South Africa:
An APRM Submission

Joint submission to South Africa's National Governing Council, highlighting significant governance questions raised by the African Peer Review Mechanism (APRM)

The Institute for Security Studies (ISS)

The African Institute of Corporate Citizenship (AICC)

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PLEASE NOTE THAT ISS ONLY WISHES TO BE ASSOCIATED WITH THE SECTIONS ON CRIMINAL JUSTICE AND CORRUPTION.

ABOUT THIS REPORT

This report is a joint submission to South Africa's African Peer Review Mechanism (APRM) National Governing Council (NGC) by the South African Institute of International Affairs (SAIIA), the Institute for Security Studies (ISS) and the African Institute of Corporate Citizenship (AICC). It was prepared between November 2005 and February 2006.

The issues examined in this report stem from a desk-based analysis of a wide range of written sources, including key books, journal articles, media reports, international agency reviews, personal interviews, as well as South African academic, NGO and government assessments. Attempts were made to use government's own assessments of problems, propose solutions wherever possible and systematically note the ways in which various aspects of governance continue to be affected by the nation's apartheid legacy.

A Guide to Big Issues: While acknowledging the considerable challenges that the country's first democratic government faced in 1994, the significant progress made and successes achieved since the demise of apartheid, APRM is not meant to be a scorecard to show how one country is better or worse than others. Rather it is meant to be part of a constructive, broad public dialogue about where the gaps in governance are and how they can best be addressed.

The focus of the report is not on individuals, but constitutional and legal systems. Where possible, arguments are grounded in actual requirements imposed by the international standards and codes that APRM expects member states to abide by. The report also brings to bear experience from other countries that have undergone peer review, lessons from recent African governance crises and acknowledged examples of global best practices. Where appropriate, the report tries to offer practical recommendations to address these big issues within the text. It does not, however, attempt to develop a comprehensive Programme Action based on these issues.

Report Structure: The report has three major sections: Democracy and Political Governance; Economic Governance and Management; and Corporate Governance. Given the time constraints, SAIIA and its partners strategically chose to make a submission on these broad areas, reflecting their collective research strengths and experience. The report therefore does not deal explicitly with one area of the APRM Self-Assessment Questionnaire (SAQ), namely Socio-Economic Development. Although socio-economic issues are of great public concern, it was not possible to examine health, education, welfare, sanitation, housing and other issues, given the time allotted for the South African review. However, problems in delivering services in these areas are all linked by systemic weaknesses in local governance, and receive special attention in the Economic Governance and Management section. That section also devotes considerable space to an analysis of systems to combat corruption and ensure oversight.

Each section begins with an overview. In general, issues are assessed in the order that they appear in the APRM self-assessment questionnaire, but this submission has not attempted to answer every APRM objective or question. In many cases, issues of particular relevance to South Africa are included even though they are not directly mentioned in the APRM documents. For example, APRM mentions only briefly judicial and parliamentary independence and effectiveness. Given their importance in South Africa's democratic system, both have been given in-depth analysis.

The Democracy and Political Governance section omits extensive discussion of conflict prevention (Objective 1) or human rights issues (Objectives 3, 7, 8 and 9). Due to generally sound economic and fiscal management processes and procedures, especially at the national level in South Africa, the Economic Governance and Management section has chosen instead to concentrate on the critically important subjects of local government service delivery and corruption and oversight, which both examine whether public funds are efficiently utilised. Important governance issues that do not slot neatly under any particular APRM Objectives are grouped at the end of each section (for example black economic empowerment in the Corporate Governance section).

The headings introducing each point try to frame the issue accurately and crisply, and allude to the solution to resolve the issue.

Contributors & Acknowledgements

The bulk of the work on this report was carried out by the researchers on SAIIA's Nepad and Governance Programme: Ross Herbert, Africa Research Fellow, who heads the programme; Steven Gruzd, who led the research team drafting the report and wrote the corruption and oversight material in the Economic Governance and Management section; Peter Farlam, who co-authored the corporate governance section and contributed to editing; Peroshni Govender, who wrote the judiciary section; and Helen Papaconstantinos, who co-wrote the local service delivery section with Ross Herbert. Tim Hughes, who heads SAIIA's SADC Parliamentary Programme, wrote much of the material on political governance and on parliament; Laura Lopez Gonzalez (SAIIA research volunteer) and Luleka Mangquku (SAIIA Deputy Publications Manager), conducted much of the background research. Thanks go to SAIIA's Director of Studies Neuma Grobbelaar, Chief Operating Officer Tom Wheeler, National Director Elizabeth Sidiropoulos, and other SAIIA staff members for their valued inputs.

The report includes contributions on the criminal justice system from Antony Altbeker, Senior Researcher at the ISS. The corruption and oversight material in the Economic Governance and Management section relies heavily on work by Hennie van Vuuren, Senior Researcher at ISS.

The Corporate Governance section draws on contributions from Dan Sonnenberg, Nkosi Ndlovu, Laurel Steinfield, Robert Faltermeier and Paul Kapelus at the African Institute of Corporate Citizenship, particularly focused on corporate social responsibility.

Note that all amounts expressed in dollars ($) refer to US dollars.

KEEPING PERSPECTIVE ON 12 YEARS OF FREEDOM

> *The inspiring perspective about our future shared by the majority of our people derives from what our country has achieved first to overcome the obstacles to freedom we faced before 1994, the advances we have made since then to consolidate our democracy, while promoting non-racism and non-sexism, the progress we have made to alleviate the poverty afflicting millions of our people, and the strides we have made to expand and modernise our economy.*
>
> President Thabo Mbeki
> State of the Nation Address, 3 February 2006

Almost twelve years into democracy, post-apartheid South Africa has defied the cynics to emerge as one of the best-governed countries in Africa on any number of indicators. Today, it is difficult to imagine that South Africa ever stood at the precipice of civil war in the run-up to the historic elections of 27 April 1994. Although many analysts and observers describe South Africa as having undergone a "miracle transformation" since 1994, this characterisation reduces the exercise to one that implies "divine" engineering, rather than a process whose outcome was by no means clear even after the elections.

The successful transition was the result of bold and prudent leadership, pragmatism, consensus-building and hard work. Leadership was evident not only at the highest echelons of political power, but equally throughout society – the business community, the trade unions, political parties of all persuasions, and religious institutions.

At the threshold of liberation, the country faced a number of challenges: managing the political transition; stabilising the economy; securing credibility in, and the confidence of, the international environment, both politically and financially; creating and consolidating respect for democratic institutions; developing and implementing policies to address the political and socio-economic legacies of apartheid and the huge income and educational inequalities it had spawned; and constructing a South African nation, based on a common value system.

On the political front, the country crafted one of the most progressive constitutions in the world (the tenth anniversary of which we are celebrating this year). The government faced a legislative challenge of removing apartheid-era laws from the statute books and ensuring that the new laws were compliant with the provisions of the constitution.

Our democracy is vibrant. There is respect for the rule of law. Elections are well managed, free and fair. Judicial independence is upheld and respected. There is an impressive array of oversight institutions. Freedom of expression is protected and practised. There is healthy debate in the media and more broadly in civil society about the burning issues of the day – from transformation and black economic empowerment to corruption and foreign policy. The foundations of a strong constitutional state have been laid.

On the economic front, the statistics paint a very clear picture of progress: In 1994, South Africa had just begun emerging out of the longest period of economic recession since the Second World War. The inflation rate, which had been in double digits since 1974, had dropped to below 10% in 1993 and averaged 8.8% in 1994. The budget deficit in 1993/94 was 10.2%, but by 1994/95 it had started declining, to 6.4%.

By the third quarter of 2005, South Africa had experienced the longest period of uninterrupted economic growth since the current upswing started in 1999 – 24 consecutive quarters of growth. In addition, South Africa's long-term foreign currency debt rating had improved dramatically from BB (high risk, speculative grade rating) in 1994 to BBB+ in 2005 (investment grade rating). The inflation rate was 3.4%. The budget deficit had dropped significantly, to 1.5% in 2004/05.

At the outset the country adopted prudent monetary and fiscal policies, which were reflected in the positive profile that South Africa has in the international markets. This has allowed the government the flexibility now to adopt a more expansionary fiscal approach, reflected in the discourse on the developmental state since 2004. Our democracy's major constraint in meeting the developmental objectives is the lack of capacity to spend the allocations – to which the declining budget deficit is testimony.

The declining deficit is also due to the ability of the South African Revenue Service to broaden the tax base, while providing tax relief and improving the efficiency of tax collection, and thus exceeding its annual revenue targets. South Africa has also effectively avoided the creation of dependency on foreign aid, which accounts for less than 1% of GDP.

Credit should also be given to the government for adjusting its broad economic policies to deal with the shifting priorities. One may argue that the imperative in 1994 was to normalise and stabilise the economy. Although this came at the expense of poverty alleviation and job creation, it allowed the state to establish a solid economic and fiscal foundation upon which subsequent expansion could be built. The ability to move to a developmental state model is largely the result of the policies of economic stabilisation the government pursued from 1996 onwards.

Investment is increasing and companies are becoming ever more aware of their roles and responsibilities to society and communities. The South African private sector has also changed the business landscape in many parts of the continent where they have invested.

On the socio-economic terrain, the lives of millions have been transformed through the supply of better houses, electricity and water, roads, schools and hospitals. South Africa's middle class has grown considerably, although the income differential between rich and poor has widened, partly a result of the high unemployment rate and jobless growth of most of the 1990s.

South Africa has given energy and impetus to recreating Africa and Africa's relations with the rest of the world. It has also made input on, and played a leading role in, the development of international regimes on disarmament and arms control.

While the African Peer Review Mechanism (APRM) is not designed or intended to compare governance levels between countries at different stages of development, South Africa certainly provides many examples of best practice for other countries on the continent, and is indeed a model for Africa.

To illustrate this, the United Nations Economic Commission for Africa (UNECA) asserted in the *African Governance Report 2005* that:

> A core element of good governance is a capable democratic state – a state embedded in the public will, relying on legitimacy through the democratic process, with strong institutions promoting the public interest. Botswana, Mauritius and South Africa, with fairly capable democratic states and good

governance, have promoted economic and human development better than countries without these characteristics. [1]

South Africa's governance footprint (darker grey) exceeds the average for the 28 sample countries used by UNECA (light grey) on every single measurement.

Along with the successes have come governance challenges as well. First, democracy is not a finite event, but a system that has to be constantly nurtured and which requires all citizens to remain vigilant.

Many obstacles stem from the apartheid era, while others are newly evolved. Violent crime continues at unacceptably high levels, undermining development efforts and confidence in the country. There remains a considerable skills deficit at all levels of government, and in the private sector. Despite sustained economic growth, prosperity has not been equitably distributed and the gap between the country's "two economies" – one for the rich and the other for the rest – is widening. Government continues to struggle to provide quality services to all the people, and tensions have flared in municipalities across the country.

Tensions within the ruling alliance have dominated political discourse, and raised serious questions about the use and abuse of power, and the effect of party leadership struggles. Conflicts of interest by politicians, private political party funding and public procurement processes are critical issues. Serious questions have been raised about parliament's role as the key instrument to check the power of the executive branch of government in the wake of internal corruption scandals such as "Travelgate" and its handling of the Arms Deal enquiry. While the independence and integrity of the judiciary is indisputable, concerns have emerged over the pace of transformation to more accurately reflect the demographics of the country.

[1] "The State of Governance in 28 African Countries", *African Governance Report 2005*, UNECA 2005, p. 26.

By thoroughly and thoughtfully scrutinising several interrelated aspects of governance – political, economic, corporate and developmental – APRM provides a unique opportunity for South Africans to take stock of how far the country has come and how far it still has to go. It is important to acknowledge strengths and celebrate successes, but the real value of the process of peer review lies in identifying challenges and systemic weaknesses. Finally, and perhaps most importantly, it is critical to arrive at an agreed vision of how to move forward. Indeed, the value of the APRM process in each country is the development of an action plan and timeframe for addressing the deficiencies identified.

This report is intended as a constructive contribution to the APRM process in South Africa. By its nature, the bulk of the text emphasises governance gaps and deficiencies, but this should be seen in the context of a well-governed country that is always striving for improvement, and that did not start with a clean slate in 1994.

The report analyses systems and institutions, rather than individuals in any particular position. Its approach is to identify gaps in laws, rules and practices that can (and/or do) create incentives for individuals or groups to exploit. It attempts to frame each issue precisely, cite compelling evidence of the problem, analyse the problem and – where possible – suggest practical and achievable solutions.

Elizabeth Sidiropoulos
National Director
The South African Institute of International Affairs
February 2006

EXECUTIVE SUMMARY

SECTION 1: DEMOCRACY AND POLITICAL GOVERNANCE

Constitutional Democracy, Elections, Rule of Law

Finalised in 1996, South Africa's constitution remains universally admired and the country now explicitly recognises the document's supremacy rather than that of the executive or legislative branch. Falling voter participation remains a concern, but each of South Africa's three national elections has been regarded as free and increasingly efficient. The right to form political parties is strongly exercised, with more than 100 registered parties. Government has begun aggressively talking about service delivery and fighting corruption, but there are major accountability problems built into the national political system. In particular, the party-list system impedes accountability to voters, results in parliament being subservient to the executive and contributes to public anger that elected officials are responsive to party politics rather than citizen interests.

The Criminal Justice System

While not expressly covered in the APRM, criminal justice is discussed extensively because of its bearing on human rights and the rule of law. Despite South Africa's notorious reputation, crime levels are falling but levels of violent crime – especially robbery and rape – remain unacceptably high. Human rights are broadly respected, although violence against women and children are concerns.

The essential policy challenge confronting government in this realm is how to make the criminal justice system more efficient.

- ***Over-centralisation of system?*** With a highly-centralised management model of criminal justice in South Africa, day-to-day oversight is often compromised. Unfortunately, proponents of increased centralisation are growing, as seen in the debate about the role and location of the Directorate of Special Operations (the "Scorpions") and the Metro Police agencies. South Africa should reopen debate about the desirability of the current centralised model, and, in particular, explore ways of ensuring more formal legislative accountability at a local level.
- ***Weaknesses in oversight of the criminal justice system.*** This is hindered by unclear mandates, resource constraints, poor coordination between agencies and a general lack of emphasis on oversight. The removal of the police internal anti-corruption unit is a concern, given allegations of police involvement in crime or corruption.
- ***Unbalanced resourcing of various branches of the criminal justice system.*** While other difficulties regarding criminal justice exist – such as the contribution of drug and alcohol use to crime, treatment of youth offenders, and the problems of policing illegal immigration – there has been a recent rise in arrests. This increase may be due to the unbalanced resourcing of police with personnel numbers growing faster than justice, prosecution, court and prison staff. Increases in police resources need to be balanced by increases in the other branches of criminal justice.

Separation of Powers – The Judiciary

South African courts, widely regarded as independent from the executive, have gained international recognition with their landmark decisions in a number of human rights matters. Nevertheless, the judiciary faces a number of challenges:

- ***Progress has been made in transforming the bench to be more representative of South Africa's population, but it still has a long way to go.*** While transformation is essential, it is important that *appointments are made legitimately and on merit* to avoid a situation in which new appointees are loyal to those who appointed them. Attacks on a slowly-transforming judiciary can be perceived as attempts to undermine judicial independence, pressurising judges to align with government programmes and policies through their rulings.
- ***The judiciary also seems to face other possible threats to its independence***. Recent draft legislation was introduced providing for the establishment of a formal complaints and disciplinary mechanism for judicial officers, and to remove administrative functions from the judiciary. Critics argue the legislation intrudes on judicial independence as the threat of disciplinary action gives government or litigants an opportunity to influence judicial decisions. Serious thought must be given to the benefit such a formal complaint mechanism will have in advancing court integrity, public profile and deterring corruption. Amending legislation may not necessarily be the best way to address issues of efficiency in the judiciary (and elsewhere in South Africa's governance systems).
- ***Lower courts suffer from scarce resources, high workloads and poor accounting practices***.

Separation of Powers – Parliament

The post-1994 parliament faced many challenges. The institution sought to retain what was functional under the previous parliamentary system, melding this with new rules, committees, and a transparent *modus operandi.* Meanwhile, many newly elected MPs were unfamiliar with parliament's inner workings. However, parliament repealed and transformed some 800 apartheid-era laws, drafted new, progressive/transformative legislation while fleshing out its new constitutional powers to review government policy, bills and departmental operations.

Parliament's biggest challenge has been developing, understanding and implementing its oversight and accountability role.

- In South Africa, ***no complete separation of powers exists*** – the executive branch is drawn exclusively from parliament and largely from the majority party. Except for the president, all cabinet members and deputies are MPs. The country's proportional representation party-list electoral system ensures tight caucus loyalty and militates against MPs' adopting independent positions – questioning a minister is not a quick way to move off parliament's back benches. Prior to and since the Standing Committee on Public Accounts (Scopa) arms deal hearings, no ANC MP has critically questioned a cabinet member, even on matters such as HIV/Aids or the death penalty.
- ***Parliament's independence has been undermined, particularly with regard to Scopa***. Scopa is one of parliament's most important committees, monitoring government expenditure and acting as taxpayers' first line of oversight. This report contends the committee lost a great deal of credibility in its handling of the arms deal.
- ***Structural constraints undermine effective committee operation and oversight***: Parliamentary committees are designed to increase legislative efficiency, deepen

parliament's deliberative function, maximise public participation, and exercise effective oversight of the executive. Departments and committees struggle to define their relationships. Departmental briefings are poorly executed. Many committees lack capacity; and there are few formal channels or requirements for executive-to-committee feedback and *vice versa*.

- ***Parliament's ethical credibility is increasingly been questioned, despite a strong code of conduct.*** There is no provision for expelling MPs who contravene ethical codes. The Ethics Committee's permissive behaviour displays questionable political will to deal with wayward MPs, particularly from the majority party. While a Register of Members' Interests exists, private sections of the register are closed to both media and civil society. The "Travelgate" scandal – which detailed abuse of travel vouchers by MPs and travel agents – remains unresolved. There is also controversy over the accounting officer/whistle-blower's dismissal, and the amounts allegedly involved are increasing.

SECTION 2: ECONOMIC GOVERNANCE AND MANAGEMENT

Corruption and Oversight

In less than 12 years, South Africa's democratic government stabilised and stimulated the economy, and placed it on a path of sustained and incremental growth. The government has promoted sound and transparent macroeconomic policies and improved public finance management. The report concentrates on fiscal management and how South Africa fights corruption and provides oversight in this section.

With the legal system considerably strengthened since 1994, South Africa ranks among the best African countries in terms of perceptions of corruption but has exhibited a disturbing downward trend over the last decade.

- ***South Africa lacks one supreme, independent corruption-fighting body – contrary to APRM guidelines – relying instead on improved coordination between several graft-fighting institutions***. National-level bodies are relatively effective in contrast to provincial and local oversight systems. Most provinces have experienced major corruption allegations and scandals, and there is weak reporting of corruption at municipal level by community and media organisations.
- ***Top anti-corruption bodies are perceived as not impartial and independent, and some decisions on who to prosecute seem driven by a political agenda.*** (These include the Public Protector, the Auditor-General, and the National Prosecuting Authority.) Examples of this are seen in the handling of the arms deal, the Jacob Zuma corruption case and senior figures' failures to abide by wealth declaration rules. Suspension of party members accused of corruption or any indiscretion during investigations and court proceedings should be introduced.
- ***Many anti-corruption bodies face capacity constraints***. These include the Public Protector, the Commercial Crime Unit and Parliament's Ethics Committee, which have critical oversight and anti-corruption roles to carry out.
- ***Regulation of funding of political parties from private sources does not exist***. It is thus almost impossible to determine whether procurement awards or other government actions are based on political donations. Regulation is critical.
- ***The absence of post-employment restriction or "cooling off" period between resignation from government and assuming a private sector job gives rise to potential "insider***

knowledge" benefits to individuals. Business ventures with government involving those related – or intimately connected – to ministers and MECs, and other procurment irregularities, require urgent attention.

- ***In practice, whistle-blowers in both private and public organisations are not protected, notwithstanding the Protected Disclosures Act.*** This is partly because of low public awareness of the act, its cumbersome appeal process, and the lack of financial compensation. This law is being reviewed.
- ***Poor public awareness of laws relating to right of access to information, money laundering, and whistle-blowing.***
- ***Government's increasing sensitivity to media criticism***. Although government itself has recently placed significant emphasis on fighting corruption, it has regularly charged that the media's focus on corruption is a manefestation of white owners' intentions to discredit government. Media freedom is protected and journalists are not physically threatened but some media organisations have experienced harassment through other methods, including court orders.

Special Focus: Local Government Service Delivery

Since 1994 the government has restructured and amalgamated previously racially segregated local governments. Its goal was to make them more effective in delivering on socio-economic development but amalgamation created unweildy structures and set in motion rampant political jockeying for position and patronage politics. It has recognised the "capacity deficit" and that many local government officials have abused their positions for self-enrichment. It has undertaken a number of initiatives and reforms to address these problems. But local government service delivery continues to be the Achilles Heel of the government's aim to provide a better life for all.

- ***There is a raft of very competent and comprehensive legislation and policies on local government.*** What is lacking is *effective monitoring* (in all three spheres of government), and *sanctions* where local governments have not complied with financial, tendering and other procedural and reporting requirements. This last point undermines the comprehensiveness of the regulatory system.
- ***Local governments fail to manage funds, implement actions and adhere to regulations in fair, transparent and effective ways.*** This is the result of a lack of technical and managerial *skills*; appointments that are not always based on *merit*; and burdening the councils with duties but not enough capacity. Corruption has also pervaded many local authorities.
- ***Local government should be more responsive to people's needs because it is closer to them.*** However, the party-list system, lack of public scrutiny (beyond major cities) and low citizen participation combine to make local government far less accountable and far more prone to mismanagement than other tiers of government. Citizen perceive that officials are not responsive to complaints and ignore civic input. This in turn has a deleterious effect on their views about democratic practices and contributes to a protest culture. The service ethic must be constantly evaluated.
- ***Local government depends on national government for a large part of their revenue stream***. This means they are not necessarily accountable to their local constituencies, and the funds may not be sufficient for projects they are expected to implement. Citizens often blame councillors for the broader failures of government to allocate resources.

- ***Amalgamation and integration of local governments have created structural weaknesses.*** Distinctions between district and local councils are often blurred. Many district councils cover very large geographical areas, making communication with their constituencies difficult. Some amalgamations of well-functioning smaller municipalities have resulted in struggles for political control and jobs, and also added logistical problems such as merging incompatible accounting systems.

SECTION 3: CORPORATE GOVERNANCE

South Africa is a world leader in codes of good corporate practice and advancing the global debate about corporations' roles in society.

- ***South Africa's regulatory framework is robust, but enforcing rules on corporate behaviour, workers' rights or the environment remains weak.*** Various bodies tasked with monitoring corporate behaviour are severely understaffed. South African companies working abroad are completely free from local laws with the exception of anti-corruption legislation.
- ***Government lacks the capacity to enforce labour and employment equity regulations.*** Poorly regulated industries engage in unhealthy labour practices, for example child labour in the agricultural sector. Whistle-blowing laws fail to protect those reporting workplace sexual harassment. Legislation and corporate codes can diminish but not eliminate unethical or illegal behaviour. *A balance must be maintained between regulating business and fostering innovation and entrepreneurship.*
- ***The costs to business of complying with regulations – red tape – are extremely high, and disproportionately burdensome on small and medium enterprises.*** The Companies Amendment Bill – due before parliament in 2006 – has drawn criticism from financial professionals and organised business for unclear definitions, harsh liabilities on delinquent directors, and legislating business-inhibiting corporate governance provisions. But the bill has already been delayed for many years.
- ***The corporate sector has implemented corporate social investment programmes, but these are notoriously difficult to measure.*** Data is largely based on unverified self-declarations by firms, which emphasise amounts spent rather than impacts. Most companies still describe their sustainability activities in an aspirational, anecdotal and episodic manner offered for public-relations purposes. The JSE's still developing Social Responsibility Index is a novel way to encourage "triple bottom line" reporting (on economic, environment and social performance) and corporate governance for listed companies but remains under-subscribed and poorly promoted.
- ***Corporate South Africa tends to deal with HIV/Aids' effects on productivity without engaging in debates around its causes.*** While many companies voluntarily implemented HIV/Aids management programmes, smaller companies tend to believe they are not affected by HIV/Aids or that they lack the resources to deal with the virus.
- ***Laws on environmental sustainability have been developed but many companies still do not have an understanding of what "sustainable development" means***. Pollution of air and water is a growing concern.
- ***Skewed racial and gender representation at board level***. Companies still lag in ensuring that boards are broadly representative of the country's demographics.

- ***Black Economic Empowerment poses challenges.*** BEE is necessary for long-term political order and economic growth. However, it has several significant dangers that are increasingly on display. These include: enrichment that only affects a few, deals financed with unsustainable debt, compromises in corporate governance principles, an emphasis on share ownership over real skills transfers, and conflict of interest/corruption issues in the form of fronting or giving major stakes for free to serving government officials or those who have just left government.

SECTION 1: DEMOCRACY AND POLITICAL GOVERNANCE

About this Section

The APRM includes nine objectives under its Democratic and Political Governance Section, listed in the box at right. Because of the inadequate time afforded for public analysis and the nation's widely acknowledged good performance in protecting human rights, this report does not discuss conflict prevention (Objective 1) and human rights (Objectives 3,7,8 and 9). There are important issues of concern, particularly in the areas of violence against foreigners and women and children, but their causes and cures are complex and better left to specialist institutions.

APRM Objectives: Democracy & Political Governance

1. Prevent and reduce intra- and inter-country conflicts
2. Constitutional democracy, including periodic political competition and opportunity for choice, the rule of law, a Bill of Rights and supremacy of the Constitution
3. Promotion and protection of economic, social and cultural rights, civil and political rights as enshrined in African and international human rights instruments
4. Uphold the separation of powers, including the protection of the independence of the judiciary and of an effective parliament
5. Ensure accountable, efficient and effective public office holders and civil servants
6. Fighting corruption in the political sphere
7. Promotion and protection of the rights of women
8. Promotion and protection of the rights of children and young persons
9. Promotion and protection of the rights of vulnerable groups including internally displaced persons and refugees.

Source: APRM Country Self-Assessment Questionnaire

The APRM clearly states that it seeks to encourage African states to think about substantive democracy as much more than the mere casting of ballots. Good political governance occurs when governments create and foster efficient, accountable institutions that improve people's lives and empower citizens to choose their leaders. The APRM requires participating states to closely examine how equitable and effective their political systems are. In the long term, perceived or real unfairness can be one of the major causes of conflict in a society, as evidenced by the collapse of the rule of law in countries like Rwanda, Somalia, Sierra Leone and Ivory Coast. In those countries, constitutional systems proved inadequate to prevent individuals and groups from abusing the political system to their own short-term advantage.

The analysis that follows takes a broader view of democracy and attempts to examine not only the declared intention of legal and constitutional structures but also whether they live up to their intended roles, given the real pressures imposed by poverty, economic competition, and the various temptations of power, politics and human nature, which constitutions are meant to guard against.

APRM Objective 2: Democracy & Elections

Constitutional Democracy Crystallising

South Africa has held three exemplary, free and fair and peaceful national elections since 1994, and will hold its third local government elections in March 2006. Its constitution, finalised in 1996, is progressive and universally admired. Parliament has revised or replaced approximately 800 apartheid laws to ensure that all South Africans are treated fairly and equitably and that their rights are protected.

APRM Democracy and Political Governance

Objective 2: Constitutional democracy, including periodic political competition and opportunity for choice, the rule of law, citizen rights and supremacy of the constitution

Question 1 under this objective asks: "In your judgment, does the political system as practiced in your country allow for free and fair competition for power and the promotion of democratic governance?" To distinguish between the ***principle*** and the ***practice,*** the principles underpinning the political system will be laid out and evaluated, and then the practice measured against them. South Africans now enjoy *de jure* entrenched, extensive and robust liberal political rights, enshrined in the constitution.[2] The preamble of the constitution asserts the centrality of "democratic values, social justice and fundamental human rights". Democratic South Africa, unlike its predecessors, explicitly recognises the supremacy of the constitution, rather than the executive or legislative branch. The constitution was adopted, *inter alia*, to "lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law".

Chapter One of the constitution asserts the centrality of human dignity, the achievement of equality and the advancement of human rights and freedoms; and universal adult suffrage, a national common voter's roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

Political rights of the individual are enshrined and protected within a Bill of Rights[3] (Chapter Two) of the constitution, specifically within section 19, which asserts:

(1) Every citizen is free to make political choices, which includes the right -

(a) to form a political party;

(b) to participate in the activities of, or recruit members for, a political party; and

(c) to campaign for a political party or cause.

(2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the constitution.

(3) Every adult citizen has the right -

(a) to vote in elections for any legislative body established in terms of the constitution, and to do so in secret; and

(b) to stand for public office and, if elected, to hold office.

[2] Constitution of the Republic of South Africa, Act 108 of 1996 (Assented to 16 December 1996 – Date of commencement 4 February 1997).

[3] The Bill of Rights also contains a "Table of Non-Derogable Rights".

The strong Bill of Rights was deliberately intended by the drafters to achieve three things: to grant inalienable rights to those previously without them; to grant *de jure* rights to those who thought they had them under the previous regime; and ensure the rights of all citizens are upheld.[4]

The Chapter One founding provisions of the constitution establish the supremacy of the constitution. Section 3 states: "This constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

The constitution may only be amended by parliament. Given its overarching significance, an amendment to Chapter 1 (the founding provisions) of the constitution requires a Bill supported by a higher majority (75%) approval of all members of the National Assembly, together with support of at least six of the nine provinces in the National Council of Provinces (NCOP) (see below for fuller description of NCOP). An amendment to Chapter 2 (the Bill of Rights) requires a Bill supported by two thirds of the members of the National Assembly plus the support of six of the nine provinces in the NCOP. Any other provision of the constitution may be amended by a Bill passed by two thirds of the members of the National Assembly, but requiring the support of six of the nine provinces in the NCOP if the proposed amendment affects the NCOP, or relates to a matter directly affecting the sphere of authority of the provinces.

Group Rights Downplayed: The constitution deliberately enshrines few collective or group rights. Three reasons emerge: a rejection of the segregationist apartheid ideology that was built on group differences; the collapse of Marxism and socialism in the early to mid 1990s (when South Africa's constitution was being drafted) and with it the notions of class rights; and the liberal-democratic desire through a Bill of Rights to prevent state tyranny and domination. Indeed, like the "historically corrective" constitutions of the United States, Germany and Japan, the drafters of the South African constitution explicitly sought not only to redress past injustices, but also to minimise the potential of repeating political excesses or tyranny.

Traditional Leadership Recognised: Chapter 12 of the constitution, however, recognises the institution, status and role of traditional leadership and makes provision for a "House of Traditional Leaders", as well as a Council of Traditional Leaders. Subject to the provisions of the constitution, Customary Law is recognised and practiced. Insofar as customary law and practices recognise traditional social formations such as monarchy and clanship, limited "group rights" and practices are protected through the constitution.

NCOP Acknowledges Regional Interests: Furthermore, parliament's second chamber, the National Council of Provinces, has ten representatives from each of the nine provinces. While this house was not established to give effect to "group rights", it gives certain powers to the provinces in a way that *de facto* acknowledges regional interests. Historical patterns of settlement and the social engineering of grand apartheid, which sought to balkanise the land mass of South Africa along racial and ethnic boundaries, has resulted in the majority of the nine provinces exhibiting distinctive ethnic social and political patterns. These are most pronounced in the KwaZulu-Natal, Western Cape and Eastern Cape provinces. Indeed, constitutionally, each provincial government is tasked with promoting regional cultural matters such as language.

[4] Discussion with Professor K Asmal, Cape Town, 29 December 2005.

State Institutions Supporting Constitutional Democracy

South Africa has created several mechanisms and institutions both to protect and to give effect to the extensive and robust rights enshrined within its constitution. These "Chapter Nine institutions" (so named because they are laid out in that chapter of the constitution) are designed to support democracy and hold executive power in check. Section 181 of the constitution holds that these institutions must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice. Furthermore, other organs of state, through legislative and other measures, must assist and protect these institutions to ensure their independence, impartiality, dignity and effectiveness. No person or organ of state may interfere with the functioning of these institutions. These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year. The six Chapter Nine institutions carry out the following functions:

The Public Protector is appointed for a seven-year term. S/he must be publicly accessible and is tasked with investigating public complaints against improper or prejudicial behaviour or policy within the state and public service. However, the Public Protector cannot investigate court decisions. (See the **Economic Governance and Management** section, page 95 for a fuller discussion).

The South African Human Rights Commission has the vital and onerous task of protecting and promoting human rights in South Africa. It has investigative and corrective powers and is also tasked with a research and educative role. Furthermore the constitution requires all organs of the state to provide an annual audit regarding the achievement and protection of rights within the ambit of the Bill of Rights. To date, the most high profile cases dealt with by the SAHRC have been those investigating complaints of racism brought to it.

The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities is tasked with protecting and promoting linguistic, cultural and religious rights of communities as prescribed by the constitution. Although such rights are broadly (or even vaguely) defined, the Commission is tasked with the aims of promoting recognition and respect for communal cultural interests with the overarching aim of achieving social harmony in a highly divided and unequal society. It has the lowest public profile of the Chapter Nine Institutions.

The Commission for Gender Equality is tasked with promoting gender equality throughout society and it monitors, investigates, researches, educates, lobbies, advises and reports on issues concerning gender equality. It enjoys additional powers as granted by national legislation.

The Auditor-General of South Africa (AGSA), along with parliament, is the key national governance oversight body. The Auditor-General, *inter alia*, audits and reports on the accounts of all national, provincial and local governments. Given that the Auditor-General has to report on the management (or mismanagement) of government departments to all legislatures that have an interest, the AGSA plays a potentially invaluable role in holding the executive branch to account and exposing maladministration and corruption, as well as over and under-expenditure of public funds. (See the **Economic Governance and Management** section, page 97 for a fuller discussion).

The Independent Electoral Commission is responsible for overall management and control of the conduct, counting and declaration of national, provincial and local elections. Beyond this the IEC plays a key role in voter and civic education through a host of programmes between and immediately prior to elections. Its credibility and standing are high amongst all

parties and civic groups. Additionally, IEC planning has improved with each successive poll, thereby ensuring greater efficiency on election day and subsequent vote counting. (See below for a fuller discussion).

By definition, the Chapter Nine institutions are in their infancy and unique in South African political history. Therefore it is understandable that they have all experienced teething problems. Common challenges are outlined below:

Defining their Roles in Relation to the Executive: Perhaps the most important challenge has been to define the role and ambit of the work of these institutions, particularly in relation to parliament and the executive branch. While all six institutions play some form of oversight role, they have each experienced difficulty in exercising executive oversight when tested. See the **Economic Governance and Management** section for an extended discussion of the Auditor-General's role in investigations into South Africa's vexed R34 billion Strategic Arms Procurement Package (the "arms deal").

Resource Constraints and Lack of Budgetary Autonomy: While the Chapter Nine institutions are constitutionally entrenched and their independence is guaranteed, their budgets are dependent on the treasury. It has been a frequent refrain from the Chapter Nine institutions that their budgets are too limited and restrictive. In the case of the Public Protector, resource constraints have resulted in delays in establishing offices. Such delays in establishing fully functional offices translate into a *de facto* contravention of the constitutional requirement that such institutions be publicly accessible.

Relevance and Accessibility: The Chapter Nine institutions have a mixed record in making themselves both relevant and accessible to the public. It is one thing for such bodies to carry out their constitutional role, but quite another for the public to understand and appreciate this role and thus feel empowered to approach and make use of the institutions to their fullest degree. The IEC has faced by far the greatest logistical challenges and while the 1994 election was characterised by profound difficulties, the very process of voter registration and the experiences gained in 1994 were built upon in the 1999 general election and the 2000 local government election, resulting in the 2004 national election being largely exemplary. At the other extreme, the Gender Commission and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities can claim far fewer successes.[5]

Managing Elections

Universal Adult Franchise Practised: The most important mechanism to protect and promote political rights is that of universal adult franchise. All South Africans over the age of 18 are entitled to vote in national, provincial and local elections. Voting is secret and voters are registered on a national common voters' roll. An Independent Electoral Commission (IEC), provided for in Chapter Nine of the constitution, carries out the comprehensive management and adjudication of elections. Each of the three national democratic elections in South Africa since 1994 has been conducted more efficiently than its predecessor and in a manner that is increasingly free, fair and a credible expression of the will of the people. Of concern, however, is the markedly lower turn-out for successive national elections. The third

[5] All professional sectors of society for example remain profoundly unequal with respect to women's representation. While far from satisfactory, both parliament and the cabinet have made great strides in achieving greater female representation. The South African parliament has some 34% women, one of the highest internationally while the cabinet has over 40% female representation. Women remain an acute minority in managerial and executive positions within South Africa's corporate sector.

set of elections for local government is to be held on 1 March 2006, and it remains to be seen whether this trend persists.

Election Management Maturing: The country enjoys a high degree of political literacy with strong voter turnout for national and provincial elections (though much lower rates for those at the municipal level).[6] Furthermore, polls show the majority of South Africans were not only satisfied with their electoral system but felt it ensured a plurality of voices within parliament, gave voters a way to change the party in power and aided in holding parties accountable.[7] South Africa has escaped the trappings of personalised rule; whatever apprehensions South African voters harbour against specific parties or leaders, they believe in the legitimacy of the system and remain committed to participating in the electoral process.

Elections in South Africa are becoming decreasingly contentious in their conduct, adjudication and declaration. The very credibility of the 1994 election was doubtful on a host of technical, infrastructural, behavioural and political grounds. There is a tacit belief amongst the major parties and role players in the 1994 election that vast compromises were made for the greater good of political stability in the fledgling democracy. Such compromises appear to have been most apparent in violence-wracked KwaZulu-Natal. It is a mark of the increasing maturity of the South African political landscape and its citizens that the criticisms of the Electoral Observer Missions to the most recent 2004 general election centre on purely "technical issues", including:

- The position of ballot booths had the potential of compromising the secrecy of the ballot in some places.
- The use of ballot papers that were not very distinct from each other led to confusion.
- Some voting stations used one ballot box for both the national and provincial ballot papers while others used a ballot box for each of the two different ballot papers.
- The lighting in some voting stations was inadequate.
- In a number of counting stations, there was no reconciliation of the ballot papers before counting.
- The role of party agents was not clear, as in some cases they were observed to be playing the roles of the election officials.
- Stakeholders also noted that the scheduling of the elections during the Easter holiday period had the potential to affect voter participation.
- There were insufficient numbers of domestic observers.[8]

The reasons for the steady drop in the percentage of registered voters participating in elections are open to debate, but for its part, the IEC can point to technological efficiencies such as intensive multi-media voter education campaigns and innovations such as verification of voter details via Short-Message-Service (SMS) to cellular telephones.

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[6] The Socio-Economic Survey Unit of the Knowledge System Group and the Human Sciences Research Council, "Identity documents and registration to vote," prepared for the Independent Electoral Commission, 2005.

[7] Southall R and R Mattes, Study commissioned by The Electoral Task Team, quoted in "Report of the Electoral Task Team", January 2003, p 8.

[8] See the Electoral Institute of Southern Africa SA Observer Mission: South African National and Provincial Elections 12-14 April 2004. For broader issue coverage see, Human Science Research Council, "Election Synopsis", Volume 1, Number 3, 2004, http://www.hsrc.ac.za/media/2004/4/20040407.pdf. See also the Electoral Institute of Southern Africa "Election Update 2004 South Africa", Number 8, 3 May 2004. http://www.eisa.org.za/PDF/eu_200408.pdf. For a more comprehensive overview see Laurence Piper (Ed), "South Africa's 2004 Election – The Quest for Democratic Consolidation, EISA Research Report No. 12, 2005.

Election Disputes Amicably Resolved: Like others globally, South African elections are not free from controversy. Beyond problems that cannot be settled by electoral officers at polling booths and counting centres, the IEC is the institutional body tasked with the consideration, adjudication and resolution of electoral challenges. These disputes generally fall within the ambit of the Code of Conduct as defined in Section 1 of the Electoral Act (202 of 1993) and signed by all parties contesting an election. Appeals against such adjudication or legal interpretations of such IEC dispute adjudication may be taken to an Electoral Court as provided for in Chapter 5 of the Electoral Commission Act (51) of 1996. Significantly, the Electoral Court enjoys the status of the Supreme Court. Although the Electoral Court may only adjudicate on matters of legal interpretation, its powers are considerable, as in terms of the Act it, "determines its own practice, procedures and rules". Furthermore, any legal review of an IEC adjudication conducted by the Electoral Court is required to be carried out urgently and expeditiously.

As stated earlier, elections in South Africa are decreasingly disputatious and litigious, yet several challenges emerged after the 2004 elections:

- The Inkatha Freedom Party (IFP) initially challenged the election in its entirety. The IFP contended that the IEC had failed to investigate some 42 complaints of violence and intimidation against its supporters. In Electoral Court papers, the IFP asserted that the intimidation meant that 367,000 of its supporters were unable to vote. The IFP further accused the South African National Defence Force (SANDF) of threatening its voters in the Msinga area of KwaZulu-Natal and submitted a dossier in this regard to the Minister of Defence, Mosiuoa Lekota.[9] In other countries, the involvement of the military in running elections has led to intimidation and other abuses of power by the executive. The IFP subsequently withdrew its case, asserting that it was "never its intention to spoil the celebrations of our first decade of democracy".
- The Freedom Front Plus (FF+) also lodged papers with the Electoral Court claiming electoral fraud was committed at a voting station in Welkom. The basis of the FF+ case was a discrepancy of some 500 FF+ votes between national and provincial governments in the same polling station.
- The African Christian Democratic Party (ACDP) lodged the third and ultimately most significant case considered by the Electoral Court. The ACDP contended that 2,666 votes credited to the Azanian People's Organisation (AZAPO) in Khayelitsha in the Western Cape were mistakenly tallied from votes cast for the ANC. The basis of the ACDP challenge was that the ANC had gained 2,666 votes on the provincial ballot and a mere 2 votes on the national ballot. The political importance of the challenge for the ACDP was that the 2,666 votes credited to AZAPO translated into a seat gained for it and one potentially lost by the ACDP. Despite an attempt by AZAPO to prevent the Electoral Court hearing the ACDP case, the IEC lodged papers with the court acknowledging its error. This resulted in the court reversing the 2,666 votes to AZAPO, crediting the ANC with the votes and awarding the ACDP a seventh parliamentary seat and reducing AZAPO to a single seat.

The manner in which these complaints were handled by all entities, political parties, the IEC and the Electoral Court, would support the view that mechanisms and institutions to protect and promote credible elections and to resolve electoral disputes are working satisfactorily in South Africa.

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[9] See "IFP concerned that IEC has not investigated complaints", IFP Press Release 19 April 2004, http://www.ifp.org.za/Archive/Releases/190404apr.htm

Unrestricted Political Party Formation: The constitution permits the free formation of political parties and since 1994 this right has been unfettered. There are some 105 political parties registered with the IEC and currently 16 parties represented in the National Assembly. This is an increase from seven parties represented in parliament after the 1994 election, elected from among 19 parties on the ballot paper. In 2004, there were 21 parties on the ballot paper. A total of 98 parties are contesting the 2006 local polls in March, up 20% from 2000.

The growth in the number of parties over three elections can be ascribed to the incentives offered by the proportional representation party list system, the splintering and demise of the New National Party, and, more importantly, the introduction of so-called "floor crossing" legislation in 2002 (see below).

Party List System Reduces Accountability to Voters

The electoral system as prescribed in the South African constitution is merely required to be one that results in general in proportional representation. National elections provide for a party list proportional representation system in which the electorate votes for a registered party on the ballot paper and the party is then allocated seats in the National Assembly in direct proportion to the vote gained. A quota system uses a formula to determine surplus seats derived from fractional vote counting. Candidates for election are placed on a party list though a series of local, provincial and nomination electoral colleges and processes, the form of which is determined by each political party.

Parties draft three lists of candidates. Assuming a party wishes to nominate 400 candidates for parliament, two hundred of these will be on a national list of representatives and two hundred will be on a list nominated by the provinces. A second ballot paper is used for parties standing for provincial assembly elections and a corresponding list of candidates is nominated by party structures to stand for election to the provincial legislatures. These legislatures vary in size according to the population of the particular province. After the official results of election are declared and the members of the National Assembly (NA) are sworn in, the NA serves as an electoral college to elect the president, who then resigns as a member of parliament. The next highest losing candidate on the majority party list is then elected to parliament to become the 400th MP. The constitution requires that there be a minimum of 350 members of parliament and a maximum of 400.[10] The 90 members of the National Council of Provinces are not directly elected but nominated via provincial and local assemblies, again in proportion to the votes garnered for their respective parties. Provincial premiers are nominated and elected by provincial legislatures, although *de facto* the dominant party has deployed its preferred candidates and they are uncontested.

The proportional representation partly list system is simple and has served its designed purpose of ensuring that minority groups and parties have some representation. As the Kenyan and US electoral systems show, a ruling party can manipulate district boundaries in a district-based system to obtain parliamentary majorities far larger than the percentage of votes won by the ruling party. In Kenya under former President Daniel Arap-Moi, KANU was consistently able to obtain a majority in parliament with only 35% of the vote.

In South Africa, the party list system ensured that minorities were not frozen out, which was important for social and political harmony. However, there are several key weaknesses highlighted below.

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[10] For a useful and comprehensive discussion of the 1994 election see Reynolds A (Ed), *Election '94 South Africa*, David Philip, Cape Town, 1994 and of the 1999 election see Lodge T, *Consolidating Democracy – South Africa's Second Popular Election*, EISA and WUP, 2001.

The most significant criticism of South Africa's party list electoral system is the resulting lack of constituency and voter accountability. While parties have moved to allocate constituencies to respective members of parliament (MPs) and parliament itself provides some funding for constituency activity, MPs are in the first and last instance currently beholden to the party and its hierarchy, rather than to constituents (and more accurately the electorate) for their political office. This is intrinsically unhealthy for democracy and may account for the sometimes poor levels of performance of MPs and their failure to tackle issues such as poor service delivery and corruption within the state. It further accounts for parliament in general and the majority party in particular, having a poor record of executive oversight since 1994. (See also discussion of Parliament pages 54-62 and and discussion of the party list system on local government service delivery page 106).

Electoral Reform Proposals Shelved

National legislation prescribing the exact form of electoral system to be adopted in South Africa effectively lapsed after the 1999 general election. Finally in April 2002, after a considerable delay, an Electoral Task Team (ETT) headed by former politician and political analyst Dr Frederick van Zyl Slabbert, was appointed by the president to assess the existing electoral dispensation, research alternatives and to make recommendations for adoption in subsequent elections.

Opinion surveys conducted as part of the ETT revealed a number of important features. Firstly, there was overwhelming satisfaction (74%) with the electoral system and its fairness (72%) amongst the electorate. The quality of inclusivity of the electoral system (82%) was particularly valued. However, a significant majority of those polled (71%) expressed a desire to vote for a candidate from an area in which they resided, perhaps as a way to increase the personal accountability of elected officials often avoided because of the party list system. Some 64% of those questioned felt that an MP "should live close to the people they represent".[11] In this regard earlier polls had shown that a significant number of voters did not know who the MP allocated to their constituency was.[12]

Of far more significance were the recommendations of the majority within the ETT. In summary the substantive recommendation was that 300 of 400 members of parliament be elected from multi-member constituencies and the remaining 100 from national party lists. Approximately 69 constituencies ranging in size from three to seven MPs according to population were envisaged. The balance of 100 national list MPs were to be "compensatory" MPs in order to ensure continuing conformity with the constitutional provision of general proportionality. Despite the majority recommendations of the ETT and submission to the cabinet, the government opted to continue with the existing dispensation for the 2004 election and to re-visit the ETT proposals prior to the 2009 elections. The reason proffered by the government for the decision to retain the *status quo* was the lack of time available to adopt and implement changes before the 2004 elections. With three years to go before the next general election in 2009, consideration of the findings and recommendations of the ETT have still not been given priority by the cabinet.

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[11] See Southall R and R Mattes, "Popular attitudes towards the South African Electoral System," Centre for Social Science Research CSSR Working Paper No. 16, November 2002.

[12] See Welsh D, "ANC opts for the electoral system that has served it well" in *Focus* 30, Helen Suzman Foundation.

Floor Crossing Erodes MPs' Tenuous Links With Voters

Section 47 of the 1996 constitution held that if an MP resigned from the party under whose list s/he had been elected, the MP would lose his or her seat in parliament and that the party would nominate and elect a replacement.[13] In other words, it prevented MPs from "crossing the floor" of the National Assembly.

In party political terms, Section 47 is a double-edged sword. In July 2002 the amendment of Section 47 to permit floor-crossing was passed by parliament and given presidential approval with the support of both ruling and opposition parties. This legislation was partly adopted to accommodate the withdrawal of the New National Party (NNP) from the Democratic Alliance (DA) at the time. The amended law was found to be unconstitutional on technical grounds, however, resulting in only local and provincial chamber floor-crossing being permitted. The appropriate constitutional amendments were subsequently made and legislation enabling MPs to cross over to other parties without losing their seats in parliament was finally approved with a number of provisos. The Constitution of South Africa Fourth Amendment Act permits two 15-day periods in every five-year parliamentary term in which members of national, provincial and local assemblies may cross over to parties without losing their seats. A minimum of 10% of a party's membership has to consent to cross the floor before any members are permitted to do so.[14]

Floor crossing *per se* is not necessarily undemocratic, in a system where an individual is chosen by direct vote. It allows for "conscience" voting, or an expression of dissatisfaction with the policies of a particular party.

The democratic principle at issue is the perceived abrogation of the mandate given by the electorate to MPs elected from a party list. South African MPs are not directly elected in constituencies, but rather assigned in proportion to the vote achieved by the party. Claims are made that MPs can be induced to join other parties with offers of position within the whippery, or committees, or councils, or executive positions, for example. Furthermore, claims have been made of MPs using the funding and electoral machinery of large parties, then abandoning these parties once elected.[15]

However, the overarching problem with floor crossing is that it further erodes the already tenuous link between the electorate and MPs. This lack of direct accountability of MPs to the electorate is a profound structural problem of the South African electoral (and party) system. MPs are permitted to behave in a manner that emphasises their lack of accountability to the electorate.

Political scientists Roger Southall and Bob Mattes contend that

> There is a very real likelihood that floor crossing under the current system will distort proportionality as reflected in the previous election; it will also deprive parties of their right to replace defectors on their own party lists. In fact, it increases the distance between voter and representative.[16]

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[13] Section 105 of the constitution holds the same provision for provincial legislatures.

[14] The period in which floor crossing may take place is the first fifteen days of September in the second and fourth years after the election giving rise to the parliament. See the Constitution of the Republic of South Africa Fourth Amendment Bill, 2002 for details. The window period dates were fixed to allay concerns that the president and hence the ruling party could choose these dates expediently, to further strengthen their position not only at the expense of other parties, but at the expense of democratic pluralism.

[15] The more sanguine argument holds that MPs and indeed party affiliations shift over time and that permitting MPs to move parties in parliament within specific time frames allows greater freedom for MPs to act according to principle and conscience without fear of losing their seats in parliament.

[16] Southall R and R Mattes, Study commissioned by The Electoral Task Team, quoted in "Report of the Electoral Task Team", January 2003, p 25.

MPs who leave one party for another, or worse still, form a new party mid term, lack any popular mandate to do so. The last round of floor crossing in September 2005 further strengthened the ruling African National Congress (ANC), which now holds some 73% of the seats in parliament. The inherent danger of single party dominance notwithstanding, concern must be raised about the motives of MPs joining the majority party on the promise of greater "job security" or possibility of promotion, rather than being motivated by belief, conscience and principle.

Floor crossing has resulted in transfers of power that are arguably contrary to voter's expressed intentions:

- The first period of floor crossing from the New National Party (NNP) to the ANC in the Western Cape Provincial Legislature resulted in a change of provincial government from the Democratic Alliance (DA)/NNP Alliance, to the ANC/NNP coalition.
- In the case of the KwaZulu-Natal provincial legislature, floor crossing saw the IFP/DA alliance relegated to 38 seats behind the ANC/small party alliance of 40 seats.
- Of potentially greater significance, as a result of floor-crossing the ANC won nine defectors and exceeded the two-thirds threshold of National Assembly members required to alter the constitution without the support of opposition parties if it so desired.
- Floor-crossing did not, however, herald tectonic shifts in party representation in parliament with both the ANC (9) and the DA (8) gaining members at the expense of the United Democratic Movement (UDM) and NNP respectively. The ability of floor crossing to thus weaken small parties, reduces the opportunity for a strong opposition to emerge. In the long-term real electoral competition is the only enduring way to keep the democratic system honest and focused on delivering public goods rather than private opportunities for party members.

Irrespective of the political and technical arguments for or against floor crossing and its particular modalities, opportunistic floor-crossing by MPs has arguably left parliament tainted in the perception of the public. The system should be modified so MPs represent defined constituencies, must compete in open primaries and if they choose to change parties should face a by-election.

