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SA Crime Quarterly
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Editorial

Courts as a site of struggle: challenges to the rule of law in South Africa

It is both ironic and fitting that this 50th edition of *SA Crime Quarterly* has a strong legal focus, since over the past few years South Africans have increasingly turned to the courts to resolve and adjudicate issues that arguably should have been resolved by other means. While a positive interpretation of this is that the courts and the judiciary have retained the confidence of South Africans, it also suggests that we have run out of other options, and seem unable to resolve political and other crises through negotiation and compromise. This is additionally ironic, since our ability to peacefully negotiate ourselves out of apartheid meant the South African transitional process and the Truth and Reconciliation Commission were hailed as a success all over the world.

In the last edition of *Crime Quarterly (SACQ 49),* which focused on the challenges of communities in the platinum belt to hold traditional leaders to account, contributors showed how community members who have turned to the courts to resolve disputes with traditional leaders (who are supposed to act in communal interests) have often been left feeling frustrated and helpless. This has led not only to a loss of faith in the criminal justice system but also to an increase in public protest, with equally unsatisfying outcomes.

Be it for rural communities struggling for justice, or political parties seeking to resolve governance crises, such as whether the President is responsible for costs associated with the building of his massive homestead in Nkandla, the courts should be the final arbitrator – applying the law to determine the correct outcome. This is a powerful role – when the litigants accept the rule of law. However, increasingly we are seeing that when the outcome of court cases does not favour the African National Congress (ANC) or those who hold positions of power, the courts offer a means to delay or stall any further action, almost indefinitely. Repeated appeals against judgements take years and a massive financial commitment – they are thus the reserve of those who have access to substantial resources. But in some cases the findings of courts are simply ignored when they don't suit those who hold power. This has been the case in Oudtshoorn in the Western Cape, where, despite court rulings requiring the ANC to step down after having lost its majority in a municipal by-election, the councillors and mayor have refused to do so. Oudtshoorn is only one among several local authorities facing crises of this nature. The power to enforce rulings in situations like this is in the hands of the police, who cannot and should not be pulled into fixing problems that should have been resolved at a political level. Oudtshoorn is just one example of where the rule of law has been flouted; there are unfortunately many others.

The breakdown of the rule of law at local level is dangerous. When the courts can no longer offer resolution, and when the breakdown of the rule of law threatens to, or does in fact, affect the delivery of basic services such as clean water, waste removal and repairs to roads, we will face not only increases in violent public protest but also the possibility of a public health disaster.

In this edition of *Crime Quarterly* Martin Schönteich shows how political interference in the National Prosecuting Authority and the failure to appoint credible and stable leadership threatens to incapacitate the institution and affects access to justice in lower courts, as it saps morale and undermines the ability of prosecutors to get on with their jobs.

The two case notes in this edition reflect on two important issues. Phumlani Tyabazayo analyses the Western Cape High Court and Constitutional Court judgements in the case brought by the Minister of Police to prevent the Premier of the Western Cape from establishing a commission of inquiry into policing in Khayelitsha. These judgements have clarified the scope of the oversight function of provincial governments in relation to policing. Since these judgements, the commission has been completed and offered a substantial set of findings and recommendations, which, if implemented, would make a positive difference to policing, at least in Khayelitsha.

In her case note Zita Hansungule considers the finding of the Constitutional Court that the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 was unconstitutional in that it required names of child offenders to be automatically included on the National Register for Sex Offenders upon conviction of a sexual offence against a child or person with disability. This judgement is significant not only because it relates to the rights of children who come into conflict with the law but also because it provides the lower courts with the basis on which to exercise discretion in cases involving young sex offenders.

We conclude this edition with an article by Douglas Coltart, who draws on South Africa's experience to show how the new Constitution of Zimbabwe might be used to amend the laws relating to rape and sexual offences in that country, and improve justice for survivors.

Chandré Gould (Editor)

A story of trials and tribulations

The National Prosecuting Authority, 1998 – 2014

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Established in 1998, the National Prosecuting Authority (NPA) immediately had to deal with escalating levels of serious crime. Through a variety of innovations, including prosecution-driven investigations popularised by the 'Scorpions', specialised career paths for prosecutors, a focus on performance measurement, and improved conditions of service, the NPA quickly became an employer of choice for a new generation of law graduates. Over the last 16 years, the NPA's specialised units have performed well. However, the NPA's performance at the level of the lower courts – where the vast majority of prosecutions occur – has been mixed. With the appointment of its sixth head or acting head in late 2013, the NPA has been burdened with inconsistent – and at times, poor and unsuitable – leadership. Relatedly, political interference and the politicisation of the NPA have seriously undermined a once promising institution, negatively affecting staff morale and performance and sapping public confidence in the NPA. The future of the NPA as an institution that exercises its functions without fear, favour or prejudice, as mandated by the Constitution, hangs in the balance.

This article begins with describing the decades-old struggle by South Africa's most senior prosecutors to be independent of executive interference. Unsurprisingly, the independence of the National Prosecuting Authority (NPA) played a prominent role in the debates around the establishment of a new, unified prosecution service for a post-apartheid South Africa. This is followed by an analysis of the development and growth of the NPA, focusing on its performance and the impact political interference – and the politicisation of some of the NPA's leadership – has had on the organisation and its operational effectiveness. The article is based on research the author has undertaken on the NPA for the last 15 years,[1] including interviews with a cross section of NPA staff in a number of provinces in 2012 – 2013.

Born into controversy

The establishment of the NPA was itself contentious.[2] From the beginning of negotiations in the early 1990s about South Africa's future political dispensation, control over criminal prosecutions and, related, the relationship between a new prosecution service and the political executive were contested.[3] It is necessary to provide some background to the debate, as the arguably ambiguous constitutional provisions dealing with the NPA would come back to haunt the organisation as it experienced, and, at times, succumbed to, political interference.[4]

Since Union in 1910, South Africa's prosecutors were, to varying degrees, subjected to executive

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interference in their affairs.[5] Between 1926 and 1992, successive ministers of justice effectively controlled the attorneys-general, the country's most senior prosecutors, whose powers extended largely along provincial lines.[6]

In 1992, the Attorney-General Act[7] sought to ensure that attorneys-general functioned independently of the executive. In terms of the Act, the authority to institute prosecutions became the sole responsibility of the attorneys-general and their delegates, free of ministerial interference.[8] Post-1994 the African National Congress (ANC), as ruling party, viewed the 1992 Act with suspicion. It regarded the Act as a political ploy by the outgoing National Party government to entrench the position of the attorneys-general, who were representative of the old order.[9]

The ANC successfully pushed for a constitutional provision to establish a *national* prosecuting authority for South Africa, whose head would be appointed by the president.[10] The constitutionality of the provision was challenged by a number of provincial attorneys-general at the time, on the grounds that it impinged on the separation of powers between the legislature, executive and judiciary.[11] The Constitutional Court rejected this objection, arguing that the prosecuting authority is not part of the judiciary, and that the appointment of its head by the president does not in itself contravene the doctrine of the separation of powers.[12]

Fears about the NPA's independence from political interference revolved around two related concerns, with the first being the power of the executive – that of the minister of justice in particular – to influence and interfere with the function of the country's chief prosecutor, the National Director of Public Prosecutions (NDPP).[13] Second, the centralised and hierarchical nature of the NPA endowed the NDPP with considerable power over the provincial Directors of Public Prosecutions (DPPs) and, by implication, all prosecutors in the country.[14] For example, the NDPP has the authority to intervene in the prosecution process when policy directives are not complied with,[15] and to review a decision to prosecute or not prosecute, after 'consulting' the relevant DPPs (i.e. the NDPP can overrule his deputies, provided consultation has taken place).[16]

In 1998, then president Nelson Mandela's appointment of Bulelani Ngcuka as the NPA's first head raised concerns among the General Council of the Bar and opposition parties that the NDPP would be a partisan political appointee.[17] Ngcuka, relatively unknown prior to his appointment, had served as ANC Chief Whip in the National Council of Provinces, following earlier work on the ANC Constitutional Committee and with the United Democratic Front. Ngcuka was, however, well regarded across the political spectrum and considered a hard worker and consensus-builder.

Immediate challenges, new priorities

On assuming his post in mid-1998 – initially with no staff or even a national office – Ngcuka faced three fundamental challenges:[18] winning the respect and allegiance of senior prosecutors, many of whom had been appointed during the apartheid era and who had opposed the creation of a centralised prosecution service; raising morale and productivity among junior prosecutors; and building public confidence in the new prosecuting authority.[19]

Some of these challenges were acute. The NPA inherited a fragmented, provincially-based and poorly remunerated prosecution corps, with some offices close to collapse.[20] For example, between 1994 and 1997 some 630 prosecutors – approximately a third of the total number of prosecutors at the time – resigned countrywide.[21] Between them they had the equivalent of more than 2 000 years of work experience as prosecutors, and their departure inevitably lowered the average experience level of prosecutors.[22]

The establishment of the NPA coincided with a shift in priorities for the criminal justice system.[23] From 1994 through 1997, government leaders in the justice sector had focused on the transformation of the police and the criminal justice system more broadly. Their goal was to make the justice system more responsive to community concerns, more accountable and democratic, and more focused on some of the underlying drivers of crime, especially socio-economic deprivation.[24]

By 1998, however, with concern about rising violent crime spreading to virtually all communities,

condemnation of the ineffectiveness of the criminal justice system was widespread. In response, the government adopted a more aggressive approach to combating crime through robust and visible policing, tougher bail laws, severe punishment of criminal offenders, and new enforcement tools to deal with organised crime.[25] This resulted in a massive increase in arrests and cases of criminal investigations referred to court by the police for prosecutors' attention.[26] The NPA responded to these challenges in a variety of ways.

Innovation and specialisation

The NPA's enabling legislation provided the new prosecuting authority with a powerful capacity to combat crime in the form of Investigating Directorates.[27] Headed by a senior prosecutor, Directorate staff were granted considerable investigative powers. Investigating Directorates were designed to be staffed by a core group of senior prosecutors and detectives, assisted, where necessary, by relevant specialists such as forensic accountants and intelligence personnel. Investigating Directorates were meant to enable prosecution-driven investigations,[28] where investigations are conducted under the close guidance and assistance of a senior prosecutor to ensure that evidence collected can be used effectively in court.[29] Traditionally, prosecutors and investigators in South Africa worked relatively independently of one another in different agencies.

The NPA quickly established three high-profile national Investigating Directorates: for organised crime, serious economic offences, and corruption.[30] In 2001, these were submerged into a newly created Directorate of Special Operations (DSO), commonly known as the 'Scorpions', focusing on a variety of national priority crimes and organised crime.[31] With a focus on high-profile cases, the Scorpions were almost immediately a public relations success. Moreover, the new directorate demonstrated the effectiveness of prosecution-driven investigations for successfully prosecuting complex crimes.[32]

Within the first five years of the NPA's existence a number of specialised units were established, permitting prosecutors to develop skills and long-term strategies for combating particularly challenging and pernicious forms of crime.[33] The first such unit, set up in 1999, was the Asset Forfeiture Unit (AFU),[34] using South Africa's new forfeiture legislation to pursue the assets of persons involved in organised crime and the proceeds of such crime. Shortly thereafter the Specialised Commercial Crimes Unit (SCCU)[35] was established with the aim of reducing complex commercial crime and, together with the police, effectively investigating and prosecuting these crimes.

Also in 1999, the Sexual Offences and Community Affairs (SOCA) Unit[36] was established with the objective of reducing levels of violence against women and children, and minimising the secondary victimisation that victims of sexual offences experience in their dealings with the criminal justice system. SOCA set up the first 'one-stop' Thuthuzela Care Centre for sexual offences victims in 2000.[37] Now numbering 35 around the country, the Care Centres use a multi-disciplinary approach, involving all the role players necessary for a successful sexual offences investigation and prosecution.[38] This integrated model has received much international acclaim and is being replicated outside South Africa.[39]

In 2003, the Priority Crimes Litigation Unit was set up to deal with, inter alia, international crimes contained in the Rome Statute of the International Criminal Court, crimes against the state such as terrorism, and matters emanating from the Truth and Reconciliation Commission (TRC) process.[40]

The NPA also established a number of other units and programmes supporting its core prosecutorial function, including corporate services, an Integrity Management Unit, a research office, an Aspirant Prosecutors' Programme, and an Office for Witness Protection.[41]

A division of the NPA dedicated to managing the performance of prosecutors countrywide, the National Prosecuting Service (NPS), was also established.[42] Through the NPS and a court management unit, the NPA initiated a strategic planning process and the design of a system of performance measurement. It introduced performance targets for individual prosecutors

and provided enhanced training and a new level of managers (chief prosecutors) to help coordinate and assess the performance of prosecutors.

