

Unrest and Violence: 2019

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Abstract

The year 2019 was characterised by gang and taxi violence. In the reporting period, the South African Police Services published the 2018 crime statistics, revealing an alarming increase in violent crimes. The annual report of the Inspectorate Judge of Correctional Services revealed that prisons remain overcrowded. Section 12(1)(a) of the Gatherings Act 205 of 1993 was declared unconstitutional. Regulations to assist dependents of victims of apartheid in relation to basic and higher education, were amended. Police corruption was addressed and neighbourhood watches in the Western Cape were accredited. In this article, two cases that dealt with parole are discussed regarding the calculation of the date of parole, as well as a court's order regarding the minimum sentence that a prisoner has to serve, before he or she can apply for parole. A decision of the Western Cape High Court is discussed in relation to the treatment of transgender prisoners. The independence of the Judicial Inspectorate of Correctional Services in relation to the *Sonke* case is dealt with. A Bill introduced a new military court structure, as well as described the role of the military police. A private member Draft General Intelligence Law Amendment Bill, 2019, now provides for more oversight of the intelligence services regarding finances. The note also refers to the destruction of firearms, the issuing of licences for firearms with new components, as well as the court's decision in *Corruption Watch v Arms Procurement*, where the court overturned the Commission of Inquiry's report regarding controversial arms procurement of 1997–1999. Gender-based violence has still not been addressed adequately, despite promises to strengthen legislation in this regard. In relation to terrorism, new financial regulations are being put in place.

Keywords: unrest; violence; crime statistics; violent protests; truth and reconciliation; security services; firearms and ammunition; domestic violence; terrorism

Introduction

The year 2019 was characterised by violence and unrest. The South African Defence Force was, for example, deployed to address gang violence on the Cape Flats, leading to a reduction in the number of violent incidents (Meyer 2019). Taxi violence also erupted, and commissions of inquiry were established in Gauteng to investigate the issue.¹ Extraordinary measures were published for comment² in the cities of Johannesburg and Tshwane to ensure public safety and the safe transport of passengers. Xenophobic attacks continued in the report era, which Chief Justice Mogoeng described as the act of hungry people (Bhengu 2019).

The crime statistics published in 2019 indicate some successes but violent crimes still had a high prevalence. The year 2019 was also characterised by violent protests.

Assistance for basic and higher education provided to descendants of victims (identified in terms of the Promotion of National Unity and Reconciliation Act 34 of 1995), was extended for another year.

There were several court cases involving the security services, arms and ammunition and domestic violence. Regulations were issued to deal with financial transactions that may relate to terrorism.

In this article, the most important measures and cases that were implemented or occurred during 2019, are detailed and discussed³ pertaining to:

- Crime statistics.
- Violent protests.
- Truth and reconciliation.
- Security services.
- Arms and ammunition.

1 GN 1471 in Gauteng PG 297 (27 September 2019)—issued in terms of the Constitution of the Republic of South Africa, 1996 and Provincial Commissions Act 1 of 1997—Practice Directive issued in terms of Rule 13 of the Rules Governing Proceedings of the Commission: Guidelines on the Media Coverage of Proceedings of the Commission; GN 1472 in Gauteng PG 297 (27 September 2019) issued in terms of the Constitution of the Republic of South Africa, 1996 and Provincial Commissions Act 1 of 1997—Rules of the Commission of Inquiry into Minibus Taxi-Type Service Violence, Fatalities and Instability in the Province of Gauteng.

2 GN 1809 in Gauteng PG 397 (4 December 2019). Issued in terms of the National Land Transport Act 5 of 2009.

3 If pertinent, some cases or regulations of 2020 are also referred to.

- Domestic violence.
- Terrorism.

Crime Statistics

In September 2019, the Minister of Police, Mr Bheki Cele, released the crime statistics for South Africa for the financial year 2018/2019. The general trends in the statistics are discussed in the next section.

Contact crimes are crimes where the victims of the crime are the target and are subjected to violence or the threat thereof (SAPS 2019b). Contact crimes include the following crimes: murder, attempted murder, sexual offences, assault and robbery. In general, contact crimes increased by 2,6 per cent from 601 366 to 617 210 reported cases during the 2018/2019 financial year (SAPS 2019a). All nine provinces reflected a gradual increase in the number of reported contact crime cases (SAPS 2019a, 6). This is alarming, since contact crimes include the most violent and dangerous crimes.

The total number of reported cases for murders has continued to increase since 2012/2013, when only 16 213 cases were reported. The total number of reported murder cases increased by 3,4 per cent or 686 more cases from 2017/2018 to 2018/2019 (SAPS 2019a, 7). Considering that 21 022 murders were reported for 2018/2019 (SAPS 2019a, 7), the murder rate per 100 000 people increased from 35,8 to 36,4. On average, 58 people were murdered daily in South Africa (Africa Check 2019). The main causative factor for murder appears to be misunderstandings or arguments between the parties with a total number of 1 727 reported murder cases related thereto. Other causative factors include domestic violence, with 1 115 related murder cases and 1 120 gang-related murders (Africa Check 2019). Various instruments or weapons were used during the commission of murders. The most prominent type of weapon appears to be firearms, being used in 7 156 of the reported cases of murders. Knives and sharp instruments were used in 6 272 reported cases of murders (Africa Check 2019). This is indicative of the violent nature of the crimes.

Attempted murder cases showed a gradual increase in the number of reported cases from 2012/2013. In 2018/2019, a total number of 18 980 attempted murder cases were reported with a case difference of 4,1 per cent or 747 cases in comparison with 2017/2018 (SAPS 2019b, 7). The main causative factor for attempted murder is similar to that of murder, considering that attempted murder is an unsuccessful murder attempt. Misunderstandings or arguments (1 874), gang-related (1 847) and armed robbery (1 572) were the most prominent causative factors for the number of reported attempted murder cases (SAPS 2019b, 6). Similar to murders, firearms (13 360), knives (1 771) and sharp instruments (526) were the most common weapons used during attempted murders (SAPS 2019b, 6). The causative factors, as well as the weapons used during attempted murders, confirm the strong link between murders and attempted murders.

Sexual offences refer to cases which include sexual activities with no consent by the victim of the crime (SAPS 2019b, 6). For purposes of the crime statistics, sexual offences are categorised as follows: rape, sexual assault, attempted sexual offences and contact sexual offences (SAPS 2019b, 7). From 2009/2010 to 2016/2017 a widely criticised decrease in the number of reported sexual offences were recorded (SAPS 2019b, 7). The reasons for such critique include the fact that, in most cases, the victims know the perpetrator, as well as the underreporting of sexual offences by the victims as a result of fear. A total number of 52 420 sexual offences were reported in 2018/2019, with a case difference of 2 312 or 4,6 per cent in comparison with 50 108 recorded in 2017/2018 (SAPS 2019b, 7). This resulted in an increase in the sexual offences crime rate from 88, 3 to 90, 3 per 100 000 people (Africa Check 2019, 11). Rape, as a sexual offence, indicated a similar decrease in the number of reported cases between 2009/2010 and 2016/2017. Between 2017/2018 and 2018/2019 a case difference of 148 or 3, 9 per cent in the total number of reported rape cases were experienced (SAPS 2019b, 7). On average, 114 people were raped daily in South Africa (Africa Check 2019, 11), with most rape victims being females in the 20–39 age group (SAPS 2019b, 6). It is important to stress that the reported number of cases does not necessarily reflect the actual number of sexual incidents (Africa Check 2019, 11). It is, therefore, argued that the statistics for sexual offences are not a true reflection of the realities faced. However, an increase in the number of reported cases is commended in that the victims should be encouraged and assisted to report these offences more regularly.

