷⁰ SAPS Report, 2014/2015: 150.

¹⁷¹ SAPS Report, 2014/2015: 122.

¹⁷² IPID Annual Report, 2014: 46.

¹⁷³ IPID Annual Report, 2014: 48.

¹⁷⁴ IPID Annual Report, 2014.

¹⁷⁵ IPID Annual Report, 2014.

¹⁷⁶ IPID Annual Report, 2014: 52.

¹⁷⁷ IPID Annual Report, 2014.

¹⁷⁸ IPID Annual Report, 2014.

arrests and attendant enforcement of the rights of arrestees and detainees is crucial in evaluating thick compliance with the constitutional goal of legal accountability.

Beyond requiring police to comply with narrow statutory definitions of arrest, South African law requires that police adhere to the very purpose of arrest. The purpose of arrest is to ensure attendance of a suspect at trial.¹⁷⁹ It is not a punishment for lack of co-operation with police or any perceived insubordination. However, even if a police officer has no intention of bringing a suspect to trial, but still arrested such a person on suspicion of committing a criminal offence, they are still an arrestee and so entitled to all the attendant rights this implies.¹⁸⁰ Furthermore, the intent requirement in an arrest is interpreted against the police should an officer arrest a suspect with the intent to question the suspect on an unrelated charge.¹⁸¹ Therefore, the lawfulness of an arrest can be vitiated simply by an officer constructing a ‘criminal offence’ broadly to include any manner of unrelated offences. The underlying presumption concerning the lawfulness of arrests seems to weigh in favour of the liberty of suspects.

Since the CPA provides for other methods to ensure attendance at a trial, such as a summons or written notice, the natural question is whether arrest is a matter of last resort or simply one of three options available to police officers to be utilised at their discretion. There is legal authority suggesting that it is preferred if police officers only effect arrests where they suspect that only the most serious crimes have been committed.¹⁸² However, this has not been interpreted to mean that there is an extra jurisdictional requirement for a lawful arrest – namely that a police officer only effect an arrest when a summons or written notice is insufficient to guarantee attendance at trial.¹⁸³ There remains an inherent discretion granted to police officers to decide for themselves the means to employ in guaranteeing a suspect’s future attendance at trial.¹⁸⁴ The Supreme Court of Appeal (SCA) argues that the lawfulness of an arrest is entirely governed by statute and since the CPA does not require this added ‘last resort’ criterion, there is no need to impose this on police officers. However, because the lack of an added criterion has never been challenged, its constitutionality is still open to doubt.

As for detentions, the constitutional text is the point of departure. For a deprivation of physical liberty to be lawful, it cannot be arbitrary or committed without just cause.¹⁸⁵ Courts have been hesitant to define exactly what a ‘deprivation’ is, but have more willingly expounded on the meaning of ‘arbitrariness’ and ‘just cause’. Ackermann J separated the enquiry into two distinct stages. In the first place, the proscription against arbitrariness means that any detention must be lawful and there must be a ‘rational connection between the deprivation and some objectively determinable purpose’.¹⁸⁶ In the absence of such a rational connection, the infringement does not pass constitutional muster. But even establishing a connection is by itself insufficient; the purpose, or ‘cause’ for the deprivation must also be a ‘just’ one.¹⁸⁷

A ‘just cause’ is a notion that must be grounded upon, and consonant with, the values expressed in section 1 of the Constitution (the supremacy clause) and gathered from the provisions of the Constitution as a whole.¹⁸⁸ Considering a string of early Constitutional Court cases, there is reason to believe that ‘proportionality’ is an implicit requirement of a just cause and that it would not be just to detain someone if this is wholly disproportionate to the reasons for the action.¹⁸⁹

The upshot of this discussion is as follows: keeping in mind the high levels of deaths and human-rights abuses that occur during and after arrest, the requirement of lawfulness is an essential check on the abuse of power by

¹⁷⁹ *Tsose v Minister of Justice* 1951 (3) SA 10 (A).

¹⁸⁰ *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) 820.

¹⁸¹ *S v Burger* 2010 (2) SACR 1 (SCA).

¹⁸² *S v More* 1993 (2) SACR 606 (W) 608C-J.

¹⁸³ *National Commissioner of Police v Coetzee* (2012) ZASCA 161 (Coetzee) para 13.

¹⁸⁴ *Coetzee* para 13.

¹⁸⁵ Section 12(1)(a) of the Constitution.

¹⁸⁶ *De Lange v Smuts NO* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) (*De Lange*) para 23.

¹⁸⁷ *De Lange* para 23.

¹⁸⁸ *De Lange* para 30.

¹⁸⁹ In *Nel v Le Roux* 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC), 1996 (1) SACR 572 (CC) and *De Lange*, the release of a witness subsequent to an inquiry meant that the coercive measures went no further than was necessary to achieve their aim and were not, therefore, substantively arbitrary. In *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC) para 55, Ackermann J specifically held that imprisonment was appropriate because it was the only effective means to achieve the objectives of the inquiry.

the police. A clear and rigorous definition of a lawful arrest or detention is thus critical to ensuring that police power is kept in check. The low standard for a lawful arrest, embodied in the lack of a requirement for less restrictive means to ensure attendance at trial, allows wide discretion for abuse. Further, the lack of a codified definition of detention and the courts reluctance to define what a deprivation of liberty actually creates further scope for abuse. More specificity is clearly needed.

Excessive force

Traditional notions of the state have as a core component that it retains a monopoly over the use of force and violence in order to safeguard the physical wellbeing of its citizens.¹⁹⁰ It follows that citizens may only legitimately use physical force in a limited number of circumstances. This is connected to Ginsburg's conflict-channeling function. The police, on the other hand, are specifically empowered to use force, and even lethal force, where necessary, in order to protect the public. The difficulty is that this power is frequently abused. For instance, there were 3856 reported cases of torture and assault by the police in 2014,¹⁹¹ which highlights a need for stronger limits on the use of force by the police.

The discretion to use lethal force, is also susceptible to abuse. The primary provision governing the use of appropriate force by the police is section 49 of the CPA. Prior to its 2003 amendment it allowed the police to use lethal force when a suspect was reasonably suspected of committing a serious crime and fled arrest.¹⁹² This degree of discretion attracted judicial scrutiny resulting in the wording of section 49 being amended. The fact that judicial intervention brought about the change makes it difficult to distinguish between thin and thick compliance on this issue. The original wording was constitutionally incompatible, but had not been passed under the legal regime effected by the Constitution. It would not make much sense to argue therefore that the wording of section 49 as passed in 1977 was a failure to implement the Constitution. However, the Constitution does not expressly abolish the wide discretion afforded to police officers – the Constitutional Court interpreted constitutional values and rights to do so. Therefore, rendering the previous wording of the Act constitutionally compliant was the result of a process of both interpretation and legislative amendment to render the Act compliant in a thin sense. The process of this amendment, however, was determined by constitutional values aimed at thick compliance. Thus, the process of amendment and interpretation will be undertaken as a combined instance of thin and thick compliance.

In *Govender*¹⁹³ the plaintiffs did not directly challenge the constitutionality of section 49(1). They argued instead that the statute needed to be interpreted in accordance with section 39(2) of the Constitution and the rights to life, dignity, physical integrity, be presumed innocent and to equality before the law. The SCA found that the state possessed both a legitimate interest in apprehending criminals, and a duty to protect its citizens (even those citizens attempting to escape arrest).¹⁹⁴ It held that the words 'reasonably necessary' in section 49(1) should be read to require proportionality both with respect to the offence and the force used, and also in relation to the 'force used and the threat that the suspect posed to the police officer and the general public'.¹⁹⁵

In *Walters*, the Constitutional Court considered the constitutionality of section 49.¹⁹⁶ The Court identified the rights to life, dignity and bodily integrity as the principal rights limiting the use of lethal force under section 49(2).¹⁹⁷ The *Walters* Court argued that a significant limitation of any of these rights would for its justification demanded a 'very compelling' public-interest reason.¹⁹⁸ The Court found that restricting the use of deadly force to serious offences could not be justified as the provision was over-broad as it stood: the offences covered ranged from violent crimes, such as murder and robbery, to non-violent crimes, such as fraud and forgery.¹⁹⁹ The court also emphasised that the purpose of arrest is to bring a suspected criminal before a court and that this

¹⁹⁰ Ampofo-Anti et al, 2008:ch23B-113.

¹⁹¹ IPID Annual Report, 2014: 57.

¹⁹² The old wording of the provision is quoted in Ampofo-Anti et al, 2008: ch23-113.

¹⁹³ *Govender v Minister of Safety and Security* 2001 (4) 273 (SCA), 2001 (11) BCLR 1197 (SCA) (*Govender*).

¹⁹⁴ *Govender* paras 12–13.

¹⁹⁵ *Govender* para 21.

¹⁹⁶ *Ex parte Minister of Safety and Security: In re S v Walters* 2002 (4) SA 613 (CC), 2002 (2) SACR 105 (CC), 2002 (7) BCLR 663 (CC) (*Walters*).

¹⁹⁷ *Walters* paras 5–7 and 29–30.

¹⁹⁸ *Walters* para 25.

¹⁹⁹ *Walters* para 41.

purpose would be frustrated if the suspect were to be killed.²⁰⁰ In light of this judgment declaring the existing provision to be unconstitutional, parliament amended the CPA.

Section 49(2) of the amended text stated:

- (2) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may **be reasonably necessary and proportional** in the circumstances to overcome the resistance or to prevent the suspect from fleeing: Provided that the arrestor is justified in terms of this section in using **deadly force** that is intended or is likely to cause death or grievous bodily harm to a suspect, **only if** he or she believes on reasonable grounds—
- (a) that the force is **immediately necessary** for the purposes of protecting the arrestor, any person lawfully assisting the arrestor or any other person from imminent or future death or grievous bodily harm;
 - (b) that there is a **substantial risk that the suspect will cause imminent or future death or grievous bodily harm** if the arrest is delayed; or
 - (c) that the **offence** for which the arrest is sought is in progress and is **of a forcible and serious nature and involves the use of life threatening violence** or a strong likelihood that it will cause **grievous bodily harm**.

Clearly, this text required not only proportionality, but also reasonable necessity, as guiding principles on the use of force. In 2010, the National Assembly tabled a further amendment to section 49 of the CPA²⁰¹ shortly after controversial statements made by National Commissioner Bheki Cele about the SAPS' new 'shoot to kill' policy for suspected criminals.²⁰² Ampofo-Anti et al argue that such a policy would be manifestly unconstitutional. The Bill was nevertheless passed in 2012, with a new provision now in force.²⁰³

Apparently, the new amendments constitute a blatant roll-back from the 2003 amendments that gave effect to *Walters*.²⁰⁴ Ampofo-Anti et al argue that the use of lethal force is no longer required to be 'immediately' necessary and the amendments do not limit deadly force to instances in which a serious crime has occurred. It seems, therefore, that deadly force could even be used during routine investigations.²⁰⁵ Further, the potential danger to the arrestor or to a third party need only be serious harm — not grievous bodily harm as was contemplated before. Additionally, the 2012 amendment no longer requires that 'substantial risk [exists] that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed.' In *Walters*, Kriegler J reasoned that an arrest was never an end in itself, but merely one means of ensuring that a suspect appeared in court. The amendments appear to ignore the actual goal of arrest: that the police must use the minimum required force to secure arrest and the use of deadly force should only be justified when death or grievous harm to the police or the public is imminent.²⁰⁶

Ampofo-Anti et al's approach is of course one interpretive route a Court can take. Another may be the *Govender* approach of narrowly construing police powers and in doing so, attaching greater importance to the rights affected. Such a narrow construction, could restore the status quo pre-2012 amendment. The requirement of

²⁰⁰ *Walters* para 52.

