

Order, the judiciary and the rule of law

The separation of powers in a democracy can only work if the impartiality and competence of the judiciary, police and prosecuting services are ensured. In South Africa, several forces and trends indicate severe shortcomings in this regard.

These forces and trends include extensive practices and sometimes institutionalised norms of nepotism and corruption, close links between some politicians and the heads of security agencies and the illegal domain, and the weak protection of citizens and communities against traumatic violent crime. In addition, there is widespread corruption, partisan ANC influence and cadre deployment in the police. A serious emerging trend is the apparent withholding of proper protection of citizens and communities that are not considered to be part of the ruling faction.

Nepotism and corruption

South Africa has a formal conventional economy, which has become strongly entangled with the ANC political elites. However, there also is an informal economy, part of which is dominated by crime syndicates with links to politicians and security agencies. As in countries like Mexico and Colombia, these two domains co-exist in the same political system.

Historically, the legal and illegal domains are also interlinked. In the case of the ruling ANC, partnerships of some cadres with drugs and smuggling crime syndicates during the years of the political underground and exile have continued after 1994. A former Mandrax specialist became a business partner of Billy Masethla, former chief of the National Intelligence Agency and now a Zuma loyalist.¹ The ANC's Polokwane conference in 2008 which brought Jacob Zuma, a head of ANC intelligence during the underground years, to power, was also attended by Zuma confidante Mo Shaik, later head of the South African Secret Service. Shaik, currently head of the Development Bank of Southern Africa's international division, was at the time accompanied by syndicate leader Cyril Beeka, who gave him the lift to Polokwane.²

Mo Shaik's brother, Shamim "Chippy" Shaik, at some stage head of acquisition of the Defence Force, was later sentenced for his involvement in the series of billion-dollar arms trade scandals. These scandals reach to the inner core of the ANC and the foundation of the new political order, allegedly involving the then defence minister Joe Modise and later Presidents Thabo Mbeki and Jacob Zuma. The African National Congress also held a ten percent share in Nkobi Holdings, a company of which Zuma's financial adviser Schabir Shaik was a director. Nkobi was one of the companies that benefited from the multi-billion rand

1. <http://mg.co.za/article/2011-10-21-the-wellconnected-mr-klamp>.

2. Stephen Ellis, *External Mission: The ANC in Exile 1960-1990* (Hurst, London, 2012), pp. 168-170, 273-274.

arms deal. All the details of the arms deal have not been unearthed yet, but much is already available in the public domain.³

In South Africa, the ANC sometimes intervenes and sometimes allows disorder to restructure the political order. The ANC uses the benefits gained from the weak institutionalization of formal bureaucratic political practices. Where the ANC as patrons nourish their clientelistic networks, the manner in which they have managed to obtain their resources will very largely be considered to be legitimate, even if it is illicit. As explained by the prominent Africa expert, Prof Patrick Chabal, this is also the case in several other African states.

Accountability within the political system now mainly takes the form of selective redistribution by political patrons to their clientelist networks. There is limited serious censure of corruption as long as the proceeds are deemed to be suitably redistributed according to the obligations of ethnic, factional or nepotistic ties of solidarity and patron-client norms of mutual obligation and exchange.⁴ Anti-corruption rhetoric is seldomly followed-up effectively, and then often aimed at political or factional opponents.

This is the combined result of ANC cadre deployment and the bureaucracy being focused on patronage, rather than service delivery. Democratic political accountability to the citizens and different communities in South Africa has been sharply reduced.

Traumatic violent crime

The ANC-in-government is increasingly relinquishing its responsibilities to protect all citizens from crime. Substantial security was achieved during the World Cup in 2010, when there was an interest to placate foreign concerns. However, before and since then, there has been a limited effective response to the concerns of citizens and communities regarding violent crime.

Violent crime is a serious problem in South Africa, and has increased considerably during the past few decades. Since 1994, hundreds of thousands of people have died due to violent crime and hundreds of thousands have been raped in South Africa. At present, it is estimated than on average, more than 40 people are murdered each day and an average of more than 140 raped.⁵

3. <http://mg.co.za/article/2011-12-02-arms-deal-bell-was-deaf-to-bribes-and-lost-out>;
<http://mg.co.za/specialreport/the-arms-deal>; http://www.armsdeal-vpo.co.za/articles04/told_you_so.html;
Paul Holden and Hennie van Vuuren, *The Devil in the Detail: How the Arms Deal Changed Everything* (Jonathan Ball, Johannesburg, 2011); Andrew Feinstein, *After the Party: Corruption, the ANC and South Africa's Uncertain Future* (Verso, London, 2009).

4. Patrick Chabal and Jean-Pascal Daloz, *Africa Works: Disorder as Political Instrument* (International African Institute, London, 1999) pp. 14, 79, 100.

5. <http://www.news24.com/Multimedia/South-Africa/SA-named-world-rape-capital-20120420>.