In the context of assault crimes, a distinction is drawn between common assault and assault with the intent to inflict grievous bodily harm (assault GBH). The total number of reported common assault cases indicated a case difference of 5 769 or 3,7 per cent for 2018/2019. This is an increase from 156 243 cases in 2017/2018 to 162 012 in 2018/2019 (SAPS 2019b, 7). A total of 444 common assault cases were recorded daily in South Africa (Africa Check 2019, 11). Assault GBH indicated an increase from 167 352 in 2017/2018 to 170 979 in 2018/2019, a case difference of 3 627 or 2,2 per cent (SAPS 2019b, 6). The following causative factors were cited for assault GBH: misunderstandings or arguments (27 813 reported cases), domestic violence (19 687 reported cases) and revenge (1 220 reported cases). Hands were used in 96 833 reported cases to commit assault GBH. Knives and sharp objects were used as weapons in a combined total of 54 183 assault GBH cases (SAPS 2019b, 7). Daily, 468 assault GBH cases were recorded in South Africa (Africa Check 2019, 11). Taking the daily recorded cases for common assault and assault GBH into account, a combined total of 912 assault cases per day were recorded during 2018/2019.

Robbery consists of two types: common robbery and robbery with aggravating circumstances. Common robbery was reported with a case difference of 1 035 or 2 per cent during 2018/2019 in comparison with 2017/2018. A total of 51 765 common robbery cases were reported for 2018/2019 (SAPS 2019b, 7). Per day, a total of 142 common robbery cases were recorded (Africa Check 2019, 11). Robbery with aggravating circumstances was reported in 140 032 instances, an increase of 1 668 or

1,2 per cent for 2018/2019 (SAPS 2019b, 7). During 2018/2019, 684 cases of robbery with aggravating circumstances were reported per day (SAPS 2019b, 7). Certain subcategories of aggravated robbery were also indicated in the crime statistics. These include the following with the case difference between 2017/2018 and 2018/2019 indicated in brackets: carjacking (-1,8%), robbery at residential premises (0,8%), robbery at non-residential premises (-0,3%), robbery of cash in transit (-23,1%), bank robbery (-69,2%) and truck hijacking (-1,7%) (SAPS 2019b, 7). The reliability and accuracy of some of these statistics are questionable. For example, according to the South African Police Service (SAPS), only four bank robberies were reported for the period 2018/2019. However, the South African Banking Risk Information Centre (SABRIC) in their annual report indicated that there were 105 bank robberies. SABRIC takes into account both successful and unsuccessful bank robbery attempts (SABRIC 2019). It appears the SAPS employ a narrow definition of what constitutes a bank robbery (see De Wet 2019). A similar issue appears with the review of robbery of cash in transit cases. The SAPS, when announcing the crime statistics, must clearly define what is taken into account when the cases are reviewed and considered under specific crimes.

Contact-related crimes are crimes which cause damage to or the destruction of the property of another. This also includes cases where personal property of an individual is damaged or destroyed for purposes of insurance claims (SAPS 2019b, 6). In general, contact-related crimes increased from 115 361 in 2017/2018 to 117 172 in the 2018/2019 reported period, which indicates an increase of 1,6 per cent in the total number of reported cases (SAPS 2019b, 7). Contact-related crimes include arson and malicious damage to property. From 2009/2010 to 2018/2019 a decrease in the number of arson cases was reported. The years 2018/2019 indicated a case difference of 5,5 per cent in comparison with the total number of reported cases for 2017/2018, that is, 3 869 cases during 2017/2018 and 4 083 during 2018/2019 (SAPS 2019b, 7). Malicious damage to property indicated a slight increase in the number of reported cases. The total number of reported cases of malicious damage to property had a case difference of 1 597 or 1,4 per cent, with 113 089 cases reported for 2018/2019 in comparison with 111 492 reported for the previous financial year (SAPS 2019b, 7).

Property-related crimes are those crimes whereby the property of an individual or an institution is taken or removed without permission (SAPS 2019b, 6). The total number of reported property-related crimes decreased from 50 975 in 2017/2018 to 49 5161 in 2018/2019. This amounted to a case difference of -2,5 per cent, that is, 12 814 fewer property-related crimes (SAPS 2019b, 7). The following property-related crimes increased during the period under review: burglary at non-residential premises (29 more reported cases) and stock-theft (823 more reported cases) (SAPS 2019b, 7). The following property-related crimes decreased during the period under review: burglary at residential premises (7 229 fewer cases), theft of motor vehicles and motorcycles (2 339 fewer cases) and theft out of or from motor vehicles (4 098 fewer cases) (SAPS 2019b, 7).

Crime detected as a result of police action are crimes not reported to the SAPS. The detection of these crimes is dependent on the deployment of law enforcement as well as the employment of intelligence (SAPS 2019b, 6). In some communities, the South African National Defence Force (SANDF) is even deployed. These processes then lead to arrests for various crimes and the apprehension of some wanted suspects (Meyer 2019, 1). Between 2009/2010 and 2017/2018, an increase in the number of crimes detected as a result of police action was recorded. In 2018/2019, 339 281 crimes were detected as a result of police action, which is 94 685 fewer than crimes detected in 2017/2018 (433 966) (SAPS 2019b, 6). A decrease in the detection of the following crimes was recorded as a result of police action: illegal possession of firearms and ammunition (1 822 fewer crimes), drug-related crime (90 890 fewer crimes) and driving under the influence of alcohol or drugs (3 248 fewer crimes). The only crimes detected as a result of police action which increased, were sexual offences in that 1 275 more cases were detected. This is commendable and the detection of sexual offences (and other serious crimes) will go a long way in the battle against crime in South Africa. Based on these statistics for crimes detected as a result of police action, the inference cannot be drawn that fewer crimes are committed, therefore fewer crimes are detected as a result of police action. No reasons were provided by the SAPS for the decrease in the number of crimes detected as a result of police action and this may lead to speculation as to the reasons for such a decrease.

More needs to be done to combat crime in South Africa. The impact of increased visible policing should not be underestimated. This can be seen by the effect that the deployment of the SANDF in July 2019 had on crime in the Cape Flats (see e.g., Meyer 2019, 1). The causative factors for or drivers of crime (see e.g., Newham 2019) need to be addressed to combat the alarming rise in crime statistics. For example, taking the daily occurrence of murder, rape, common assault, assault GBH, common robbery and robbery with aggravating circumstances into account, no fewer than 1 910 reported crimes were recorded daily in the period 2018/2019.

Violent Protests

Covid-19 Regulations: Permit Requirement for Protest

The court in *SATAWU & Others v Garvas*⁴ dealt with the importance of the right to protest. The right to protest gives a voice to the powerless and voiceless, the political and economic vulnerable groups in society as an outlet for their concerns and frustrations.⁵ Considering the many challenges such as the loss of income, poverty and hunger experienced by many South Africans during the current lockdown period, this right to protest is that vehicle to express these concerns and frustrations. Various protests were experienced in South Africa during the national lockdown. These protests would have been regarded as illegal, since according to the lockdown regulations the right to

4 2012 (8) BCLR 840 (CC).

5 *ibid* para 61.

protest is limited by an unjust practice to stop the issuing of permits for protests. The court in *Mlungwana and Others v The State and Another*⁶ found that the criminalisation of “the failure to provide or inadequate notice” to be unconstitutional, as it amounts to an unfair limitation of the right to assemble.⁷ The argument is made that the judgment of the court in the *Mlungwana* case strengthens the argument that the notice requirement does not reflect a permission-seeking process. Thus, regulation 6.5.2, instructing municipalities to stop the issuing of permits to protest, should be regarded as irrelevant as no permission is required.