A further innovative development was the introduction of a 'community prosecution' model, which sought to generate a new range of responses to crime that moved beyond the traditional NPA role of processing and prosecuting cases.[43] Instead of prosecuting cases in court, the community prosecutor's mission was to reduce and prevent crime, and build relationships and collaborate with the community.[44]

Consolidation and growth

During the early years of the NPA's existence, Ngcuka and his senior team sought to create a national and unified prosecuting authority; in terms of both structure and management systems and the attitudes of its staff. This was no easy task. At the time of the NPA's creation, the country's (provincial) prosecution services were losing professional staff at an alarming rate because of, *inter alia*, poor pay and working conditions, many senior white prosecutors' uncertainty about their future, and rapidly rising levels of recorded crime, which not only placed increased burdens on prosecutors but also undermined public confidence in the criminal justice system.

Partly because he was a political insider with an open channel to then president Thabo Mbeki, and partly because of the pressure the government experienced to combat crime, Ngcuka managed to accrue additional resources for the NPA, including salary increases for prosecutors.[45] With increased funding, the NPA established new senior positions, expanding the number of career paths for prosecutors. Increased specialisation allowed experienced prosecutors to become experts in their fields.

The NPA also removed prosecutors in the lower courts from the *de facto* day-to-day administrative control of magistrates, contributing to an overall professionalisation of the prosecution service. A new and modern head office building, the rising prominence and success of the Scorpions, and regular nationwide meetings between senior prosecutors to discuss strategy and share good practices, all contributed to an improved image[46] for the prosecuting authority and a growing *esprit de corps* for its prosecutors.[47]

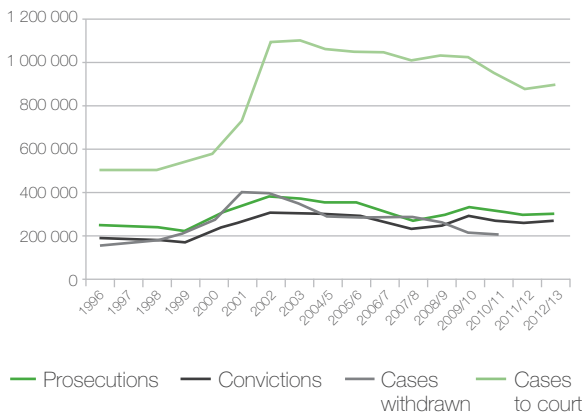
As one commentator noted: 'In its first few years the NPA attracted talented lawyers who gave up private sector jobs to join this cool new outfit. Along with the taxman, the NPA was easily the most attractive government agency to work for.'[48]

Performance

The NPA's performance should be interpreted in the context of an increase in resources, especially in the number of prosecutorial staff. Moreover, the NPA added an additional layer of countrywide supervision to the prosecutorial function, improved and institutionalised training for prosecutors, and enhanced its ability to measure the performance and output of prosecutors. Given these positive changes, it is striking that the data discussed below do not show more sustained and marked improvements in the NPA's performance.

During the first few years of its existence, the NPA had to deal with a massive increase in the number of cases referred to court by the police – from 524 000 in 1998 to over a million in 2002 (Figure 1).[49]

Figure 1: Case processing trends, 1996 – 2012/13



Source: NPA and SAPS annual reports[50]

Between 1999 and 2002, the number of prosecuted cases increased by 62%. It is probably no coincidence that the upward swing in the number of prosecuted cases began shortly after the establishment of the NPA. The NPA employed additional prosecutors shortly after its establishment,

and succeeded in increasing the number of trial hours in court.[51] The introduction of Saturday[52] and additional courts in 2001 also contributed to the increase in the number of finalised cases.[53]

The gradual downward trend in the number of prosecutions after 2002 can be attributed to an increase in the use of alternative dispute resolution mechanisms by the NPA and a decline in the number of cases referred to court. While a negligible number of cases had been resolved through alternative dispute resolution mechanisms in 1998, by 2012/13 these had increased to over 143 000.[54]

The overall conviction rate, calculated as the number of cases convicted as a proportion of cases prosecuted, has improved since 1998 (Figure 2).[55] This is, however, an ambiguous performance indicator. Generally the NPA prosecutes cases only when its prosecutors believe they have a reasonable prospect of obtaining a conviction. By interpreting these criteria to prosecute more restrictively – by withdrawing borderline cases, for example – prosecutors are able to improve their chances of obtaining a conviction without any requisite improvement in the skills they devoted thereto.

The steady increase in the number of cases withdrawn by the prosecution service was reversed after 2002.[56] Nonetheless, the number of cases referred to court and subsequently withdrawn by the NPA remains high, typically in the region of 300 000 per year in the decade after 2003.[57]

Figure 2: Conviction rate, 1996 – 2012/13

Source: NPA and Department of Justice annual reports[58]

The NPA's achievements have been more pronounced in the output of its specialised units. The DSO, the AFU, the SCCU and the SOCA Unit have, for example, succeeded in maintaining high performance rates in prosecuting complex and serious crimes and, in the case of the AFU, seizing the proceeds of organised crime.[59]

As discussed in the next section, a very small subset of the NPA's successes – investigating and prosecuting high-profile politicians – has resulted in the erosion of its independence. Thus, the NPA's emblematic crime-fighting tool, the DSO, was disbanded after a resolution to this effect was passed at the ANC's annual conference in 2007[60] (see *SACQ* 24, June 2008).

Politicisation of the NPA

In 2000, the DSO began a corruption investigation into a multi-billion rand arms procurement package concluded by the South African government in 1999. The primary suspect in the NPA's investigation was Schabir Shaik, a businessman and financial advisor to then deputy president Jacob Zuma.[61] His brother, Chippy Shaik, was in charge of arms acquisitions at the Department of Defence, which allowed Schabir Shaik to bid on a lucrative contract to supply Corvettes to the South African Navy.[62] It subsequently transpired that Schabir Shaik was believed to have had a corrupt relationship with Zuma, and that the latter was also a suspect in the investigation.[63] In August 2003, Ngcuka announced that despite the existence of a *prima facie* case against the deputy president, the NPA would not prosecute him.[64] This went against the advice given to Ngcuka by his team of senior arms deal prosecutors.[65]

Zuma supporters interpreted Ngcuka's announcement as part of a manoeuvre to taint Zuma's reputation: namely, that Ngcuka's decision suggested that Zuma was likely guilty of a crime but that the NPA lacked the necessary evidence to prove guilt beyond reasonable doubt, as would be required in a trial. In the ensuing fallout, Ngcuka was accused of being an apartheid-era spy but was cleared by a commission of inquiry instituted by Mbeki.[66] In mid-2004, Ngcuka announced his decision to resign, citing personal reasons.[67] It is likely, however, that the

debacle around Ngcuka's decision not to prosecute Zuma, a critical report by the Public Protector on that decision, and the spying allegations all contributed to Ngcuka's decision.[68]

The above developments occurred in the context of a power struggle between two factions within the ANC, aligned behind Mbeki on the one side and Zuma on the other.

In the interim, the case against Schabir Shaik had gone ahead. Upon Schabir Shaik's conviction in mid-2005, Mbeki announced that Zuma would be relieved of his government duties because of the latter's relationship with Shaik, as found in the court judgement.[69]

This context is important as it provides the first indication that the NPA could be misused in an intra-party political power struggle in the ANC – fissures that were to affect and divide the NPA profoundly in the years thereafter.[70]

In 2005, Vusi Pikoli succeeded Ngcuka as NDPP.[71] Under Pikoli's leadership, emboldened by the Schabir Shaik conviction, the NPA charged Zuma with various counts of racketeering, money laundering, corruption and fraud.[72] A conviction and sentence of imprisonment exceeding one year – highly likely upon conviction on such serious charges – would have rendered Zuma ineligible for election to Parliament and thereby to serve as the country's president. This was a direct threat to Zuma's ambitions, as he had been elected as head of the ANC in late 2007.

Also under Pikoli's leadership, the NPA determined to prosecute the then national commissioner of police, Jackie Selebi, a perceived ally of Mbeki, on corruption charges.[73] Shortly after the existence of a warrant for the arrest of Selebi became known, Mbeki suspended Pikoli on the basis of an 'irretrievable breakdown' in the relationship between Pikoli and the justice minister.[74] While a commission of inquiry subsequently found that most of the allegations against Pikoli were unfounded, Parliament endorsed Pikoli's suspension.[75] Pikoli's dismissal had a chilling effect on the NPA and was a deeply demoralising experience for prosecutors who saw in him a disciplined and principled leader.[76]

The political meddling in the affairs of the NPA by the country's executive, and the impact this had on the organisation, is a matter of public record. The various machinations are sufficiently numerous and complex to fill a book.[77] Space does not permit a detailed exposition here; suffice to make the following abbreviated points:

- Ngcuka was NDPP for six years (the law provides for a 10-year tenure for an NDPP).[78] After his departure, the NPA entered a period of instability, infighting and public controversy, all of which continue to this day. Since August 2004, the NPA has had six different NDPPs (of which three served in an acting capacity)[79] – an average of less than two years per NDPP or acting NDPP. This led to numerous changes in the strategy and organisational priorities of the NPA.
- Within the NPA's senior leadership, pro-Mbeki and pro-Zuma factions developed, affecting staff morale and unduly influencing senior appointments and promotions.[80] Often a form of institutional stalemate ensued with numerous senior positions filled by 'acting' appointees who lacked the security permanent appointment would provide. This state of affairs has had an arguably debilitating effect on the NPA's organisational effectiveness, and diverted institutional energy to internecine conflicts at the expense of focusing on the organisation's mission.
- As a consequence of, inter alia, the DSO's success in investigating, among others, senior MPs implicated in the 'Travelgate' scandal,[81] and politicians involved in the arms deal, notably Zuma and Selebi, the enthusiasm the ruling party's members of Parliament and the executive held for the DSO 'waned substantially'.[82] This resulted in the disbandment of the DSO and the loss of a significant crime-fighting tool in the NPA's armoury.
- On application of the opposition Democratic Alliance, the Constitutional Court found that Menzi Simelane, who was appointed as NDPP in late 2009 by President Zuma, was not a fit and proper person to be NDPP, thus effectively overturning the President's appointment.[83] For the head of a relatively young organisation (the NPA had been in existence for 13 years at the time Simelane's appointment was set aside by the courts) to

be branded unsuitable to his position invariably undermined public confidence in the organisation and underscored the political nature of the NDPP's appointment.

- Badly conceptualised and politically motivated decisions by the NPA have resulted in the courts reviewing NPA decisions to discontinue prosecutions in a select number of high-profile cases.[84] If this becomes a trend, it can result in the NPA being bogged down in costly and time-consuming litigation in the years ahead, being asked to justify why it declined to prosecute in specific cases. This is not to question the courts' authority to review, under certain circumstances, prosecutorial decisions not to prosecute, but it is an indictment of the NPA that its traditionally wide-ranging discretion to decline to prosecute is coming under increasing judicial scrutiny.

The disappointing aspects of the NPA's performance are especially glaring in the context of the growth in the number of prosecutorial staff over the past decade, and better pay and working conditions. It is possible that areas of poor performance have been exacerbated by the political and politicised crises the NPA has been embroiled in for the greater part of its existence.

Shortly after the Supreme Court of Appeal set aside Simelane's appointment as NDPP for being 'inconsistent with the constitution and invalid',[85] and the NPA's withdrawal of corruption and fraud charges against Richard Mdluli, head of crime intelligence in the police (a decision which the courts subsequently set aside),[86] one commentator wrote in early 2012:

> The NPA is a flicker of its old self, plagued by internal power battles, witch-hunts and pungent odours of political influence. Good prosecutors are leaving in droves, I am told, and those who stay keep their mouths shut and follow orders.[87]

Conclusion

After its establishment in 1998, the NPA rapidly drew together the provincial attorneys-general's offices into one national organisation. In short order, the new organisation set up the DSO with its multi-disciplinary, prosecution-driven approach to investigations, and established specialised units in the office of the NDPP. It also created new positions to enhance the career choices of prosecutors, professionalised the management of the NPA's growing staff, and devoted time and effort to improving the NPA's image among the public through innovative approaches such as 'community prosecution' and public outreach efforts.