When assessing the impact of violent crime on South Africa's citizens, it is of major importance to take note of the psychological impact of fear. As noted by foreign psychologists visiting South Africa, in some parts of the country a continuous fear of violent crime is prevalent that usually only emerges in areas of armed conflict. The reason is that a violent incident can occur anywhere, and at any time, in a completely arbitrary but brutal manner.⁶

In this regard, the fear of violent crime against oneself and loved ones in private spaces like homes plays an important role. House robbery is a growing problem across most provinces. It involves hold-ups of the house's inhabitants, often entailing threats or actions involving assault, rape, torture and murder of children, the elderly or women. Official crime figures show that house robbery increased nationally by 64.4 per cent in the past eight years and appears to have stabilised at a high rate.

In addition, Interpol has named South Africa the "Rape Capital of the World" in 2012. Extrapolating from the statistics, one in three South African women will be raped in their lifetime. Between 1994 and 2004, 512,869 incidents of rape were recorded at an average of 140.4 per day.

A global crime study, conducted by renowned global polling group Gallup in December 2012, showed that South Africa ranked second behind Venezuela on the list of countries where adults were afraid to walk alone at night on streets where they lived. A representative nationwide crime survey concluded in September 2013 by Pharma Dynamics, a company that also specialises in treating depression in South Africa, revealed that more than 94 per cent of people who took part in the survey were 'extremely afraid' of falling victim in the near future:

With serious and violent crime currently at a 10-year high, with increases in murder, attempted murder, car hijacking, street robbery and house robbery – all crimes which South Africans are most afraid of – it is no wonder that perceptions of insecurity are so high. Our survey is indicative of how much crime, specifically violent crime, can contribute to a mass fear of insecurity.⁷

Government released its annual national crime statistics in September 2013. While there were decreases in many categories of reported crimes, the figures did show a worrying increase in some of the most violent crimes. There are debates about the accuracy of the crime statistics of the South African police. Due to the uneven quality of policing and no independent audit of the data-gathering process of crime statistics, police statistics are widely regarded as underestimating the situation. Security researcher David Bruce concludes:

6. See the report by Fred de Vries, correspondent for the Dutch newspaper *Trouw* and author of *Rigtingbedonnerd*, an acclaimed book on South Africa at <http://www.trouw.nl/tr/nl/4324/Nieuws/article/detail/1354583/2007/01/12/De-Johannesburgziekte.dhtml> and <http://soulsafari.wordpress.com/2012/11/05/afrikaners-rigtingbedonnerd-exclusive-interview-with-fred-de-vries/>.

7. <http://www.iol.co.za/news/crime-courts/south-africans-live-in-perpetual-fear-1.1581044#.Umgmml7CRD4>.

*The implication is that the non-recording of crime is widespread within the SAPS and that this non-recording is responsible for much of the reduction in violent crime that has been reported in statistics over recent years. The implication of this, in turn, is that current crime statistics cannot be regarded as a reliable indicator of trends in crime, particularly in violent crime.*⁸

With this in mind, a number of facts and statistics pertaining to violent crime in South Africa are now provided. The statistics revealed that there had been a total of 806,298 serious crime arrests effected in 2012/13, significantly more than the 777,140 of the previous year, and 352,513 convictions during the period. However, they showed there had been a 0.6 per cent increase in murder during 2012/13, while attempted murder had increased by 6.5 per cent during the period. The statistics also showed that in 2012/13, there had been increases in incidents of violent house robberies (an increase of 3.6 per cent), car hijackings (an increase of 5.4 per cent) and aggravated robbery (an increase of 1.2 per cent).

Gareth Newman, Director at the Institute for Security Studies, said incidents of violence remain unacceptably high:

*Serious and violent crime is increasing in South Africa. This shows that Government's approach to crime is not working. After a long period of decreases in serious and violent crime, these are the worst figures we have seen in ten years. We have seen increases in murder, attempted murder, car hijacking, street robbery and house robbery. These are some of the crimes South Africans are most afraid of.*⁹

South Africa displays major variations in terms of the distribution of the major forms of violent crime. The country is split into nine provinces of which high per capita rates of robbery are recorded in KwaZulu-Natal, the Western Cape, and most noticeably in Gauteng.

Violent crime in the metropolitan areas, particularly in townships and inner city regions, is associated with young men, often part of informal gangs or more organized syndicates.¹⁰ In response to the lack of trust in the police, millions of South Africans have turned to private security companies, especially the 'armed response' companies that send armed guards rushing to your house within minutes of your alarm being triggered. This means that businesses and households are paying for security twice over – via tax to fund the police and again to purchase private security.

8. David Bruce, *Tackling Armed Violence: Key Findings and Recommendations of the Study on the Violent Nature of Crime in South Africa* (The Centre for the Study of Violence and Reconciliation and The Department of Safety and Security, 2010), pp. 5-6, 15.