PR System Favours Big Parties

While there is freedom to form political parties and the electoral system promotes inclusiveness and minority representation, legislative, regulatory and funding biases favour larger parties.

The South African electoral system of proportional representation has no minimum threshold for representation in parliament (save for the 0.25% of the popular vote required to win a single seat in parliament). Given the acutely heterogeneous nature of South African society this may be regarded as a strength of the system and one that has aided political stability.

Those parties achieving a minimum 0.25% and thus one seat in parliament are rewarded with state funding in proportion to the number of seats gained in the national election. The funding is governed by the Public Funding of Represented Political Parties Act (103) of 1998. The Represented Political Parties Fund is administered by the Independent Electoral Commission.[17] This places those parties in parliament at a financial advantage, in particular

[17] For an analysis of issues relating to party funding in South Africa see Matlosa K (Ed), *The politics of state resources: Party funding in South Africa*, Konrad Adenauer Foundation, Johannesburg, 2004.

during election campaigns. The public profile garnered by parties represented in parliament through media exposure obviously translates into a considerable electoral advantage over those un-represented in the National Assembly. (See also discussion under Local Government, page 106).

Political parties are required to pay a R5,000 registration fee to the Independent Electoral Commission. Parties wishing to participate in national elections are required to pay a fee of R150,000 and an additional R30,000 for each province in which it contests an election for representation in provincial legislatures. This places a disproportionate financial burden on smaller parties.

Closed Candidate Lists Hamper Voter Participation

Under South Africa's current closed candidate system the ranking of candidates on party lists cannot be altered by the voters. Consequently, not only are voters' preferences for specific candidates disregarded, but their choices are shaped by party loyalty in the face of a lack of options:

> It should be remembered that one can reject an individual candidate only by voting for a candidate from another political party, and that may just be asking too much of many voters, regardless of where they find themselves on the political spectrum.[18]

Van Zyl Slabbert's team in 2003 suggested a move from closed to open ballots, which would take into account voters' preference and ranking of officials.

[18] Southall R and R Mattes, Study commissioned by The Electoral Task Team, quoted in "Report of the Electoral Task Team, January 2003, p 20.

APRM Objectives 2&3: The Criminal Justice System[19]

APRM Democracy and Political Governance

Objective 2: Constitutional democracy, including periodic political competition and opportunity for choice, the rule of law, citizen rights and supremacy of the constitution

Objective2, Question 2: What weight do provisions establishing the rule of law and the supremacy of the constitution carry in practice?

Objective 3: Promotion and protection of economic, social and cultural rights, civil and political rights as enshrined in African and international human rights instruments

Objective 3, Question 3: What steps have been taken to facilitate justice for all?

The APRM requires states to uphold the rule of law, protect human rights, provide equal justice for all and maintain an impartial and independent judiciary. It is critical that the various components of the country's criminal and civil justice system, including police, investigators, prosecutors, judges, and prisons are seen by the public to be fair, impartial and effective. History makes clear that societies where the population cannot receive justice in effective, timely and affordable ways run significant risks of political and social conflict. The riots over local service delivery in recent months derive from public frustration with this broader definition of injustice. Given the APRM's objectives to evaluate the judiciary but also the broader political system and sources of potential conflict in society, the criminal justice system deserves special attention.

Given South Africa's reputation for having one of the world's highest crime rates, criminal justice policy and performance are hotly debated in the country. This section reviews some of the key issues in this debate, and offers a bird's-eye view of some of the major policy and implementation challenges for government in the short-, medium- and long-term. The section is organised in three parts. The first sets out some of the basic facts about the crime situation in South Africa. The second looks at policy challenges in the criminal justice system. The third part looks at delivery challenges in the criminal justice sector, given finite resources.

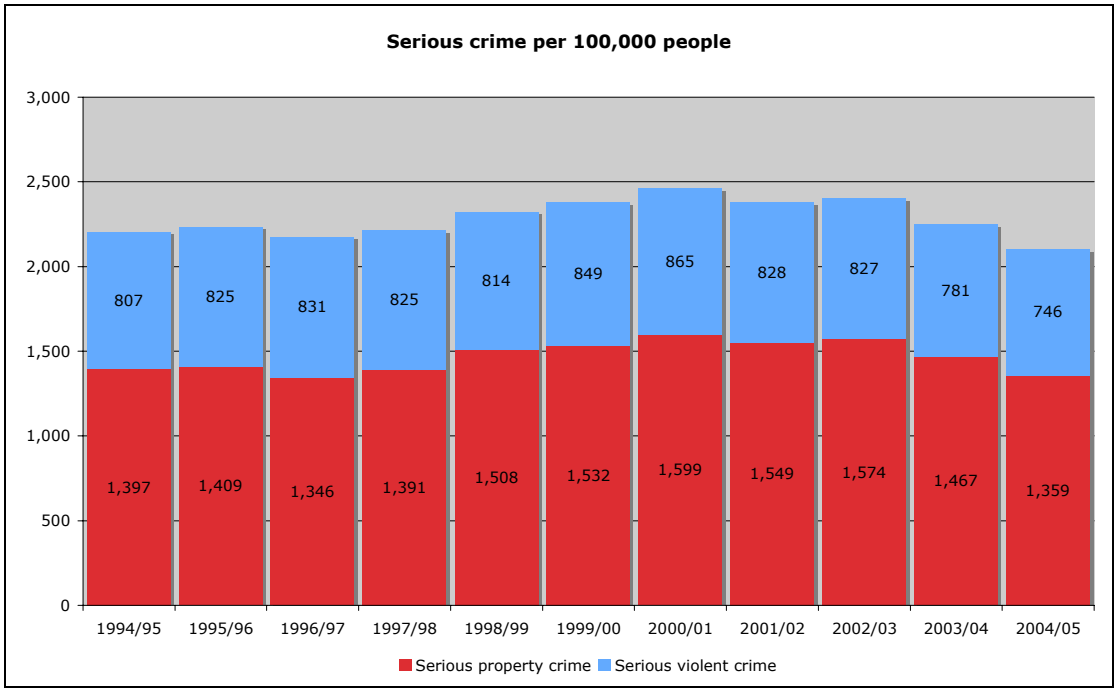
Crime and Justice in South Africa: Summary Statistics

As the following graph indicates, South Africans experienced about 750 serious violent crimes and about 1,360 serious property crimes per 100,000 people in 2004/05.[20] This is about 15% lower than the peak rates of crime per capita experienced in 2000/01.

Since 2000/01, declines in the rate of criminality have been fairly broad-based, although rates have differed across different kinds of crime. The one exception is aggravated robbery which, when compared with 2000/01, was 5% up in per capita terms, even though it fell in 2004/05 compared to 2003/04.

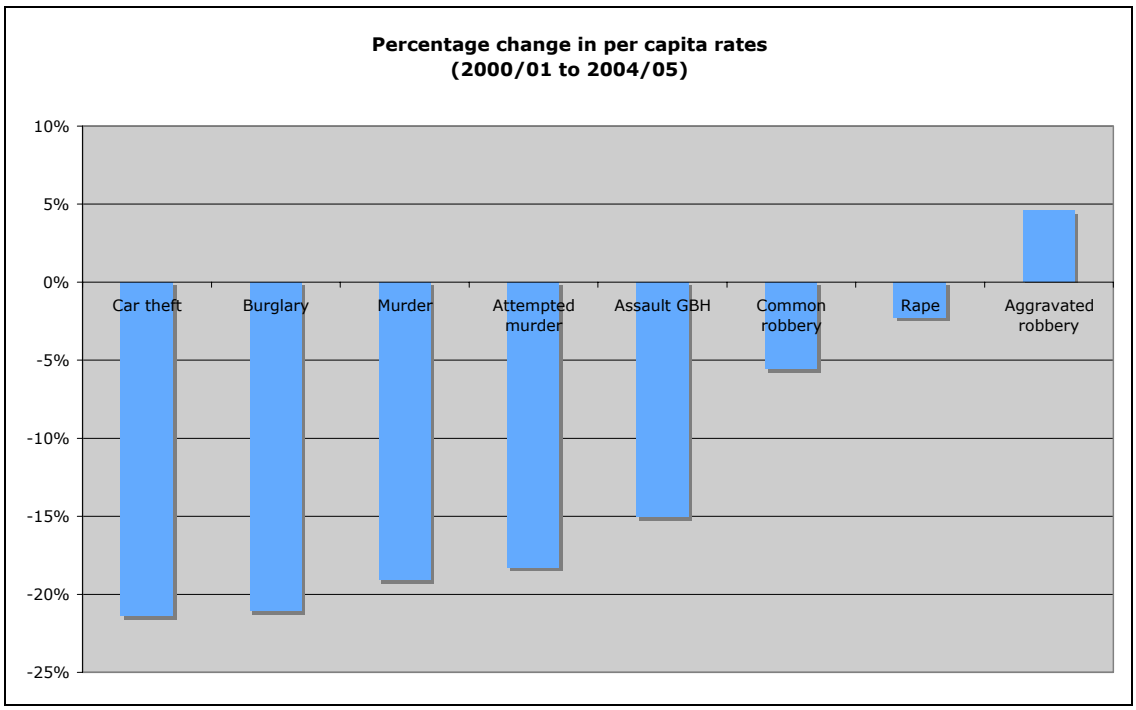
[19] This section was written by Antony Altbeker, Senior Researcher, Institute for Security Studies (ISS).

[20] All figures are from SAPS Annual Reports. "Serious violent crime" includes murder, attempted murder, rape and assault with intent to cause grievous bodily harm. "Serious property crime" includes aggravated robbery, common robbery, car theft and housebreaking (both residential and business).



Source: SAPS Annual Report, various years

Crime levels *are* falling in South Africa, suggesting that policies and strategies put in place by government are bearing some fruit. But crime levels still remain unacceptably high. This is made clear when examining some international data.

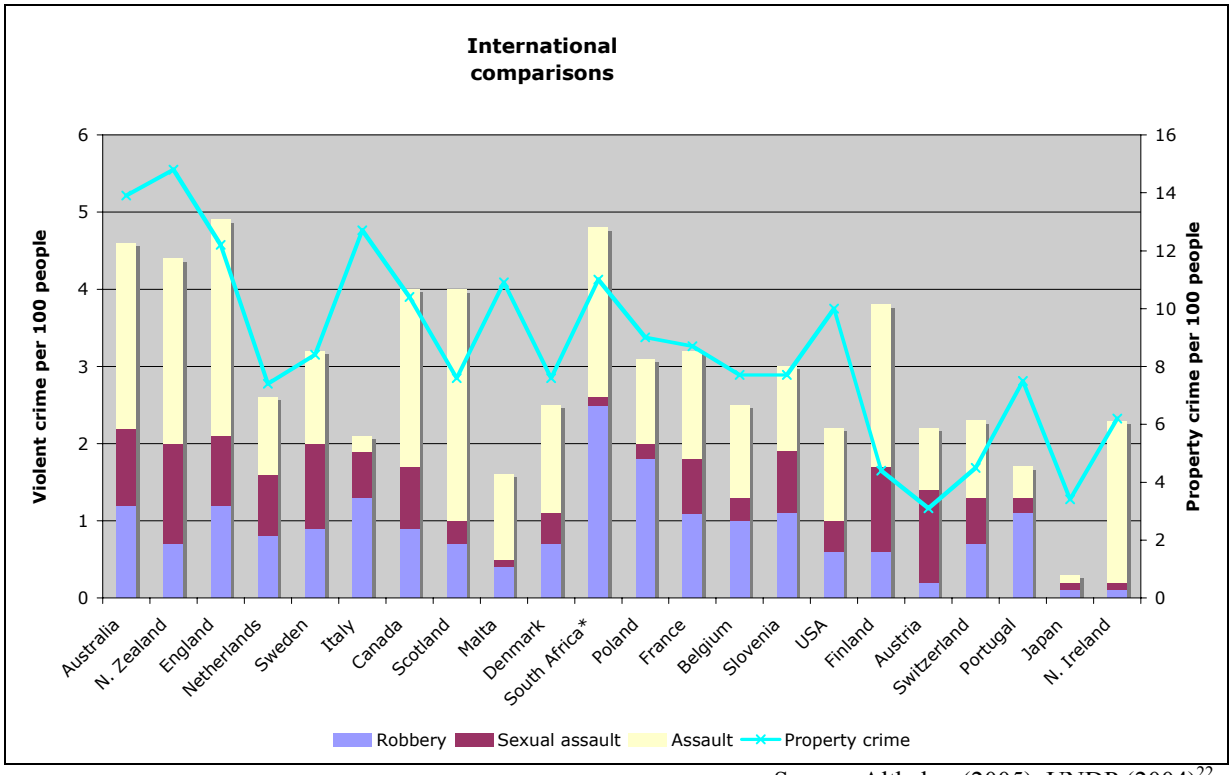


Source: SAPS Annual Reports, various years

While acknowledging the enormous dangers inherent in any cross-national comparison of crime rates,[21] the comparisons that can be made suggest that while South Africa's level of

[21] See Altbeker A, "Puzzling statistics" in *South African Crime Quarterly no.12*, Pretoria: ISS.

property crime is similar to other countries, the country has a very high level of violent crime, especially robbery.



Source: Altbeker (2005), UNDP (2004)[22]

This general trend is confirmed by the graph below of murder rates for countries for which data are available.[23]

South Africa's crime problem is therefore best seen as a problem of violent crime. It is therefore essential to examine whether government polices and strategies in the criminal justice system have contributed optimally to reducing violence in society.

It is important to note that crime levels, especially violent crime levels, are generated by a slew of factors, most of which are not directly amenable to reduction through the machinery of the criminal justice system. The police, the courts and the prisons cannot ameliorate social conditions which lead to frustration and which can, therefore, lead to inter-personal violence;[24] police patrol work can suppress only a minority of crimes;[25] detective work, even in the most developed societies, can identify suspects involved in stranger-crime only very

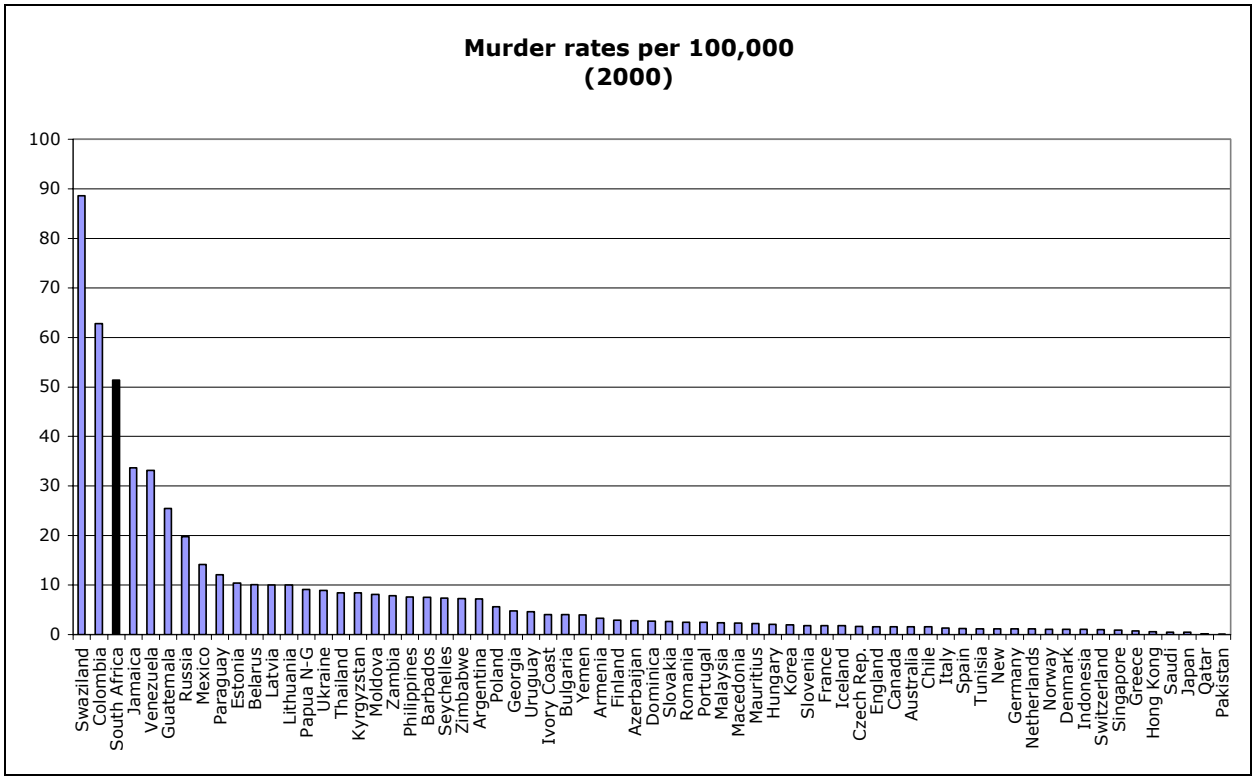
[22] The data presented here come from the International Crime Victims Survey conducted by the United Nations. Being a victimisation survey, it asks a representative sample of the population about their experience of crime. It is not, therefore, constrained by the reporting- and recording deficiencies of citizens and police departments. It is, however, far from clear that respondents in all countries understand the definition of these crimes in exactly the same way, hence it may be that respondents in New Zealand interpret "sexual assault" differently from those in South Africa.

[23] Once again, note that the challenge of cross-country comparison is acute. See Altbeker A, *op cit*, for more details.

[24] See SA Government, 1996, *The National Crime Prevention Strategy*, Pretoria: Ministry of Safety and Security.

[25] See Sherman, 1995, "The Police" in Wilson and Peterselia (eds) *Crime: Twenty-eight leading experts look at the most pressing problem of our time*, San Francisco: ICS Press.

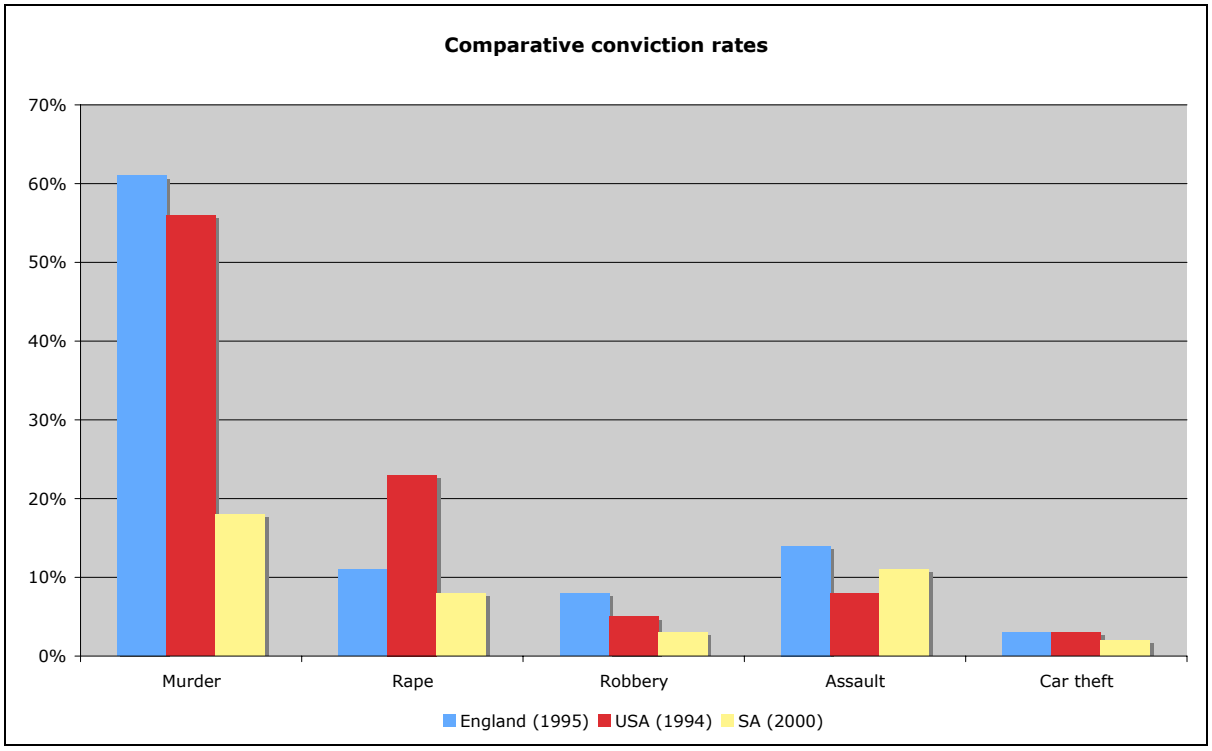
rarely;[26] prison is seldom particularly effective at rehabilitating offenders, even when they are not as overcrowded as are South Africa's prisons.[27]



Source: Altbeker (2005b), UNODC (undated)

Nevertheless, there is clearly room for improvement in the performance of the criminal justice system, both in relation to preventing violence, as well as in ensuring the conviction of offenders. This last point is supported by a comparison of conviction rates between South Africa, the United States and England.

[26] See Skogan and Atunes (1998) for an account of the performance of detectives in the USA. The study concluded that the vast majority of crimes that are solved, are solved because a suspect is readily identifiable when the investigation commences. In the case of stranger crime, conviction rates fell to below 10%.
[27] See Steinberg, 2004, Prison Overcrowding and the Constitutional Right to Adequate Accommodation in South Africa, Johannesburg: CSVR.



Source: Leggett (2003)

As is evident from the above, South Africa's conviction rates for car theft, assault and robbery are not dramatically different from those of the US and England. Matters are different for rape (where the US has far higher conviction rates) and murder, where South Africa trails the other two countries considerably.

Court	Cases finalised in court	Withdrawals/ declined to prosecute	Conviction rate for cases finalised in court
District	275,478	269,025	82%
Regional	33,758	25,895	65%
High Court	1,392	127	77%

Source: Country Corruption Assessment Report - South Africa, 2003.[28]

Statistics presented by the NPA to the Parliamentary Portfolio Committee on Justice and Constitutional Development in June 2002, for all cases which come to court, illustrate the problem of court overloading and withdrawals of cases. An enormous number of cases never go to court, but those that do proceed often result in convictions.

Policy Challenges in Dealing with Violent Crime

Broadly South Africa's criminal justice institutions are built on the back of appropriate principles. The problems that exist relate to resources, management, responsiveness, work loads and productivity. The essential policy challenge confronting government in relation to criminal justice is how to extract productivity gains from a system as large and unwieldy as

[28] *Country Corruption Assessment Report- South Africa*, published jointly by the South African government and United Nations Office on Drugs and Crime – Regional Office for Southern Africa (UNODC/ROSA), April 2003, p 2.

the criminal justice system in South Africa. Before dealing with this matter, however, it is worth noting the key gains that have been made in the past 12 years, some of which are enormously impressive.

The criminal law and the criminal justice systems have been reengineered in conformance with the requirements of the constitution. Enormous strides have been taken to improve the legitimacy of the police and their relationship with the community after the ravages wrought by apartheid.

The 11 police agencies that existed prior to 1994 have been melded into a single body with relatively strong organisational structures and in which key organisational processes have been successfully bedded down. Similarly, a single prosecution service with wholly new structures, policies and procedures has been created, while a highly-skilled investigative institution, the Directorate of Special Operations (the "Scorpions"), has been created out of nothing.

New technology – such as an automated fingerprint identification system – has been introduced to improve the performance of the police and the criminal justice system as a whole.

Therefore, the South African government can be justifiably proud of its efforts to transform the criminal justice system. There remain, however, important areas of concern. These are dealt with in the following sections.

The Limits of Centralised Responses to Crime Problems

The highly-centralised model of managing criminal justice in South Africa is potentially the most important constraint on the continued improvement of productivity and performance in the medium- and long-term. It is also an issue that makes the effective day-to-day management of personnel in the institutions harder.

In a democracy, policing and prosecution are activities that entail granting wide discretion to officials at relatively low levels of power in the respective organisations. Police officers and prosecutors operate in a system in which the choices they make – whether or not to open cases, make arrests, prosecute, lead a particular piece of evidence, request severe sentences – occur in conditions where even the most rudimentary oversight is not usually possible by managers or central decision-makers.

There are obviously important economies of scale associated with the centralisation of these institutions (for training, technological infrastructure and procurement, for example) and standardisation and equality of access to services (which can be driven more forcefully in centralised agencies) are important values and organisational aims. One of the costs of centralisation, however, is the diminished quality and rigour of managerial oversight over police officers and prosecutors. Thus, there are limits to how much productivity can be enhanced in large, highly-centralised agencies, and it seems that these limits are now being reached in the police and, perhaps, the prosecution service.

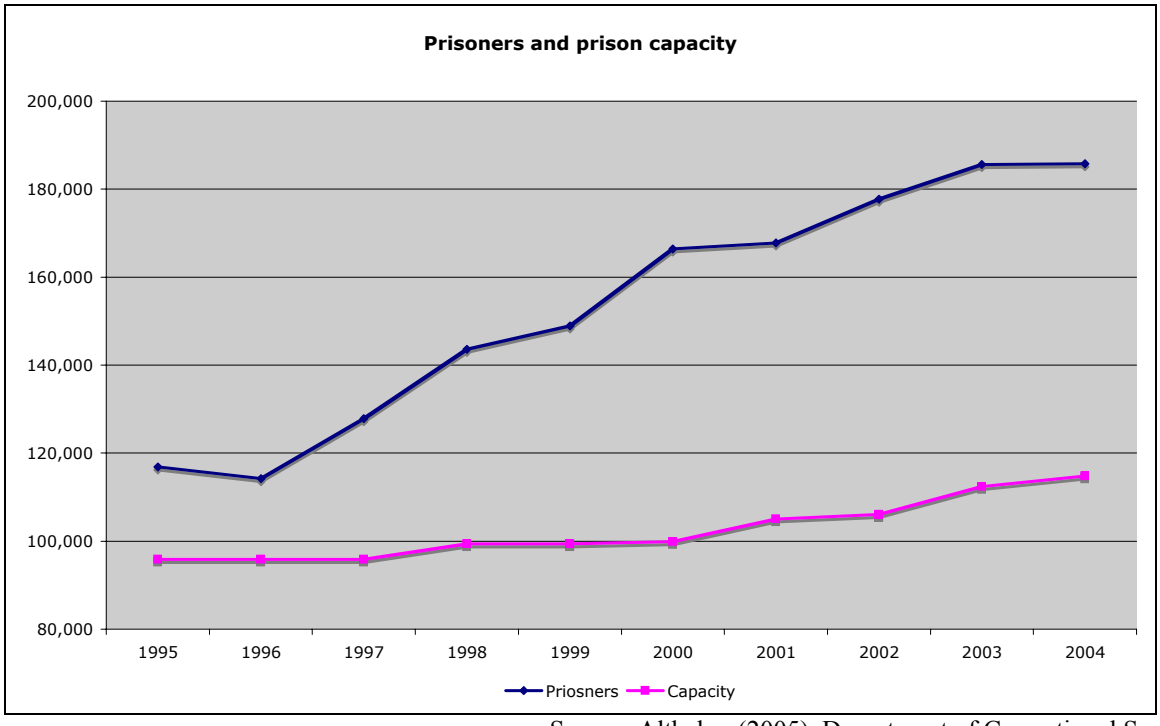
Stating the problem in these terms does not, unfortunately, lead to obvious solutions that are both practical and politically saleable. There does however seem to be a growing tendency in recent policy discussions to advocate further centralisation, for instance in relation to the role and location of the Directorate of Special Operations and the Metro Police agencies. The debate on the DSO's future has become highly politicised, and often underestimated the negative impact that centralisation may have on the effective oversight of personnel in these agencies.

A second, related issue is that highly centralised organisations – such as the police – must, of necessity, adopt policies, strategies and procedures in a one-size-fits-all manner. Given the vast differences in crime problems, and, therefore, the policing challenges, in different areas of the country, this must reduce the overall efficiency of police response to crime. South Africa should reopen debate about the desirability of the highly centralised model of policing currently employed, and, in particular, explore ways of ensuring more formal legislative accountability at a local level.

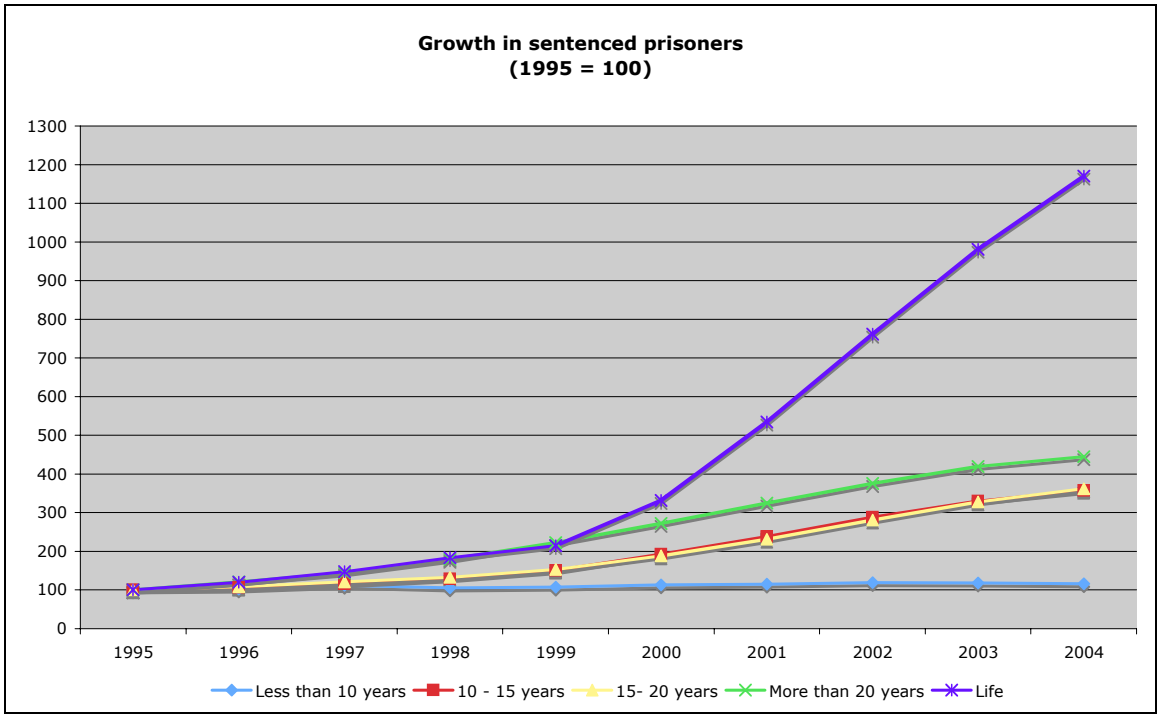
Prisons Overcrowded

One of the most serious problems confronting the criminal justice system in the medium- and long-term is the overcrowding of the country's prisons, which have seen occupancy rates 60% to 80% higher than the prisons are actually built for.

It is true that part of the reason that South Africa's prisons are overcrowded is a lack of resources (see below). Another part of the problem, however, derives from policy choices that have been made, the two most important of which are the tightening of bail conditions in the Criminal Procedure Second Amendment Act (105 of 1997) and the passing of minimum sentencing legislation in the Criminal Law Amendment Act (85 of 1997). The effect of the latter piece of legislation is made apparent in the following graph.



Source: Altbeker (2005), Department of Correctional Services



Source: Fagan (2004)

While sound arguments can be made for these laws – arrestees in serious cases were receiving bail too easily and sentences were inconsistent and often considered too lenient[29] - they have accelerated prison overcrowding. This phenomenon is undesirable on humanitarian and policy grounds, and the litigation it has now generated has the potential to result in policy-making from the Bench. It seems increasingly likely that court decisions will soon require legislation to be amended.

A related factor is the absence of practical, adequately-funded alternatives to prison. This area must be explored energetically, as it is the only alternative to either continued problems of overcrowding or massive increases in expenditure on building additional capacity.

Civilian Oversight of Policing Ineffective

The centralisation of policing in South Africa is one reason why civilian oversight of the police is not as effective as it could and should be. Other reasons arise from confusion over the mandates of the different oversight agencies, a lack of resources, a lack of coordination, and the apparent downgrading of the importance attached to oversight by government.[30]

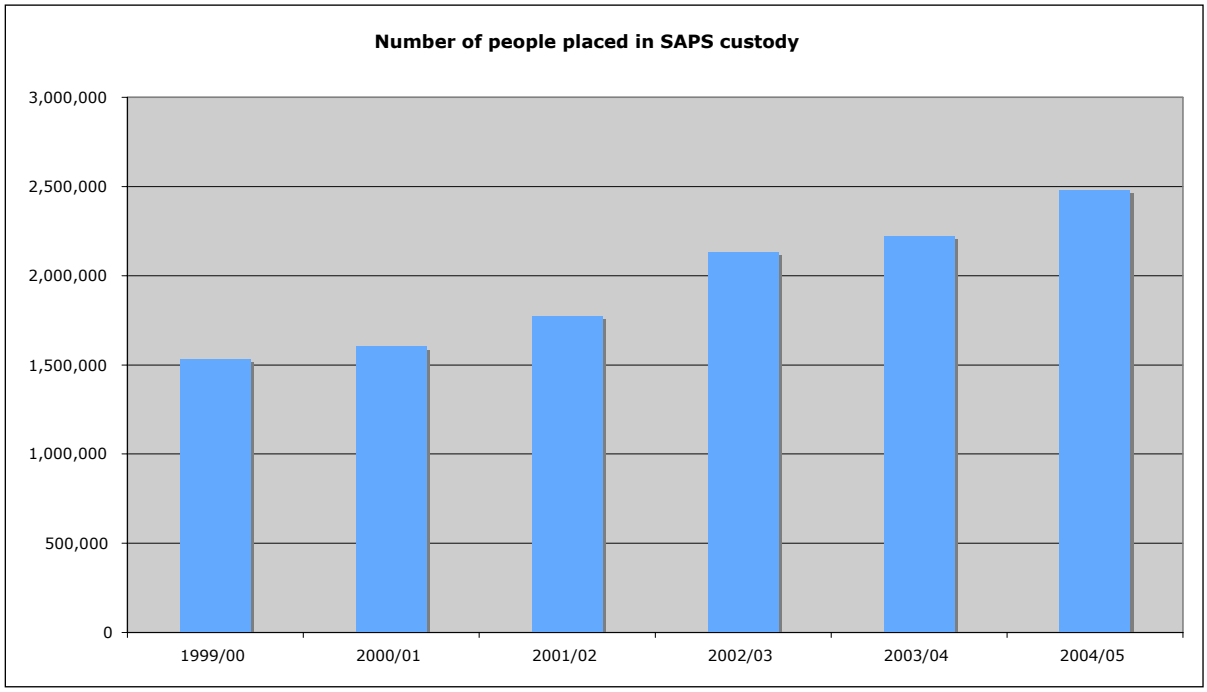
The almost exclusive focus on how to improve police effectiveness in the fight against crime has meant less attention on how to ensure that the police themselves are accountable. But these concepts are intimately interrelated: oversight is a crucial mechanism for ensuring increased effectiveness. It is clear that the South Africa's current oversight architecture, is not optimal, and needs to be urgently addressed.

[29] For a review of these debates, see Sloth-Nielsen and Elhers, 2005, *A Pyrrhic victory?: Mandatory and minimum sentences in South Africa*, Pretoria: ISS.
[30] See Mistry and Klipin, 2004, South Africa: Strengthening Civilian Oversight over the police in South Africa: The national and provincial secretariats for safety and security, Pretoria: ISS.

Access to Justice for All Proving Difficult

One of the most impressive achievements of the SAPS over the past few years is the extent to which they have increased the number of arrests that are being made every year (from about 1.5 million in 1999/00 to about 2.5 million in 2004/05).

Although increased arrest rates point to improved efficiency and effectiveness, it is crucial to recognise that a criminal justice system is not supposed to be just a machine for producing arrests and convictions; it is also supposed to deliver justice. Given the rapid rise in the number of arrests, it is important to strengthen the mechanisms for guaranteeing that the system is fair and just.

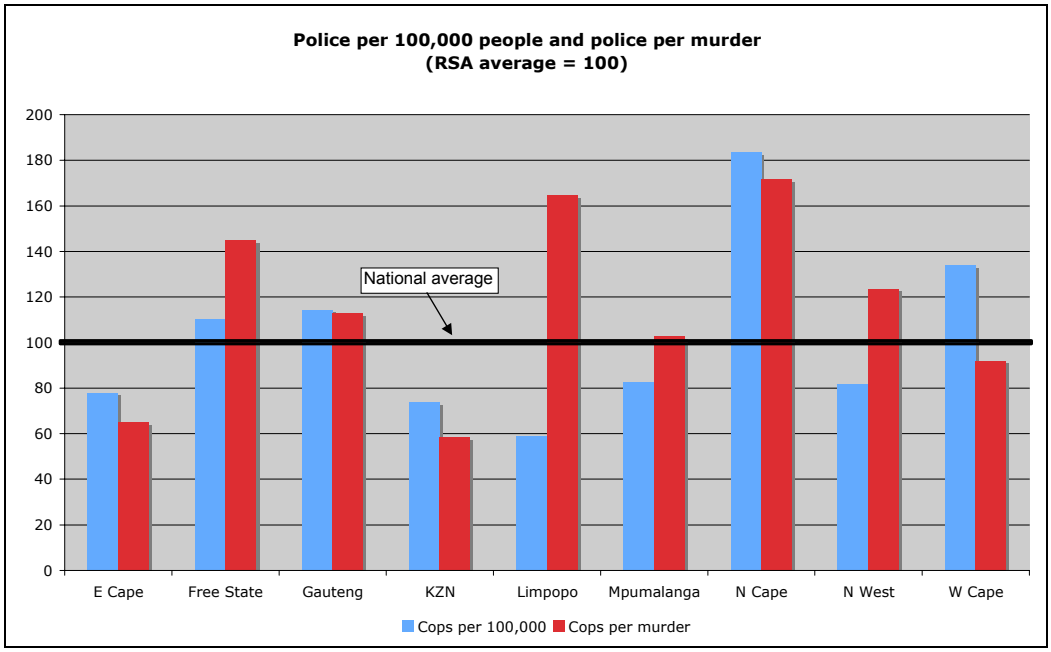


Source: SAPS Annual Report 2004/05

This is partly a question of resources – especially as Legal Aid Board's budget has been stationary in real terms – and partly a question of the overall ethos of the criminal justice system. In this regard, more needs to be done to ensure that the values of the system are reaffirmed continuously.

Access to justice also depends on the extent to which the institutions of the justice system (criminal, civil and administrative) are accessible to all people in the country. For example, some provinces have more police officers per 100,000 people than others. The national average is a little less than 250 officers per 100,000 people, but it varies between 145 per 100,000 in Limpopo and over 450 per 100,000 in the Northern Cape.

One response to this might be that since crime is not distributed evenly, the police ought not to be either. Still, looking at the number of police officers per murder, there remain inequalities in access. Here the national average is 6.1 officers per murder, but this varies between under 4 officers in each of KwaZulu-Natal and the Eastern Cape, to over 10 in Limpopo (which has a very low murder rate) and the Northern Cape (which has a very high ratio of police to population).



Source: SAPS annual report and www.saps.gov.za

Non-State Structures Play Key Roles

Access to justice, broadly defined, can also include access to structures that are not run by the state. In South Africa the two key structures that play a role are the private security industry and structures of traditional justice.

The private security industry as a whole might be worth as much as R40 billion a year, with the guarding industry alone employing over 260,000 people. Doubtless, this capacity makes an important contribution to policing the country, both by preventing crime (although some think they may simply displace crime to other targets) and to arresting perpetrators. Few doubt, however, that the industry has not been optimally used or that real issues of equity arise. It may be that the industry – being part of the private sector – cannot be obliged to deal with all potential problems of this nature. It seems, however, that there may be problems with regulating the training and operations of members of the industry, and that there is, therefore, room for improvement.

A similar argument could be made in respect of traditional structures of justice. While access to justice is significant in respect of all South Africans, these problems are most pronounced in the rural areas. The South African Law Commission, for instance, observed that 80% of criminal cases – especially those dealing with petty assault and theft – in the rural areas are handled by traditional structures of justice.[31] Yet these structures are not connected to or supported by the state. This does not mean that the state should control these structures, but it is to say that they should be regulated and supported by the state given that they play such an important role in the administration of justice.

Young Offenders Vulnerable

Although the constitution sets out some high standards for the treatment of child/juvenile offenders, legislation in this regard has been repeatedly delayed. This has meant that children

[31] See SA Law Commission, 2003, *Customary Law: Report on traditional courts and the judicial function of traditional leaders*, Pretoria: SALC.

in conflict with the law who move through the criminal justice system are not yet afforded all the protections that their vulnerable status requires. The draft bill, the first to have been costed before submission to cabinet, provides for a series of measures that will minimise the exposure of children to the physical and psychological dangers associated with holding cells and prisons. It is important that these be considered and that those that are practical and affordable are implemented timeously.

Better Regulation of Alcohol and Narcotics Needed

One of the most widely accepted theses in the policy literature on crime in South Africa is that alcohol (in particular) and narcotics play an important role in explaining South Africa's high levels of crime. A large number of crimes are accompanied by alcohol use. This assessment is based both on police experience of the sometimes intimate link between taverns and shebeens, on the one hand, and township crime levels, on the other, as well as on some empirical work in which the blood levels of arrestees was tested.

- A sample of nearly 3,000 arrestees in three cities tested in 1999/00 found that 44% of those arrested for violent crime and 50% of those arrested for property crime tested positive for some form of narcotic.[32]

Given the links between alcohol/drugs and crime, redoubled efforts need to be made to develop a workable, practical and robust approach to regulating the manufacture, sale and use of these products. The challenges here are, admittedly, enormous, and the sometimes simplistic calls for increased enforcement of legislation in relation to shebeens can be dismissed as unrealistic. Nevertheless, this remains an area in need of sound policy intervention. One area of particular concern here is the relative lack of programmes for the rehabilitation of drug addicts.

Controlling Migration Poses Problems

Another area where policy might be fruitfully reviewed is in the enforcement of migration policies, especially when this is left to the police, a strategy that creates a number of problems.

Managing migration in South Africa is inherently difficult simply because the country attracts a large number of migrants. Because the migration regime is restrictive, and because many of those who might qualify to come to the country on visitors' visas cannot get travel documents from their own governments or South African missions in their countries, much of this migration is unlawful. The sheer scale of the phenomenon, however, means that it has virtually overwhelmed the systems and resources in place to try to manage it. This, by itself, ought to suggest that there are problems with South Africa's migration regime.

A second layer of problems are generated by the fact that the South African Police Service is *de facto* the institution principally charged with policing migration, with the effect that the organisation must invest vast quantities of its time, energy and resources chasing down migrants and sending them through the repatriation process. This might be justified if there were indisputable evidence that migration is an important cause of high levels of criminality

[32] Leggett (ed), 2000, *Drugs and Crime in South Africa: A Study of three cities*, Pretoria: ISS.

in South Africa. In fact, there is no such evidence. Indeed, in October 2005, when there were over 160,000 people in South Africa's prisons, a mere 4,500 were foreign nationals.[33]

This is not to say, of course, that there are no migrants involved in crime – indeed, there are many. However, if the police spent their time and energy pursuing criminals, rather than pursuing migrants who might or might not be criminals, their impact on crime levels might well be enhanced.

There is also growing anecdotal evidence that policing migration has created a lucrative source of illicit income for some police officers. As such, the role of the police in managing migration may be undermining the integrity of law enforcement as a whole.

Once again, it is not absolutely clear what can and should be done to remedy these problems. In the long-term, however, it would be desirable to reduce police responsibility for enforcing migration policy and to hand this over to officials dedicated to this purpose.

Rural Policing and Commandos Face Profound Changes

Recent research by the ISS has highlighted a potential problem that may arise with the implementation of the decision to close down the Territorial Reserve (otherwise known as the "commandos"). Commandos tend to concentrate on typically rural crimes, such as stock theft, property crime and farm attacks. If not replaced with an equally well equipped and motivated volunteer force, there will be a likely increase in rural crimes and farm attacks.[34]

Better Use of Resources in the Criminal Justice System

The principal challenges facing the criminal justice system do not derive from the adoption of poor policies. There are policy challenges, but the real issue is whether the resources exist in the criminal justice system to deliver on its mandate.

In this regard, recent research by the ISS has established some fundamental facts:

- South Africa spends a good deal more on criminal justice as a proportion of its GDP than does the rest of the world;
- Relative to the population, the personnel complement of the justice system is roughly in line with world norms;
- In relation to violent crimes, the number of personnel per crime falls well below international norms; and
- Resource levels in criminal justice in South Africa have been growing strongly for the past five years.[35]

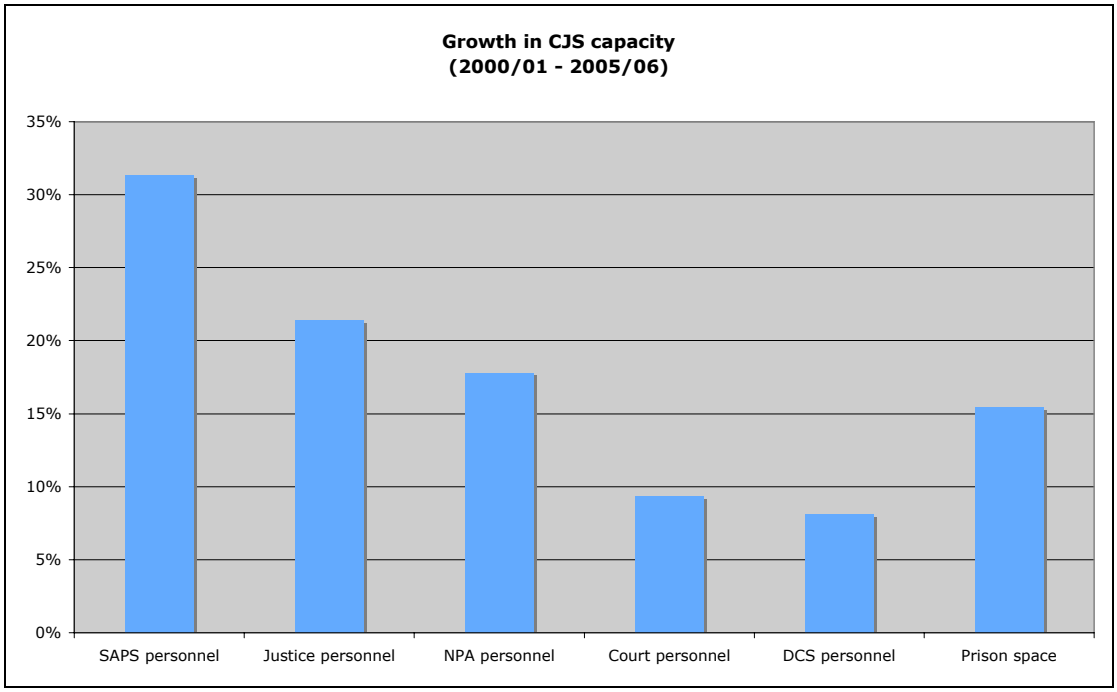
There is no simple answer to whether South Africa needs to devote more resources to criminal justice. Since South Africa already spends significantly more GDP on criminal justice than do other countries, it is not realistic to think that the country can raise personnel per crime levels anywhere close to those of the rest of the world. Nor is it clear that the problem is that South Africa uses its resources poorly since a large proportion of the gap between high levels of expenditure in relation to GDP and only modest resource levels per capita or in relation to

[33] DCS, personal communication with the author.
[34] For more on this issues, see Steinberg, *After the Commandos: The future of rural policing in South Africa*, 2005, Pretoria: ISS.
[35] See Altbeker A, Paying for crime: The resourcing of the South African Criminal Justice System, 2005, Pretoria: ISS.

criminality, is that salaries in the criminal justice system average more than three times the level of GDP per capita. This is a ratio which neither rich countries nor poor countries where personnel in the civil service (including in the criminal justice system) seldom earn salaries as large (in relation to GDP per capita) as do South Africa's. Besides, as even a cursory review of the available literature makes clear, the level of expenditure on criminal justice is only weakly related to the level of crime. It is simply not true that much greater expenditure would necessarily make a very large impact on crime levels.

Having said that, the same research pointed out that the existing growth of resourcing for criminal justice is unbalanced.

- This is most obviously reflected in the following graph which reflects that police personnel numbers have grown 50% faster than justice personnel as a whole, twice as fast as staff at the prosecution service, three times as fast as court personnel and prisons personnel, and twice as fast as prison space. Indeed, given that police personnel far outnumber personnel in other departments, in effect the increased number of police officers is, in absolute terms, a great deal larger than even these figures imply.



Source: Altbeker, 2005b.

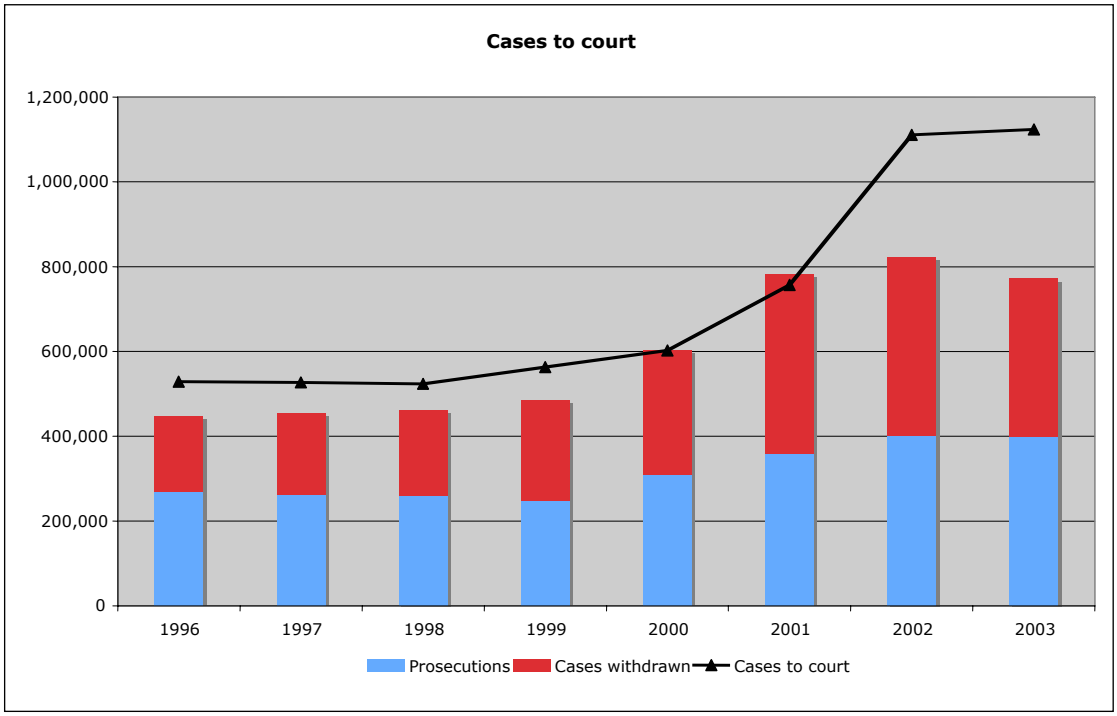
The lack of balance in capacity growth in the criminal justice system presents a huge challenge for the system, as it is bound to lead both to blockages in the courts and to further overcrowding in the prisons, since more police officers must imply that more arrests will be made.

- For instance, figures from the Department of Correctional Services indicate nearly 30% of South Africa's prison population remains un-sentenced.[36] Un-sentenced prisoners currently cost the South African government nearly R6 million per day.[37]

[36] Statistics as of the last day of 2005, Department of Correctional Services, available at www.dcs.gov.za/WebStatistics/.
[37] Statistics as of the last day of 2005, Department of Correctional Services, available at www.dcs.gov.za/WebStatistics/.

- One such prisoner was Mosefako Julia Mashele. Mashele, one of five inmates who sued the Minister and Commissioner of Correctional Services, as well as other top prison officials over unsatisfactory prison conditions. She spent more than five years in prison before being acquitted and freed.[38] However, while cases like Mashele's linger in the system, the Department of Correctional Service estimates the current level of over-crowding in its prisons at about 136%.[39]

This is something which needs to be addressed over the next few years, preferably by raising the rate of growth of the budgets of the Department of Justice and Constitutional Development and the Department of Correctional Services, rather than by redirecting resources from the police to these departments. Indeed, as the final graph demonstrates, blockages in the courts appear to have increased already.



Source: National Prosecution Authority

Progress Deserves Recognition

Any review of the policy challenges confronting government in relation to the criminal justice system, must be premised on the recognition of the enormous progress that has been made to build a functional, effective system based on the principles enshrined in the constitution. In this, the past decade has seen truly remarkable progress. Indeed, the degree of professionalism in the criminal justice system is perhaps unique in the developing world.

[38] Rickard C. "Don't Shoot the (Awaiting Trial) Piano Playing Prisoner: Judges Consider Music Making in the Cells," *Sunday Times*, 27 February 2002.
[39] Statistics as of the last day of 2005, Department of Correctional Services, available at www.dcs.gov.za/WebStatistics/.