The positive changes have had the most measurable impact on the performance of the NPA's specialised units. The NPA's performance at the lower or magistrate's court level, where the vast majority of all prosecutions occur and where most public interactions with the prosecution service take place, are more mixed.

Time will tell whether the NPA is able to extract itself from its present malaise. It has the resources and infrastructure, and many dedicated prosecutors to do so. To fulfil its constitutional mandate to prosecute 'without fear, favour or prejudice', a principled and dedicated core of senior NPA leaders is indispensable. The NPA will need leaders who are committed to upholding the Constitution and, by implication, the rule of law.

As gatekeepers to the criminal justice system, prosecutors are the system's most powerful officials. Prosecutors decide whether criminal charges should be brought and what those charges should be. In South Africa, prosecutors exercise considerable discretion in making those crucial decisions. Politicians the world over, particularly those in powerful executive positions, will always be tempted to interfere in prosecutorial decisions, especially where they are the subject of investigations and possible prosecution. Whether blatant political interference or subtle pressure – and the NPA has suffered plenty of both – the best line of defence is prosecutors themselves, who need to be beyond reproach.

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Notes

1 Martin Schönteich, The South African Prosecution Service, in J Steinberg (ed.), *Crime wave: the South African underworld and its foes,* Johannesburg: Witwatersrand University Press, 2001; Martin Schönteich, *Lawyers for the people: the South African Prosecution Service,* Institute for Security Studies (ISS), Monograph 53, 2001, http://www.issafrica.org/publications/monographs/monograph-53-lawyers-for-the-people-the-south-african-prosecution-service-by-martin-schonteich; Martin Schönteich, NPA in the dock: thumbs up for the prosecution service, *SA Crime Quarterly* 3 (March 2003), 29–32, http://www.issafrica.org/publications/south-african-crime-quarterly/south-african-crime-quarterly-3/npa-in-the-dock-thumbs-up-for-the-prosecution-service-martin-schonteich; Anton du Plessis, Jean Redpath and Martin Schönteich, Report on the South African National Prosecuting Authority, in *Promoting prosecutorial accountability, independence and effectiveness,* Sofia: Open Society Institute, 2008; Martin Schönteich, Strengthening prosecutorial accountability in South Africa, ISS, Paper 255, April 2014, http://www.issafrica.org/publications/papers/strengthening-prosecutorial-accountability-in-south-africa.

2 Dirk van Zyl Smit and Esther Steyn, Prosecuting Authority in the New South Africa, *Centre for the Independence of Judges and Lawyers Yearbook,* VIII (January 2000), 144.

3 PM Bekker, National or super attorney-general: political subjectivity or judicial objectivity?, *Consultus* 8(1) (April 1995), 27; ZB du Toit, Groot agterdog heers oor die 'super-prokureur-generaal', *Rapport,* 9 February 1997.

4 For example, at the time of the constitutional negotiations the issue of the measure of control exercised by the NDPP over the provincial DPPs was controversial and 'the outcome was a compromise'. See William A Hofmeyr, Confirmatory and supporting affidavit, *S v Zuma and Others* NPD, CC 273/07 (8652/08), para 10.

5 For a detailed historical discussion, see Schönteich, *Lawyers for the people,* 31–33.

6 The Supreme Court was established in 1909. All provincial divisions of the Supreme Court had an office of the provincial attorney-general, as did some of the court's local divisions (e.g. Witwatersrand, Eastern Cape) but not others (e.g. Durban and Coast). The Interim Constitution, which came into force in 1994, retained the structure of the Supreme Court, but absorbed the supreme courts of the homelands as provincial divisions. The 'final' Constitution, which came into force in 1997, transformed the provincial and local divisions into high courts.

7 Attorney-General Act 1992 (Act 92 of 1992), Pretoria: Government Printer. The Act came into operation on 31 December 1992.

8 In terms of section 4 of the Attorney-General Act, an attorney-general needed to vacate his office only on attaining the age of 65 years (unless the president extended this for a maximum of two years). Moreover, an attorney-general could be suspended and removed from office, by the president or at the request of both houses of Parliament in the same session, only on the grounds of misconduct, continued ill-health or incapacity to carry out his duties of office efficiently. In an instance where the president suspended an attorney-general, both houses of Parliament could overrule the president's suspension.

9 In 1994 the newly appointed Minister of Justice, Dullah Omar (ANC), stated that the office of the attorney-general lacked accountability and had been an instrument of the apartheid state. In 'the dying days of apartheid' the independence of the office of the attorney-general was introduced. This, Omar concluded, was not done so much to guarantee independence as to entrench the status quo. See Omar plaas vraagteken oor 'PG's van apartheid', *Die Burger,* 14 November 1994.

10 Constitution of the Republic of South Africa 1996 (Act 108 of 1996), Pretoria: Government Printer, section 179(1)(a).

11 Du Toit, Groot agterdog heers oor die 'super-prokureur-generaal'.

12 See *Ex Parte Chairperson of the Constitutional Assembly: in re certification of the Constitution of the Republic of South Africa,* 1996 1996 (4) SA 744 (CC).

13 While the Constitution endows the prosecuting authority with considerable functional and legal independence from the executive, there is room for ambiguity in the way the relevant constitutional provisions are to be interpreted. Section 179(2) of the Constitution empowers the prosecuting authority 'to institute criminal proceedings on behalf of the state' and 'to carry out any necessary functions incidental to instituting criminal proceedings'. Moreover, section 179(4) demands that prosecutors exercise their functions 'without fear, favour or prejudice'. Section 179(5) implies that the NDPP is on an equal footing with the minister of justice, as the NDPP must determine prosecuting policy 'in concurrence' with the minister. That is, while the minister has to consent to any policy that is to come into effect, the minister cannot unilaterally impose his will on the NDPP. On the other hand, section 179(6) contains an ambiguous provision that the minister of justice is 'responsible for the administration of justice' and 'must exercise final responsibility over the prosecuting authority'. This seemingly undermines some of the prosecuting authority's independence. Moreover, section 179(1)(a) provides that the NDPP is appointed by the president in his capacity as 'head of the national executive'.

14 Bekker, National or super attorney-general, 27.

15 Constitution of the Republic of South Africa, section 179(5)(c).

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45 Interview with an erstwhile senior advisor to Bulelani Ngcuka, Cape Town, 1 March 2013.

46 Martin Schönteich, NPA in the dock: thumbs up for the prosecution service, *SA Crime Quarterly* 3 (March 2003), 29–32.

47 Interviews with prosecutors of varying ranks and in a variety of locations in 2001–2002.

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50 The data has been compiled from various annual reports produced by the NPS (http://www.npa.gov.za/) and the South African Police Service (SAPS) (http://www.saps.gov.za/about/stratframework/annualreports_arch.php).

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The Khayelitsha Commission of Inquiry[1]

Challenging the scope of provincial policing powers

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On 24 August 2012, the Premier of the Western Cape appointed a commission of inquiry, in terms of section 206(5) of the Constitution, to probe complaints of police inefficiency and a breakdown of relations between the community and the police in Khayelitsha, a township in the Western Cape. The Minister of Police and the National Police Commissioner challenged this decision and lodged an urgent application with the High Court of the Western Cape. The adjudication of this matter by the High Court and, subsequently, by the Constitutional Court, presented an opportunity for the courts to clarify the scope of provincial policing powers. This article analyses the courts' interpretation of the scope of provincial policing powers and argues that the adjudication of this matter has clarified the powers of provinces with regard to policing. The article also examines impediments to the exercise of provincial executives' policing powers.

For many years, the accountability of the South African Police Service (SAPS) to provincial governments has been a subject of debate.[2] The Constitutional Court case between the Minister of Police and the Premier of the Western Cape bears testimony to the contestation in this area. The uncertainty was as a result of section 206 of the Constitution, which states that policing is a national competency but, at the same time, confers oversight powers to provinces.[3] These constitutional provisions have caused confusion regarding where responsibility actually lies. The formulation of section 206 was the product of fierce debate during negotiations preceding the ushering in of democracy in South Africa and deals mainly with the allocation of policing powers to the national and provincial governments. The question before negotiators at the time was whether police should be controlled at national or provincial levels.[4]

This article seeks to analyse the case of the commission of inquiry in Khayelitsha in the Western Cape and considers the implications for SAPS accountability to provincial governments in the future. Because the matter was heard by the Western Cape High Court before it was adjudicated by the Constitutional Court, the analysis considers the judgement of the Western Cape High Court in the matter.[5] The minority judgement of the Western Cape High Court is also considered.[6] Even though minority judgements have no binding effect on lower courts, they do have persuasive force on future cases and therefore cannot be underestimated. Furthermore,

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minority decisions can contribute to the development of our jurisprudence of constitutional interpretation.[7]

This case concerns the appointment of a commission of inquiry to probe allegations of police inefficiency and the breakdown of trust between the community and the police in the Western Cape. The Premier of the Western Cape had received complaints from the Women's Legal Centre on behalf of various civil society organisations, including the Social Justice Coalition. The allegations mainly concerned the area of Khayelitsha, a township in Cape Town under the jurisdiction of the City of Cape Town. The complaints included, among others, allegations of 'widespread inefficiencies, apathy, incompetence and systemic failure of policing routinely experienced by Khayelitsha residents'.[8] The Premier appointed a commission of inquiry in terms of section 206 (3) and (5), to be read with section 127(2) (e) of the Constitution,[9] and section 1(1) of the Western Cape Provincial Commissions Act,[10] to investigate these allegations. The establishment of this commission was widely acknowledged as being a good first step towards addressing the unacceptably high crime rate in Khayelitsha.[11]

However, the Minister of Police challenged the Premier and questioned her authority to appoint this commission of inquiry. He contended that the Premier did not have the power to appoint a commission with coercive powers against members of the SAPS and with powers to subpoena witnesses. He maintained that the Premier had failed to comply with her constitutional obligations with regard to the requirements of cooperative governance and that the terms of reference of the commission were vague and overly broad.[12]

The Court, therefore, had the task of interpreting the powers of provinces with regard to policing, including that of appointing commissions of inquiry to investigate the SAPS.[13] The Court also had to determine the extent of the duty of both the Premier and the Minister with regard to the principles of cooperative governance and inter-governmental relations, in the event of a dispute between two or more different spheres of government.[14]

This article seeks to contribute to the clarification of the role of provincial governments in policing matters.

History of SAPS accountability at provincial level

The advent of democracy in South Africa brought with it a plethora of changes to the structure and form of the country, including that of police accountability. Some of these changes were required by the first interim constitution of the Republic of South Africa. In the interim constitution, police services fell under the direction of national government as well as various provincial governments.[15] It is clear that under the interim constitution, provincial governments had powers to control the police in their respective provinces.[16]

However, when the final Constitution (hereinafter referred to as the Constitution) was adopted by the Constitutional Assembly in 1996, the provisions of the interim constitution were drastically changed. Under the Constitution, the powers of provinces were curtailed and they were left with only monitoring, oversight and liaison functions.[17] This curtailment of provincial powers in policing was considered by the Constitutional Court in the 1996 case of the certification of the Constitution.[18]

The question considered by the Constitutional Court in the 1996 certification case was whether the new powers of monitoring, oversight and liaison equalled the powers contained in the interim constitution relating to control of the police. The Constitutional Court agreed that provinces' loss of direct control over the provincial commissioner was a significant diminution.[19] The Court further agreed that the provincial functions of oversight, monitoring and liaison were important functions and that their effective exercise by the province could have a profound influence on the performance of the provincial commissioner's functions, although the measure of control was reduced and indirect.[20]

To compensate for the provinces' loss of direct control of the police, the provinces were given powers to establish commissions of inquiry to probe allegations of police inefficiency and dysfunctional relations with the police.[21] It was these powers that became the subject of contestation in the case under review.