9. <http://www.securitynewsdesk.com/2013/09/24/south-africas-violent-crime-figures-slammed-as-worst-for-ten-years/>.

10. David Bruce, *Tackling Armed Violence: Key Findings and Recommendations of the Study on the Violent Nature of Crime in South Africa* (The Centre for the Study of Violence and Reconciliation and The Department of Safety and Security, 2010), pp. 5-6.

According to the South African Institute of Race Relations, there were almost 7,500 registered private security companies in South Africa in 2010, compared to about 4,600 in 2005. The number specializing in armed response had grown from 743 to more than 2,700 in the same period.¹¹ However, even some who have these services, are attacked, raped and killed, either outside of their securitized homes, or sometimes even inside them. As a result, the sense and reality of being unsafe continue.¹²

In black communities, those who have protested against gaps in service delivery have experienced forms of police intimidation.¹³ In its *Annual Report 2012*, Amnesty International expressed serious concerns about brutality, including torture and extrajudicial killings, at the hands of the police in South Africa.¹⁴

The ability of the state to protect its citizens and its resulting legitimacy in South Africa is suffering from a grave historical crisis. In addition, the ANC-ruled state itself has become responsible for a high level of violence through its direct abuse of power. In this regard, the killing of protest leaders like Andrew Tatane, but especially also the Marikana massacre of protesting miners in August 2012, are considered to be key indicators.

According to the government's green paper on policing, drawn up by the police civil secretariat and released earlier in July 2013, violent crime is preventing South Africans from participating socially and economically in the country. In addition to the about R68 billion in tax money spent annually on the South African Police Service (SAPS), violent crime was costing the country dearly due to loss of productivity and foreign investment.¹⁵

Widespread corruption in the police

Corruption is broadly defined as the abuse of official power or authority for personal gain. The police, however, are in a unique position compared to other public servants. They have a monopoly on the state-sanctioned use of force, powers that allow them to deny people their freedom, access to both public and private places, and access to information not readily available to other civil servants.

In recent years, trust in state institutions has started to decline substantially. The 2011 South African Social Attitudes Survey (SASAS) by the Human Sciences Research Council (HSRC) found that 74 per cent of all South Africans believed that corruption had increased in the past three years. Two-thirds of the respondents (66 per cent) felt that bribery and abuse of power for personal gain were prevalent among members of the SAPS. A substantial minority of people also perceived widespread corruption among officials of the Department of Home

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11. <http://www.theglobeandmail.com/report-on-business/international-business/crime-falls-but-fear-remains-big-business-in-south-africa/article620863/>.
 12. http://www.voanews.com/content/crime_study_shows_south_africans_fear_housebreaking_most/1523355.html.
 13. <http://www.ru.ac.za/highwayafrica/articles/name,79752,en.html>.
 14. <http://www.amnesty.org/en/region/south-africa/report-2012>.
 15. <http://www.fin24.com/Economy/Violent-crime-harms-SA-economy-20130618>.

Affairs (38 per cent), national politicians (37 per cent), officials awarding public tenders (37 per cent), and people working in the judicial services (36 per cent).

The HSRC survey also suggests that citizens do not believe that the state is doing enough to tackle corruption. Almost two-thirds (63 per cent) felt that the national government and Parliament were not doing enough to fight corruption, while 33 per cent believed that corruption flourished because of inadequate punishment by the judicial system.¹⁶

According to a survey reported in Transparency International's *Global Corruption Barometer 2013*, 83 per cent of South Africans believe the police to be corrupt.¹⁷ Amnesty International has (as has been stated above) expressed serious concerns about brutality, including torture and extrajudicial killings, at the hands of the police in its Annual Report 2012 on South Africa.¹⁸ Independent studies have confirmed that the SAPS had been used to repress peaceful marches and freedom of association. Total civil claims against the police for abuses including wrongful arrests and destruction of property more than doubled in the past two years to R14.7 billion. The 2012 National Victims of Crime Survey revealed that police corruption is the second most prevalent form of public sector corruption as reported by victims, and the rate has increased since 2011.¹⁹ Both experiences and perceptions among citizens reinforce this conclusion of widespread corruption in the police.

Consolidated statistics for corruption in the police is no longer made available publicly. However, police members themselves believe the whole of the SAPS to be widely corrupt. Involvement of police officers in criminal activities is a cause for concern in Gauteng, stated provincial Premier Nomvula Mokonyane in September 2013:

*A worrisome statistic shows that 18 out of 50 provincial policing precincts were reported as crime-infested dens that recorded police collusion and outright corruption. The Johannesburg central police precinct tops the list with approximately 13,000 criminal cases that were perpetrated by officers in uniform.*²⁰

In August 2013, the parliamentary portfolio committee on police heard that a major general, 10 brigadiers, 21 colonels, 43 lieutenant colonels, 10 majors, 163 captains and 706 warrant officers have been found guilty of serious offences. In total 1,448 members of the police have convictions, according to an audit up to January 2010. The crimes include murder, attempted

16. <http://www.issafrika.org/iss-today/can-citizen-action-alone-tackle-lawlessness-and-corruption-in-south-africa;>
<http://www.issafrika.org/iss-today/safe-as-houses-what-do-we-know-about-home-robberies-in-south-africa.>

17. <http://www.iol.co.za/news/crime-courts/majority-of-sa-thinks-police-are-corrupt-1.1545776#.UmkOnL7CRD6>.

