

Reflections on the Delivery of Justice in South Africa Over the Last 20 Years

With the eyes of the world on South Africa's criminal justice system because of the Oscar Pistorius trial, it is perhaps an appropriate moment to reflect on the delivery of Justice by our constitutional democracy during the first 20 years of its existence.

International media ratings for South Africa are higher for this trial than when we hosted and staged the FIFA World Cup soccer tournament in 2010. And South Africa is putting on a great show thanks to the entrepreneurial spirit of certain media houses and the enlightened judgement of North High Court Judge President Dunstan Mlambo, (a very sober judicial officer who for years chaired the Legal Aid Board), which has allowed much of the proceedings to be carried live on radio and TV. Appropriately, he built in protections for both accused and witnesses to comply with our Constitution but with one stroke he has made the adage –Justice must be seen to be done – real for the smartphone-Twitter-Facebook generation. With a judge from central casting – Judge Masipa is symbolic of South Africa's aspiration to have women and black people holding high judicial office – a celebrity accused and witnesses more glamorous than from a TV series, the real life courtroom drama is gripping indeed.

Equally impressive is South Africa's criminal procedure with all the checks and balances mandated by our progressive Constitution. It is a system we can be proud of. We can watch a criminal justice system which is orderly, erudite, articulate and fair. The cameras are not lying. This is how it works in our High Courts and our Appeal Courts. Even more impressive of course, is to watch our Constitutional Court in operation. Possibly one day soon, now that Judge President Mlambo has broken the ice, this will happen around some cause célèbre.

Sadly there is another reality in our criminal justice system: a very low conviction rate. Of all serious criminal cases reported to the police, like rape and murder, only 8-10 per cent make it to trial – and this in a country which has the highest rape rate and one of the highest murder rates in the world. Remarkably the rate has remained virtually constant over the past 10 years, despite the earnest protestations of those responsible in Government that measures are being taken to remedy this shaming statistic. Once cases get to court of course, the conviction rate rises to nearly 80 per cent in the High Courts and slightly less in the lower courts. However, the approximately half million missing accused that disappear from the criminal justice system every year is an uncomfortable blot on it. These cases fall by the wayside because of notoriously poor policing, poor investigation by both detectives and prosecutors who are often impossibly burdened with dockets (140 at a time is not unusual), all of which contributes to poor and slow delivery of Justice, particularly in the lower courts.



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Corruption is also not unknown. Often, before cases actually get to trial, dockets go missing (at a price), or witnesses disappear. Some police officers are in the pockets of crime bosses and some court interpreters who are an important cog in the wheel of the criminal justice system, particularly in the lower courts are corruptible and incompetent. In a nasty new development key investigators are assassinated by hitmen when the stakes are high enough.

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A discussion of South Africa's criminal justice system in the past 20 years would be incomplete without a reference to the disappearance of the death penalty from our law. This is another reason why our Constitution is regarded as progressive. Our Constitution states, in simple terms, that: "Everyone has the right to life" (section 11 of the Bill of Rights). This occasioned a number of hectic manoeuvres during negotiations on the Bill of Rights of the Interim Constitution in 1993. First off, Nelson Mandela insisted on a moratorium on the death penalty while negotiations were in progress. The fact that nearly all the people on death row (over 450) were black men spoke volumes, quite

apart from principle. Chief Justice Corbett (at the time) rendered a legal opinion to the negotiating group that, if the right to life was so clearly and unequivocally put, there could never again be a death penalty. This was later confirmed in 1995 in the State vs Makwanyane by the newly constituted Constitutional Court.

A debate on the issue was held in Parliament in 1993. As a newly minted Deputy Minister of Justice, and one of only a few NP MP's who had always been against the death penalty, I was in an awkward position. But to his credit, President FW De Klerk encouraged me to go out fighting and speak against the death penalty in the National Assembly, which I did. I believe it is to South Africa's everlasting credit that this barbarous punishment was done away with. In fact, South Africa went further. The final Constitution affirms the freedom and security of the person human dignity and the right not to be subjected to cruel, inhuman or degrading punishment. Unfortunately – quite often – officers of the law are captured on camera ignoring these provisions.

However, it is in the context of the criminal justice system where the majority of ordinary people encounter justice. During apartheid the experience of the majority was extremely negative. This is why the Bill of Rights dedicates a long section to the rights of arrested, detained and accused persons (section 35), but with no corresponding section on the rights of victims!

In summary, the South African criminal justice system demonstrates much the same symptoms as the rest of our country's administration. The Constitution is laudable and progressive; the laws are sound and clearly set out and have been extensively amended to bring them into line with the Constitution. Other laws have been introduced to ensure that the Constitution becomes a reality in citizens' lives, such as a new Sexual Offences Act, the prevention of domestic violence legislation, a reformed abortion law and so on. To show they meant business in fighting South Africa's excessively high crime rate, in the early 2000's Government introduced heavier penalties for serious crimes. In spite of a tight budget, a court building and maintenance programme has ensured a relatively high standard of court facilities.



However, it is the implementation of all this that fails. There is often inadequate training for lower court officials, too many vacant posts at all levels, loyal cadres being deployed in posts they are not – to use the constitutional phrase applied to judicial officers – “fit and proper” to hold (although there is less of this in the Justice sector than most others). These failings apply across the board in criminal and civil justice – overlong delays are a real problem in civil cases. To be fair, it must be conceded that many of these problems are common to justice systems around the world.

The Constitution guarantees the right of access to court and to have disputes resolved. South Africa was bequeathed by its former colonial masters a sound system of civil law which endures to this day – contractual certainty enforceable in the courts, constitutional safeguards for property rights, and an excellent system of deeds registration, administration of estates and the registration of business entities and trade rights .