Current legal position

Under the Constitution, the powers to control and manage the police service in accordance with national policy, set by the national Minister of Police, are vested in the National Commissioner.[22] In terms of Part A of schedule 4, the Constitution provides that the province and national government have concurrent competency over policing. However, the powers of the province are qualified in that the powers of the provincial executive are, to an extent, set out in chapter 11 of the Constitution. In terms of the Constitution, provinces are entitled to:

- Monitor police conduct
- Oversee the effectiveness and efficiency of the police service, including receiving reports on the police service
- Promote good relations between the police and the community
- Assess the effectiveness of visible policing
- Liaise with the cabinet member responsible for policing with respect to crime and policing in the province[23]

These provisions are characterised by high levels of ambiguity. For instance, there is no clarity regarding the parameters of authority to 'promote good relations between the police and the community'.[24]

In order to perform the above-mentioned functions, the province is given powers to:

- Investigate, or appoint a commission of inquiry into any complaints of police inefficiency or a breakdown in relations between the police and any community
- Make recommendations to the cabinet member responsible for policing[25]

The Constitution provides that:

- A member of the cabinet must be responsible for policing and must determine national policing policy after consulting the provincial executive and taking into account the policing needs and priorities of the provinces as determined by the provincial executive
- The national policing policy may make provision for different policies in respect of different provinces after taking into account the policing needs and priorities of these provinces.[26]

The Constitution further provides for the following:

- Provincial commissioners are responsible for policing their respective provinces in accordance with national legislation and subject to the control of the National Commissioner
- Annually, provincial commissioners must report on policing in the province to the provincial legislature and submit a copy of the report to the National Commissioner
- If the provincial commissioner loses the confidence of the provincial executive, that executive may institute appropriate proceedings for the removal or transfer of the commissioner or take disciplinary action against him/her in accordance with national legislation[27]

Provincial policing powers

The Constitutional Court, in the judgement delivered by Moseneke DCJ, affirmed that the Premier and the province had a duty to respect, protect and promote the fundamental rights of people within the province.[28] The court stated that the Premier was obliged to take reasonable steps to shield the residents of Khayelitsha from an unrelenting invasion of their fundamental rights because of continued police inefficiency in combating crime and the breakdown of relations between the police and the community.[29]

The Constitutional Court confirmed that the role of the provincial executive in relation to policing was limited to monitoring, overseeing and liaison functions as set out in section 206 (3) of the Constitution. To give more teeth to the monitoring and oversight functions that the province enjoyed, section 206(5) was included in the Constitution to allow provinces to set up commissions of inquiry to investigate complaints of police inefficiency or a breakdown of relations between the police and a community, and to make recommendations to the Minister.[30]

The Constitutional Court viewed the powers of a province to investigate or appoint a commission

of inquiry for complaints against police inefficiency and compromised police-community relations as a constitutionally mandated function. According to the Court, provinces were entitled to monitor and oversee the police function,[31] as this was one of the mechanisms of accountability and oversight available to a province. Therefore, a commission of inquiry established for this purpose must be effective and capable of giving reasonable effect to the entitlement of a province over police function.[32] The Court furthermore rejected the position of the SAPS – namely that provinces can only perform such oversight via the structure of the Civilian Secretariat for Police[33] established in terms of the Civilian Secretariat for Police Act.[34]

However, what needed to be established was whether a commission established for this purpose with the powers to subpoena witnesses was tantamount to usurping the control of the police service. The Minister of Police and the National Commissioner of Police contended that a commission of inquiry with powers to subpoena was tantamount to controlling the police, which was the constitutionally reserved function of the National Commissioner. The Constitutional Court dismissed this argument. It stated that to appoint a commission of inquiry with powers to subpoena witnesses did not give the province competence to control and direct the police service and, further, that a commission without powers to subpoena would be unable to fulfil its mandate.[35] It said that provincial functions of monitoring, overseeing and promoting community-police relations would never be achieved if police were immune from being called upon to testify or produce documents on their policing functions.[36] The Court further acknowledged the provisions dealing with inter-governmental cooperation and found that the Premier fully complied with her obligations in this regard.[37]

The minority judgement of the Western Cape High Court, delivered by Justice Vincent Saldanha, elaborated on the exercise of these powers by the provincial executive within the context of the principles of co-operative governance in terms of chapter 3 of the Constitution. The minority judgement held that 'the appointment of the commission of inquiry by the Premier under section 206 (5) with regard to policing must be exercised with proper regard to the provisions of the Constitution in respect of the powers and functions over police services and must occur within the context of Section 41 of the Constitution.'[38]

Saldanha stated that the Premier and the MEC for Safety, on one side, were enjoined by the Constitution to engage with the Minister of Police and the National Commissioner of Police, on the other side, as a precursor to the establishment of the commission of inquiry. The minority judgement, applying the terms of the Constitution, held that the duty to engage was vested in both the national and provincial spheres of government.[39] The latter judgement concluded that the decision to appoint the commission of inquiry was premature because, importantly, the Premier had failed to continue engaging with the Minister and the National Commissioner. She thereby failed to exhaust her obligations in terms of constitutional provisions on inter-governmental cooperation. The minority judgement in this matter emphasised the strict adherence to the principles of inter-governmental cooperation in resolving disputes between different spheres of government and/or organs of state. The minority judgement found that the Premier of the Western Cape had not exhausted her obligations under the Constitution in terms of inter-governmental cooperation.[40]

Impediments to the exercise of provincial powers

The Constitutional Court made it clear that the powers of provinces with regard to policing were confined to monitoring, oversight and liaison. The Court also affirmed that these powers should be exercised with regard to the principles of co-operative governance as espoused in chapter 3 of the Constitution. However, it is the view of this writer that there are certain notable impediments to the exercise of these powers. These include, inter alia:

- Non-recognition of provincial executive powers, as entrenched in section 206 of the Constitution, by provincial management of the SAPS.[41] The provincial management of the SAPS in certain provinces objects to provincial executives exercising these powers.[42]

- The limited role of provinces in the formulation and determination of a national policing policy. The authority to do this is vested in the Minister of Police, who must establish policy after consultation with the provincial government and taking into account the policing needs and priorities of the province.[43] In essence, the provinces are at the mercy of the Minister in the determination of policing policy, especially those aspects that affect the provinces.[44]
- Complaints from the public are the precursor to the appointment of a commission of inquiry or investigation. The provincial executive cannot *ex mero motu* set up a commission of inquiry or investigation.[45] To do so would be viewed as usurping the powers of control of the SAPS, which are vested in the National Commissioner.
- After the work of a commission of inquiry has been completed, the recommendations are sent to the Minister.[46] The Minister may decide not to take action or may frustrate the process if he/she was against the appointment of the commission in the first place.
- Weak provincial legislature will compromise police accountability at the provincial level; more so if the legislature does not exercise the powers vested in it by the Constitution. This includes calling the provincial commissioner to answer questions put to him/her and to consider the provincial SAPS's annual report. One of the primary ways in which the legislature contributes to the oversight of the police is through holding the provincial executive and Department of Community Safety accountable for fulfilling its mandate.[47]
- The requirements for strict adherence to the principles of cooperative governance can frustrate the province in exercising its policing powers, especially if national government does not cooperate with the province.[48]

Conclusion

The adjudication of this matter by the High Court and the subsequent appeal to the Constitutional Court has brought some clarity on the powers of provinces with regard to policing. The Constitution makes it clear that policing is a national competency.[49] However, this does not mean that provinces have no role in policing, in particular in holding the provincial police management to account.

The provincial executive also has a responsibility to promote good police-community relations. The exercise of these powers is not without challenges, but the challenges can be minimised if provincial executives understand the parameters of their powers. The ruling party, in its discussion paper, has advocated that the roles and responsibilities of provinces must be legislated so as to remove any uncertainty and possibility of disputes. Furthermore, the discussion document advocates the strengthening of the powers and functions of provinces.[50] Equally, SAPS provincial management must accept and embrace the constitutional responsibility of the provincial executive to hold police in the province accountable for their actions.

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Notes

1 The views expressed in this article are solely those of the author and do not reflect the views of his employer or any other individual associated with the Eastern Cape Provincial Legislature.

2 See David Bruce, Unfinished business: the architecture of police accountability in South Africa, African Policing Civilian Oversight Forum, Policy Paper 2, November 2011; Milicent Maroga, *Community policing and accountability at station level,* Centre for Study of Violence and Reconciliation, 2005; Gareth Newman and David Bruce, Provincial government oversight of the police, Centre for the Study of Violence and Reconciliation, April 2004. The latter paper was commissioned by the Gauteng Provincial Legislature to assist in answering, among others, the question: 'To what extent can legislature exercise control in respect of policing matters?' This was as a result of the questions that have been raised as to how best provincial governments can exercise oversight of the police agencies operating in their field of jurisdiction.

3 Constitution of the Republic of South Africa 1996 (Act 108 of 1996), Pretoria: Government Printer.

4 David Bruce, Policing powers, politics, pragmatism and the provinces, *SA Crime Quarterly,* 40, 2012, 3.

5 *Minister of Police and 6 others v Premier of the Western Cape and 8 others,* 21600/2012, Western Cape High Court, unreported judgement. The applicants in this case were the Minister of Police (Former Minister Nathi Mthethwa), National Commissioner of the South African Police Service (Commissioner Riah Phiyega), the Provincial Commissioner of the South African Police Service for the Western Cape (Gen. Arno Lamoer), the Civilian Secretariat for the police service and three other police officials. The respondents were

the Premier of the Western Cape (Premier Helen Zille), the Member of the Executive Council for Community Safety and Security, Western Cape (MEC Dan Plato), the City of Cape Town, Justice Catherine O' Regan, Adv. Vusumzi Patrick Pikoli, the Secretary to the Commission, Adv. T Sidaki, the Women's Legal Centre and the Social Justice Coalition.

6 At the Western Cape High Court, Justice Vincent Saldanha delivered a minority judgement and could not agree with the majority. The judgement was delivered by Justice James Yekiso with Justice Jeanette Traverso DPJ (Deputy Judge President) concurring.

7 Silas Mothupi, The value of minority judgements in the development of constitutional interpretation in South Africa, *Codicillus,* 46, 2005.

8 *Minister of Police and 6 others v Premier of the Western Cape and 8 others* 2013 (12) BCLR 1365 (CC), para 3. The parties in this case are similar to those in the Western Cape High Court. *See Minister of Police and 6 others v Premier of the Western Cape and 8 others* 21600/2012.

9 Constitution of the Republic of South Africa 1996 (Act 108 of 1996), Pretoria: Government Printer.

10 Western Cape Provincial Commissions Act 1998 (Act 10 of 1998), Pretoria: Government Printer.

11 See Pierre De Vos, Why is Mthethwa trying to stop inquiry into police incompetence, Constitutionally Speaking, http://constitutionallyspeaking.co.za/why-is-mthethwa-trying-to-stop-inquiry-into-police-incompetence/ (accessed 25 June 2014). See also Russel Bothman and Max Price, Statement from the University of Cape Town and Stellenbosch University on the breakdown in relations between the police and Khayelitsha community, University of Cape Town, www.savi.uct.ac.za/wp-content/uploads/2012/11/UCT_US_statement_Khayelitsha.pdf (accessed 24 October 2014).

12 *Minister of Police v Premier of the Western Cape* 2013 (12) BCLR, 1365 (CC), para 15.

13 Constitution, section 206 (5).

14 Ibid., chapter 3.

15 Interim Constitution 1993 (Act 200 of 1993), Pretoria: Government Printer, sections 214 and 219.

16 The provisions in the Interim Constitution gave the Member of the Executive Council powers and responsibilities to issue directions to the Provincial Commissioner in his or her performance functions, as set out in section 219(1). The functions in respect of which the members of the Executive Council may issue directions to the Provincial Commissioner include:
- The investigation and prevention of crime
- The development of community-policing services
- Maintenance of public order
- Provision in general of all visible policing services; including:
  - The establishment and maintenance of police stations
  - Crime reaction units
  - Patrolling services
- Protection services in regard to provincial institutions and personnel
- Transfers within the province of members of the service
- The promotion, up to rank of lieutenant-colonel, of members of the service

17 Constitution, section 206.

18 *Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 CC*, heard on 1–5 and 8–11 July 1996 and decided on 6 September 1996.