National Unity and Reconciliation

The regulations relating to assistance for victims in respect of basic education⁸ as well as higher education⁹ respectively, were amended. The higher education regulations indicated clearly that the regulations only applied to public higher education and training.¹⁰ If a person had registered with a private higher education institution before the amendment of these regulations, then the amendment would not apply.¹¹ It also amended the amounts per annum provided for books, devices and travel costs¹² and also made provision that some of the money may be made available before the costs are incurred.¹³ The fund administrator must transfer the funds to the Department of Higher Education before 15 January each year.¹⁴ Regulation 22 was amended to extend the period of the application of these regulations to six years (previously five years) to be calculated from 7 November 2014. The regulations pertaining to basic education include a similar regulation.¹⁵

The definition of “administrator” in the regulations on basic education is replaced to make provision that an official of the Department of Basic Education can deal with applications in terms of the regulations.¹⁶ The reference to the National Student Financial Aid Scheme is deleted.¹⁷

6 2019 (1) SACR 429 (CC).

7 *ibid* para 112.

8 GN R1286 in GG 42740 (4 October 2019), amending GN R852 in GG 10305 (3 November 2014), issued in terms of the Promotion of National Unity and Reconciliation Act 34 of 1995 (GN R1286).

9 GN R1285 in GG 42740 (4 October 2019), amending GN R852 (3 November 2014), issued in terms of the Promotion of National Unity and Reconciliation Act 34 of 1995 (GN R1285).

10 Regulation 2(2) of GN R1285.

11 Regulation 22A inserted by GN R1285. This regulation came into operation on 7 November 2019. The rest of the regulations came into operation on 1 January 2020.

12 Regulations 5–8, 8A of GN R1285.

13 Regulation 16 of GN R1285.

14 Regulation 17 of GN R1285.

15 Amendment of reg 21(1) by reg 5 of GN R1286.

16 Regulation 2(a) of GN R1286.

17 Regulation 2(b), 3(2) and (3) and 16(3)(b) of GN R1286.

The amounts made available for education for victims in respect of basic education¹⁸ and higher education and training¹⁹ in terms of the Promotion of National Unity and Reconciliation Act 34 of 1995, were increased.

Security Services

Police Services

Many concerns are raised about corruption, such as the abuse of power and bribery in the SAPS. The rise in numbers may also be attributed to a concerted effort to address corruption within the SAPS, as well as the work of 1591 whistleblowers (Anon 2019e).

A Proposed National Standard of Policing to determine a uniform ranking structure and insignia for all municipal police services was published for comment in terms of the South African Police Service Act 68 of 1995.²⁰

The Western Cape Department of Community Safety accredited neighbourhood watches in the Western Cape in terms of the Western Cape Community Safety Act 3 of 2013.²¹ It is an indication that the SAPS recognises the important work that neighbourhood watches fulfil.

Correctional Services

The Judicial Inspectorate for Correctional Services' Annual Report 2017/2018 Financial Year, prepared by Inspecting Judge Johann van der Westhuizen, indicated that overcrowding of prison facilities, as well as the deterioration of some of the facilities, remains a concern. Prisons in the Eastern Cape are 57.86 per cent overcrowded, while Gauteng's prisons are overcrowded by 48.49 per cent, followed by the Western Cape 45.39 with per cent, KwaZulu-Natal with 33.96 per cent (a reduction from previous report), Limpopo and Mpumalanga with 33.96 per cent, and Free State and the Northern Cape with 11.4 per cent (Van der Westhuizen 2019). Approximately 18 000 prisoners are serving life sentences (they have to serve a minimum of 25 years). The concept of minimum sentences is seen as one of the major reasons for overcrowding in prisons (Van der Westhuizen 2019, 41). Approximately 1 200 prisoners have some form of mental illness and despite treatment, the situation of state patients as well as their accommodation in prison is not ideal (Van der Westhuizen 2019, 25). The victim-offender dialogue that forms part of the parole process is seen as a stumbling block in that either the offender or the victim does not want to take part in the process. Sometimes the victims cannot be traced. The dialogue is not compulsory but in some instances the

18 GN R246 in GG 42251 (26 February 2019).

19 GN R617 in GG 42423 (29 April 2019).

20 GN 1698 in GG 42922 (20 December 2019).

21 PN 92 in Western Cape PG 8150 (13 September 2019).

parole board makes it a condition (Van der Westhuizen 2019, 41). The issue of parole was also the subject of various court cases, as discussed hereafter.

The report by Van der Westhuizen (2019) deals with various complaints raised, such as riots, assault, suicide attempts, lack of beds, run down kitchens, human resources issues, and lack of training for staff, amongst others. It also includes reports of visits by other independent judges in the provinces. In addition to this report, the auditor-general indicated that the Department of Correctional Services does not “investigate incidents of irregular, fruitless and wasteful expenditure,” which include, amongst others, “non-compliance with legislation, fraud, theft and breach of fiduciary duty that resulted in financial losses to the state” (Anon 2019f).

Parole

Two interesting judgments were handed down dealing with matters linked to parole, including whether the existing parole system—which essentially distinguished between persons sentenced before and after a particular date—was constitutional on the basis that it was in contravention of the equality clause in section 9 of the Constitution of the Republic of South Africa, 1996 (the Constitution).

In *Phaahla v Minister of Justice and Correctional Services (Tlhakanye Intervening)*²² section 136(1) of the Correctional Services Act 111 of 1998 was declared invalid. The issue at hand was whether the application of a longer non-parole period in the case of some inmates and not others on the basis of the date of sentence infringed on inmates’ right to equality and fair trial rights guaranteed by the Constitution.²³ The historical background regarding the issue of parole and its development in South Africa, the pre- and post-constitutional dispensation, is rather complex as it encompasses various dates and time periods.²⁴ However, the importance of the periods is that in the period 1 March 1994 to 1 October 2004, inmates serving a life sentence were required to serve a minimum period of 20 years in prison before becoming eligible for consideration for parole, whereas persons who were sentenced after 1 October 2004 were required to serve a period of at least 25 years before they could be considered eligible for parole.²⁵ The new parole dispensation commenced when the Prisons Act of 1959 was repealed and replaced by the Correctional Services Act 111 of 1998, which commenced on 1 October 2004. Accordingly, the commencement of section 136(1) created a dual system of assessment, where the consideration and placement on parole of sentenced inmates were determined by the date of their sentence. In the High Court the impugned sections were found to be a breach of the applicant’s right to equality in terms of section 9(1) and (3) of the Constitution because the date of sentencing as a determining factor, rather than the date of commission of the offence, was found to be arbitrary and irrational,

22 2019 (2) SACR 88 (CC).

23 *ibid* para 1.

24 *ibid* paras 5–10.

25 *ibid* para 8.

which led to a retroactive application of the law and amounted to unfair discrimination against the applicant and inmates who found themselves in similar positions. To the extent that the impugned provisions imposed a stricter parole regime on the basis of the date of sentencing, the impugned sections were constitutionally invalid.

The current application was brought to the Constitutional Court under section 172(2)(d) of the Constitution, on the following bases: (a) the impugned provisions breached the appellant's right to equal treatment and protection of the law under section 9(1) of the Constitution, and his right not to be discriminated against under section (3); and sub-section 3(b) that the impugned sections breached his right to a fair trial, specifically, his right to receive the least severe of the prescribed punishments if the prescribed punishment for the offence has changed between the time the offence was committed and the date of sentencing.²⁶

The applicant's submissions were dealt with first,²⁷ followed briefly by the intervening party's submissions.²⁸ The applicant's submissions were essentially threefold: (a) there was a presumption of non-retrospectivity in law and an interpretation of the law favouring liberty should be preferred. In this light, the use of the date of sentencing to distinguish between the two sets of parole systems was arbitrary and irrational and counteracted the purpose of section 136. The date of an offence was fixed and certain, whereas the date of sentencing was unpredictable due to unforeseeable delays in the system. Further, (b) parole formed part of and was inextricably linked to, sentencing and punishment as it changed the conditions of punishment from imprisonment to correctional supervision within the community. Parole could thus shorten or lengthen the period a person was imprisoned and could thus materially change the term of imprisonment that was initially ordered by the court; and (c) a person could not be sentenced to a harsher punishment than what was applicable at the time of the offence. In the present instance, Mr Phaahla (the applicant), was convicted on 25 September 2004 and sentenced on 5 October 2004, only four days after the new dispensation commenced.