18. <http://www.amnesty.org/en/region/south-africa/report-2012>.

19. <http://www.issafrika.org/iss-today/roots-of-the-crisis-facing-the-south-african-police>.

20. <http://www.iol.co.za/news/crime-courts/gauteng-cop-corruption-worries-premier-1.1580676#.Umgn2b7CRD4>.

murder, culpable homicide, rape, attempted rape, assault, aiding an escapee, theft, housebreaking, drug trafficking, kidnapping, robbery, and malicious damage to property.²¹

The instrumentalisation of disorder has become a disincentive to the benefiting elites to establish a better-functioning state. It must be born in mind that there is a large number of hard-working, dedicated policemen and women who willingly serve their communities under very difficult circumstances.²² However, their morale is seriously being affected by the misdeeds of many of their seniors and colleagues. Many officials also feel inhibited in a hierarchical organization like the police and are concerned about damaging their careers by taking strong stands against measures or inaction that they oppose.

In addition, investigative journalists and whistleblowers that pointed at cases of corruption inside the security agencies could not rely on the protection of democratic institutions, but had to face various forms of harassment and intimidation instead. One of these incidents in 2010 involved the then National Police Commissioner Bheki Cele. As stated by Gareth Newman and Andrew Faull, researchers at the reputable Institute of Security Studies:

The image of SAPS senior management was further damaged by allegations in August 2010 that Cele irregularly interfered to secure a tender for politically connected businessman Roux Shabangu. The journalist who wrote the first story containing this allegation was arrested soon after the news broke, but was released without charge, suggesting that the arrest was an attempt at harassment. A five-month investigation by the Public Protector and Special Investigating Unit (SIU) into the allegations found that both the Minister of Public Works, Gwen Mahlangu-Nkabinde, and Cele had acted improperly and illegally by approving funds for the leases of two buildings without it going out to tender, and that police deliberately manipulated the needs analyses to align them with Shabangu's building. Less than two weeks after the release of the Public Protector's first report, SAPS intelligence officials arrived at the office of the Public Protector and requested documents pertaining to the report. Their actions were widely perceived as police intimidation. The officers involved were briefly suspended before being reinstated in their positions as crime intelligence officials.²³

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21. <http://www.theguardian.com/world/2013/aug/15/south-african-police-convicted-criminals>;
<http://www.iol.co.za/news/crime-courts/criminal-cops-have-rights-phiyega-1.1568980#.UmuqtlRJxMs>;
<http://www.bdlive.co.za/national/law/2013/07/30/police-with-criminal-records-still-at-work>.
 22. <http://www.issafrica.org/iss-today/growing-calls-for-inquiries-into-policing-in-south-africa>;
<http://www.economist.com/news/middle-east-and-africa/21573156-death-taxi-driver-highlights-failings-throughout-police-bad-cop-bad>.
 23. Gareth Newman and Andrew Faull, *Protector or predator? Tackling police corruption in South Africa* (ISS, Pretoria, 2011), pp. 23-24.

ANC influence and cadre deployment in the police

Due to cadre deployment, key crime intelligence, investigative and prosecutorial services are unable to effectively use their constitutional powers against senior ANC politicians allegedly involved in corruption, including the current President, Jacob Zuma.

Corruption in the police has been inadequately checked to a serious degree. Opportunity, evidence of corruption at the political and organisational top, and fundamental organisational and management failures are to blame. As in some US cities at the beginning of the twentieth century, the political culture at present allows for widespread police corruption to flourish in South Africa.

Career politicians have been appointed as SAPS National Commissioners as opposed to experienced police professionals. One instructive example is former President Thabo Mbeki's protection of Police Commissioner Jacky Selebi in the face of hard evidence that Selebi was involved in corruption. Another is accusations of political interference in the National Prosecuting Authority's corruption case against Jacob Zuma in 2008 and the subsequent closing of the Directorate of Special Operations (known as the 'Scorpions'), which had investigated him and his allies. The 2009 conviction of a senior police commander for meddling with a blood sample drawn from ANC heavyweight Tony Yengeni, who had been caught driving under the influence of alcohol, is another.²⁴

The Directorate of Special Operations (known as the 'Scorpions'), formed in 1999 under President Thabo Mbeki, investigated Zuma and his allies on charges of corruption before he became president. Its staff of 536 consisted of some of the best prosecutors, police, financial, forensic and intelligence experts in the country, but it was disbanded in the late 2000s, allegedly due to political pressure.