APRM Objective 4: Separation of Powers[40] – The Judiciary

The African Peer Review Mechanism actively encourages countries to examine possible sources of conflict and devise means to alleviate problems. South Africa's high crime rate, incidents of mob justice and political claims that the bench is not independent are examples of why the judiciary needs examination. The judiciary is also vital to upholding human rights. The speed, effectiveness, accessibility and cost of obtaining justice for ordinary citizens are equally important factors. If people cannot access justice, or the system does not speedily resolve cases, if concerns over the independence and the integrity of the judiciary continue to emerge – public faith in justice and our democratic system will suffer.

As Chief Justice Pius Langa put it, " The strength of a democracy is measured by the confidence the public has in the judiciary and the court."[41]

APRM Democracy and Political Governance

Objective 4: Uphold the separation of powers, including the protection of the judiciary and of an effective legislature

Question 1: What are the constitutional and legislative provisions establishing the separation and balance of powers among the Executive, the Legislature and the Judiciary branches of government**?**

Question 2: Is the judiciary independent from the Executive and does it have adequate resources and autonomous management?

Overview of the South African Judiciary

After decades of segregation under apartheid, South Africa adopted a non-racist, non-sexist constitution in 1996. Despite the new constitution, the country struggles with legacies from the past regime, and the criminal justice system – a former tool of oppression – remains somewhat ill-equipped to deliver justice to the majority of the population. Slowly but surely, however, South Africa is re-fashioning its justice system from the ground up by responding to specific crime problems.

The police and justice systems have been severely criticised for their inability to uphold safety and security throughout the country. Vigilantism has increased, as frustrated communities mete out punishment to perpetrators. Other challenges to the justice system are external. The opening of South Africa's borders after the isolation years of apartheid rule has made the country vulnerable to international criminals, and organised crime is becoming a serious concern as well.

The structure of the judicial system is set out in Chapter 8 of South Africa's constitution. Section 165 guarantees the independence of the courts and requires the organs of the state to

[40] While there is considerable separation of powers between the executive, legislative and judicial branches in South Africa, this separation is not as complete as the United States model, nor is it designed to be. Indeed within Chapter 3 of the constitution is enshrined the principle of "co-operative government". In broad terms this pertains to the vertical governance relationship between national, provincial and local government. While distinct, at the same time each is inter-related and must seek to co-operate and co-ordinate their respective legislative and policy activities. The parameters and authority of each sphere of government must not be encroached upon by another and all must preserve, protect and promote the integrity of the Republic. Spheres of government must interact in an amicable manner and keep one another informed of activities and matters of mutual interest. Moreover structures must be put in place to ensure such co-operation between levels of government. Disputes between tiers of government should be avoided, as should legal action.

[41] Langa was interviewed in April 2005 by his fellow judges on the Judicial Service Commission and the minister and deputy minister of justice. Webb B, "Langa unhappy with rate of transformation", Mail and Guardian, 4 April 2005.

assist and protect the courts to ensure their "independence, impartiality, dignity and effectiveness". Chapter 2 of the constitution (Sections 34 and 35) guarantees everyone the right to have a dispute or trial heard by a fair, impartial and independent court.

Independence of the Judiciary: Basic Principles

The following principles were adopted the General Assembly of the United Nations in December 1985 and are considered governing tenets of the judiciary.

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.
4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.
5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.
6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.
7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

http://www.unhchr.ch/html/menu3/b/h_comp50.htm

The court structure consists of the Constitutional Court, the Supreme Court of Appeal, the High Courts, the Magistrate Courts and any other court established by an act of parliament. The Supreme Court of Appeal is the highest court of appeal, except in constitutional matters. It replaced the Appellate Division of the Supreme Court. Several specialised courts exist. The Land Claims Court was established in 1996 to hear disputes arising from the Restitution of Land Rights Act 1994 and the Land Reform (Labour Tenants) Act of 1996. The court decides appropriate forms of restitution for people who have been dispossessed of their land under racially discriminatory laws and practices, and protects labour tenants from eviction without an appropriate court order. There are also Labour Courts, to handle employment disputes, and Small Claims courts.

Judiciary Independent

South African courts are widely regarded as independent and free from executive domination and have "gained international recognition with their landmark decisions in a number of human rights matters, including the death penalty and the area of economic, social and cultural rights,"[42] said a 2001 report by the International Commission of Jurists. The current system also contains a number of constitutional provisions aimed at promoting judicial independence. These include: protection from arbitrary removal from office; security of tenure (see below); and a guarantee against the reduction of salaries. Judges can therefore rule without fear or favour, and they do so.

Former Chief Justice Arthur Chaskalson stated that "government had not once, in the past decade of our democracy, interfered with or undermined the independence of our judiciary".[43]

[42] "South Africa - Attacks on Justice 2000", 13 August 2001, Geneva: The International Commission of Jurists, *www.icj.org*

[43] De Lange J, "Goal is to streamline, not undermine, SA's courts", *Business Day*, 12 May 2005.

Deputy Chief Justice Dikgang Moseneke said the independence of the judiciary was a "no-go area, uncompromisable". At the same time, he added that "clearly there is no definition of what institutional and substantive independence means," while declaring his support for the continuation of what he deemed a healthy debate for a transitional state such as South Africa regarding the judiciary's independence.[44]

Constitutional Court Progressive and Autonomous

The post-apartheid bench has entrenched its autonomy and integrity by delivering several key judgments that have seen laws re-written and the government challenged. The government has taken some judgments on appeal (like the "Nevirapine case" below) and lost. The Constitutional Court is highly regarded, and its rulings are respected and enforced. Selected landmark cases are outlined below.

- **Minister of Health and Others v Treatment Action Campaign and Others (2002)[45]**: In 2001 the Treatment Action Campaign successfully challenged the South African government's policy of restricting the drug nevirapine (used for the prevention of mother-to-child transmission of HIV) to public sector hospitals involved in a pilot study. The trial court ruled that the limited provision of the medicine was "not reasonable and [was] an unjustifiable barrier to the progressive realisation of the right to health care."[46] The Constitutional Court upheld this ruling, stating that the government's nevirapine policy violated the health care rights of women and newborns under the South African constitution.[47] The court also found that it was reasonable to expect the government to offer a single dose of nevirapine to a mother and her child to prevent the transmission of HIV.[48] The government was ordered to remove the restrictions on, and facilitate the use of nevirapine; train counsellors and take reasonable measures to extend testing and counselling facilities throughout the public sector.
- **National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others (1999)[49]:** The Constitutional Court acknowledged that within common and statutory marriage laws there existed both discrimination and the denial of equal protection of the law by the State against homosexual couples. The court therefore declared the common law definition of marriage and the Marriage Act unconstitutional and ordered parliament to amend marriage legislation.
- **Government of the Republic of South Africa v Grootboom (2000)**[50] In 1998, residents of a Western Cape informal settlement – frustrated with the slow pace of housing delivery – began occupying vacant private land earmarked for low-cost housing. The new settlement, dubbed "New Rust", was later the site of a round of forcible evictions, where residents' possessions were burnt in conduct reminiscent of the apartheid era.

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[44] "Most Judges 'Support Change'", *Sapa,* 27 May 2005.
[45] Minister of Health v. Treatment Action Campaign, Constitutional Court of South Africa, 2002 (10) BCLR 1033.
[46] Treatment Action Campaign v. Minister of Health, High Court of South Africa, Transvaal Provincial Div., 2002 (4) BCLR 356(T), Dec. 12, 2001; cited in Annas GJ, "The Right to Health and the Nevirapine Case in South Africa", *New England Journal of Medicine*, Vol 8, 20 February 2003.
[47] Minister of Health v. Treatment Action Campaign, Constitutional Court of South Africa, 2002 (10) BCLR 1033.
[48] Community Law Centre, University of Western Cape , *www.communitylawcentre.org.za/ser/casereviews/2003_5_sa.712.php*
[49] National Coalition For Gay and Lesbian Equality and Ors v The Minister of Home Affairs, Constitutional Court of South Africa, 2000 (1), BCLR 39.
[50] South Africa vs Grootboom, Constitutional Court of South Africa, 2000 (11), BCLR 1169.

- The Constitutional Court assessed the Cape Town Metro's housing programme and concluded that the evictions were unconstitutional, since the local government made no provision for the relief of a category of people in desperate need of housing. The Court held that such measures failed the reasonableness test of Section 26(2) of the constitution, which "requires the state to devise and implement, within its available resources, a comprehensive and co-ordinated programme to realise the right of access to adequate housing" and that such a programme "should provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations."[51] However, the Court was careful to note it was not endorsing "any practice of land invasion for the purpose of coercing a state structure into providing housing".

Judges Enjoy Guaranteed Tenure

Section 176 of the constitution guarantees the tenure and remuneration of judges. All judges, except for Constitutional Court judges, hold office until discharged from active service under the terms of an act of parliament. Constitutional Court judges hold office for non-renewable terms of 12 years. A judge may only be removed if the Judicial Service Commission finds that the judge suffers from incapacity, is grossly incompetent or is guilty of gross misconduct. The president may also remove a judge on the basis of a resolution adopted by at least two thirds of the members of the National Assembly. There have been no cases where the president has exercised this right. Members of the bench can therefore make rulings without fear of losing their jobs.

Bench Grapples with Transformation Challenges

At the core of the South African judiciary is the issue of transformation – a welcome move which would see the bench change to represent the country's demographics. However, while transformation is worthy and will subsume judges from diverse backgrounds, all appointments must be made legitimately and based on merit. Anything else would compromise their independence by creating a situation where new appointees feel loyal to those that have appointed them.

Chief Justice Langa said: "I would have been surprised if the judiciary had escaped the scourge of racism but there are many of all races who have distanced themselves from it, he said, noting that those who did not should be exposed and confronted without hesitation."[52]

As the democratic dispensation began, there were only three black members of the bench. Justice Lex Mpati, Deputy President of the Appeal Court, explains:

> If we go back to 1994, out of 166 judges of the Supreme Court of South Africa there was only one black judge – the late Chief Justice Ismael Mahomed, who had been appointed in 1991, at the time when the winds of change were already blowing across the face of South Africa. There were two other black judges, Justice Madala in the Transkei (now in the Constitutional Court) and Justice Khumalo in Bophuthatswana – two so-called 'independent territories.' [53]

A challenge to the South African judiciary is the "question of how a judge [who] ten years ago dealt with crimes against only a minority of the population can today respond to the needs of all?"[54]

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[51] Tshipanyane T, SA Human Rights Commission, www.sahrc.org.za/housing_for_poor.htm

[52] Webb B, "Langa unhappy with rate of transformation", Mail and Guardian, 4 April 2005. The comments were made at his interview for the post of chief justice in April 2005.

[53] Mpati L, "Transformation In The Judiciary – A Constitutional Imperative", inaugural lecture, University of the Free State, 6 October 2004.

[54] Vera Institute of justice, www.vera .org.za/section4/section4_1.asp.

The judiciary in post-apartheid South Africa was not reconstituted, unlike many other organs of state where senior government officials were offered retirement packages. The judges that were appointed before 1994 continued to serve as members of the judiciary and perform their functions under the new constitution.[55] To have wholesale replaced the judiciary could have been seen as an effort by the executive branch to dominate and politicise the judiciary. Resisting that obvious political benefit of such a move was arguably an important demonstration of the government's respect for the independence of the judiciary as a check on executive power. Under apartheid a number of white judges were highly respected and continue to serve on the bench, but there are still some who critics charge have not embraced the values and ethos of the constitution.

In 1996 all South African judges swore an oath to uphold the new constitution but the continued majority of white, male judges has led to a certain lack of faith in the judicial system. Despite efforts to achieve a more equitable racial balance, there is a popular belief that the judiciary does not adequately reflect post-apartheid South Africa.

Given the historical background, comments and criticism around the judiciary are understandable but as a report by the Political Information and Monitoring Service (PIMS) at the Institute for Democracy in South Africa (Idasa) put it: "The transformation of South Africa's judiciary is constitutionally prescribed, necessary and inevitable – what is important about transformation, however, is the form it takes."[56]

Idasa researchers said, "The blueprint for the kind of South Africa that we want lies in the constitution which calls for non-racism, non-sexism and inclusiveness to permeate every level of society. The judiciary cannot and should not be divorced from this conversation."[57]

At a roundtable discussion on the transformation of the judiciary in October 2005, Justice Jeanette Traverso,[58] the deputy judge president of the Cape High Court said: "It is essential that we as members of the legal profession confront this issue ourselves. It is not for the executive to dictate to us."[59]

She added:

> Much has been said about transformation. For some it is more than a process whereby the racial and gender profile of our country is reflected in the appointment of our judges. Others simply view it as a process aimed at the intellectual transformation of individual members of the bench; a process aimed at the appointment of people who espouse and promote the fundamental rights enshrined in the constitution … a process aimed at promoting a culture of accountability … whereby courts are made more accessible to litigants. There are also those who consider it involves the complete reorganisation and the modus operandi of the judiciary.[60]

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[55] International Commission of Jurists, www.icj.org.za

[56] Seedat S, Faull J *et al*, "Debating the Transformation of the Judiciary: Rhetoric and Substance", Public Information and Monitoring Service at Idasa, 13 May 2005.

[57] Seedat S, Faull J *et al*, "Debating the Transformation of the Judiciary: Rhetoric and Substance", Public Information and Monitoring Service at Idasa, 13 May 2005.

[58] Traverso is one of the "accused" in the so-called racism report by her boss, Cape Judge-President John Hlophe. His report alleged racist attitudes were common on the bench and that Traverso said a colleague Judge Yekiso was unable to write his own judgment in the controversial medicine pricing case and that Judge Hlophe had to do it on his behalf. See De Bruin P and C Smith, "Hlophe row: Traverso 'amazed'", *Beeld*, 28 February 2005.

[59] Traverso J, "Transformation of the Judiciary: Changing the racial and gender composition", Roundtable discussion hosted by Idasa and the University of Cape Town's Democratic Governance and Rights Unit, 11th and 12 October 2005.

[60] Traverso J, "Transformation of the Judiciary: Changing the racial and gender composition", Roundtable discussion hosted by Idasa and the University of Cape Town's Democratic Governance and Rights Unit, 11th and 12 October 2005.

Slow Pace in Redressing Racial Imbalances

The period since apartheid has seen the demographics on the bench change. From just three black men and two white women among the country's 166 superior court judges in early 1994, by 2005, there was a marked change. Of the 198 superior court judges, the majority remain white males (96), however there are now 50 African, eight coloured and 16 Indian male judges. In addition there are 28 female judges – 12 white, eight African, three coloured and five Indian.[61]

There has been a fair amount of debate as to whether the pace of transformation is too slow, whether white candidates have been overlooked for appointments, and whether adequate measures are being taken to facilitate the entry of black and female candidates.[62] But a senior judge said the Judicial Services Commission is making progress in redressing the racial and gender imbalances –"where they can find suitably qualified candidates, they have appointed them". Of the last 30 judicial appointments, "24 were previously disadvantaged."[63]

Controversy Around Some Judicial Appointments

There has been a perception by some members of the judiciary that less qualified candidates are being appointed before more senior members of the judiciary. Such fears have been part of the public discourse in many countries engaged in affirmative action/transformation involving formerly excluded groups. It is beyond the scope of this report to assess whether appointments resulted in appropriately skilled people being nominated to the bench. However, the tone and conduct of the debate inappropriately put respect for the judiciary at risk.

There is a constitutional requirement that the judiciary broadly reflect the ethnic and gender diversity of South Africa and that this should be considered during the appointment process: "Due to the policy of apartheid the current judiciary does not fulfil this criteria, although progress is being made. This approach often conflicts with the traditional policy of promotion based on seniority."[64] Several cases in the mid-1990s can be cited:

- In 1997, during the selection process for the Chief Justice, many judges came out publicly in favour of Justice Van Heerden, the most senior judge in the Court of Appeal. The main alternate nomination was Deputy President of the Constitutional Court, Justice Mahomed, who was supported by President Mandela. It appeared that many regional judges had called meetings to encourage support for Justice Van Heerden. A judge of the Court of Appeal, Justice Hefer, also publicly called for Justice Mahomed to withdraw his candidature.[65]
- In April 1998, several judges from the KwaZulu-Natal bench petitioned the JSC to appoint Justice William Booysen over Justice Vuka Tshabalala as Judge President of the provincial division, alleging that the latter would fail to command the respect of the other judges due to a lack of experience. On 1 June 1999 it was also reported that then Deputy President Mbeki, who was to be appointed as president on 11 June 2000, vetoed the appointment of Justice Edwin Cameron to the Constitutional Court in favour of Justice Sandile Ngcobo.[66]

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[61] Seedat S, Faull J *et al*, "Debating the Transformation of the Judiciary: Rhetoric and Substance", Public Information and Monitoring Service at Idasa, 13 May 2005.
[62] Seedat S, Faull J, *et al*, "Debating the Transformation of the Judiciary: Rhetoric and Substance", Public Information and Monitoring Service at Idasa, 13 May 2005.
[63] Personal communication, Judge of the Supreme Court of Appeal, December 2005.
[64] International Commission of Jurists, *www.icj.org.za*
[65] International Commission of Jurists, *www.icj.org.za*
[66] International Commission of Jurists, *www.icj.org.za*

- A perception that less qualified candidates are being appointed has also led to some judicial retirements. In 1996 Justice Rex Van Schalkwyk resigned citing the policy of affirmative action as having a deleterious effect on the bench. Justice Piet van der Walt announced his retirement in October 1998 after a less senior judge was appointed over him to be President of the Transvaal High Court.[67]

Judicial Independence – Public Criticism and Perceived Threats

The debate about the pace of transformation in the judiciary saw the ruling African National Congress (ANC) and the judiciary engage in unseemly public debate in 2005. At its 93rd birthday celebration in January 2005, the National Executive Committee of the ANC accused the bench of having a collective mindset that was not in line with the "vision and aspirations of millions of the people who engaged in the struggle to liberate our country from white minority domination."[68]

The statement added:

> We face the continuing and important challenge to work for the transformation of the judiciary. The reality can no longer be avoided that many within our judiciary do not see themselves as being part of these masses, accountable to them, and inspired by their hopes, dreams and value systems. If this persists for too long, it will inevitably result in popular antagonism towards the judiciary and our courts, with serious and negative consequences for our democratic system as a whole.[69]

In a show of support, the government's alliance partner, the South African Communist Party (SACP) said: "there is still a long way to go particularly when it comes to ensuring that the values, interests and aspirations of the millions of workers and the poor are at the centre of the justice system in our country".[70]

This stand-off between the ruling party and the bench came just months after "a war of words between some black and white judges over judgments in cases involving the government". The way in which such comments were made in public was interpreted by some as a threat that judges must rule in the government's favour or risk wholesale replacement by the executive.[71] The mere levelling of threats or calls for accountability to voters has been seen by significant segments of the judiciary as a threat to judicial independence.

The *Mail & Guardian* quoted a judge who described the ANC's call for judicial accountability to the masses as "'astonishing', pointing out that it was the constitution to which the judiciary was accountable, not 'the masses'. He suggested calling for accountability to the masses was very close to calling for accountability to those who purport to represent them – namely the ruling party."[72]

The *Mail & Guardian* commented in an editorial that the ANC had quickly denied that its January 8 statement threatened the independence of the courts, but the newspaper said: "The language of the statement clearly reflected ambivalence in the ANC over whether the

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[67] International Commission of Jurists, *www.icj.org.za*

[68] Statement of the National Executive Committee of the African National Congress on the occasion of the year 93 of the ANC, Umtata, 8 January 2005.

[69] Statement of the National Executive Committee of the African National Congress on the occasion of the year 93 of the ANC, Umtata, 8 January, 2005.

[70] Statement by the South African Communist Party "Debate on the Transformation of the Judiciary cannot be delegitimised", 11 January 2005.

[71] The most recent of these was around the pharmaceutical industry's case against Health Minister Manto Tshabalala-Msimang and her department over medicine pricing, which saw two black judges ruling in favour of the government while a white judge (Traverso) sided with the pharmaceutical industry. See Ndlangisa S, Msomi S and C Rickard, "ANC threatens judges", *Sunday Times*, 9 January 2005.

[72] Dawes N and F Moya, "ANC divided on judiciary", *Mail & Guardian*, 14 January 2005.

constitutional mandate for judicial transformation gave adequate expression to the courts' role in social development".[73]

Judicial Independence – Executive Involvement in Judicial Discipline

Arguing that the judiciary faced problems with unaccountable judges and certain administrative shortcomings in the efficiency, training and management of courts, the Department of Justice began to develop the draft legislation to address judicial accountability in 2000. The draft Judicial Services Commission Amendment Bill (JSCA Bill) and the Judicial Tribunal Conduct Bill (JCTB) provide for the establishment of a formal complaints and disciplinary mechanism for judicial officers. The bills would also see the Department of Justice take over certain administrative control over court management.

Critics argue that the Bill will intrude on judicial independence – specifically that the threat of disciplinary action gives government politicians or litigants an opportunity to influence judicial decisions. They claim the existing features of the South African judiciary are sufficient to ensure judicial accountability.[74] Such features include open hearings, reasoned judgments, appellate procedures and rules defining when judges should remove themselves from a case.

But the creation of a disciplinary and complaints mechanism has much value. It could advance the integrity of the court system, improve its public profile as a fair and independent institution not beyond accountability, and deter possible corruption and manipulation of the bench. Equally, abuse of complaint mechanisms against judges could be used by the accused to undermine the legitimacy of the judiciary and its verdicts. Such an "attack-the-judges" strategy featured prominently in the corruption cases surrounding former deputy president Jacob Zuma and other corruption cases.

The proposed disciplinary bills originate in section 180 of the constitution, which grants parliament the authority to adopt legislation to deal with complaints against judicial officers. International trends favour the establishment of a proper system that deals fairly and efficiently with complaints against judges, and regulates possible conflicts of interest. By establishing clear standards of conduct for judges – and a disciplinary procedure to deter corruption and conflicts of interest – public confidence in the courts can be enhanced.[75]

However, it is important that such a disciplinary body be independent of government. The proposed legislation vests authority to investigate and hold hearings in the hands of the Judicial Services Commission, through its subcommittee and tribunals. The Bills therefore rely on an independent body, the JSC. Some have argued that the possible inclusion of members of the legislature or executive on the Tribunal (or committee) of the JSC – and their roles in the appointment process – is an interference with the separation of powers principle and the independence of the judiciary. [76]

Judicial Independence – Executive Involvement in Judicial Management

The ability of the courts to administer efficient, swift justice is vital to their role as a societal arbiter of disputes and purveyor of justice. However, the government proposes to have the

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[73] Editorial, "Danger signs", *Mail & Guardian*, 17 February 2005.
[74] Seedat S, Faull J *et al*, "Debating the Transformation of the Judiciary: Rhetoric and Substance", Public Information and Monitoring Service at Idasa, 13 May 2005.
[75] Email correspondence with S Seedat, 31 January 2006.
[76] Email correspondence with S Seedat, 31 January 2006.

Department of Justice take over certain administrative functions that the courts in South Africa traditionally managed for themselves. In January 2006, the gazetting of draft legislation on changes to the administration of justice raised public concern. The draft Constitution 14th Amendment Bill and the proposed Superior Courts Bill are intended to create a single, streamlined judicial structure that will separate administrative and judicial functions for the first time.[77] Government seeks to make the Constitutional Court of South Africa a final court of appeal in all matters, not only constitutional ones.[78]

There is a legitimate argument that there is a need for greater judicial efficiency in management of cases and finances. The (former) Chair of the Parliamentary Portfolio Committee on Justice and Constitutional Development, Johnny de Lange (now Deputy Minister of Justice and Constitutional Development) noted: "The Department of Justice has not reconciled its books since 1959 and had no real accounting system until two years ago. Of the 518 courts under the Department's jurisdiction, only 30 are computerised and many transactions are not properly recorded."[79]

Transferring Judicial Powers to the Executive – A Threat to Independence: The new bill would give the justice minister – a political appointee – control over administration and budgetary matters within the judiciary, (including court budgets, hiring and firing of staff and management of court functions), effectively removing these functions from the chief justice.[80] Judges possess specific knowledge of the state of the court, its systems and personnel, and are in a position to make decisions about court administration. The Department of Justice is not particularly noted for its own administrative efficiency, which raises questions over why it would be seen as more capable of administering the courts than judges. In practice, judicial and administrative functions are difficult to delineate. If power to make decisions about budget and administration is constitutionally entrenched with the executive branch, judges would have less influence over the specific needs of their own courts.[81]

Criticising this aspect of the bill, the General Council of the Bar of South Africa argued that the administrative independence of courts is an important part of judicial independence: "It is not possible to divorce the administrative functions pertaining to the courts from the exercise by the courts of their judicial functions … a court's judicial function is inextricably linked to, and dependent upon, the way in which courts themselves function and are administered."[82]

Presidential Power to Pack the Court: Under one of the proposed amendments, the president would need only to consult with the chief justice to make acting appointments, and would not need to have agreement, thus reducing the chief justice's powers, and giving the president the potential to pack the bench with compliant acting judges.

Removing the Power to Block Unconstitutional Laws: The proposed legislation will also bar all courts from suspending the coming into force of an act of parliament – a move that law academics say is rooted in the United Democratic Movement's 2002 challenge to floor-crossing legislation.[83] (See **floor crossing**, page 26).

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[77] Ensor, L, "Scramble to soothe judges' fears on bill", *Business Day*, 17 January 2006.
[78] The argument is that there cannot be two separate courts deciding on separate matters. See: Staff Reporter, "Courting Trouble", *Business Day*, 18 January, 2005.
[79] Van Vuuren H, *National Integrity Systems, Transparency International Country Study Report, Final Draft South Africa*, p 50.
[80] Van Gass C, "DA, judges shocked by timing of constitutional amendment", *Business Day*, 18 January 2006
[81] Email correspondence with S Seedat, 31 January 2006.
[82] Sapa, "Bar Council 'concerned'", News24.com, 30 January 2006.
[83] Staff Reporter, "Government takes aim at courts' power over Acts", *Mail & Guardian Online*, 18 January 2005.

A Rushed Debate: The judiciary has argued that the proposed legal and constitutional changes have been rushed, without proper consultation or meaningful government alterations to address grave concerns over judicial independence.

Former chief justice Arthur Chaskalson and his successor Judge Langa have urged the executive to seek consensus instead of using strong-arm tactics.[84] In January 2006, Langa was quoted in the media as being "surprised" and unaware that the amendment bill had been published on 14 December 2005. Langa said he would have expected a longer period to consider the draft and the period in which it was published was "awkward for everybody" including non-lawyers and those most affected.[85]

When the proposed amendments were put to judges in April in 2005 at a judicial colloquium many expressed their dissatisfaction. The then chief justice Chaskalson said:

> They raised concerns about certain provisions of the draft legislation, including provisions which they considered to be inconsistent with the separation of powers and the independence of the judiciary mandated by the constitution.[86]

Afterwards, senior judges including Langa; Bernard Ngoepe, the President of the Transvaal Division; Eastern Cape Judge President Cecil Somyalo; and the KwaZulu Judge President Vuka Tshabalala endorsed memoranda voicing their displeasure.

Government denies that the Bill was being rushed or that it fundamentally threatened judicial independence. Director-General of the Department of Justice and Constitutional Development Menzi Simelane denied that the department had snubbed the country's top judges by not consulting them before publishing the draft amendments and said judges had been consulted previously. However, judges maintain that government consultation was perfunctory and simply ignored objections over fundamental principles of independence.

Chair of the Parliamentary Justice Portfolio Committee, Fatima Chohan-Khota denied charges that the amendments were being pushed through during the December 2005 holiday period. She said the draft constitutional bill had been under debate for four years. According to Simelane, the constitution as it now stands does not stipulate the powers of the chief justice. It only outlines functions. What the Constitution 14th Amendment Bill does is actually confer that authority.[87]

Efficiency Can Be Realised in Other Ways: As noted in the discussion above on the criminal justice system, there are many ways that the inefficiencies involved in dispensing justice can be removed without executive intrusion into the courts. Notably changes are needed to prisons, resources and management of police investigations, and prosecution services.

According to Shameela Seedat, a legislation analyst at the Institute for a Democratic South Africa's Political Information and Monitoring Service, "The department can improve efficiency without resorting to constitutional amendment, as demonstrated by its recent decision to introduce court managers". Court managers were first introduced in 2004 and employed by the department to work with judges and magistrates on administrative matters. They report to judges, so judicial authority is not undermined. Seedat questions the government's priorities: "Should the primary concern of the executive not be to improve the

[84] Moya F, "Judges to talk tough at key meeting", *Mail & Guardian,* 1 February 2006.
[85] Van Gass C, "DA, judges 'shocked' by timing of constitutional amendment", *Business Day*, 16 January 2006.
[86] "Judges want to talk," news24.com, 18 April 2005.
[87] le Roux M, "Amendments to judiciary not sneaked into law", *Mail & Guardian Online*, 18 January 2005.

efficacy of institutions operationally rather than to spend time and effort on high-level constitutional changes?"[88]

Lack of Funding, Security Threaten Justice

The lower levels of the court system suffer from a lack of adequate funding. This is illustrated by concerns regarding the level of security in the court system.

Security is a problem. South African defendants frequently escape from holding cells, often with police complicity or as a result of failure to provide sufficient security staff. In January 2000, four armed men held up a magistrate, prosecutor and several members of the public at the Phoenix Magistrates' Court in Durban. The men were able to bring firearms into the court, as there was not enough money to repair a broken weapons scanner.

Workloads are also a concern. "Judges and magistrates confront the daily frustrations of crowded court rolls, overtaxed prosecutorial services and limited police resources," said Supreme Court of Appeal Judge Mohammed Navsa.[89]

Adequate funding is essential to maintain the independence of the judiciary and to safeguard the judicial process from any inappropriate or unwarranted interference. The United Nations Basic Principles on the Role of Lawyers also requires that authorities must adequately safeguard the security of lawyers if they are threatened as a result of the discharge of their functions.[90]

[88] Seedat S, "Judicial objectives could be met without constitutional changes", *Sunday Times*, 29 January 2006.
[89] Navsa MS, opening address at the "A new decade of criminal justice in South Africa – Consolidating Transformation", 7 February 2005.
[90] International Commission of Jurists, *www.icj.org.za*

APRM Objective 4: Separation of Powers – Parliament

APRM Democracy & Political Governance

Objective 4: Uphold the separation of powers, including the protection of the judiciary and of an effective legislature

Question 1: What are the constitutional and legislative provisions establishing the separation and balance of powers among the Executive, the Legislature and the Judiciary branches of government?

Question 3: How would you rate the independence of the legislative body in your country?

The constitution contains strong provisions for the protection and promotion of individual rights, but also sets out provisions for checks and balances between the arms of government. The constitution calls for a co-operative form of governance, which must operate in a manner that is effective, transparent, accountable and coherent for the Republic as a whole. However, the constitution also assigns specific powers to the legislature in the furtherance of executive oversight.

Chapter Four (Section 55) of the South African constitution, states that the National Assembly must provide for mechanisms to ensure that all executive organs of state in the national sphere of government are accountable to it. Furthermore, it must maintain oversight of the exercise of national executive authority, including the implementation of legislation and any organ of state.[91] The National Assembly may impeach/remove the president on the grounds of serious misconduct or incapacity. Furthermore, it may pass a motion of no confidence in the cabinet, in which case it must resign and be re-constituted by the president.

Additionally, the National Assembly may summon any person to appear before it to give evidence on oath or affirmation, or to produce documents; require any person or institution to report to it; compel, in terms of national legislation or the rules and orders, any person or institution to comply with a summons and receive petitions, representations or submissions from any interested persons or institutions.[92]

The second chamber of parliament has changed its name from the Senate to the National Council of Provinces (NCOP) in 1997. As the name suggests, this house is constituted to strengthen the linkages of governance and representation between the first (national), second (provincial) and third (local) tiers of government. The NCOP consists of 90 members comprising ten members from each of the nine provinces. Members of the NCOP are nominated by provincial legislatures and a delegation from the South African Local Government Association. Four special delegates (including the Provincial Premier) are drawn from the provincial legislatures, and may alternate from time-to-time. The remaining six delegates are permanent. Members are voted in proportion to their party's respective representation in the Provincial Legislature.

The NCOP has a measure of veto power. Each provincial delegation head casts one vote on behalf of the province, and five of the nine provinces have to vote in favour of any issue, except constitutional amendments which require six provinces to be in favour. In NCOP votes on ordinary bills not affecting the provinces, each delegate has a vote, a third of delegates must be present, and the decision is taken by a majority of those present. The NCOP is guided by the deliberative and legislative role of the National Assembly, but importantly, it may also initiate or prepare bills in which Provincial Legislatures have joint law-making power with the

[91] Constitution of the Republic of South Africa Act, (108) 1996.
[92] Constitution of the Republic of South Africa Act (108) 1996, Section 56.

National Assembly. These "Schedule Four" (of the constitution) laws pertain to areas such as agriculture, education, health, environment and housing.

Executive Branch/Party System Subvert Parliamentary Oversight[93]

Despite the powers of oversight envisioned by the constitution, parliament has not always asserted meaningful oversight of executive branch policy, departmental operations or proposed bills. Parliament's most vexatious challenge has been the development, understanding and implementation of its oversight and accountability role. While the principle of parliament's oversight role is clearly enunciated within the constitution, its practical operation is fraught with difficulty. Some of the key challenges:

PR System Prioritises Party Loyalty: Furthermore, South Africa's proportional representation party list electoral system ensures tight loyalty to the party rather than to a given electoral constituency or the mandate conferred by promises made to voters in a specific district (see also **PR Reduces Political Accountability to Voters, below).** Thus the party list system, supported by the assertive use of party discipline, militates against MPs' adopting independent positions. Promotion from the back to the front benches of parliament is not achieved by questioning or critically engaging a minister or deputy.

Ministers and Deputies are MPs: With the exception of the president (who, after his election by parliament, departs the legislature) all cabinet members and their deputies are members of the National Assembly and in large part from the majority party. This undermines the separation of powers between the executive and legislative branches of government. Not only can ministers vote and play an active role in parliament, they socially and politically, by virtue of their positions, have far more influence on parliamentary affairs than their voting numbers would suggest.

African Nationalism Encourages Solidarity: Arguably too, the pervasive ideology and ethos of the majority party, the African National Congress (ANC), encourages solidarity, rather than critical engagement or public debate. No ANC MP critically questioned a member of cabinet in parliament – even on matters of conscience such as HIV/Aids and the death penalty – before the Scopa arms deal hearings (see arms deal and Scopa discussion pages 86-95), and certainly none have done so since.

Presidential Domination of the Ruling Party: The president, through his governmental and party powers, dominates the ruling party and has vast powers to punish, demote, deny advancement or indirectly bring party peer pressure to bear on party members. This power is supported by the culture of solidarity, the party list system, the choice of cabinet from within

[93] It is important to note the historical legacies that parliament confronted after the transition to democracy in 1994. While they had the mission to transform parliament from an exclusive all-white institution to a "People's Parliament", the majority of newly-elected MPs took time to understand and become experienced in the ways of parliament. New MPs by definition had no experience of, or exposure to, the inner workings and disciplines of parliament as an institution. Many had spent years in exile, in prison, engaged in guerrilla warfare, as civic leaders or as trade unionists. No newly-elected African MP had ever served in parliament, although a number had held office in Black Local Authority and homeland administrations. Part of the challenge was to retain what was functional under the previous parliamentary system and meld this with new rules, new committees and a new transparent *modus operandi,* given that the new constitution obliges parliament to facilitate public engagement in all its activities. There has also been a high turnover of MPs from the ruling party as many are redeployed to positions in the executive and replaced by candidates on the party list. In addition, parliament faced an arduous task of repealing and removing from the statute book all lingering discriminatory legislation and the drafting of new, democratic and progressive/transformative legislation. This has been a considerable task and has seen some 800 new pieces of legislation enacted since 1994.

parliament and the use of party whips. With these instruments, the president and party can enforce strict discipline on MPs and level sanctions against those opposed to or questioning the presidential line. As a consequence, the presidency has enormous power to subvert the independent oversight role envisioned by the constitution, rendering constitutional guarantees of independence more theoretical than practical.

The factors above affect other democracies, but the independence of the legislature is, in the US and UK systems, maintained because strong constituency-based election systems give legislators a power-base that insulates them from the dictates or control of political party leaders and the consequent threat of punishment for dissent. In such systems political parties must retain cohesiveness through the strength of their arguments and persuasion, not the threat of sanctions.

See also discussions in the Economic Governance section this report of:

- **Scopa and the arms deal investigation, pages 86-95** (demonstrating how parliament's principal oversight body failed to exercise sufficient oversight over the executive);
- **Ruling Party Protective of Members, page 78** (outlining how the ANC has ignored or dismissed allegations against powerful party members until those individuals are found guilty by the court system);
- **The Public Protector, page 95** (examining the role he played in the arms deal and Oilgate investigations, and his record of shielding senior party members from public or parliamentary sanction); and
- **The Auditor-General of South Africa, page 97** (looking at how he edited the arms deal final report and performance in holding the executive to account).

Declining Trends in Oversight and Accountability by Parliament

While oversight responsibility vests with parliament as a whole, responsibility for review of specific departments and issues is delegated first to committees,[94] some of which have been very assertive while others have been weak. For example, the Justice and Finance committees, have been extraordinarily diligent and have thoroughly interrogated and indeed re-written legislation. Others have been less distinguished. The variable performance of respective committees has in part been due to the nature of leadership shown by committee chairs, as well as by their composition and sphere of operations. The Committee on Foreign Affairs for example has had little opportunity to consider legislation since 1994 and has concerned itself

[94] Much of the work of the post-1994 parliament is managed through an extensive committee system. Committees are designed to improve the efficiency of the legislative process, to deepen and enhance the deliberative function of parliament and to maximise public participation in the legislative process through hearings and submissions. Crucially, however, committees are constituted to strengthen parliament's capacity to conduct effective oversight of the executive. In accordance with Rule 199 of the Rules of the National Assembly, the Speaker, in conjunction with the Rules Committee, established "a range of portfolio committees and assigned a portfolio of government affairs to each committee". Currently the following types of parliamentary committee exist: National Assembly (NA) Portfolio Committees (discussed in more detail below); Ad Hoc Committees that dissolve after dealing with the specific matter for which they were constituted; constitutionally prescribed joint committees (Human Rights, Public Protector, Defence and Finance), Statutory Committees (Intelligence); Joint Committees with the NA and NCOP (Joint Committee on Members' Interests and the Standing Committee on Public Accounts); Standing Committees; Joint Ad Hoc Committees and Joint Standing Committees.

with international agreements and protocols, issues of departmental transformation and department briefings on foreign policy.[95]

Each committee is tasked with maintaining oversight of: the exercise of national executive authority within its portfolio; the implementation of legislation pertaining to its portfolio; any executive organ of State within its portfolio; and any other body or institution in respect of which oversight was assigned to it.

A parliamentary committee may monitor, investigate or enquire into and make any recommendations concerning any constitutional organ of state within its purview. A committee is granted these powers with regard to the legislative programme, budget, rationalisation, restructuring, functioning, structure or staff and policies of such organ of state or institution. Furthermore, a committee is tasked with considering all bills and amendments to bills referred to it. Thus its powers are, theoretically, considerable. None is more important in its oversight role than the Standing Committee on Public Accounts (Scopa), which monitors all government expenditure and is thus the first line of oversight and protection for the South African taxpayer in relation to the government. (The role and effectiveness of Scopa is covered in greater detail below, and in the **Economic Governance and Management** section).

Parliament's Assessment of its Own Oversight: To its credit, parliament commissioned an external team of legal experts in January 1999 to interpret, report on and make recommendations regarding its oversight and accountability role as provided for in the constitution. Reporting back in July 1999, the expert report took its terms of reference as that of outlining and explaining the nature of the obligation that Section 55(2) of the constitution places on the National Assembly to hold organs of state and the national executive authority to account:

- The report questioned the practicality of parliament playing an effective oversight role over all organs of state, but strongly asserted the need for parliament to concretise and protect its role through new and specific legislation.
- The report also urged the protection of the independence of the Chapter Nine Institutions. In this regard it recommended the separation of the funding base of these institutions from the executive in order to remove potential political leverage over them and ensure credible operational independence.
- Moreover the report noted a decline in the quantum of committee briefings received from Departments,[96] and thus implied the marginalisation of parliament by the executive.

Some three years later the Parliamentary Ad Hoc Sub-Committee on Oversight and Accountability produced its final report in response to the independent consultancy.[97] In summary the Ad Hoc Sub-Committee castigated the consultancy. It concluded that parliament had already commenced strengthening its oversight and accountability roles and took issue with a number of the central contentions of the consultant's report. Finally, it recommended further examination by the Parliamentary Joint Rules Committee before coming to a decision on the modalities of future parliamentary oversight. The Ad Hoc Sub-Committee Final Report

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[95] It is important to note that the Department of Foreign Affairs does not administer legislation as other departments do. It is more of a policy advisory arm to the executive, and carries out South Africa's foreign policy.

[96] Corder H, S Jagwanath and F Soltau, "Report on Parliamentary Oversight and Accountability" Faculty of Law, University of Cape Town, July 1999.

[97] "Final Report of the Ad Hoc Sub-Committee on Oversight and Accountability", Parliament, Cape Town, 3 September, 2002.

made a number of specific recommendations, the most substantive of which was the acceptance of an Accountability Standards Act to provide form and substance to parliament's role *vis-à-vis* Executive oversight. To date, however, it is difficult to establish evidence of new initiatives or developments emerging in practice from the "Oversight and Accountability" consultancy, or indeed from the Ad Hoc Sub-Committee's work. Perhaps parliament's robust approach to the APRM process in South Africa is evidence of a change in this respect.

Uneven Department-Committee Relationships

An array of structural constraints has resulted in committees working less than optimally and failing to conduct thorough and robust oversight of the executive. The first difficulty has been establishing a clear and co-operative understanding between government departments and parliamentary committees about the nature and obligations of the relationship. Even where ministers, deputy ministers and directors-general have not sought to avoid scrutiny and oversight and where a transparent and co-operative relationship has been established, the modalities for ensuring oversight have not always been effective. Practical problems include:

Departmental Briefings Not Always Relevant, Concise or Timeous: The format and extent of information provided by government departments has not always been what committees want or need to know. Certainly in the earliest days of the new parliament this may have been attributed to committee members not clearly understanding what it was they were supposed to be soliciting from departments. Given the legacy of opaqueness which characterised the previous apartheid administration, "old guard" officials were unused to and perhaps uncomfortable with the new light of transparency scrutinising their operations. More specifically, written departmental submissions to committees have often been voluminous and technical in nature, sometimes running to hundreds of pages. This problem is exacerbated when inadequate time is provided for committees to read, reflect and discuss written submissions prior to the departmental presentation being given. In certain committees it has not been uncommon for written submissions to be provided the day before, or worse still, handed out at the time of the departmental briefing.

Poor Quality Departmental Annual Reports: Each national department is required to produce an annual report outlining its activities, performance and spending, including the Auditor-General's report on that department. Provincial departments and municipalities are similarly required to present annual reports to their legislatures and councils, respectively. The annual report is supposed to be a meaningful briefing and oversight document to appraise legislators of the key programmes and challenges, both financial and operational, facing the department.

However, at present annual reports offer very little useful information, focus almost exclusively on putting forward a positive image of the department and offer very little meaningful analysis of problems confronting departments. They are produced in small quantities (usually 1,000 copies per department), are not made easily available to the public and are often posted late or incorrectly on the relevant web sites.

Although the Public Service Commission has advocated implementation of performance management systems, more substantive discussion of problems and the use of public opinion surveys to gauge satisfaction with government services (See **Special Focus: Local Government,** page 106), there is little evidence of these reforms in departmental reporting. Parliament at national, provincial and local level are supposed to table such reports and interrogate them as a principal method of holding their respective executive branches accountable. But this process is inconsistent nationally and less frequent at lower levels of

government. Below is a list showing the status of the electronic copies of annual reports for government departments:

Government Departments	2004/05 Annual Report Published to website as of 31 January 2005?	Notes
Agriculture	YES	Must open link to 1999 Annual Report in order to get a list of reports by year.
Arts and Culture	NO	
Communications	NO	Have posted 2003/04 Annual Report but nothing more recent
Correctional Services	NO	Have posted 2003/04 Annual Report but nothing more recent. Dedicated link on Home Page made annual report easy to locate
Defence	YES	Dedicated link on Home Page
Education	YES	
Environmental Affairs and Tourism	NO	Although one can order documents and publications, annual report is not published to website
Finance	YES	Provides various reports on local government as well.
Foreign Affairs	YES	Dedicated link on Home Page
Health	YES	No search function on website. Must go to 'documents', then 'reports' and then 'annual reports'.
Home Affairs	NO	Only 2003/04 posted
Housing	NO	Only 2003/04 posted
Justice & Constitutional Development	NO	Only 2003/04 posted
Labour	YES	pdf file will not download
Land Affairs	YES	Not easy to find on website
Minerals and Energy	YES	Fairly easy if one uses 'search' function
Provincial and Local Government	NO	2003/04 report listed but file is empty
Public Enterprises	YES	Dedicated Link on Home Page
Public Service and Administration	YES	Found under 'documents' link.
Public Works	YES	
Science and Technology	YES	Well-organised and easy to locate
Social Development	NO	Only 2003/04 posted but is erroneously filed under 'Documents 2005'.
Sport and Recreation	NO	Only 2002/03 posted and Auditor-General's Report and financial statements missing from annual report. The numbered sections of the annual report do not describe their content. Illogical sequencing used in naming documents, i.e., Part 3 of annual report is titled 'Report 2' and so on.
Trade and Industry	YES	Annual Report found under 'Publications'
Transport	YES	Shows up as search result 13 when one uses search function.
Water Affairs and Forestry	YES	Found under 'documents' link.
Safety and Security	NO	No Annual Reports posted. No Auditor-General reports posted. Very sparsely populated

Committees Lack Capacity: Although party whips attempt to ensure a fit between relevant experience and committee position, the relationship between committee MPs and departmental officials is by definition one of amateur to professional. This is not peculiar to South Africa, but certainly in the first parliament of the new democracy, the relevant skill

levels of many committee MPs were found wanting. Furthermore, committees have lacked adequate research resources to effectively interrogate ministers, deputy ministers and their senior officials. Departmental briefings are characterised by the attendance of a battery of senior officials with years of relevant experience and qualifications in support of a minister. Furthermore, argumentation by Departments is often of a legalistic nature, frequently leaving committee members at a disadvantage. This has to some degree been ameliorated by the allocation of a researcher dedicated to each committee. However, on a purely technical basis, committees continue to struggle to effectively carry out oversight of the executive.

Lack of Mechanisms for Mutual Feedback: A further and related weakness is that there are few formal channels or requirements for executive-to-committee feedback and vice versa. Once the parliamentary committee has received the annual departmental briefing, there is no formal requirement to effect significant policy adjustment, and little evidence thereof.

Parliament Does Not Scrutinise Departmental Budget Votes Intensely

Parliament has been recently criticised for spending too little time considering and debating departmental budgets. In 2004 and 2005, parliament used extended public committees – where the National Assembly divides into four committees of roughly 100 MPs each – to debate the budget votes, and thereafter the House convenes to vote on the budgets. On some days, as many as three extended public committees are convened. *Business Day* Parliamentary Editor Wyndham Hartley comments, "Having more than one budget vote on any given day means that neither MPs nor the media are able to give them the attention they deserve."[98]

Quality of Debate in Parliament Diminished

It is also worth noting a reduction in the quality of debate and questions in the chamber of the National Assembly. The physical shape of the National Assembly does not permit government/opposition exchanges across the despatch box. Rather, ruling party members and the opposition occupy a podium and invariably read from a prepared text. While motions are common, snap debates are rare. Furthermore, since being elected to office in 1999, President Thabo Mbeki has reduced the number of presidential question times to once every three months, with only five written questions that must be submitted weeks in advance. This is far too infrequent for parliament to hold the president to account and contrasts markedly with the British system, where the prime minister must respond to questions on a weekly basis.

Parliament's Credibility and Effectiveness Questioned

The metamorphosis of the South African parliament from a discredited edifice of repression and exclusion in the apartheid era to a central institution of democracy is profound and the efforts to transform the institution into a "people's parliament" cannot be overstated. Yet while programmes to transform parliament into a transparent and accessible institution have been

Trust in the South African Parliament 1995-2002[99]

	1995	1997	1998	2000	2002
Total	45	42	57	34	31
Black	53	50	70	39	39
White	24	13	18	11	10
Coloured	33	27	32	30	17
Indian	31	20	26	7	23

[98] Hartley W, "Parliament faces sequel 'annus horribilis two'", *Business Day,* 6 January 2005.
[99] Adapted from Mattes R, C Keulder, AB Chikwanha, C Africa and YD Davids (2002) *Democratic Governance in South Africa: The People's View,* Afrobarometer Working Paper No. 24.

successful, where parliament itself is perceived to be weak, its relevance and importance to the public are diminished. There has been a growing perception of irrelevance, disempowerment and concern regarding members' performance, conduct and ethics.

As the table to the right demonstrates, in South Africa the diminution in levels of trust in parliament has been marked, even before the floor crossing issue or the outbreak of the recent travel voucher abuse scandals:[100]

There are two forces at play in this regard. The first is the structural relationship between parliament and the executive branch and in particular the relative weakness of the legislature. The second relates more to the role and behaviour of parliamentarians themselves. These have been discussed in the sections examining floor crossing and ethics elsewhere in this report.

Parliament's Ethics Committee: Parliament's "internal" credibility, and more particularly that of its MPs, has been questioned in the realm of ethics. In addition to the preamble of Chapter Two (the Bill of Rights) in the constitution, Chapter 10 entrenches the principle of a high standard of ethics from public representatives and public servants. In October 1995 the cabinet adopted a code of conduct as part of the Ministerial Handbook and in 1996 the National Assembly adopted a parliamentarian's code of conduct, which was also adopted by the National Council of Provinces in 1997. This code of conduct laid emphasis on the voluntary disclosure of members' financial and business interests. But despite the operation of such codes of conduct, parliament has experienced a number of ethics crises in recent years.

The impression of poor, if not unethical, performance by MPs has been reinforced by high levels of absenteeism, particularly during the second parliament. This pattern of sometimes poor attendance has been compounded by the perception of a weak disciplinary system within parliament in its flaccid response to the problem of MP absenteeism. For example, Winnie Madikizela-Mandela was absent from parliament more often than she attended, failed to respond to repeated requests by parliament's Ethics Committee to appear before it and was ultimately never sanctioned by parliament.

One of the key related issues that parliament has also failed to resolve is the ambiguity between the authority of the Ethics Committee and the authority of and respect for, senior members of the ruling party. It is the permissive and effete behaviour of parliament's Ethics Committee in dealing with senior figures that has led to questions about the political will of parliament, and in particular the ruling party, to deal with wayward MPs. Yet there is no current provision permitting the expulsion of an MP who fails to adhere to the MPs code of ethics, merely the imposition of a fine if found guilty.

The Ethics Committee has no paid staff, curtailing its ability to launch investigations. On some occasions when the committee has forced MPs to account to it – including cases involving senior ANC MPs Winnie Madikizela-Mandela, Toni Yengeni and Defence Minister Mosiuoa Lekota – the proceedings took place in closed meetings. This again limited the

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[100] The South African parliament is not alone in this regard. Gallup International's 2002 Voice of the People survey of 36,000 people in 47 countries (statistically representative of 1,4 billion people) revealed low levels of trust in parliaments generally. The central institution of democratic representation in each country polled (parliament, assembly or congress) was held to be the least trusted amongst 17 institutions, including corporations. Two-thirds of those polled disagree that their country is governed by "the will of the people", with people having as much trust in the media and unions as they do in their elected governments. In Africa, some 60% of those polled expressed trust in the media, as opposed to just 43% who trusted the government. Some 69% of Africans do not believe their country is governed by the will of the people. Of further interest, non-governmental organisations (including advocacy groups) enjoyed the second highest trust rating, after the armed forces. See www.wef.org Press release, "Trust will be the challenge of 2003" 8 November 2002.

oversight role that the media and the public could play. The committee has relatively weak powers of sanction (at worst, a fine of a month's salary or the suspension of the rights and privileges of a seat in parliament for 15 days). In Lekota's case, he neglected to declare his directorship of a winery and his shares in a petroleum distribution company. He received a written reprimand and was docked a week's pay, a mere slap on the wrist, given his position.

Idasa's research found that implementation of ethics regulations across government proved challenging, with some annually-required disclosures not made timeously (or at all). Some MECs have taken several years to make their disclosures in provincial legislatures. The bodies charged with overseeing these systems lack capacity.

- The Public Service Commission had just two employees to process over 3,000 declaration of interest submissions. This seriously hinders their ability to unearth potential or real conflicts of interest. In 2002/3, 55% of national government officials did not give the PSC a financial disclosure form, and only a third complied at provincial level. This placed a burden on the PSC to chase late forms.
- There are no means to check these self-made declarations against activities of the officials concerned, placing the onus on the media and civil society.[101]

Registry of Politician's Interests has Loopholes: While the president's office and all nine premier's offices must keep a register of Executive Members' Interests, the law does not contain punishment or independent oversight provisions, as the intention is to prevent unethical behaviour rather than punish it. Van Vuuren contends that

> the 'embarrassment factor' of being hauled before the committee may prove sufficiently threatening for some MPs, particularly young politicians and back-benchers who have their sights on higher office and do not yet enjoy any political protection from party leadership. Similarly, senior officials such as ministers or party leaders are unlikely to relish the public attention that being called before the committee is likely to place upon them, and the resultant bad publicity for the party concerned.[102]

A Register of Members' Interests has been created for MPs, but public oversight – regarding the non-private portions of the register – remains the sole means to ascertain whether declared interests match MP's activities. There is no formal monitoring mechanism. The private sections of the register are not open to media and civil society scrutiny at all.