The respondents submitted the following submissions: (a) amending the minimum detention period encapsulated a balancing of various considerations that bore a rational connection to a legitimate government purpose; (b) using the date of commission of offence, instead of the sentencing as the relevant date, was problematic as offences could be ongoing or entail a number of different offences; (c) parole was premised on an accused being found guilty and being sentenced rather than on the commission of the offence; and (d) as the provisions did not impair the fundamental human dignity of inmates, they did not amount to discrimination. However, if they did amount to

26 *ibid* para 13.

27 *ibid* paras 22–25.

28 *ibid* para 26.

discrimination, such discrimination was not unfair because it was directed toward a legitimate government purpose.²⁹

On the basis of the contention that the applicant had a right to the least severe of the prescribed punishments, the question was explored whether parole was indeed a kind of punishment. In dealing with the matter, Dlodlo AJ (with Mogoeng CJ, Basson AJ, Cameron J, Froneman J, Goliath AJ, Kampepe J, Mhlantla J, Petse AJ and Theron J concurring) was satisfied that parole and correctional supervision were substantially identical: "... parole, which is a non-custodial measure and form of supervision in the community, indicating that parole is in fact a kind of punishment."³⁰ The rules that governed the length of period to be served in prison before an inmate became eligible for parole were statutory and functioned automatically. The effect of these rules was thus to shorten a term of imprisonment, which was a form of punishment.³¹ People who committed similar offences at the same time could, however, receive punishments that differed in severity, depending on elements of the criminal justice system beyond their control. This different treatment immediately implicated the right to equality under section 9 of the Constitution and the right to receive the least severe of the prescribed punishments under section 35(3)(n) of the Constitution. The court thus continued to consider whether the impugned sections indeed infringed the applicant's right to equality.³²

Where an impugned provision differentiated between categories of people, it had to bear a rational connection to a legitimate government purpose, otherwise the differentiation would be a violation of section 9(1) of the Constitution.³³ Having already established that there was indeed a differentiation, the next step was to ascertain whether the differentiation was connected to a legitimate government purpose. In this rationality enquiry, the focus could only be on whether the differentiation was arbitrary or not. It was not for the court to decide whether there was a better means to achieve the objective.³⁴ Section 9(1) thus presented a very low threshold to meet. The state averred that the purpose of the differentiation was to protect a group of people from retroactive application of the law that would affect them in a way that was prejudicial.³⁵ However, in protecting one group it negatively affected another. Accordingly, "it can never be a legitimate government purpose to differentiate between two groups of people in order to protect only one of them from prejudicial retroactive application of the law."³⁶ On this basis the differentiation between two groups on the basis of the date of sentencing was not legitimate, meaning that the section failed the test for section 9(1). Although

29 *ibid* paras 27–28.

30 *ibid* para 31.

31 *ibid* para 421.

32 *ibid* paras 45–48.

33 *ibid* para 46.

34 *ibid* para 48.

35 *ibid* para 49.

36 *ibid* para 51.

not a listed ground, the impugned section furthermore discriminated on the basis of their status as convicted persons.³⁷ Such a system was unfair, as it subjected one group to a more severe system of parole, on the basis of their sentencing date only.

The court thereafter dealt with the right to a fair trial.³⁸ Section 35(3)(n) was a component of the right to a fair trial guaranteed by section 35(3) of the Constitution. The court found that section 35(3)(n) should first serve as an interpretative presumption that aided reading down sentencing legislation in conformity of the Constitution. If there was no ambiguity and the express intention of the legislature was to prescribe a more severe punishment retrospectively, then the constitutionality of that legislation would be at issue.³⁹ The link between section 9(1) and (3) and section 35(3)(n) was furthermore highlighted: section 35(3)(n) also ensured that accused persons who committed the same offence on the same date, but were convicted and sentenced on different dates, would receive equal treatment under the law, thus reflecting the guarantee in section 9(1) of the Constitution.

Finally, having regard to the fact that the accused had no control over the length of a criminal trial or frequent delays in the criminal justice system, and as parole was part of punishment, the relevant date ought to be the date of the offence:⁴⁰ “For these reasons, the applicant’s proposition should win the day: punishment, and parole eligibility, should be determined by the date of commission of the offence.”⁴¹ The court thus declared section 136(1) and 73(6)(b)(iv) of the Correctional Services Act 111 of 1998 inconsistent with section 9(1) and (3) and section 35(3)(n) of the Constitution. Parliament was granted a period of 24 months to amend section 136(1) accordingly.

Justices Froneman and Cameron, while concurring with the findings of the main judgement, also submitted separate judgments. Justice Froneman concurred that the impugned provisions contravened section 9(3) and 35(3)(n) of the Constitution, but disagreed that it also contravened section 9(1). He made that finding on the basis that the two systems were distinguished so as to also strive for practicable and efficient implementation of legislation. He found it laudable that the legislature strove towards a legitimate legislative framework that was clear and easy to implement effectively and consistently.⁴² Cameron J likewise concurred with the main judgment, but expanded on the rationality issue in his separate judgment, so as to highlight the irrationality of drawing distinctions between systems on the basis of the date of sentencing.⁴³

37 *ibid* para 53.

38 *ibid* paras 55–69.

39 *ibid* para 61.

40 *ibid* para 70.

41 *ibid* para 70.

42 *ibid* para 75.

43 *ibid* para 83.

In *Tutton v S*⁴⁴ the issue was likewise parole, given that a non-parole order was handed down under section 276B of the Criminal Procedure Act 51 of 1977. The said section enabled a court to direct, when sentencing an accused, that he/she shall not qualify for parole for a certain period of time. The appellant was sentenced to 20 years' imprisonment on two counts, 10 years of which were ordered to run concurrently, resulting in an effective period of imprisonment of 30 years.⁴⁵ On application, the appeal was upheld against sentences imposed to the extent that it directed 15 years of the sentence imposed in respect of the count of dealing in cocaine should run concurrently with that of the count dealing with dagga, effectively resulting in a term of 25 years. However, as part of the order handed down the court also fixed a non-parole period of 15 years in accordance with section 276B(2) of the Criminal Procedure Act. The present appeal to the Supreme Court of Appeal (SCA) was in respect of the non-parole period of 15 years, as the appellant was not informed of the court's intention to deal with section 276B(2), nor was he afforded the opportunity to address the court before such order was handed down.

The possibility of a non-parole period was provided for in section 276B(2) of the Criminal Procedure Act when the Act was amended in 1997. While being provided for specifically, it is trite that such an order "should not be resorted to lightly."⁴⁶ Such an order could only be handed down (a) when circumstances specifically relevant to parole existed; (b) in addition to any aggravating factors pertaining to the commission of the crime for which there was evidential basis; and (c) the court had to invite and hear oral argument on the specific issue before the imposition of a non-parole period.⁴⁷

The SCA found that the trial court committed a serious misdirection by imposing a 15 year non-parole period without first establishing whether there existed exceptional circumstances to do so and by not inviting parties to make oral submissions.⁴⁸ Having set aside the non-parole order, the next question was whether the matter ought to be remitted to the trial court or whether the SCA could finalise the matter instead. Given that the appellant had already served 11 years, and as a remittal could bring about further delays, the SCA per Zondi JA upheld the appeal and set aside the non-parole period of 15 years.