Besides the seven convicted criminals on the ANC's national executive committee (NEC), six NEC members were at the time the subject of criminal investigations. At least two of these were being investigated by the Scorpions – Ngoako Ramathodi for allegedly being a secret shareholder in a company that had received a multimillion-rand tender from the Limpopo Provincial Government when he had been Premier of the province, and Thaba Mufamadi for receiving bribes in a social-grants tender award. The then impending charges against Police Commissioner Jackie Selebi and the indictment of Jacob Zuma came about because of investigations by the Scorpions.²⁵

Richard Mdluli, a Zuma supporter, was appointed as Divisional Commissioner of the police's Crime Intelligence Division effective from 1 July 2009. Shortly thereafter, the Scorpions was formally disbanded. Advocate Vusi Pikoli, former National Director of Public Prosecutions, recently alleged in his memoirs, *My Second Initiation*, that Billy Masethla, the ANC cadre

24. <http://www.bdlive.co.za/national/2013/10/15/legislation-does-not-protect-hawks-from-political-interference>.

25. <http://mg.co.za/article/2008-01-21-scorpions-disbanding-is-to-protect-anc>;
<http://www.corruptionwatch.org.za/content/switching-scorpions-cases-hawks>;
<http://www.economist.com/node/11333160>.

deployed as head of the National Intelligence Agency, wanted to forbid Pikoli from prosecuting Jacob Zuma for corruption. Kgalema Motlanthe, President at the time, agreed with Masethla. Pikoli also states that the decision to disband the Scorpions investigating unit was “aimed at protecting corrupting politicians”.²⁶

The official Directorate for Priority Crime Investigations, known as the ‘Hawks’, replaced the Scorpions. In 2011, the Constitutional Court also found that it was “insufficiently insulated from political influence in its structure and functioning” to fulfil its functions as an anti-corruption investigation agency.²⁷ The Hawks is vulnerable to political interference as there are two processes by which its head could be removed: one through the Minister of Police and the second by Parliament, but there is no clarification on which process is superior.²⁸

The Hawks’ investigation of crime intelligence appears to have pitted former Scorpions members involved in the corruption probe of then-Deputy President Jacob Zuma against those seen as his supporters. A pattern of tit-for-tat court cases, investigations and media leaks have come to define local law enforcement agencies in recent years.

In March 2011, a warrant was issued for Mdluli’s arrest, in connection with the murder of Oupa Ramogibe, who was shot dead on 17 February 1999. The Hawks also began investigating Mdluli, Crime Intelligence Finance Chief Solly Lazarus and Senior Supply Chain Manager Hein Barnard over the alleged plundering of the division’s secret account. The special account had been used for years as a political slush fund and the division’s officers had merely taken this a step further by abusing it for their private benefit. Mdluli was alleged to have employed his friends and family as intelligence operatives, misused safe houses for mistresses, and misused police funding to purchase luxury cars.

The fraud and corruption charges against Mdluli were dropped on 14 December 2011. On 23 September 2013, Judge John Murphy instructed the SAPS to reinstate all criminal charges against Mdluli without delay. The court in effect also compelled the NPA to prosecute Mdluli. It is exceptionally rare for a court (in most common law countries) to compel a prosecution service to prosecute, so this is quite significant.

According to the court, Lieutenant General Nhlanhla Mkhwanazi in the withdrawal of disciplinary action against Mdluli had “undermined the integrity of SAPS and failed to ensure

26. See <http://www.legalbrief.co.za/article.php?story=20131024121805632>; <http://www.iol.co.za/news/politics/zuma-sex-scandal-pikoli-speaks-out-1.1594519#.UnKfeb5gXzB>; Vusi Pikoli and Mandy Wiener, *My Second Initiation* (Picador Africa, Johannesburg, 2013).

27. SAPA, Hawks law sent back to parliament, *IOL News*, 17 March 2011; <http://www.iol.co.za/news/politics/hawks-law-sent-back-to-parliament-1.1043485> (accessed 22 March 2011); Andrew Faull, *Inside view: Police officials’ perceptions of corruption and integrity management at three Gauteng SAPS stations in 2009* (ISS, Pretoria, 2011); Andrew Faull, *Corruption in the South African Police Service: Civilian perceptions and experiences* (ISS, Pretoria, 2011); Gareth Newman and Andrew Faull, *Protector or predator? Tackling police corruption in South Africa* (ISS, Pretoria, 2011), pp. 20-24.

28. <http://www.bdlive.co.za/national/2013/10/15/legislation-does-not-protect-hawks-from-political-interference>.

that it operated transparently and accountably”. Riah Phiyega, then Head of the Office of the Inspector General of Intelligence and current National Police Commissioner, according to the court, “failed in her constitutional duty to investigate allegations against [Richard Mdluli] and the unfeasibility of his holding of a position of trust at the highest level in SAPS”.