The ruling party has a majority on the Joint Committee on Ethics and Members' Interests which updates the register, allowing it the leeway to protect its members. Idasa research notes that while the code is strong by international standards, it has not been robust enough to hold senior ANC members accountable in critical test cases (such as Tony Yengeni, Winnie Madikizela-Mandela and Jacob Zuma), all of whom contravened the code but none of whom were effectively penalised.[103] Confidentiality also prevents citizens from gaining access to the asset disclosure declarations of senior public servants. "To the extent that the Public Service Commission and individual departments don't do verifications internally (and … that is not consistently done) there is no one else to catch errant civil servants."[104]

Travelgate Scandal Damages Public Trust in MPs and Parliament

The so-called "travelgate" investigation, which involves abuse of parliamentarians' travel vouchers, arose originally during 2002. By early 2006 it had not been effectively resolved.

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[101] Idasa, ePoliticsSA, "Government Ethics – balancing competing interests in the public interest, Edition 05, 16 August 2004, pp 3-4.
[102] Van Vuuren H, *National Integrity Systems Transparency International Country Study Report* Final Draft South Africa 2005, p 40.
[103] Calland R and P Graham, *Democracy in the Time of Mbeki,* 2005, Cape Town: Idasa, pp 179-180.
[104] "Indicator Scores", South Africa Report for Global Integrity, Center For Public Integrity, 2003, Indicator 45.

MPs are issued with a book of travel vouchers against which they may claim a specific number of flights, rail, or bus journeys for themselves and their families in a calendar year between parliament and their constituency against proof of ticket purchase. Although the former speaker of parliament had made public individual cases in 2002, a subsequent forensic audit conducted by a leading company revealed a far more extensive pattern of systematic abuse of travel vouchers by MPs in collusion with travel agents. The abuse consisted of falsely claiming for "legitimate" parliamentary business flights, when such trips were never made. In some instances private holiday flights were billed as legitimate parliamentary flights, in others, flights were not taken and the cash value was pocketed, or split between the MP and the travel agency, at the expense of parliament and the South African taxpayer. The alleged fraud is not an isolated incident. The DSO (Scorpions) investigated some 20,000 travel vouchers, with some 7,000 tickets allegedly forged. The estimated value of the alleged fraud is R13 million,[105] although reports in January 2006 suggested that the true figure could be as much as R36 million.[106].

As much as the allegations of fraud have damaged its image, the manner in which parliament has dealt with the alleged fraud has compounded the problem. Although almost one in ten (37) MPs including the Speaker of the National Assembly and cabinet ministers, have been mentioned during the course of investigations, initially no member of parliament resigned, or was suspended by his or her party pending the outcome of the investigation. Democratic Alliance MP Craig Morkel took a voluntary suspension pending the outcome of the criminal proceedings, after the party publicly named him (with his consent) as having participated in travel voucher abuse. Five ANC MPs resigned in June 2005 having accepted a plea bargain from the National Prosecuting Authority and have had to pay large fines, and a further three ANC members were no longer in parliament. The contents of the forensic report conducted for parliament has been withheld from the public. While there is a legitimate case to be made for legal and reputational protection against scurrilous allegations, as well as the presumption of innocence and the right to a fair trial, court cases involving related travel agents made public the details of criminal charges relating to MPs' abuse of the system.

As parliament re-opened in February 2006, 21 MPs still faced criminal charges for defrauding parliament in this scandal.[107] There is also growing controversy over the alleged unfair dismissal of the accounting officer in parliament who initially exposed the scandal, and allegations that the amounts involved in the fraud are much higher than initially thought.

Transparency International's *2006 Global Corruption Report* comments:

> The fallout from Travelgate has been varied. On the one hand, it showed that the anti-corruption bodies and judiciary have a fair degree of independence and are able to carry out their functions without hindrance, even when high-ranking members of the ANC were involved. On the other, there have since been moves to "muzzle" the Scorpions by incorporating the unit into the regular police force. A judicial commission of inquiry has been convened to determine the Scorpions' future. That decision could signal the strength of the government's commitment to fighting corruption at the highest levels.[108]

Note: the role and effectiveness of parliament's Standing Committee on Public Accounts (Scopa) is examined from page 86 in the Economic Governance section.

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[105] "Scorpions reveal details of Travelgate probe", *Cape Times*, September 10 2004.
[106] Dawes N, "Travelgate bill doubles", *Mail & Guardian*, 27 January to 2 February 2006.
[107] Hartley W, "Parliament faces sequel 'annus horribilis two'", *Business Day*, 6 January 2006.
[108] Kajee A, "South Africa", *2006 Global Corruption Report*, Transparency International, Berlin, p 244.

SECTION 2: ECONOMIC GOVERNANCE AND MANAGEMENT

About this Section

The second section of the APRM Self-Assessment Questionnaire is officially named Economic Governance and Management, but APRM does not focus the section merely on classical economic issues of inflation, monetary policy and development strategy. It also includes discussion of fiscal management, transparency and public administration. As noted below, the authors broadly commend the government's stewardship of macro economics and development strategy but offer only a basic overview of the situation. Given the allotted time, this report must leave more substantive discussion of economics to other more specialised organisations.

However, having done substantial work in Africa on public finance management and fighting corruption – two subjects that are inescapably intertwined, we examine below the key issues affecting fiscal management and the fight against corruption. Anti-corruption measures are directly mentioned in both the political and economic governance sections of the APRM Self-Assessment Questionnaire. To avoid repetition, the report clusters corruption related concerns in one place in this chapter.

Because many of the difficulties in public finance occur at provincial and local levels, which have particular problems separate from national arrangements, we have included a Special Focus section at the end of this chapter to examine problems and solutions affecting local government and the increasingly contentious issue of service delivery.

APRM Objectives:
Economic Governance & Management

1. Promote macroeconomic policies that support sustainable development
2. Implement sound, transparent and predictable government economic policies
3. Promote sound public finance management
   - What has your country done to make the public administration, legislative system and fiscal authorities work effectively and in a transparent manner?
   - What has your country done to promote sound public finance management?
   - What measures has your country to develop an effective system of fiscal decentralisation.
4. Fight corruption and money laundering
5. Accelerate regional integration by participating in the harmonisation of monetary, trade and investment policies

Preamble to Economic Governance Section of APRM Self-Assessment Questionnaire

"The Africa crisis is generally viewed as a political crisis with economic consequences. It should, however, be acknowledged that the economic disorder of African countries over the past decades may have aggravated the political turmoil and further deteriorated the living conditions of large segments of the African population.

The economic disorder of Africa has both internal and external dimensions. These include, among others: inefficient revenue mobilisation and aid dependency; weak central banks and inefficient financial sectors; non-transparent budgetary procedures and ineffective oversight by parliamentary and other auditing bodies; unfriendly environment for private investments, characterised by pervasive corruption, poor economic infrastructures and unpredictable public administrations."

Source: APRM Country Self-Assessment Questionnaire

APRM Objectives 1 & 2: Promoting Economic Development

In less than twelve years, South Africa's democratic government has done a great deal to stabilise and stimulate the economy and place it on a path of sustained and incremental growth; promote sound and transparent macroeconomic policies; improve and enhance the management of public finances through progressive and comprehensive legislation such as the Public Finance Management Act and the Municipal Finance Management Act; and pursue strong business links with the African continent. A robust public debate has arisen on the direction that economic and developmental policy should follow in the coming decades.

Broadly, South Africa's macroeconomic indicators are sound and improving. Inflation has been within the target range (of 3 to 6%) for several years. Real interest rates are at historic lows and the housing market has been booming. Formal sector employment is rising, real GDP growth is over 4%, and the currency is more stable than it was four years ago. The 2005 budget was squarely aimed at promoting economic growth, fostering social development and reducing poverty and inequality. The budget deficit is also firmly under control which was aided by improved revenue collection.

Government's *2005 Budget Review* acknowledged this progress and how the benefits of a strengthening economy were to be utilised:

> Following 10 years of deep institutional reform and sound economic management, the economy is stronger than it has been since the early 1980s, and the capacity of Government to improve the lives of all is steadily being built. Strong economic growth, rising employment, a buoyant investment environment and accelerated delivery of social and municipal services would further raise living standards and reduce poverty and inequality over the decade ahead.
>
> The South African economy is experiencing one of the longest periods of economic expansion since World War II. Following a difficult period of corporate restructuring, formal sector employment has been increasing for about two years; inflation has moderated and interest rates have fallen to historic lows. Investment in both public and private sectors has accelerated, bringing a steady expansion in productive capacity. The economy grew by 3.7% in 2004 and is set to grow by 4.3% in 2005. Inflation is projected to remain well within the target range while capital investment is projected to reach 18% of GDP by 2007, up from 15% in 2002.
>
> The 2005 Budget makes a significant contribution towards the goals of accelerating economic growth, advancing social development and bridging the divide between rich and poor. Real growth in spending will average 5.5% over the next three years with significant additional allocations for social grants, infrastructure investment, land restitution, improved remuneration for police, teachers and social workers, investment in skills development and municipal and social services. Within a sound fiscal framework, Government is again able to provide moderate reductions in tax rates for both individuals and companies.[109]

The governance research group Idasa (the Institute for Democracy in South Africa) concluded:

> The South African legal framework can be described as sound and very enabling with regard to transparency and participation. Important are:
>
> - constitutional requirements governing revenue funds, the division of revenue, budgets, Treasury control, procurement, government guarantees, remuneration of people holding public office, provincial and municipal taxing and borrowing;
> - the requirements of the Public Finance Management Act (PFMA) and the Treasury Regulations published in terms of the Act;
> - the government's obligations under the International Monetary Fund (IMF) Standards of Data Dissemination.[110]

Also important are the introduction of the Medium Term Expenditure Framework (MTEF) in 1998, and the Medium Term Budget Policy Statement (MTBPS) in 1997. However there are significant gaps in what government reports. Idasa notes:

> The absence of a legal requirement for the publication of contingent liabilities (other than government guarantees) and extra-budgetary activities remains a major gap in South Africa's transparency requirements.
>
> Legislation aimed at empowering and enabling parliament and provincial legislatures to amend budgets is still outstanding.

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[109] *Budget Review*, National Treasury, 2005, p 1.
[110] Barberton C, "South Africa: Law is Enabling, but gaps persist", IDASA, no date, p 1.

There is legislation that details executive transparency requirements but none when it comes to any one body tasked with policing these requirements. Nor is there any single piece of legislation or code that focuses on fiscal transparency."[111]

Objectives 3, 4, 5 and 6: Fiscal Management & the Fight Against Corruption

This corruption and oversight section begins with an overview on measurements of corruption, as per the APRM indicators. It then examines the obligations set out in the international codes and standards that APRM member states are to meet. The section briefly assesses how South Africa measures up according to those specific commitments. The section also discusses some specific deficiencies in the South African anti-corruption system. Finally, it discusses each important anti-corruption body, noting the systemic problems that if addressed would bring South Africa in line with global best practices.

The APRM Questionnaire asks similar questions about corruption and fiscal management in both the political and economic sections.

To avoid duplication they are jointly analysed in this section:

Economic Objective 3: Promote sound public finance management
Economic Objective 4: Fight corruption and money laundering
Political Objective 5: Ensure accountable, efficient and effective public office holders and civil servants
Political Objective 6: Fighting corruption in the political sphere

Overview of National Anti-Corruption Efforts and Rankings

The APRM Self-Assessment Questionnaire asks in the criteria used for evaluation for an overall assessment of the level of corruption in the country. The following summarises publicly available surveys and actions of government.

Corruption is a major concern, and retards South Africa's development efforts. A report by the Institute for Security Studies estimated that in 2003, almost R2 billion was lost to corruption in the Department of Social Welfare, while the Department of Labour may have lost as much as R1 billion of the funds earmarked for skills development. The Road Accident Fund may also have lost R1 billion in that year. The private sector may be losing as much as R50 billion annually to fraud and corruption.[112]

The 2003 *Country Corruption Assessment Report- South Africa* (CCAR), published jointly by the South African government and United Nations Office on Drugs and Crime – Regional Office for Southern Africa (UNODC/ROSA), aptly summarises the situation in South Africa:

> Commitment to good and clean governance, and thus anti-corruption, was and still is one of the priorities of the democratic South Africa and its Government since 1994. Indeed, the Government of South Africa has undertaken a number of important and far-reaching anti-corruption measures. These range from the adoption of the comprehensive framework for initiatives to combat and prevent corruption in the public service (known as the Public Service Anti-Corruption Strategy), through to the promulgation of a rather comprehensive anti-corruption related legislative framework and the development of investigating and prosecuting anti-corruption capacities, to efforts to develop partnerships with business and civil society. …

[111] Barberton C, "South Africa: Law is Enabling, but gaps persist", IDASA, no date, p 1.
[112] Van Vuuren H, *National Integrity Systems Transparency International Country Study Report* Final Draft South Africa 2005, p 8.

> many of these efforts have started yielding results, but others are lagging behind and need further development in order to complement the strategic anti-corruption undertaking.[113]

Anti-corruption specialist Hennie van Vuuren, at the Institute for Security Studies (ISS) writes:

> The country has developed an advanced framework of law, strategy and institutions that have a mandate to combat corruption. Specialised anti-corruption institutions have been set up, together with state institutions, which are mandated by their constitutions to support constitutional democracy. South Africa has developed a bold new piece of anti-corruption law, which complements existing legislation that promotes an open accountable democracy. However, despite the fact that political will does exist to tackle corruption, the implementation of anti-corruption measures presents a serious challenge.[114]

South Africa has strong systems to counter and reduce corruption in both the public and private spheres, but there is room for improvement. While it may appear that corruption is just a post-apartheid phenomenon, before 1994 nepotism, favouritism, patronage and graft abounded. The legal system has been considerably strengthened since 1994:

- **The Prevention and Combating of Corrupt Activities Act (Act 12 of 2004)** – provides the legal definition of corruption and creates a range of offences.
- **The Promotion of Access to Information Act (Act 2 of 2000)** – promotes transparency and allows access to information held by government and private bodies.
- **The Promotion of Administrative Justice Act (Act 3 of 2000)** – compels officials to ensure that decisions affecting the public are made fairly and allows the public to demand written explanations for administrative decisions.
- **The Protected Disclosures Act (Act 26 of 2000)** – encourages whistle-blowing in the workplace and seeks to protect those who expose unlawful and irregular behaviour. It is being revised.
- **The Public Finance Management Act (Act 1 of 1999)** and **Municipal Finance Management Act (Act 56 of 2003)** govern the control and use of public finances at all levels of government.
- **The Financial Intelligence Centre Act (Act 38 of 2001)** is designed to combat money laundering.[115]

The **Department of Public Service and Administration** has taken the lead on galvanising not only government but also business and civil society groups around anti-corruption strategies and practices.

Idasa researchers comment that "Government has in the past ten years passed a panoply of legislation pertaining to corruption and potential conflicts of interest in government and the public service. However, serious gaps remain in the implementation of such legislation."[116]

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[113] *Country Corruption Assessment Report - South Africa*, published jointly by the South African government and United Nations Office on Drugs and Crime, Regional Office for Southern Africa (UNODC/ROSA), April 2003, p 2.

[114] Van Vuuren H, *National Integrity Systems Transparency International Country Study Report,* Final Draft South Africa 2005, p 8.

[115] Department of Public Service and Administration, *Anti-Corruption Capacity Requirements*, Guidelines for implementing the Minimum Anti-Corruption Capacity Requirements in Departments and Organisational Components in the Public Service, January 2006, p 6.

[116] Idasa, ePoliticsSA, "Government Ethics – balancing competing interests in the public interest, Edition 05, 16 August 2004, p 1.

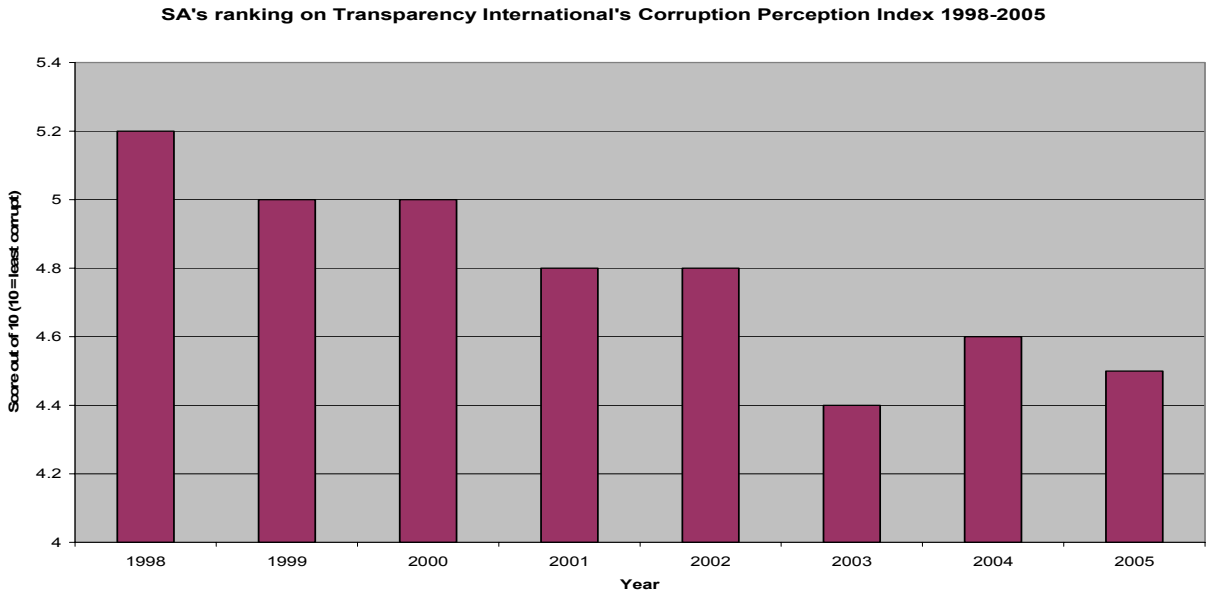
The CCAR recognised that measuring the extent of corruption is extremely difficult, as there is no central database of corruption cases, and "no standard approach in terms of definitions, methodologies, samples and sources" used in studies of corruption in South Africa. [117]

In surveys of perceptions about corruption conducted for the CCAR, 41% of respondents believed that corruption was one of the most important issues to be addressed in South Africa, with a further 39% saying there was a lot of corruption but that it was not the most important issue. In the business sector, 62.1% thought it had become a serious issue in business (although only 12% said they would not invest because of corruption). But research for the report also showed that people's *actual experiences* of graft were considerably lower than perceived levels of corruption:

> South African citizens appear to view the most common areas of corruption in relation to seeking employment and the provision of utilities such as water, electricity, and housing. Public service managers also identified nepotism in job seeking, promotions and in the provision of entitlements. The business community identified clearance of goods through customs; procurement of goods for government; police investigations; obtaining business licenses and permits; securing work and resident permits as the most corruption prone activities. The public servants most associated with corruption both for the citizens and the businesses appear to be the police. All surveys indicate that police officers are the most vulnerable to corruption, followed by customs, local government, home affairs and court officials. To this list, businesses added the managers and/or employees from companies other than their own. [118]

The CCAR also revealed how difficult it was to gather data on official corruption cases from government departments and law enforcement agencies.

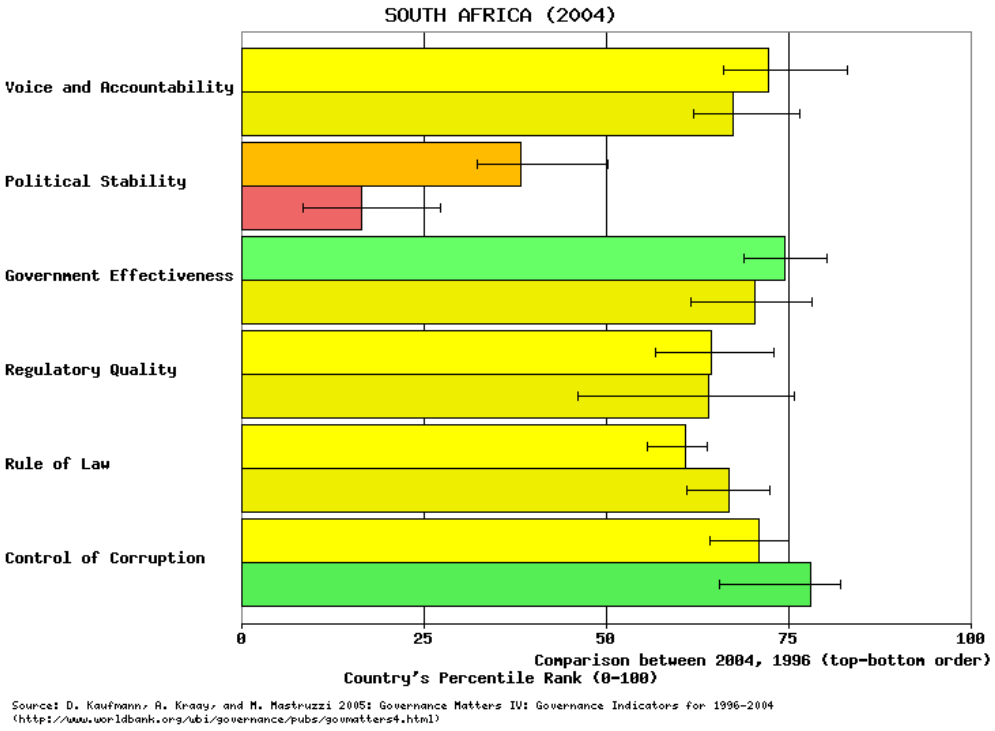
South Africa's ranking on Transparency International's Corruption Perception Index, which measures public and investor perceptions about the level of corruption across most of the countries in the world, shows a disturbing downward trend since 1998.



[117] *Country Corruption Assessment Report- South Africa*, published jointly by the South African government and United Nations Office on Drugs and Crime – Regional Office for Southern Africa (UNODC/ROSA), April 2003, p 3.

[118] *Country Corruption Assessment Report- South Africa*, published jointly by the South African government and United Nations Office on Drugs and Crime – Regional Office for Southern Africa (UNODC/ROSA), April 2003, p 3.

The graph below compares World Bank Institute governance indicators for South Africa in 1996 and 2004.The top bar on each indicator is performance in 2004, and the bottom bar shows performance in 1996. As can be seen, control of corruption and rule of law are the two major areas where South Africa's performance has deteriorated.



The CCAR frankly acknowledges that while South Africa has a robust and world-class legislative framework and transparency legislation, it is struggling to implement anti-corruption measures:

> However, there are serious weaknesses and shortcomings in the capacity and will of public sector bodies to implement and to comply with the laws. For example, certain public bodies view some of the legislation (e.g. Access to Information) as too demanding of resources. There are overlapping mandates, which affect the law enforcement agencies and the constitutionally created bodies. Proper legislative changes are needed to better define the mandates and facilitate co-ordination in the fight against corruption. The legislation is focused on the public sector and does not deal adequately with the private sector. Thus legislative efforts are needed to provide for the inclusion of certain corporate governance measures. Finally, promulgation of adequate legislation and regulatory mechanisms for the private funding of the political parties and political campaigns is expected. [119]

What the Codes and Standards Say

The major codes and standards referred to in the APRM are the AU Maputo Convention on Preventing and Combating Corruption (2003), the UN Convention on Corruption, the AU Durban Declaration on Democracy, Political, Economic and Corporate Governance (2002) and the Solemn Declaration and Memorandum of Understanding of the Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA). Corruption also is central to the codes on fiscal transparency, banking regulation and conventions against money laundering.

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[119] *Country Corruption Assessment Report- South Africa*, published jointly by the South African government and United Nations Office on Drugs and Crime – Regional Office for Southern Africa (UNODC/ROSA), April 2003, p 6.

The codes call for a common-sense approach to fighting corruption, with laws and institutions designed to anticipate the inevitable temptations of human nature and formulate preventive systems accordingly. International best practice acknowledges that no single super institution can be sufficient, but a variety of vigilant bodies and means of imposing transparency are necessary. The AU calls for an independent anti-corruption authority following international best practice, which acknowledges that for investigators and prosecutors to be free to charge senior politicians they must be insulated from interference from the executive branch, which will face the temptation to protect its reputation by suppressing sensitive investigations. While little mention has been made of Freedom of the Press and Freedom of Information in the APRM questionnaire, international best practice recognises their importance in supporting governments' anti-corruption and accountability efforts. Thus laws affecting media freedom, criminal liable and suppression of publication are important.[120]

Selected Commitments – AU Convention On Corruption

"The State Parties to this Convention undertake to abide by the following principles:

1. Respect for democratic principles and institutions, popular participation, the rule of law and good governance.
2. Respect for human and peoples' rights in accordance with the African Charter on Human and Peoples Rights and other relevant human rights instruments.
3. Transparency and accountability in the management of public affairs.
4. Promotion of social justice to ensure balanced socio-economic development.
5. Condemnation and rejection of acts of corruption, related offences and impunity.

[Article 5] The State Parties to this Convention undertake to …

*3. Establish, maintain and strengthen **independent national anticorruption authorities** or agencies.*
*4. Adopt legislative and other measures to create, maintain and **strengthen internal accounting**, auditing and follow-up systems, in particular, in the public income, custom and tax receipts, expenditures and procedures for hiring, procurement and management of public goods and services.*
*5. Adopt legislative and other measures to **protect informants** and witnesses in* corruption and *related offences, including protection of their identities.*
6. Adopt measures that ensure citizens report instances of corruption without fear of consequent reprisals.

[Article 7] In order to combat corruption and related offences in the public service, State Parties commit themselves to:

*1. Require all or designated public officials to **declare their assets** at the time of assumption of office during and after their term of office in the public service.*
*2. Create an internal committee or a similar body mandated to establish a **code of conduct** and to monitor its implementation, and sensitize and train public officials on matters of ethics.*
*3. **Develop disciplinary measures** and investigation procedures in* corruption and *related offences with a view to keeping up with technology and increase the efficiency of those responsible in this regard.*
*4. **Ensure transparency**, equity and efficiency in the management **of tendering** and hiring procedures in the public service.*
5. Subject to the provisions of domestic legislation, any immunity granted to public officials shall not be an obstacle to the investigation of allegations against and the prosecution of such officials.

Source: AU Convention on Preventing and Combating Corruption, 2003

Beyond general guidelines, the standards cited by the APRM call for some specific things:

- A genuinely independent anti-corruption authority with an independent budget.
- Transparent declaration of political party financing.
- Transparent and accountable budgeting with quarterly budget reports to the public and semi-annually to parliament.
- Transparent public tendering with clear published standards.

[120] The codes and the APRM questionnaire suggest analysis of corruption in six ways or levels. Instead of discussing each law and institution under each of these six levels, this report has opted to deal with specific requirements of the codes and then bring these levels of analysis to bear in addressing each institution. The levels are (1) in terms of the existence, staffing, funding and capacity of required institutions, (2) the adequacy of laws and procedures, (3) the conformance of government to those laws, (4) analysis of how government handled particular incidents of corruption, (5) the number of prosecutions and the results of cases, and (6) surveys or other measurement of corruption levels.

- Steps to fight money laundering and comply with the 40 provisions of the international Financial Action Task Force.
- A code of conduct for public officials.
- Declaration of the assets of politicians and civil servants upon entry and exit of office and regularly between entry and exit.
- Effective independence of the judiciary, parliament and corruption prosecuting authority.

How Does South Africa Measure Up to Specific Code Requirements?

Codes Call for Central Anti-Corruption Body

South Africa does not have one supreme corruption-fighting body, which is contrary to the APRM call for an independent anti-corruption body. The Conference on Security Stability Development and Cooperation, July 2002, obligates countries to adhere to the:

> "Adoption, signing and ratification of an AU Convention on Combating Corruption and establish by 2004 in each African country (where it is not presently in existence) an independent anti-corruption Commission, with an independent budget that must annually report to the national parliament on the state of corruption in that country."

There is great value in this recommendation. Effectively fighting corruption is a crucial national goal that should not be lost amid the larger number of common criminal cases that clog the courts and overwhelm police and prosecutors. Providing a separate anti-corruption body would provide a clear central focal point for reporting corruption information and disseminating it to the public. It would also allow more rational decisions about what level of funding and staffing are needed. By raising the profile of corruption investigations, it would send a stronger signal to public officials that the political system is serious about preventing graft.

Although the individuals in national public office have shown more political will than in other African countries, there are signs that the systems in South Africa suffer the same systemic weakness that plague anti-corruption efforts in Ghana, Kenya, Malawi, Uganda, Nigeria and many other nations. The country's top anti-corruption bodies report directly to a political office – the minister of justice – the system continuously stands accused by the media and public of resisting prosecution of senior political figures. Although many in government would argue that there is no clear evidence for such bias, the appearance of impropriety is widespread; surveys show a substantial majority of citizens believe corruption is common and riots over corruption allegations threaten the fabric of social harmony. Whether they are factually correct or not is immaterial. Through the debates around the partisan handling of the arms deal investigation, failure of senior politicians to abide by wealth declaration rules, the parliamentary Travelgate scandal and the Jacob Zuma prosecution it became clear that substantial portions of the population expressed grave doubts over the impartiality of public institutions – even among those who believe Zuma's actions are deeply inappropriate. Such widespread doubts about impartiality are something no nation should take lightly.

In finding Schabir Shaik guilty of a "generally corrupt relationship" with the former deputy president, the court directly contradicted the conclusions of the nation's highest offices responsible for fighting corruption. The director of public prosecutions, the public protector and the Auditor-General, who formed the arms deal Joint Investigation Team concluded corruption was evident but that it did not significantly influence the awarding of contracts. Moreover, the Auditor-General engaged in substantial editing of the arms deal report stripping out politically damaging detail.[121] (See discussion of the AGSA page 97 and the Arms deal pages 86-95.)

Left unattended, the perception that justice is not impartial is a dangerous trend. In many African nations it has led to increasing factionalisation of politics and feeds a culture of

[121] Kajee A, "South Africa", *2006 Global Corruption Report*, Transparency International, Berlin, p 244.

entitlement and corruption. Creation of an anti-corruption body with powers to investigate and prosecute without permission from the minister of justice or president would remove doubts about impartiality and put South Africa in line with best practice.

Anti-Corruption Strategy Neglects Prevention and Education

The CCAR notes that while there has been considerable effort devoted to increasing law enforcement capacity in investigations and prosecutions, far less funding and attention has been given to prevention of corruption efforts and public education. The report states, "This constitutes one of the major weaknesses of the South African approach to corruption."[122] Indeed anti-corruption bodies in Ghana and Malawi, following global best practice have adopted public education and prevention strategies.

Unregulated Private Funding to Political Parties – A Corruption Threat

The African Union Anti-Corruption Convention (2003) requires disclosure of private funding to political parties. However, South Africa permits unrestricted private and foreign funding to political parties, contrary to global best practice.

- Under the AU Convention, Article 10 (which South Africa ratified in 2005) "Each State Party shall adopt legislative and other measures to (a) proscribe the use of funds acquired through illegal and corrupt practices to finance political parties; and (b) incorporate the principle of transparency into funding of political parties."
- Under the AU Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA), African states are obliged to "Conclude by 2004 legal mechanisms for the institution of campaign finance reform including disclosure of campaign funding sources and for proportionate state funding of all political parties, to ensure transparency, equity and accountability in electoral contests."

While state funding to political parties represented in the South African parliament is transparent and well controlled, there is currently no regulation of funding from private sources, domestic or foreign. This poses a major conflict of interest and has been at the heart of some of the most damaging corruption incidents.

Political parties in South Africa are not obligated to stipulate where any of their private funding comes from, nor how they raise money and argued in court they alone among all private and government bodies should not be subject to the provisions of South Africa's freedom of information law. It is therefore almost impossible to determine whether procurement awards or other government actions are made on the basis of political donations. Routinely starved of organisational funds, parties and ambitious individual politicians face a continuous temptation to alter policy or engage in deals designed to draw private funding. This system has lead in the US, France and many African states to a condition of perpetual lobbying and the corrupt exchange of funding for favourable policy changes or access to state tenders. A recent report by Kenya's former top anti-corruption officer notes that the Kenyan government engaged in phoney tenders because the ruling party lacked funds to fight the 2007 election.[123]

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[122] *Country Corruption Assessment Report- South Africa*, published jointly by the South African government and United Nations Office on Drugs and Crime – Regional Office for Southern Africa (UNODC/ROSA), April 2003, p 7.

[123] BBC, "Kenyan deputy refuses to resign", 2 February 2006, http://news.bbc.co.uk/2/hi/africa/4674704.stm.

The absence of regulation of private payments to political parties is thus a grave weakness in South Africa's anti-corruption architecture:

- South Africa was one of 25 nations subjected to a detailed critique of its anti-corruption systems conducted by the Center for Public Integrity (CPI). It concluded: "The most glaring omission in electoral processes and accountability provisions is the lack of rules governing either receipt or disclosure of private or foreign contributions to political parties."[124]
- A peer reviewer in the CPI report commented:

  > The lack of regulation on private and foreign funding is one of the greater dangers to our democracy, both in terms of the integrity of political outcomes and in terms of levels of corruption. While it is generally agreed that when individual politicians take money in return for political favours the crime of corruption is committed, there seems to be a large perceptional grey area in situations where parties, rather than individuals, accept financial benefit."[125]

- Van Vuuren said:

  > This is probably one of the last areas in which corruption can go both undetected and unpunished, given the country's extensive anti-corruption armoury … The next two to three years before fundraising commences in earnest [for the 2009 national elections] provide an ideal opportunity for reform." [126]

CPI also points out that in South Africa, there are no limits on the amounts donated to either political parties or individual candidates by either individuals or firms, and no cap on the total amount a party can spend.[127] The Independent Electoral Commission very rarely investigates political party finances.

In the 2004 election year, the ANC received R42 million in public funding, the DA R9 million and small parties such as the Freedom Front Plus (FFP) R1 million. Private funding for political parties is believed to be much larger than public funding. This potentially allows benefactors to buy political influence. In a state such as South Africa where one party is overwhelmingly dominant, this reinforces unequal access to funds. According to Idasa, "When public decisions are made, or perceived to be made, on the basis of political contributions, not only will policy be suspect, but the government will not be seen as accountable to the people."[128]

There are mounting allegations in the press about foreign governments or wealthy individuals making donations to political parties in return for political favours:

- A trial is currently underway where former Deputy Minister for Social Development in the Western Cape, David Malatsi, stands accused of accepting R400,000 in donations for the New National Party (NNP), which was then in government from an Italian businessman, Riccardo Augusta, the developer of the Roodefontein Golf Estate in Plettenberg Bay.[129] The donation to the party was an apparent bribe to obtain permission for the development to bypass an adverse environmental impact assessment.

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[124] Camerer M, "Integrity Assessment," South Africa Report for Global Integrity, Center For Public Integrity, 2003, p 3.
[125] "Indicator Scores", South Africa Report for Global Integrity, Center For Public Integrity, 2003, Indicator 18a.
[126] Van Vuuren H, *National Integrity Systems Transparency International Country Study Report* Final Draft South Africa 2005, p 40.
[127] "Indicator Scores", South Africa Report for Global Integrity, Center For Public Integrity, 2003, Indicators 18b,c and d.
[128] Calland R and P Graham, *Democracy in the Time of Mbeki,* 2005, Cape Town: Idasa, pp 179-180.
[129] Herzenberg C, Idasa Position Paper: Regulation of private funding to political parties. Idasa, Pims-SA. October 2003.

- In December 2004, the Western Cape leader of the Independent Democrats (ID), Lennit Max, alleged that party leader Patricia de Lille had taken money from a prominent gangster in the Western Cape to fund her 2004 election campaign. She refuted the claim and Max was suspended from the party.
- Notorious German businessman Jurgen Harksen made sizeable donations to the Democratic Party/Alliance in the Western Cape before his extradition to Germany to face several fraud charges.

NGOs like Idasa and others have been lobbying for regulation since at least 1997 but civil society activism increased in 2004 when parliament excluded a clause on private funding of political parties in the new Prevention and Combating of Corrupt Activities Act. All of South Africa's larger political parties refused to reveal their funding sources after Idasa requested them to do so, as public bodies. Idasa lost a High Court case against the ANC, DA, IFP and NNP in 2005, with the court ruling that political parties were private, not public, entities and therefore did not have to disclose private funding. Although Idasa lost their legal case, it did result in an undertaking being made by the ANC to move to a regime of funding transparency. To date this commitment has not yet resulted in a shift in policy.

Recommendations have included mandatory disclosure for all amounts over a certain threshold (R50,000 has been suggested) and banning contributions by foreign countries or companies. Almost certainly due to civil society pressure, before the 2004 elections several large companies revealed how much they had paid to different political parties. Mining giant AnglogoldAshanti has even developed a policy to regulate all future contributions to political parties.

Conflicts of Interest Are Not Managed Effectively

The constitution clearly sets out to prevent conflict of interest among cabinet ministers and deputy ministers, members of parliament, and senior civil servants. However, the systems and regulations leave significant problems.

Ministers and deputy ministers have to abide by the Executive Ethics Code, part of national legislation, which precludes them from taking on any other paid work, exposing themselves to any potential conflict between their official responsibilities and their private interests, or using their positions inappropriately for gain for themselves or others. There are similar provisions designed to prevent members of parliament facing conflicts of interest. Members of the Executive, as MPs, are also bound by them. Parliament promulgated a code of conduct in 1997. The code requires members to declare any personal or private financial interests of their own, their spouse, partner or business associates, and withdraw from any parliamentary committee where a conflict of interest could arise. Van Vuuren comments that:

> The Executive arm of government, particularly members of cabinet, have emerged relatively untainted by corruption since 1994. This is probably the result of good salaries, a high level of oversight from both the Opposition and the media. … A strong standard of checks and balances has been put in place with the creation of the Executive Members' Ethics Act (No. 82 of 1998). This requires the disclosure of assets and interests by senior officials, which should be recorded in the register of Executive Members Interests that the president's office has a duty to maintain. [130]

No Restrictions on Senior Government Members Entering Business: Concern has also been raised about the "revolving door" practice in which retiring MPs, including high profile

[130] Van Vuuren H, *National Integrity Systems Transparency International Country Study Report* Final Draft South Africa 2005, p 32.

and well-connected MPs (particularly cabinet ministers) who have been privy to the inner workings of governmental policy and planning, leave parliament to immediately take up positions in the private sector, thereby potentially providing the employing company with a considerable competitive advantage. There have been several recent high-profile examples (where no corruption allegations have been proven):

- Former Premier of the platinum-rich North-West Province, Popo Molefe, joined a consortium involved in buying platinum mines scarcely two months after leaving office.
- Former Minister of Justice Penuell Maduna was involved in purchasing a stake in the country's biggest synthetic fuel company less than a month after leaving government.
- The late former Minister of Defence Joe Modise joined an arms company after leaving government.

Currently there is no post-employment restriction, or cooling off period, between resignation from parliament and the assumption of a private sector position.

Both this matter and that of the MPs Code of Conduct, have, however, recently come under review.[131] Insofar as question marks about the efficacy of the voluntary Code of Conduct and respect for the authority of the Ethics Committee go to the heart of parliament's credibility, the lasting impression is less than satisfactory. Idasa calls the lack of post-government restraint of trade restrictions a "lacuna in South Africa's ethics laws".[132]

With the exception of the Gauteng and Western Cape provincial governments, there are no restrictions placed on officials moving from ministerial, provincial government or parliamentary positions to the private sector, where their government involvement could give them advantage or have direct influence on future business prospects.

Enforce a Post-Government Cooling-Off Period: One of the recommendations of the Joint Investigation Team (JIT) report into the arms deal (**see section on Scopa, page 86)** was that "Parliament should take urgent steps to ensure that high ranking officials and office bearers, such as ministers and deputy ministers, are not allowed to be involved, whether personally or as part of private enterprise, for a reasonable period of time after they leave public office, in contracts that are concluded with the state." To date, Parliament's Ethics Committee has not yet acted upon this.[133] South Africa should introduce regulations suitable to local conditions, with suggestions of a mandatory cooling off period of at least six months.

Relatives of Senior Officials Often Get Government Contracts: Nepotism allegations are notoriously difficult to prove or quantify. Some departments, such as correctional services at provincial level, have been accused of rife nepotism (despite exoneration by the Public Protector). Concerns have increased recently about business ventures with government involving those related to or intimately connected to ministers and MECs. Van Vuuren gives examples of how those close to powerful officials are receiving valuable government contracts:

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[131] See the Idasa PIMS 2003 Ethics Report *Ibid*; Kader Asmal "Joint Committee on Ethics and Members' Interests Review: The Role and Function of the Ethics Committee", Tuesday, 10 August 2004, http://www.pmg.org.za/docs/2004/appendices/040824asmal.htm and D. Sing, "Promoting Ethical Behaviour Amongst Public Representatives and Public Servants in South Africa" http://www.up.acacademic/soba/SAAPAM/administratio%20publica/vol9no1/sing.htm

[132] Idasa, ePoliticsSA, "Government Ethics – balancing competing interests in the public interest", Edition 05, 16 August 2004, p 4.

[133] Idasa, ePoliticsSA, "Government Ethics – balancing competing interests in the public interest", Edition 05, 16 August 2004, pp 3-4.

> Nambita Stofile, wife of the former Eastern Cape Premier (and a current national minister), benefited from business in that province. She is a director of two separate companies that have secured at least five contracts from the provincial government, although she has denied having an unfair advantage.[134]

Some argue that relatives and partners of politicians who hold office should be barred from competing for government business, while others say this infringes on their rights as citizens to trade freely and choose their professions. They argue that if tender procedures are conducted transparently – including coming forward with interests publicly (disclosure), and when a potential conflict arises, withdrawing for the decision-making body if necessary (recusal) – then any such contract won by a relative is legitimate. When relatives win contracts it does not necessarily mean there has been corruption, but it does fuel perceptions and raises questions about conflict of interest.

Ruling Party Protective of Members: The ANC has demonstrated a tendency to be over-protective of party members, ignoring or dismissing allegations against politically powerful party insiders until those individuals are found guilty by the court system, thereby not forcing cabinet or parliament to take decisions that may damage the party politically. The following examples illustrate this point:

- Both parliament and the executive failed to publicly condemn former ANC Chief Whip and head of parliament's Joint Standing Committee for Defence Tony Yengeni for not complying with parliamentary codes and ethics in his acceptance and non-disclosure of a 47% discount on a luxury Mercedes Benz facilitated by the European Aeronautical Defence & Space Company (EADS), a successful foreign contractor in the arms deal. Former Speaker Frene Ginwala supported Yengeni until he was convicted, and only then requested he resign. [135]
- National government did not intervene when former Mpumalanga Premier Ndaweni Mahlangu reappointed Steve Mabona to the provincial cabinet as safety and security MEC, after he had been forced to resign, having been found to have lied about his role in issuing a fraudulent driver's licence to Baleka Mbete, then Deputy Speaker of Parliament (and current Speaker). Mahlangu had defended Mabona by saying it was acceptable for politicians to lie.[136]
- Eastern Cape MEC for Health Dr Bevan Goqwana, responsible for the province's R4.5 billion health budget, owned a private ambulance company and admitted to running a private specialist practice while in office. He was also listed as a director of the private St Mary's hospital. (Former) Eastern Cape Premier Makhenkesi Stofile admitted he authorised these conflicts of interests, making him party to breaching the Executive Members Ethics Act. [137]
- Some MPs implicated in Travelgate feature prominently on ANC party lists for the 2006 local government elections.

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[134] See Groenewald Y, "In the pound seats: State contracts awarded to the wives of politicians", *Mail & Guardian*, 28 May 2004, quoted in Umqol'uphandle – SA Corruption Briefing, Issue 17, Pretoria: ISS, 14 July 2004.

[135] Allan C, "Nixing corruption needs practice and leadership", *Mail & Guardian Online*, 22 December 2003.

[136] Allan C, "Nixing corruption needs practice and leadership", *Mail & Guardian Online*, 22 December 2003. The Moldenhauer Commission found that Mabona had lied about his involvement in the irregular (although not fraudulent) issuing of Baleka Mbete-Kgositsile's driver's licence. The Commission also ordered Mbete-Kgositsile to return her licence. See "Licence problem is resolved", *Daily Dispatch,* 11 September 1997 at *http://www.dispatch.co.za/1997/09/11/page%2017n.htm*

[137] Allan C, "Nixing corruption needs practice and leadership", *Mail & Guardian Online*, 22 December 2003.

Abuse of Privileges of High Political Office: This issue came to the fore in January 2006 in the aftermath of a controversial trip taken by Deputy President Phumzile Mlambo-Ngcuka, dubbed "Gravy-plane-gate" by the media. In late December 2005, the deputy president flew on an air force jet to Dubai with her husband and children. The costs were entirely covered by the Presidency (and ultimately the taxpayer) estimated to be about R700,000. At first the Presidency claimed that the trip was a private holiday, and that for security reasons, the deputy president was entitled to use state resources such as the jet both for public and private purposes. Over the next few days, it emerged that the aircraft had also carried her personal assistant's children and her friend, former ambassador Thuthukile Mazibuko-Skweyiya (wife of Zola Skweyiya, Minister of Social Development), and Mlambo-Ngcuka herself claimed publicly that the trip was partly work-related, examining infrastructure development projects.

According to the Handbook for Members of the Executive and Presiding Officers, the deputy president cannot be accompanied by a member of cabinet or his/her spouse. Rules also only allow officials to be flown to their final destination, but there is evidence that the aircraft made an additional stop. The Presidency was initially silent and later claimed the visit was partially a business trip. Mlambo-Ngcuka admitted some liability in the end and admitted it was an oversight on her part.

The incident generated immense reaction from the media and the public response was divided, with many feeling that the trip was an extravagant misuse of state resources.

In February 2006, Auditor-General Shauket Fakie hinted that he might consider an urgent audit of the trip "due to public interest in the issue." This followed a rejection by the ANC-dominated Standing Committee on Public Accounts (Scopa) of a call by the DA for a special investigation into the trip. Scopa had said the issue would be covered in the routine audit by the Auditor General of the presidency. The DA and FF+ also petitioned the Public Protector to investigate the trip.[138]

Public Procurement Vulnerable to Corruption

The supply of goods and services to the public sector across national, provincial and local government has an estimated worth of approximately R180 billion annually. Being at the interface between the government and private enterprise, procurement the world over is an area where corruption often occurs. Van Vuuren said:

> Public procurement is necessary to enable the public service to deliver on its developmental mandate to the South African people (be that in terms of building houses, constructing bridges or providing schools with textbooks). At the same time, public procurement was identified by government as a driver for black economic empowerment, particularly for small and medium-sized entrepreneurs. It is therefore essential to ensure that the effect of corruption in this particularly vulnerable area is mitigated. [139]

Camerer notes

> In terms of debarment, companies found guilty of violations such as bribery or incompetence are included on a list compiled and circulated by the Treasury to government departments. In theory, companies on the list are precluded from receiving government contracts; in practice, however, this list is rarely consulted. [140]

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[138] Webb B, "Fakie open to interim gravy-plane audit", *The Star*, 2 February 2006.
[139] Van Vuuren H, *National Integrity Systems Transparency International Country Study Report* Final Draft South Africa 2005, p 64.
[140] Camerer M, "Integrity Assessment", South Africa Report for Global Integrity, Center For Public Integrity, 2003 p 4.

Government's 2001 Joint Comprehensive Procurement Assessment Report identified several existing issues in tendering in South Africa at the time, and noted the challenges for any future tendering framework:

- insufficient planning and linking of entities to budgets;
- lack of uniform bidding and other procedures across the public sector;
- conflicts of interest due to the composition of tender bodies;
- consultants not being selected in a systematic, competitive manner;
- flaws in the awarding of tenders, particularly corruption;
- insufficient training of staff (a key factor); and
- the procurement processes being too rule-driven.

The CCAR said:

> The public sector has started to blacklist suppliers that take part in corrupt practices. This strategy forms part of the ongoing procurement reform within the South African public sector. A blacklist of corrupt public servants also needs to be developed. Further work is required to ensure that procurement systems are effectively controlled, especially within the area of preferential procurement, where opportunities exist for the discretionary award of contracts. [141]

Some departments, like National Treasury, have stronger systems to overcome these challenges. For a discussion of Black Economic Empowerment and its relation to procurement, see **Corporate Governance** section, below.

Supply Chain Management Framework Decentralised Tendering: Following a long assessment of the tender board system by government and Treasury, provincial tender boards have been eliminated in South Africa, and the national State Tender Board will be phased out and replaced by the "Supply Chain Management Framework" (SCMF), which decentralises the procurement function to accounting officers in the three different spheres of government (national, provincial and local). It will change procedures – in an attempt to reduce corruption – for accounting officers in various departments all along this chain.

Van Vuuren notes some formidable challenges to implementing this framework, including heavy new responsibilities on accounting officers who will require training and education; the need for a dispute resolution mechanism should there be challenges to their decisions; [142] the need for careful monitoring by Treasury and the AGSA's office; and the need to ensure that the Supply Chain Managament Framework is applied consistently to all areas of procurement.

Whistle-Blowers Still Unprotected

Despite the legal protection offered to those employees who expose corruption in both private and public organisations under the Protected Disclosures Act (PDA) of 2000, "in practice it is rarely safe to blow the whistle without suffering negative consequences." [143]

- The 2003 *Country Corruption Assessment Report* notes that "The Protected Disclosures Act provides state-of-the-art protection to whistle-blowers in a workplace, but it requires guidelines on policy and procedure for implementation to be effective." [144]

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[141] *Country Corruption Assessment Report- South Africa*, published jointly by the South African government and United Nations Office on Drugs and Crime – Regional Office for Southern Africa (UNODC/ROSA), April 2003, p 8.

[142] Van Vuuren, interview with H Malinga.

[143] Camerer M, "Integrity Assessment," South Africa Report for Global Integrity, Center For Public Integrity, 2003, p 4.

- Transparency South Africa (T-SA) notes, "Though whistleblowers are protected under the Protected Disclosures Act, several have been fired, blackmailed or publicly tainted by their employers for exposing corruption."[145]
- The national police service has ordered all police officers seconded to the National Prosecuting Authority's witness protection unit to abandon their posts by March 2005 because of failure of the NPA to obtain budget resources to pay their salaries. The move risks disrupting key prosecutions and puts protected witnesses at risk.[146]

Problems with the PDA include low public awareness on how to use the act, and a cumbersome appeal process. There is no standard award of compensation for dismissals resulting from exposing corruption. (See also **Corporate Governance** Section, page 126 onward). Transparency International's *2006 Global Corruption Report* comments:

> Though well intended, the PDA appears to have failed whistleblowers in several instances, not only because it sets out exactly to whom disclosures are to be made, but also how the informant wishes to claim its protection. The act specifies that a whistleblower must make what is referred to as a "protected disclosure" to a specified group of persons if s/he wishes to avoid suffering "an occupational detriment." The manner in which the disclosure is made is also regulated. Government employees … are free to register grievances as long as a prescribed procedure is followed. … The disciplinary offence – and the legal confusion – derives from the public service regulations, and what they proscribe in terms of communicating, especially outside the public services. There is therefore a tension between the regulations and the PDA. The jury is still out on the effectiveness of the PDA, as many potentially successful attempts to blow the whistle are likely to go unreported; the act is up for review by parliament in late 2005. [147]

The CCAR recognises the work that still has to be done to get South Africa's whistle-blower protections working efficiently:

> For a whistle-blowing mechanism to be effective, there must be effective protection of the identity of the whistle-blower and there must be effective follow-up of all bona fide disclosures. Most government departments do not have policies and procedures in place to comply with the Protected Disclosures Act. Few departments have a hotline, and even fewer have effective procedures to operate it effectively, and yet, this is the only whistle-blowing mechanism that departments rely on. Installation of such hotlines is often not properly supported by investigation capacity, policies and evaluation." [148]

The Transparency South Africa website offers evidence of the initial difficulties in getting these hotlines working, and the relatively low impact they have had in bringing perpetrators to book:

- In 2003, only eight national departments had established anti-corruption hotlines, and there were none in the Eastern Cape, North West or Free State Provinces.
- In Gauteng, 54% of the hotline's reported cases were solved in 2000. Mpumalanga received 3,600 calls in 2001, but only 12 criminal charges were laid against individuals. In contrast, the Western Cape recorded 83 calls with 27 disciplinary charges laid.[149]

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[144] *Country Corruption Assessment Report- South Africa*, published jointly by the South African government and United Nations Office on Drugs and Crime – Regional Office for Southern Africa (UNODC/ROSA), April 2003, p 6.