²⁰¹ Criminal Procedure Amendment GG 33526 of 5 October 2010.

²⁰² SAPA, 2009.

²⁰³ The section incorporating the 2012 amendment now reads:

'49.(2) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing, but, in addition to the requirement that the force must be reasonably necessary and proportional in the circumstances, the arrestor may use deadly force only if-

- (a) the suspect poses a threat of serious violence to the arrestor or any other person; or
- (b) the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of effecting the arrest, whether at that time or later.'

²⁰⁴ Ampofo-Anti et al, 2008: ch23B-17.

²⁰⁵ Ampofo-Anti et al, 2008: ch23B-17.

²⁰⁶ Ampofo-Anti et al, 2008: ch23B-18.

'reasonable necessity' may approximate a 'substantial risk' criterion since the weight of the rights potentially affected (life, bodily integrity and dignity) supports the position that lethal force would only be necessary in instances where there is a substantial risk of harm being done to the arrestor or another person. Further, the proportionality requirement would also require a serious justification for the use of force and the most obvious reason for doing so involves the idea that a substantial risk of harm would eventuate. Consider also that even though 'serious'²⁰⁷ as opposed 'grievous'²⁰⁸ bodily harm are distinct, the proportionality requirement guards against any excessive use of force that does not correlate with the harm potentially committed. Lastly, the purpose of arrest still includes a 'necessity' requirement, which would imply that an excessive use of force would be unnecessary as it is clearly ineffective in bringing an accused to trial.

Whilst this interpretive approach could arguably render the amendments constitutionally compatible, the passing of this amendment by parliament does not send positive signals for the legal accountability of police in relation to its use of lethal force. Indeed, the perception was strongly created that the amendments were a deliberate dilution of the requirements for resorting to lethal force. We see also in the survey we conducted a lack of faith in the police and that there were often instances of heavy-handedness or excessive force. Specifically, 66% of black respondents believe police use too much force against ordinary people; 71 % of Indian and 51% of Coloured respondents hold the same opinion. Interestingly only 15% of white respondents felt this way. This may indicate skewed policing along racial lines in Gauteng with more violence being used against black and Indian people. The 2012 amendment signify a move away from constitutional values and suggest a less than optimal performance of the legislature in this regard. A review of a series of stress points concerning excessive force is instructive.

Police brutality

On Wednesday, 18 April 2011, the death of teacher and community activist Andries Tatane by six policemen during a service-delivery protest was filmed by a witness and broadcast on television news. This cold-blooded killing caused a national outcry.²⁰⁹ Soon after, a police sergeant was accused of shooting Jeannette Odendaal dead outside a police station.²¹⁰ The circumstances around her death remain unclear, but she was apparently crying for help before her death.²¹¹ On Thursday, 28 February 2013, the video of a Daveyton taxi driver (Macea) being dragged behind a police van was the focus of international and local media – a painful reminder of another incident in the early 1990s when a policeman brutalised an illegal immigrant by setting dogs on him.²¹² These are just a few incidents in a more ubiquitous trend of police brutality in South Africa. Consider the following graph depicting instances of police brutality and misconduct released by the Independent Complaints Directorate in 2013.²¹³

²⁰⁷ Oxford English Dictionary 2010, 'serious' meaning 'significant or worrying because of possible danger or risk; not slight or negligible: *she escaped serious injury.*'

²⁰⁸ Oxford English Dictionary 2010, 'grievous' meaning 'very severe or serious'.

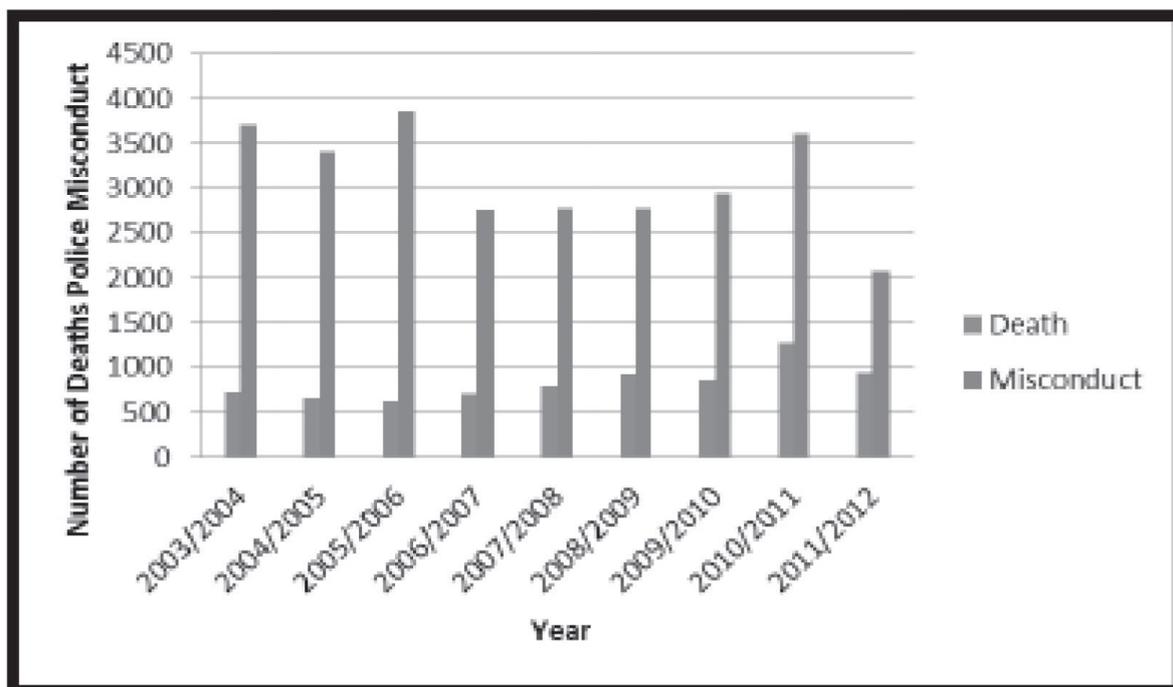
²⁰⁹ Theletsane, 2014: 356.

²¹⁰ Theletsane, 2014: 356.

²¹¹ Theletsane, 2014:356.

²¹² Theletsane, 2014:356.

²¹³ Quoted in relevant part in Theletsane, 2014:358.



The highest number of recorded deaths caused by police action between 2003-2012 was in 2010/2011 with 1 276 instances. The year with the lowest reported deaths was 2006/2007 with 621 cases. There is a slight decrease in 2011/2012 to 932 cases. The number of cases of death at the hands of police remains high. Police misconduct, which includes corruption, theft and fraud, also remains high. Although there is a decline in certain periods, the differences are minimal. The financial year 2005/2006 saw the highest number of police misconduct cases (3 865). The decline in 2006/7 compared to 2005/6 was not significant, and there was no change in the number of misconduct cases in 2007/8 compared to 2006/7. Whilst there appeared to be a decline in 2011/2012, current statistics are not encouraging either. As previously stated, there were 3856 reported cases of torture and assault by police in 2014.²¹⁴ Of these deaths, 145 were complaints of torture and 3711 of assault.²¹⁵

A systemic culture of police brutality with victims even dying in custody is evident. This not only amounts to excessive force but represents a violation of the right to freedom and security of the person as well as the rights of arrestees and detainees in the Constitution. In fact, the antics of members of the current police service are reminiscent of Apartheid-era policing²¹⁶ – a state of affairs the Constitution aimed, and it seems has thus far failed, to remedy.

Marikana incident

This infamous incident occurred at the Lonmin Mine in Marikana in the North West Province from Saturday 11th August to Thursday 16th August 2012, following a strike by members of various trade unions in the mining sector. Police opened fire on protestors (who they understood to be threatening them), leading to the deaths of approximately 44 people, more than 70 injuries, approximately 250 arrests and damage and destruction to property.²¹⁷

The flaws in how the police understand what constitutes appropriate force befitting crowd dispersal were exposed by the findings of the Commission of Inquiry established by the president to investigate the incident.²¹⁸ The Constitution provides the President with the power to set up Commissions of Inquiry.²¹⁹ Whilst the Marikana incident was itself a serious blow to the new constitutional order, the strong findings of the Commission and its role in sifting through the evidence, could be seen as a success for the constitutional order.

²¹⁴ IPID Annual Report, 2014:57.

²¹⁵ IPID Annual Report, 2014:57.

²¹⁶ Theletsane, 2014: 357.

²¹⁷ Presidential Proclamation 50 of 2012, Gov Gazette 35680.

²¹⁸ Marikana Report, 2015.

²¹⁹ Section 84(f) of the Constitution.

The Commission was able to channel the disputed allegations into a legal process which resulted in firm and balanced outcomes. The process also highlighted a number of important issues around the functioning of such commissions of inquiry and the conditions under which they will be regarded as legitimate. In particular, the courts were confronted with a number of cases which dealt with the question of whether the arrested and injured miners at Marikana were entitled to state-funded legal representation for the duration of the Commission's mandate.²²⁰

In relation to the use of force specifically, the Commission found that a number of policemen 'exceeded the bounds of what can be regarded as reasonable self- or private defence'.²²¹ Many of the strikers who were killed or injured had wounds on their chests or heads.²²² To add to this, there is video evidence of police shooting at head and chest height.²²³

Furthermore, several police members who fired at the scene of the incident admitted in their statements that their rifles were on automatic fire.²²⁴ Not only did police commanders later describe this action as 'grossly negligent', but the expert witness called by the police at the Commission, Mr Cees de Rover, said that in his view 'automatic rifle fire has no place in law enforcement'.²²⁵ De Rover pointed out that at every pull of the trigger a police-officer needed to meet the requirements that there be 'an imminent threat to life or serious injury'.²²⁶ Thus police behavior in this respect failed even to meet the 2012 amendment of section 49 of the CPA since this force was neither necessary nor proportionate.

Excessive force not only undermines the legitimacy of the police force, but also fails to meet the criterion of conflict resolution. In fact, this particular performance indicator was addressed by the Marikana Commission itself. In the many criticisms leveled against police tactics by expert witnesses, the decision by the police to dictate terms to the armed strikers attracted particular comment. Mr E. Hendricks, a policing expert who had managed the first phase of a technical co-operation agreement between the South African and Belgian governments from 1996 to 2000, criticised the police strategy as not addressing 'prevention' by, for example, meeting with the different parties or establishing negotiation channels.²²⁷ In this respect, his evidence was similar to that of Mr De Rover, who spoke of the need for the police to act as facilitators rather than as the mouthpiece for the mine.²²⁸ Mr De Rover referred, too, to the need for SAPS to have had a 'bargaining chip' in order to be able to fulfill this role, and to find ways to diffuse the tension to create 'an atmosphere that would make it possible to have a conversation rather than an adversarial stand-off'.²²⁹ Failure to do this led to the tragic loss of life, violating the principle of legal accountability in using force disproportionately and unnecessarily. It also showed how the police failed to understand their role in resolving societal conflict rather than demanding one-sided capitulation.