19 Ibid., para 392–401.

20 Ibid.

21 Constitution, section 206 (5).

22 Ibid., section 207 (2).

23 Ibid., section 206 (3) (a)–(e).

24 Bruce, Policing powers, politics, pragmatism and the provinces, 3.

25 Constitution, section 206 (5).

26 Ibid., section 206(1) and (2).

27 Ibid., section 207 (4) (a)–(b), 207(5) and 207 (6).

28 *Minister of Police v Premier of the Western Cape* 2013 (12) BCLR, 1365 (CC).

29 Ibid.

30 Ibid., para 38–39.

31 Ibid., para 41.

32 Ibid.

33 Ibid., para 56.

34 Civilian Secretariat for Police Act 2011 (Act 2 of 2011), Pretoria: Government Printer.

35 *Minister of Police v Premier of the Western Cape* 2013 (12) BCLR 1365 (CC), para 50.

36 Ibid., para 54.

37 Ibid., para 62.

38 *Minister of Police v Premier of the Western Cape*, Case No 21600/2012, Western Cape High Court, unreported judgement, para 79.

39 Ibid., para 82.

40 Ibid., para 98.

41 Section 206 (3) of the Constitution provides for powers of provinces with regard to policing.

42 Duxita Mistry and Judy Klipin, Strenghtening civilian oversight over the police in South Africa: the national and provincial secretariats for safety and security, Institute for Security Studies, Paper 91, 2004, 18.

43 Constitution, section 206 (1) and (2).

44 Bruce, Unfinished business.

45 *Minister of Police and Premier of the Western Cape* 2013 (12) BCLR 1365 (CC), para 38.

46 Constitution, section 206 (5) (b).

47 Newham and Bruce, Provincial government oversight of the police.

48 Constitution, chapter 3.

49 Ibid, sections 206 and 207.

50 African National Congress, Legislature and governance – policy discussion document, March 2012, 13.

Protecting child offenders' rights

Testing the constitutionality of the National Register for sex offenders

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The Constitutional Court recently declared the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007 (Act 32 of 2007) unconstitutional in its requirement that the names of child offenders be automatically included on the National Register for Sex Offenders when convicted of a sexual offence against a child or a person with disability. The Court held that automatic inclusion on the Register violated a child's right in terms of section 28(2) to have their best interests taken into account as the paramount consideration in every matter affecting the child. The Court held that the individual circumstances of children should be taken into account and that they should be given the opportunity to be heard by the sentencing court regarding the placement of their details on the Register. The Court decided that sentencing courts should be given the discretion to decide whether to place a child on the Register or not.

The past few years have seen significant developments in the laws that determine how the criminal justice system interacts with child offenders. Greater emphasis is placed on practices such as diverting child offenders from the criminal justice system; applying restorative justice principles to child offenders while ensuring their responsibility and accountability for crimes committed; and effectively rehabilitating and reintegrating child offenders to minimise the potential of reoffending.[1] This has resulted in increased dialogue and a proliferation of judgements[2] that aim to provide guidance on the implementation of legislation regulating this interaction. Courts have engaged and grappled with the law, and issues that arise from the law, in light of the Constitution and international law.

The recent Constitutional Court judgement of *J v National Director of Public Prosecutions and Another*[3] is no exception, with its main focus being the constitutionality of automatically placing child offenders on the National Register for Sex Offenders (the Register) after conviction. (The Register and its purpose are discussed in more detail below in the section 'Overview of the legal provisions at issue'.)

Brief background

When the applicant (J) was 14 years old, he was charged with the rape of three minors in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007 (Act 32 of 2007, the Sexual Offences Act). In addition, he was charged with assault with intent to cause grievous bodily harm after stabbing a 12-year-old girl. He pleaded guilty to all the charges and was convicted by a Child Justice Court. J was sentenced to five years' compulsory residence in a child and youth care centre and a further three

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years' imprisonment thereafter for the three rape charges.[4] For the assault charge he was given a suspended sentence of six months' imprisonment.[5] The magistrate also ordered that J's name be entered on the Register in terms of section 50(2) of the Sexual Offences Act.[6] Section 50(2) states the following:

(a) A court that has in terms of this Act or any other law—

(i) convicted a person of a sexual offence against a child or a person who is mentally disabled and, after sentence has been imposed by that court for such offence, in the presence of the convicted person; or

(ii) made a finding and given a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, that the person is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence or was, by reason of mental illness or mental defect, not criminally responsible for the act which constituted a sexual offence against a child or a person who is mentally disabled, in the presence of that person,

must make an order that the particulars of the person be included in the Register.

(b) When making an order contemplated in paragraph (a), the court must explain the contents and implications of such an order, including section 45, to the person in question.[7]

The matter went before the Western Cape High Court by way of automatic review in terms of section 85(1)(a) of the Child Justice Act.[8] The High Court *mero motu* [of its own accord] asked the regional magistrate and the Director of Public Prosecutions whether the magistrate was competent to make an order in terms of section 50(2) of the Sexual Offences Act, in light of the objectives of the Child Justice Act as well as section 28 of the Constitution. Both responded in the affirmative and recommended that the High Court confirm it.[9] A full bench was constituted to hear the matter on 3 May 2013. J was represented by Legal Aid, and the Centre for Child Law, upon the invitation of the Court, entered the matter as *amicus curiae*.[10]

Deliberations in the high court

It was argued on J's behalf that regional magistrates are granted no discretion by section 50(2) to decline to make an order to place child offenders' details on the Register, as the Act does not distinguish between a child sexual offender and an adult sexual offender.[11] The automatic inclusion of their details on the Register ignores the rights of child offenders, such as the right to be protected against degradation and the right not to have his or her well-being, moral or social development placed at risk.[12] Inclusion, it was argued, fails to consider the long-term effects on the child offender and is not in line with the objectives and principles of the Child Justice Act, which places child offenders in a different category from adult offenders and recognises their unique and vulnerable position in society.[13]

The *amicus curiae* agreed that section 50(2) violates a number of the constitutional rights of child offenders, and undermines the objectives of the Register.[14] It argued that the section is not properly in touch with the aim of the Register, which is to protect children and persons with disabilities from predatory adults by limiting their employment opportunities to jobs that do not involve access to children or persons with mental disabilities.[15] The *amicus* further pointed out that the section is too broad, particularly as a result of the comprehensive definition of sexual assault, which includes everything from rape to kissing.[16] The *amicus* submitted that the section cannot be read in a constitutionally compliant manner, and therefore amounts to a constitutional infringement of rights.[17]

The state argued that placing offenders' details on the Register is not an infringement of their inherent dignity.[18] The contents of the Register are not made public; only certain categories of people can access the contents of the Register through an application process.[19] The section gives judicial officers the power to order that the name of a sexual offender, including a child sexual offender, be included in the Register with the aim of eradicating the high number of sexual offences in South Africa.[20]

On considering the arguments by all the parties, the High Court found that the rights of child offenders as well as those of adult offenders would be infringed by section 50(2) of the Sexual Offences Act because of the consequences and the impact of inclusion of their details on the Register, and mainly because it affected their right to be heard.[21]

On the question of whether the infringement of these rights was justifiable in terms of section 36 of the Constitution, the High Court held that because the legitimate constitutional purpose of the Sexual Offences Act is to protect victims of sexual abuse, the limitation of the rights of the offenders was reasonable and justifiable in an open and democratic society.[22] It further found that in the case of child offenders, the best interests set out in section 28(2) of the Constitution may be limited.[23]

The High Court was, however, of the view that section 50(2) prevents a court from assessing child offenders to determine if they pose any threat to others and if circumstances warrant their inclusion on the Register.[24] This is due to the fact that the Sexual Offences Act criminalises a broad array of conduct, and the presiding officer making the decision to place a child on the Register is granted no discretion in the matter.[25]

Interestingly, on the issue of the right of adult offenders to be heard, the High Court held that section 50(2) of the Sexual Offences Act infringes on their right to a fair hearing as set out in section 34 of the Constitution.[26] The section does not give the offender an opportunity to persuade the court that he should not be placed on the Register.[27] The High Court found this infringement to be unjustifiable, as no legitimate constitutional purpose is served.[28] It therefore found section 50(2) of the Sexual Offences Act to be invalid and inconsistent with the Constitution.[29]

The declaration of constitutional inconsistency was suspended for 18 months to afford the legislature the opportunity to amend the section.[30] Through the process of 'reading in', the Court inserted words into section 50(2) that would be applied during the 18-month suspension. The intent of the insertion was that, if good cause was shown, a court could direct that an offender's details not be included in the Register.[31] Furthermore, courts would have the responsibility to inform convicted persons that they could make representations on their inclusion in the Register.[32]

Deliberations in the Constitutional Court

Section 172(2)(a) of the Constitution requires an order of constitutional invalidity to be confirmed by the Constitutional Court before coming into force. On 6 February 2014 the Constitutional Court heard arguments and dealt with the issues below:[33]

- Should the proceedings extend to adult offenders?
- Does section 50(2) of the Sexual Offences Act limit constitutional rights and, if so, can the limitation be justified in terms of section 36 of the Constitution?
- If the limitation cannot be justified, the section must be declared unconstitutional and the Constitutional Court must determine a just and equitable remedy.

Overview of the legal provisions at issue

Chapter 6 of the Sexual Offences Act provides for the establishment of the Register to contain particulars of persons convicted of any sexual offence against a child or a person with a mental disability.[34] The Register aims to protect children and persons with mental disabilities from coming into contact with sex offenders by ensuring that relevant employers, licensing authorities and childcare authorities are informed that a particular person is on the Register.[35] A prospective employer must apply with the Registrar to check the prospective employee's details against the Register.[36]

Once a person's details are on the Register, section 41(1) of the Sexual Offences Act provides that they cannot be employed to work with children; hold any position that places them in a position of authority, supervision or care of children; be granted a licence or approval to manage or operate an entity, business or trade in relation to the supervision or care of children or where children are present; and become foster parents, kinship caregivers, temporary safe caregivers or adoptive parents.[37]

An offender has an obligation to disclose any previous sexual offences against children or persons with mental disabilities to an employer, licensing authority or childcare authority. Failing to do this will result in criminal sanction.[38]

Once an offender's details have been entered on the Register they can only be removed under limited circumstances.[39] Section 51(2) lays out two circumstances in which a person's details may never be removed, namely when someone has been sentenced to a period of imprisonment of over 18 months (even if wholly suspended), or if a person has two or more convictions of a sexual offence against a child or persons with mental disabilities.[40]

A plain reading of section 50 of the Sexual Offences Act points to the registration applying to child offenders.[41] Section 50(2)(a) applies to 'a person [convicted] of a sexual offence against a child or a person who is mentally disabled', where 'person' applies to both children and adults.[42]

The scope of the proceedings

When the matter was before the High Court, the main issue before it, and the questions raised, focused on child offenders.[43] The Court, however, made an order that deliberately extended to adult offenders, while making no distinction between child offenders and adult offenders.[44]

The Constitutional Court did not approve of this approach and was of the view that '[w]hile courts are empowered to raise constitutional issues of their own accord, this power is not boundless.[45] In order for the interests of justice to favour a court considering a constitutional issue of its own accord, it is important that the issue arises on the facts because it is generally undesirable to deal with an issue in abstract …'[46]

The facts presented before the High Court raised the application of section 50(2) to child offenders.[47] The Constitutional Court held that it was inappropriate for the High Court to consider the constitutionality of the section in relation to adult offenders and then to extend its order to cover all offenders.[48] The issues raised by the case would apply differently to children and adults, and they had not been discussed properly on the facts or in legal argument in the High Court or the Constitutional Court.[49]

Does section 50(2)(a) infringe on the rights of the child offender?