Prisoners

The Equality Court dealt with an application of a transgender inmate to be allowed to express her gender identity while in prison. The applicant in *September v Subramoney*⁴⁹ averred that the respondents' treatment constituted unfair discrimination and harassment under the Promotion of Equality and Unfair Discrimination Act 4 of 2000. The

44 (294/18) [2019] ZASCA 3 (20 February 2019).

45 *ibid* paras 1–4.

46 *ibid* para 8.

47 *ibid* para 8.

48 *ibid* para 10.

49 [2019] 4 All SA 927 (WCC).

background was briefly the following:⁵⁰ While born a male, the applicant had since 2012 been living openly as a woman in dress and lifestyle. After being convicted for murder, theft and attempted theft in 2013, she was sentenced for 15 years' imprisonment. She informed the respondents in 2016 that she would be pursuing treatment to enable her transition from male to female. As she had not had any access to treatment yet, the only manner in which she could express her gender identity was by dressing as a woman, wearing her hair long and in a feminine style, wearing make-up and by referring to herself in the feminine and requesting persons to refer to her as a woman and through using the female pronoun. Immediately following her incarceration, she was allowed to express her gender identity as set out above, but that approach was replaced by a strict, genetic approach of being born a male, her gender being reflected as male in all official documents and thus being treated as a male inmate. In this process the applicant had been placed in solitary confinement and had also attempted to commit suicide.

The respondents' submissions were all tied to the applicant's biological, genetic identity.⁵¹ As all the official documentation identified the applicant as "male," she was thus treated accordingly, which meant that no discrimination occurred. The respondents also highlighted that their treatment of the applicant in a male correctional centre was for her own safety.⁵² Further, the instances of her solitary confinement was a result from her breaking the rules and acting in contravention of protocols—in this regard she was thus treated like any other inmate who contravened rules.⁵³

The court approached the matter by first setting out the present approach in South African prisons,⁵⁴ which made provision only for males and females, with corresponding clothing and toiletry allocations. Currently, no provision is made for persons who had commenced treatment for sex alteration, but before a change on the population register was effected.⁵⁵ This exposition was followed by a detailed exposition of the legislative framework and legal principles, including the relevant sections of the Constitution (sections 7—the Bill of Rights was the cornerstone of the democracy; 9—equality, 10—dignity and 12—freedom and security of the person), the Births and Deaths Registration Act 52 of 1992; the relevant provisions of the Correctional Services Act 111 of 1998;⁵⁶ as well as the applicable international law⁵⁷ and the Yogyakarta Principles.⁵⁸

50 *ibid* paras 10–40.

51 *ibid* para 41–62.

52 *ibid* para 41.

53 *ibid* para 49.

54 *ibid* paras 54–58.

55 *ibid* paras 56.

56 *ibid* paras 63–87 for more detail.

57 *ibid* paras 86–94.

58 *ibid* paras 95–100. The Yogyakarta Principles is not an international treaty, but contains principles that were developed by 29 experts from 25 countries in relation to sexual orientation and gender identity.

In light of all of the above, the court per Fortuin J proceeded to discuss the case of the applicant in particular. In this regard, a distinction was drawn between (a) the disciplinary measures resulting in the applicant's solitary confinement; and (b) the respondents' failure to allow the applicant to express her gender identity. With regard to the former, the court was satisfied that the action of the respondents was in response to the applicant's conduct and her contravention of rules.⁵⁹

Concerning the expression of gender identity, the court underlined that what needed to be determined was whether the respondents complied with the basic standard laid down in section 12 of the Constitution.⁶⁰ The conduct of the respondents caused the applicant severe mental suffering, disabled her from transitioning socially and prevented her from expressing her identity, also by way of clothing, which was in this instance much more than merely clothing or interest in fashion. Overall, various rights in the Bill of Rights came into play, including section 9—equality; section 10—dignity and section 16(1) that gave everyone the right to freedom of expression.⁶¹ In this light the court concluded that the right to dignity included the applicant's right to her gender identity.⁶²

Reasonable accommodation was a factor the court had to consider in determining the fairness of the discrimination in question. A variety of reasonable steps were available, that should balance competing issues raised. What was required, was a balanced enforcement of the relevant constitutional rights.⁶³ Exactly how that was to be done in practice, could be gleaned from international examples set out in the judgment in paragraphs 129–133, including adopting a policy for transgender inmates, and corresponding commissary items; deferring to a gender identity panel of doctors and therapists and granting access rights to clothing and make-up appropriate for self-identification.

Regarding the legal principles, the statutory framework as well as the international law rules, duties and obligations, the court reached the following conclusion: "... the respondents' failure to apply the principle of reasonable accommodation to the applicant to allow her to express her gender identity renders the discrimination against her manifestly unfair."⁶⁴ Being incarcerated did not take away her basic human rights. Instead, being imprisoned contrary to her right to dignity, violated section 10 and section 35(2)(e) of the Constitution.⁶⁵ The court went to great lengths to underline that the case was not about changing the binary gender system that was in place. The case was about equality, dignity, freedom of expression, dignified detention and the prohibition of

59 *ibid* para 143.

60 *ibid* para 110.

61 *ibid* paras 116–121.

62 *ibid* para 122.

63 *ibid* para 128.

64 *ibid* para 156.

65 *ibid* para 158.

inhumane treatment and punishment.⁶⁶ The court thus found that the respondents' failure to allow the applicant to express her gender identity constituted unfair discrimination and was thus unlawful and unconstitutional. The respondents were directed to take reasonable steps to give effect to the applicant's constitutional rights by considering a list of options and/or combinations of options and were further ordered to introduce gender sensitivity training for the Department of Correctional Service's employees.

Establishment of Judicial Inspectorate of Correctional Services: Constitutionality

*Sonke Gender Justice NPC v President of the Republic of South Africa and Others*⁶⁷ dealt with the constitutionality of Chapter IX⁶⁸ of the Correctional Services Act 111 of 1998, specifically the establishment of the Judicial Inspectorate of Correctional Services (JICS), its structure and functionality. The main contention regarding the constitutionality challenge was founded on an obligation on the state, under section 7(2) of the Constitution, to create a prison inspectorate that was sufficiently independent so as to act effectively. It was thus alleged that the JICS, the primary institution tasked with the monitoring and overseeing of the correctional system, as it was presently constituted, lacked the necessary structural and operational independence.⁶⁹

In dealing with the matter, the court per Boqwana J first set out the historical background to the establishment of the JICS⁷⁰ and the relevant statutory framework.⁷¹ Central to the applicant's case was the fact that the JICS was in material respects beholden, or susceptible to being beholden, to the Department of Correctional Services.⁷² For the JICS to be operational, it depended on the Department of Correctional Services for its budget, staffing needs and other relevant expenses. Overall, the present structure and operation resulted in three forms of dependence: financial, operational and perceived dependence.⁷³ In response, the respondent put forward that the application was essentially based on conjecture and not factual evidence and that the budget was allocated from finances from the National Treasury and not from the Department of Correctional Services.⁷⁴

Whether the JICS was independent or not, was thus critical for purposes of achieving the objectives of section 7(2) of the Constitution, on the one hand, and the effective operation of the JICS, on the other. In this regard, the court highlighted the importance of the JICS—it served a crucial function, focusing on facilitating inspection and

66 *ibid* para 164.

67 2019 (2) SACR 537 (WCC).

68 Especially ss 85(2), 90(1), 88A(1)(b), 88A(2) and (4) and 91.

69 *Sonke Gender Justice* (n 67) para 4.

70 *ibid* paras 8–9.

71 *ibid* paras 10–18.

72 *ibid* para 19.

73 *ibid*.