[145] Molelel, C and S Russouw, "Whistleblowers need protection," 20 August 2004. Transparency International South Africa (TISA). Available online: http://www.tisa.org.za/index2.php?option=content&do_pdf=1&id=23

[146] Rowan P, "State witnesses left high and dry," *Sunday Times,* 5 February 2006

[147] Kajee A, "South Africa", *2006 Global Corruption Report*, Transparency International, Berlin, pp 245-6.

[148] *Country Corruption Assessment Report- South Africa*, published jointly by the South African government and United Nations Office on Drugs and Crime – Regional Office for Southern Africa (UNODC/ROSA), April 2003, p 8.

[149] See http://www.tisa.org.za/index.php?option=content&task=view&id=18

Review of Specific Oversight Institutions

This section outlines the key weaknesses in some of the major institutions that have a role in exposing, preventing or prosecuting corruption. Clear patterns of resource constraints, staff attraction and retention problems, and overlapping institutional mandates and responsibilities emerge. It will examine the following in some detail:

- The South African Police Service (SAPS)
- The National Prosecuting Authority (NPA)
- The Directorate of Special Operations (DSO) (the "Scorpions")
- The Assets Forfeiture Unit (AFU)
- The Special Investigative Unit (SIU)
- Parliament's Standing Committee on Public Accounts (Scopa)
- The Public Protector
- The Auditor-General of South Africa (AGSA)
- The Independent Electoral Commission (IEC)
- The Financial Intelligence Centre (FIC)
- The News Media and Freedom of Information provisions

South African Police Service (SAPS)

Many of the constraints on the SAPS were dealt with in the section on the **Criminal Justice System**, above. Looking specifically at their capacity to investigate and control corruption, the SAPS investigates corruption through its Commercial Crime Unit, Organised Crime Units and Detective Branch.

Internal Police Anti-Corruption Unit Disbanded: The SAPS Anti-Corruption Unit (ACU) was established in 1996 to tackle increasing police corruption, but has since been shut down. Between 1996 and 2001, the unit received nearly 21,000 allegations of police corruption, about 3,000 officers were arrested and about 600 convictions were made.[150] The unit's low conviction rate was attributed to capacity constraints, problematic witnesses (who were often anonymous and provided insufficient information), and the flawed Anti-Corruption Act of 1992 that repealed the common law offence of bribery while instituting difficult legal requirements in order to prove corruption.[151] The SAPS began closing ACU provincial offices in 2000, claiming that these closures would allow for the pooling of resources and greater police efficiency. However, the lack of a dedicated internal body to probe South Africa's considerable police corruption is a serious deficiency in the anti-corruption system.

Acute Resource Constraints at the Commercial Crime Unit: The Commercial Crime Unit has experienced severe resource constraints and a poor conviction rate:

- The CCAR noted the Commercial Crime Unit "has experienced difficulties in retaining experienced staff." In 2001, this unit, responsible for investing all commercial crime, had just 990 police and 121 civilian administrative staff members (representing about 0.85% of 130,000 SAPS employees). Despite a new training curriculum, "the staff turnover, restricted budget, heavy caseload and long case duration has reduced its effectiveness in

[150] Newham G and L Gomomo, "Bad Cops Get a Break: The closure of the SAPS Anti-Corruption Unit", *SA Crime Quarterly,* No. 4, June 2004, p 5.
[151] Newham G and L Gomomo, "Bad Cops Get a Break: The closure of the SAPS Anti-Corruption Unit", *SA Crime Quarterly,* No. 4, June 2004, p 7.

securing convictions," and uncertainty remains on whether the SAPS or DSO has jurisdiction between over fraud cases.[152]

- The Commercial Crimes Unit only investigated 88 cases in terms of the (now repealed) 1992 Corruption Act in 1998, 149 in 1999 and 125 in 2000, representing less than a quarter of a percent of all cases investigated by the unit. However, because of the difficulties the old act presented in securing convictions, many cases were framed as fraud or theft cases instead. [153]

In an attempt to expedite the investigation and prosecution of white-collar crime cases, a Special Commercial Crimes Unit (SCCU) was established in 2000 by the NPA and Department of Justice as a pilot project. The SCCU's mandate is to accept matters for investigation and prosecution emanating from the SAPS Commercial Branches in Johannesburg and Pretoria. The SCCU combines the efforts of prosecutors and investigators to ensure speedy investigation and finalisation of trials. The pilot project has proved very successful, and has expanded to Durban and Port Elizabeth. Since the establishment of the SCCU in Pretoria, there has been an increase in the conviction rate from 86.6% to 96.2%. However, according to an NPA report to parliament in June 2004, lack of funding has prevented the opening of an office in Cape Town. The SCCU head also reported to parliament that all the offices face an enormous workload and lack capacity and personnel. This institution needs more support from the government and private sector.[154]

National Prosecuting Authority (NPA)

The National Director of Public Prosecutions (NDPP) is the Head of the National Prosecuting Authority (NPA), and his/her independence is guaranteed by the constitution. It is a ten-year non renewable position. The president appoints the head of the NPA and although s/he reports to parliament, s/he is accountable to the minister of Justice. The NPA has the power to institute criminal proceedings on behalf of the state and to carry out any necessary functions incidental to instituting criminal proceedings.

The first NDPP, Bulelani Ngcuka, resigned in July 2004 after successfully moulding an organisation with the capacity and political will to effectively tackle corruption and organised crime. In an interview with the *Financial Mail* shortly after announcing his resignation, Ngcuka commented that "a politically independent director of public prosecutions is wishful thinking". Ngcuka said that what is needed is someone with the support of the ruling party but with objectivity in taking decisions.

> When we started with asset forfeiture we suffered a number of setbacks because of loopholes in the legislation. The law needed to be changed. Parliament did so in the shortest time it has yet taken to pass an amendment. That happened because I was able to explain to the leadership and political parties, even the opposition, why it was necessary. They trusted me and that facilitated communication. A second reason is the scramble for budget. If nobody knows you, you get nothing. So it is very important that you have somebody in whom the ruling party has confidence. Remember, this position is quasi-judicial; it straddles the line

[152] *Country Corruption Assessment Report- South Africa*, published jointly by the South African government and United Nations Office on Drugs and Crime – Regional Office for Southern Africa (UNODC/ROSA), April 2003, pp 46-47.
[153] *Country Corruption Assessment Report- South Africa*, published jointly by the South African government and United Nations Office on Drugs and Crime – Regional Office for Southern Africa (UNODC/ROSA), April 2003, pp 46-47.
[154] Van Vuuren H, *Transparency International Country Study Report* Final Draft South Africa 2005 , p 64.

> between the executive and the judicial. The Executive has a say, because at the end of the day it is the Executive, not the judiciary, that must account for the crime rate and answer to the population.[155]

In February 2005 Advocate Vusi Pikoli was confirmed by President Mbeki as the new head of the NPA.The NPA has become embroiled in politics, with various factions within the ruling alliance accusing it of favouritism and factionalism.

Directorate of Special Operations (DSO) (the Scorpions)

Generally regarded by the public as the state's main anti-corruption body, the Directorate of Special Operations (DSO) was established by President Mbeki in 1999 to deal with organised crime and corruption, complex financial crime, racketeering and money laundering. The DSO- more often called "the Scorpions" because of its scorpion insignia – is a division within the NPA, and was officially launched in January 2001 when the National Prosecution Authority Amendment Act came into force. The DSO replaced three former investigating units: the Investigating Directorate: Organised Crime and Public Safety (IDOC); the Investigating Directorate: Serious Economic Offences (IDSEO); and the Investigating Directorate: Corruption (IDCOR). Modelled after the US Federal Bureau of Investigation, the unit's creation represented a novel blend of integrated crime analysis, investigation and prosecution within South African law enforcement. The DSO strategy involves addressing and disrupting organised crime; becoming a depository for crime information in order to analyse trends and determine targets; implementing anti-racketeering and money-laundering legislation; and "proliferating the perception of victory over crime, essential to enhance public confidence".[156]

The Scorpions have indeed enhanced the public's confidence in anti-corruption measures. An average of 90% of prosecuted cases result in convictions.[157] With such a success rate, the unit sends a message to both the public and criminals:

> The focus of the Scorpions on high-profile crimes, matched with its success rate…may act as a deterrent to potential perpetrators of high-profile crimes by creating the sense that the state *does* have sufficient capacity to tackle such activities. Similarly, the Scorpions have come to represent the state's capacity and political will to tackle cases of 'grand corruption'. The latter is a necessity given the lack of faith in the police to tackle crimes such as corruption (although this perception may not be entirely correct)…[158]

However, the Scorpions' success rate has not shielded them from criticism – especially from fellow law enforcement agencies. The South African Police Service (SAPS) has accused the Scorpions of "cherrypicking" winnable cases based on the Scorpions' strict and extensive case selection criteria.[159] Better relationships and co-ordination with SAPS is just one of the challenges facing the Scorpions.[160] Others include:

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[155] Bruce P, "The end of an era"(interview with Bulelani Ngcuka), *Financial Mail*, Johannesburg, 30 July 2004.
[156] Van Vuuren H, Transparency International Country Study Report Final Draft South Africa 2005, p 75.
[157] Van Vuuren H, Transparency International Country Study Report Final Draft South Africa 2005, p 76.
[158] Van Vuuren H, Transparency International Country Study Report Final Draft South Africa 2005, p 76.
[159] Van Vuuren H, Transparency International Country Study Report Final Draft South Africa 2005, p 76.
[160] Van Vuuren points out that any inclination by government to incorporate the DSO into the SAPS would not only undermine public confidence, as the DSO would basically cease to exist given the potential for capacity overlap, but also take tensions between the DSO and SAPS from bad to worse. See Van Vuuren H, Transparency International Country Study Report Final Draft South Africa 2005, p 79.

Courtroom Skills: While the Scorpions is said to be staffed with mostly young, motivated university graduates, the DSO could use improvement in skill areas related to the courtroom.[161]

Political Challenges Undermine Work: Created under the Mbeki presidency, the Scorpions have long had presidential support; however their critics have grown increasingly vocal in Mbeki's second term. Media reports cite "ANC insiders" when putting forth the notion that former Deputy President Jacob Zuma and National Police Commissioner Jackie Selebi were seeking to reduce the unit's independence.[162] The very success of this unit and the manner in which it has sometimes conducted its business (as well as political pressure, institutional clashes and jealousies from within the South African Police Service) prompted President Mbeki to establish a commission of enquiry (the Khampepe Commission) into the mandate and location of the DSO. The specific issue under examination is whether the DSO ought to retain its independent investigative and prosecutorial role or to be incorporate under the South African Police Service.[163] The findings of the Khampepe Commission are expected in 2006.

Assets Forfeiture Unit (AFU)

Also a part of the NPA, the Assets Forfeiture Unit was created in May 1999 in order to implement sections of the Prevention of Organised Crime Act of 1998, focusing on property and goods acquired by criminal means. Under Chapters five and six of this Act, the state is allowed to confiscate suspected criminals' assets through civil action against the property without an actual criminal conviction against its owner. Though the unit does not have a specific anti-corruption mandate, from early on it identified corruption and serious economic offences as targets and by June 2000 had lost only five cases out of the 28 it had initiated. The money generated from these forfeitures was deposited into a Criminal Assets Recovery Fund, in order to assist law enforcement agencies in combating organised crime when no identifiable victim is found.[164]

One of AFU's strategic objectives has always been the development of asset forfeiture law via test cases. In this regard, legal challenges to the AFU's seizures remain. However, the unit has obtained more than 60 High Court judgments serving to clarify asset foreiture law. Furthermore, during 2003-2004, the AFU had a success rate of more than 80%.[165]

Also, in contrast to the DSO (see below), the AFU maintains good relations with key partners such as the South African Police Service, Directorate of Special Operations, South African Revenue Service and other law enforcement structures. The unit is also in the midst of signing formal guidelines for co-operation with both the SAPS and DSO.[166]

The AFU has, however, conceded that much more needs to be done to make a dent in criminal proceedings:

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[161] The Portfolio Committee on Justice and Constitutional Development. Justice budget: input by units of the National Prosecuting Authority, 18 June 2004. As reported by the Parliamentary Monitoring Group www.pmg.org.za., as cited in Van Vuuren H, Transparency International Country Study Report Final Draft South Africa 2005, p 78.

[162] Boyle B, S Msomi *et a, "* Mbeki, Zuma battle over Scorpions", *Sunday Times*. Johannesburg. 20 February 2005, as cited in Van Vuuren H, Transparency International Country Study Report Final Draft South Africa 2005, p 78.

[163] See government notice No. R317 dated 1 April 2005 published in the Government Gazette No. 27446.

[164] Schönteich M, "The Asset Forfeiture Unit: Performance and Priorities" Nedbank ISS Crime Index, Vol. 4 June 2000, No. 3, May-June, www.iss.co.za/Pubs/CRIMEINDEX/00VOL4NO3/Assetforfeiture.html

[165] Van Vuuren H, Transparency International Country Study Report Final Draft South Africa 2005, p 79.

[166] Van Vuuren H, Transparency International Country Study Report Final Draft South Africa 2005, p 81.

> Through its interaction with the Treasury, the AFU estimates that it would have to recover 10 times its current recovery figures to make a real impact. The AFU has identified 13 priority crimes, ranging from keeping brothels, through to drug money and violent crime. The three areas in which the largest percentage of assets have been frozen in the past five years are economic crime (62.8%), natural resources (9.7%) and corruption (8.1%) – corruption represents a monetary value of over R57 million.[167]

The Special Investigative Unit (SIU)

The Special Investigative Unit (SIU) was established in 1996, with a specific anti-corruption mandate. Originally a stand-alone institution, it was linked to controversy over the arms deal investigation (see Case Study below on **Parliament and the Arms Deal: A Test of Oversight and Accountability, page 90)** and this may explain its decreased independence, as it is closely linked to the NPA.

The unit's head is a presidential appointment and reports directly to the president. If the SIU receives information it wishes to investigate, the SIU then submits an application to Minister of Justice for the matter to be proclaimed by the president in the Government Gazette, and if the application is granted, the investigation goes forward. The Special Investigating Units and Special Tribunals Act (74 of 1996) allows special tribunals to be established, so that SIU cases can be quickly dealt with and are not tied up in the slow mainstream judicial process. If the investigation reveals a possible crime, the case is then forwarded to the NPA.

The CCAR noted in 2003 that

> The SIU has accumulated a significant backlog of work; which … may take up to three years to complete … [A recent review of the SIU] concluded that the team's effectiveness was hampered by taking on too many less serious matters, which added unnecessarily to their workload. Many matters could have been dealt with elsewhere. The inflow of work and the prioritisation of matters are now being handled far better [168]

The Standing Committee on Public Accounts (Scopa)

The Standing Committee on Public Accounts (Scopa) is one of the most important oversight committees in parliament. It receives all the Auditor-General's reports for scrutiny. Idasa notes that "Scopa has the unique constitutional mandate to follow up on issues that the Auditor-General has identified as unsatisfactory. Scopa is therefore a crucial link in the chain of accountability."[169]

The R30 billion Strategic Defence Procurement Package (or arms deal) issue has seriously weakened Scopa. South Africa's Auditor-General Shauket Fakie bypassed Scopa when he submitted the results of an investigation into the controversial arms deal by a Joint Investigations Team (JIT) – made up of the National Director of Public Prosecutions (NDPP), Public Protector and his own office – directly to cabinet (the body that had made the procurement decision), on the basis that it was a "special report". There are allegations that cabinet then altered or at least had sight of the contents before Scopa, thus seriously weakening parliament's oversight function.[170] Former Scopa Chair Gavin Woods (IFP) and

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[167] Van Vuuren H, Transparency International Country Study Report Final Draft South Africa 2005, p 79.

[168] *Country Corruption Assessment Report- South Africa*, published jointly by the South African government and United Nations Office on Drugs and Crime – Regional Office for Southern Africa (UNODC/ROSA), April 2003, pp 52-53.

[169] Idasa, "Democracy and the Arms Deal Part 3", A Submission to Parliament, 5 August 2003, p 7.

[170] In January 2005, a South African arms contractor who had been a losing bidder in the arms deal used access to information legislation to make public earlier drafts of the JIT report. There are telling omissions in the final draft, perhaps made at the request of cabinet, including indications of flawed tendering for jets, political influence from Defence Minister Joe Modise, irregularities in the contracts for supplying new helicopter engines and that the off-set programme (where a contract award would result in greater investment into South Africa) was "materially flawed." This all contradicts the AGSA's claim that the report was not significantly altered.

former ANC Scopa member Andrew Feinstein resigned from Scopa in protest on 1 September 2001.

Some MPs have said that Scopa has moved from being strongly autonomous to being closer to the executive, which has led to reduced confidence in the committee.

- The CPI report said: "Whereas before 2001 Scopa had a proud tradition of working consensually as a committee and exercising its role in a non-partisan fashion, the arms deal … significantly weakened the committee which then voted along party lines with direct political interference from the ruling party … Thus, while there is seldom political interference into the work of the committee, on the few occasions it happened in recent times, it did not receive any protection, even from the overall legislature from whence such protection should be forthcoming."[171]
- Gavin Woods was replaced as Scopa chair by a member of the New National Party (NNP), Francois Beukmann. While this upheld the tradition of appointing an opposition MP to chair Scopa, the ANC and NNP at the time were co-operating closely. This led to questions over Beukmann's impartiality. In an interview with van Vuuren, Woods said:

  > Francois Beukmann knew the least about finances. So he could be managed [by the ANC]. He is a lawyer, and he may be a brilliant lawyer, but he knows precious little about finances. With the emergence of sub-committees [chaired by the ANC] the work has been taken out of the hands of the chair, leaving him basically to do administrative work.[172]

- Woods also said that Scopa members often do not go further than what the AGSA himself recommends when summoning senior officials for questioning.
- Patricia de Lille fears that "Scopa has become another compliance committee, stamping reports of government".[173]
- According to Douglas Gibson, the Chief Whip of the DA, "…[Scopa] has suffered almost a mortal injury [following the arms deal investigation]. It is going to take years for Scopa to recover, if it ever does."[174]

Idasa notes that there is time and the opportunity for Scopa to reassert its oversight role, as the arms deal is set to run for 12 years. [175]

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[171] "Indicator Scores", South Africa Report for Global Integrity, Center For Public Integrity, 2003, Indicator 35c.
[172] Interview with van Vuuren, September 2002.
[173] Interview with van Vuuren, September 2002.
[174] Interview with van Vuuren, September 2002.
[175] Idasa, "Democracy and the Arms Deal Part 3", A Submission to Parliament, 5 August 2003, p 5.

CASE Study: Parliament and the Arms Deal – A Test of Oversight and Accountability[176]

By Tim Hughes, SAIIA Parliamentary Research Fellow

Like all matters in contemporary South Africa, the corrosive legacy of apartheid protruded into the origins of the debacle. The substantive basis for the arms deal was the threadbare state of the equipment of the South African National Defence Force, largely as a result of decades-long arms embargo and the financial limitations placed on the National Party government through the dual impact of biting international banking sanctions and the country's involvement in a host of costly wars in the region, most notably in support of Unita in Angola. The cutting of international lines of credit in 1985 forced the South African Finance Ministry and the Reserve Bank to attempt to run an overall balance of payments surplus and to protect the capital and current accounts. In practical terms this translated into expensive (and irreplaceable) military equipment, such as jet fighters and naval warships, rapidly becoming both obsolete and unsustainable.

Yet while the case for the replacement of old and high maintenance equipment was easy to make, the scope, content and timing of any such replacement and procurement process were areas for considerable debate and disagreement. Disagreement centred on four areas. Firstly, the identification of a national threat (or otherwise) necessitating the procurement package. Secondly, the identification and sourcing of appropriate hardware to meet such a real or potential threat. Thirdly, the timing and structure of payment for such equipment, either as a package deal, or piecemeal. Fourthly, questions of affordability and national priority – a classic guns or butter debate.

The former chair of the Parliamentary Committee on Defence has claimed that it was the committee's rejection of the proposal by the defence minister at the time, the late Joe Modise, to make use of second-hand military equipment to replace the SANDF's aging and obsolete equipment which led to the drafting of the 1996 Defence White Paper and subsequent Defence Review.[177] If so, it was also parliament's somewhat superficial treatment and acceptance of the Defence Review in April 1998 that ultimately led to its own nadir with respect to the arms deal. While the Defence Committee concerned itself with overseeing transformation and a shift in the ethos away from over-secrecy of SANDF operations, it was technically ill-equipped to make sense of and critically examine the massive and complex arms deal. In addition to its direct financial and macro-economic implications, the package included provision for the generation of counter-trade, or off-sets, amounting to R104 billion, while generating some 65,000 jobs.[178]

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[176] This section is adapted from a forthcoming case study of parliamentary failure by Tim Hughes, "The South African Parliament's Failed Moment", Blackwell, 2006.

[177] Modise T, "Parliamentary Oversight of the Department of Defence: 1994 to 2003", in Le Roux L, M Rupiya and N Ngoma (eds), *Guarding the Guardians – Parliamentary Oversight and Civil-Military Relations: The Challenges for SADC*, Institute for Security Studies, Pretoria, 2004.

[178] While much has been made of the off-set, counter-trade and job creating potential of the arms deal, the penalty clauses for non-delivery of the off-set targets is a mere 10% of contract value, rather than the off-set value. It is contended by the government that this is twice as high as the international norm of 5% of contract value. Some of the off-set elements of the deal have been met. For more information on the offset arrangements see Christopher Wrigley, *The South African deal: A case study in the arms trade*, Campaign Against Arms, London, June 2003. http://www.caat.org.uk/information/publications/countries/southafrica-0603.pdf

Numerous aspects of the arms deal are worthy of examination, but the sheer magnitude of the total procurement package, which was originally stated as R29.8 billion, but when signed amounted to R33 billion makes it South Africa's largest single public procurement package. Political and strategic arguments aside, the magnitude of the deal elevated it to a position of significant material importance for the South African taxpayer and indeed non-taxpayer. Furthermore, its sheer scope and complexity confronted parliament and a number of its committees (Scopa, Defence, and Trade and Industry) with the task of making sense of the deal in all its guises, as well as exercising adequate oversight and holding the Executive to account for its actions, particularly given the deal's long-term implications.

Pursuant to the Defence White Paper of 1996, a cabinet sub-committee and thereafter the full cabinet approved the South African Defence Review, a comprehensive 15 chapter report of the entire operations and requirements of the South African National Defence Force. Chapter 13 of the Defence Review laid out the equipment requirements and acquisition policy of the Department of Defence. In April 1998, parliament gave its approval of the Review, thus providing a mandate for the commencement of Strategic Defence Packages for the Acquisition of Armaments at the Department of Defence. In November 1998 the first concerns were raised at the rapidity with which in just seven months the cabinet announced the names of the preferred bidders for the supply of new equipment. Then Deputy President Thabo Mbeki appointed Jayendra Naidoo, former executive director of the National Executive Development and Labour Council (Nedlac), to examine the affordability of the proposed arms package taking into account the country's socio-economic priorities. In this regard the attractiveness of the domestic investment and job-creation potential of the proposed counter-trade and off-set programmes within the arms deal became a highly significant dimension. Less than a year later, in September 1999, the cabinet announced that it was satisfied with all aspects of the proposed arms deal including that of off-sets and counter trade and that it was approving the expenditure of R21.3 billion over eight years (possibly rising to R29.9 billion over 12 years). Given the weight of importance accorded to the off-sets and counter trade, the Ministries of Defence and Finance, and the Department of Trade and Industry formed part of the government negotiating team. It was also in September 1999 that the first accusations of graft, bribery and corruption became public when then Pan Africanist Congress MP Patricia de Lille announced in parliament that she had received documentation from concerned ANC MPs of substantial malpractice in the granting of arms deal contracts.

Since there is a constitutional requirement that the Auditor-General, Shauket Fakie, examine all government expenditure and in particular the arms deal given its magnitude, the AGSA commenced a review of the selection process of the granting of contracts to the primary contractors.[179] Consistent with the requirements and ethos of the constitution, the Auditor-General reported his findings to parliament's Standing Committee on Public Accounts. The Auditor-General established and reported on a number of key areas of concern, including the choice of more expensive contractors within the tendering process, but added "(A)spects of independence, fairness and impartiality could have been addressed more significantly … the potential conflict of interests that could have existed was not adequately addressed by this process."

Additionally the Auditor-General found there to have been "material deviations from the originally adopted value system". Furthermore the report noted, "I am of the opinion that the guarantees, in the case of non-performance, may be inadequate to ensure delivery of National

[179] South Africa Auditor-General, "Special Review of the Selection Process of Strategic Defence Packages for the Acquisition of Armaments at the Department of Defence (DoD)" [RP 161-2000], Pretoria, 15 September 2000.

Industrial Participation (NIP) commitments. This could undermine one of the major objectives of the strategic defence packages which was the counter-trade element of the armaments package deal."

The Auditor-General's review went on to note that elements of the process were not in line with Ministry of Defence requirements for dealing with international offers nor compliant with procedures laid down for armaments acquisition policy. State parastatal ARMSCOR procedures were not fully adhered to, budgets were inadequate and arithmetic errors were found. The Auditor-General's review concluded, "Many allegations regarding possible irregularities in contracts awarded to sub-contractors exist … I recommend that a forensic audit of or special investigation into these areas be initiated".

Upon receipt of the Auditor-General's report and recommendations, the National Assembly referred it to Scopa for its consideration.

Consistent with the convention practised amongst parliaments of Commonwealth countries, the South African parliamentary public accounts committee has been chaired by a member of an opposition party since 1994. In the first term of the new parliament the chair was Ken Andrew a member of the Democratic Party and in the second parliament Dr Gavin Woods, a member of the Inkatha Freedom Party (which continued to serve in the cabinet until the 2004 elections). This continued practice ran against the trend of electing ANC chairs to all portfolio committees after the 1999 election.

It would be misleading to characterise Scopa's treatment of the Auditor-General's review as flexing its constitutional muscles. Yet Scopa's engagement with the arms deal enquiry became an important litmus test for its and by extension, parliament's *locus standi*, not simply with respect to the constitution, but also with respect to the executive and the Chapter Nine institutions of the Auditor-General and Public Protector, Selby Baqwa. Scopa's hearing into the report of the Auditor-General on 11 October 2000 established a number of important pegs in the ground. In addition to Scopa members and the chair of the Parliament's Defence Committee, the 11 October hearing saw present the Head of the Special Investigative Unit, Judge Edward Heath, the Auditor-General, the Ministry of Finance, the head of the government arms acquisitions, the negotiator of the arms deal counter trade packages, the chief executive and chairman of ARMSCOR, the Secretary of Defence and senior members of the SANDF. Significantly the chair of Scopa refused the SANDF the opportunity to conduct a presentation to the committee, but rather asserted that the DoD had been called to the hearing to answer questions raised by Scopa. This set an important precedent.

Besides the inadequacy of certain responses provided by some of those questioned by Scopa, what is of particular significance is the tenacity of the questioning by committee members belonging to the ruling party. Former ANC Scopa committee member Laloo Chiba is recorded as expressing the following during questioning of ANC stalwart and Director of Acquisitions Chippy Shaik, "Your response is not acceptable. The answer of statutory costs is not correct … I want total calculations to be re-submitted to this committee within seven days … What will be the total outlay – R50, R60, or R70 billion? Without such calculations, how could you motivate such purchases? … Submit copies of these agreements to this committee within three-to-four days with the contracts and figure work."

The head of the ANC on Scopa Andrew Feinstein, although less aggressive in tone, asked the following questions of his fellow party member Shaik:

> "Why don't we spend most of our budget on arms in order to leverage economic development? It doesn't make sense to me as an economist. International literature suggests these offsets are subsequently diluted or disappear, or the suppliers factor the penalties into the costs. Why should South Africa be different from the international experience? We need the legally binding contracts … was cabinet misled? On what basis was

> the cabinet decision made? The Auditor-General has noted that that the packages were negotiated before the Budget was provided. Did the tail wag the dog? When did conflicts of interest occur? … Was the minister advised of the conflicts of interest? … Did you declare your conflict of interest?"[180]

This form of questioning illustrates the serious and non-partisan approach adopted by Scopa in its hearings and was the guiding ethos underpinning its report into the arms deal. On 30 October 2000 Scopa presented its findings to parliament in the form of its Strategic Arms Purchases Review: Final Report on Standing Committee on Public Accounts Final Report. The Report concluded that given the evidence before it, the seriousness of the issues under investigation, the range and nature of the questions left unanswered, as well as the recommendations of the Auditor-General, Scopa recommended the establishment of an independent and expert forensic investigation. Most significantly, however, Scopa argued that given the complex and cross-cutting nature of the issues under investigation, a multi-sector investigative team ought to be assembled to carry out the investigation. Scopa's recommendation was that the team be comprised of the Chapter Nine Offices of the Auditor-General and Public Protector, the Investigations Directorate of the Serious Economic Offences Office and the (Judge) Heath Special Investigative Unit and "any other appropriate investigative bodies". Scopa proposed that it would prepare a written brief for such an independent investigative body and that it would report back to parliament at regular intervals. Concurrently Scopa would continue with its own examination of the arms deal which would include the questioning of cabinet ministers. Crucially, Scopa's report was adopted by the National Assembly without debate on 2 November 2000. Whether parliament was aware of the political and constitutional implications of Scopa's report and recommendations must remain speculative. Assuming it fully applied itself to the content and recommendations of the report, this may be interpreted as a strong mandate from parliament to the committee to push the boundaries of its activities and authority with respect to Chapter Nine institutions and indeed the executive branch. If, on the other hand, parliament failed to apply itself fully to the consequences of the Report without debate, this would reflect as an indictment on the institution.

Despite Scopa's parliamentary mandate the entities it corralled into the investigating team were less unquestioning of their role and mandate. Cognisant of the un-charted and potentially stormy seas they were about to sail into the Scopa meeting of 13 November 2000 debated the respective areas of expertise and overlap between the institutions involved.[181] Emerging from the 13 November meeting, however, was a clear objective for the investigation, the sourcing of finance, the resources required, administrative arrangements, processes to be followed, the contracting of expertise, the broad framework of the investigation as well as the identification and management of Departmental documentation required. The team, co-ordinated under the aegis of the Auditor-General undertook to report back in July 2001.

It was at this time that the executive began to recognise that a tipping point had been reached in which parliament in the guise of Scopa had successfully galvanised four powerful,

[180] Standing Committee on Public Accounts Parliamentary Hearings, Selection Process of the Strategic Defence Packages; Stockholdings in Department of Defence, 11 October 2000. Note: Shaik's brother is and was a Director and material beneficiary of a company that won contracts in the arms deal.

[181] Scopa chair Gavin Woods convened a meeting with the members of the JIT at which a working division of labour was thrashed out. Cognisant of the constitutional, legal and political imperatives, in November 2000 Woods had sought independent legal counsel opinion. He additionally wrote to Fink Haysom, legal adviser to former President Mandela and retained by Speaker Dr Frene Ginwala, to request a legal opinion as to how Scopa ought to interact with the four entities in the investigating team. Haysom forwarded a legal opinion that set out the distinctive constitutional and legal modalities required for the individual institutions in the JIT to report to Scopa and parliament. He made the point, however, that Scopa could not instruct the JIT with respect to its activities.

professional investigative bodies to examine what was root and stock an executive initiative and programme. It was then that it mobilised in response to these rapid developments. The first line of attack from the executive was to remove Judge Willem Heath and thus the Special Investigative Unit from the team. Heath and his Unit had developed considerable expertise into governmental corruption. The former Justice Minister, Penuell Maduna, sought to have Heath removed from the Scopa investigating team on the grounds that a sitting judge could not head the Special Investigative Unit. On 28 November 2000 the Constitutional Court held that Heath's role in the Special Investigative Unit (SIU) was unconstitutional. Woods responded by writing to President Mbeki requesting a Presidential Proclamation allowing the SIU to re-join the investigation. Maduna recommended against such a proclamation, advice which the president took and announced that he would not issue such an enabling proclamation. Not content with blocking Heath's participation, Mbeki went on television to berate Heath for withholding important information. Mbeki displayed diagrams purporting to illustrate the fallacious basis of Heath's understanding of the arms deal. These drawings were later identified as the working drafts of an investigative journalist, not Heath's.

A further executive salvo was collectively fired by former Trade and Industry Minister Alec Erwin, Finance Minister Trevor Manuel, Defence Minister Mosiuoa Lekota and former Public Enterprises Minister Radebe who put the case for the government to the South African public on 12 January 2001.[182] Pre-empting the Scopa/Auditor-General's Report, the thrust of the ministers' contention was that there had been no wrong-doing whatsoever and that even the figures of the ballooning cost of the arms deal where both an exaggeration and misreading of the financing calculations of the deal. Most significantly however, the ministers took aim at both the Auditor-General and Scopa. According to them, the Auditor-General,

> "(M)ay not have been adequately exposed to the high-level decision-making process … Accordingly, the (AGSA's) inferences are based on incomplete information … The Auditor-General is entitled to his opinion as to the adequacy of the performance guarantees … We believe that we are entirely within international practice and … that the Auditor-General is incorrect when he sees the counter-trade aspects of the deal as a major objective of the deal … The Auditor-General has not correctly dealt with the matter of the first order values … and he will need to hold further discussions with the Ministry of Defence to clarify this matter."

Scopa came off no less lightly. The ministers accused the committee of not understanding the immense complexity of the arms procurement process and thus arriving at false and erroneous assumptions. The irony of Scopa not fully understanding the arms deal is not lost on the ministers who accused Scopa of failing to take up the offer of ministerial assistance or even requesting ministerial assistance in explaining the detail of the deal. More powerfully however, the ministers signalled their strategic line of attack by asserting that Scopa had acted *ultra vires* by involving investigative agencies other than the Auditor-General. A further nail in the coffin of Scopa's investigation was driven home by a letter issued in January 2001 to Woods by the Leader of Government Business in the House, axed Deputy President Jacob Zuma,[183] who challenged the basis and approach of Scopa's investigation.

Ironically, the *coup de grace* in the assault on Scopa came not from the executive, but from

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[182] Government Communication and Information Service, "Background Notes on the Strategic Defence Procurement Package for the Press Statement issued by the Ministers of Defence, Finance, Public Enterprises and Trade and Industry", 12 January 2001.

[183] Former head of the National Directorate of Public Prosecutions Bulelani Ngcuka subsequently publicly announced that the NDPP had found *prima facie* evidence of corruption against Zuma as part of its investigation into the arms deal, but that the prospects of a conviction were too low to attempt to prosecute. His financial adviser Schabir Shaik was found guilty of fraud and of having a "generally corrupt" relationship with then Deputy President Jacob Zuma. Zuma was relieved of the deputy presidency, and will be on trial for corruption in 2006.

within parliament itself. On 27 December 2000 the then Speaker of the National Assembly, Frene Ginwala, issued a statement in which she questioned the association of the Heath SIU and the Office for Serious Economic Offences in the Scopa investigative team. Furthermore, she adjudicated that Scopa had gone beyond its mandated powers in sub-contracting outside units to conduct work on its behalf. She further asserted that the chair of a committee may not commit the committee to a course of action, hearing, or investigation, without the full consultation and support of the particular committee. As such, Ginwala implied that Woods had acted *ultra vires*.

On 22 January 2001 the ANC members of Scopa fell into party line and publicly announced that their interpretation of Scopa's 14th Report differed from Woods's, in that they rejected the insistence that specific investigative units had to serve in the investigative team. This cleared the way for the Heath Special Investigative Unit to be excluded. On the same day the guillotine fell on Feinstein, head of the ANC Study Group on Public Accounts.[184] He was replaced by Geoff Doidge, Deputy Chief Whip of the ANC. Justifying the tightening of party control in Scopa, ANC Chief Whip, Tony Yengeni[185] acknowledged that the party and president sought to effectively control and subordinate parliament and Scopa to their will, which is a fundamental violation of separation of powers:

> "There was no objection to these changes, as it was the ANC government that was under attack, it was imperative that the lines of accountability between the ANC members in the committee (Scopa) and the ANC leadership be strengthened. I don't want to cast aspersions. We really wanted to improve our capacity, but also wanted people who are going to be the political link with ANC structures so that the ANC from the president down could exercise political control."[186]

These developments signed the death warrant of bipartisanship in Scopa, but also cast grave doubts about the ruling party's commitment to the cardinal principles of openness, accountability and transparency. Moreover it signalled the moment in which Scopa's *raison d'etre* was compromised for the sake of party solidarity and the protection of the executive rather than holding it to account. The die had been cast and hereafter, while the Joint Investigative Team (JIT) continued its brief under the auspices of the Auditor- General,[187] *sans* the particular skills and experience of Heath, the credibility of the investigation would always be in doubt. By the time of its second committee Report on the arms deal in May 2001, Scopa had become a divided and divisive entity unable to agree even on procedural matters. ANC members accused the chair of hijacking the committee and the official opposition Democratic Alliance was unable to associate itself with the Second Report of the committee. The DA tabled eight substantive amendments to the report, some of which were profound and went to the heart of the constitutional mandate, authority and obligation of the committee. All were rejected.

On 15 November 2001 the Joint Investigative Team released its Report to parliament and cleared the government of any wrong-doing in the arms deal. While the report highlighted inadequacies and shortcomings within the tendering process, these were of a technical nature.

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[184] Feinstein subsequently resigned from Parliament and left the country to work in London.

[185] Yengeni was subsequently charged with fraud and corruption by the Scorpions and found guilty of receiving a bribe from a successful contractor in the arms deal while Chair of Parliament's Defence Committee and convicted of a criminal offence.

[186] As quoted in Paton C, "Drowning in a Sea of Troubles", *Sunday Times*, 4 February 2001.

[187] The JIT was finally constituted of the Public Protector who was responsible for the public phase of the investigation and liaising with other investigating agencies; the Auditor-General responsible for the overall investigation and reporting with specific responsibility for examining the content and processes followed in the arms deal - including areas of risk, conflict of interests and cost to the State; and the National Directorate of Public Prosecutions examining, *inter alia*, any criminal aspects of the arms deal.

Prosecutions pursuant to the findings of the report and the work of the Directorate of Public Prosecutions were aimed at private individuals, who although strongly connected to cabinet ministers and the ANC did not pose a threat to the integrity and reputation of the government. However, widespread public criticism of the JIT report resulted in the Auditor-General taking the unusual step of drafting a Special Report on the JIT Report to refute and rebut allegations of a 'whitewash' and of executive pressure to expunge potentially damaging detail and evidence.

With the JIT Report completed and presiding over an irreconcilably divided committee, Scopa Chair Gavin Woods resigned his position on 25 February 2002. Minutes of the committee meeting of 26 February 2002 record the intensity of the debate as to whether part of the meeting ought to be held in camera and whether transcripts ought to be publicly released. The threatened, or potential, abrogation of core principles of openness, transparency and accessibility provided for in the constitution, parliament and committee work bears testimony to the depths to which the committee had sunk in the maelstrom of the arms deal.[188]

Scopa Regaining Some Credibility on Oilgate Investigation Scandal: Pan-Africanist Congress (PAC) MP Themba Godi was named as new Scopa chairperson in October 2005. His impartiality was also questioned by the DA, given that he had previously proposed that the PAC merge with the ANC.[189] However, in its handling of the Oilgate scandal, Scopa appears to be regaining some credibility.

In May 2005, the *Mail & Guardian* newspaper exposed the alleged laundering of public funds to the ANC's 2004 election campaign fund through the parastatal PetroSA and a private black economic empowerment company, Imvume Management. Imvume had requested a R15 million advance on an oil transaction, and had transferred R11m of this to the ANC. PetroSA had subsequently doubled up the payment.[190] The Freedom Front Plus said that it had ten tough questions for PetroSA when its management appeared before Scopa on 24 August 2005, but was prevented from asking them as the Scopa chairperson only allowed questions from the Standing committee, and alleged an ANC filibuster: "The ANC members of the committee dominated the question time with extended questions about non-essential issues," said Freedom Front Plus leader Pieter Mulder.[191]

However, in November 2005 Scopa did criticise Imvume Management and PetroSA regarding Oilgate, making "the first official public acknowledgement that the transaction was irregular" and contradicting the Public Protector's earlier findings in July 2005 that PetroSA's advance payment to Imvume was "lawful, well-founded and properly considered."[192] It also criticised the endorsement of the Public Protector's report by parliament's Mineral and Energy Portfolio Committee on 31 August.[193] DA MP Dreyer commented said she was "impressed" at the way Scopa under Themba Godi had handled the matter, adding that "perhaps Scopa is wanting to regain lost credibility."[194]

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[188] All parliamentary committee minutes are available on-line at www.pmg.org.za
[189] "DA says Scopa chair shows protection of ANC interests", *The Herald Online*, 25 October 2005.
[190] Brümmer S and S Sole, "Scopa hits out at Oilgate 'irregularity'", *Mail & Guardian*, 18 November 2005.
[191] Mulder P, "Oilgate and What it Means for the South African Political System", Africa Dialogue Lecture Series, University of Pretoria, 8 November 2005, p 3.
[192] Brümmer S and S Sole, "Scopa hits out at Oilgate 'irregularity'", *Mail & Guardian*, 18 November 2005.
[193] Mulder P, "Oilgate and What it Means for the South African Political System", Africa Dialogue Lecture Series, University of Pretoria, 8 November 2005, p 3.
[194] Brümmer S and S Sole, "Scopa hits out at Oilgate 'irregularity'", *Mail & Guardian*, 18 November 2005.

Public Protector (Ombudsman)

The Public Protector is an independent Chapter Nine Institution, protected by the constitution, and accountable to parliament. S/he has the power, within the confines of the constitution and legal system, "to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice; report on that conduct; and take appropriate remedial action."[195]

Constitutionally, the Public Protector may not investigate court decisions, and must be accessible to all. All his reports must be made public, barring exceptional circumstances. The Public Protector must have legal expertise, has a non-renewable seven year appointment, and it would take two-thirds of the National Assembly to remove him or her. The president appoints the public protector, based on parliament's recommendation.

Any citizen (barring some public officials in particular circumstances) may report a matter to the Public Protector, who is then bound to investigate the matter, and may also initiate his or her own investigations. Matters under the Public Protector's jurisdiction include institutional maladministration in state or public entities, abuse of power or improper conduct by officials, and any act or omission leading to improper prejudice to another person.

Public Protector has Capacity Constraints: South Africa also has provincial Public Protectors. The combined national and provincial staff is 154 and the 2004/05 budget is over R43 million.[196] Despite these resources, the Public Protector's office has had capacity problems, according to the 2003 report to parliament.[197] The DPSA recommended that the Public Protector create additional posts to clear its backlogs, mainly created by the increased workload since the establishment of provincial offices.[198] This had as not yet happened as senior vacancies are still being filled.

The Public Protector receives a high volume and variety of complaints from the public, with 48,017 complaints processed from 1995-2001, with an average turnaround time of six to nine months.

- Roughly half of the cases in one year are carried forward to the next, and the volume of new cases puts continual pressure on the system.
- Some departments and parastatals have been slow to respond to the Office of the Public Protector, and are not always cooperative.
- Lack of resources prevented some staff from conducting some on-site investigations.
- Investigators have large case loads, many of which are carried forward into the next year. In 2003, there was a backlog of about 6,000 matters.
- The Public Protector is not a well-known corruption-fighting institution, and there is a need to raise public awareness about its role and function.

Impartiality of Public Protector Questioned: Advocate Lawrence Mushwana replaced Advocate Selby Baqwa SC as Public Protector in October 2002. Both of South Africa's Public Protectors have been ANC members. Mushwana was a serving ANC MP at the time of

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[195] South African Constitution 181(c).
[196] Public Protector, Presentation before the Portfolio Committee on Justice and Constitutional Development, Parliament (10 June 2004).
[197] Mushwana, L. Presentation before the Portfolio Committee on Justice and Constitutional Development, Parliament, Cape Town, 12 June 2003.
[198] Email comment from M Mosheshe, 12 December 2003.

his appointment, leading some to question his independence and susceptibility to pressure from the ruling party. A comment by a peer reviewer in the CPI report:

> Both incumbents to date … have given the impression of being relatively independent-minded generally, but both seem(ed) prone to using contorted logic to arrive at executive-minded decisions in high-profile, sensitive cases" while another said "[n]either … have successfully supported the independence of the agency in the face of executive pressure."[199]

Mushwana stated that opposition political parties tend to use the Public Protector to test political disputes or "for the media frenzy that such reportage was likely to cause".[200] He claims that despite having found in favour of several high profile ANC officials, he has "taken over 17,000 decisions on complaints, mostly against senior ANC leaders in charge of departments and parastatals…(and has) dealt with corruption and maladministration in a dispassionate manner".[201]

Some high profile cases implicating senior members of the executive brought before Mushwana include:

- An undeclared gift received by former Deputy President Jacob Zuma. He found in Zuma's favour.
- Claims that Defence Minister Mosiuoa Lekota did not disclose certain shares. The Public Protector found in his favour;
- A piece of expensive diamond jewellery worn by former Minister (now Deputy President) Phumzile Mlambo-Ngcuka that she received from someone later appointed to the SA Diamond Board. Mushwana found that although she had not declared this, it did not constitute a gift or a donation.
- A house bought from the Department of Public Works at well below market price by First Lady Zanele Mbeki, which she attempted to sell for double the price ten months later. Mushwana found in Mrs Mbeki's favour, who claimed she had bought the house for Thabo Mbeki's mother, who declined the offer. The Public Protector ruled that this was a private matter.[202]
- Allegations lodged by former Deputy President Jacob Zuma against former NDPP, Bulelani Ngcuka, concerning the manner the NPA had investigated Zuma on corruption charges. His finding in favour of Zuma angered Ngcuka and former Justice Minister Penuell Maduna, who called the decision "spineless". A row erupted between the institutions, and Mushwana's report to parliament criticised Ngcuka and Maduna.

As previously discussed, in the Oilgate scandal, the Public Protector was requested in June 2005 by the Freedom Front Plus political party to investigate a payment of R15 million by PetroSA to a BEE oil company, Imvume Investments, in December 2003, and again in February 2004, following allegations that R11 million had been paid to the ANC as election funding. They also asked Mushwana to delve into a series of alleged payments by Imvume or its CEO Sandi Majali, including to a company run by the brother of current Deputy President Phumzile Mlambo-Ngcuka and a construction company for improvements to the home of Social Development Minister Zola Skweyiya. The Public Protector on 29 July ruled that there was no misconduct or maladminstration by PetroSA or any other public official, and that the

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[199] Peer review comment, "Indicator Scores", South Africa Report for Global Integrity, Center For Public Integrity, 2003, Indicator 53e.
[200] Sefara M, "Watchdog or lapdog? SA's public protector faces heat". *Cape Argus*, 16 July 2004.
[201] Sefara M, "Watchdog or lapdog? SA's public protector faces heat". *Cape Argus*, 16 July 2004.
[202] Sefara M, "Watchdog or lapdog? SA's public protector faces heat". *Cape Argus*, 16 July 2004.

R15 million lost its character as public money when it was paid by PetroSA and was thus beyond his jurisdiction.[203] parliament's Standing Committee on Public Accounts (Scopa), however, subsequently reported "irregularities" by both PetroSA and Imvume (see discussion of Oilgate, above).

In January 2006, the *Mail & Guardian* newspaper filed a court challenge to Mushwana's findings on Oilgate, seeking to have his July 2005 report overturned and redone. They claim Mushwana's report avoided probing parts of the scandal, but exonerated government and the parastatals involved.[204]

The Auditor-General of South Africa (AGSA)

The Auditor-General of South Africa (AGSA) is the supreme institution empowered to audit and report on the accounts and financial management of all spheres of government and other statutory and non-statutory bodies. The office of AGSA is constitutionally guaranteed as a Chapter Nine Institution. S/he is appointed by the National Assembly, and must submit audit reports to the relevant national or provincial legislature and all reports must be made public. Under the Public Finance Management Act, he must report to parliament on the accountability of public entities.

Although the office does not have prosecutorial powers and serves only to uncover and disclose problems, the office is a vital source of information for parliament and the public. If it does not perform its duties adequately or publicise them broadly, there is no other source of information about what is going on in government accounts – save the media and what government chooses to say about itself.

Auditor-General's Reports Much Less Informative than Ghana, Kenya, Malawi: The Auditor-General's office produces reports in a timely way on all national departments, provincial governments and municipalities. However, the Auditor-General's office has several crucial weaknesses. While the office performs its duties in a far more timely way in comparison to the office in other African countries, its reports are extremely superficial and contain very little detailed information when compared to the work produced by much more poorly funded Auditors' General in Ghana, Kenya, Malawi and Mauritius.[205] While other Auditors' General make detailed public reports running to hundreds of pages listing specific information about tenders done outside of the legal rules, money gone missing and payments unauthorised, the South African AGSA provides only minimal information that gives no indication of who is culpable or how the error in question occurred. For example, the AGSA's report on the accounts of the Department of Provincial and Local Government 2002/03 notes only that "Fifteen payments (R4.8 million) were made in error to local authorities and is included in accounts receivable disallowed." No further explanation is offered over a large sum of missing funds.

The AGSA's office is founded on the idea that public information is a critical antedote to unaccountable individuals and institutions. However, without detailed information the public and parliament cannot fulfil their roles in pressuring for accountability.

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[203] Mulder P, "Oilgate and What it Means for the South African Political System", Africa Dialogue Lecture Series, University of Pretoria, 8 November 2005, pp 2-3.
[204] Brummer S, "M&G wants Oilgate report overturned", 31 January 2006.
[205] The South African Institute of International Affairs has conducted in-depth analyses of fiscal governance, using the APRM methodology in Malawi, Ghana, Mauritius and Kenya in 2004-2005.

Performance Management Reports and Audits Not Completed as Required: The Municipal Systems Act (sec 46) requires municipalities to implement a performance management system and submit a report on results to the Auditor-General annually for audit. In 2002/03 the AGSA only completed 21 such audits and in 2003/04 completed 22 out of 284 municipalities. This is a reflection of municipalities not having set up performance management systems as required and the AGSA not having completed the audits. The AGSA did not explain why the audits were not complete in his report but noted: "It is clear that overall governance in respect of PMSs was still not satisfactory at the key municipalities during the period under review."[206]

Auditor-General's Reports Not Broadly Distributed: The AGSA no longer produces a single consolidated report on issues in public finance. Instead the office issues a brief report on each provincial, local and national entity. Those bodies are supposed to include the AGSA's reports along with their financial statements in an annual report that should be tabled in the relevant parliament, legislature or municipal council. However, many such entities file their reports late or not at all and a substantial number do not make the information readily available to the public. As a result, the AGSAs work is substantially reduced in its value and power to assist with accountability.

According to the AGSA, the office cannot provide audit reports directly to the public but citizens must go directly to each individual entity. There are a total of 27 national departments, 111 provincial entities, 284 municipal governments and many state-owned enterprises that produce accounts subject to AGSA review. The AGSA also conducts a variety of special investigations and, where appropriate, passess information on to the relevant investigative/prosecutorial body. However, these reports are not available on the AGSA's website. To force the media and parliament to chase every one of these documents separately is inefficient and contrary to the spirit behind having an Auditor-General.

Integrity of the Auditor-General's Office Damaged By Conduct of Arms Investigation: Auditor-General Shauket Fakie's editing of the arms deal report suggests strongly that his political loyalties superseded his constitutional mission. The final report was published after Fakie met with President Mbeki, before presenting the report to Scopa. Cape Town businessman Richard Young, MD of arms company C^2I^2 Systems was a losing bidder in the arms deal. Young used the Promotion of Access to Information Act (PAIA) in a protracted three-year legal battle to obtain early drafts of the JIT report from the Auditor-General's office. These early drafts reveal that the final arms deal report was substantially edited. According to *Business Day*, fundamental differences between the drafts and the final version included:

- the removal of strong objections from senior defence force members to purchasing more jet aircraft that they believed were unneeded;
- the influential role the late Minister of Defence Joe Modise played in ensuring that the R15 billion purchase of jet aircraft happened despite objections from defence department experts;

[206] The requirements of the Municipal Systems Act (2000) and the Municipal Finance Management Act are being phased in based on the capacity of municipalities with the high capacity municipalities required to abide by 30 June 2006, medium capacity ones by 30 June 2007 and low-capacity municipalities by 30 June 2008. Fifty municipalities are deemed high capacity by the National Treasury. The first performance management systems audits were done in 2002/03. Fakie S, "General Report of the Auditor-General on the Audit Outcomes of Local Government for the Financial Year Ended 30 June 2004"

- Modise's key role in ensuring that British-made Hawk aircraft were chosen over the substantially cheaper Italian Aermacchi MB339;
- the removal of findings that suggested substantial shortcomings in the procurement process in almost all of the product lines purchased; and
- the inclusion of findings that affirm the integrity of the government's contracting position (for example "No evidence was found of any improper or unlawful conduct by government … There are therefore no grounds to suggest that government's contracting position is flawed") that did not appear anywhere in the earlier draft versions.[207]

In *Business Day*, Richard Young was quoted as saying, "The huge changes happened between 18-26 October. The drafts had gone to the Presidency on 4 October while Fakie met with the President around 16 October." [208]

Critics accused the office of buckling under executive pressure, such as permitting reports to be amended by the cabinet before release and thus failing both parliament and the electorate. In defending his handling of the report in an interview with the *Sunday Times,* Auditor-General Shauket Fakie said all changes were initiated by the Joint Investigation Team. "When we looked at the message the report was giving and how it came across, we had to make some changes, not to the substance of the report but to how it came across. When Young sought a copy of the draft to determine what was cut, the Auditor-General fought the request. "I knew the kind of debate that I would be embroiled in if I issued the draft report. Every word I changed I would have to sit down and explain."[209] The Auditor-General exists to serve the interests of the people, as represented by parliament and the very existence of the institution acknowledges the need in all democracies to hold the executive branch – the actor with control of policy and purse strings – to account. Instead of serving the interests of full disclosure and public accountability, the Fakie's edits of the arms deal report served only the interest of allowing the executive of escaping blame for the obvious flaws in the management of the process. Although the institution is well defined in law, the arms deal incident suggests Fakie put loyalty to party and government before his constitutional duty to the public. In 2003, Scopa implicitly acknowledged the point by recommending changing the law so that that in future forensic investigations, the Auditor-General need not consult the Executive. However, the law has not been changed to date in this regard.