The Court confirmed that the starting point for matters concerning the child is section 28(2) of the Constitution, which provides that:

> A child's best interests are of paramount importance in every matter concerning the child.[50]

The best-interests principle:

> ... encapsulates the idea that the child is a developing being, capable of change and in need of appropriate nurturing to enable her to determine herself to the fullest extent and to develop her moral compass. [The Constitutional Court] has emphasised the developmental impetus of the best-interests principle in securing children's right to learn as they grow how they should conduct themselves and make choices in the wide and moral world of adulthood. In the context of criminal justice, the Child Justice Act affirms the moral malleability or reformability of the child offender.[51]

The Court laid out key principles for applying the best interests approach to child offenders:[52]

- The law should generally distinguish between adults and children
- The law must allow for an individuated approach to child offenders
- The child or their legal representative must be afforded an appropriate and adequate opportunity to make representations at every stage of the criminal justice process, giving due weight to the age and maturity of the child

The Court discussed the three principles and found that in relation to the first principle, section 50(2) in its current form does not distinguish between adult offenders and child offenders.[53] Furthermore, in relation to the second principle, the Court was of the view that the best interests approach should be flexible enough to allow for the determination of factors that will secure the best interests of

the child offender, taking into account individual circumstances.[54] The Child Justice Act was held up as an example to follow, as it provides for an individualised approach and contains guiding principles to be taken into account when dealing with children in the criminal justice system.[55]

With regard to the third principle, the Court also referred to the Child Justice Act, which provides in its guiding principles that every child should be given an opportunity to participate in proceedings that would result in decisions that affect him or her.[56]

When section 50 of the Sexual Offences Act is read as a whole, it can be seen that a court is granted no discretion on whether or not to include an offender's details on the Register.[57] The registration occurs automatically after conviction and sentencing, or after the court has made a finding in terms of section 77(6) or 78(6) of the Criminal Procedure Act.[58] This is an infringement of the best interests of the child.[59] The requirement for automatic registration excludes an opportunity for individual responses to the child offender, as well as the opportunity to take into account the views and representation of the child.[60] The restricted conditions under which an offender can apply for his or her details to be removed from the Register are not flexible enough to consider the particular child's development, or ability to reform.[61]

The consequences that arise from being placed on the Register will not only affect the child offender while still a child, but may extend into adulthood.[62] Child offenders who have served their sentences but whose details have been included on the Register 'will remain tarred with the sanction of exclusion from areas of life and livelihood that may be formative of their personal dignity, family life, and ability to pursue a living'.[63] This seriously affects the rights of the children concerned, as they may still be able to benefit from rehabilitation services and be integrated into society if given the opportunity and necessary tools.[64]

Is the limitation of the right of the child offender justifiable?

The right of child offenders to have their best interests considered paramount, as set out in section 28(2) of the Constitution, can be subject to limitation.[65]

Section 36 of the Constitution states that rights can be limited to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, and sets out the following factors to be taken into account:

- The nature of the right
- The importance of the purpose of the limitation
- The nature and extent of the limitation
- The relation between the limitation and its purpose
- Less restrictive means to achieve the purpose[66]

The Court began by acknowledging that, when dealing with children exposed to the criminal justice system, the importance of the best-interest principle cannot be denied.[67] It then went on to recognise that the Register has a commendable and legitimate aim, to keep children and persons with disabilities safe in the places where they learn and grow.[68] It acknowledged the harm caused by sexual violence: it 'threatens a victim's rights to freedom and security of the person, privacy and dignity in a profound way. Sexual offences have effects that ripple far beyond the horrific immediacy and physicality of the crime.'[69]

The limitation therefore aims to achieve a valuable purpose, which is to protect children and persons with mental disabilities.[70] However, the automatic operation of section 50(2)(a) results in the limitation not always achieving its purpose for child offenders.[71] The Register functions on the premise that the offenders concerned pose a risk to children and persons with mental disabilities, and disregards the fact that patterns of recidivism for sexual offences vary considerably between adults and children.[72]

The Court was of the view that there are less restrictive means to achieve the aims of the Register.[73] If the courts are granted discretion, and the child offender granted an opportunity to make representations on the issue of registration, there would be the possibility of greater congruence between the limitation and its purpose.[74] This would also provide courts with more flexibility to respond to cases on individual merits so as to meet the child's best interests.[75]

The Court concluded that the limitation of the right of child offenders in section 50(2)(a) is not justified in an open and democratic society, which resulted in the section being declared constitutionally invalid.[76]

Remedy

The Court held that the legislature must be afforded the opportunity to fix the constitutional defect while taking into account expert opinion on the unique circumstances of child sex offenders and victims in South Africa.[77]

The Court, however, found that it was faced with difficulties that arose as a consequence of having to determine what just and equitable order to grant in the interim, namely:[78]

- The Sexual Offences Act creates complex mechanisms that regulate the treatment of offenders following their convictions. Only section 50(2)(a) was before the Court. The Court cannot order an interim remedy without affecting the rest of the statutory scheme.
- The Register fulfils an important purpose of protecting vulnerable persons from sexual abuse in places where they should be safe, and no evidence was placed before the Court that children and/or persons with mental disabilities would not be harmed. Therefore it could not issue a moratorium on the registration of child offenders or allow the declaration to operate retrospectively.

The Constitutional Court therefore instructed Parliament to remedy the defect within 15 months, during which the declaration would be suspended.[79] However, it advised that a shorter period of correction of the defect be preferred, as rights infringements to child offenders would continue to operate as a result of the suspension of the declaration.[80]

With regard to child offenders who have already been placed on the Register, the Court ordered that a mechanism be provided to identify them so that they have an opportunity to obtain legal advice and assistance.[81] This should be done in order to salvage the rights of these children.[82] The Court will then make the information available to persons and organisations seeking to assist these child offenders.[83]

Analysis and conclusion

This judgement contributes positively to the developing jurisprudence that promotes the principle that the best interests of children must be considered central in matters concerning them. It builds on other Constitutional Court judgements that target and develop the application of the best interests of child offenders (among the often conflicting interests of victims and the community).[84] It confirms the view that children, child offenders in particular, are to be regarded as individuals whose cases must be decided on their own merits and in light of their own individual circumstances. The Court recognises the severity of placing child offenders' details on the Register. Such inclusion does not create or encourage a growth space in which a child can be influenced in positive ways through various means that allow for rehabilitation, reform and reintegration. Child offenders are thus not merely abandoned to the criminal justice system without the consideration of less restrictive alternatives.

The rights and interests of victims are not ignored by the Court either. The Court successfully strikes a balance between the rights and interests of child offenders and those of victims. It recognises and acknowledges the harm caused by sexual violence to the victim, as well as to society. It emphasises the importance of protecting vulnerable members of society from sexual abuse. There is an appreciation of the fact that the Register fulfils the important role of protecting victims of sexual abuse, and therefore does not completely do away with the possibility of including child offenders on the Register. Instead, it advocates for granting sentencing courts a discretion that is dependent on the circumstances in individual cases.

This said, there are concerns that arise from the order that was given by the Court. The first relate to the remedies that are available, if any, for child offenders whose details have already been included on the Register. Once they have been identified, questions arise about whether they should be subject to individual assessments, who would carry out these assessments, and against what criteria. Also, even when they have received the required legal assistance, and the courts have been convinced that

some children should not be on the Register, there is no legal standing on which these courts or the Registrar can effect the removal of their details from the Register. The declaration of invalidity has been suspended, leaving the provisions in place, and no interim measures have been put in place to assist these children.

Lastly, it is a pity that the Court failed to set out a structured order that would address the issue of what should be done about child offenders who, during the 15 months of the suspension of the declaration of invalidity, are convicted of and sentenced for sexual offences and are therefore automatically placed on the Register.

It is hoped, however, that in the interim, the continued implementation of this judgement will result firstly in the amendment of the offending legislation and provisions therein, and secondly in the protection of the best interests of child offenders.

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Notes

1 See the Child Justice Act 2008 (Act 75 of 2008), Pretoria: Government Printer, preamble.

2 See, for example, *S v CKM and Others* 2013 (2) SACR 303 (GNP); *Director of Public Prosecutions, Western Cape v Prins and Others* 2012 (2) SACR 183 (SCA); *S v FM* 2013 (1) SACR 57 (GNP); *Mpofu v Minister of Justice and Constitutional Development* 2013 (9) BCLR 1072 (CC) or 2013 (2) SACR 407 (CC); *The Teddy Bear Clinic for Abused Children and RAPCAN v The Minister of Justice and Constitutional Development* 2013 (12) BCLR (CC); *S v VC* 2013 (2) SACR 146 (KZP); S v CS 2013 (2) SACR SACR 323 (ECG).

3 J v National Director of Public Prosecutions and Another 2014 (2) SACR 1 (CC).

4 *J v NDPP* para [3]. This was done in terms of section 76(1) and (3) of the Child Justice Act.

5 Ibid.

6 Ibid.

7 Section 50(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

8 *J v NDPP* para [4].

9 Ibid.

10 *S v IJ* 2013 (2) SACR 599 (WCC) at para [11].

11 Ibid., para [54].

12 Ibid., para [56].

13 Ibid., para [57 to 60].

14 Ibid., para [70].

15 Ibid., para [74].

16 Ibid., para [79].

17 Ibid., para [74].

18 Ibid., para [85].

19 Ibid.

20 Ibid., para [89] – [90].

21 *J v NDPP* para [6].

22 Ibid., para [7].

23 Ibid.

24 Ibid.

25 Ibid.

26 Ibid., para [8].

27 Ibid.

28 Ibid.

29 Ibid., para [9].

30 Ibid.

31 Ibid.

32 Ibid., para [8] – [9].

33 Ibid., para [10] and [14] – [15].

34 Ibid., para [20]. Also see Sexual Offences Act, section 42.

35 Ibid. Also see Sexual Offences Act, section 43.

36 See Sexual Offences Act, sections 44 and 45.

37 *J v NDPP* para [21].

38 Ibid., para [24]. Also see Sexual Offences Act, section 46.

39 *J v NDPP* para [25]. Also see Sexual Offences Act, section 51.

40 Ibid.

41 *J v NDPP* para [27].

42 Ibid.

43 Ibid., para [28]

44 Ibid.

45 Ibid., para [30].

46 Ibid.

47 Ibid., [para 31].

48 Ibid.

49 Ibid.

50 Ibid., para [35].

51 Ibid., para [36].

52 Ibid., para [37 to 40].

53 Ibid., para [37].

54 Ibid., para [38].

55 Ibid., para [39].

56 See Child Justice Act, section 3 (c); J v NDPP para [40].

57 *J v NDPP* para [41].

58 Ibid.

59 Ibid., para [42].

60 Ibid.

61 Ibid.

62 Ibid., para [43], and see footnote 52 of the judgement.

63 Ibid., para [44].

64 Ibid.

65 Ibid., para [46].

66 Ibid.

67 Ibid., para [47].

68 Ibid.

69 Ibid., para [48].

70 Ibid., para [49].

71 Ibid.

72 Ibid.

73 Ibid., para [50].

74 Ibid.

75 Ibid.

76 Ibid.

77 Ibid., para [54].

78 Ibid., para [54 to 55].

79 Ibid., para [56].

80 Ibid.

81 Ibid., para [57].

82 Ibid.

83 Ibid.

84 See for example: *S v M (Centre for Child Law as amicus curiae)* 2008 (3) SA 232 (CC) or 2007 (12) BCLR 1312 (CC) or 2007 (2) SACR 539 (CC); *Centre for Child Law v Minister of Justice and Constitutional Development and others (National Institute for Crime Protection and Reintegration of Offenders as amicus curiae)* 2009 (6) SA 632 (CC) or 2009 (2) SACR 477 (CC) or 2009 (11) BCLR 1105 (CC); *Mpofu v Minister of Justice and Constitutional Development* 2013 (9) BCLR 1072 (CC) or 2013 (2) SACR 407 (CC).