Political accountability

Thin compliance

The political buck in policing, as constitutionally prescribed by section 206(1) of the Constitution, stops with the Minister of Police as the cabinet member responsible for policing. This principle is not expressly echoed by the SAPS Act but is implied by the different functions and powers granted to the Minister in her oversight role. For example, sections 2 to 4 of the SAPS Act make it clear that the police secretariat (a body consisting of civilian experts on policing) serves only as an advisory body that reports to the Minister. Section 4 also delegates responsibility of the executive committee (consisting of all members of the provincial executives who are responsible for policing) to the Minister. The Act also grants the Minister veto powers over certain actions of the national commissioner of police that are politically controversial. An example of this is when the

²²⁰ See *Legal Aid South Africa v Magidiwana and Others* 2015 (6) SA 494 (CC); *Legal-Aid South Africa v Magidiwana and Others* 2015 (2) SA 568 (SCA); *Magidiwana and Another v President of the Republic of South Africa and Others* [2013] ZAGPPHC 292; *Magidiwana and Others v President of the Republic of South Africa and Others* [2013] ZACC 27; 2013 (11) BCLR 1251 (CC).

²²¹ Marikana Report, 2015:257.

²²² Marikana Report, 2015:257.

²²³ Marikana Report, 2015:257.

²²⁴ Marikana Report, 2015:258.

²²⁵ Marikana Report, 2015: 258 and 356.

²²⁶ Marikana Report, 2015: 258 and 356.

²²⁷ Marikana Report, 2015:349.

²²⁸ Marikana Report, 2015: 349.

²²⁹ Marikana Report, 2015:349.

Commissioner orders an officer to perform a function outside the Republic. The Minister may give overriding orders,²³⁰ presumably because the function may have foreign policy implications. The Minister also oversees the community policing forums.²³¹ Thus it seems most police functionaries are accountable politically to the Minister. This accords, to some extent, with the constitutional value of political accountability though it also places a large amount of power in the hands of one individual.

Thick compliance

Sadly, despite the Constitution and the SAPS Act attempting to lay political accountability at the doorstep of the Minister, political considerations are still considered by ordinary officers who are neither cabinet members nor elected officials of any kind. A case in point is once again the Marikana Incident.

Political, and not simply security, factors shaped the decision whether or not to employ lethal force against protestors. The provincial police commissioner, Lt Gen. Mbombo, was recorded during a conversation with the national police commissioner, General Rhia Phiyega, expressing concern that the protest must be suppressed before Julius Malema MP, an opposition party leader, arrived on the scene and in any way claimed credit for resolving the situation.²³² Mr Malema had played a part in pacifying a similar protest at another North West mine, Impala, and it seems the two commissioners were concerned that should Mr Malema be successful again at Marikana, this would buoy his campaign to nationalise South Africa's mines.²³³ Added to this complex situation was the fact that Deputy President Cyril Ramaphosa was a shareholder in the Lonmin mine and had been the chairperson of the disciplinary committee which had expelled Mr Malema from the ruling party.²³⁴ They agreed that they needed to ensure that they 'killed this thing'.²³⁵ Following this conversation, Lt Gen Mbombo was contacted by Mr Themba Godi MP, another opposition parliamentarian who offered assistance to the police.²³⁶ She and another senior officer agreed that the situation 'would get out of control' allowing 'opportunists' (like Godi) to comment on the protest.²³⁷ This accelerated police plans to confront the protestors the next day.²³⁸

Under cross-examination before the commission's evidence leaders, General Phiyega gave 'unsatisfactory and unconvincing' testimony, claiming she was unable to recall this conversation.²³⁹ The commission found that General Phiyega was 'complicit in engaging in discussions where political factors were inappropriately considered and discussed in relation to policing the situation at Marikana'.²⁴⁰ This is inconsistent with the constitutional and statutory regime.²⁴¹ It particularly it undermines the principle of political accountability by dispersing policy-making amongst several political actors who cannot be said to fall under a clear hierarchy of responsibility. In this case, the Constitution makes it clear that political accountability lies with the Minister and operational responsibility with the national commissioner.²⁴² Political ramifications of police action are simply not the national commissioner's concern. By making it such, General Phiyega blurred the lines that allow for responsibility to be traced back to the Minister.²⁴³

Worse than blurring responsibility, considering political factors led to reckless and poor decision-making during the actual incident. An encirclement plan, which posed a lesser threat to the lives of strikers, but would have taken a day longer was inexplicably jettisoned.²⁴⁴ The commission found that the decision not to implement it was clearly dictated by the earlier decision that Thursday, 16 August, was to be 'D-Day'.²⁴⁵ The commission is

²³⁰ Section 12 of the SAPS Act.

²³¹ Section 22(2) of the SAPS Act.

²³² Marikana Report, 2015:164.

²³³ Marikana Report, 2015:164.

²³⁴ Marikana Report, 2015:164.

²³⁵ Marikana Report, 2015:164.

²³⁶ Marikana Report, 2015:164.

²³⁷ Marikana Report, 2015:164-165.

²³⁸ Marikana Report, 2015:165.

²³⁹ Marikana Report, 2015:168.

²⁴⁰ Marikana Report, 2015:169.

²⁴¹ Marikana Report, 2015:169.

²⁴² Section 206 compared with section 207 of the Constitution.

²⁴³ See Federalist Papers No 70 on how this political plurality is used to 'conceal faults and destroy responsibility'.

²⁴⁴ Marikana Report, 2015:331-340.

²⁴⁵ Marikana Report, 2015:341.

even more blatantly damning in its findings and categorically states that this decision was the main cause of the 34 deaths on 16 August.²⁴⁶ Such a finding erodes the legitimacy and public confidence in the police. This loss of public confidence was highlighted by a SAPS Parade at which General Phiyega stated that whatever had happened at Marikana represented the 'best possible policing'.²⁴⁷ Later under cross examination, to quote the Commission, 'she cut a sorry figure when things that had happened and which were recorded on video or in photographs were shown to her and she was asked whether they represented the 'best of responsible policing''. Therefore, sadly, legitimacy cannot be regained by simply publically asserting it. Evidently, despite the Constitution's clear division of responsibility, a culture of ingraining and respecting the distinct constitutional roles of the political branches and the operational ones (such as the SAPS) is yet to be fully realised.

Transparency

Thin compliance

Section 208 of the Constitution requires that a civilian secretariat be established in terms of national legislation to function under the direction of the Minister of Police. A civilian secretariat for policing was established by the SAPS Act.²⁴⁸ One of its functions is to ensure transparency in policing.²⁴⁹ This is also one of the stated purposes of the community policing forums.²⁵⁰ There is also an express obligation on the National Police Commissioner in appropriate matters to ensure transparency when issuing orders and instructions.²⁵¹ Therefore, the SAPS legislation has not only created oversight and monitoring bodies mandated to ensure transparency; it also places particular obligations on police leadership to foster transparency in the police service. This generally complies with the internal constitutional goal and also meets the legitimacy criterion.

Thick compliance

Crime statistics

It would be preferable for the police to volunteer relevant information to the public, rather than be pressured or force of law to do so. To some degree, SAPS meets this standard by releasing annual crime statistics to the public every September.²⁵² However, in recent years there have been concerns, both from within the SAPS and civil society, that the SAPS places too much importance on reported crime as a measure of police success.²⁵³ Experts argue that police have a limited impact on preventing most types of crime.²⁵⁴ Further, because of the importance placed on recorded crime in South Africa, there are instances in which the police have neglected to record crimes to keep the number of incidents within the designated target.²⁵⁵ The targets tend to be set lower than the number of crimes recorded in the same month of the previous year.²⁵⁶ A notable change in recent years has been an emphasis on 'crimes reliant on police action', such as arrests for drunk driving.²⁵⁷ Police are generally able to 'stay in the green' when it comes to these categories, and so play up their successes on the media.²⁵⁸

There are also issues of data-messaging to reach this desired drop in crime statistics. For instance, some researchers have observed that a commander of a crime-prevention unit can open a spreadsheet on a station computer and record the number of people stopped for the evening, the number of cars stopped and searched etc. The data would always be captured mid-shift.²⁵⁹ In other words, half the data was estimates based on actions the commander hoped that his members would carry out, but may never have taken place.²⁶⁰ This introduces an

²⁴⁶ Marikana Report, 2015:341.

²⁴⁷ Marikana Report, 2015:388 citing Transcript from Video Recording VVV5 in the Annexures to the Marikana Report.

²⁴⁸ Section 2 of the SAPS Act.

²⁴⁹ Section 3 (1)(c) of the SAPS Act.

²⁵⁰ Section 18(1)(e) of the SAPS Act.

²⁵¹ Section 25(1)(b) of the SAPS Act.

²⁵² Owen and Faull, 2013: 62.

²⁵³ Owen and Faull, 2013: 62.

²⁵⁴ Owen and Faull, 2013:63. See also Faull, 2010.

²⁵⁵ Owen and Faull, 2013: 63.

²⁵⁶ Owen and Faull, 2013:63.

²⁵⁷ Owen and Faull, 2013:63.

²⁵⁸ Owen and Faull, 2013: 63.

²⁵⁹ Owen and Faull, 2013:63.

²⁶⁰ Owen and Faull, 2013:63.

imaginary narrative, which in turn travels up the national hierarchy.²⁶¹ In other cases, police officers would discourage victims of assault from opening cases.²⁶² The logic was that assault cases are so often thrown out of court or withdrawn by complainants such that it would be better left off the station's records.²⁶³ The result is that police management have no idea how many instances of assault are actually taking place in their constituency and will not therefore be able to identify it as an emerging problem. Furthermore, station management could rely on the incorrect fact of having reduced the incidents of assault.²⁶⁴ There is evidence to suggest that this practice of data-padding is widespread.²⁶⁵

These flaws in the methods of data gathering thwart the transparency goals of the Constitution. Transparency is entirely useless if the accuracy of the information released is called into question or is unreliable. If these statistics on crime are not to be trusted then it means thick compliance with the Constitution's transparency objective has not been achieved. The legitimacy objective, which is fostered by a general transparency norm, is also affected.