74 *ibid* para 21.

reporting on the vulnerable, how they were treated and the conditions they were held in.⁷⁵

Not only did the Constitution enjoin the establishment of a constitutionally compliant correctional system,⁷⁶ but international law further necessitated the establishment of a sound correctional system, which included oversight and monitoring structures to be in place.⁷⁷ Creating an inspectorate that was not independent, was thus not reasonable, given the constitutional and international considerations.⁷⁸ Although the Constitution did not specifically require the creation of an inspectorate with the necessary independence, the scheme of the Constitution, read with international law obligations and the objectives of the Act, the most reasonable and effective interpretation of section 7(2) of the Constitution therefore imposed an obligation on the state to create an adequately independent institution.⁷⁹ In this light, the court proceeded to consider whether the JICS did indeed have operational and structural independence.

Absolute independence was not at stake here, but adequate independence.⁸⁰ Various issues emerged in this regard. The power to identify a suitable CEO lay with the presiding judge, whereas the appointment of the CEO was by the National Commissioner. Issues of misconduct by the CEO had to be referred to the National Commissioner, by the presiding judge. In this regard the court found that the process of referral from the JICS to the National Commissioner could undermine the independent role the CEO had to play, not only in actual sense, but also perceptually.⁸¹ Accordingly, disciplinary matters were thus moved from the office of the inspecting judge, not to a neutral body or institute, but to the very body on whose conduct the inspectorate was intended to report. This did not pass constitutional muster.⁸²

Money and finances were likewise problematic. Because of how the system was structured, the JICS had no autonomy with regard to monies and finances and was completely dependent on the Department of Correctional Services, irrespective of whether the funds originated from the Treasury.⁸³

In reaching conclusions, the court reiterated that the challenge was not in relation to the presiding judge, but was directed at the JICS as an institution and whether statutorily it had adequate independence, which allowed it to fulfil its role.⁸⁴ In light of the above discussion, section 88A(1)(b), read with section 91—dealing with the funding of the

75 *ibid* para 22.

76 *ibid* para 25.

77 *ibid* paras 30–35; 40–43.

78 *ibid* para 42.

79 *ibid* para 43.

80 *ibid* para 44.

81 *ibid* para 51.

82 *ibid* para 53.

83 *ibid* paras 61–67 especially.

84 *ibid* para 73.

JICS; and section 88A(4)—dealing with the misconduct and incapacity of the CEO, were found to be inconsistent with the Constitution.⁸⁵ That finding was incorporated into the final order, thereby granting parliament a period of 24 months in which to cure the defect.⁸⁶

Defence

The deployment of members of the Defence Force,⁸⁷ in order to prevent and combat crime and to maintain and preserve law and order in the Western Cape, was criticised. The criticism dealt with whether the community was actually safer, the financial and social costs of the operation, the continued existence of gangs in the area, and the non-consultation with the community (Bernardo 2020).

A Military Discipline Bill [B21–2019] was introduced in parliament.⁸⁸ The aim of the Bill is to strengthen the military justice system in and outside South Africa's borders.⁸⁹ According to the Memorandum to the Bill, the Military Discipline Supplementary Measures Act 16 of 1999 is not sufficient to address all disciplinary matters of the Defence Force and was inadequate to deal with the appointment of military judges, the administration of the courts, and the appointment of military police. The legislation is fragmented and the Bill will consolidate all measures as well as address the interpretations issues that were caused by the 1999 Act.

The Bill provides for the introduction of a range of military courts, namely a Court of Military Appeals; a Court of Senior Military Judicial Reviews; a Court of Military Judicial Reviews; a Court of Senior Military Judge; and a Court of Military Judge. "The Court of Military Appeals is the highest military court and a judgment thereof binds all other military courts."⁹⁰ Chapter 2 of the Bill describes the jurisdiction, appointment and procedures of these courts. In some instances, the courts will have concurrent jurisdiction with the civil courts.⁹¹ A Judge Advocate General, a Director, Senior Staff Officer Military Defence Counsel, Military Law Practitioners, Military Prosecution Counsels, Military Defence Counsels, Military Judges and Senior Military Judges are appointed in terms of chapter 3. All accused have a right to legal representation⁹² as well as the right to review and appeal.⁹³ Investigations and pre-trial procedures are set out in chapter 6, while the procedures for arrest, warning and confinement are dealt with in

85 *ibid* para 74.

86 *ibid* para 78.

87 GN 1214 in GG 42715 (19 September 2019)—from 16 September 2019 to 31 March 2020.

88 GN 510 in GG 42342 (28 March 2019).

89 *ibid*. Cl 2. Cl 3 lists the person to whom the Bill will apply. Cl 4 deals with extra-territorial jurisdiction.

90 *ibid*. Cl 6. Cl 161 makes provision for the appointment of a Clerk of Court of Senior Military Judicial Reviews and a Clerk of Court of Military Judicial Reviews.

91 *ibid*. Cls 8 and 9. The jurisdiction of civilian courts are also described in ch 4 of the Bill.

92 *ibid*. Cl 83.

93 *ibid*. Ch 10.

chapters 5, 7 and 9. Schedule 1 of the Bill lists disciplinary and other military offences. The Bill also prescribes the sentences and alternative punishments.⁹⁴

Commanders would be able to effect military discipline and describe the procedures how military disciplinary hearings should be conducted. The Bill provides for the possibility of suspension, administrative discharge or dismissal.⁹⁵ A Provost Marshall General will be appointed to oversee the military police.⁹⁶ The appointment, duties and the functions of military police are described. The Minister of Officers Commanding or commanding officers may prohibit access of persons to military property or premises. They also have powers in relation to the removal and exiting of a person from military property or premises as well as control of such a person. Schedule 2 of the Bill lists the acts of misconduct that will be subject to military disciplinary hearings.

The Bill further provides that the Minister may issue regulations and make rules.⁹⁷ The Bill includes transitional provisions.⁹⁸ The Bill will repeal the Defence Act 44 of 1957 and the Military Discipline Supplementary Measures Act 16 of 1999.

The Defence Act 42 of 2002 also came under scrutiny in the case of the *Minister of Defence and Military Veterans v Maswanganyi*.⁹⁹ The case entailed the interpretation and operation of section 59(1)(d) of the Defence Act 42 of 2002. The issue at stake was whether the above section operated *ex lege* or whether there had to be one or more of the appellants who made a decision to put it into operation; furthermore, whether reinstatement followed automatically under that section. The facts were briefly the following: the respondent was arrested in 2010 on a charge of rape, was convicted in 2014 and sentenced to life imprisonment. In 2015, his appeal was successful and he was released from prison on 16 February 2015. However, on his conviction in 2014, his employment was terminated by the SANDF under section 59(1)(d) of the Defence Act. On that basis he could not be reinstated automatically, but had to follow the normal recruitment process for employment in the SANDF.¹⁰⁰

Under section 59(1)(d) of the Defence Act, employment of a member is terminated, *inter alia*, if he or she was sentenced to a term of imprisonment by a competent court. On the other hand, section 42 of the Act provided for suspension awaiting trial or appeal. The respondent averred that section 59(1)(d) did not apply automatically, but had to be put into operation by the appellants and further, that section 42 of the Defence Act ought to have been applied, which provided for suspension and not for dismissal or termination

94 *ibid.* Cls 84 and 85.

95 *ibid.* Ch 11.

96 *ibid.* Cls 136–149. The functions and duties of the military police are to be found in cls 141–150. See also cls 151–159.

97 *ibid.* Cl 162.

98 *ibid.* Cl 163.

99 2019 (5) SA 94 (SCA).

100 *ibid* paras 1–3 generally.

of employment. It was in this regard that the interpretation and operation of section 59(1)(d) were contested.