The decision by Andrew Chauke, Director of Public Prosecutions for South Gauteng to withdraw murder charges against Richard Mdluli without consultation was criticised and found dubious by the court. It found that based on an invented reason, specialised Commercial Crimes Unit Head Lawrence Mrwebi dropped corruption charges against Richard Mdluli. According to the court, Advocate Nomgcobo Jiba, Deputy National Director of Public Prosecutions at the NPA, failed in her constitutional duty by remaining “supine” in the face of the public outcry over Mdluli. Still, at present, moves and lobbying are underway to pave the way back for Mdluli as a Zuma ally into the SAPS.

Meanwhile, President Zuma has expunged the criminal record of Jiba’s husband, Booker Nhantsi, who had been found guilty of embezzlement. Interestingly, Mdluli had supported Jiba after she had been suspended from the NPA for allegedly abusing her power to derail the prosecution of former SAPS National Commissioner Jackie Selebi. Following a closed-door deal, the NPA also dropped serious corruption charges against two senior KwaZulu-Natal politicians who are known supporters of a second Zuma presidency.

Thus, the key crime intelligence and investigative units of the police service and the main prosecution agency have been overtaken by factional battles due to politicization and corruption.²⁹ Much of it can be related to the National Prosecuting Authority’s inexplicable withdrawal of charges on over 700 counts of corruption against President Zuma shortly before the 2009 election. Since then, the President or his supporters have ensured that these actors are sufficiently contained or controlled through cadre deployment to ensure that he stays out of court.

As stated by the Institute of Security Studies:

There have been various incidents that have suggested a lack of integrity and independence within the NPA, most notably the withdrawal of serious criminal charges against those connected to or openly supporting President Zuma.

Indeed, there were accusations of political meddling when former NDPP Bulelani Ngcuka made the controversial statement in 2003 that even though there was a prima facie case of corruption for Zuma to answer to, the NPA was not going to prosecute as it felt the case was not winnable. This was the case despite the fact that Shabir Shaik was convicted and sentenced to 15 years for

29. <http://mg.co.za/article/2013-10-31-infighting-vs-crime-fighting>;
<http://www.dailymaverick.co.za/article/2013-05-06-saps-mdluli-on-the-rise-again-while-rumours-of-the-coming-purge-persist/#.UnUHQ75gVD4>.

*corruption involving Zuma. Again in April 2009, when then acting director of the NPA Mokotedi Mpshe dropped criminal charges of corruption, fraud, money laundering and racketeering against Zuma, many people suspected that the reasons were primarily political in nature. The NPA's credibility took a huge knock both when Mokotedi said the reason for his decision was not based on the merits of the case, meaning the evidence against Zuma, but because of untested and illegally obtained crime intelligence tapes, and when it emerged that he had plagiarised an overturned Hong Kong court judgement to explain his argument.*³⁰

The justice system and the judiciary

Policy documents of the ANC state unambiguously that the organisation uses its policy of cadre deployment to give the ANC control over “all centres of power”. In terms of this policy, the ANC has already succeeded in gaining control over most institutions that wield power.

The South African judiciary is still generally seen as independent and free of executive interference. However, this tendency is under threat, since both policy processes and the emerging institutional norms and incentive systems of patronage and prebendalism inhibits the capacity of the police, as well as prosecution and correctional service delivery. As a result, the potential positive roles of the judiciary in ensuring law and order, the rule of law and justice are hugely inhibited. Still, the judiciary has issued several judgments in past years that reflect its continued position as an independent voice.

In 2011, of the 226 judges, 135 were black and 91 white. However, transformation has largely focused on demographics. Concerns have been expressed that appointments should also take into account skills, a judicial mind set and a philosophy that embraces the values of the South African Constitution. There are concerns that the language of demographic transformation will be used to push for the appointment of more ‘pro-executive’ judges.

Unanswered questions remain about whether the Judge President of the Western Cape, John Hlophe, attempted to influence two Constitutional Court Judges, Chris Jafta and Bess Nkabinde to decide a matter in favour of Jacob Zuma. George Devenish, Emeritus Professor of Public Law at the University of KwaZulu-Natal (Durban) and one of the scholars who assisted in drafting the interim constitution in 1993, has assessed the Hlophe issue:

*This traumatic state of affairs must be seen for what it is – a constitutional crisis of chronic proportions that could do permanent damage to the judiciary with dire consequences for democracy.*³¹

30. <http://www.issafrika.org/iss-today/whither-integrity-and-independence-in-the-npa>.

31. <http://www.iol.co.za/the-star/hlophe-case-a-stain-on-judiciary-1.1592943#.UmTUPr7CRD4>;
<http://mg.co.za/article/2013-10-17-hlophe-matter-must-not-be-swept-under-the-carpet>.