‘Freedom from all forms of violence’

Using Zimbabwe’s new Constitution to encourage rape law reform

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The right to ‘freedom from all forms of violence from public or private sources’, enshrined in Zimbabwe’s new Constitution, could have a significant impact on efforts to end violence against women (VAW) in the country. The right is particularly relevant in the Zimbabwean context where VAW occurs in a range of settings, from the most intimate of relationships in the home to the state’s use of rape as a political weapon. One way in which the state can fulfil its duty to address VAW is through the reform of the country’s rape law. With comparative reference to the impact of the right to freedom from violence in South African law, this article discusses three areas of Zimbabwean law that present potential obstacles to achieving justice for rape survivors: the definition of the crime of rape, the abolished but tenacious cautionary rule, and the sentencing of sexual offenders.[1]

The new Constitution of Zimbabwe[2] was drafted in the wake of what was arguably the country’s most violent election.[3] Much of the violence had been perpetrated against women.[4] When President Robert Mugabe signed the new Constitution into law on 22 May 2013, for the first time in the nation’s history the supreme law of the land enshrined a right to ‘freedom from all forms of violence from public or private sources’.[5] Although Zimbabwe’s previous Constitution did have a Declaration of Rights, it did not include the right to freedom from violence and generally was less extensive than the new Declaration of Rights. The criminal law was, therefore, the primary legal means of protecting women from violence. In all likelihood this will continue to be the case following the adoption of the new Constitution. However, the inclusion of the right to freedom from all forms of violence in the supreme law of Zimbabwe, to which the criminal law is subject, means that the criminal law may need to be amended, moulded and shaped in order to better give effect to this right.[6]

The right, therefore, has huge potential for advancing women’s rights and addressing violence against women in Zimbabwe.[7] However, as observed by a key civil society leader, Netsai Mushonga, ‘[w]hile we applaud the successful end to the constitution-making, this ushers in the more difficult exercise of constitution-building, ensuring that rights become reality for women’.[8] This article seeks to make a contribution to that difficult task by considering how the right to freedom from all forms of violence can be used to encourage the reform of Zimbabwe’s rape law.

First, the nature and prevalence of rape in Zimbabwe will be considered. Next, I will discuss the importance of the right to freedom from violence for the law reform agenda. Lastly, I explore how the right can be

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brought to bear on three aspects of the criminal law that present potential obstacles to justice for rape survivors, namely the definition of rape, the cautionary rule and sentencing of offenders.

Rape perpetration in Zimbabwe

The Zimbabwe National Statistics Agency provides statistics for reported cases of rape. According to figures released for the fourth quarter of 2013, reported rapes from the previous four years were as follows: 3 481 in 2009, 4 450 in 2010, 5 446 in 2011, 5 412 in 2012 and 4 735 in 2013 (excluding November and December).[9] These statistics are based on police records and therefore must be regarded with extreme caution. It is widely recognised that rape is underreported globally.[10] Police statistics are sometimes rendered even more unreliable in developing countries, where there is limited infrastructure for crime reporting.[11] Research in Zimbabwe further shows that reporting is negatively affected by societal perceptions of rape, especially marital rape.[12] Politically motivated rape is also less likely to be reported, especially if the crime was committed by the police themselves.[13] Nevertheless, these figures provide some basis for assessing the prevalence of rape in Zimbabwe. The Research and Advocacy Unit has estimated, based on these statistics, that '[f]ifteen (15) women are raped in Zimbabwe every day – one in every 90 minutes'.[14] Given the reality of low reporting levels, the situation is probably much worse.

In Zimbabwe rape has been perpetrated both by private persons, often including those close to the rape survivor, as well as by the state and the state's agencies, such as the police and the army. Studies show that politically motivated violence in Zimbabwe has been perpetrated by the state, and, when perpetrated by private parties, has sometimes been state sanctioned.[15] According to a number of civil society sources, rape has been used as a political weapon in Zimbabwe.[16] There are reports of politically motivated rapes occurring during the liberation war of the 1970s,[17] and being perpetrated by the army (especially the Fifth Brigade) during the 'disturbances' of the 1980s known as *Gukurahundi*.[18] Since 2000, according to the Research and Advocacy Unit, politically motivated violence, including rape, has primarily occurred during elections.[19]

A survey conducted between 2005 and 2006 among 8 907 women between the ages 15 and 49 indicated that a significant portion of Zimbabwean women had experienced domestic violence of a sexual nature. In the survey, '25 percent of women reported that they have experienced sexual violence at some point in their lives'.[20] Furthermore, the 'majority (65%) of women reported that their current or former husband, partner, or boyfriend committed the [first] act of sexual violence [against them]'.[21]

The relevance of the right to 'freedom from violence' to rape law reform

Obligations under the due diligence standard

The concept of 'due diligence' has been imported into human rights law – particularly with regard to VAW – to assess whether the state has taken adequate measures to fulfil its duties to protect women.[22] These duties have been acknowledged in Zimbabwe's Constitution, which states that the state has a duty to respect, protect, promote and fulfil the rights in the Declaration of Rights – including, of course, the right to freedom from all forms of violence.[23] The former United Nations Special Rapporteur for Violence against Women, its Causes and Consequences, Yakin Ertürk, outlined numerous steps that states should take in order to fulfil these obligations. This article will focus on just two of these, namely the reform of the criminal law[24] and the administration of punishment for perpetrators of rape as a form of VAW.[25] The legislature has an important role to play in fulfilling these duties, as the primary arm of government tasked with law reform by passing new legislation and making amendments to existing laws.[26] The judiciary also has a role in the law reform process by developing the common law in line with the Constitution[27] and striking down any unconstitutional legislation.[28] The judiciary is also the arm of government that administers punishment to those who violate the right to freedom from violence, by sentencing those convicted of violent crimes, such as rape, under the criminal law.

The influence of the right in South African law

Section 52(a) of the Constitution of Zimbabwe states that 'every person has the right to bodily and psychological integrity, which includes the right … to freedom from all forms of violence from public or private sources'. An almost identical right is found in section 12(1)(c) of the South African Constitution, which states that 'everyone has the right to freedom and security of the person, which includes the right … to be free from all forms of violence from either public or private source'.[29] For this reason, the South African experience will be valuable in informing how the right can be used in Zimbabwe. The South African experience is also relevant for at least two other reasons: firstly, as a neighbouring country to Zimbabwe, South Africa has a similar history and context as well as similar cultures; secondly, both countries' legal systems have their roots in Roman-Dutch law and English common law and refer to each other's case law.

In 1998, Helene Combrinck wrote an influential paper on how the inclusion of this right in South Africa's new Constitution could be used in the fight to end VAW in South Africa.[30] According to Combrinck, what is of particular importance for addressing VAW is that the right is framed to include violence from both public and private sources.[31] This is because human rights have traditionally been regarded as only protecting the individual from the abuses of the state, or 'public sources'.[32] This legal tradition has long undermined the protection of women from violence, since the source of VAW is very often a private one.[33]

The right to freedom from violence has been instrumental in the reform of rape law, both through legislative reforms and through the development of the common law by the courts. The Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007,[34] which introduced a number of key reforms to South African rape law, was founded on the right to be free from all forms of violence, and other key constitutional rights such as the right to equality.[35] The right has also influenced how the South African courts understand the purpose of the crime of rape. This is seen clearly in a judgement penned by Justice AJ Patel of the Venda High Court, which states:

> The modern function of the crime of rape … is the protection of women from sexualised violence. It is not so much as it involves unlawful sexual intercourse as the fact that it involves an invasion and infringement of a woman's fundamental rights as a person ... [such as] her right to be free from all forms of violence …[36]

In light of the above, the South African experience will be relevant to understanding the potential impact of the right to freedom from violence on each of the three areas of Zimbabwe's criminal law as discussed below, namely the definition of the crime of rape, the cautionary rule and the sentencing of sexual offenders.

The definition of rape

Much of the debate around the reform of South Africa's rape law has centred on the definition of rape.[37] This is an area of the law that also needs reform in Zimbabwe. The definition of rape in Zimbabwean law is found in section 65(1) of the Criminal Law (Codification and Reform) Act 2004 and is framed as follows:

> If a male person knowingly has sexual intercourse or anal sexual intercourse with a female person and, at the time of the intercourse … the female person has not consented to it … and … he knows that she has not consented to it or realises that there is a real risk or possibility that she may not have consented to it … he shall be guilty of rape and liable to imprisonment for life or any shorter period.[38]

The definition is fairly comprehensive, but it is not without its problems. Firstly, the definition of rape, read with the definitions of sexual intercourse and anal sexual intercourse,[39] restricts the types of penetration to vaginal or anal penetration of a woman by a man's penis. Therefore, other types of coerced penetration, such as oral penetration, or vaginal and anal penetration by objects other than a penis, are excluded from the definition. These types of coerced penetration fall under a different crime – aggravated indecent assault.[40] Although aggravated

indecent assault carries the same penalty as rape, it has been argued that the exclusion of these types of penetration from the definition of rape fails to recognise that 'the trauma of the victim is equally severe in all instances of penetration' and implicitly labels such acts of penetration a lesser crime.[41]

Secondly, the definition of rape is gendered: only men can be perpetrators of rape and only women can be victims of rape. Not only does this raise serious constitutional concerns relating to discrimination against men and boys who are raped, but who are not *legally* considered to have been raped, but additionally the gendered definition of rape has its roots in patriarchal considerations. The common law crime of rape was originally conceived as a property crime against men.[42] Furthermore, it has been argued that the idea that only women can be raped perpetuates the patriarchal conception of rape as a 'metonym of feminised victimhood'.[43]

Should the courts declare the definition unconstitutional?

While it is clearly arguable that the definition of rape in Zimbabwean law could be improved, the question remains whether it is unconstitutional. A similar question came before the South African Constitutional Court in *Masiya v Director of Public Prosecutions*[44] where the court was asked to decide whether the common law definition of rape, which excluded anal penetration of women and similarly discriminated on the grounds of sex, was unconstitutional. The Constitutional Court found that notwithstanding its deficiencies, the definition of rape 'ensure[d] that the constitutional right to be free from all forms of violence, whether public or private, as well as the right to dignity and equality [were] protected'.[45] The court held that the definition should be developed to include 'acts of non-consensual penetration of a penis into the anus of a female' in order to give effect to the spirit, objects and purport of the Bill of Rights but declined to extend the definition of rape in a gender-neutral way.

If the Zimbabwean courts decide to follow *Masiya* then it may be that Zimbabwean law's definition of rape may be found not to fall foul of the Constitution of Zimbabwe, which is similar in many respects to the South African Constitution. However, it should be noted that the *Masiya* judgement was widely criticised,[46] and South African law's definition of rape was amended through legislative intervention soon after the judgement was handed down in order to make the changes the court had failed to make.

Therefore, Zimbabwean courts should not be overly influenced by the restrictive approach adopted in *Masiya*. Rather it is submitted that the courts should follow the approach to the interpretation of fundamental rights laid down by Zimbabwe's Supreme Court in *Smyth v Ushewokunze,*[47] where the Court stated that '[t]he endeavour of the Court should always be to expand the reach of a fundamental right than to attenuate its meaning or content'. This approach has been given added weight in light of section 46(1)(a) of the new Constitution of Zimbabwe, which binds the courts to give '*full* effect to the rights and freedoms enshrined in [the Declaration of Rights].'[48]

Furthermore, in *Zimbabwe Township Developers v Lou's Shoes*,[49] the Supreme Court stressed that when considering whether a statute is unconstitutional '[o]ne doesn't interpret the Constitution in a restricted manner in order to accommodate the challenged legislation'. Rather, stated the Court, '[t]he Constitution must be properly interpreted, after which the challenged legislation must be examined to discover whether it be interpreted to fit into the framework of the Constitution'. In light of the above, and in relation to the right to freedom from all forms of violence, it is suggested that Zimbabwean courts now have the opportunity to declare the criminal law's distinction between different forms of coerced sexual penetration unconstitutional, given the appropriate case.

Legislative intervention needed?

Alternatively, the legislature could amend the definition of rape to make it gender-neutral and to extend it to all types of coerced sexual penetration.[50] Given that the definition of rape is contained in statute rather than in the common law, this is preferable. This could be done through amending the definition in Criminal Law (Codification and Reform) Act 2004 or by creating a separate Sexual Offences Act. Zimbabwe did previously have separate sexual

offences legislation, which included a definition of rape that was gender-neutral and applied to a broad range of types of sexual penetration. This Act was repealed by the Criminal Law (Codification and Reform) Act 2004, which codified the majority of Zimbabwe's criminal offences in a single Act. Although there is some merit in having a single codified Act for criminal offences, it may be prudent for Zimbabwe to return to a system of dealing with sexual offences separately, given the unique challenges that sexual offences present and in light of the other legislative changes suggested below. In the next section I address the cautionary rule in sexual offences cases.