On the facts it transpired that the respondent had concealed the fact of his arrest, which meant that section 42 could not be relied on retrospectively. That was the case because section 42 could only enable the suspension of a member who was still in service and able to appear in court under circumstances where the SANDF was aware of such appearance in court.¹⁰¹ The jurisdictional facts for the operation of section 42 were thus absent.¹⁰²

The wording of section 59(1) of the Act was, however, very clear, in accordance with the normal rules of grammar and syntax.¹⁰³ The section envisaged the termination of employment of members of the SANDF in certain specified instances, thereby constituting an automatic termination. In these set out instances, termination followed *ex lege*.¹⁰⁴ Accordingly, no decision was required by one or more of the appellants to effect such termination.

The respondent further proffered an alternative argument that section 59(1)(b) would then also operate automatically in a converse factual scenario, namely, if the respondent was then released on appeal, his reinstatement ought to follow automatically.¹⁰⁵ Again, the court relied on the wording of the relevant section. Given that section 59(1)(d) did not contain such a provision of reinstatement, the respondent remained dismissed by operation of law.

On the facts the respondent could have employed section 42 at the time of his arrest, in 2010, when he should have informed his employers of said arrest. The belated attempt to invoke section 42(1) was thus misconceived. The court was satisfied that the appellants were correct in requiring the respondent to apply for re-employment.¹⁰⁶ The appeal was thus upheld.

Intelligence

A private member Draft General Intelligence Laws Amendment Bill, 2019, was published for comment.¹⁰⁷ A member of parliament, Steenhuisen, introduced the Bill as he was of the opinion that the current intelligence legislation contained lacunae, which the State Security Agency (SSA) could exploit or manipulate. If the intelligence legislation is read with the Regulation of Interception of Communications and Provision of Communication-Related Information Act 79 of 2002 (RICA), an individual's right to

101 *ibid* para 8.

102 *ibid* para 10.

103 *ibid* para 11.

104 *ibid* para 13.

105 *ibid* para 14.

106 *ibid* para 15.

107 GN 112 in GG 42263 (28 February 2019).

privacy can be severely curtailed and infringed. The current process should be curtailed and only breached where and if interception cannot be avoided. The Bill proposes several amendments to the current legislation. It is proposed that the National Strategic Intelligence Act 39 of 1994 be amended to “regulate the collection of signals intelligence, limiting the functions of the SSA and regulating the sharing of collected information.” Accordingly, RICA will have to be amended to broaden the reporting obligations placed on judges and government role players when they authorise interception. Three judges should be appointed to deal with interception applications where there are compelling reasons for the interception. It is further proposed that the Director-General of the SSA should be vetted and his or her appointment be proposed by an *ad hoc* parliamentary committee. The Intelligence Services Act should further be clear as to which government components make up the SSA. The Bill will only be made available once the chief parliamentary legal advisor has certified the Bill.

In November 2019, five months after the sixth parliament was constituted, a Joint Standing Committee on Intelligence was appointed (Anon 2019g).

Arms and Ammunition

The government granted amnesty for illegal firearms and also extended the period for applications for firearms or to submit firearms for destruction in terms of the Firearms Control Act 60 of 2000.¹⁰⁸ Gun Free SA, a non-profit organisation, welcomed the decision of the Minister of Police, but warned that some of the surrendered arms and ammunition may find their way to the streets again. It also emphasised that the police could not remove guns for which the licence had expired, as an interdict in this regard applies (Anon n.d.).

Government also indicated that it would destroy firearms, ammunition and firearm parts that were either voluntarily surrendered or forfeited.¹⁰⁹ In April 2019, more than 30 000 illegal firearms were destroyed (Anon 2019a). The South African Police Services in the Western Cape recovered 1 037 illegal weapons from November 2018 to August 2019 that were also destroyed (Anon 2019d).

In *South African Arms and Ammunition Dealers’ Association v National Commissioner of the South African Police Services*¹¹⁰ the applicants applied for an interdict regarding the refusal of the respondent “to allow the change of one already licensed component with another licensed component,” in this case, to replace the barrel of a firearm.¹¹¹ A

108 GN 1527 in GG 42858 (27 November 2019) and GN 1661 in GG 42911 (13 December 2019).

109 GN 298 in GG 42284 (6 March 2019)—which was published for comment by 27 March 2019. GN 1299 in GG 42751 (9 October 2019) was published for comment.

110 (38807/2019) [2019] ZAGPPHC 291 (11 July 2019).

111 *ibid* para 11. In para 21 the court states: “The interdict sought is only in respect of the summary and arbitrary refusal to allow barrel changes without regard to the facts of each particular application and in the circumstances the authority vested in the respondents to administer the provisions of the Act are not in any way subverted or curtailed.”

gunsmith may alter a firearm in accordance with the Act.¹¹² The respondents argued that the Act does not specifically provide for “the replacement of a gun barrel” and that such applications may be refused.¹¹³ They further argued that a new firearm is created, but the court rejected the argument.¹¹⁴ In considering whether the interdict should be granted, the court accepted that the appeal remedy in the Act “is illusory” as there is an indication that applications for replacement of barrels fail even on appeal.¹¹⁵ The court granted an interim interdict, prohibiting the respondents to implement their policy document of 28 May 2019 that states that any application for a replacement of a barrel should be refused. The respondents were further required to accept and process all such applications on their own merit.¹¹⁶

The Gauteng High Court ordered the Minister and Commissioner of Police to implement an electronic database for firearms within four months from the judgment. The Central Dealers Database have to link with the databases kept by arms dealers within a period of 48 months (Anon 2019b).

The investigations into the controversial 1997–1999 arms procurement (Strategic Defence Procurement Packages (SOPP)) continued in 2019. In *Corruption Watch and Another v Arms Procurement Commission and Others*¹¹⁷ President Zuma established a commission of enquiry in October 2011. The commission had to investigate allegations of fraud, corruption, impropriety and irregularity in the SOPP.¹¹⁸ The report with findings was delivered in 2015 (cf. Du Plessis et al. 2017).¹¹⁹ The applicants approached the court to “set aside these findings, essentially on the basis that the commission failed to carry out its constitutional and statutory function ... in the manner required by the law.” The commission further did not comply “with the requirements of legality and rationality.”¹²⁰ The review application was not opposed.¹²¹ The court stated that the only question before the court was whether the commission, “in undertaking its task, failed to comply with the requirements of legality and rationality, which are the tests to be applied in respect of an application to review the commission’s findings.”¹²² They found

112 *ibid* para 15.

113 *ibid* para 18. In effect it means that when a barrel becomes dysfunctional the firearm will have to be destroyed.

114 *ibid* para 25.

115 *ibid* para 21.

116 *ibid* para 28.

117 2020 (2) SA 165 (GP).

118 *ibid* para 1.

119 *ibid* para 2.

120 *ibid* para 3. In para 18 the court stated as follows: “The applicants’ case is essentially the following: the commission failed to gather relevant material, to properly consider and investigate matters raised in this regard, failed to admit evidence which was highly material to its inquiry and which was in its possession, failed to seek and allow information or material evidence from key witnesses and failed to test the evidence of witnesses who appeared before it by putting questions to them with the required open and enquiring mind.” The evidence in dispute is set out from paras 21–47.

121 *ibid* para 17.