In 2008, the Constitutional Court was deciding on a case dealing with Jacob Zuma, then an ordinary citizen. After visits by Western Cape Judge President John Hlophe to Judges Jafta and Nkabinde of the Constitutional Court, their discussions were reported to other members of the court, including the then Chief Justice Pius Langa. On the strength of these reports, the judges of the court lodged a complaint with the Judicial Service Commission (JSC) based on an allegation of an improper attempt to influence the court's pending judgment in the Zuma case.

After litigation had been initiated by Hlophe to clear his name, Jafta and Nkabinde made sworn statements confirming the contents of the complaint insofar as it related to them. An inquiry finally got underway in 2009. The JSC subcommittee charged with the task heard evidence from Jafta, Nkabinde and Hlophe, then decided this evidence was insufficient to establish that Hlophe had improperly attempted to influence the other two judges.

However, the organisation Freedom under Law, chaired by Judge Johann Kriegler made an application to the Supreme Court of Appeal. It argued that the JSC had abdicated its constitutional duty to investigate the complaint properly and had failed to assess the evidence in a legal fashion. Inexplicably, it had disallowed cross-examination of the three witnesses. In March 2011, a unanimous bench of the Appeal Court ruled that the process had to recommence.

Constitutional Law experts Issacharoff and Pildes distinguish between first-order and second-order approaches to constitutional judicial review. In South Africa, the Constitutional Court has tended to use a first-order approach that gives attention to those consequences of the ANC's domination that manifests themselves as violations of rights. A second-order approach to tackle the background rules that structure and result from ANC domination has been largely absent.³²

At present, as argued by Constitutional Law expert Sujit Choudry, the Court lacks an adequate understanding and the conceptual tools to question the assumption of political competition and alternation in South Africa's political order. The Constitutional Court judges do not realize that it cannot rely on the risk of losing power as a strong check on the ANC's abuse of power.³³

The NDR and withholding protection from farmers

Under Zuma, the police has been expanded by 70,000 members and its budgets increased by 22 per cent, but cases finalised have dropped by 10 per cent. Appointments based on patronage and ANC cadre deployment have had a major impact, also directly on the political

32. Sujit Choudry, "He Had a Mandate": The South African Constitutional Court and the African National Congress in a Dominant Party Democracy, *Constitutional Court Review*, 2010.

33. Sujit Choudry, "He Had a Mandate": The South African Constitutional Court and the African National Congress in a Dominant Party Democracy, *Constitutional Court Review*, 2010, pp. 5-6, 37-38.

system: there is a weak handling of the increasing number of political killings in South Africa, which is often related to whistleblowers revealing corruption, or to competition for positions that would give access to resources.

Gareth Newham of the Institute for Security Studies states:

*The police cannot become more effective because the national commissioner of police was a political appointment and has no police experience. The system for a professional ethos has collapsed and lower level officials are excluded because they aren't politically-aligned. If people are not seen as a part of the ruling factions and they are killed, there is little chance of an investigation.*³⁴

A particularly serious category of crime, is attacks on the small community of about 30,000 commercial farmers. These attacks are not being perpetrated against members of minorities only, however most of the victims of such attacks are Afrikaner farmers. More than 3,300 farm attacks have been recorded in the period 1991-2013.³⁵

Few of these incidents involve large-scale theft. Usually, arms, vehicles, mobile phones and cash are robbed, but combined with high levels of brutality, violence and even torture. Eileen de Jager and Roelien Schutte, two sisters who clean up crime scenes nationally, have said that they had seen a definite increase in extreme violence in farm attacks. They said if the public realised what actually happened during such attacks, it would serve as a wake-up call that would mobilise communities to be more vigilant. De Jager stated:

*Victims are often tortured before being dragged behind cars, or they are mutilated with boiling water. It is beyond insane.*³⁶

Even the organisation Genocide Watch of US Prof Gregory Stanton voices concerns about farm attacks and murders. However the South African Minister of Police refuses to categorise this as a priority crime, deserving of special police strategies to prevent such incidents.³⁷ The unwillingness to prioritise farm murders comes after the ANC government had disbanded the rural commandoes that served as a protective mechanism. It indicates the subjection of even a general interest like food security and general stability to political preferences and opportunities to gain resources.

34. <http://allafrica.com/stories/201310220779.html?page=3>.

35. Dirk Hermann, Chris van Zyl en Ilze Nieuwoudt, *Treurgrond [Land of sorrow]* (Kraal, Pretoria, 2013); <http://www.issafrica.org/iss-today/farm-attacks-and-farm-murders-remain-a-concern>.

36. <http://news.iafrica.com/sa/829892.html>.

37. <http://genocidewatch.net/2012/12/07/country-profile-south-africa/>;
<http://www.citypress.co.za/news/farms-are-not-special-areas-minister/>;
<http://mybroadband.co.za/vb/content.php/6070-Farms-do-not-deserve-more-police-focus-Police-Minister>.