Attempts to mislead the public regarding Marikana

Unfortunately, police at times fail to live up to the ideal of transparent policing. To explore this, we must return once again to the Marikana incident. During the events of Marikana, the president was at a South African Development Community (SADC) meeting in Mozambique with the Minister of International Relations, who requested that the National Commissioner have a report prepared so that the president could decide whether to remain at the SADC meeting.²⁶⁶ A report was prepared and sent to the Minister on 17 August.²⁶⁷ That morning, the police commissioner held a media briefing at which she read out a statement.²⁶⁸ The information in this document was obtained from the commanders at Marikana.²⁶⁹ Importantly, the Marikana massacre comprised of two incidents. The second incident is more infamous than the first because the evidence suggests that miners may have been shot whilst hiding and running away.²⁷⁰

Although the wording of the two statements is for the most part identical, there is what the commission called 'a very material difference'.²⁷¹ While the report to the president and the minister made it clear that there were two separate incidents in which the strikers were shot and killed,²⁷² the subsequent media statement created the impression that there was only one shooting incident in which the police had no choice but to defend themselves with maximum force against a dangerous group of strikers.²⁷³

The commission found that the changes were not accidental because 'the wording of the relevant parts of the statement was otherwise virtually identical'.²⁷⁴ The police commissioner was unable to explain the discrepancy and so left the commission to conclude that this was a deliberate attempt to mislead the public.²⁷⁵ This is a prime example as to why transparency was included as a constitutional goal. Clearly, a lack of transparency in this instance was aimed at justifying police action and ensuring that the police could not be held publically accountable. It not only undermines Ginsburg's legitimacy criterion, but also the provision of public goods since the public was no able to demand better policing if it was not aware of the serious inadequacies present in the police force.

The Defence Forces

The Apartheid-era SADF, comprising of the army, the navy, the air force, and the military health service, fought in both the world wars and later, a proxy war in Angola – supposedly against Communist forces harbouring

²⁶¹ Owen and Faull, 2013:63.

²⁶² Faull, 2010:22.

²⁶³ Faull, 2010:22.

²⁶⁴ Faull, 2010:22.

²⁶⁵ Faull, 2010:20. See also Matshedisho, 2009:33.

²⁶⁶ Marikana Report, 2015: 392.

²⁶⁷ Marikana Report, 2015:392

²⁶⁸ Marikana Report, 2015:392

²⁶⁹ Marikana Report, 2015: 392

²⁷⁰ Marikana Report, 2015: 369.

²⁷¹ Marikana Report, 2015: 393.

²⁷² Marikana Report, 2015: 393.

²⁷³ Marikana Report, 2015: 394.

²⁷⁴ Marikana Report, 2015: 394.

²⁷⁵ Marikana Report, 2015:396-397.

take-over ambitions in Namibia (then South West Africa) and South Africa. It imposed mandatory conscription on all white men, resulting in a force of 100 000 conscripts at one time and enjoyed a substantial budget, reaching as much as 4.4% of South Africa's Gross Domestic Product. These experiences in battle, growing numbers and inflated budget enabled the building of strong military capabilities.²⁷⁶ This powerful Defence Force was then utilised during the states of emergency in the 1970s and 1980s to quash the proliferation of protests against the Apartheid government. The Apartheid government also oversaw the establishment of ostensibly independent armies in the former homelands – Transkei, Ciskei, Venda and Bophuthatswana – in an endeavour to advance the security needs of the Apartheid regime.²⁷⁷ In response, the anti-Apartheid liberation movements developed their own armed wings – UmKhonto we Sizwe of the ANC and the Azanian People's Liberation Army for the PAC – that engaged in a series of guerilla attacks against state institutions.²⁷⁸

At the fall Apartheid, to alleviate the risk of a coup d'état by the existing defence force, the Interim Constitution contained provisions for the granting of amnesty to soldiers and senior officers of the Apartheid SADF in exchange for full disclosure of involvement in any gross human-rights violations. A significant challenge existed as well of integrating a mostly white Defence Force with the mostly black military wings of the liberation movements. One of the notable successes of the post-apartheid government was the creation of a unified SANDF in the face of this divided history.²⁷⁹ Conscription was abolished during the transitional period and the army became professional. Whereas it might have been predicted that such a project would have been a failure given the divisions between the different parties, the SANDF has held together and succeeded in creating a unified force and command. Below, we examine two key internal goals of the Constitution: a transformed defence approach known as non-offensive defence; and political accountability.

Non-offensive defence: a transformed defence approach

Thin compliance

According to section 200(2) of the Constitution, 'the primary object of the Defence Force is to defend and protect the Republic, its territorial integrity and its people'. This is echoed by the Defence Act.²⁸⁰ This suggests that the Constitution has a particular vision of how the Republic and its people are to be defended or protected. Moreover, the Republic is to be defended in accordance with principles of international law regulating the use of force,²⁸¹ which prohibits the use of force in international relations.²⁸² The exception to this prohibition against aggression is circumstances of self defence.²⁸³ An important component of self-defence is that there must be an armed attack²⁸⁴ or threat of such an attack taking place.

This reactive approach defence is reiterated by South Africa's Defence Act.²⁸⁵ This has been described as a non-offensive policy favouring 'restraint on the threat or use of force against the territorial integrity of another state'²⁸⁶ as part of a desire to build trust between sovereign states.²⁸⁷ In South Africa this thinking also sprang from a desire to break away from South Africa's violent past and also by a sense of post-conflict fatigue amongst the public post 1990.²⁸⁸ The SADF had also been involved in a disastrous proxy war in Angola which led to a great loss of life and no concrete outcome.

Non-offensive principles were later accepted in the White Paper on Defence.²⁸⁹ The drafters of the White Paper left the strategic and technical implications of the primarily defensive policy of the SANDF to the Defence

²⁷⁶ Le Roux, 2005: 243-244.

²⁷⁷ Le Roux, 2005:245.

²⁷⁸ Le Roux, 2005:246-248.

²⁷⁹ See in general Le Roux, 2002.

²⁸⁰ Section 2(b) of the Defence Act 42 of 2002.

²⁸¹ Section 200(2) of the Constitution.

²⁸² Article 2(4) of the United Nations Charter.

²⁸³ Article 51 of the United Nations Charter.

²⁸⁴ Case Concerning the Military and Paramilitary Activities In and Against Nicaragua (Nicaragua vs United States) 1986 I.C.J. 14 para 35.

²⁸⁵ Section 2(d) of the Defence Act.

²⁸⁶ Jordaan and Esterhuysen, 2004:60.

²⁸⁷ Jordaan and Esterhuysen, 2004:61.

²⁸⁸ Jordaan and Esterhuysen, 2004:62.

²⁸⁹ White Paper on Defence, 1996.

Review process.²⁹⁰ In the end the principles of non-offensive defence were incorporated into defence policy within the concepts of ‘confidence-building defence’ and ‘a primarily defensive posture’,²⁹¹ and avoided direct inclusion of non-offensive defence – something that was heavily opposed by army generals.²⁹²

All this boils down to an attempt by the constitutional framework to legitimise the manner in which the SANDF uses force by bringing it in line with classical principles of international law. Furthermore, non-offensive defence seeks to allay the fears of neighbouring Southern African states that were subject to border air raids during Apartheid because many harboured banned liberation movements. A break from this history seems to have been attempted through this general principle of non-offensive defence.

Thick compliance

Importantly, non-offensive defence does not mean complete demilitarisation or an inability to defend oneself. For this reason, the pendulum cannot swing too far in favour of the ‘non-offensive’. A balance must be struck, something South Africa has not achieved.

The end of the Cold War and the dissolution of the former Soviet Union contributed to the resolution of most of Southern Africa’s historical conflicts (e.g. Namibia, Mozambique) and in doing so substantially reduced the need demand for militarisation.²⁹³ By 1996 the defence budget had declined by more than 50%²⁹⁴ and there was a decline in other related disarmament measures.²⁹⁵ The SADF was restructured with various units being disbanded or closed. There was also a general scaling down of bases and installations during this period.²⁹⁶ South Africa then terminated its nuclear weapons programme²⁹⁷ and brought an end to the use of offensive weapons, such as long-range missiles, in the SANDF.²⁹⁸

The unintended consequence of this rapid disarmament is that it is highly improbable that South African troops are currently equipped to face a combat situation without the aid of allies.²⁹⁹ An unfortunate demonstration of this is South Africa’s disastrous peace-keeping mission in the Central African Republic (CAR).

Peacekeeping Mission in the Central African Republic

The peace mission policy explaining why South Africa entered the conflict in the CAR stated that: ‘South Africa has an obvious interest in preserving regional peace and stability in order to promote trade and development and to avoid the spillover effect of conflicts in its neighbourhood.’³⁰⁰ However, the SANDF itself was not keen on involvement because it was itself underfunded and unable to support others militarily. It was pushed into action by the civilian Secretary of defence in deference to the President’s instructions.³⁰¹ Nonetheless, the presidency forged ahead and insisted that the SANDF intervene in the conflict on the side of the government of the CAR and its President Bozize.

However, when the real fighting started around Bangui on 22 March 2013, South Africa’s allies, spearheaded by Chad (FOMAC) and Bozizé’s own troops (FACA), disappeared from the scene, leaving a small, ill-equipped SANDF contingent alone to stand its ground against the rebels.³⁰² With no aerial reconnaissance capability and limited intelligence, the SANDF commander received a report that the FOMAC and FACA forces had been overrun.³⁰³ South African troops had no helicopters, no air support and no evacuation facility.³⁰⁴ In the end,

²⁹⁰ Jordaan and Esterhuise, 2004:65.

²⁹¹ Jordaan and Esterhuise, 2004:65.

²⁹² Jordaan and Esterhuise, 2004:65.

²⁹³ Batchelor and Dunne, 1998:7

²⁹⁴ Batchelor and Dunne, 1998:8.

²⁹⁵ Batchelor and Dunne, 1998:9.

²⁹⁶ Batchelor and Dunne, 1998:9.

²⁹⁷ Jordaan and Esterhuise, 2004:65.

²⁹⁸ Jordaan and Esterhuise, 2004:65.

²⁹⁹ See generally Ferreira, 2014:4.

³⁰⁰ Ferreira, 2014:8.

³⁰¹ Ferreira, 2014:10.

³⁰² Ferreira, 2014:12.

³⁰³ Ferreira, 2014:12.

³⁰⁴ Ferreira, 2014:13.

underestimating the strength, ability and nature of the rebels in the CAR cost SANDF 14 soldiers who were killed and 26 who were wounded in the capital, Bangui.³⁰⁵

Therefore, if the SANDF could not face a conflict against CAR rebels, this gives cause to reflect on whether troops are in fact adequately equipped to face any potential foreign or domestic threat to the existence of the Republic and a substantial portion of its people. Thus, as much as non-offensive defence increases the legitimacy of the Defence Force amongst citizens, there is a need to strike a balance by ensuring military effectiveness. Otherwise, the ability to deliver a significant public good – the defence of the Republic – cannot be achieved.

Political accountability

Thin compliance

Only the President, as head of the national executive, may authorise the deployment of the force in defence of the Republic or in fulfillment of an international obligation.³⁰⁶ The Defence Act echoes this exclusive vesting of power.³⁰⁷ The President is obliged to provide *information* of the reasons, location, number and period of deployment³⁰⁸ – making him exclusive locus of deployment power. He is also only accountable ex post facto to an parliamentary oversight committee. This is intended to achieve the constitutional goal of centralising political accountability to hold particular public officials responsible for deployment decisions. This also seems to confer legitimacy on any actions taken whilst simultaneously ensuring that there are political consequences for poor decisions. However, political accountability may also have negative consequences that ultimately undermines legitimacy where, for example, the president's unilateral deployment of troops is unpopular. In these circumstances, the absence of parliamentary oversight may undermine the legitimacy of such a defence mission.