All are plagued by the ills that dog other aspects of the administration of Justice listed above and as a result efficiency has deteriorated over the past 20 years. The civil courts are often subject to excessive delays. On the other hand, post-1994, the civil courts have been modernized and expanded to include a system of specialist courts such as the Labour Courts, the Competition Appeal Court, the Electoral Court and so on. Good moves.

So what are the most positive aspects of our Justice system and Justice delivery which set us apart? By far the most important is our constitutionalism: the fact that the Constitution is the supreme law of our country and cannot be easily or lightly

By far the most important is our constitutionalism: the fact that the Constitution is the supreme law of our country and cannot be easily or lightly changed or challenged. It establishes the Rule of law, guaranteed by an independent Constitutional Court of 11 Judges including the Chief and Deputy Chief Justice – in other words: it is our apex court.

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One of the most positive stories coming out of South Africa in the past 20 years is the magnificent performance of our Constitutional Court. It is an acknowledged world leader in the development of socio-economic rights, namely rights of access to housing, health and education. The Constitution, in the Bill of Rights – Chapter 2, gives Government some leeway, as far as the realization of these rights by ordinary folk is concerned, in that it provides that “the state, through reasonable measures, must make, within its available resources, [access to health, education, and housing] progressively available”. The Concourt was not prepared to leave it

there, and in a number of judgements has taken an activist stance – notably the case of Irene Grootboom and the Marconibeam squatters, insisting on follow-up reports from the erring Western Cape government at the time, which in the opinion of the Court had failed to comply with either the provision in the Bill of Rights of the Constitution or the Concourt’s ruling on the provision of housing for these squatters. The Grootboom case is one of the leading cases around the world on such issues. Sadly Irene Grootboom herself died before seeing any change in the condition of her squatter community, but in the annals of socio-economic right cases her name is writ large.

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As Deputy Minister of Justice in 1993, I represented the government at the Multi-Party Talks concerning the negotiation of the content of the Bill of Rights and the new constitution. Former president FW de Klerk commented at the time that I should always be grateful to him, for there is no higher calling for a lawyer than to help draft a constitution. I must agree.

It was a formative experience of my life. One of the main reasons South Africa’s constitution is regarded as one of the most progressive in the world, is the Equality Clause (section 9 of the Bill of Rights) which is one of the most extensive there is. A further reason involves the institutional framework created particularly by Chapter 9, calling for “State institutions supporting Constitutional Democracy”. These institutions whose independence is guaranteed in the Constitution, include the Public Protector (currently Thuli Madonsela – who is fast becoming a legend), the South African Human Right Commission, the Commission for Gender Equality, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Minorities (a constitutional acknowledgement of our diversity), the Electoral Commission and the Auditor General. Their performance has not always been consistent but on the whole they have performed well and are enormously important, together with the courts, for upholding the Rule of Law in our country. During the negotiations on the above two elements of our Constitution, the Equality Clause was quite a tough sell, particularly the part outlawing discrimination on the basis of sex, gender and sexual orientation, which was strongly opposed by traditional leaders. In the end a very strong multi-party women’s lobby prevailed.

Another important reason for the respect South Africa's Constitution that has engendered around the world, is the section on the Courts and the Administration of Justice (Chapter 8) and the protection this has afforded to the Rule of Law in our country. I would like to highlight one aspect of this and it is the mechanism laid down in the Constitution for the appointment of judges. This is done through the Judicial Service Commission (JSC), on which I served for 10 years.

In order to guarantee the separation of powers with a court system that functions independently, it is essential to appoint judges who are not corrupt or easily influenced by the political powers that be. The best way to ensure this is through a transparent process of appointment. Most developing democracies wrestle with this problem. A case in point is Eastern Europe, (where I served as Ambassador to Bulgaria for 4 years), as it emerged from Soviet domination where independent courts were unknown. Only since its membership of the EU in 2007 has Bulgaria begun to put mechanisms in place to ensure a transparent process of appointing judges and to put a stop to the endemic corruption in the judiciary, which plagues European countries outside the ambit of the EU (such as Ukraine).

I believe that the process of appointment of judges through the JSC, as set out in our Constitution, is one of the most open and transparent in the world and compared to most other countries, less subject to political interference – at least on paper. It is a rigorous process. Judges, or would-be judges, have to make application in terms of a detailed questionnaire, with support from their peers; and they are subject to a sifting process conducted by the non-politicians on the JSC. The successful candidates appear before the JSC in a public process including the media and are subject to extensive questioning by the 20 plus members of the Commission. This process is a great leveller and a candidate who is not an appropriately qualified 'fit and proper person', usually falls by the wayside. Yes, there are a number of politicians in the JSC – the representatives of the National Assembly, the Council of Provinces, and the Justice Minister – and yes, probably more members of the Commission support the governing party than not – after all the President can appoint 4 members. However, in the 10 years of my experience, every attempt was made to avoid political appointments. Possibly this was due to the calibre of the chair – always the Chief Justice and, in my case, Arthur Chaskalson and Pius Langa, with luminaries like George Bizos serving as the President's appointees.

Political will is also required to make such institutions operate optimally. Much criticism has been directed at the JSC of late and in my view it would be a tragedy for our country if such an outstanding institution should fail. It has been emulated by the UK when Tony Blair instituted judicial reforms. (Both Germany and the US have a much more politically influenced process of appointing top judges.)

In conclusion, one can say that during the past 20 years of our democracy the Justice system has been a bit like the proverbial curate's egg – good in parts. However, as can be seen daily on our TV screens and those around the world the delivery of justice is in full swing in South Africa.

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