The Auditor-General has proved somewhat stronger in highlighting the numerous expenditure and budgetary deficiencies in government departments, particularly within provincial and local government.

Some Departments Consistently Receive Qualified Audit Reports: Certain departments repeatedly receive qualified audit reports: Home Affairs, Public Works, and Water Affairs and Forestry all received qualified reports for the four years up to 2003/04, while Correctional Services and Statistics South Africa had qualified reports for three consecutive financial years. In 2003/04, eleven departments received a qualification, up from eight in the two previous financial years, which "suggests that the implementation and policies and procedures by management to satisfy the requirements of the [Public Finance Management Act] is proving difficult." [210]

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[207] Cohen T, "Arms-deal report cover-up", *Business Day*, 7 January 2005.
[208] Cohen T, "Arms-deal report cover-up", *Business Day*, 7 January 2005.
[209] Barron C, "Watchdog worried about our tax wastage", *Sunday Times,* 5 February 2006
[210] Fakie SA, *General Report of the Auditor-General on Audit Outcomes for the Financial Year 2003-04*, Pretoria, 8 December 2004, p 5.

- In the Eastern Cape, the recommendations made by the Auditor-General are seldom implemented; particular departments such as education have received audit disclaimers year on year for the same problems, such as the failure to submit documentation. The Auditor-General has noted in reports that his queries have been raised repeatedly (since 1995 in some instances), yet no progress appears to have been made in addressing them by departments.

Departments Do Not Concentrate Sufficiently on Performance Management: President Mbeki has tried to impose delivery targets on all departments at a political level, but there is no management system to track whether spending patterns are geared to achieve these targets. The AGSA concentrates on auditing financial statements with only ad hoc performance audits, and notes that the financial statements he gets do not tie back to progress against departmental targets:

> The challenge that we face by concentrating on our auditing of financial statements is the expectation gap between the product my office delivers and the product the stakeholders require, since their focus is on service delivery. This gap in expectation will continue unless the financial statements submitted by audited entities contain information on performance measured against predetermined objectives.[211]

Although the AGSA has "…identified the need for a shift in the scope of my reporting, [the report recognises that] extended performance information auditing cannot supersede the existing audit process.[212]

This concern was reiterated in the 2003/04 report, which highlighted "fundamental deficiencies in the reporting on performance information in the annual reports. This includes poor linkage to budget commitments, lack of measurable objectives and lack of explanation of deviations from planned targets and outputs. Much work is required in the development of reporting in this area, if we are to achieve effective accountability around service delivery."[213]

Auditor-General Struggles to Collect Revenue from Local Authorities: The Office of the Auditor-General has difficulty in recovering audit fees from cash-strapped municipalities.[214]

Outsourced Forensic Auditors Lack Funds to Do Job Properly: Between 70% and 80% of forensic auditing for the AGSA's office is done by contracted professionals.[215] Insufficient funding often curtails their effectiveness.

- Van Vuuren notes the example where the Telecommunications Portfolio Committee requested the AGSA to investigate the awarding of South Africa's third cellular phone licence to Cell-C despite the bidder's poor funding provisions.Van Vuuren said, "In his final report the AGSA indicated that he was concerned by impediments created by resource constraints and the urgency and haste with which he was requested to undertake the audit (a point he raised from the outset)."[216]

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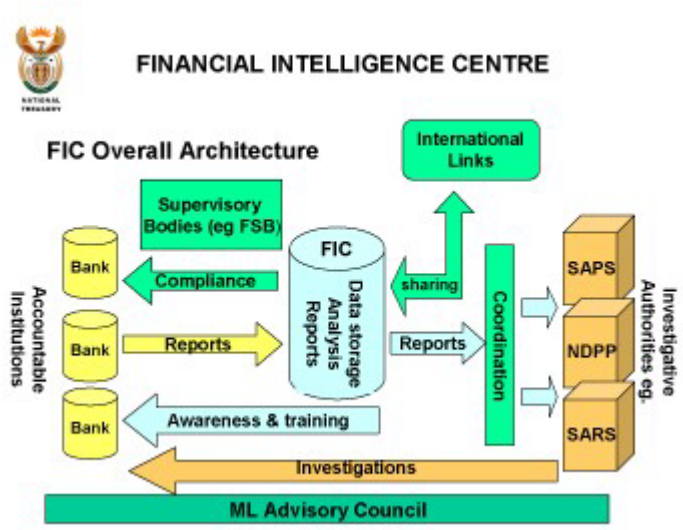
[211] Fakie SA, *Activity report for the financial year 2002-2003*, Pretoria, 2004.
[212] Fakie SA, *Activity report for the financial year 2002-2003*, Pretoria, 2004.
[213] Fakie SA, *General Report of the Auditor-General on Audit Outcomes for the Financial Year 2003-04*, Pretoria, 8 December 2004, p 2.
[214] *Country Corruption Assessment Report- South Africa*, published jointly by the South African government and United Nations Office on Drugs and Crime – Regional Office for Southern Africa (UNODC/ROSA), April 2003, p 50.
[215] Van Vuuren H, *National Integrity Systems Transparency International Country Study Report* Final Draft South Africa 2005, p 46.
[216] Interview with the author, September 2002. Cited in Van Vuuren *op. cit.*

The AGSA in his 2003-04 report notes that outside auditors place less emphasis on compliance with the Public Finance Management Act (PFMA) and Treasury regulations, internal audits and audit committees and asset management.

The Financial Intelligence Centre (FIC)

The Financial Intelligence Centre (FIC) was established in February 2002 under the Financial Intelligence Centre Act (FICA, of 2001), which also set up South Africa's regulatory anti-money laundering regime.[217]

The Centre does not actually investigate nor prosecute money laundering. Instead, it facilitates such actions by making the information it collects available to investigating authorities like the South African Police Services (SAPS); the National Prosecuting Authority (NPA) through the Directorate of Special Operations (Scorpions) and the Asset Forfeiture Unit (AFU); intelligence services; and South African Revenue Service (SARS). Efforts at cross-border cooperation have also been undertaken as embodied in the Eastern and Southern Africa Anti-Money Laundering Group. In keeping with this spirit, the Financial Intelligence Centre also disseminates information to counterpart bodies in other countries. Hence, the Centre has become a repository of information as well as playing a part in coordinating policy aimed towards strengthening South Africa's anti-money laundering regime.[218]



Source: www.fic.gov.za/

Challenges for the FIC: The FIC seems to be adequately structured, funded, staffed, and provided with the necessary resources to combat money laundering. Yet the South African context brings with it its own challenges in fighting this type of financial crime - the predominantly cash economy, large informal sector and the international dimensions of money laundering.[219] In addition to these contextual constraints, the centre is hampered by a lack of public awareness surrounding money laundering:. Twenty-six of 33 auditors surveyed were aware of anti-money laundering measures. However, when asked to name the measures

[217] In this section, money laundering refers to the processing of criminal proceeds in order to disguise their illegal origins.
[218] Financial Intelligence Centre Web Site, www.fic.gov.za/.
[219] Standing A and H van Vuuren, "The Role of Auditors: Research into Organised Crime and Money Laundering", Institute for Security Studies, Occasional Paper 73, May 2003.

they cited a diverse list with rarely one reply the same as the other. It should be noted that seven were completely unaware of any measures to combat money laundering.[220]

The FIC acknowledges that better public awareness around money laundering is needed:

> A very important element is ensuring that the level of public awareness is raised, so that any person who wished to open a bank account or conduct a business transaction will understand that the institution concerned will ask questions regarding their identity. People need to understand that this is to enable them to do business in the context of a more secure financial system and environment in the future.[221]

While there have been plenty of teething troubles, banks now seem well on the way to implementing FICA effectively. South Africa's banks and other financial institutions embarked on a massive campaign to verify the identities and details of their account holders to comply with FICA in 2004 and 2005. So far, more than 24,000 suspicious transactions have been reported to the centre, which has passed 1% of these onto law-enforcement agencies. Though the number of cases that have proceeded is small, the pace of prosecutions is expected to increase. Civil action has been taken to freeze or seize about R170 million of assets suspected of being proceeds of organised crime.[222]

However, convictions for money laundering remain low as it appears agencies and prosecutors have generally focused on investigating and prosecuting the related crimes. For instance, between 1996 and 2003, South Africa only had two money laundering convictions.[223]

The FIC needs to move beyond gathering information for investigations. The unit's powers should be expanded to include investigative and prosecutorial components.

The News Media and Freedom of Information

According to Van Vuuren's research, within the South African context, official governement processes uncover about 60% of corruption in state structures, civil society uncovers about 18% and investigative journalism is responsible for bringing to light about 8% of state corruption.[224] While journalism's contribution may seem small, the media often unearth politically sensitive cases otherwise left untouched by politicians and civil society. Some goverment bodies operating in anti-corruption capacities – for example the NPA and the Scorpions – use media coverage to help them decide on targets or cases. Indeed, media exposure fuelled the NPA's investigations into Schabir Shaik and then Deputy President Jacob Zuma's involvement in aspects of the controversial arms deal, as well as allegations of rape against Zuma.

While the media rights advocacy group Reporters Without Borders rates South Africa as a beacon of press freedom in the region,[225] the US-based NGO Freedom House, in its annual global review of media independence, drew attention to the country's lingering apartheid-era

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[220] Standing A and H van Vuuren, "The Role of Auditors: Research into Organised Crime and Money Laundering", Institute for Security Studies, Occasional Paper 73, May 2003.
[221] Standing A and H van Vuuren, "The Role of Auditors: Research into Organised Crime and Money Laundering", Institute for Security Studies, Occasional Paper 73, May 2003.
[222] "Money Laundering", Business Day, 1 July 2005.
[223] International Monetary Fund, "South Africa: Report on Observance of Standards and Codes FATF Recommendations for Anti-Money Laundering and Combating the Financing of Terrorism", April 2004.
[224] Van Vuuren H, Transparency International Country Study Report Final Draft South Africa 2005 , p 85.
[225] Reporters Sans Frontieres, South Africa – 2003 Annual Report, http://www.rsf.org/article.php3?id_article=6452&var_recherche=south+africa

laws that restrict access to information and compel journalists to divulge sources.[226] Freedom House also noted the growing sensitivity to media criticism demonstrated by the government.

The posture of government officials and spokesmen/women often reflects a hostile attitude that denies or excuses public service failures rather than taking them on board and energetically responding to them. Anti-media sentiments have been expressed from the top.

- For example, President Thabo Mbeki wrote in the 23 August 2002 edition of the weekly electronic newsletter, *ANC Today:*

  > The mass media in South Africa is still shaped by the same political and economic forces which existed under apartheid. As a result it tends to reflect the interests, views and political aspirations of those who benefited from apartheid. Linked to this is the predominantly commercial nature of the media, which means that the media generally addresses itself to the affluent sections of society.[227]

- "We face a situation that is almost unique in democratic countries. The ultra-majority political tendency in South Africa represented by the ANC does not have the slightest representation in the media," said Minister in the Presidency Essop Pahad. Such comments come despite a massive influx of black editors and reporters at many major newspapers, increasing black ownership of publications and broadcast media assets, the ruling party argues that the media serves the interest of those who benefitted from aparthied and is destructively critical. While reaffirming his attachment to press freedom, he denounced "irresponsible journalism" of certain publications.[228]
- In September 2004, the ANC threatened to sue the newspaper *This Day* for publishing a list of names connected with Travelgate.[229]

Threats to media freedom: While South Africa does not face a situation where journalists are (regularly) threatened with physical harm, there is a worrying trend emerging where those with economic and political power are resorting to the courts and other forms of harassment, said Console Tleane of the Freedom of Expression Institute.

"There are a number of defamation cases before the courts, involving papers like the *Mail & Guardian* and *Business Day*," he said. "It is the smaller papers that constantly face the threats of being closed down." The *Mail & Guardian* is being sued, among others, by wealthy oil trader Sandi Majali and the African National Congress over its Oilgate revelations.[230] (See also discussion in the section on the **Public Protector**, page 97**).**

In May 2005, a gagging order was placed on the *Mail & Guardian* by the Johannesburg High Court when it was preparing to publish further damaging information about the Oilgate scandal. The weekly went to print, but the Oilgate story was completely blacked out on page two. This was the first time since the 1980s that the paper had been restricted in what it could publish.[231] But the newspaper is not taking this lying down. In January 2006 it filed a court challenge to have the Public Prosecutor Lawrence Mushwana's findings on Oilgate – in which

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[226] It is perhaps worth noting that a similar ranking of countries according to degree of press freedom done by Reporters Sans Frontieres ranked South Africa 31 out of 167 countries surveyed, the third highest African country after Benin and Namibia. Reporters Sans Frontieres, Worldwide Press Freedom 2005, accessed 18 January 2006, www.rsf.org/article.php3?id_article=15332

[227] Mbeki T, "Media Transformation An Essential Part of Social Change," *ANC Today,* Vol 2, No 34,23 August 2002.

[228] Reporters Sans Frontieres, South Africa – 2002 Annual Report

[229] Freedom House, Inc. Freedom of the Press Country Reports 2005: South Africa www.freedomhouse.org/template.cfm?page=16&year=2005&country=6834

[230] Zvoyuya P, "SA's Press Freedom Still Threatened", *Mail & Guardian*, 4 November 2005.

[231] Wolmarans R, "Media freedom has 'suffered major blow'", *Mail & Guardian*, 27 May 2005.

he exonerated the major political players – reversed and re-investigated. The paper's editor Ferial Haffajee said,

> Mushwana tried to bury important allegations unearthed by the *Mail & Guardian*, and he smeared us in the process. A newspaper is built on little other than its credibility and reputation –Mushwana wilfully sought to damage ours. It is unusual for a newspaper to enter activist territory and legally challenge someone with whom we disagree, but we felt this is necessary to protect our own credibility and the public's right to know.[232]

In addition, some journalists who expose crime or corruption have had their safety threatened in the past year:

- In February 2005, SABC's Mpumi Phaswa was assaulted by relatives of Joseph Zitha, the suspected leader of a criminal syndicate, after attempting to take a photograph of Zitha.[233]
- In April 2005, a police officer threatened to beat journalist Frans van der Merwe of the *Limpopo Mirror* and *Zoutpansberger* newspapers.[234]
- Former Beaufort West mayor Truman Prince was charged with public violence in 2005 after an alleged assault on a team from the SABC's "Special Assignment" programme Prince was implicated in a documentary on child prostitution.

Controversy over journalists testifying: In recent years, the issue of whether journalists should be compelled to give evidence in court proceedings and reveal their sources have emerged.

- In defence of disgraced journalist Ranjeni Munusamy who was called to testify before the Hefer Commission which investigated allegations that Bulelani Ngcuka was a spy for the apartheid regime, Raymond Louw, a member of the SA National Editors' Forum (Sanef) argued that reporters should never be made to testify as this would compromise their independence, professionalism, endanger their lives and undermine democracy. Sanef also explicitly said that it supported the principle, not the individual.
- Photographer Bennie Gool refused to answer questions about his photographs on the fiery death of gangster Rashied Stagie, saying his life and those of other photographers would be in danger if they were seen to be collecting evidence for the prosecution.
- In September 2005, *The Star* suspended journalist Alameen Templeton, who gave evidence on behalf of the state in a case where an employer was accused of throwing a worker into a lions' den. Templeton did not seek permission from his editor nor inform the newspaper of his decision to testify. In a statement responding to the case, Sanef said, "People who talk to journalists need to be assured they are talking to journalists and not extensions of the law enforcement agencies."[235] The forum is campaigning for ammendments to laws which compel journalists to disclose their sources or give evidence after covering stories.

Access to Information Legally Guaranteed, But Compliance Lags: Enshrined in the constitution and the Promotion of Access to Information Act (PAIA) (Act 2 of 2000), the protection and promotion of access to information in South Africa has come a considerable distance since the days of apartheid. However, there remain obstacles and potential threats to

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[232] Brummer S, "M&G wants Oilgate report overturned", *Mail & Guardian*, 31 January 2006.
[233] Freedom House, Inc. Freedom of the Press Country Reports 2005: South Africa. www.freedomhouse.org/template.cfm?page=16&year=2005&country=6834
[234] *Ibid.*
[235] www.sanef.org.za

freedom of speech. Procedures under PAIA are tedious and time consuming.[236] There is poor awareness of and compliance with PAIA across a range of government entities, as well as private companies who are also obliged by PAIA to reveal information.

Other Laws Potentially Undermine Free Speech: Van Vuuren cites several laws that potentially limit and threaten freedom of expression:[237]

- The **Interception and Monitoring Act 2002** (not yet in force) enables the monitoring of journalists' communications by the state or employers under certain conditions. This law may eventually be tested in the Constitutional Court should it be found to be in conflict with the right to privacy as contained in the Bill of Rights (Chapter 2 of the constitution).
- The **Protection of Information Act (84 of 1982)** is a remnant of apartheid, and is regularly used by the state to prevent the media from accessing information that may be pertinent to the public, according to NGOs such as the Freedom of Expression Institute (FXI).[238] This occurs despite the act being in many ways directly contrary to the Promotion of Access to Information Act (PAIA).
- **Section 205 of the Criminal Procedure Act (51 of 1977)** empowers courts to subpoena witnesses to give evidence without allowing any form of qualified privilege to journalists. It is now the subject of a Constitutional Court challenge.[239]
- The **Protection of Constitutional Democracy against Terrorism and Related Activities Act** will restrict coverage and therefore the public's right to know, and also put unprecedented legal pressure on journalists to reveal sources. After NGOs and Cosatu objected to sections of the original bill, many controversial clauses were dropped.

[236] Van Vuuren H, Transparency International Country Study Report Final Draft South Africa 2005 , p 82.
[237] Van Vuuren H, Transparency International Country Study Report Final Draft South Africa 2005 , p 83.
[238] Van Vuuren H, Transparency International Country Study Report Final Draft South Africa 2005 , p 83.
[239] Van Vuuren H, Transparency International Country Study Report Final Draft South Africa 2005 , p 83.

Special Focus: Local Government and Service Delivery

The preceding section concentrated on corruption and oversight mechanisms mainly at the national level. However, the structures of local government deserve special attention. Local government is the main delivery agent for much socio-economic policy and is the focus of increasing public anger over service delivery problems. It is where the problems of corruption and lack of oversight are most manifest, and most acutely illustrates the challenges to sound public financial management.

This section draws on research and views from a variety of research organisations including the Human Sciences Research Council (HSRC), and the Centre for Development and Enterprise (CDE). In aiming for a balanced view, the research was careful to incorporate the views of people who are most expert in the field – local government officials, the South African Local Government Association (SALGA), the Municipal Infrastructure Unit (MIU), and the National Treasury. Sources used for reporting progress included *ANC Today*, and government communiqués, supplemented with independent critiques and analysis from a wide range of studies and reports.

There is a great deal that could be said about local government and service delivery, and in an ideal report, every local government entity would be dealt with in its own right. However, there are broad patterns that affect many municipalities, which, if addressed, could significantly improve the quality of local government service delivery.

HISTORICAL LEGACIES OF APARTHEID

Centuries of segregation and decades of apartheid in South Africa left behind a legacy of gross inequality in the delivery of public services such as housing, water, sanitation and electricity. Separate, racially-based local authorities were specially created to reflect and reinforce residential and economic separation.

Municipal authorities serving white areas could rely on their strong local tax base to provide well-developed and maintained infrastructure and efficient public services.

The resources devoted to developing other population groups were grossly inferior and inadequate. Black urbanisation was strictly regulated and townships were denied industrial, commercial and retail development. The high cost of transport from isolated townships severely restricted opportunities for low-skill residents.

During the 1980s, overloaded black local authorities could not cope with growing service demands, and were discredited by mismanagement and corruption. Township communities responded to the deteriorating quality of public services with mass boycotts of rent and service charges. These local protests were a key factor in bringing about South Africa's democratic transition.

The post-apartheid era also brought with it a newly organised local government structure, creating new challenges when nine new provinces replaced the 'Bantustans' and four former provinces.

A primary goal of the ANC when it came to power in 1994 was to redress the impacts of apartheid with regard to a more equitable distribution of public services. Central to this process was involving people in the decisions about how services should be delivered. The Reconstruction and Development Programme (RDP) focused on a people-centred, grass-roots vision of development that was based on growth through redistribution.

Local authorities, in particular, underwent a long process of restructuring in order to extend services more efficiently and equitably to historically disenfranchised communities. The Growth, Employment and Redistribution programme (GEAR) was put in place in 1996 as a macroeconomic framework directed at cutting state expenses at all levels.

However, this focus was on austerity rather than redistribution. Although the intention was to resolve apartheid boundary anomalies and to devolve responsibility for service delivery from the national to local level, there have been formidable challenges in meeting this mandate.

Government Actions so Far

The APRM should recognise the extraordinary problems left behind by apartheid, the difficulties of talking about governance structures with wide variance in their capacity levels and the efforts of government to roll out wholly new programmes and services to all citizens using what has proven to be very new or problematic local government systems. It should acknowledge also that government and society at large have been well aware of service delivery issues.

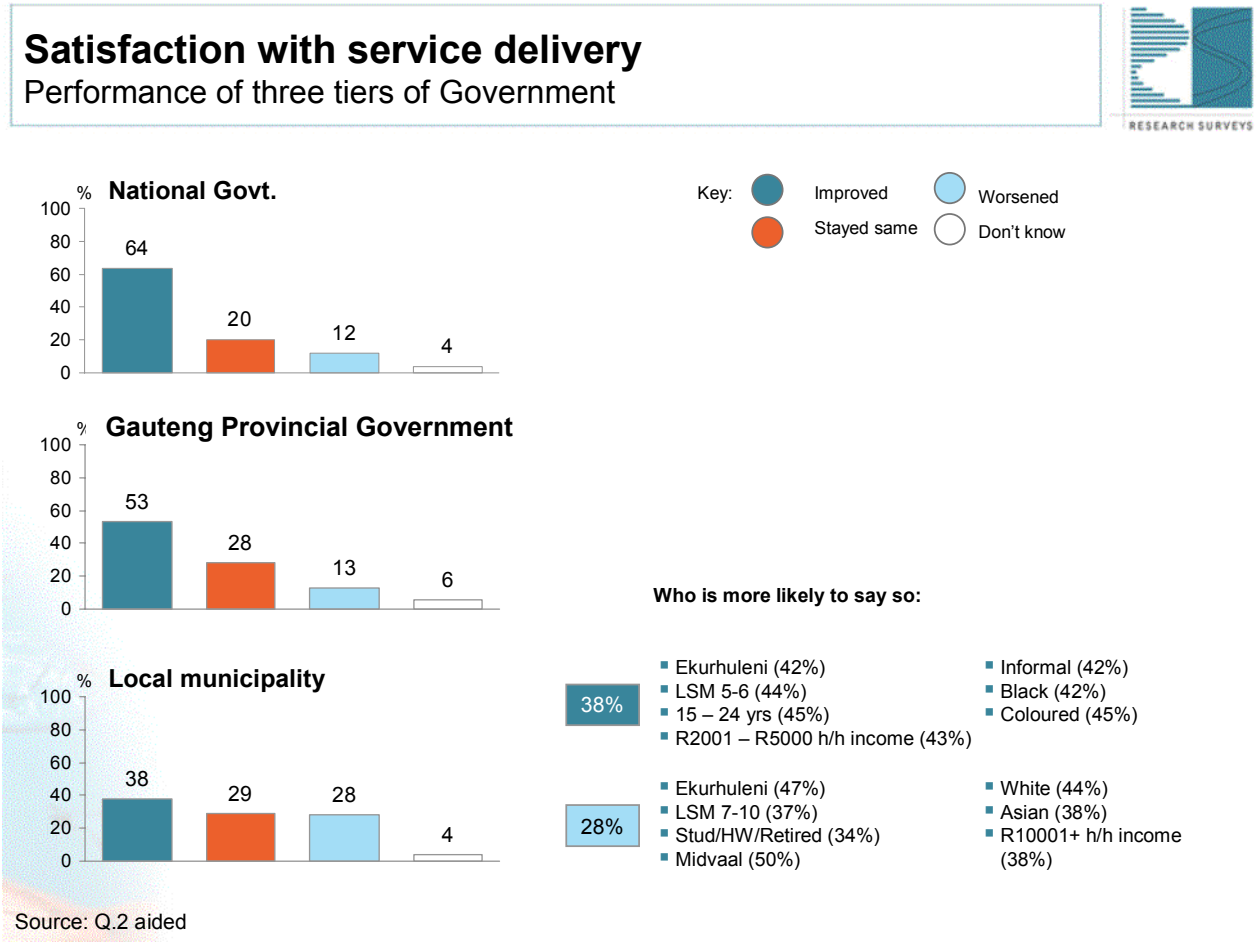
Government has undertaken a wide variety of reforms that aimed to improve local governance and service delivery including:

- forming the President's Coordinating Council;
- changing legislation to bring local and provincial government employees under the national public service rules to improve hiring, management and control;
- crafting new laws to order and regulate municipalities in standardised ways;
- improving the rules governing municipal finance, auditing and reporting;
- deploying special advisors and resources to local government through Project Consolidate;
- promulgating an Intergovernmental Relations Framework;
- establishing various coordinating bodies at local, district, provincial and national levels;
- creating various capacity building initiatives run by the Treasury and Department of Provincial and Local Government (DPLG);
- defining and funding a variety of targeted grant programmes to transfer funds to lower levels of government;
- launching of an imbizo programme to give the public more interaction with government and avenues to register complaints;
- removing cross-boundary municipalities;
- piloting the use of citizen satisfaction surveys to measure the responsiveness of government;
- creating a system of Integrated Development Planning in all municipalities; and
- requiring more frequent and detailed financial reporting.

A great deal of work has been done in very problematic areas. However, the recent rash of public riots and disturbances over service delivery emphasise that South Africa has a real problem that is arguably getting worse despite interventions from national government.

The material that follows is but a tiny fraction of what could be said on local government, but is selected with the aim of identifying gaps and institutional or structural changes that could make a positive difference.

Citizen Perceptions of Government Performance



Source: *2005 Gauteng Citizen Satisfaction Survey*

Surveys of citizen satisfaction find that people believe the national government has improved performance over the past 10 years but satisfaction with local government is markedly lower. The survey found that "slightly more than a third of Gauteng residents perceive local government to have improved, with about a third feeling it has worsened. … Interestingly, opinions are voiced firmly, as indicated by low 'don't know' figures."[240]

[240] Gauteng Department of Developmental Planning and Local Government, "Citizen Satisfaction Survey", July 2005, p 26.

Key Weaknesses in Local Political Systems[241]

South Africa's Local Government System – A Cumbersome Hybrid

The country's local government system is a result of trying to deal with the difficult legacies of apartheid, which left effective governance in some areas but weak systems in much of the country. Integration of the former homelands structures and massive rural to urban migration compounded the difficulties of crafting a coherent system that could dispense services equally to all. The system now in place faces significant problems.

National government has the vast majority of managerial capacity and has reserved for itself the most important forms of taxes. As a result, municipalities must deliver expensive services and roll out the infrastructure needed to dispense those services – electricity, water, sewage, schools and roads – but do not have the power to raise sufficient revenues. Through a complex allocation system, national government is supposed to pass on an "equitable" share of revenue to provincial and local government. Under this system, local elected governments and citizens vote for certain types of improvements but national allocations often do not provide sufficient funds. Local government is supposed to be more responsive to the people because it is closer to them.

However, in practical terms, many municipalities are grossly failing to manage funds in fair, transparent and effective ways; leading to rising citizen anger over failure to deliver services and perceived unfairness. This represents a fundamental challenge to the national political order. National government is perpetually in the awkward position of trying to rectify failing local governments without being seen as overturning local democratic choices.

As a result, national government's relationship with local government is fraught with many of the same problems that surround the foreign aid donor-recipient relationship in the rest of Africa. Left alone, local government is unlikely to be able to pull itself up by its own bootstraps. It has neither the managerial and technical staff nor the resources. Corruption has grown more severe at local level and risks seeping into higher levels of government.

Problems with poor service delivery at local level are compounded by poor administration, planning and accounting control at provincial level. Basic policies, procedures and asset registers were not in place, pointing to "a basic and serious financial management problem," Auditor-General Shauket Fakie noted in a 2003/04 report on provincial finances.[242] In the 2003/04 fiscal year, 38% of the 111 annual reports from provincial departments failed to

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[241] Sections 139(1)(a) and (b) and 155(7)l of the constitution give national and provincial government executive and legislative authority to oversee the performance of municipalities. Sections 215 and 216 and other provisions in Chapter 13 grant powers to the National Treasury to oversee and regulate the financial affairs of municipalities. Local government's wide range of powers and functions are described in Part B, Schedules 4 and 5 of the 1996 Constitution. The powers listed in Schedule 4 are the same as those that apply to provincial and national government, however national and provincial governments have the executive authority to ensure that municipalities carry out certain duties adequately in the areas of: air pollution; building regulations; child care facilities; electricity and gas; fire fighting services; local tourism; municipal airports; municipal planning; municipal health services; municipal public transport; municipal public works (with respect to those functions assigned under the Constitution or any other law); ferries; jetties, piers and harbours (excluding national and international shipping matters); stormwater management in built-up areas; trading regulations; water and sanitation services (drinkable water and domestic waste and sewage disposal services). (See 'White paper on local government', 1996, p 4. and 'Local government', www.southafrica.info/pls/procs/iac.page?p_tl=690&p_t2=1823&p_t3=2716&p_t4 Two pieces of legislation – the Municipal Structures Act of 1998 and the Municipal Systems Act 1999 (and their subsequent amendments) – establish the powers and responsibilities of various local government bodies. They are complemented by the Intergovernmental Framework Act of 2005.

[242] Loxton L, "Fakie slams provinces for lack of accountability, poor controls", *Business Report,* 30 May 2005.

receive "unqualified" status from the Auditor-General, meaning they contained substantial problems or were never filed. Four of nine provinces did not submit their annual reports in 2003/04. Fakie noted that provinces failed to link measurable objectives with set time frames, while most departments did not report on targets set in the national budget.[243]

The solution is to apply the kinds of techniques shown elsewhere to improve accountability, transparency and responsiveness to voter needs. This means making the Batho Pele principles work, demanding that departments report meaningfully on their problems, conducting regular candid surveys of citizens, and dedicating more staff and resources to capacity building.

Party-List System Blocks Accountability, Penalises Dissent

In the political negotiations leading to the advent of democracy in 1994, South Africa embraced the party list system to ensure that minorities had some political representation and to prevent the well-documented tendency of gerrymandering in systems based on defined parliamentary districts. However, the party list system ensures that individuals are not elected based on their support within a community but on their support within party structures.

Communities have little say in nominating their preferred candidates, instead political parties selects contenders in different wards. The ability to curry favour with party elders is the tool for personal advancement for politicians. Because individual success depends on protecting the party reputation, such party-list systems discourage open debate and encourage sweeping issues of non-performance and corruption under the carpet. The ability actually to deliver goods to citizens has thus come to have little impact on the personal advancement of local politicians, who instead concentrate on managing upward and using office to dispense favours to influential political allies. (See also discussion of the party list system, page 25).

The news media is vital to maintaining clean, responsive government by disseminating information on government plans and exposing problems when they occur. However, in South Africa (as well as in democracies worldwide) the media pay very little attention to particular local governments, aside from major cities. And very few citizens, have the time to attend council meetings and try to hold politicians accountable.

These factors – intra-party political incentives, lack of public scrutiny and low citizen participation – combine to make local government far less accountable and far more prone to mismanagement than other arms of government.

Because party list systems ensure tight control at the top, they have the effect of stifling the natural desire for advancement by officials at lower levels. Without clearly defined systems for advancement, party list systems are prone to factional fighting.

In the United States, local government was similarly highly prone to corrupt ethnically based patronage politics until party list systems were replaced by open political primaries in the early part of the 20th century. Under the primary system each party conducted a preliminary election to determine whose name would be on the ballot on election day. Candidates had to publicly court votes through debate and exposure of non-performance, which shifted the criteria for success from insider contacts to delivery and good policy ideas.

Such a system – recently adopted in Kenya – encourages competition between the best ideas within each party. It harnesses the ambition of officials within each party and ensures that parties themselves unearth and publicise failure to perform in office or corruption.

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[243] Loxton, Lynda "Fakie slams provinces for lack of accountability, poor controls", *Business Report,* 30 May 2005.

As a result, such a system exposes problems, counteracts the shortage of local media focus and helps find solutions to problems sooner. In South Africa councillors are elected from defined wards and should be more in touch with local desires and are required to report back to constituencies.

Autocratic Versus Responsive Governance

Recent riots around the country as well as democratic experience around Africa make clear that the attitude and comportment of government officials toward people has a dramatic effect on citizens' faith in the system and belief that their views will be listened to. Once the belief takes hold that governments do not listen to citizen complaints, people begin either withdrawing from official processes or acting to bypass them. Declining voter turnout is one signal of declining interest in democratic institutions and disaffection with politics. Riots and the burning of councillors' houses are a sign that citizens do not believe election processes deliver results in keeping with their declared wishes.[244]

PSC 2000 Survey Findings

- Citizens are seldom consulted about their needs;
- Citizens are typically unaware of the standards they should be demanding;
- Access to services remains a problem;
- Whilst courtesy standards had been set in many departments, departments were unable to measure whether these standards were being met as they had not canvassed the opinion of their clients;
- Information and dissemination campaigns were not always comprehensive, and there were gaps in communication between institutions and the communities they served;
- Citizens were not kept abreast of the performance of either provincial or national departments;
- Limited efforts had been made to establish complaint handling mechanisms, and where they exist at present they "rarely function effectively"; and
- "Very few departments undertake meaningful analysis of the performance in terms of value for money".

Although government began efforts around 1995 through the DPSA's White Paper on Transformation of the Public Service Delivery to define and create a responsive, customer-focused public service. The paper defined eight principles known as the Batho Pele principles ("People First"), which were to guide government departments in improving service and responding to public needs. This was a major departure from the past, but 10 years later there is growing public dissatisfaction. Across all levels of government, but particularly at local level, there is a perception that elected and non-elected officials are not responsive to citizen complaints, ignore civic input regarding contentious decisions on who should get new houses or roads, unwilling to help citizens solve problems and frequently seek to suppress rather than act upon valid criticism of government actions. Several surveys and much anecdotal evidence support this:

- In 2000 the Public Service Commission (PSC) undertook a citizen satisfaction survey that found that citizens did not feel consulted, that feedback functions were patchy or ineffective and complaints handling mechanisms were weak and ineffective.[245] (See findings box above.)
- The Parliamentary Portfolio Commitee on Public Services and Administration conducted a fact finding tour in July and August 2005 to Eastern Cape, KwaZulu-Natal, Limpopo and

[244] There were more 50 disturbances in the year to August 2005, according to John Kane-Berman of the Institute for Race Relations. *Business Day*, 25 August 2005.

[245] The Public Service Commission did publish a report on a 2001 survey that focused on health, education and social welfare functions. It examined specific services and functions of the departments but did not report back generalised comments in the same fashion as the 2000 survey.

North-West and reported widespread problems of poor services, failure to communicate between national departments and poor service to citizens.[246]

- Nearly half of the electorate is dissatisfied with the performance of municipal government, according to Markinor's Biannual Government Performance Survey conducted in November 2005.[247]
- In 2002 at the request of Kader Asmal, the Public Protector investigated public service levels and found "there (are) problems related to the general compliance of Batho Pele and that the Management of discipline in the Public Service is a point that needs attention." Directors' General asked by the Protector for reasons why, noted the following, among many factors: "the attitude of the public servants, not having a sense of urgency when dealing with the public; a lack of openness in the public service and the secretive attitude of some officials lead to lack of responsiveness; a lack of will and commitment on the part of some public officials to do their work on time; the exodus of trained and experienced staff in the public service in the last 10 years…; the deterioration of complaint handling mechanisms; lack of diligence and commitment to service delivery on the part of employees; service standards have not been established to provide a specific level and quality of service to customers."[248]
- Gauteng – arguably one of the country's best run provinces – conducts an annual citizen satisfaction survey, drawing similarly stark conclusions about government responsiveness. The survey report summarised citizen views of municipal government as "not held accountable, unreliable, [has] poor service, [makes] false/empty promises, authoritative, rude, takes time to do things, greedy, not representing 'me', helpful at times, satisfied with some services."[249]

  > "Overall, respondents across all surveyed areas [including urban, township, rural, affluent and poor areas] predominantly had negative perceptions of the municipality. … Amongst the majority of respondents, there was mention of minimal work being done to ensure the provision of the above-mentioned services, once again linked to the negative perception of the municipality. Hence a major gap between the rationale for a municipality and the actual delivery of services."[250]

It is important to note that the Gauteng survey found that satisfaction with services was higher in affluent areas and much more negative in urban and informal settlements.

- In the Gauteng survey, 63% agreed with the statement that there is "lots of corruption in the departments", 51% said "municipality funds are not well managed", 44% said "bad performance of civil servants is not corrected", 53% agreed that "officials involved in housing are corrupt", 49% agreed that "processes for allocating houses are unfair", 45% disagreed that the "municipality is in touch with their needs", but 43% said the "the municipality is better now than 10 years ago."[251]

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[246] Parliamentary Portfolio Committee on Public Services and Administration, "Provincial oversight visit by the Portfolio Committee on Public Service and Administration," 31 July-12 August 2005

[247] Mafela N, "SA divided on service delivery", *Sunday Times,* 5 February 2006

[248] Baqwa S, Public Protector's Report No.19, 10 June 2002, www.polity.org.za/html/govt/pubprot/report19.html

[249] Gauteng Department of Developmental Planning and Local Government, "Citizen Satisfaction Survey", July 2005, p 8.

[250] Gauteng Department of Developmental Planning and Local Government, "Citizen Satisfaction Survey", July 2005, p 8.

[251] Gauteng Department of Developmental Planning and Local Government, "Citizen Satisfaction Survey", July 2005, pp 28-37.

With regard to the Batho Pele principles, the survey found most people had heard of the concept but were unfamiliar with the specifics. However, the principles were "not perceived to be realistic, with the municipality not considered to take citizens' needs sufficiently and with commitment into consideration. Furthermore, the municipality was perceived to be a 'dictator' in reality, with citizens' needs not considered a priority."[252]

It is fair to say that the anger expressed by citizens in recent riots over service delivery would support the contention that there is a significant problem deserving much greater government attention and more frequent surveys would help put offending departments and levels of government on notice.

Evaluating the service ethic throughout government would be a valuable exercise for South Africa to do as part of its APRM analysis. Ghana and Kenya included such surveys in their research for APRM and the authors believe it would be a valuable, objective addition to the South African assessment.[253]

Batho Pele Principles

1. **Consultation**: Citizens should be consulted about the level and quality of the public services they receive and, wherever possible, should be given a choice about the services they are offered.
2. **Service Standards**: Citizens should be told what level and quality of public services they will receive so that they are aware of what to expect.
3. **Access**: All citizens should have equal access to the services to which they are entitled.
4. **Courtesy**: Citizens should be treated with courtesy and consideration.
5. **Information**: Citizens should be given full, accurate information about the public services they are entitled to receive.
6. **Openness and transparency**: Citizens should be told how national and provincial departments are run, how much they cost, and who is in charge.
7. **Redress**: If the promised standard of service is not delivered, citizens should be offered an apology, a full explanation and a speedy and effective remedy; and when complaints are made, citizens should receive a sympathetic positive response.
8. **Value for money**: Public services should be provided economically and efficiently in order to give citizens the best possible value for money.

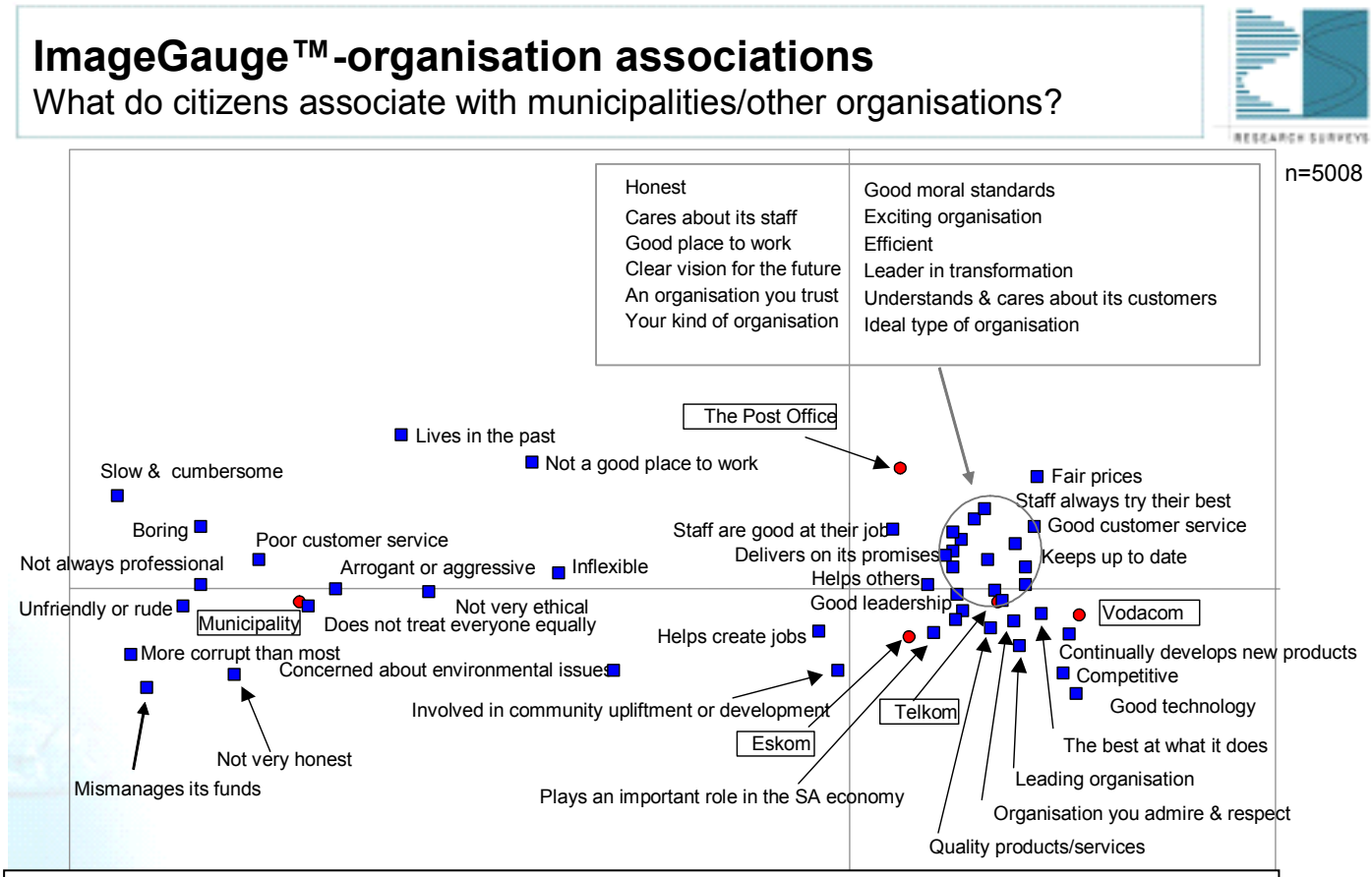
The idea of assessing the tone and attitude of government toward citizens was embraced in the White Paper on Transforming Public Service Delivery (No. 1459 of 1997), which advocated measuring government service based on its responsiveness to citizens using a set of service principles known as the Batho Pele principles (see page 114).

The PSC supported this view, arguing that such surveys should be commended as a governance management of best practice that ought to be conducted frequently across all government departments.

Presently, departments are required to produce annual reports, but they do not focus on attitudes and customer service. They are public relations vehicles designed to put the best possible spin on government activities but in so doing fail to provide information to parliament or citizens that would allow meaningful analysis of problems and needed corrective actions. It is vital that all levels of government examine the attitude and responsiveness of elected and non-elected government officials, quite apart from their statutory powers or management performance.

Such a problem cannot be solved by central edict, but should be addressed by remedies that promote a culture of responsive governance in which citizens know their rights to information and redress of problems. Those rights are enshrined through systems of transparency, reporting back to constituencies and regularised efforts of government to allow citizens to rate

[252] Gauteng Department of Developmental Planning and Local Government, "Citizen Satisfaction Survey", July 2005, p 13.
[253] Afrobarometer, "Citizens Experiences with South Africa's Public Service", *Afrobarometer Briefing*, 10 March 2005.



The Gauteng Citizen Satisfaction Survey asked citizens to rate various aspects affecting the reputation of government and other institutions, including the Post Office, Telkom and Vodacom. While municipalities are linked closely in citizen's minds to unfriendly, rude, slow, cumbersome and mismanagement, Vodacom and the Post Office are much more associated with fair prices, staff doing their best, competitive, best at what it does. Source: 2005 Gauteng Citizen Satisfaction Survey, p 22.

the effectiveness and responsiveness of different public bodies. As the PSC citizen satisfaction survey recommended,

> "Such measurement is vital in creating a quality service culture and nurturing an environment for:

- Conducting open, honest, transparent and ongoing consultations with citizens;
- Involving employees (as citizens and providers) in the entire process; and
- Re-measuring satisfaction levels regularly to determine trends and the effectiveness of the improvements that have been implemented."[254]

Such ratings should factor into the management and rewards of the civil service staff. When citizens believe their complaints are dealt with fairly and promptly, they are more likely to direct their attention to working with and improving government rather than attacking it in protest. Several related issues affect public satisfaction with service delivery:

Expectations and the Real Powers of Councillors: A variety of officials and activists interviewed for this submission noted that local councillors are often seen by the public as their envoy not merely to a given council with limited means and powers, but as their agent of all of government. Because of the limited funding available to a given council and its high degree of dependence on grants from national and provincial governments, councillors may be able to vote for local projects that fail to materialise because of funding decisions taken at

[254] Public Service Commission, Citizen Satisfaction Survey: Overview Report, 2003.

higher levels of government. As a result councillors are often blamed for the broader failures of government to allocate resources where individual citizens would like. In addition certain key citizen demands, such as housing, are not administered by local councils in all cases but rely on provincial and national actions. Nevertheless when housing goes up in a contentious place or new units are allocated to squatters instead of long-standing backyard shack dwellers, tempers flare and the blame is often directed at the councillor for the area.

Ward Committees: Ward committees provide a structured channel of communication between geographic communities and their political representatives at the ward and metropolitan level.[255] These committees represent an opportunity for communities' interests to be represented, and, ideally, should be used to ensure wide representation from civic, development, business, trade union, taxi, women, youth, religious, cultural and other groups. However, participation rates vary widely. The Gauteng citizen survey found that only 30% of people had participated in a ward council. At the same time, ward committees are increasingly becoming a political arena for sectarian turf battles - even within the same political organisation – and this is taking energy away from work needed to reflect community priorities.[256] Ward councils, led by the ward councillor, are expected to develop rules to govern membership and proceedings. In terms of the resources needed to carry out their duties, each councillor has access to a centralised constituency office (each political party will have their own), and to technical and administrative staff. A practical problem exists, however, in reaching all of one's constituents. Some wards in rural areas cover enormous distances, making regular contact with constituents difficult.

Councillors Don't Report Back to Communities: Communities affected by service delivery riots and protests have particularly complained that elected councillors do not brief citizens on government affairs, live outside their designated wards and do not fulfil the mandate to meet regularly with citizens. The Gauteng Department of Local Government notes that "communities' trust in ward councillors is at its lowest in most areas and this is evident in the results of the Citizen Satisfaction Survey."[257] The 2005 Gauteng Citizen Satisfaction Survey reported that citizens "were largely unaware of the processes" of councils … Perceptions of nepotism and favouritism were discussed as a 'given' fact of life." As one survey respondent said: "Ward councillors are elected as somebody's nephew."[258] Ward committees should be chaired and convened by the councillor elected to the ward area, and are expected to meet with their ward committee once a month or not less than four times a year.[259]

People are dissatisfied because they are not involved in the process of nominating candidates for local elections and candidates chosen by party structures often do not report back to communities about the status of government plans and decisions.

The ANC has pledged to improve ward councillors' interaction with communities through ward committees. ANC councillors will now be made to sign a pledge committing themselves to live in the community that elected them, to listen to the views of the community and to hold public meetings to report back at least four times a year. However, if this is a systemic deficiency, it should become a requirement of law with attendant reporting systems and penalties, not merely an internal party affair. Like any requirement on public officials, the

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[255] 'White paper on local government', 1996, p 56.
[256] Atkinson, D, *A passion to govern: third generation issues facing local government toda*y, Centre for Development and Enterprise, June 2002, p 9.
[257] Gauteng Department of Local Government, 2004/05 Annual Report, p 8.
[258] Gauteng Department of Developmental Planning and Local Government, "Citizen Satisfaction Survey", July 2005, p 14
[259] ANC local government election manifesto 2006

demand to hold meetings and report to constituents would require a system for reporting the attendance of councillors and for following up on citizen complaints.

District Councils Geographically Too Large: The country previously had over 800 municipalities, which were amalgamated into the present 284. District councils were created to provide a form of local governance to rural areas, oversee smaller local councils and help deliver on the valuable national goal of offering quality services to all citizens. However, the new councils are in many cases far too large and unwieldy to be managed effectively.

According to Dr Doreen Atkinson, an HSRC researcher on local government

> Some of the new amalgamated district municipalities are inordinately large in geographic terms – for example, Xhariep is the size of Hungary, Northern Free State has the same diameter as Belgium, and Namakwa is as long as Kansas. Some local municipalities are also vast: in the Northern Cape, some municipalities are built around three or four towns and have diameters of up to 150km."[260]

Amalgamation Created Administrative, Patronage and Political Problems Haring Service: Many towns had been independent and well managed but through the amalgamation process were folded into larger political entities that included multiple towns. The process created massive administrative, management and political problems that continue to play out and harm service delivery. Staff with very different task descriptions had to be integrated into a common organogram. Forming one entity out of several formerly separate towns – each with its own allegiances and political loyalties – created major uncertainty among staff, jockeying for position and stimulated a new level of patronage politics. New municipalities also had to integrate different billing revenue systems working with different municipal rates using different credit control policies. Often this was done using poor systems of data management.

For example, Ekurhuleni metro in Gauteng's East Rand, combined Germiston, Boksburg, Benoni, Brakpan and several other former independent towns. None had been poor performers but amalgamation set in motion a massive struggle for political control and jobs. This led to a destructive pattern of patronage, favouritism and created major problems of merging incompatible accounting, payroll, and human resource systems.

New regulations in 2002 did not resolve the problem, leaving in their wake extremely complex service delivery structures, inconsistent responsibilities and budgetary arrangements across the country. The task of integrating administrative, financial and information systems proved to be time-consuming, complex and difficult.

Compounding this problem, the powers allocated to district councils are granted on an *ad hoc* basis by provinces, and are thus inconsistent and overlap with town councils within their boundaries. In terms of democratic practice, they are also too extensive for poor rural voters without transport to have meaningful interaction with councillors.

Unclear Lines of Authority Between District and Local Councils: The *Local Government Transition Act* did not provide for a clear description of the powers of District Councils.[261] In October 2000, the Municipal Structures Act was amended ostensibly to divide duties for water, health, sanitation and electricity between local and district councils. The districts were to be akin to service wholesalers; and local councils more to retail service providers. However, the practical division of duties spawned widespread criticism as unwieldy and creating unneeded layers of administration. The Municipal Advisory Committee

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[260] Centre for Development and Enterprise, "Local Government in South Africa: Priorities for Action (Roundtable Discussion with the Minister of Provincial and Local Government), *CDE Roundtable 7*, 2003, p 27.
[261] 'White paper on local government', 1996, p 13.

recommended that DPLG not transfer service delivery functions to districts because it would compound difficult problems of accountability and create a fourth layer of government.

Councils Burdened With Duties but Not Capacity: For poorer, rural councils the awkward split of responsibility with district councils results in unfunded mandates. Dr Doreen Atkinson, who studied the problems in rural councils for the HSRC, noted that:

> 'Devolution by stealth' is a major problem in these smaller, more rural municipalities. This process describes departments making increasing demands on municipalities without realising the full implications of what they are asking. The evidence also shows that huge 'unfunded mandates' are coming through the system, from environmental affairs to transport to water to finance. National government has changed the way in which municipalities can use their 'equitable share' [funding from National Treasury] which is in effect a 'creeping assignment' of responsibilities, with damaging unintended consequences. Municipalities now have to use their 'equitable share' to subsidise the municipal accounts of indigent people.[262]

(See also **National Government Supplies Insufficient Funding**, page 123.)