Thick compliance

Peacekeeping missions need to be approved by the United National or African Union and are required to undergo a democratic process of parliamentary oversight before a mandate is given to accept 'part-responsibility for stability in Africa and elsewhere'.³⁰⁹ The goals and objectives of the mandate must be clear and a detailed operational plan must be put in place. Such a democratic requirement presumably requires the President, as Commander-in-Chief, to propose a focused plan and the stated objectives before deploying the Defence Force. However, the South African Constitution only requires the President to *inform* parliament about what he is doing together with the reasons for doing so. He is not required, for example, to receive their approval which would require him to convince a majority of the house that there are good reasons for military deployment. In South Africa, such a requirement is likely to impose only a low threshold of justification given that the majority of seats in the National Assembly are held by the ANC at present. However, given that the SANDF was not itself keen on involvement in the CAR – because of its limited capability both financially and militarily – had the president been required to address the SANDF's concerns, then perhaps the mission would have been better planned.

In summary, the current constitutional provisions do not require general public accountability and should be modified to provide for prior oversight mechanisms. Moreover, there should also be oversight in the aftermath of a mission. Whilst there was some media outcry about the loss of the soldiers in the CAR, there was no adequate mechanism to investigate the failures that led to the disastrous intervention in question.

Intelligence services

The nature of intelligence work is that it requires a reasonable level of secrecy to fulfill its functions.³¹⁰ Therefore it is difficult comprehensively to evaluate the performance of the National Intelligence Agency (NIA) in achieving this objective. It is also, for this reason, difficult to argue that transparency should be a constitutional goal for an agency that requires *some* secrecy to secure the national security of the Republic. Although there is

³⁰⁵ Ferreira, 2014:5.

³⁰⁶ Section 201(2) of the Constitution.

³⁰⁷ Section 18 of the Defence Act.

³⁰⁸ Section 201(3) of the Constitution.

³⁰⁹ Ferreira 2004:9.

³¹⁰ See section 27 of the Intelligence Services Act 65 of 2002 (ISA) for the secrecy obligations members of the National Intelligence Agency owe to the Republic.

parliamentary oversight over the NIA,³¹¹ because those committee reports are mostly classified,³¹² evaluating thick compliance is difficult. A possible argument is that there are important exceptions to secrecy, which we refer to as ‘reasonable transparency’. Further, we must also evaluate the general attainment of the goals of political accountability.

Political accountability

Thin compliance

In relation to the intelligence services, unlike the police service and Defence Force, political accountability lies directly in the hands of the president – he is not, for example, required to appoint a minister³¹³ but may elect to do so.³¹⁴ It is unclear where political accountability lies in such a situation but presumably, this would be an instance of delegation and political accountability would then lie in the hands of the Minister – as it does with the ministers of Defence and Police.³¹⁵ The Intelligence Services Act (ISA) recognises this power of delegation of political accountability by stating that the word ‘Minister’ in the ISA may refer to the President or a cabinet member appointed by the President.³¹⁶ The ‘Minister’, according to the ISA, also has the power to issue directions to the Director-General of Intelligence concerning the running of the agency.³¹⁷ Therefore, the ISA has made it reasonably clear that political accountability lies with the President or his appointed minister. Thus, there has been general thin compliance with the principle of political accountability. At the same time, it must be questioned whether it is adequate to place political accountability solely in the hands of the president and whether, as with defence, it would not have been better to establish a level of parliamentary oversight.

Thick compliance

Ambiguous constitutional provisions led to the need for a clarification by the Constitutional Court in the Masetlha case of the nature of the President’s political control over the intelligences services.

Masetlha Scandal

Mr Billy Masetlha, the Director-General of Intelligence, was unceremoniously dismissed by the former president Thabo Mbeki following a botched surveillance operation of a politically well-connected businessman Saki Macozoma.³¹⁸ The President did so by terminating Mr Masetlha’s term of office 21 months early.³¹⁹ The President cited an irrevocable break-down of trust in the relationship between himself and Mt Masetlha, which the latter challenged in court arguing that the president could not dismiss him summarily without discussing the matter with him. This case exposed some rather clumsy constitutional and legislative drafting. The Constitution only grants the President an express power to appoint a Director-General³²⁰ but is silent as to the power to dismiss him/her. It is this silence that allowed Mr Masetlha to claim that the president did not have the power to dismiss him without some form of consultation.

In the opinion of the majority of the Constitutional Court there was an implied power to dismiss the Director-General without consultation to ensure that the President was able to perform his function of protecting national security.³²¹ Further, the Court found that it was rational to dismiss Mr Masetlha because of the breakdown in the relationship of trust between himself and the president.³²² Pertinently, the Court found that the nature of

³¹¹ See generally Intelligence Services Oversight Act 40 of 1994.

³¹² Section 5 of the Intelligence Services Oversight Act.

³¹³ Section 209(2)(b) of the Constitution.

³¹⁴ Section 209(2)(b) of the Constitution.

³¹⁵ See generally *Carltona Ltd v Commissioner of Works* (1943) 2 All ER 560 where there is a general presumption in favour of delegation in Ministries of State. The same reasons of policy-making efficiency could be applied to a case where the President, having to ensure that the intelligence services are well supervised, delegates authority to another person who can devote their attention exclusively to this objective.

³¹⁶ Section 1 of the ISA

³¹⁷ Section 10(1) of the ISA.

³¹⁸ *Masetlha v President of the Republic of South Africa* [2007] ZACC 20, 2008 (1) SA 566 (CC), 2008 (1) BCLR 1 (CC) (*Masetlha*) paras 1 and 9.

³¹⁹ *Masetlha* paras 1 and 9.

³²⁰ Section 207(2) of the Constitution.

³²¹ *Masetlha* para 68.

³²² *Masetlha* para 68.

this relationship and decision was executive and policy-laden.³²³ This underscores the fact that the only person who can take such a decision is the President. Political accountability thus lies ultimately with the president and the president alone (except if the president delegates this responsibility to the Minister). It is questionable whether this is desirable and whether there should be further checks on the power of the President or his/her appointed Minister in these circumstances.

Transparency

Thin compliance

As previously stated, secrecy is a necessary component of intelligence. However, responsible and accountable government requires a measure of transparency. Hence, we formulate this goal as that of 'reasonable transparency' with respect to the intelligence services. Proposed national legislation concerning how state secrets are classified and disclosed has been a heated and contested topic between the government and the media.³²⁴ At the centre of this controversy has been the Protection of State Information Bill (Information Bill).³²⁵ In an attempt to reform Apartheid-era, draconian state secrecy legislation, the government proposed the Information Bill to bring security legislation in line with the Constitution.³²⁶ Specifically, the state wished to put the protection of state information within a revised legislative framework.³²⁷

However, there has been significant criticism of the proposed legislation. In particular, non-governmental organisations argue that the definition of 'national security' and the 'espionage offences' are too broad and that the power to classify is problematically centralised in the security cluster.³²⁸ For instance, national security includes 'economic, scientific or technological secrets vital to the Republic'.³²⁹ This definition is said to be overbroad because it includes undefined economic secrets.³³⁰ This particular criticism is not alone particularly convincing considering the rising cases of economic espionage internationally.³³¹ It is a reasonable measure to prohibit disclosing this sort of information in general, especially at a time when so called 'hacktivist' groups such as Wikileaks would gladly disseminate information that foreign competitors could use to harm the Republic's economic security.³³² The question is not whether sensitive economic information could implicate national security, but whether this could be abused. That requires one to assess the defences available to whistleblowers.

Opponents of the Information Bill argue that there is increased chance of abuse of the legislation if there is no general public interest defence.³³³ In order for whistleblowers to be protected from criminal liability, they would have to challenge the initial decision to classify the information. Classifying authorities are prohibited from classifying information with the intent to prevent government embarrassment or disguise any fraudulent activities.³³⁴ The obvious objection is that the absence of a public interest defence places the onus on the defendant to challenge the initial classification and may therefore have a chilling effect on whistle-blowing. A general public interest defence would not require such a strenuous burden: it would allow the substance of the information to speak for itself instead of having to prove nefarious intent by a government official. These difficult aspects of reasonable transparency have yet to be tackled by a court, which will have to determine whether the absence of such a defence prioritises national security at the expense of the right to access to information, and the requirements of 'reasonable transparency'.

Regardless of the above, it is clear that had it not been for vehement public criticism and objection, the more draconian aspects of the initial draft Bill would not have been altered.³³⁵ For instance, the definition of national security in the original draft bill was amorphous and lacked any real clarity on what sort of information posed a

³²³ *Masetlha* paras 75-77.

³²⁴ Editorial 2014.

³²⁵ Bill B6H of 2010.

³²⁶ See Preamble of the Information Bill.

³²⁷ Preamble of the Information Bill.

³²⁸ Right2Know Campaign, 2014.

³²⁹ Section 1 of the Information Bill, under the definition of 'national security' in subsection (b)(v).

³³⁰ Right2Know Campaign, 2014.

³³¹ US Counterintelligence Report, 2011.

³³² US Counterintelligence Report, 2011: 6 and 11.

³³³ Right2Know Campaign, 2014.

³³⁴ Section 14(2) of the Information Bill.

³³⁵ See all 8 drafts of the bill before the most recent version under Bill no's 6A to H.

threat to national security if disclosed.³³⁶ In this sense, the public-participatory mechanisms that the Constitution requires be in place allowed for and encouraged further amendment of the Bill in light of strong public sentiment. The change in the draft Bill that has occurred as a result of this process can be seen to be a success of the participatory democratic elements of the constitutional structure of South Africa, which would in turn not have taken place without the responsiveness of the ruling party. This raises some of the questions outlined in the democracy chapter concerning the capacity of a set of constitutional rules and principles alone to address circumstances such as one-party dominance.

Thick compliance

Masetlha Scandal

The Masetlha scandal also implicated issues surrounding ‘reasonable transparency’. In a claim premised on the right to open justice, Independent Newspapers (Pty) Ltd (Independent Newspapers), sought an order compelling public disclosure of certain portions of a record of the Masetlha proceedings in the Constitutional Court.³³⁷ The Minister of Intelligence, objected on grounds of national security.³³⁸ Mr. Masetlha argued that these portions of the record described certain activities of the NIA that were classified as ‘secret’ or ‘confidential’.³³⁹ The Court therefore had to decide whether national security was a sufficient justification to withhold parts of a court record.