Food security has dropped in the past five years to include only 45.6 per cent of the population. Yet, better protection of farmers is being withheld.³⁸ The Masibambisane Rural Development Trust programme, the only wide scale nationally driven food security programme, is just as subject to political preferences. After being initiated by the government, Masibambisane somehow transformed into an NGO, chaired by President Jacob Zuma and run by a relative, Sibusiso “Deebo” Mzobe. Mzobe has little prior experience in this field.³⁹

Land ownership and land reform are contentious issues in South Africa. Farmers or land owners are often singled out and blamed for the slow progress made in this regard. The ANC political elites have also racialised the issue to mobilize support for the ANC’s policy of increased access to resources, be it through new regulations, taxes and shares related to business – especially in the mining and energy sector – or to land.

ANC Youth League Deputy-President Ronald Lamola called on several occasions in June 2012 for the expropriation of farms and even threatened violence as part of this process. He inter alia said:

*If they don’t want to see angry black youths flooding their farms they must come to the party. Whites must volunteer some of the land and mines they own. They can’t only be compelled to do so through legislation.*⁴⁰

He also called for changes to the Constitution to allow the state to appropriate land and said youth unemployment could not be dealt with unless land was expropriated. Lamola stated that “it is an illusion if South Africans believe they can get their land back peacefully” and “we need an act as forceful as war to bring it back to the Africa”.⁴¹

Some of the violent attacks on farmers, like some attacks in urban areas, show signs of thorough planning and professional execution by well-trained gang members or militias. Unlike the case of farm invasions in neighbouring Zimbabwe, to date insufficient evidence has emerged of militias being responsible for some of these attacks. However, it cannot be excluded that new evidence may emerge in future, especially from under-policed urban township areas that point to a different conclusion.⁴²

Dr Johan Burger of the Institute for Security Studies states:

38. <http://www.news24.com/SouthAfrica/News/Food-security-in-SA-declining-study-20130806>.

39. <http://www.iol.co.za/news/politics/zuma-s-cousin-caught-in-a-scandal-1.1521950>;
<http://www.iol.co.za/business/companies/brics-event-nets-r2-3m-for-zuma-relative-1.1577779#.UnPVaL5gVD4>; <http://www.enca.com/south-africa/zuma-implicated-rural-development-deal>; <http://mg.co.za/article/2013-02-08-00-zumas-most-trusted-lieutenants>.

40. <http://mg.co.za/article/2012-06-05-ancyl-land-reform>.

41. <http://mg.co.za/article/2012-06-05-ancyl-land-reform>;
<http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71654?oid=307730&sn=Detail&pid=71616>.

42. <http://www.moneyweb.co.za/moneyweb-south-africa/business-worried-about-increase-in-violent-crime>.

The murder of 32 farmers (exclusive of their families and workers) in 2011 provides a murder ratio of 98.8 killings per 100,000. This is over three times higher than South Africa's national average of 30.9 murders per 100,000 in that year and 14 times the global average of 6.9 murders per 100,000. South African farmers are almost twice as likely to be murdered as police officials, where a ratio of 51 murders per 100,000 was recorded during 2011/12. This was enough of a concern for the Minister of Police to host a national summit on police killings in July 2011, which resulted in a "Ten Point Implementation Plan" to address this problem.

So why are the murders of farmers not being prioritised by the government? There is already a crisis in commercial agriculture and these attacks are making it worse. If this situation continues it will have a very negative impact on the rural economy and South Africa's food security. It is crucially important for government to prioritise the security of our farming community and to resume the monitoring and reporting of these attacks and murders. We will all be worse off if the government continues to ignore this pressing problem.

In the case of political killings of mostly black whistleblowers revealing corruption or people not seen as part of the ruling faction, police investigation and follow-up protection has been limited and almost reluctant.⁴³ Similarly, proper protection of the farmers whose property is coveted and who are not seen as part of the ruling faction, is being withheld. In contrast, when faced with attention from international actors and media during the World Cup 2010, the ANC government actively intervened to ensure security at important venues.

Several factors reinforce what amounts to a government policy of withholding protection from citizens and communities not considered as part of the ruling faction: the ANC's policy of a National Democratic Revolution, also in land possession and ownership; its cadre deployment, also in the police; its focus on own patronage rather than service delivery; its decreasing accountability to citizens and communities; and factions in the ANC that want the land of many farmers to be transferred to ANC cadres and constituencies.

For partisan political reasons, the ANC cadres in state structures have not used their ability to improve the protection of the small commercial farming community, the key actor that ensures food security in South Africa. As Africanist Prof Patrick Chabal has noted in some cases elsewhere in Africa,⁴⁴ the ANC is in effect allowing violent crime to restructure the political environment in its favour.

43. <http://allafrica.com/stories/201310220779.html?page=3>.

44. Patrick Chabal and Jean-Pascal Daloz, *Africa Works: Disorder as Political Instrument* (International African Institute, London, 1999).