122 *ibid* para 50.

that the commission failed to rigorously interrogate witnesses and that they were not confronted with the allegations made against them.¹²³ The commission further failed to obtain essential evidence in reports.¹²⁴ The court found that the commission failed “to enquire into key issues as is to be expected of a reasonable commission.” They accepted facts as common cause and did not test the evidence. The commission ignored the criminal case of Schabir Shaik. A commission is not bound by the strict rules of evidence and pleadings as courts are and can, therefore, obtain any material evidence that is needed for its decision.¹²⁵ The court indicated that courts should be cautious to interfere in a commission’s findings. However, as there is clear evidence that the commission did not adhere to the principle of legality, the findings of the commission were set aside.¹²⁶

In *Jansen v S*¹²⁷ the appellant was convicted of having been in the unlawful possession of an unlicensed 9 millimetre pistol and five rounds of ammunition in contravention of the provisions of the Firearms Control Act 60 of 2000.¹²⁸ He was sentenced to 15 years imprisonment in respect of the firearm, and 18 months imprisonment for the possession of the ammunition, which were ordered to run concurrently.¹²⁹ The appellant was also granted leave to appeal on petition against both the convictions and the sentences imposed by the trial court.¹³⁰

On appeal against the two convictions, it was evident that the state’s evidence was based on a witness (A) that saw the appellant at a taxi rank with “the shape of what he thought was a firearm concealed under the shirt of the appellant.”¹³¹ He then called a Mr Gouws and asked him to call the police, which he did. The witness (A) was interested in the appellant because of a previous confrontation and the fact that the appellant was a member of a gang. The police officers arrived and arrested the appellant after he had boarded a taxi, and threw the firearm on the floor when noticing their approach. The appellant’s argument was that he had no knowledge of the firearm, that he was arrested for attempted murder and was not shown the firearm. The court found that the trial court was in its rights to convict the appellant and that the testimonies of the police officers and the witnesses were credible.¹³²

On appeal against the sentences, it was not in dispute that the firearm was a semi-automatic firearm.¹³³ The State gave notice of its intention to rely on the provisions of

123 *ibid* paras 53–66.

124 *ibid* para 67.

125 *ibid* para 69.

126 *ibid* para 70.

127 2020 (1) SACR 413 (ECG).

128 *ibid* para 1.

129 *ibid*.

130 *ibid*

131 *ibid* para 2.

132 *ibid* para 6.

133 As defined in the Firearms Control Act 60 of 2000.

section 51(2) of the Criminal Law Amendment Act (as amended) 105 of 1997 in the charge sheet, which obliges a court to impose a sentence of 15 years imprisonment in the case of a first conviction for “any offence relating to—(b) the possession of an automatic or a semi-automatic firearm, explosives or armament,” unless substantial and compelling circumstances¹³⁴ are present and justify a less severe sentence.¹³⁵ The court thus has a discretion in imposing a sentence.

The introduction of the minimum sentences has been much criticised.¹³⁶ It is evident that the minimum sentences “unduly interfered with the discretionary powers of the court to impose what it considers to be an appropriate sentence in the circumstances of any particular case.”¹³⁷ The appellant’s argument is based on the judgment of *S v Madikane*¹³⁸ where the court found “for the submission that the prescribed sentence of 15 years imprisonment must be reserved for exceptional cases.”¹³⁹ In considering the facts of appeal the court took in consideration the principle of proportionality and the interest of society. The appellant had previous convictions, one of which was possession of a firearm where he received a five year suspended sentence in 2015. His conviction thus constituted a breach of the conditions of that sentence, which was considered by the trial court as an aggravating factor. The court found that the trial court correctly imposed a 15-year sentence for the possession of the firearm and three years for the possession of ammunition.¹⁴⁰

Domestic and Gender Violence

Protests have erupted across South Africa against gender-based violence (GBV) in the country after the rape and murder of a 19-year-old student, Uyinene Mrwetyana. In the same timeframe, South African female boxing champion, Leighandre “Baby Lee” Jegels, was shot and killed by her boyfriend. An outcry for harsher sentencing laws and the review of current domestic violence legislation was at the centre of these protests (Kiewit 2019). President Cyril Ramaphosa has confirmed that the Domestic Violence Act 116 of 1998 is being reviewed with the aim of strengthening “provisions around domestic homicide and the enforcement of protection orders” (Anon 2019c).

Strides have been made in recent case law pertaining to the conviction of the accused. In *Tshabalala v The State*; *Ntuli v The State*¹⁴¹ the Constitutional Court dismissed the appeal of the applicants. The applicants argued that the doctrine of common purpose cannot be applied to the common law crime of rape, due to the instrumentality nature of

134 As contemplated by s 51(3) of the Criminal Law Amendment Act 105 of 1997 (as amended).

135 *Jansen* (n 127) para 7; if read with Part III of Sch 2 of the said Act.

136 *ibid.* See elaborate discussion in judgment paras 12–19.

137 *Jansen* (n 127) para 9.

138 2009 (1) SACR 552 (SCA).

139 *ibid* para 27.

140 *ibid* para 41.

141 2020 (3) BCLR 307 (CC).

the offence.¹⁴² The court found that common law rape is not merely about “the man inserting his genitalia into a female’s genitalia without her consent” but about the dominance of men over women, like in this case where a group rape took place.¹⁴³ The court further held that the “instrumentality argument has no place in our modern society, founded upon the Bill of Rights” and stems from a patriarchal system.¹⁴⁴ The court concurred with the High Court’s application of the doctrine and held that the applicants’ appeal must therefore fail.¹⁴⁵

The 2018 Declaration of the Presidential Summit Against Gender-Based Violence and Femicide was a response by the president on the marches by women under the umbrella of #TheTotalShutdown movement (The Presidency 2018). The summit was meant to be a turning point, as it provided the opportunity for different spheres to work constructively towards eradicating gender-based violence. GBV-curbing initiatives have been discussed, but not much has been done to curb the escalation of GBV and femicide.

Terrorism

Draft amendments to the Money Laundering and Terrorist Financing Control Regulations, issued in terms of the Financial Intelligence Centre Act 38 of 2001, were published for comment on 1 April 2019.¹⁴⁶ The final regulations have not been published yet, as section 31 of the Financial Intelligence Centre Act is not yet in operation.¹⁴⁷ It can only come into operation once regulations set a threshold for the international transfer of funds. The draft amendments set thresholds that any transfer of R5000 and above must be reported to the Financial Intelligence Centre. The information will include the reporter, the transaction details as well as the parties to the transaction. Thresholds are also set for section 28 reporting.

On 1 April 2019, the Minister of Finance gave notice of resolutions adopted by the Security Council of the United Nations under Chapter VII of the Charter of the United Nations.¹⁴⁸ The Director of the Financial Intelligence Centre gave notice of persons and entities that were identified by the Security Council of the United Nations and that are listed in the Targeted Financial Sanctions List.¹⁴⁹

142 *ibid* para 2. This entails that the common law crime of rape can only be committed by a male using his own genitalia, and not by an individual who is merely present when the offence is committed.

143 *ibid* para 51.

144 *ibid* para 54.

145 *ibid* para 64.

146 GN 115 in GG 42267 (28 February 2019).

147 GN 519. Ss 2(a) and (c), 3(c), 17, 20, 21(b), 24, 39 and 42 came into operation on 1 April 2019—GN 519 in GG 42360 (29 March 2019).

148 GN 528. S 26A—GN 528 in GG 42369 (1 April 2019).

149 GN 199 in GG 42365 (1 April 2019).

Conclusion

Developments, annual crime statistics and governmental response in the report period underlined that South Africans continue to live in a violent society, confronted by increasing violent crimes, gender-based violence and unrest and upheaval in communities, also linked to service delivery protests, taxi violence and the deployment of the defence force. In this regard, the trend in increasing incidences linked to the use of fire arms, knives and sharp instruments in murders and attempted murders has continued. Notably, seemingly fewer incidences of sexual assault and rapes have been reported. That development represents under reporting of crimes, for various reasons, as opposed to an actual decline in numbers. Sexual crimes disproportionately impact on women and girls, often already vulnerable because of prevailing socio-economic circumstances. In this context, sufficient support for victims is critical, also in relation to reporting crimes and dealing with the aftermath.

Governmental response has included a variety of legislative measures, as well as ensuring more visible police presence and National Defence Force deployment in some areas. However, these endeavours are usually interim only, and not encompassing enough. While there is a call for more effective prosecution and incarceration, that would have a knock-on effect on the already overcrowded and dilapidated correctional facilities. Clearly, a much more focused, encompassing approach to crime prevention is urgently needed.

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