The Court began by distinguishing this case from a challenge about a decision to classify information as secret or confidential. The distinction lies in both parties having put the information before a court – in a public hearing – and so disclosing the information. The issue then was whether the Court should withhold this information from the general public.³⁴⁰ The information was therefore placed voluntarily under the authority and direction of the Court.³⁴¹ The Court thus had to wrestle with competing claims of ‘open justice’ and national security.³⁴² ‘Open justice’ is described as ‘a cluster or umbrella of related constitutional rights which include freedom of expression and the right to a public trial’³⁴³ and flows from the founding values of transparency, accountability and responsiveness in the way courts and organs of state function.³⁴⁴

However, the Court stated that it must balance both open justice and national security, and cannot therefore assume in a case like this that transparency is the default position.³⁴⁵ The Court then proceeded to disclose certain portions of the record and restricted access to others.³⁴⁶ This ad hoc approach to disclosure matters has the very negative effect of providing little general guidance as to what sorts of information are likely to be disclosed by a court. What constitutes reasonable transparency, it seems, will be determined on a case-by-case basis.

National Prosecuting Authority

Although not expressly mentioned as part of the Security Services by the Constitution, the NPA is essential to ensuring both national security and the security of private persons.³⁴⁷ The sections dealing with the NPA are included in the chapter of the Constitution relating to the judiciary. However, the function of the NPA very much relates to the operation of the criminal law and is completely distinct from the function of judging. For

³³⁶ Section 1 of Bill 6A-2010 which defined national security as: ‘The resolve of South Africans as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life, and includes protection of the people and occupants of the Republic from hostile acts of foreign intervention, terrorist and related activities, espionage and violence, whether directed from or committed within the Republic or not, and includes the carrying out of the Republic’s responsibilities to any foreign country in relation to any of the matters referred to in this definition’

³³⁷ *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae)* In re: *Masetlha v President of the Republic of South Africa and Another (Independent Newspapers)* 2008 (5) SA 31 (CC); 2008 (8) BCLR 771 (CC) para 1.

³³⁸ *Independent Newspapers* para 1.

³³⁹ *Independent Newspapers* para 3.

³⁴⁰ *Independent Newspapers* para 51.

³⁴¹ *Independent Newspapers* para 51.

³⁴² *Independent Newspapers* para 56.

³⁴³ *Independent Newspapers* para 39.

³⁴⁴ *Independent Newspapers* para 40.

³⁴⁵ *Independent Newspapers* paras 55-56.

³⁴⁶ *Independent Newspapers* paras 59-74.

³⁴⁷ See *Ampofo-Anti et al*, 2008: ch 23B-81 and ch23B-101.

this reason, we have chosen to consider it in this chapter rather than the one relating to the judiciary. Its inclusion in the judiciary chapter of the Constitution may itself be regarded as strange and indicate a lack of clarity on the part of the drafters as to where it falls in the constitutional structure – something that in itself has led to challenges.

Independence

Thin compliance

As stated, the Constitution requires that a NPA be created.³⁴⁸ This must be done through national legislation.³⁴⁹ On 24 June 1998, the President assented to the NPA Act,³⁵⁰ fulfilling this constitutional obligation. The Constitution also requires that national legislation ensure that the prosecuting authority exercise its functions 'without fear, favour or prejudice'.³⁵¹ The NPA Act stipulates that 'a member of the prosecuting authority shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law'.³⁵² The Act takes this further and states that subject to the Constitution and the Act, 'no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the prosecuting authority or any member thereof in the exercise, carrying out or performance of his or her powers, duties and functions'.³⁵³ The Constitution states that the president must appoint the National Director of Public Prosecutions (NDPP) and that the minister of justice exercises final responsibility over the NPA. The minister can do so by requiring the NDPP to provide a report concerning any case, matter or subject dealt with by the NDPP in the exercise of their powers, the carrying out of their duties and the performance of their functions.³⁵⁴ The minister may also request that reasons be provided for any decision taken by a Director of Public Prosecutions in the exercise of his or her powers, the carrying out of his or her duties or the performance of his or her functions.³⁵⁵ Therefore, it can safely be said that the Act complies in a thin sense with the Constitution's injunctions concerning the NPA.

Thick compliance

The NPA has since its inception battled to adhere to its constitutional obligation to exercise its duties independently and without bias. Bedeviled with constant political meddling from the executive, the institution has not fared well under the pressure. Arguably, this is part of a design flaw in the Constitution which recognises the need for independence but places final responsibility for its actions within the realm of the executive, that is, it has not given the NPA 'institutional independence' as is the case with the chapter 9 institutions. That said, the provisions discussed above, such as the duty to prosecute 'without fear, favour or prejudice' do confirm that the NPA enjoys what we referred to above as 'decision-making independence'. There have been several NDPP's who have not survived to serve their entire terms and were removed from office prematurely due to some or other political scandal. The sorry tale of these NDPP's and the political currents that swept them away is described below.

Ngcuka

Bulelani Ngcuka was appointed as the country's first NDPP in 1998.³⁵⁶ Initially, his appointment was opposed by opposition parties, arguing that he had been too intimately involved in the activities of the ruling ANC to exercise his duties with the required independence.³⁵⁷ Mr. Ngcuka, however, proved himself an able NDPP, prosecuting high profile ANC members, including ANC parliamentary chief whip Toni Yengeni and investigating the current president, then deputy president Jacob Zuma, for corruption and fraud.³⁵⁸ Mr. Ngcuka

³⁴⁸ Section 179 of the Constitution.

³⁴⁹ Section 179 of the Constitution.

³⁵⁰ 32 of 1998.

³⁵¹ Section 179(4) of the Constitution.

³⁵² Section 32(1)(a) of the NPA Act.

³⁵³ Section 32(1)(b) of NPA Act.

³⁵⁴ Section 33(2)(a) of the NPA Act.

³⁵⁵ Section 33(2)(b) of the NPA Act.

³⁵⁶ South African History Online *Bulelani Ngcuka*.

³⁵⁷ South African History Online *Bulelani Ngcuka*.

³⁵⁸ South African History Online *Bulelani Ngcuka*.

also decided to investigate former Presidential spokesman Mac Maharaj, Zuma's financial advisor Schabir Shaik and current communication's manager at the South African National Roads Agency, Vusi Mona. This investigation resulted in a national scandal.³⁵⁹ The three subjects of the investigation threw their own counter-allegations at Ngcuka. They accused Ngcuka of being an Apartheid government spy who was executing a secret mission to discredit the ruling party and bring down the democratic government.³⁶⁰ Fanciful as these allegations were, the scandal was such that president Mbeki appointed a commission of inquiry, led by former chief justice Hefer, to investigate the matter.³⁶¹ After a careful and lengthy investigation, Hefer CJ found that these allegations were spurious and false. To use his words: "The suspicion which a small number of distrustful individuals harboured against [Mr.. Ngcuka] fourteen years ago was the unfortunate result of ill-founded inferences and groundless assumptions."³⁶²

Consequently, Hefer CJ found that the Maharaj and Shaik allegations of spying had not been established and that Mr. Ngcuka probably had not acted as an agent for a pre-1994 government security service.³⁶³ This saga once again illustrates the importance that commissions of inquiry have assumed in South African to deal with controversial matters and allegations. Despite the commission's findings, however, Ngcuka still chose to resign.³⁶⁴

Pikoli

Following this unfortunate episode, President Mbeki appointed Vusi Pikoli as the new NDPP to replace Ngcuka.³⁶⁵ Mr Pikoli was also fearless in the execution of his duties, investigating high profile public officials like prominent businessman Glen Agliotti and then national police commissioner Jackie Selebi.³⁶⁶ Unfortunately for Mr Pikoli, following the initiation of a corruption investigation against commissioner Selebi, President Mbeki summarily suspended him from his duties pending an investigation into several alleged failures committed by Mr Pikoli in the pursuance of his duties. And so was born another commission of Inquiry into the fitness to hold office of an NDPP. President Mbeki appointed former parliamentary speaker Dr Frene Ginwala to head the commission.³⁶⁷ Specifically, Dr Ginwala had to investigate the following: whether Mr Pikoli failed to appreciate several national security threats in executing his duties; whether Pikoli failed to appreciate and defer to the oversight and final responsibility exercised by the minister over the NPA, causing a breakdown in the relationship between the NDPP and the Minister; and, whether Mr Pikoli failed adequately to recognise and comply with the accounting oversight exercised by the Director-General of Justice Mr Menzi Simelane.³⁶⁸

The Ginwala Commission concluded that there was no irretrievable breakdown in the relationship between Mr Pikoli and the Minister³⁶⁹ and that Mr Pikoli had not failed to consider national security in failing to prosecute certain persons.³⁷⁰ The commission also found that Mr Pikoli had not acted against the public interest in awarding immunity as conditions of plea bargains with admitted criminals who turned state witness, including Mr Agliotti.³⁷¹ The commission concluded further that Mr Pikoli had not failed to appreciate any oversight powers that the Director-General, Mr Simelane, had over the NPA.³⁷² In fact, the commission found that Mr Simelane had failed to appreciate the limits of his own office and could not interfere in the management of the NPA.³⁷³

However, the commission did find that Mr Pikoli had failed to appreciate certain politically sensitive national security matters and therefore failed to inform the Minister and the President before taking action. Specifically,

³⁵⁹ South African History Online *Bulelani Ngcuka*.

³⁶⁰ South African History Online *Bulelani Ngcuka*.

³⁶¹ See generally Hefer Commission.

³⁶² Hefer Commission: 52.

³⁶³ Hefer Commission: 61.

³⁶⁴ Archibold, 2004.

³⁶⁵ See generally Ginwala Commission.

³⁶⁶ Ginwala Commission para 257.

³⁶⁷ Ginwala Commission para 1.

³⁶⁸ Ginwala Commission para 2.

³⁶⁹ Ginwala Commission para 311.

³⁷⁰ Ginwala Commission para 312.

³⁷¹ Ginwala Commission para 315.

³⁷² Ginwala Commission para 318.

³⁷³ Ginwala Commission para 320.

Mr Pikoli apparently failed to inform the Minister of his intention to execute search, seizure and later arrest warrants against National Police Commissioner, Selebi.³⁷⁴ He then failed to obtain the required security clearance before searching the home of Deputy President Zuma.³⁷⁵ Mr Pikoli even indicated that he had the power to defy the President had the President requested a delay in executing the warrants against the Police Commissioner.³⁷⁶ Despite these adverse findings, Dr Ginwala found that Mr Pikoli was a fit and proper person to hold his office provided he displayed a greater appreciation of the final responsibility the relevant executive authorities exercise over the NDPP.³⁷⁷ Unfortunately, president Jacob Zuma decided to dismiss Mr Pikoli from his position despite the commission finding him fit and proper to hold the post.³⁷⁸ Once again, this suggests too much discretion lies with the executive in dealing with the NPA. A commission of inquiry was, once again, central to making credible findings about the fitness of Mr Pikoli to hold office and highlighted the inexplicability of the decision of the President to fire him after its reports was released. The report of the commission also played an important role in the inability of the subsequent appointment to this position to continue to occupy this office to which we now turn.