Weak, Late, Uninformative Written Reports: Although local, district and provincial governments all are required to report back on financial and service delivery matters, a variety of official sources indicated that required reports are filed late, without proper information or not at all. Of the 284 municipalities in the country, only 148 (52%) filed their financial reports with the AGSA by the deadline for the fiscal year ended 30 June 2005. By 30 September, 36% had still not filed.[263] This is an improvement from the fiscal year ended 30 June 2002, when 78% of municipalities did not submit reports to the AGSA by the deadline.

The Media and Council Meetings: Information about council decisions is not regularly and sufficiently disseminated to people. As people are not adequately informed, they cannot contribute in making decisions. Systems for municipal communication is also weak and this contributes to the problem of citizens being uninformed about the progress of local government.

Poor Public Communication: Citizen satisfaction surveys confirm that local, provincial and national government have exacerbated public anger and compounded service delivery problems with poor communication and poorly conceived, hasty political promises. While the government's decision to offer a portion of water for free to citizens can be defended as a policy choice, it was announced in haste and in a simplistic manner for political gain. Instead of explaining properly, the concept was described as "free water", which compounded an already severe problem of non-payment for services. This exacerbated the financial problems of municipalities as it did not give adequate thought about how the idea should be conveyed and how the financial implications would be dealt with. With some exceptions, government has reacted to the media as a threat to be blocked rather than an ally that is needed both to convey information to the public and a much needed means in keeping political systems honest.

Websites, which could serve a much more valuable role in informing the public, do not carry current or in-depth information. Participants in the 2005 Gauteng Citizen Satisfaction Survey said they were aware of communication channels but "the consensus was that not enough was being done to inform or interact with the community."[264] Survey participants made a number of suggestions, including: putting up small offices or mobile municipal units in shopping

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[262] Centre for Development and Enterprise, "Local Government in South Africa: Priorities for Action (Roundtable Discussion with the minister of Provincial and Local Government), *CDE Roundtable 7*, 2003, p 28.
[263] Fakie, S, "Report of the Auditor-General on the Submission of Financial Statements by Municipalities for the Financial Year Ended 30 June 2005", www.agsa.co.za/reports/localgov.
[264] Gauteng Department of Developmental Planning and Local Government, "Citizen Satisfaction Survey", July 2005, p 14.

centres to allow for complaints and enquiries, flyers, newsletters, radio commercials which "reach where television cannot reach", and personal visits, particularly for the elderly and people in areas far from council offices.

Weaknesses in Financial Management and Planning

Problems with National Government Delivery Targets

Despite significant delivery of housing, electricity, water and other services, national government does not present a clear picture of service delivery backlogs. In 2003, the DPLG said it would take R38.4 billion a year to address infrastructure delivery backlogs,[265] but in 2005 government said it planned to spend R400 billion on infrastructure over the next five years. The additional funding is good and it is commendable if government reappraises its goals and financial means. However, shifting goals contributes to unrealistic expectations and public dissatisfaction. This undermines faith in the system and seems to be promoting a culture of protest rather than one of participation as the road to obtaining needed service from government.

In addition targets have been set in ways that lead to confusion by the public. In the HSRC's *State of the Nation 2005-2006* report David Hemson notes that original targets set under the Reconstruction and Development Programme failed to account for a massive movement of people from rural to urban areas and a simultaneous dramatic increase in the number of households (people are setting up households with fewer people). This means that South Africa is further behind service delivery demands despite building many new houses, installing water points, etc.

"Between 1994 and 2002 an additional 1.3 million households obtained improved toilet facilities. However, this was insufficient to change coverage at the basic level, which has declined from 67% to 62%."[266]

Weak Provincial Accounting and Control

Problems with poor service delivery at local level are compounded by poor administration, planning and accounting control at provincial level. Basic policies, procedures and asset registers were not in place, pointing to "a basic and serious financial management problem," Auditor-General Fakie noted in a 2003/04 report on provincial finances.[267] In the 2003/04 fiscal year, 38% of the 111 annual reports from provincial departments failed to receive "unqualified" status from the Auditor-General, meaning they contained substantial problems. Four of nine provinces did not submit their annual reports in 2003/04. Fakie noted that provinces failed to link measurable objectives with set time frames to their expenditure, while most departments did not report on targets set in the national budget.[268]

Weaknesses in Department of Provincial and Local Government

Together with Treasury, the Department of Provincial and Local Government (DPLG) plays a crucial oversight role in trying to rectify poorly performing or collapsing local authorities and assisting them with capacity building programmes. However, there are significant problems in the way the DPLG relates to provinces and municipalities.

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[265] Centre for Development and Enterprise, "Local Government in South Africa: Priorities for Action (Roundtable Discussion with the minister of Provincial and Local Government), *CDE Roundtable 7*, 2003, pp 6-7.
[266] Hemson D, State of the Nation 2005-2006, Human Sciences Research Council
[267] Loxton L, "Fakie slams provinces for lack of accountability, poor controls", *Business Report,* 30 May 2005.
[268] Loxton L, "Fakie slams provinces for lack of accountability, poor controls", *Business Report,* 30 May 2005.

- **Lack of Control/Monitoring of Grants:** While a wide variety of reports document the extensive failure of municipalities to manage funds properly, control corruption and account for funds, the DPLG does not exert adequate control or follow-up on use of the grants it makes to lower levels of government. The Auditor-General noted in his 2002/03 analysis of the DPLG:

  > **"Material contravention of the requirements of the Division of Revenue Act:** The department effected transfer payments of R 2,4 billion to various provincial departments and local authorities. This constitutes 35.8% of the department's expenditure. Due to the ineffective monitoring and review over compliance with the requirements of the Division of Revenue Act and gazetted conditions, I could not even through alternative procedures satisfy myself that the transfer payments were utilised as stipulated."[269]

  At the time of writing, the DPLG had not posted its 2004/05 annual report on its website, which contains the most recent analysis.

- **DPLG Failed to File Reports:** Even though it has an oversight role and is supposed to push municipalities and provincial governments to abide by national rules, DPLG itself failed to meet its reporting requirements in 2002/03. As the Auditor-General wrote: "No reliance could be placed on the work of internal audit as no audit reports were finalised and presented to the Audit Committee during the year under review."[270]

- **DPLG Does Not Properly Control Assets:** Although the DPLG said in its annual report that "there was an improvement in the manner in which the DPLG manages and controls its assets,"[271] the Auditor-General noted in his 2002/03 analysis that problems remain: "During the audit of assets, the following shortcomings in the control of assets and inventory were identified and brought to the attention of the accounting officer: The Asset Management Policy had not been approved. No unique identification number was allocated to control assets and their physical locations … [There is] inadequate control over equipment moving to/from the IT section."[272] This problem is a generalised one throughout government. The Auditor-General examined provincial and national budgets in 2003/04 and found that "asset management is a perennial issue that is not being effectively addressed."[273]

- **Accounting and Control Weaknesses**: The Auditor-General noted in his 2002/03 report that in DPLG:

  > "a number of high-risk control weaknesses existed, i.e. no formally approved security policy, no disaster recovery plan, no change control procedures, no backup and restore procedures and no user account management procedures. Furthermore, formally approved service level agreements also did not exist between the department and all the third parties with whom it had arrangements for the delivery of IT services."[274]

- **Poor Quality Information in DPLG Annual Report:** The DPLG produces an annual report similar to other government departments, which follow a style similar to that used in corporate annual reports. However, the information offers only very cursory description of major programmes, including only the intentions of the programmes and no meaningful analysis of the issues, dynamics or problems in provincial or local government or the department itself. As a result, the report is a public relations document rather than a

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[269] Department of Provincial and Local Government, 2002/03 Annual Report, p 58.
[270] Department of Provincial and Local Government, 2002/03 Annual Report, p 58.
[271] Department of Provincial and Local Government, 2002/03 Annual Report, p 19.
[272] Department of Provincial and Local Government, 2002/03 Annual Report, p 58.
[273] Loxton L, "Fakie slams provinces for lack of accountability, poor controls," *Business Report*, 30 May 2005.
[274] Department of Provincial and Local Government, 2002/03 Annual Report, p 58.

meaningful report to aid citizens or parliament in determining what ought to change or be subjected to greater scrutiny. There is no overview offered of systemic problems in provincial or local governments and no discussion of the extent of service delivery backlogs or how the department would address them. As it is now constituted, the DPLG annual report provides almost no useful information to the public that would enable an assessment of how it conducts its affairs or whether its efforts were successful. There is no meaningful discussion, only a table that offers short sentence fragments to outline its projects. Under "consultation arrangements with customers," the DPLG lists "improved communication channels and relations "as an accomplishment without elaboration:[275]

The department, like all departments, ought to be required each year to produce a clear, common-sense report of gaps and governance problems and present this in open hearings in parliament. The President's Coordinating Council, which meets to discuss key problems in intergovernmental relations, noted that year-end performance evaluations ought to be included in the reports of each department with problems and corrective measures to be undertaken. If this logic applies to lower levels of government, it ought to be applied equally to the more strategic national departments.[276]

Common Problems Within Municipalities

Poor Quality or Non-Existent Computerised Financial Systems: A wide variety of reports and officials noted that financial systems used by local authorities for billing of services, debt collection, tracking of assets and other aspects of accounting are incompatible with district, provincial and national systems. As a result, there are no reliable figures on the level of debt of municipalities. This calls into question the validity of figures used in medium-term financial frameworks for localities and the ability to assess progress and backlogs in infrastructure delivery.

- The Gauteng Department of Local Government noted in its 2004/05 annual report that "Municipalities are losing millions in revenue because of corrupted data that needs to be cleansed."[277]

Failure of Local Officials to Follow Financial Control Laws: Municipalities do not comply with requirements to file financial and performance reports as required by the Municipal Finance Management Act. Fakie noted recently: "The main area of concern is that where on average municipalities are taking four to six months to submit their financial statements, the act requires that the reports be submitted within two months."[278]

- Municipalities that are sole owners of so-called municipal entities (power companies, etc) that are required to produce their own statements, must consolidate those municipal entity reports into a consolidated report. In fiscal year 2005, 80% of the 15 municipalities concerned failed to file reports within three months of the close of the fiscal year.
- Of 68 municipal entities (state owned enterprises or things like local zoos or power agencies), only 30% met the submission deadline.
- Local governments are required to submit financial reports to the Auditor-General within two months of the close of the fiscal year and the Auditor-General is to complete audits of them within three months. However, of the 284 local municipalities only 95 (33%) were

[275] Department of Provincial and Local Government, 2002/03 Annual Report, p 205, table 1.2.
[276] Ministry of Provincial and Local Government, press statement of the President's Coordinating Council, 8 April 2005.
[277] Gauteng Department of Local Government, 2004/05 Annual Report, p 8.
[278] Ensor L, "Poor Debt Collection 'Cripples Municipalities'", *Business Day,* 18 November 2005

able to receive completed audits by 30 April 2005, 10 months after the end of the financial year. Forty municipalities, (14%) had not yet submitted financial statements for auditing by that date, whilst 145 (51%) were submitted after the deadline of 30 September 2004.[279]

- In the Eastern Cape, Local Government MEC Sam Kwelita told the provincial parliament that only two municipalities out of more than 40 had received unqualified audit reports from the Auditor-General, and a significant number had not bothered in eight years to report their finances for an audit.[280]

Lack of Sanctions for Violations of the Municipal Finance Management Act: The Act is a solid, detailed law requiring regular and timely financial and performance reporting by municipalities. However, there are no significant tools to be used or penalties to be invoked against municipalities that do not comply. Mayors of municipalities that fail to file on time are required to lodge a letter explaining and stating when reports would be filed, but no sanctions can be invoked for failure.

No Effective Salary Controls: There are no effective controls or standards on municipal salaries, which has allowed wide variation in salary levels and bonus schemes, and nepotism and political favouritism to allocate exorbitant or unjustified salaries for top officials while underpaying key technical staff.

- 67% of the 138 municipalities put under the DPLG's Project Consolidate rescue plan awarded performance bonuses to municipal managers in the past year.[281]
- News reports highlight many instances of municipal managers earning more than the president or collecting large salaries and bonuses despite gross failures to deliver services or collect revenues.

No Meaningful Personal or Political Sanctions Imposed for Non-Performance: Although the Municipal Finance Management Act and other legislation declares that municipalities and provinces have various reporting and management obligations, there are no practical sanctions that can be imposed by national government for non-compliance. For example, the formula for allocating funds for Municipal Infrastructure Grants has five components, one of which is a bonus or penalty based on past performance. But only the Northern Cape saw a decrease in its allocation of Municipal Infrastructure Grant funds between 2005 and 2006 in the Medium Term Expenditure Framework. If certain provinces perform poorly, that record should be widely publicised so that voters may apply pressure for performance. Officials who fail to comply with rules should be publicly named by the Auditor-General and become ineligible for office.

National Government Supplies Insufficient Funding to Municipalities: Section 227 (intergovernmental transfers of money) entitles local government to an "equitable share" of nationally raised revenue in order to carry out its functions – usually 40% from the national government and the rest made up at the local municipal level. Revenue from trading services accounts for over 60% of locally-raised government revenue, with electrical services and property taxes making up the largest sources of revenue.

Non-Payment of Services: Poor service delivery by government is increasingly being used by citizens to rationalise not paying for public services. Given the heavy reliance of local governments' on revenue from reselling electricity and water, non-payment is a massive threat to the financial viability of local government and thus to future infrastructure and

[279] Auditor-General's Annual Report 2004-2005, p 23.
[280] Hartley W, *Business Day,* 14 September 2005.
[281] Mafela N, "Fat Bonuses for Officials at Ailing Municipalities", *Sunday Times*, 8 January 2006.

service delivery. The 2005 decision to rationalise the power sector is expected to deny municipalities a major source of revenue. To solve the problem, government must use a two-fold strategy of working with individual municipalities to improve services and aggressively following that with improved revenue collection efforts.

Shortage of Key Technical and Managerial Skills

Local and provincial governments are facing a profound capacity problem, with many unable to file adequate reports, manage projects or comply with national laws on managing funds, tendering and planning. Evidence of the severity of the problem comes from numerous sources:

- As President Thabo Mbeki noted in launching the Project Consolidate effort to assist municipalities:

  > Before the launch of the project, an audit was done on municipalities, focussing at their capacity on service delivery and implementation of policies. This audit found that 136 of the 284 municipalities have little or no capacity to service their areas and therefore need urgent support to improve their delivery mechanisms.[282]

- "Deputy President Phumzile Mlambo-Ngcuka said Monday that a shortage of engineering, management, finance, information technology and other key skills was hurting government efforts to boost infrastructure and investment. The lack of skilled manpower is so crippling that Mlambo-Ngcuka said at a news briefing that the government was considering drafting retirees back into the work force, luring South Africans emigrants home and drawing in new immigrants."[283]

- The Auditor-General noted that provincial and local government departments had a senior management vacancy rate of 61%, which was compounded by a significant 20% vacancy rate in key national departments that support local service delivery – including the departments of public service and administration, provincial and local government, national treasury, public enterprises, public works and science and technology (in the 2002/03 and 2003/04 financial years.) "This, together with the expected increase in economic activities and service delivery in our country, creates serious concerns about the long-term ability of these government departments to deliver on their mandates," Fakie said.[284]

- Henk Langenhoven, executive director of the South African Federation of Civil Engineering Contractors, noted:

  > There are so many worthy infrastructure project ideas on the drawing board, but they are not being translated into reality … A recent skills audit has revealed technical vacancies as high as 74% at local authorities. The decision-making expertise is not there and budget allocations are just not being channelled through to projects.[285]

- The Auditor-General found recently that only 8% of government workers qualified as "highly skilled" while 90% were considered either low- or semiskilled. In Gauteng's housing department alone, there is a 30% shortfall of skilled senior staff.[286]

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[282] Address by President Thabo Mbeki to the National Council Of Provinces, KwaZulu-Natal, 5 November 2004, http://www.anc.org.za/ancdocs/history/mbeki/2004/tm1105.html
[283] Nullis C, "South Africa confronts a lack of skilled labor", Associated Press, 6 February 2006
[284] Ensor L, "Lack of managers hobbles delivery, Fakie tells MPs", *Business Day,* 21 January 2005.
[285] Healing J, "Plenty of money, but no one to spend it", *Sunday Times*, 27 February 2005.
[286] Benjamin C, "Skills shortage dogs local services", *Business Day,* 17 August 2005.

- The Treasury's provincial financing figures reveal that after three-quarters of the 2004/2005 financial year, the provinces had spent only 46.4% of their combined R12 billion capital budgets, which meant that many infrastructure projects were simply not going ahead. The backlog could be as high as R170 billion.[287]

Hiring Based on Political/Family Loyalties Rather than Merit: Closely related to the problem of lack of control on salaries (discussed above under **Financial Weaknesses of Local Government**) is a lack of disciplined procedures to ensure that civil service jobs are filled on merit with qualified people. Government's contention that local authorities lack capacity effectively concedes that municipalities are staffed with people ill-equipped to perform the tasks demanded of them, on top of significant numbers of unfilled positions.

- "Amalgamation brought the rise of patronage politics. In some provinces, political parties vetted candidates for the posts of municipal managers in all the municipalities. 'Patronage politics has led to the appointment of political parties' "favourite sons", often with very poor qualifications or experience," according to a study of local service delivery problems for the Human Sciences Research Council.[288]
- Mamphela Remphele, managing director at the World Bank and a former UCT vice chancellor observed:

  > The appalling skills gaps in the civil service and the unsustainable vacancy rates reflect not only lack of skills, but the corroding effect of politicisation of appointments at many levels of our civil service. There are too many skilled professionals being denied job opportunities at the various levels of government because they are outside of the party political networks that have captured civil service jobs for patronage. Comparative analyses worldwide point to the importance of limiting political appointments based on loyalty to the top layer. Strict professional competency criteria need to be applied for the rest of the system to ensure efficiency and effectiveness. We need to strengthen professional recruitment, promotion, training and retention of public officials at all levels. Mediocrity has to be rooted out and meritocracy promoted.[289]

- President Thabo Mbeki noted:

  > Some of the people who are competing to win nomination as our candidate local government councillors are obviously seeking support on the basis that once elected to positions of power, they will have access to material resources and the possibility to dispense patronage. These goings on tell the naked truth that the ranks of our movement are being corrupted by a self-seeking spirit that leads some of us to view membership of our organisation [the ANC] as a stepping stone to access to state power, which they would then use corruptly to plunder the people's resources for their own personal benefit.[290]

Ineffective Salary Scales, Recruiting, Skill/Merit Evaluation: The desire of politicians to build a support base through patronage and control of resources is a well-documented difficulty of political systems the world over. All elected leaders should have the right to choose key staff to help set the course of policy, but if the entire body of the civil service comes to be selected based on political loyalties rather than merit, the ability of governments to carry forward programmes declines precipitously. This is a key lesson from the study of young democracies across Africa. Municipalities are willing to pay top salaries for municipal managers and mayors, but they are unwilling to pay competitive salaries for technical staff, engineers and financial managers needed to ensure projects are implemented timeously. To allow top politicians the latitude to make new policy without sparking job safety fears among civil servants, mature democracies the world over have built systems to distinguish between policy-setting political appointees and ordinary technocratic civil servants. This distinction is

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[287] Healing J, "Plenty of money, but no one to spend it," *Sunday Times*, 27 February 2005.
[288] Lucas P, "Small municipalities caught between unrealistic expectations and critical shortages", *HSRC Review,* June 2003.
[289] Ramphele M, "Our young democracy", Steve Biko Memorial Lecture, *Business Day,* 14 September 2005.
[290] Mbeki T, *ANC Today,* 14-20 October 2005.

enforced with strong civil service examinations and systems for properly defining the needed skills of a job and applicants for it. At local level, such systems for merit based selections are widely disregarded or openly ignored. Municipal managers have been selected on loyalty to local politicians rather than a genuine transparent contest of skills and qualifications.

Pressure to Transform Local Government, Forced Out Qualified Staff: Post-1994 government sought to accelerate racial transformation of local government and offered attractive voluntary severance packages to civil servants. As a result, many skilled technicians, accountants, engineers and managers left government. The broader economy faces severe shortages in such skills and universities are producing vastly fewer graduates than demanded by the public and private sectors. Many of them re-entered local government services as contractors working at significantly higher cost to government. Affirmative action was used as a guise to expand patronage politics, which directly undermines merit-based hiring.[291]

The exodus of skilled staff from government service was large. Azar Jammine, Chief Economist at Econometrix, estimates that as many as 20,000 people left the public service for better paying jobs during the past decade. "Delivery paralysis" at the local level he says,

> was due to a lack of skilled people able to take decisions in the public services. Apartheid robbed blacks of a good education, but when the new government came to power it put them in place of people who had a lot of experience. The new people were out of their depth, because there was insufficient skills transfer.[292]

Scale of National Capacity Building is Too Small: Given the size of the problem and the large amount of available infrastructure funds that cannot be spent for want of effective staff, the National Treasury's efforts to boost local capacity are too small and unlikely to bring about meaningful change soon. According to the 2005 Medium Term Expenditure Framework (MTEF), there are only 30 advisors working in selected municipalities in support of the Municipal Finance Management Act. In addition, Planning and Implementation Management Centres have been established in 47 districts to assist with planning and management. Municipalities have used Financial Management Grants to employ 250 interns, and such grants funded training for 600 municipal officials. The allocations for these capacity building steps are not small (R596 million over the 2005 MTEF). But the total numbers affected – even if the programmes worked brilliantly – would seem inadequate to the problem.

- Although the need for capacity building is pronounced, National Treasury held spending flat for capacity building grants in the 2005 MTEF, noting only that they are under review. "Over the past four years – since 2002 – more than R2.4 billion has been committed for capacity building and restructuring activities but without measurable impact on capacity. These grants will be reviewed in 2005/06 and in the interim, have been capped."[293]
- According to Project Consolidate, 136 municipalities are in dire financial shape and need direct assistance. But the Local Government Financial Management Grant to most municipalities was either R250,000 or R500,000 with a few larger cities receiving more (Johannesburg and Tswhane each received R3 million in 2005/06 but this falls to R500,000 in 2006/07. This is sufficient only to hire one or two skilled managers or conduct short-term training.

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[291] Atkinson, D, *A passion to govern: third generation issues facing local government toda*y, Centre for Development and Enterprise, June 2002, p 12.
[292] Staff Reporter, 'South Africa: Rising Pressure on Government to deliver quicker', *IRIN NEWS,* 27 May 2005.
[293] Department of Treasury, 2005/06 Medium Term Expenditure Framework, Chapter 7.

- Municipalities that have civil engineering staff report a 35% vacancy rate, and metropolitan councils report a 45% vacancy rate. "Continued vacancies in local government will mean that existing infrastructure will be rendered worthless. Protests relating to lack of service delivery, as have been witnessed in 2005, could become commonplace," noted a recent assessment of problems with infrastructure delivery by the civil engineering profession.[294]

More Fundamental Solutions Required: Sending in management teams to problematic municipalities is an appropriate step, given the capacity limitations at national and provincial levels. However, a durable solution requires a fundamentally larger output of finance, accounting and project management graduates from South African universities, loosening work permit rules to allow importation of needed professionals from Africa or further abroad and replacing patronage-based recruitment with professional merit based hiring. Although some municipalities pay very high salaries for a few top officials, securing such jobs is seen as dependent on political connections rather than merit. And comparatively low salaries are offered to skilled engineers, planners, accountants and other needed technocrats. As a result, the high salaries offered to the few do not have the desired effect of drawing skilled professionals into the public service.

[294] Cokayne R, "SA faces engineering crisis," *Business Report,* 24 October 2005.

SECTION 3: CORPORATE GOVERNANCE

About this Section

Corporate governance examines how businesses operate within a country and the regulation of the national commercial environment.

In 1992, the Institute of Directors formed the King Committee on Corporate Governance. This private-sector-led initiative developed and released the first King Report on Corporate Governance (King I) in 1994, which contained a groundbreaking voluntary code of best practice for companies. The King report was emulated internationally.

The APRM identifies seven distinguishing characteristics of corporate governance, taken directly from the *King Report on Corporate Governance For South Africa 2002* (referred to hereafter as "King II"): discipline, transparency, independence, accountability, responsibility, fairness and social responsibility.[295] This section will follow the five broad corporate governance objectives outlined in the APRM Country self-assessment questionnaire (see box to the right). The cross-cutting issue of black economic empowerment (BEE) is treated in a separate discussion.

APRM Objectives: Corporate Governance

1. Promote an enabling environment and effective regulatory framework for economic activities.
2. Ensure that corporations act as good corporate citizens with regards to human rights, social responsibility and environmental sustainability
3. Promote adoption of codes of good business ethics in achieving the objectives of the corporation
4. Ensure that corporations treat all their stakeholders (shareholders, employees, communities, suppliers and customers) in a fair and just manner
5. Provide for accountability of corporations, directors and officers

Source: APRM Country Self-Assessment Questionnaire

APRM Objective 1: Business Environment

Armstrong notes the drive towards corporate governance in South Africa "was not stimulated by any significant crisis in the corporate sector at that time; rather it concerned the competitiveness of the country to the global economy following its transition to a fully-fledged democracy after … apartheid."[296]

The 2002 King II Report updated King I, having reviewed local and global developments. It also considered how to protect "the interests of a wider range of stakeholders", considered

[295] King Committee on Corporate Governance, *King Report on Corporate Governance for South Africa 2002*, Institute of Directors, March 2002, pp 11-12. Chaired by Mervyn King, the Institute of Directors formed the King Committee on Corporate Governance in 1992. This private-sector-led initiative developed and released the first King Report on Corporate Governance ("King I") in 1994, which contained a groundbreaking voluntary code of best practice for companies . The 2002 report, known as "King II" embellished and updated King I, having reviewed local and global developments. It also considered how to protect the "interests of a wider range of stakeholders", considered "matters of risk and internal controls assurance" (control and risk management) and also recommended "provisions for effective enforcement of good corporate governance standards and of the existing rules and regulations".

[296] Armstrong P, Segal N and B Davis, *Corporate Governance: South Africa, A Pioneer in Africa*, Johannesburg: South African Institute of International Affairs, 2005, p 9.

"matters of risk and internal controls assurance" (control and risk management) and also recommended "provisions for effective enforcement of good corporate governance standards and of the existing rules and regulations".[297]

Armstrong *et al* note:

> A particular emphasis in the second King Report was on the qualitative aspects of good corporate governance …The review was noteworthy for bringing into this framework the societal obligations of companies, in this way indirectly reinforcing the expectations of government and the wider community that the corporate sector will contribute to the country's transition and development.[298]

However, there are a number of corporate governance challenges for South African companies, particularly those expanding into other parts of Africa. South Africa has been a world leader in developing codes of good corporate practice and advancing the global debate about the roles of corporations in society, most notably through the two King Reports on Corporate Governance of 1994 and 2002. Corporate Governance has assumed increasing importance in the wake of major corporate mismanagement abroad and in South Africa.

A theme that emerges strongly is that the regulatory framework is robust, but enforcing these rules with respect to corporate behaviour, workers' rights or the environment poses numerous formidable challenges. Legislation and corporate codes can diminish but not eliminate unethical or illegal behaviour. Another trend is that a balance must be maintained between regulating business and fostering innovation and entrepreneurship.

Strong Economy But Labour Laws and Crime Discourage Investment

South Africa enjoys a reputation as one of the best-governed and most stable African states. Macroeconomic indicators have been improving: in recent years inflation has stabilised at a low level, economic growth has been steadily (if slowly) increasing and the currency has been relatively stable.

APRM Corporate Governance

Objective 1: Promote an enabling environment and effective regulatory framework for economic activities

- In a recent global survey of economic freedom in approximately 200 countries by the US-based Heritage Foundation, South Africa was ranked 50th. It was judged "mostly free" on the Heritage scale.[299] The survey cited moderate levels of trade protectionism and barriers to foreign investment, but also the country's declining inflation and the recognition and protection of property rights. It does note the high income tax levels and high government expenditure, at 30% of GDP.
- On the 2004 "opacity index" developed by the Kurzman Group consultancy, which measures small-scale, high frequency financial risks across countries in five broad categories forming the acronym "CLEAR": business and government **C**orruption, an ineffective **L**egal system, deleterious **E**conomic policy, inadequate **A**ccounting and governance practices, and detrimental **R**egulatory structures, South Africa appears in 20th

[297] Armstrong P, Segal N and B Davis, *Corporate Governance: South Africa, A Pioneer in Africa*, Johannesburg: South African Institute of International Affairs, 2005, p 16.
[298] Armstrong P, Segal N and B Davis, *Corporate Governance: South Africa, A Pioneer in Africa*, Johannesburg: South African Institute of International Affairs, 2005, p 17.
[299] Heritage Foundation, "2006 Index of Economic Freedom", accessed 23 January 2006, available at www.heritage.org/research/features/index/country.cfm?id=SouthAfrica.

position out of 48 countries surveyed, at the same level as fast-growing Taiwan and Spain.[300]

- According to advice given to US investors interested in South Africa:

> The government of South Africa welcomes foreign investment as a key driver for the country's economic development and integration into the global economy. Its macroeconomic management is sound. Investment policies that promote openness and raise productivity and growth are key objectives of the [government]. In 2004 the government announced a goal of investment reaching 25 percent of GDP by 2014. Moody's gave South Africa (SA) a sovereign debt rating of BAA1, three steps into the investment grade, in January 2005. Standard & Poor and Fitch also rank South Africa at investment grade. The [government] has liberalised trade and developed its competitiveness by lowering tariffs, abolishing most import controls, and reforming the regulatory environment. South Africa's record of political and macroeconomic stability over the past decade has helped to create a promising medium to long-term economic climate for local and international firms in South Africa.[301]

Despite this, the country has not been able to attract significant amounts of foreign direct investment (FDI). As Armstrong, Segal and Davis point out:

> Notwithstanding South Africa's prominence and the acknowledgement of its relatively advanced economic system in the context of emerging markets, it has not been a significant recipient of … FDI, which remains a cause for concern for the government and the business sector. In 2001, South Africa received approximately $6.5 billion in FDI on account of an unbundling of cross-shareholdings by the London-listed company Anglo American and its subsidiary, De Beers, but this was an exception: the figure has remained at around $1 billion or less annually, a fraction of the total global FDI flows of $735 billion reported in 2002.[302]

However, South Africa's FDI improved substantially in 2005 when British bank Barclays bought South Africa's fourth-largest bank, Absa, in a deal worth nearly R30 billion ($4.7 billion).[303] Other reported deals in 2005 included a $100 million (R640 million) investment by General Motors, the world's largest carmaker, in South African production of a global version of its Hummer sports utility vehicle,[304] as well as considerable investments by Vodafone in telecommunications and Mittal in the steel industry.

One of the reasons given for the comparatively low levels of foreign investment is the country's labour legislation. In his 2005 budget speech, Finance Minister Trevor Manuel said:

> We must address the barriers to small business development and job creation that arise from cumbersome municipal planning and approval procedures, or from overly burdensome administration of the tax laws, environmental regulations or labour market controls.[305]

Commentators have argued for labour reforms, "particularly those making it easier to hire and fire" in order to encourage investment and reduce unemployment.[306] Deputy President Phumzile Mlambo-Ngcuka, who heads up a task team aimed at boosting the country's economic growth recently advocated greater flexibility in the labour market as part of the Accelerated Shared Growth Initiative (ASGI) strategy for the country.[307] Deputy Finance

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[300] See http://www.opacityindex.com/opacity_index.pdf

[301] US Department of State, "2005 Investment Climate Statement — South Africa", *www.state.gov/e/eb/ifd/2005/42112.htm.*

[302] Armstrong P, Segal N and B Davis, *Corporate Governance: South Africa, A Pioneer in Africa*, Johannesburg: South African Institute of International Affairs, 2005, p 12.

[303] "Absa and Barclays: 'Today is the day'", *M&G Online*, 27 July 2005.

[304] "Investor vote of confidence in SA", 25 May 2005, *www.southafrica.info/doing_business/investment/investment-250505.htm.*

[305] Budget Speech 2005 by Minister of Finance Trevor A. Manuel, Delivered 23 February 2005, available at www.info.gov.za/speeches/2003/03022614201001.htm.

[306] Katzenellenbogen J, "IMF lauds 6% growth bid while urging reforms of tariffs, laws", *Business Day*, 14 October 2005.

[307] Ntuli D, "Reckless labour reform" warning, *Sunday Times*, 4 December 2005.

Minister Jabu Moleketi echoed these ideas in his discussion document on a two-tier labour market released in June 2005. There is public debate around the merits and pitfalls of a two-tiered labour system for South Africa.

The country's high crime rate is also a deterrent to investment. In October 2005, the World Economic Forum's 2005 *Global Competitiveness Report* praised South Africa's sound macroeconomic policies but said business "continues to be concerned about rising crime and corruption, which add to business costs and undermine productivity".[308]

Effective Legal System and Property Protected

South Africa's constitution enshrines human rights principles and provides effective protection for individual property rights. The courts are independent and effective and there is respect for the rule of law. According to the World Bank's *Doing Business in 2006* report,[309] South Africa's standing with regard to registering property, protecting investors and enforcing contracts is as follows:

Registering Property (2005)			
The ease with which businesses can secure rights to property is measured below. In South Africa, it takes **6** steps and **23** days to register property. The cost to register property in South Africa is **11.0%** of overall property value.			
Indicator	**South Africa**	**Region**	**OECD**
Procedures (number)	6	6.9	4.7
Time (days)	23	117.5	32.2
Cost to register a property sale (% of property value)	11.0	12.7	4.8
Protecting Investors (2005)			
The indicators below describe three dimensions of investor protection. The indexes vary between 0 and 10, with higher values indicating greater disclosure, greater liability of directors, greater powers of shareholders to challenge the transaction, and better investor protection.			
Indicator	**South Africa**	**Region**	**OECD**
Disclosure Index (Transparency of transactions)	8	5.4	6.1
Director Liability Index (Liability for self-dealing)	8	4.7	5.1
Shareholder Suits Index	8	5.0	6.6
Composite Investor Protection Index	8.0	5.0	5.9
Enforcing Contracts (2005)			
The ease or difficulty of enforcing commercial contracts in South Africa is measured below. It takes **26** steps and **277** days to enforce contracts there. The cost of enforcing contracts is **11.5%** of debt.			
Indicator	**South Africa**	**Region**	**OECD**
Procedures (number)	26	35.9	19.5
Time (days)	277	434.1	225.7
Cost (% of debt)	11.5	41.6	10.6

The figures above clearly demonstrate that South Africa is well ahead of its region on all these measures.

[308] Katzenellenbogen J, "Crime, slow IT uptake 'make SA less able to compete'", *Business Day*, 29 September 2005.
[309] *Doing Business in 2006*, Washington DC: World Bank, *www.doingbusiness.org.*

Red Tape Chokes and Costs Business

However, research published in June 2005 by the Johannesburg-based SBP[310] *Counting the cost of red tape to business in South Africa,* estimated that "Regulatory compliance – red tape – cost South African businesses R79 billion in 2004, an amount equivalent to 6.5% of GDP."[311] This research into the costs imposed on companies in complying with regulations and legislation surveyed a wide array of businesses of all sizes, from informal enterprises, small and medium businesses to large private-sector corporations. See box below for the highlights of this report:

Highlights from SBP's *"Counting the cost of red tape to business in South Africa"*

- 34% of businesses surveyed cited the interface between the state and business as their biggest constraint to expansion and employing staff.
- The most troublesome and time-consuming regulations were VAT (19% of responses), other aspects of tax administration, labour laws, and SETA/RSC levies, in that order.
- 75% said that compliance costs had increased over the past two years; 80% noted an increase over the past ten years; and 83% expected future cost increases.
- On average, the annual costs of regulatory compliance were R105,000 per firm.
- Big firms have the largest costs absolutely but, relative to their size, small firms bear the heaviest burden. Compliance costs represent 8.3% of turnover for enterprises with annual sales below R1 million, and 0.2% of turnover for corporations with sales of R1 billion or more.
- Informal enterprises are deterred from entering the formal economy because of the higher tax burden, and the red tape they would have to face.
- The regulatory costs incurred by South African businesses are a significantly higher percentage of GDP than in many developed countries.
- New World Bank research has shown that an improved regulatory environment could increase economic growth in many developing countries by as much as 1.4% a year.

The report notes, "Though South Africa has a better regulatory system than many developing countries, improving the regulatory environment could have a significant impact on our economic prospects too."

However, as Jayne Mammat, Senior Manager in charge of auditing firm Ernst & Young's Governance and Sustainability department noted, it is important to balance the protection offered by compliance, "Can South Africa afford to have two or three corporate failures like Leisurenet every year, that devastates employees, suppliers and clients, not to mention pension funds invested?"[312]

Cumbersome Company Registration Process

The Companies and Intellectual Property Registration Office (CIPRO) is the result of the 2002 merger of the South African Companies Registration Office (SACRO) and the South African Patents & Trademarks Office (SAPTO). With a mission to facilitate economic participation, CIPRO unfortunately has a poor track record, leading for some to call for a

[310] SBP, formerly known as the "Small Business Project", is now called "Strategic partnerships for business growth in Africa".
[311] SBP, *Counting the cost of red tape to business in South Africa*, (Headline Report), Johannesburg, p 1.
[312] Telephone interview with J Mammat, 30 January 2006.

privitisation of this body's work.[313] The understaffed office receives 24,000 applications annually, with the waiting time for processing often cited as a hindrance to new businesses:[314]

- It can take up to six weeks to receive a reply from CIPRO. This waiting time factors into the three years it may take someone to establish a business in South Africa, three times as long as in the UK or the US.[315]
- There are up to 13 separate applications required to register a company.
- Cipro's Internet connectivity leaves much to be desired. Its website is unacceptably slow and unreliable, which delays access to forms and information for potential business owners.[316]

South African Company Law Requires Reform

South Africa's archaic Companies Act was promulgated in 1973 and is out of step with the profound economic, political and technical changes affecting enterprises locally and internationally over the last 33 years. Company law has been neglected while parliament has passed volumes of other legislation since 1994.

The King II report made 27 "recommendations requiring statutory amendment and other actions" and 11 of them pertained to specific weaknesses in the Companies Act.[317] However, the Companies Act is yet to be fully reformed, even though it has been discussed for many years.

"The corporate law reform process has taken far too long," said *Business Report*'s Ann Crotty. "It does not seem to have been a big priority for government, and the process has been haphazard."[318]

Major corporate and accounting scandals at home (such as the collapse of Leisurenet, Saambou Bank and Macmed) and abroad (WorldCom, Parmalat, Enron) finally provided impetus. The Department of Trade and Industry (the dti) published guidelines for corporate law reform in May 2004, [319] having launched the reform programme as early as 1997.

These guidelines acknowledge that "the South African Companies Act is thirty years old, largely out of line with modern business practices and deficient in some critical areas, notably … shareholder protection, capital rules and corporate governance generally." [320] The guidelines intend to eliminate obsolescence and major flaws in contemporary corporate law by (among others):

- harmonising corporate law with the constitution and other new legislation;

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[313] Free Market Foundation, "Cipro should perform of get off the pot", www.freemarketfoundation.com/ShowArticle.asp?ArticleType=regulation&ArticleID=1129.
[314] Free Market Foundation, "Cipro should perform of get off the pot", www.freemarketfoundation.com/ShowArticle.asp?ArticleType=regulation&ArticleID=1129.
[315] Free Market Foundation, "Cipro should perform of get off the pot", www.freemarketfoundation.com/ShowArticle.asp?ArticleType=regulation&ArticleID=1129.
[316] Thomas S and S Lunsche, "An Economy in Shackles", *Financial Mail,* 23 December 2005.
[317] Points 4-14, King Committee on Corporate Governance, *King Report on Corporate Governance for South Africa 2002*, Institute of Directors, March 2002 pp 42-45.
[318] Telephone interview with A Crotty, 27 January 2006.
[319] *South African Company Law for the 21st Century: Guidelines for Corporate Law Reform*, Department of Trade and Industry, May 2004.
[320] *South African Company Law for the 21st Century: Guidelines for Corporate Law Reform*, Department of Trade and Industry, May 2004, p 20.

- reducing costs and red tape in forming and running businesses;
- abolishing archaic solvency tests and protecting creditors more fully;
- including explicit provisions on corporate governance;
- strengthening corporate law enforcement mechanisms through an envisaged Companies and Intellectual Property Commission; and
- widening the obligations of companies beyond shareholder to stakeholders such as communities, employees, customers, suppliers and the environment.

Instead of comprehensive reform, a piecemeal process has been followed. A Draft Companies Amendment Bill, which fills some of the gaps, was released in June 2005 and is due to come before parliament in 2006. A full overhaul of the legislation is expected in 2007 at the earliest.

Some significant amendments in the Bill include:

- Section 38, to allow companies to provide financial assistance to other companies (intended to boost empowerment transactions);
- Changing Section 228 to make it more difficult for directors to dispose of company assets or large portions of the business, by increasing the approval required from a simple majority to a three-quarters majority at a meeting with a prescribed quorum, thus protecting minority shareholders (and making mergers and acquisitions more difficult); and
- Providing for business rescue measures short of liquidation.

While broadly supportive of the Draft Companies Amendment Bill and of measures to provide for legal backing of accounting standards, differentiated reporting requirements for companies of varying sizes and the establishment of a Financial Reporting Standards Council, the South African Institute of Chartered Accountants (SAICA) had several major concerns. SAICA criticised the short two-week period permitted for comments on the Bill, and expressed concerns on over 20 other substantive points, including several unclear definitions (e.g. a "limited purpose company" and "independent non-executive directors") and the proposed four-year rotation period for auditors.[321]

APRM Objective 2: Good Corporate Citizenship

Before looking at the role that South African companies play in relation to the societies they operate in, it is useful to offer definitions of some of the terminology used.

APRM Corporate Governance Objective 2:
Ensure that corporations act as good corporate citizens with regards to human rights, social responsibility and environmental sustainability

Definitions

The King II Report defines "**sustainability**" in a business context to mean that

> Each enterprise must balance the need for long-term viability and prosperity – of the enterprise itself and the societies upon which it relies for its ability to generate economic value – with the requirement for short-term

[321] The South African Institute of Chartered Accountants (SAICA),"Comment on the Draft Companies Amendment Bill, 2005, Published in the Government Gazette of 13 July 2005", 5 August 2005.

> competitiveness and financial gain … Social, ethical and environmental management practices provide a strong indicator of any company's intent in this respect. [322]

King II defines the related concept of "**corporate citizenship**" as:

> Business decision-making linked to ethical values, compliance with legal requirements and respect for people, communities and the environment … [evidenced by] … a comprehensive set of policies, practices and programmes that are integrated throughout business operations, and decision-making processes that are awarded by top management.[323]

"**Corporate social responsibility** is how a company spends its extra cash on good causes," said Ralph Hamann, Head of Research at Unisa's Centre for Corporate Citizenship, "while corporate citizenship is about how the company made that money in the first place – was it at the expense of people and the environment?"[324] He uses corporate citizenship as "an umbrella term broadly referring to the hope that business should or can contribute to sustainable development."[325] In the South African context, sustainability and corporate citizenship have been closely linked to the concept of *ubuntu*, emphasising supportiveness, shared humanity and solidarity.

Some companies prefer to use the term "**corporate social investment**" (CSI), which emphasises that these acts and projects are voluntary and constructive contributions to national development objectives, rather than an obligation to address past corporate guilt or redress misdeeds.[326]

It is simplistic to merely equate positive social investments with donations to NGOs or community development initiatives. It is much broader and more nuanced. Companies can also make a positive contribution to society through the products and services that they provide. Examples include low-cost banking and insurance products for the poor, information and communication technologies and cheaper medicines.

The "**triple bottom line**" refers to the economic, social and environmental aspects of a company's operations. "**Sustainable reporting**" refers to how companies publicise their view of how they perform on these triple bottom line issues. CSR/CSI are voluntary endeavours and are sometimes called "**non-financial issues**", which are however increasingly being seen as core rather than peripheral to business functioning.

Armstrong *et al* note that corporate responsibility also obliges companies to address challenging issues of racial balance, skills development and other labour matters :

> Stakeholder rights … are addressed through specific laws providing for affirmative action and addressing historical racial imbalances in the workplace, employee skills development, labour and employee rights, the prevention of discrimination and harassment across a broad spectrum of issues and circumstances. The second King Report goes further in requiring that every company should report at least once annually on the nature and extent of its social, transformational, ethical, safety, health and environmental management policies and practices. This extended brief envisages companies going beyond the legal requirements and treating these aspects of their activities as strategic issues.[327]

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[322] King Committee on Corporate Governance, *King Report on Corporate Governance for South Africa 2002*, Institute of Directors, March 2002, p 91.
[323] King Committee on Corporate Governance, *King Report on Corporate Governance for South Africa 2002*, Institute of Directors, March 2002 p 91.
[324] Telephone interview with R Hamann, 27 January 2006.
[325] Hamann R, *Can business make decisive contributions to development? Towards a research agenda on corporate citizenship and beyond,* Centre for Corporate Citizenship, Unisa, undated, p 5.
[326] Fig D, "Corporate social and environmental responsibility", *SA Labour Bulletin*, April 2002, p 83.
[327] Armstrong P, Segal N and B Davis, *Corporate Governance: South Africa, A Pioneer in Africa*, Johannesburg: South African Institute of International Affairs, 2005, p 21.

Enforcing Human Rights

Companies are bound by South Africa's constitution and legal system to protect and uphold the human rights of their workers, suppliers, customers and communities. However, the state's capacity to monitor and ensure that corporations do so is severely limited.

Unregulated Industries Imperil Workers' Rights: Post-apartheid South Africa has introduced a variety of laws designed to radically improve employment conditions and ensure employees have a mode of representation and protection from exploitation. These laws impact directly on firms. They include the Labour Relations Act (66 of 1995), Basic Conditions of Employment Act (75 of 1997), and Employment Equity Act (55 of 1998). However, some serious challenges remain in enforcement.

- For example, the Basic Conditions of Employment Act prohibits the employment of children under the age of 15, and the constitution affords children protection from maltreatment, neglect, abuse or degradation; and exploitative labour practices. However, there is concern regarding forced child labour practiced in the farming industry. A recent report released by the Ministry of Labour noted:

  Anecdotal evidence shows that children of tenants are sometimes forced to work for the landowner for little or no wages in return for the family occupying land or accommodation. The penalty when the child does not provide services is eviction of the whole household.[328]

- This type of "bonded labour" comes about due to labour tenancy, where children can be nominated to work for the family's right to use and live on the land. [329] The department has found it difficult to enforce the legal provisions, since most farm workers live isolated from inspectors and police, and inspectors must inform farmers in advance of any inspections.

- Basic working conditions and rights are also often ignored in unregulated or poorly regulated sectors, such as security, manufacturing, retail, taxi and hospitality industries. [330]

- A survey of 1,252 women, performed by the Sexual Harassment Education Project found that as many as 77% of women experienced sexual advances in the workplace. The industries in which it was most common included: security, construction, mining, film and music, and domestic services. Many women think that they will lose their jobs if they voice a compliant.[331] Additional protection is needed for whistleblowers that expose harassment as well as corruption in the workplace. (see discussion of protection for whistleblowers in **Economic Governance and Management** section, page 80).

No Guidelines for SA Companies Operating Abroad: South Africa has neither laws nor policies to cover the behaviour of South African companies operating beyond the national borders (with the exception of the recent Prevention and Combating of Corrupt Activities Act (Act 12 of 2004)). Although some South African companies voluntarily disclose the nature of their operations in these countries in their annual or sustainability reports, it is difficult to

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[328] The National Child Labour Action Programme for South Africa. October 2003. Ministry of Labour. Produced in part by International Labour Organization and the International Programme on the Elimination of Child Labour. Available online: http://www.labour.gov.za/download/9496/Research%20report%20-%20National%20Child%20Labour%20Action%20Programme%20for%20South%20Africa.doc

[329] The Land Reform (Labour Tenants) Act allows a labour tenant to nominate another person to work in their place if they are unable to work themselves, thereby retaining the family's right to use and live on the land.

[330] Bell T, "Any job mantra disguises race to the bottom", *Business Report*, 13 January 2006.

[331] Mphuthing P, "Women scared to 'blow whistle' on sex pest," *Business Day,* 8 December 2005.

ascertain the level of compliance with accepted international human rights norms and standards, particularly in countries where regulation and monitoring is weak.

Local companies are encouraged to invest elsewhere, but management of their social impacts is not a feature of government's policies. A May 2005 AICC Briefing Paper on *Promoting South African Companies Corporate Responsibility in Africa* noted:

> There appears to have been limited interaction between the South African government and other African governments with regard to promoting corporate responsibility and to engaging the private sector to facilitate responsible economic growth and development.

South Africa should develop and adopt a code to guide the ethical behaviour of businesses operating outside the country. There is also scope for South African companies to apply their positive experiences of black economic empowerment (BEE) – including local employment creation, affirmative action, and skills development – in their African operations, to both enhance their competitive advantage and spur economic development.

Business Pragmatic on HIV/Aids: South African companies may not discriminate against persons with HIV or Aids.[332] Government's vague and ambiguous approach in dealing with the HIV/Aids pandemic is contrasted with the (mostly) efficient approach adopted by some South African companies. Corporate South Africa has tended to deal with the effects of HIV/Aids on workforce productivity, without engaging in debates around its cause and other socio-political issues. Many South African companies have voluntarily implemented HIV/Aids management programmes; realising that the cost of treating labourers, and in some cases their immediate families, outweighs the cost of having to rehire and train new employees.

Some companies are addressing HIV/Aids by providing anti-retroviral drugs to their workers, and reduced prices of anti-retrovirals (ARVs) is encouraging companies to implement treatment programmes. Other corporations are engaging in public-private partnerships to help government address its resource and infrastructure capacity restraints in implementing its Comprehensive HIV and Aids Care, Management and Treatment Plan.

For example in the Eastern Cape DaimlerChrysler South Africa, the Border Kei Chamber of Business, and Deutsche Investitions und Entwicklungsgesellschaft mbH have partnered to find a "sustainable solution to consistently deliver comprehensive HIV/Aids prevention, care, support, treatment, and risk management services at the small and medium-enterprise level."[333]

However there are significant differences in the approaches to HIV/Aids adopted by different industries and individual firms. The most recent report published by the South African Business Coalition on HIV and Aids (SABCOHA) (2005) found that:

> More than 80% of the financial services companies and 60% of the mines surveyed have an HIV/Aids policy in place. 52% of transport companies and 47% of manufacturers surveyed have policies, while less than a third of the wholesalers, building and construction companies and vehicle dealers have implemented an HIV/Aids policy. Only 12% of retail respondents reported having HIV/Aids policies in place. [334]

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[332] The Department of Health's strategic plan for HIV/Aids and STDs in South Africa 2000 – 2005, states that the "plan provides a broad framework for government, NGOs, business, labour, women and all sectors of society" for tackling the HIV/Aids epidemic and STDs.

[333] DaimlerChrysler Press Release: R4.4 Million boost to combat HIV/Aids in the Eastern Cape. November 15, 2005.

[334] The Impact of HIV/Aids on Selected Business Sectors in South Africa. 2005. SABCOHA. Available Online: http://www.ber.sun.ac.za/downloads/2005/aids/HIVAIDS_Report2005.pdf.

The study also found, disturbingly, that small companies either believe they are not at risk from HIV/Aids or that they are too small to have the resources to deal with the virus and its consequences.

Advancing Corporate Social Responsibility (CSR)

Public debate in South Africa about the roles and obligations of companies towards society tends to be dominated by BEE. Discussion of the concepts of "corporate social responsibility" and "corporate citizenship" happens on the margins, in the financial media and within selected firms. CSR is often incorrectly equated with BEE. Only in large corporations with significant international exposure does CSR tend to extend as an organisational objective beyond the realm of philanthropy.

After 1994, the large corporate sector increasingly aligned its corporate social investment programmes with government's developmental imperatives. According to surveys conducted by Trialogue, a consultancy specialising in CSI and corporate citizenship,[335] annual CSI expenditure was estimated at R2.35 billion in 2003. Education funding made up 39% of CSI spent in 2003, up from 35% in 2000, while spending on health (including HIV/Aids) was in the order of 10% in 2003, with a similar proportion spent in support of job creation initiatives. Other areas – in order of declining budget proportion – were training; social development; arts and culture; community and rural development; environment; sports development; safety and security, and housing.[336]

There are many ways in which South African companies have ploughed back profits into communities. Generic examples of CSI projects are mentioned in the box below. Businesses have forged partnerships with government to drive programmes that address skills development, employment creation (especially within the tourism industry), combating crime, education, and development of small, medium, and micro enterprises (SMME). Government has also used tax deductions to aid development by influencing approximately 150 of South Africa's largest companies to contribute 2% of their post-tax earnings to the Business Trust.[337]

Some examples of CSI Projects

- **Education**: support for community education facilities; secondary and tertiary education level programmes aimed at promoting the industry; bursaries and scholarships.
- **Training**: community training; skills development for unemployed; adult basic education and training in communities; community financial literacy programmes.
- **Development** programmes for youth and other target groups.
- **Environment**: support of conservation projects; community clean up projects; food garden initiatives.
- **Job Creation**: projects external to the workplace or any commitments contained in empowerment financing.
- **Arts & Culture**: support of development programmes; development of new talent.
- **Health:** support of community clinics; health programmes in the community.
- **Sport**: supporting development programmes.