The cautionary rule

The *Mupfudza* rule

The cautionary rule in relation to sexual offences is a rule of evidence that requires judicial officers to treat the evidence given by a complainant in a sexual offence case as inherently suspect, and therefore in need of corroboration.[51] The rule seriously prejudices the success of the prosecutorial process in rape trials and is humiliating for sexual assault survivors.[52] In Zimbabwe, the courts used to apply the cautionary rule using a two-stage test laid down in *S v Mupfudza*[53] that has been summarised as follows:

> The first question to be asked by the court is: 'Is the complainant credible?' If the answer is in the affirmative, the next question is: 'Is there corroboration of or support for the evidence of the complainant?' In other words, the court must not only believe the complainant, it must in addition be satisfied, by an application of the cautionary rule, whether it might still not have been deceived by a plausible witness.[54]

Has the rule been abolished?

Heléne Combrinck's 1998 article argued that the right to be free from all forms of violence would be key to ensuring the abolition of the cautionary rule in South African law.[55] That very same year the rule was, arguably, abolished in South Africa by the Supreme Court in the case of *S v Jackson.*[56] Two years after that, in the case of *S v Banana,*[57] the Supreme Court of Zimbabwe expressly overruled *S v Mupfudza* and applied *S v Jackson*, abolishing the cautionary rule from Zimbabwean law. Nevertheless, the cautionary rule continues to threaten to unduly influence cases involving sexual offences. In South Africa, some judges, such as Justice Thring in *S v Van der Ross*,[58] have interpreted *S v Jackson* as merely abolishing the mandatory application of the cautionary rule to complainants in sexual cases, and continued to apply it on a discretionary basis.[59] In Zimbabwe, although the higher courts have generally avoided applying the cautionary rule, there remains a concern that the courts may adopt the approach of *S v Van der Ross* (and thus resurrect the cautionary rule), since *S v Banana* stated that Zimbabwean courts should 'proceed in conformity with the approach advocated in South Africa'.[60]

Ensuring the rule is no longer applied

South Africa's legislature has now expressly abolished the cautionary rule through section 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.[61] It may be advisable for Zimbabwe's legislature to do the same in order to ensure clarity, especially in light of evidence that there is still confusion in Zimbabwe around the application of the cautionary rule. For example, Justice Musakwa's judgement in *S v Makomeke*[62] reports that '*[b]oth* counsels submitted in their heads of argument that the trial court ought to have adopted the approach in *S v Mupfudza* supra in its assessment of the complainant's evidence'.[63] If, over a decade after *S v Banana* was handed down, there is still such confusion among Zimbabwean legal practitioners, it raises concern about what is being applied in the magistrates' courts – usually the courts of first instance in rape cases – whose judgements are not reported.

However, it must be acknowledged that legislative interventions are no guarantee to ensuring that courts do not apply the rule. A recent study has indicated that South African judges are *still* applying the cautionary rule, despite its having been expressly abolished by the legislature.[64] Therefore, there may have to be judicial training on this matter, in addition to legislative clarity, in order to finally do away with this tenacious and patriarchal rule.

The third and final issue, discussed in the next section, is the sentencing of offenders.

Sentencing of sexual offenders

Rape sentencing in Zimbabwe

Sentencing of sexual offenders recently came under the spotlight in Zimbabwe when a motion was introduced in Parliament in February 2014, calling for mandatory minimum sentences of no less than 30 years' imprisonment for those convicted of rape.[65] At present, Zimbabwean law does not impose mandatory minimum sentences for the crime of rape. The courts are entitled to impose a life sentence for rape,[66] but generally far more lenient sentences than that are administered, even in very serious cases of rape. For example, in *S v Dhliwayo*,[67] the High Court reduced the sentence imposed by a magistrate to an effective sentence of four and a half years' imprisonment for the rape of a girl estimated to be between 10 and 11 years of age.[68] In reaching its decision the Court relied on a series of cases in which similarly lenient sentences had been administered for rape.

One of the seminal Zimbabwean cases on sentencing in rape trials is *Nemukuyu v S.*[69] The judgement sets out what the courts must take into account when sentencing persons convicted of rape. While the judgement is generally quite balanced, it nevertheless illustrates one of the problems in Zimbabwe's rape sentencing legislation that perpetuates misconceptions about the nature of rape and encourages lenient sentencing. Section 65(2) of the Criminal Law (Codification and Reform) Act requires judges to take 'the degree of force or violence used in the rape' and 'the extent of physical and psychological injury inflicted upon the person raped' when sentencing. Therefore, in reaching its decision to reduce the magistrate's sentence to an effective sentence of eight years' imprisonment,[70] the Court relied on mitigating evidence that the convicted man 'did not use a lot of force … [h]e simply over powered the complainant, causing no further physical harm beside that he inflicted on her private parts'.[71] Such remarks exhibit a gross misunderstanding about the inherently forceful and violent nature of rape, especially in light of the fact that the rape survivor was only 12 years old when she was raped, and the convicted person, who was her grandfather, was meant to be looking after her (in *loco parentis*) at the time and thus was in a position of authority and protection over her.

South Africa's mandatory minimum sentence legislation

South Africa has passed minimum sentence legislation to try to ensure that judges administer more severe and consistent sentences for a number of serious crimes, including rape. When rape is perpetrated under certain aggravating circumstances, a life sentence must be administered. One such aggravating circumstance is when the victim is under the age of 16 years. This lies in stark contrast to the sentences administered in *S v Dhliwayo* and *Nemukuyu v S* – where in both cases the victims were younger than 16 years. When there are no such aggravating circumstances, the minimum sentences for rape under South African legislation range from 10 to 15 to 20 years' imprisonment for first, second and third offences, respectively. This more nuanced approach presents a potential alternative to the blanket minimum sentence of 30 years' imprisonment for all instances of rape proposed by the motion submitted to the Zimbabwean Parliament.

Judges in South Africa may not derogate from the mandatory minimum sentences unless there are 'substantial and compelling reasons' to do so.[72] The legislation also outlines certain circumstances that may not constitute substantial or compelling reasons, one of which is 'an apparent lack of physical injury to the complainant'.[73] Although the 'substantial and compelling reasons' proviso has been inappropriately used by some South African judges to reduce sentences on spurious grounds – sometimes even directly contradicting the list of grounds that may not constitute substantial and compelling reasons – the legislation has led to an increase in the severity of sentences for rape in South Africa.[74]

Does the right support the adoption of minimum sentences?

Two primary justifications for legislating mandatory minimum sentences for rape in Zimbabwe were put forward during the parliamentary debate. These

were, firstly, the need to send a strong message to the public that rape is a serious crime and, secondly, the argument that more severe sentences will act as a deterrent to potential perpetrators of rape. These sentiments are similar to the reasons put forward for the introduction and continuation of mandatory minimum sentences in South Africa.[75]

In societies like Zimbabwe and South Africa, where sexual violence against women has been normalised, it is important to send a strong message to society that rape is a heinous crime, and that those who perpetrate rape will be punished harshly.[76] The right to freedom from violence adds weight to this argument, as rape can no longer be viewed as just a crime – it is also a violation of a fundamental human right. Additionally, the disproportionate impact that rape has on women means that the crime engages the constitutional dimensions of equality and dignity. Testimonials from rape survivors in South Africa indicate that 'lenient sentences make survivors feel like their lives are "cheap," that they have been exposed to tremendous injustice, and that they are left exposed to intimidation and threats'.[77] Therefore, increasing the severity of punishments administered to perpetrators of rape through minimum sentence legislation may serve as a much needed acknowledgement of the seriousness of the crime and the severity of its impact on rape survivors.

An evaluation of the efficacy of minimum sentence legislation as a deterrent is very important for the purposes of this article – if the right to freedom from violence is to be used as a justification for introducing such legislation then it is important that the legislation should be aimed at reducing the perpetration of rape in Zimbabwe, and thus protecting women from violence. In light of this, it is important to acknowledge that research suggests that increasing the severity of sentences does not seem to have a significant deterrent effect on the rate of commission of crimes targeted by the increased sentences.[78] Sloth-Nielsen and Ehlers' 2005 paper assessing the impact of South Africa's minimum sentence legislation concludes that 'at present, there is little reliable evidence that the new sentencing law has reduced crime in general, or that specific offences targeted by this law have been curbed'.[79] A number of studies have suggested that the severity of a punishment may have less influence on its efficacy as a deterrent than the certainty that a punishment will be administered and the celerity of its administration.[80] Therefore, if deterrence is the goal, it may be more effective to focus on streamlining the criminal justice system to ensure the swift and certain administration of justice in rape trials, rather than to increase sentences.

Therefore, in reaching its decision on whether to introduce mandatory minimum sentences, Zimbabwe's legislature will need to balance the importance of sending a strong message to society about the seriousness of the crime of rape, with the lack of conclusive evidence on the deterrent effect of such legislation.[81]

Addressing misconceptions about rape

Whether or not the legislature decides to adopt mandatory minimum sentencing, Zimbabwe's sentencing guidelines must be amended to avoid the perpetuation of misconceptions about rape. It is submitted that either section 65(2) be amended such that 'the degree of force or violence used in the rape' and 'the extent of physical and psychological injury inflicted upon the person raped' are removed from the list of factors that judges must take into account when sentencing. Alternatively, it should be specified that these factors may only be used as aggravating circumstances, because the way in which these factors have been applied by judges – as mitigating circumstances when they are not present – undermines the inherently violent and forceful nature of rape. It may be necessary for the legislature to go as far as the South African legislation and explicitly state that the lack of apparent injury to the complainant may not be used as grounds for reducing a sentence. Judicial training and education, as required by the due diligence standard,[82] may also be necessary to address judges' misconceptions about rape.

Conclusion

It is clear that the new Constitution could have a significant impact on the fight to end violence against women in Zimbabwe, through the reform of the country's criminal law relating to rape. The right to

freedom from all forms of violence demands that the criminal law properly acknowledges women's lived experiences of sexual violence, ensures a smooth and non-discriminatory prosecutorial process, and administers appropriate punishments to those who have perpetrated rape. The state's obligations ushered in by the new Constitution to respect, protect, promote and fulfil women's right to freedom from violence gives added weight to the urgency of the law reform process. While comparative examples from the South African context provide useful guidance for that process, it remains to be seen what will be done in the Zimbabwean context, where the courts and the legislature face the challenges of operating in a highly politically contested environment with a severely depressed economy and a history scarred with violence.

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Notes

1 The author would like to thank Dee Smythe, Kelley Moult and Chloë McGrath for helpful comments on earlier drafts of this article.

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48 Constitution of Zimbabwe, section 46(1)(a) (emphasis added).

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65 Full text of debate on motion on mandatory sentence for rape, including statutory rape, of not less than thirty years and appropriate sentences for other forms of gender based violence in Parliament 5 February 2014 – 22 July 2014, compiled by Fungayi Jessie Majome MP.

66 Criminal Law (Codification and Reform) Act, section 65, chapter 9:23.

67 *S v Dhliwayo* [1999] JOL 4922 (ZH).

68 Seven years' imprisonment, of which two and a half years were suspended for five years.

69 *Nemukuyu v S* [2010] JOL 26232 (ZH).

70 Twelve years' imprisonment, four of which were suspended for five years.

71 *Nemukuyu v S*, 10.

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81 There are, of course, other justifications for and objections to the adoption of mandatory minimum sentences, not discussed here, which the legislature will need to take into account.

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Previous issues

The articles in this edition of *SACQ* reveal the extent to which the promise of the democratisation of rural South Africa of the 1990s has turned to bitter disappointment for residents of mining areas in the North West province. Contributors to this edition are historian, Jeff Peires; SWOP researcher Sonwabile Mnwana; Centre for Law and Society researchers Boitumelo Matala and Monica de Souza; and Legal Resource's Centre attorney, Wilmien Wicomb. The edition is guest edited by Mbongiseni Buthelezi.

In this special edition of *SACQ* contributors assess the functioning of the criminal justice system over the past 20 years. Gail Super theorises about the consequences of locating crime combatting as a 'community' function. Julia Hornberger argues that the police need to change their approach to incidents of public violence. David Bruce assesses state responses to corruption, and suggests why these may be failing. Khalil Goga looks at the institutions to address organised crime. Lorraine Townsend and her colleagues assess court services to support child witnesses. Jean Redpath shows that punitive bail and sentencing practices underlie the persistent problem of prison overcrowding and Elrena van der Spuy and Cloe McGrath assess the Judicial Inspectorate of Correctional Services.

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