Simelane

After dismissing Mr Pikoli, president Zuma saw fit to appoint as NDPP none other than Mr. Menzi Simelane – the Director-General of Justice who had attempted to exercise accounting oversight over the NPA.³⁷⁹ The official opposition party – the Democratic Alliance (DA) – challenged the President's decision in court. The DA argued that the President had failed to appoint a fit and proper person to the office and so his decision should be set aside as it was irrational.³⁸⁰ This claim was based primarily on the findings of the Ginwala Commission about Mr Simelane's integrity, character and ability. The President opposed the application, arguing that he had applied his mind and was not bound by the findings of the Ginwala Commission with respect to Mr Simelane's character.³⁸¹

The Constitutional Court held on appeal that the standard of a 'fit and proper' person is an objective standard.³⁸² The process taken to appoint the NDPP, the Court found, must be related to the purpose of the power of appointment.³⁸³ The purpose of this power is to ensure that the person who is appointed the NDPP is 'sufficiently conscientious and has the integrity required to be entrusted with the responsibilities of the office'.³⁸⁴ The Court quoted extensively from the Ginwala Commission's findings. Specifically, Dr Ginwala's averment that Mr Simelane's testimony was 'contradictory and without basis in fact or in law' and that Mr Simelane's allegations against Mr Pikoli were, to use Dr Ginwala's words, 'baseless'.³⁸⁵ The Court also cited the fact that Dr Ginwala had expressed concern about Mr Simelane's 'lack of appreciation and respect for the import of the Inquiry established by the President'.³⁸⁶ The Court also emphasised Mr Simelane's failure to disclose several letters exchanged between the president, the minister and Mr Pikoli covered by the commission's subpoenas which were central to deciding the issue of Mr Pikoli's fitness for office.³⁸⁷ Thus, the Court found that the President's decision to ignore the Ginwala Commission's findings and Mr Simelane's conduct before the commission rendered the decision to appoint him irrational.³⁸⁸ The Court found that the President ought to have launched an investigation into Mr Simelane's honesty and conscientiousness.³⁸⁹ There was thus no rational relationship between ignoring the Ginwala's commission's findings and the purpose for which the power had

³⁷⁴ Ginwala Commission para 320.

³⁷⁵ Ginwala Commission para 339.

³⁷⁶ Ginwala Commission para 355.

³⁷⁷ Ginwala Commission paras 349 and 358.

³⁷⁸ Joubert, 2012.

³⁷⁹ *Democratic Alliance v President of South Africa and Others* 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) (Democratic Alliance) paras 4(a) and (c).

³⁸⁰ Democratic Alliance para 11.

³⁸¹ Democratic Alliance para 9.

³⁸² Democratic Alliance para 20.

³⁸³ Democratic Alliance para 37.

³⁸⁴ Democratic Alliance para 49.

³⁸⁵ Democratic Alliance para 50.

³⁸⁶ Democratic Alliance para 51.

³⁸⁷ Democratic Alliance paras 54-77.

³⁸⁸ Democratic Alliance para 86.

³⁸⁹ Democratic Alliance para 88.

been granted to the president.³⁹⁰ In an extraordinary order, the Court then invalidated the president's decision to appoint Mr Simelane as NDPP.³⁹¹ This decision highlights the important role of an independent institution like the Court in ensuring that other institutions can exercise their functions through the appointment of appropriate persons.

Nxasana

President Zuma then appointed Mxolisi Nxasana as the new NDPP.³⁹² There were, however, reservations held by opposition parties because Mr Nxasana was acquitted of murder charges in the late 1980's and had only been a magistrate who had not held a senior position within the NPA.³⁹³ President Zuma nonetheless forged ahead with the appointment.³⁹⁴ However, a couple of months later the Presidency made an about-turn concerning Mr Nxasana. President Zuma expressed concern about Mr Nxasana's fitness to hold the position because of the acquitted murder charge and because Mr Nxasana had not been granted security clearance.³⁹⁵ However, Mr Nxasana argued that the Presidential u-turn was due to certain factions in the ruling party erroneously believing Mr Nxasana would re-institute the corruption investigation against President Zuma dropped before the beginning of the President's first term.³⁹⁶ The President then suspended Mr Nxasana and created a commission of Inquiry headed by Nazeer Cassim SC to investigate Nxasana's fitness for office.³⁹⁷ Abruptly, the night before the commission was to commence its work, the President dissolved the commission, informing Cassim that the Presidency and Mr Nxasana had reached an amicable settlement of the issue.³⁹⁸ The terms of the understanding were that Mr Nxasana had agreed to resign and the Presidency was prepared to offer him R17 million as compensation for his early resignation.³⁹⁹ This incident once again highlights severe concerns relating to political interference with the NPA and the willingness to stop at nothing to exercise political control. It also highlights the possible abuse of the use of commission of inquiry and the need to limit Presidential discretion in this regard to avoid discrediting them through rendering them simply instruments for the President's political purposes.

Conclusion on the independence of the NPA

Evidently, the NPA's independence has been consistently under threat from executive and political interference. Whilst, as the Ginwala Commission rightly recognised, there is a need for some political control to be exercised over the NPA, this in no way justifies the constant interference with the NPA's operational decisions, including decisions as to who to prosecute.⁴⁰⁰ This situation trespasses into the very heartland of NPA prosecutorial discretion, which should be exercised without fear, favour or prejudice.⁴⁰¹ The NPA Act only requires the NDPP to keep the minister and president informed concerning politically sensitive or national security issues that arise from a decision to prosecute – not to obtain permission.⁴⁰² To think otherwise, would render the very notion of independent decision-making illusory.

Even more troubling is the carelessness concerning the integrity of candidates in the appointment process. Specifically, the case of Mr Simelane stands out. The fact that the Constitutional Court had to decide on the character of an NDPP who had already been found by a Presidentially appointed commission to be untruthful and careless speaks to the inability of other political institutions to check Presidential power. Worse, it stands as an indictment of ability of the presidency to appreciate that the integrity of the NDPP must be above reproach.

Therefore, considering all the many scandals and threats concerning various NDPP's, there has not been thick compliance in respecting the NPA's decision-making independence. There is some worry here about the Constitution itself and whether the drafters should have given the NPA institutional independence as well as

³⁹⁰ Democratic Alliance para 88.

³⁹¹ Democratic Alliance para 95.

³⁹² Evans and Pillay 2014.

³⁹³ Evans, 2015.

³⁹⁴ Evans, 2015.

³⁹⁵ Evans and Pillay, 2014.

³⁹⁶ Evans and Pillay, 2014.

³⁹⁷ Presidential Note, 2015.

³⁹⁸ Evans, 2015.

³⁹⁹ Corruption Watch, 2015.

⁴⁰⁰ Ginwala Commission para 358.

⁴⁰¹ Section 32(1)(a) of the NPA Act.

⁴⁰² Ginwala Commission para 358 read with section 33 of the NPA Act.

decision-making independence. Moreover, the Constitution has only one short provision on the NPA and much of its regulation is left up to national legislation. There is also a lack of clarity as to the role of the executive in relation to the NPA, which has led to some of the problems above. This is a clear area in which better constitutional design was necessary.

8.4. Conclusions and recommendations

Performance

The Police Service has a very limited degree of performance in relation to the goals set for it. It has established community policing forums, which seek to bring policing closer to the community. It has also voluntarily published crime statistics without any constitutional obligation compelling them to do so though, as has been seen above, there are some concerns relating to the veracity thereof.

The Defence Force has broadly achieved the goal of non-offensive defence by reducing general defence spending and participating in peace-keeping missions which engender good continental relations. The Defence Force has also succeeded in creating one united force that brings together soldiers from the old apartheid order with those fighting for the liberation movements which is a major achievement.

The Intelligence Services are subject to some political accountability by having to report to the President or Minister of Defence. There has also been attempt – albeit highly controversial – to render the law relating to the protection of state information more compliant with the new constitutional order.

The NPA has also had certain NDPP's, such as Vusi Pikoli and to an extent Bulelani Ngcuka, at the helm who fearlessly instituted proceedings against high profile individuals.

Under-performance

A concerning area of where the Constitution itself is poorly designed relates to the failure to include constitutional protection for an independent corruption agency, especially for a country that has South Africa's history of endemic corruption, was unfortunate. This led to courts having to indirectly fashion such constitutional protection via interpretation, inevitably causing uncertainty and straining relations with other branches of government.

The Police Service's performance on most of its constitutional goals has been tragically sub-optimal. There seems to be little appreciation of the post-Apartheid notion of a transformed, community-centered police service that takes its positive obligations seriously. Even attempts by courts to encourage an inculcation of this goal indirectly by revising delictual liability has failed to change police behavior. Additionally, instances of unlawful arrests, detentions and excessive use of force are rife. The police also woefully fail in many respects to bring perpetrators of crime to justice.⁴⁰³ The police have also shown themselves incapable of appreciating that political accountability lies with the minister of police and that senior police officials have no business concerning themselves with political factionalism. On transparency, the police service has also failed markedly by demonstrating that they are willing to conceal vital information from the public if such information is potentially embarrassing, as they did during the Marikana Incident.

The Defence Force has also struggled to find the balance between pursuing non-offensive defence and still adequately equipping soldiers for armed conflict. The misguided and poorly planned mission in the CAR is demonstrative of this failure. It also highlights a design flaw in the Constitution in that the president is able to

⁴⁰³ The SAPS' Annual Report 2015 records, for example, a conviction rate of 87.56% (for serious crimes) and 75.12% (for crimes against children). Although these statistics suggest a very strong ability to fight crime, analysts doubt the reliability of using the 'conviction rate' – rather than the number of convictions in relation to number of crimes reported – as a measure of performance. The reason is that many crimes that are committed do not result in a conviction (possibly for lack of evidence) or do not even go to trial (because prosecutors retain a discretion whether to prosecute). The result is that the actual success rates are probably substantially lower. See Jean Redpath, ISS Monograph Number 186 'Failing to prosecute? Assessing the state of the National Prosecuting Authority in South Africa' (2012) available at: <https://www.issafrica.org/uploads/Mono186WEB.pdf> (accessed on 16 March 2016) and Africa Check 'Conviction rates an unreliable benchmark of NPA success' available at: <https://africacheck.org/reports/conviction-rates-an-unreliable-benchmark-of-npa-success/> (accessed on 16 March 2016).

take decisions to deploy troops without parliamentary approval which would at least have required a higher level of justification for any such life-threatening mission.

The Constitutional design relating to the Intelligence Services is also sub-optimal in not requiring some level of parliamentary oversight over its operations. The new regime relating to state information has failed adequately to offer protection for whistleblowers through the creation of a general public interest defence for disclosure of classified information.

As for the NPA, it seems that there has been a failure to respect the constitutionally mandated decision-making independence of the institution. The fact that no NDPP has served out his full term and that one NDPP had to be dismissed by a court because of serious doubts as to his integrity and conscientiousness is alarming. There is a categorical failure of the Constitution's goal of prosecutorial independence. That failure, as we saw, may to some extent be laid at the door of the Constitution itself given the very design of the institution – particularly the decision not to grant it 'institutional independence' – as well as a lack of specificity concerning the relative roles of the executive and the NPA.