Adapted from the Financial Sector BEE Charter

Social Responsibility Needs Clearer, More Robust Reporting: Quantifying CSI initiatives is notoriously difficult. Data is largely based on unverified self-declarations by firms, and companies have an incentive to portray themselves in the best possible light. The vast majority of companies still describe their sustainability activities in an aspirational,

[335] *The CSI Handbook,* Trialogue, 6th edition.
[336] Visser W, *Corporate Sustainability in South Africa: A ten year review.*
[337] *Working Together,* Business Trust Review 1999-2004.

anecdotal and episodic manner with an emphasis on positive content. Case studies presented are of general company performance and risk management effectiveness. Although the growing focus on corporate citizenship has galvanised companies into some level of action, many pay lip service to sustainability. South African companies generally do not publicly commit themselves to objective targets or report performance against such targets. Those companies that do tend to state these targets in general terms and report performance equally vaguely. Only a small minority of companies, mostly those in the resources sector (with substantial environmental damage to clean up), report their performance in a manner that allows for year-on-year comparison in respect of performance against targets.

In South Africa, company reports tend to emphasise the amounts invested rather than the impacts of their programmes, and few tend to monitor whether the projects they fund have the desired outcome and are sustainable.

Benchmarking CSR projects against their social and environmental performance can provide transparency and facilitate an effective and credible monitoring system. AICC's July 2004 paper on *Corporate Social Responsibility in South Africa* noted:

> South African companies who are leaders in sustainability reporting have moved towards systematic reporting and are beginning to provide an increasing range of comparable (numerical) data for stakeholders to assess their progress, or lack thereof. Where numerical data is inappropriate, leaders are beginning to explain in a more systematic manner their strategies and programmes for addressing issues.

Companies of all sizes are reluctant to formally commit to stakeholder involvement on specific social and environmental issues in their company, despite general commitments to these principles. Similarly, reporting on corporate charitable activity rarely mentions community or stakeholder input and feedback opportunities.

CSI Relies on Self-Monitoring: Corporate annual reports suffer the same weaknesses as government annual reports discussed in the previous chapter. They provide a public relations spin on events but do not present meaningful discussion of the real problems confronting their workers, communities and environments in which they operate. To move CSR beyond a few publicity seeking donations to focus on deeper aspects, company reporting must be strengthened.

Government relies on a combination of labour, environmental and empowerment legislation to influence and encourage companies to act responsibly, but ultimately depends on self-monitoring by the corporate sector.

Research conducted for an AICC Briefing Paper published in May 2005 found that

> Existing initiatives suffer from an implementation gap. Almost all interviewees noted that current corporate responsibility initiatives "don't have teeth". This is not to suggest that mandatory regulations are necessary or indeed feasible, but rather that there are no institutional mechanisms to promote and monitor existing initiatives … There is an important intermediate position that can be achieved between government regulation, on the one hand, and voluntary business guidelines, on the other. Some of the above initiatives are already beginning to occupy this "in-between" space, most prominently the King II code, which is a listing requirement for the JSE Securities Exchange.

Many of the companies interviewed were concerned about "standard fatigue":

> the view that there are already too many guidelines and standards on corporate responsibility and that they are becoming too confusing and burdensome for companies. Clearly there is an incentive for some prioritisation, coalescence, and adaptation of existing initiatives, rather than the creation of new guidelines.

Using legislation to compel corporations to invest in socio-economic initiatives may have negative consequences, including deterring investment and stifling business growth. Government should continue to use other means (such as facilitating, partnering, and

endorsing) to influence socially responsible investments, and should leverage BEE Charters to align industries' social investments with government agendas.

JSE's Social Responsibility Index (SRI) Seeks to Promote Corporate Citizenship: There has been a major effort to standardise sustainability reporting in South Africa among listed companies. In May 2004, the JSE Securities Exchange was the first exchange in an emerging market to launch its Social Responsibility Index (SRI), following similar initiatives on the New York and London exchanges. The intention was to identify listed companies "that integrate the principles of the triple bottom line into their business activities, and to facilitate investment in such companies."[338] Companies voluntarily submit annual reports on their economic, social and environmental policies and practices within a strong corporate governance framework.

According to Corli le Roux, Legal Counsel at the JSE who works on the SRI, the establishment of the index helped to crystallise the debate around triple bottom line reporting and corporate governance. "It was hard for companies to know what to do and how to do it, and the SRI was an attempt to encourage good practice and get conformity in reporting,"[339] she said. She added "this index wants to change the paradigm of 'chequebook philanthropy', which sees CSR as just what the chairman's fund sponsors. It's about a holistic, responsible, balanced way of doing business."

The SRI was also a tool for investors to see which companies take corporate citizenship seriously. All of the 160-odd listed companies were invited to submit information by filling in a questionnaire on their economic, environmental and social performance. In 2004, 74 companies submitted questionnaires and 51 made it onto the index. In 2005, according to le Roux, the criteria were made tougher than in 2004, "as the SRI started to judge performance rather than policy." [340] Sixty companies applied and 50 made the index. Data for the third review has been collected and will be released in April or May 2006. Jayne Mammat of auditing firm Ernst & Young said:

> The SRI is worthwhile but needs to be better marketed and publicised, not just when the latest version is announced once a year. Otherwise it will stay as the same 50-odd companies. I know of some who did not reapply because they saw no benefits.[341]

Companies are assured of confidentiality, and the JSE merely publishes the names of the corporations on the index, without stating whether the others did not apply or failed the criteria. "But we don't insist on only audited data," said le Roux. "and there is no specific audit to verify what every company reports. A lot is based on trust and companies wanting to manage their reputations. They get points for disclosing, but not better points for *what* they are disclosing." [342] At present, only two funds are actively tracking the index, and it still follows the All-Share Index, with no special weighting within the index.

Use Incentives to Bolster Government: Incentives for and partnerships with business will help to address government's lack of capacity to implement its policies. To strongly influence corporate citizenship by companies, government must actively involve business in developing or refining any legislation or frameworks around CSR and indeed fostering economic activity. Government should ensure that companies have adequate time to respond to proposed bills and amendments.

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[338] *JSE SRI Index: Background and Selection Criteria*, Johannesburg: JSE, September 2005, p 2.
[339] Telephone interview with C le Roux, 25 January 2006.
[340] Telephone interview with C le Roux, 25 January 2006.
[341] Telephone interview with J Mammat, 30 January 2006.
[342] Telephone interview with C le Roux, 25 January 2006.

Protecting the Environment

Historically, the environment[343] has been equated with conservation, with scant attention paid to pollution or environmental problems outside of national parks or the impact on people living near industry. Apartheid-era nature conservation authorities fenced people out and protected world-class parks, but the law and business paid little attention to the stewardship of all the land between the pristine parks. Since democratisation, conservation has taken on a human dimension, mirroring the global move towards a more people-centred approach to species protection. The 2002 World Summit on Sustainable Development (WSSD) encapsulated this trend, and as host to that summit, South Africa has been at the forefront of the "sustainable development" debate.

But government has struggled to articulate its vision for sustainable development, and, according to a recent government assessment, departments need to "align their sector specific goals and targets with those of the [WSSD] and integrate them into their strategic plans and priorities."[344] This in turn implies that companies have no real understanding of what South Africa's sustainability goals are. Business seems to lack its own coherent strategy. Because there is no clear and shared understanding of what is meant by "sustainable development", this also complicates efforts to produce laws to enhance the concept.

It is also dangerous to generalise about "business" as if it were monolithic. Some companies – especially those with a considerable international profile that may be listed on stock exchanges in the north or attract international investors – have excellent environmental management practices. In some cases, South African companies that supply global corporations also have to improve their environment credentials to secure or retain these customers.

Balancing the need for economic growth and simultaneously ensuring sound environmental management is a difficult task. This section examines the corporate role in safeguarding South Africa's environment.

Robust Legal Framework to Protect Environment But Poor Enforcement: Section 24 of the constitution enshrines environmental rights. The Department of Environmental Affairs and Tourism (DEAT) has established a comprehensive legal framework for environmental protection, which places responsibility on companies to protect the environment and provides for liability where pollution occurs. The National Environmental Management Act (NEMA) of 1998

> imposes a duty of care on all people to take reasonable steps to prevent or at least minimise environmental pollution and degradation. The act also casts a wide net of liability for those who may be held financially accountable for the costs of environmental clean-ups.[345]

Other key pieces of legislation include the Air Quality Act and the Environment Conservation Act.[346] The King II Report suggests that companies report on their environmental

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[343] This report defines environment as the country's biota – its living organisms, the landscapes that they inhabit, the systems they are part of as well as those historical and cultural features which are also part of the landscape.
[344] Director: Sustainable Development Cooperation, Department of Environmental Affairs and Tourism
[345] Plit L, "Companies must pay for pollution, degradation", *Business Day*, 14 July 2005.
[346] Environmental requirements also form part of mining and minerals legislation, given the large environmental impacts associated with mining. These laws are intended to safeguard the biophysical environment by ensuring the sustainable use of natural resources, the conservation of biodiversity and the right to a clean environment as enshrined in the Constitution. Other important pieces of legislation concern water (National Water Act, Act 36 of 1998), forests (National Forests Act, Act 84 of 1998), the Marine Living Resources Act, Act 18 of 1998) and

responsibilities as part of "triple bottom-line" reporting, and many listed companies do so (with varying degrees of rigour).

Although the legislation is strong, the ability to enforce these laws continues to be weak:

Lack of Inspectors: The DEAT, in its last National State of the Environment Report in 1999 acknowledged that "the enforcement of policy and law can still be considered weak".[347] The report continued:

> This can be attributed to the lack of appointed officials to carry out these responsibilities. In the case of air pollution control, **there are only seven Pollution Control Officers for the nine provinces.** The DEAT is also working with 145 local authorities to deal mainly with smoke, dust and motor vehicle emissions.[348]

Air Pollution: The National State of the Environment Report went on to note that "the approach to air pollution control is far from comprehensive, and reducing air pollution, especially in informal settlements, has not been effective."[349]

- A 2002 GroundWork report found that "South African industries are not being held accountable for their air pollution … the DEAT's budget allocation for air pollution control is small and getting smaller; and the enforcement capacity … is inadequate and eroding further."[350]

Problems with Environmental Planning and Management: South Africa possesses a comprehensive set of environmental planning and management regulations, which, coupled with legislation that calls for integrated development plans, local economic development strategies and the like, should ensure that environmental sustainability is safeguarded. Yet several problems with environmental planning and management are apparent:

Limited Monitoring and Enforcement Capacity: Without strong monitoring and enforcement at all levels of government, environmental mismanagement will certainly continue since many project developers regard environmental sustainability as an irritation.

Environmental offenders have for far too long escaped prosecution because the country did not have the necessary legislation in place or the enforcement mechanisms to bring culprits to book. Now South Africa has established the "Green Scorpions" (so christened by the media), a network of environmental enforcement officials from different national, provincial and municipal government departments, through an amendment to NEMA, which came into effect on 1 May 2005. The new Chapter 7 of NEMA now provides for Environmental Management Inspectors (EMIs) to be designated by the minister and MECs. For the first time, environmental enforcement officials from across the country will be part of a national network, sharing intelligence, experience, common training and procedures. This national EMI network breaks through traditional separations and will include park rangers and conservation officers, air quality officers, pollution and waste enforcement officials and officials monitoring compliance with legislation relating to Environmental Impact

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more recently, national parks and national botanical gardens, which are governed by the National Environmental Management: Protected Areas Act (NEMPAA) (Act 57 of 2003) and the National Environmental Management: Biodiversity Act, (NEMBA) (Act 10 of 2004), respectively. National policy on coastal resources has been developed (White Paper for Sustainable Coastal Development in South Africa April 2000) and legislation is being considered. Policy regarding the sustainable use of agricultural resources has also been tabled.

[347] *National State of the Environment Report*, Pretoria: Department of Environmental Affairs and Tourism, 1999, available at *www.ngo.grida.no/soesa/nsoer*

[348] *Ibid*.

[349] *Ibid*.

[350] *Corporate Accountability in South Africa: the petrochemical industry and air pollution*, Pietermaritzburg: GroundWork, 2002, p 64.

Assessments. EMIs will now work in close collaboration with the South African Police Service and the National Prosecuting Authority to investigate and institute criminal proceedings against offenders who contravene environmental legislation. The presence of the EMI network will prompt companies and individuals to rethink environmental policies or face harsh penalties.

- In May 2005, a self confessed polluter in Gonubie, East London, was convicted of contravening certain provisions of the Environment Conservation Act 73 of 1989 and was sentenced to five years imprisonment suspended for five years, after having been found burying drums containing hazardous waste.

According to Mark Jardine of the DEAT, it is too early to pinpoint the successes or limitations of the EMI network as the new legislation still has to be implemented on a widespread basis.[351]

Better coordination between businesses and the environmental authorities is required from project conception through to implementation. The current trend is for large-scale projects with potentially severe negative environmental impacts to be refused permission to proceed. These include the mining of St Lucia's dunes, and the N2 toll road through the Transkei portion of the Eastern Cape.

Environmental Impact Assessments Pose Problems: Though the legislation calling for Environmental Impact Assessments (EIAs) is well defined, problems arise because the project proponent sponsors the assessment; it is often extremely difficult to predict long-term social and environmental consequences of a development; and deciding what constitutes sustainable development is difficult, particularly for project regulators and gatekeepers. Independent assessors would help to alleviate some of these problems.

Resource Utilisation and Allocation Challenges: South Africa's dependency on natural resources for income generation and job creation is well known. Key problems with the utilisation and allocation of these resources exist in different sectors:

- **Mining:** The mining sector charter goes a long way to provide opportunities for previously disadvantaged persons. The environmental problems associated with mining, aside from the obvious impacts – water and land pollution, land alteration etc. – also include an influx of people to mining areas (for example Rustenburg in the North West Province, located in the platinum belt).

  The Department of Minerals and Energy has punished a number of companies for contravening environmental regulations, for example shutting down the mining operations of New Diamond Corporation at Schmidtsdrift in Kimberley in October 2003 as a result of pollution that was destroying graves and threatening to pollute the community's groundwater supply.[352]

- **Fishing Rights:** Although the government's coastal management programme is commendable, the apparent marginalisation of fishermen in the Western Cape ensures that poor people remain at the periphery, and that the sustainable use of fisheries is not guaranteed.[353] Numerous disputes have arisen over unfair allocations of fishing rights and BEE "fronting" that uses the poor to get licences but leaves them without any benefits.

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[351] Email correspondence with M Jardine, 30 January 2006.
[352] Naidoo S, "Diamond mine closed for harm to environment", *Business Day*, 29 October 2003.
[353] See *Noseweek* June 2004

- **Property Development:** Environmental considerations should be factored into *any* residential housing development. Northern Johannesburg is a good example of runaway sprawl spreading out into what was previously countryside. While population expansion and the growing middle class cannot be avoided, there is clearly a need for sound urban planning with the cooperation of property developers and municipal councils. Government has consistently failed to anticipate the magnitude of rural to urban migration, which is creating densely populated, unsanitary informal settlements that are difficult to improve once they are established. Thus, there is a need for fast tracking housing, water and sewage delivery.
- **Biodiversity:** The creation of the South African Biodiversity Institute (SANBI) is a welcomed move to provide support to government's biodiversity planning. The business sector, via the land it owns and develops, has a clear role to play in ensuring that South Africa's natural heritage is conserved and utilised appropriately. Ensuring this preservation and proper utilisation should be integral to the environmental planning and management process as well as in the preparation of IDPs. Here government has a role to identify those areas regarded as sensitive and to direct development accordingly.

APRM Objective 3: Good Business Ethics

Uneven Implementation of Corporate Governance

APRM Corporate Governance Objective 3: Promote adoption of codes of good business ethics in achieving the objectives of the corporation

In 1992, the Institute of Directors formed the King Committee on Corporate Governance. This private-sector-led initiative developed and released the first King Report on Corporate Governance (King I) in 1994, which contained a groundbreaking voluntary code of best practice for companies. The King report was emulated internationally. Armstrong notes the drive towards corporate governance in South Africa

> was not stimulated by any significant crisis in the corporate sector at that time; rather it concerned the competitiveness of the country to the global economy following its transition to a fully-fledged democracy after … apartheid.[354]

The 2002 King II Report updated King I, having reviewed local and global developments. It also considered how to protect "the interests of a wider range of stakeholders", considered "matters of risk and internal controls assurance" (control and risk management) and also recommended "provisions for effective enforcement of good corporate governance standards and of the existing rules and regulations".[355]

Armstrong *et al* note:

> A particular emphasis in the second King Report was on the qualitative aspects of good corporate governance …The review was noteworthy for bringing into this framework the societal obligations of companies, in this way indirectly reinforcing the expectations of government and the wider community that the corporate sector will contribute to the country's transition and development.[356]

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[354] Armstrong P, Segal N and B Davis, *Corporate Governance: South Africa, A Pioneer in Africa*, Johannesburg: South African Institute of International Affairs, 2005, p 9.
[355] Armstrong P, Segal N and B Davis, *Corporate Governance: South Africa, A Pioneer in Africa*, Johannesburg: South African Institute of International Affairs, 2005, p 16.
[356] Armstrong P, Segal N and B Davis, *Corporate Governance: South Africa, A Pioneer in Africa*, Johannesburg: South African Institute of International Affairs, 2005, p 17.

However, there are a number of corporate governance challenges for South African companies, particularly those expanding into other parts of Africa.

Poor Shareholder Activism: A major shortcoming in the promotion of business ethics in South Africa is the lack of shareholder rights and shareholder engagement on the part of institutional investors, as well as the general public. Pension fund trustees have left many retirees massively exposed to risks.

This view is echoed by a number of business experts:

- "Shareholder activism has lagged, especially by institutional investors who put pensioners' money at considerable risk," said Tony Dixon, CEO of the Institute of Directors (IoD).[357]
- "We, the public, the consumers, even the shareholders are remarkably passive when we experience corporate wrongdoing," said *Business Report* journalist Ann Crotty.[358]
- Armstrong said that some companies view corporate governance as an impediment to doing business and do not appreciate that, as the managers of other people's money, they have a measure of accountability to inform shareholders about how they are spending this money and why.[359] However he adds that not enough shareholders are asking these questions.

See also **Stakeholder Engagement** section below.

King Code is not Mandatory for Private Sector: Both King Reports (I & II) provide guidelines for good corporate governance in South Africa, but remain voluntary. "King II is an excellent report, but many companies don't adhere to it, or just pay lip service to its principles," said Ann Crotty.[360] "For example, Standard Bank and Liberty have a strange relationship – Standard Bank is Liberty's largest shareholder and dominates the board. Thus Liberty's directors are only nominally independent."

The JSE Securities Exchange has cherry-picked only some King II provisions into its listing requirements, such as the separation of the CEO and Managing Director roles, and insists on remuneration and audit committees. "As a regulator, I need hard and fast rules to enforce. And there is full compliance – if rules are breached, companies are delisted" said John Burke, Director of Issuer Services at the JSE, who regulates all corporate activity on the exchange, including listing and the fulfilment of continuing obligations.

Unlisted Companies Not Adequately Regulated: But unlisted private companies, close corporations and other smaller entities are not included, and there is enormous room for "regulatory arbitrage". There is no consistency in enforcing business rules, and companies can simply choose to delist from the JSE and thus avoid a highly regulated environment. This means that significant corporations, such as Pioneer Foods or Macsteel, which are not listed on the JSE, do not have to comply with a whole list of corporate governance issues and offer less protection to customers and creditors.

> Given the difficulties of applying the guidelines across the entire South African economy, the recommendations of the second King report focus primarily on companies quoted on the JSE, banks and financial institutions, and public sector enterprises and agencies at both national and provincial levels. … There are a multitude of unquoted private companies, close corporations and other forms of corporate entities

[357] Telephone interview with T Dixon, 26 January 2006.
[358] Telephone interview with A Crotty, 27 January 2006.
[359] Temkin S, "Global corporate governance kingpin calls for tighter ships in local business", *Business Day*, 21 September 2005.
[360] Telephone interview with A Crotty, 27 January 2006.

> that fall outside the structures above…. There is no easy way to include them, given the limited capacity for enforcement that South Africa currently possesses, although it is desirable that they should fall within the ambit of good business practice.[361]

Judiciary Slow, Poorly Equipped for Commercial Disputes: Armstrong also notes that the slow, overburdened judicial system struggles to try commercial crimes, with a lack of training for prosecutors and judges on white-collar crime issues. The Leisurenet case took a decade to get to court, while the Parmalat and Enron cases were wrapped up within 18 months overseas.

More Enforcement Officials Needed: Implementation has also been lacking, as a result of limited capacity:

> Notwithstanding the ambitious goals set by the policy-makers to ensure good corporate governance, a perverse consequence (which is typical of most emerging markets) has been to raise doubt as to the institutional capacity of South Africa to implement the high standards desired. By and large, neither the structures nor the financial resources to carry out this mandate have been forthcoming. Consequently, the admirable objectives set by the authorities are sometimes undermined by the lack of capacity for full and proper enforcement of the regulations.[362]

See also discussion of **CIPRO**, above.

Disputes Over Corporate Law Reform: The corporate law reform process is intended to include many more of the King II principles in legislation. As mentioned earlier, there is some resistance within organised business, with the feeling that this will stifle entrepreneurship and place inordinately heavy burdens on small and medium enterprises.

Proposed changes to the Companies Act, – which will place "heavy responsibilities" (including potential criminal liability) on non-executive directors – are deterring experienced businesspersons from serving on the boards of non-blue chip firms, said IoD executive director Tony Dixon. Dixon told parliament's ad hoc committee on corporate governance in December 2005 that one proposed clause in the Companies Amendment Bill "would oblige members of audit committees to sign a statement to the effect that the annual financial statements complied with all laws",[363] over 120 of which affect business. Dixon elaborated:

> We have big concerns about the government trying to legislate corporate governance. Non-executive directors are being chased away by some of the harsh provisions in this Bill, which increase their personal liability for corporate failure. … They don't want to apply their skills and sit on boards or audit committees where we really need them – in municipalities or parastatals or failing companies. We have to limit their liability to say a multiple of their fee for fraud or negligence, rather than a proposed jail term. … The biggest single problem we face is enforcement. The old Companies Act had no teeth. The new one goes too far the other way.[364]

However, US laws imposed in the wake of Enron have similarly imposed the burden on directors to personally attest to the accuracy of financial statements.

Laws to Tighten Governance of State-Owned Enterprises

The Public Finance Management Act (PFMA) of 1999, which applies to all departments, constitutional institutions and public entities, aims to improve economic governance in the public sector by holding the "heads of departments accountable for the use of resources to

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[361] Armstrong P, Segal N and B Davis, *Corporate Governance: South Africa, A Pioneer in Africa*, Johannesburg: South African Institute of International Affairs, 2005, p 17.
[362] Armstrong P, Segal N and B Davis, *Corporate Governance: South Africa, A Pioneer in Africa*, Johannesburg: South African Institute of International Affairs, 2005, p 34.
[363] Ensor L, "Companies Act changes 'scare off directors'", *Business Day*, 6 December 2005.
[364] Telephone interview with T Dixon, 26 January 2006.

deliver services to communities".[365] The PFMA emphasises "regular financial reporting; independent audit and supervision of internal control systems; improved accounting standards; greater emphasis on output and performance; and increased accountability at all levels."[366]

- Municipalities that are sole owners of so-called municipal entities (power companies, etc) that are required to produce their own statements must consolidate those municipal entity reports into a consolidated report. In fiscal year 2005, 80% of the 15 such municipalities failed to file within three months of the close of the fiscal year.

Government is transforming its state-owned enterprises (SOEs), which form a major part of South Africa's formal economy, from loss-making, inefficient entities to "drivers of economic efficiency and growth".[367] In 2005, Minister of Public Enterprises Alec Erwin announced "plans to transform the parastatals [primarily SAA, Eskom, Denel and Transnet] from loss-making businesses – which act as a drain on the economy and add to the overall cost of doing business – into financially stable nuclei of activity and centres of excellence in key sectors of the economy".[368] Erwin said that public enterprises would be required to meet the same standards of profitability, and efficiency as the private sector, and increasingly become reliant on their own balance sheets rather than state support and guarantees. [369] It is probably too early to judge the results of these efforts.

As part of its focus on "reviewing laws and regulations necessary to ensure that the South African regulatory environment is operating in accordance with international best practices and conventions",[370] government comprehensively updated the Protocol for State-owned Enterprises on Corporate Governance in line with King II. The new protocol "incorporated more comprehensive and rigorous guidelines for public sector institutions".[371] It defines the roles and responsibilities of the boards of directors, the duties of accounting officers, as well as advising on monitoring and compliance, regular publication of data and reports, as well as BEE and employment equity.[372]

However, there has been great difficulty in applying the PFMA and MFMA to vastly different government entities.

- "There is … well developed legislation, which regulates the financial management of the public sector in line with international best practice … however, there are capacity constraints in complying with this legislation" admits the 2003 *Country Corruption Assessment Report.*[373]

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[365] Government Communication and Information System (GCIS), *SA Yearbook 2004/05*, SA Presidency, 2004, p 237.
[366] Government Communication and Information System (GCIS), *SA Yearbook 2004/05*, SA Presidency, 2004, p 237.
[367] Ensor L, "Minister dares SA's state-owned albatrosses to turn into tigers", *Business Day*, 18 April 2005.
[368] Ensor L, "Minister dares SA's state-owned albatrosses to turn into tigers", *Business Day*, 18 April 2005.
[369] Ensor L, "Minister dares SA's state-owned albatrosses to turn into tigers", *Business Day*, 18 April 2005.
[370] Pan African Consultative Forum on Corporate Governance (PACFCG), *South Africa: Corporate Governance Status*, April 2005, *www.corporategovernanceafrica.org.*
[371] Armstrong P, Segal N and B Davis, *Corporate Governance: South Africa, A Pioneer in Africa*, Johannesburg: South African Institute of International Affairs, 2005, p 24.
[372] *Protocol on Corporate Governance in the Public Sector*, Pretoria: Department of Public Enterprises, 2003.
[373] *Country Corruption Assessment Report- South Africa*, published jointly by the South African government and United Nations Office on Drugs and Crime – Regional Office for Southern Africa (UNODC/ROSA), April 2003, p 6.

- "Parastatals, government departments and municipalities are battling to get anyone to sit on audit committees and there seems to be far less than full compliance with the PFMA and MFMA," said IoD CEO Tony Dixon.[374]

APRM Objective 4: Stakeholder Engagement

APRM Corporate Governance Objective 4: Ensure that corporations treat all their stakeholders (shareholders, employees, communities, suppliers and customers) in a fair and just manner

Fair treatment of all stakeholders is a key tenet in the dti's approach to reforming company law in South Africa. While environmental impact assessment regulations provide for intensive stakeholder engagement, it is not always evident whether their issues are adequately dealt with. Whether poorer communities are as well listened to is up for debate.

The following issues are relevant to stakeholder engagement:

- Dialogue is encouraged by the government and is legislated in some areas, such as through collective bargaining with unions, workplace forums, and in Environmental Management Programme Reports (EMPRs) and Environmental Impact Assessments (EIAs) for mining companies (in which they are required to engage with all stakeholders, including the communities). However, whether the concerns of the poor and marginalised are voiced and considered remains an issue, especially in industries that do not require EMPRs or EIAs.
- Few companies report in depth on their stakeholders, including details of major conflicts or measures to resolve these issues. Many corporations erroneously regard stakeholders as shareholders only.
- There is a lack of accountability mechanisms for non-financial reporting; readership of sustainability reports continues to remain very low. Government needs to start assessing the reports, and engaging civil society to provide feedback on how companies can improve their reporting and results on their CSR/CSI.
- Economic imperatives drive most decisions. While this might be commercially sensible, it sometimes excludes other social or environmental considerations that may have a long-term impact on the country's sustainable development.
- The government has used sector charters to drive stakeholder engagement. For example, in the Financial Charter, companies have been challenged to create pro-poor products for the often-neglected disadvantaged customer base.
- Companies often regard stakeholder dialogue as stakeholders asking for money, when in actual fact there is a genuine need for relationship building and the fostering of trust.
- Stakeholder engagement is often a once-off event; it should be an ongoing process and not only a requirement for certain stages of project development or planning.
- It is clearly impossible to accommodate all needs of all stakeholders, yet it is possible to determine which are the most crucial and work with these.

APRM Objective 5: Corporate Accountability

[374] Telephone interview with T Dixon, 26 January 2006.

Since the King Reports there has been a greater emphasis on appointing independent non-executive directors. As Armstrong *et al* note:

APRM Corporate Governance Objective 5:
Provide for accountability of corporations, directors and officers

> The need for a proportion of independent board members as a counter-balance [to the tightly-knit South African business community] … has allowed particular emphasis to be paid to issues of diversity, both in terms of gender and race.[375]

There has subsequently been a surge of "director development and corporate governance training, led by the Institute of Directors in Southern Africa"[376] since the first King Report "drew attention to the importance of a properly-functioning board of directors as a key ingredient of good corporate governance".[377]

The IoD "has been particularly prominent in instituting training programmes for directors, whether inexperienced or experienced. Some 5,000 individuals have passed through the IoD's programmes over the past four years, following the interest stimulated by the second King review".[378] Director training and induction is "an imperative for any director appointed to a public sector institution and has gained considerable ground among private sector companies (listed and unlisted), while it is mandatory for any director appointed to a company quoted on the Alternative Exchange of the JSE".[379]

Skewed Racial and Gender Representation at Board Level

The Employment Equity Act calls for equitable racial representation within companies. Achieving these goals has been relatively more successful at the semi- and unskilled levels of employment, but remains a problem higher up the employment ladder, especially among women. The issue of diversity at board level, both in terms of race and gender, has received much attention in South Africa since the publication of King II in 2002.

Business Report cited figures from their own research in August 2005:[380]

- The boards of the companies they surveyed have on average 9% female and 25% black directors.
- Some of the largest and most expensive boards (e.g. AngloGold and AngloPlatinum) have some of the fewest black, female and independent directors.
- Fewer than one in ten members of remuneration committees are black or female, and there are no women or black directors on the remuneration committees of several top JSE companies: Naspers, Primedia, Edcon, Sanlam, Nedbank, FirstRand, Standard Bank, Imperial, Bidvest, JD Group, Pick 'n Pay, Shoprite, Ellerine, Barloworld, Datatec and AngloGold Ashanti.

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[375] Armstrong P, Segal N and B Davis, *Corporate Governance: South Africa, A Pioneer in Africa*, Johannesburg: South African Institute of International Affairs, 2005, p 18.
[376] Pan African Consultative Forum on Corporate Governance (PACFCG), *South Africa: Corporate Governance Status*, April 2005, *www.corporategovernanceafrica.org.*
[377] Armstrong P, Segal N and B Davis, *Corporate Governance: South Africa, A Pioneer in Africa*, Johannesburg: South African Institute of International Affairs, 2005, p 18.
[378] Armstrong P, Segal N and B Davis, *Corporate Governance: South Africa, A Pioneer in Africa*, Johannesburg: South African Institute of International Affairs, 2005, p 18.
[379] Pan African Consultative Forum on Corporate Governance (PACFCG), *South Africa: Corporate Governance Status*, April 2005, *www.corporategovernanceafrica.org.*
[380] "Key findings from six months of research by *Business Report"*, *Business Report* ,21 August 2005.

As Dr Namane Magau, president of the Businesswoman's Association of South Africa (BWASA) points out:

> While women make up 52% of the adult population in South Africa, they make up only 41% of the working South African population, constitute only 14.7% of all executive managers and only 7.1% of all directors in the country are women.[381]
>
> Women are significantly underrepresented in the boardrooms of corporate South Africa – both as an absolute number and relative to the rest of the world. … These results are in sharp contrast to women's strong representation in South Africa's parliament and in South African owner-managed businesses, where local companies rank among the best in the world.[382]

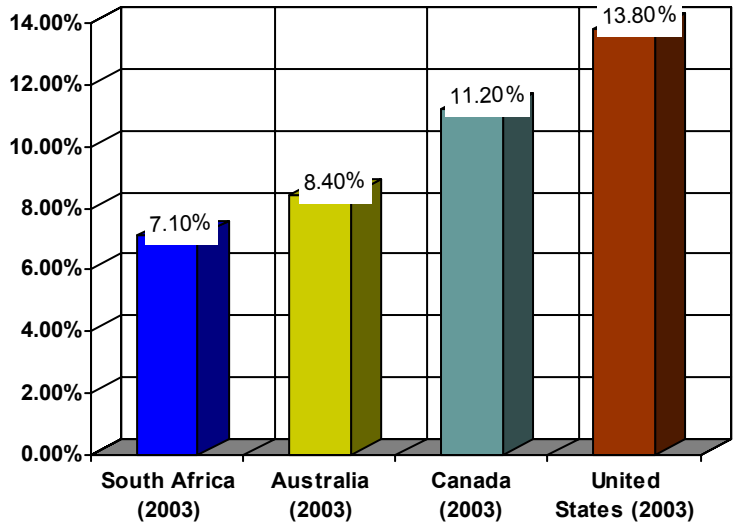

Figure 1: Percentage of board directors that are women

Source: Magau N, "BWA & Regional Dialogue on BEE (Catalyst Census)", *www.bwasa.co.za*

New Auditing Requirements Opposed by Industry

A key issue that has emerged in the wake of corporate governance scandals worldwide is whether auditors should be self-regulated, or regulated by an industry, governmental or independent oversight body. Is the voluntary nature of the King II code good enough, or is mandatory imposition of good governance required?

The new Auditing Profession Act (assented to by the president on 12 January 2006 but not yet implemented) aims to tighten up corporate governance standards by providing more regulation of auditors through the newly-established Independent Regulatory Board for Auditors. Auditors are obliged to report irregularities to the board and can face a "prison term of up to 10 years for making a false report".[383] However, the big three auditing firms – Deloitte, Ernst & Young, and KPMG – objected to the bill before it was passed into law, on the basis that it imposes too stringent oversight responsibilities on auditors. Ernst & Young said the proposal "obliging auditors to report irregularities such as fraud, theft and dishonesty" was not likely to be effective and "would result in companies being reluctant to

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[381] Magau N, "BWA and Regional Dialogue on BEE (Catalyst Census)", Powerpoint presentation to the Businesswoman's Association of South Africa, January 2005, *www.bwasa.co.za*

[382] Grant Thornton Business Owners Survey – 2003, cited in Magau *op. cit.*

[383] Ensor L, "Big three auditors in plea for fewer responsibilities under bill", *Business* Day, 17 October 2005.

disclose information to auditors".[384] KPMG said an auditor could not be expected to be able to identify irregularities in terms of all laws.

However, audit firms worldwide had come to enjoy overly close relationships with clients and faced fundamental conflicts of interests in offering management and information technology consulting services to those same clients. Regulatory changes in the US and Europe post-Enron and Parmalat impose much higher liability burdens on audit firms, which auditors would prefer to avoid when South Africa reforms its regulations.

- Kariem Hoosain, CEO of the PAAB acknowledged that failure by auditors to report illegal acts by partners, members, creditors, shareholders and investors – which could attract a ten year jail term – "may create havoc in the market and that auditors will err on the side of caution," but said that the PAAB was developing practical guidelines in conjunction with National Treasury to be able to reduce the flow of reports.[385] He also hoped that the Companies Amendment Act and Auditing Professions Act would come into force simultaneously.

The South African Institute of Chartered Accountants (SAICA) also raised key outstanding concerns about the draft legislation (with several problems from an earlier draft having been addressed).[386] These were:

- **Education, Training and Professional Development:** SAICA felt that the newly-formed Independent Regulatory Board of Auditors (IRBA) should set the standards for the profession as a regulator, rather than engage in its own education and training, or register auditors who do not follow a professional membership route.
- **Multidisciplinary Practices:** SAICA objected to the prohibition of auditing practices including non-auditing professionals, such as legal, actuarial and forensic specialists, given international practice and the complexity of audits.
- **Disciplinary Matters:** SAICA felt that "cognisance was not given to the volume of complaints and disciplinary matters currently handled" by the Public Accountants' and Auditors' Board (PAAB, which will become the IRBA in 2006), and which if unchanged would "grind the disciplinary process to a halt, and significantly increase the costs without any benefit."[387]
- **Reportable Irregularities:** SAICA felt the practical process for reporting would be "hugely cumbersome" and required "an enhanced but workable process and structure."[388] They also felt that definitions were not clear enough.
- **Composition of Committees for Auditing Standards:** SAICA felt that this section of the law was too prescriptive and inflexible, and should leave the selection of committees to the discretion of the IRBA.

More Staff Required: Thingle Pather, Project Director in the Standards Division of SAICA responsible for auditing and non-financial reporting, noted that these concerns

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[384] Ensor L, "Big three auditors in plea for fewer responsibilities under bill", *Business* Day, 17 October 2005.
[385] Telephone interview with K Hoosain, 27 January 2006.
[386] Sehoole I, SAICA Executive President, "Comment Letter on the Revised Auditing Profession Bill", 30 September 2005.
[387] Sehoole I, SAICA Executive President, "Comment Letter on the Revised Auditing Profession Bill", 30 September 2005, p 3.
[388] Sehoole I, SAICA Executive President, "Comment Letter on the Revised Auditing Profession Bill", 30 September 2005, pp 3-4.

were not addressed in the final Act. "There is just one person at PAAB currently receiving reports on material irregularities," she said in an interview. "They will need hundreds, because they will be flooded with correspondence. Auditors will be scared of criminal prosecution and so will report when in doubt."[389]

Excessive Executive Salaries

The huge salaries, performance bonuses and extensive share options given to chief executives (CEs) of some South African companies are worrying both in terms of corporate governance as well as economic sustainability. Excessive and poorly-explained CE payouts appear to run counter to the principles of transparency, accountability and fair and just treatment of all stakeholders, while also widening the gap between the rich and the poor.

A survey of around 900 companies by PE Corporate Services shows that the "gap between the remuneration of a CE of a medium-sized to large company in SA and the pay of a worker at the minimum wage has risen from 35:1 in 1994 to 55:1 in 2004".[390] Martin Westcott from PE Corporate Services said the survey "seems to confirm that the rich are getting richer and the poor are getting poorer".[391] South Africa's income disparity figure of 0.61 "is among the worst nations …. double that of the UK and US … worse than South America and marginally behind Zimbabwe".[392]

Recent performance payouts for CEs include Shoprite CE Whitey Basson's R51 million "performance bonus" for 2005, MTN CE Phuthuma Nhleko's 2004 bonus of R9.2m, Standard Bank's Jacko Maree (R9.1m) and Telkom's Sizwe Nxasana (R8.2m).[393]

> In 2001 Old Mutual CEO Mike Levett retired with a package of R150m, the main bulk of which were share options and pension. The following year it emerged that US national and South African Airways CEO Coleman Andrews had been paid R232m over a 34-month period at the helm of the airline, including pay of R100m, a share award equivalent of R59m and a termination payment of R74m.[394]

In November 2005, the *Financial Mail* found that salary increases of SA-based CEs "dipped to an average 9% from 15% the previous year" but also that the pay packages were more complex than above-inflation salary increases:

> A cursory glance at CE pay packages bears out the impression that SA bosses are rewarded more generously than either inflation or general pay rates might suggest. More careful analysis, though, reveals a complex amalgam of salaries, bonuses and share options – and raises questions about whether the JSE's compulsory pay disclosure policy, begun in 2003, goes far enough.[395]

The *Financial Mail* said that in some cases significantly high bonuses could be justified on the basis of performance and global competition for highly skilled executives but that this depended on two factors:

> the remuneration strategy and aspects such as criteria used in awarding performance-based bonuses; and how well companies explain these processes to outsiders. If boards fail at either of these, they risk making executive pay look indefensibly extravagant and contributing to perceptions of corporate greed.[396]

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[389] Telephone interview with T Pather, 27 January 2006.
[390] McNulty A, "CEO pay: Deep Packets", *Financial Mail*, 11 November 2005.
[391] Graham S, "Unions and management must up level of wage debates to avoid strikes", *Business Report*, 2 September 2005.
[392] World Council on Corporate Governance, news report, "Executives' cash windfall raises poverty question in South Africa", no date, *www.wcfcg.net/news_22.htm.*
[393] McNulty A, "CEO pay: Deep Packets", *Financial Mail*, 11 November 2005.
[394] World Council on Corporate Governance, news report, "Executives' cash windfall raises poverty question in South Africa", no date, *www.wcfcg.net/news_22.htm.*
[395] McNulty A, "CEO pay: Deep Packets", *Financial Mail*, 11 November 2005.
[396] McNulty A, "CEO pay: Deep Packets", *Financial Mail*, 11 November 2005.

Cosatu economist Neva Makgetla raises three concerns over rapidly increasing CE packages:

- Performance bonuses and share options tend to focus on short-run increases in stock price, rather than long-run investment in capital, technology and skills that can lay the basis for sustained and equitable growth.
- As long as most workers and communities see little improvement in their conditions, the sight of managers in business and the state awarding themselves lucrative packages goes down very hard.
- Accelerated, sustainable growth is impossible without greater equity.[397]

Makgetla said that "proponents of exorbitant management packages argue that they are needed to retain high-level personnel, who will otherwise move overseas". However, South Africa "can never hope to compete on remuneration with the richer industrialised countries" and should rather "build greater commitment to the country and shape working conditions that can inspire high-level personnel".[398]

The World Council on Corporate Governance news report also warned that

> With unemployment sitting at [about]30% of South Africa's economically active population and four-fifths of the population earning less than R3,000 a month, exorbitant directors' salaries are likely to be the cause of considerable unrest.[399]

Challenges of Black Economic Empowerment (BEE)

The government's BEE policy, designed to deracialise and stimulate participation of previously disadvantaged groups in the economy, is regarded as a social and political imperative to address the economic disparities of the past.[400] Through sector-specific charters in particular, BEE is "having a significant impact not only on the equity structure of companies, but also is rapidly transforming the structure and composition of boards of companies and their management".[401]

Vuyo Jack, executive chairman of Empowerdex analyses the seven different BEE mechanisms now outlined in the 2003 Broad-Based Black Economic Empowerment Act and use of BEE scorecards that hope to advance people at different economic stages:

- **Corporate social investment** helps move people from below the poverty line, but government continues to shoulder responsibility in meeting basic needs.
- **Employment equity** and **skills development** are tools to move those in "economic survival" mode to the "economically ready" stage, when all they will require are opportunities, resources and networks for their businesses to flourish.
- **Ownership, management, preferential procurement** and **enterprise development** are the key tools to allow people to progress to the "economically empowered" stage.[402]

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[397] Makgetla N, "Why we should care about excessive pay", *Business Report*, 2 November 2005.
[398] Makgetla N, "Why we should care about excessive pay", *Business Report*, 2 November 2005.
[399] World Council on Corporate Governance, news report, "Executives' cash windfall raises poverty question in South Africa", no date, www.wcfcg.net/news_22.htm.. Note that South Africa's unemployment rate is currently calculated at 26%, using the narrow definition of unemployment.
[400] Broad-based Black Economic Empowerment (BBBEE) is defined as "the economic empowerment of all black people including women, workers, youth, people with disabilities and people living in rural areas through diverse but integrated socio-economic strategies" in the Broad-Based Black Economic Empowerment Act of 2003.
[401] Pan African Consultative Forum on Corporate Governance (PACFCG), *South Africa: Corporate Governance Status*, April 2005, *www.corporategovernanceafrica.org.*
[402] Jack V, "Empowerment Partnerships", *New Agenda*, Issue 20, Fourth Quarter 2005, p 1.

South African companies are adjusting to empowerment issues, even if there was initially scepticism and resistance; however, transformation is not happening in the same manner or at the same pace across the corporate spectrum. Firms are beginning to see the business sense behind empowerment, and recognise the costs to business for not transforming, such as losing out on contracts with government, and being seen as out of step with national priorities.

BEE Issues

BEE is necessary for the political order and economic growth. However, it has several significant dangers that are increasingly on display. These include: lack of breadth, its debt basis, compromising corporate governance principles, failure to focus on real skills transfer systems, and it raises conflict of interest/corruption issues in the form of fronting or giving major stakes for free to serving government officials or those who have just left government (See **Economic Governance and Management** section on conflicts of interest, page 76).

Empowering Elites: Government's empowerment strategies to date have tended to enrich a proportionately small clique of black business people, overlooking the broad-based intentions of the policy.[403]

Vuyo Jack recently summed up the initial BEE record:

> In the last 10 years there has been slow movement towards the advancement of people because the only tool used was "ownership", with no focus on transferring economic benefits and voting rights to black people. This form of wealth transference is playing economic musical chairs or a game of smoke and mirrors … when the smoke cleared there were some black casualties behind. There is little to show for this period other than key lessons to learn and things to avoid. [404]

Political author William Gumede said, "Now it's not just a few whites at the top, but a handful of blacks joining them. This is 'cappuccino' empowerment – white foam sprinkled with chocolate."[405]

Share Ownership vs Real Skills Development: A bias towards ownership has concentrated on gaining share ownership among a small pool of politically well-connected senior black party members. There has been a consequent neglect of more meaningful and empowering activities such as improvement of management, training or industry-specific knowledge. Deputy President Phumzile Mlambo-Ngcuka counters these criticisms, arguing that while the big BEE deals involving prominent people are reported in the media, "there are many unreported deals that catch limited or no media attention".[406]

Jack also outlines the three different types of BEE partnerships. **Operational partners** are usually independent black entrepreneurs who have run successful businesses before merging with or buying into other companies in the same sector. **Broad-based partners** include development trusts, union funds, business association funds and employee share ownership schemes which use investment management companies to engineer BEE deals. Their many beneficiaries do not run the funds e.g. Kagiso Trust, Women's Development Bank and

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[403] Initially, the lack of access to capital by black investors proved challenging, which partly explains why the same small group of (politically connected) black capitalists tended to repeatedly land lucrative deals. However, companies have recently begun to allocate shares to black employees and trusts representing the poor communities in an attempt to broaden empowerment initiatives. See Davids E and A Hale, " The Art of BEE Transaction Financing," 18 August 2004. Bowman and Gilfillan, http://www.bowman.co.za/LawArticles/Law-Article.asp?id=825778281.

[404] Jack V, "Empowerment Partnerships", *New Agenda*, Issue 20, Fourth Quarter 2005, pp 1-2.

[405] Quoted in Clayton J, "'Cappuccino' empowerment that left a bitter aftertaste", *Timesonline*, 31 January 2006.

[406] Mlambo-Ngcuka P, "Adding value at the rock face: Empowerment lessons from the mining sector", *Umrabulo*, February 2005.

Nathold. Finally, **influential partners** are those who carry political sway through their extensive networks of contacts, with struggle credentials that win lucrative deals. [407]

Empowering Former Politicians: Jack writes: "When influential politicians change careers … to business, a flurry of suitors flood them with opportunities [in exchange] for the received return of access to political networks." [408] The more prominent the former politician, the greater the opportunities, and the more deals s/he concludes, "the more bankable s/he becomes as a dealmaker, and the stakes get higher." He cites the incremental value of deals secured by ANC heavyweights Tokyo Sexwale, Cyril Ramaphosa and Saki Macozoma.

BEE Equity is Debt-Based: Because few black business people initially had the capital to buy significant ownership stakes, BEE share ownership has been overwhelmingly financed by granting ownership in exchange for loans to pay for the shares. This model is sustainable only if share prices continue to rise faster than interest rates on the debt, which puts a "lack of sustainability of empowerment shareholding" at the core of BEE.[409] Where black capital is absent, deals happen through combining debt and discounts on share purchase prices.

BEE May Discourage Investment: For foreign investors, equity and ownership quotas may adversely influence investment decisions. Moeletsi Mbeki said, "The JSE has huge numbers of foreign investors coming from outside. If you're going to force them to sell 26% of their company, you're driving a foreign disinvestment programme."[410]

BEE Compromising Corporate Governance Standards: Armstrong said that black economic empowerment would prove to be the most challenging issue for governance.[411] He noted compromises to best practice that companies have been making in pursuit of BEE objectives, including non-executive board members being given shares in management schemes, while "good corporate governance demands that financial arrangements with non-executive directors should be kept separate from those with management."[412]

The shortage of experienced and well-connected black executives has led to some serving on the boards of many companies, which has led to a dilution of their oversight capacity. For example, Cyril Ramaphosa sits on at least eight major boards – including SABMiller and Standard Bank – and in 2005 attended just one out of five board meetings at Bidvest, where he became chairman in 2004. He did not serve on Bidvest's audit, nominations or remunerations committee, yet was paid R360,000 for being the chairman.[413]

But it is not only black businessmen that are represented on multiple boards. *Business Report* graphically illustrated the overlap:

> Such is the interconnectedness of boardrooms in South Africa that if just nine individuals – Doug Band, Les Boyd, Dave Brink, Warren Clewlow, Brian Connellan, Len Konar, Eric Molobi, David Nurek and Cyril Ramaphosa – contracted a highly infectious disease, then within six months it is likely that company boards

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[407] Jack V, "Empowerment Partnerships", *New Agenda*, Issue 20, Fourth Quarter 2005, pp 1-2.
[408] Jack V, "Empowerment Partnerships", *New Agenda*, Issue 20, Fourth Quarter 2005, p 3.
[409] Cargill J, "Filling cracks in BEE edifice", *Business Day*, 13 October 2005.
[410] Quoted in Clayton J, "'Cappuccino' empowerment that left a bitter aftertaste", *Timesonline*, 31 January 2006.
[411] Temkin S, "Global corporate governance kingpin calls for tighter ships in local business", *Business Day***,** 21 September 2005.
[412] Quoted in Temkin S, "Global corporate governance kingpin calls for tighter ships in local business", *Business Day***,** 21 September 2005.
[413] Rose R, "Will Bidvest explain Ramaphosa's failure to attend all board meetings?", *Business Day*, 24 October 2005.

representing at least 90 percent of the market capitalisation of the JSE would be laid low with that same disease.[414]

"Fronting" Undermines BEE: Another issue of concern is "fronting", which is the practice of white companies using black business people (which includes black, Indian and coloured people), to present a veneer of empowerment without any genuine transfer of wealth or control taking place.

- In August 2005, Minister of Public Works Stella Sigcau revealed the results of an investigation that found that 15 companies had cost her department R440 million from 2003 to 2005 by posing as BEE entities.[415]
- In September 2005, Gauteng Premier Mbhazima Shilowa said,

  A contract obtained through fronting should be considered to have been fraudulently acquired and punishable by law … Fronting is stealing public money. We must have a blacking out mechanism. Once a company is found to be guilty of fronting it should be barred from receiving government business in future,"[416]

- Van Vuuren said:

  This form of fraud – perpetrated by both parties – has the potential to reduce the current 'empowerment' policy to a mere bureaucratic hurdle for businesses and individuals intent on subverting it. This does little for the cause of ensuring long-term equity of ownership in the economy as envisaged in these policies – and in the constitution.[417]

Broad-Based Ownership is Problematic: Vuyo Jack raises five main concerns about whether broad-based ownership schemes (trade unions, employee trusts and other collective enterprises) will achieve BEE objectives, and how those looking for BEE scorecard points can exploit them:[418]

- Some trusts have unspecified or vague beneficiaries, and may not explicitly target black people in their trust deeds or founding documents.
- Sometimes groups are unknowingly included as part of BEE consortia, and thus not empowered.
- These groupings carry enormous time and administration costs to set up.
- Economic benefits will only accrue to the beneficiaries after a long time, sometimes in 13, 25 or even 55 years.
- The greater the number of beneficiaries, the smaller the value each will receive.

In concluding his article, Jack writes:

> The major issue is that BEE has not led to the creation of new markets and new drivers of economic demand in the economy yet … [but] the broad-based BEE strategy is one of the most innovative transformation policies in the world to date because it relies on commercial leverage to achieve its aims with no direct penalties applied, and inherently ensures a spread of benefits to a broader range of beneficiaries."[419]

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[414] "Key findings from six months of research by *Business Report"*, *Business Report,* 21 August 2005.
[415] Mametse D, "Fronts will face the full might of the law: Sigcau", *Moneyweb*, 2 August 2005, *www.moneyweb.co.za;* Mofokeng M, "BEE-fronting companies cost government R441m", *Mail & Guardian*, 2 August 2005.
[416] "Fronting is stealing public money", *Business Report*, 9 September 2005.
[417] Van Vuuren H, *National Integrity Systems Transparency International Country Study Report* Final Draft South Africa 2005, p 67.
[418] Jack V, "Empowerment Partnerships", *New Agenda*, Issue 20, Fourth Quarter 2005, pp 3-4.
[419] Jack V, "Empowerment Partnerships", *New Agenda*, Issue 20, Fourth Quarter 2005, pp 3-4.

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