Recommendations

In light of the areas of under-performance identified above, the following recommendations are made:

- There is a need for a clearer definition to be developed of what constitutes a lawful arrest or detention. That is a matter that could be attended to short of constitutional amendment.
- The requirements around lethal force in recently amended legislation needs to be rendered stricter and clearer to ensure that the constitutional requirements outlined by the Constitutional Court are met
- Stronger steps need to be taken to separate out decisions around policing from political interference and to ensure the police force is not used for political ends
- Data-gathering practices around crime and statistics need to be improved so that greater transparency is achieved in this regard
- A significant number of states require some legislative approval for the deployment of their Defence Force. Including such a provision in the Constitution may make for more sober and considered decision-making.
- The lack of clarity as to Parliament's role in the dismissal of the Intelligence Inspector General may lead to the possibility of presidential interference with the Inspector-General's work. Thus, the constitutional text should include a provision on Parliament's oversight in the dismissal of an Inspector-General.
- A general public interest defence should be made available to whistleblowers who release protected state information in order to expose any matters (such as criminal activity or corruption) on which there is a pressing public interest
- The institutional independence of the National Prosecuting Authority should be guaranteed by the Constitution. The current provisions do not adequately safeguard its independence and there is a lack of specificity concerning the relative roles of the executive and the NPA. A more expansive provision providing stronger protection for the independence of the NPA would be desirable. A note of caution is sounded here given the current penchant for weakening institutions rather than strengthening them.
- We have identified a serious omission of the Constitution involves the failure in the document to include constitutional protection for an independent corruption agency, especially for a country that has South Africa's history of endemic corruption. This led to Courts having indirectly to fashion such constitutional protection. It would be preferable to include the need for this independent corruption-busting agency in the Constitution's text though the current attempt to weaken institutions for political gain cautions against tampering too much with court-led developments.

References

- Baeefe, B. (2006) 'Vigilantism in the western Cape' available at http://www.capecapegateway.gov.za/Text/2006/04/vigilantism_in_the_western_cape.pdf
- Batchelor, P. and Dunne, P. (1988) 'The Restructuring of South Africa's Defence Industry' available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.459.9848&rep=rep1&type=pdf> (accessed on 10 November 2015)
- Boonzaier, L. (2013) 'State Liability in South Africa: a More Direct Approach' *South African Law Journal* 130(2): 330-368
- Cawthra, G. and Luckham, R. eds (2003) *Governing Insecurity: Democratic Control of Military and Security Establishments in Transitional Democracies*. London: Zed Books
- Dugard, J. *International Law A South African Perspective* (2011) Juta Cape Town
- Du Toit, E. De Jager, FJ. Paizes, A. Skeen, A STQ. and Van der Merwe, S. (2004) *Commentary on the Criminal Procedure Act*. Cape Town: Juta; looseleaf, updated annually.
- Ellis, S. (1998) 'The Historical Significance of South Africa's Third Force' *Journal of Southern African Studies* Vol. 24: 261.
- Fagan, A (2008) 'Reconsidering Carmichele' *South African Law Journal* 125(4):659-673
- Farlam I et al (2015) 'Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana, in the North West Province' available at: <http://www.sahrc.org.za/home/21/files/marikana-report-1.pdf> (accessed on 21 March 2016)
- Faull, A. (2010) 'Missing the Target: When Measuring Performance Undermines Police Effectiveness' *SA Crime Quarterly* 31:19-25
- Ferreira, R. (2014) 'South Africa's Participation in the Central African Republic and Democratic Republic of Congo Peace Missions: A Comparison' *Polieta* 33(2): 4-27
- Ginsburg, T. and Huq, A. (2015a). 'Evaluating Constitutional Implementation'. Chicago Conference Paper
- Ginwala, F. (2008) 'Commission of Inquiry into the Fitness of Advocate VP Pikoli to hold the Office of National Director of Public Prosecutions' available at http://www.justice.gov.za/commissions/2008_ginwala.pdf (accessed on 27 November 2015).
- Heitman, H R. (2013) *The War in Bangui. The Untold Inside Story*. Johannesburg: Mampoor, 40
- Hefer, J J F. (2004) 'Commission of Inquiry into Allegations of Spying against the National Director of Public Prosecutions, Mr BT Ngcuka' available at http://www.justice.gov.za/commissions/comm_hefer/2004%2001%2020_hefer_report.pdf (27 November 2015)
- Jordaan, E. and Esterhuysen, A. (1994) 'South African Defence since 1994' *African Security Review* 13
- Kuzwayo, J. (1998) 'Developing Mechanisms for Civilian Oversight over the Armed Forces' *African Security Review* 7(5): 54-61
- Le Roux, L. (2002) 'The South African National Defence Force and its Involvement in the Defence Review Process' in Williams et al eds.
- Le Roux, L. (October 2005) 'The post-apartheid South African Military: Transforming with the Nation' in Rupiya ed.

- Lotze, W. de Coning, C. and Neethling, T. (2015) *Peacekeeping Contributor Profile: South Africa* available at: <http://www.providingforpeacekeeping.org/2014/04/03/contributor-profile-south-africa/>
- Magubane, B. et al (2004) *The Road to Democracy in South Africa Volume 1: 1960's-1970's* South African Democracy Education Trust, Cape Town.
- Masiloane, D. (2007) 'Proactive policing for the rich and reactive policing for the poor: hypocrisy in policing a stratified society' *South African Journal of Criminal Justice* 20: 328-340
- Matshedisho, R. (2009) 'Concept Note Eight: 'We must fight them!' Police violence, torture and brutality' in Vigneswaran et al eds.
- Moseneke, D. (2010) 'The role of comparative and public international law in domestic legal systems: a South African perspective' *Advocate (South Africa)* 23: 63
- Newham, G. (2005) 'Strengthening Democratic Policing in South Africa through Internal Systems for Officer Control' *South African Review of Sociology* 36(2):160-177
- Owen, O. and Faull, A. (2013) 'On the Record' *SA Crime Quarterly* 46:61
- Rauch, J. (2005) 'The South African Police and the Truth Commission' *South African Review of Sociology* 36 224
- Rupiya, M. ed (2005) *Evolutions and Revolutions, A Contemporary History of Militaries in Southern Africa*. Institute for Security Studies, Cape Town
- Synckers, F. and Le Roux, Y. (2008). 'Criminal Procedure Rights of Arrested, Detained, and Accused Persons' in S. Woolman et al eds.
- Stack, L. (1998) 'The State Security Council, the Courts and the 'TRC' *Indicator SA* 19.
- Theletsane, K I. (2014) 'Managing the South African Police Service' *Journal of Public Administration* 49(1): 341-361
- Van Vuuren, H. (2006) 'Apartheid Grand Corruption Assessing the Scale of Crimes of Profit from 1976 to 1994' *Institute for Security Studies* available at <http://opensecrets.org.za/wp/wp-content/uploads/Apartheid-Grand-Corruption-2006.pdf> (accessed on 15 October 2015)
- Williams, R. Cawthra, G and Abrahams, D. eds (2008) *Ourselves to Know: Civil-Military Relations and Defence Transformation in Southern Africa*. Pretoria: Institute for Security Studies
- Ampofo-Anti, O. et al. (2008) 'Security Services' in Woolman et al eds.
- Woolman, S. et al (2008) *Constitutional Law of South Africa* 2 edition. Juta, Cape Town
- Vigneswaran and Hornberger eds (2009) *Beyond 'Good Cop'/'Bad Cop': Understanding informality and police corruption in South Africa*. Open Society Foundation for South Africa, Johannesburg

Newspapers and sundry sources

- Africa Check 'Conviction Rates an Unreliable Benchmark of NPA Success' accessed at: <https://africacheck.org/reports/conviction-rates-an-unreliable-benchmark-of-npa-success/> (16 March 2016).
- Archibold, S. (2004) 'Ngcuka was not "robust enough"' *Mail and Guardian* available at <http://mg.co.za/article/2004-07-26-ngcuka-was-not-robust-enough> (accessed on 27 November 2015)
- Corruption Watch (2015) 'Freedom under Law go to court over Nxasana' available at <http://www.corruptionwatch.org.za/corruption-watch-freedom-under-law-go-to-court-over-nxasana/> (accessed on 28 November 2015)
- Criminal Procedure Amendment GG 33526 of 5 October 2010.
- Defence in democracy, White Paper on national defence for the Republic of South Africa, as approved by Parliament on 14 May, 1996.

Editorial 'Secrecy Destroys Accountability' (2014) *Mail and Guardian* available at <http://mg.co.za/article/2013-11-14-secrecy-destroys-accountability> (accessed on 23 November 2015)

Evans, J. (2015) 'Zuma shuts down inquiry into NPA boss Mxolisi Nxasana' *Mail and Guardian* available at <http://mg.co.za/article/2015-05-11-are-mxolisi-nxasanas-skeletons-ready-for-inspection> (accessed on 27 November 2015)

Evans, S. and Pillay, V. (2014) 'NPA: Mxolisi Nxasana's fight-back begins' *Mail and Guardian* at <http://mg.co.za/article/2014-06-04-npas-mxolisi-nxasana-fight-back-begins>

Redpath, J. (2012) 'Failing to Prosecute? Assessing the State of the National Prosecuting Authority in South Africa' (2012) *ISS Monograph Number 186* available at: <https://www.issafrica.org/uploads/Mono186WEB.pdf> (16 March 2016)

Federalist Papers

Grossman, A. (2015) 'US Charges Six Chinese Citizens with Economic Espionage' *Wall Street Journal* available at <http://www.wsj.com/articles/u-s-charges-six-chinese-citizens-with-economic-espionage-1432046527> (accessed on 23 November 2015)

Independent Police Investigative Directive *IPID Annual Report* (2014)

Joubert, P. (2012) 'ANC interference prompts Pikoli sacking' *Mail and Guardian* available at <http://mg.co.za/article/2012-05-24-anc-forces-pikoli-sacking> (accessed on 27 November 2015).

Oxford English Dictionary (2010) Stevenson ed. Oxford University Press.

SAPA (2009) 'Cele Tells Police to Use Deadly Force' *Business Day* available at <http://www.businessday.co.za/articles/Content.aspx?id=88947> (accessed on 3 November 2015).

Presidential Note 102 of 2015, Government Gazette No 38463 sourced on 11/27/2015 at http://www.justice.gov.za/legislation/notices/2015/20150209-gg38463_gen102.pdf.

Presidential Proclamation 50 of 2012, Gov Gazette 35680.

Protection of Information Bill B6H of 2010

South African History Online 'Bulelani Ngcuka' available at <http://www.sahistory.org.za/people/bulelani-ngcuka> (accessed on 23 November 2015)

South African History Online 'Sharpeville: A Turning Point in South African History' available at <http://www.sahistory.org.za/topic/sharpeville-massacre-21-march-1960> (accessed on 6 October 2015)

South African Police Services (SAPS) Report 2014/2015

Working Group on Corruption and Security Corruption: The Unrecognised Threat to International Security the Carnegie Endowment for International Peace (2014)

Right2Know Campaign (2014) 'What's still wrong with the Secrecy Bill' available at <http://www.r2k.org.za/2014/09/11/whats-still-wrong-with-the-secrecy-bill/> (accessed on 27 November 2015)

US Office of the National Counterintelligence Executive (2011) 'Foreign Spies Stealing Economic Secrets in Cyberspace' available at http://www.ncsc.gov/publications/reports/fecie_all/Foreign_Economic_Collection_2011.pdf (23 November 2015)