

## CHAPTER 5

# PROSECUTIONS AND THE ADMINISTRATION OF JUSTICE

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South Africa's judiciary, courts and prosecution service do not have the capacity to adequately deal with the case load swamping the country's criminal courts. Between 2001 and 2002 the number of investigated cases referred to court increased by 47%. Between 1996 (the first year for which accurate figures are available) and 2002 the number of criminal cases referred to court increased by a massive 110%.<sup>113</sup> Over the same period the number of prosecutions and convictions increased by, respectively, only 51% and 58%.

Since the late 1990s the National Prosecuting Authority (NPA) has employed more prosecutors, and the annual number of finalised cases has increased. However, because of high levels of crime, and police operations which result in a large number of arrests, the number of outstanding or uncompleted cases in the country's courts has also increased. While the state can employ more prosecutors, it is expensive to train new recruits and pay them high enough salaries to keep experienced and skilled prosecutors in its employ. Moreover, the effective prosecution of certain intricate crimes require specialised skills which the NPA does not have.

A cost-effective way of dealing with the large backlog of cases, and the prosecution of intricate cases, is to outsource their prosecution. Some tentative steps towards outsourcing particularly difficult-to-prosecute commercial crimes have been taken by the NPA's Specialised Commercial Crime Unit. At the Pretoria Specialised Commercial Crimes Court, the NPA has outsourced the prosecution of selected cases to experienced private counsel.

Another way to lighten the burden on the state's prosecutors is to make it easier for crime victims to institute private prosecutions. It is, for example, likely that, given the choice, some financial institutions would happily forego relying on overworked public prosecutors and prefer to pay competent private counsel to prosecute persons suspected of defrauding them of large sums of money. Other outsourcing options to relieve the pressure on the criminal courts include private arbitration and mediation schemes to deal with minor criminal offences, and outsourcing the management, administra-

tion of criminal courts. These and other outsourcing options are discussed in greater detail below.

## **Insufficient Capacity**

Cases are 'referred to court' when the South African Police Service (SAPS) hands over investigated cases to the prosecution service. This is done when the police believe there is a *prima facie* case against a suspect. In essence, cases are sent to court only if there is fairly substantial evidence for a suspect to be charged with an offence. Only about a quarter of all crimes recorded by the police result in referrals to court. Yet, the courts are unable to deal with the load of cases the prosecution service has elected to prosecute. The number of cases referred to court since 1996 – and especially since 2000 – has been increasing at a far greater rate than the courts are able to finalise (Figure 1).

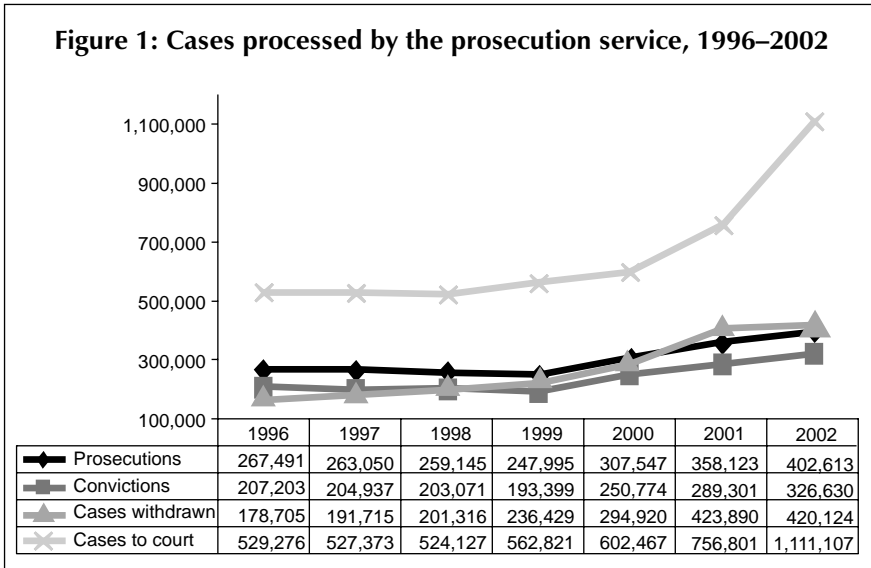
For example, during 2002 some 1.1 million cases were referred to court. During the same year only 403,000 cases were finalised with a verdict, of which 81% resulted in a conviction and 19% in an acquittal or not guilty finding.<sup>114</sup> A further 420,000 cases were withdrawn by the prosecution service.<sup>115</sup> Thus, of all the cases dealt with by the prosecution service during 2002, just over half (51%) were withdrawn. A further 40% resulted in a conviction and 9% in an acquittal.<sup>116</sup>

What follows below is a brief discussion, demonstrating that a lack of a sufficient number of skilled and experienced prosecutors and police investigators is leading to inefficiencies in the court process; specifically to high case withdrawal rates and a growing backlog of outstanding cases.

### ***Withdrawn cases***

Between 1996 and 2002 almost two million cases referred to court were withdrawn by prosecutors across the country. With almost every second case referred to court being withdrawn, it would appear that police resources are being wasted in the investigation of cases which do not make it to the trial stage of criminal proceedings.

There are a number of reasons for the high withdrawal rate. A common reason for the withdrawal of charges against an accused is a court's refusal to grant the prosecution any further postponements in respect of a case on the



Sources: SAPS CIAC, NPA Court Management Unit

court roll. The South African constitution grants every accused the right to have their trial begin without any unreasonable delay.<sup>117</sup> Often suspects are charged before the investigation pertaining to their case is completed by the police. This can produce lengthy delays as the police’s investigations need to be finalised before the prosecution can compile a detailed charge sheet against an accused and commence with a formal prosecution.

Courts will grant postponements to the prosecution, so as to allow the police to finalise its investigations, for a reasonable time only. In less serious cases, lengthy and frequent postponements are rarely granted. For example, prosecutors require a blood-alcohol analysis report from the Department of Health’s forensic chemical laboratories to successfully prosecute persons charged with driving while under the influence of alcohol (i.e. drunken driving). It takes about six weeks for such a report to be finalised, and the courts are generally prepared to postpone drunken driving cases for such a length of time. Over busier periods, such as Christmas time, when there are many police roadblocks and the number of people charged with drunken driving increases, the finalisation of such reports can take up to three months. Most courts are unlikely to postpone drunken driving cases for such a long time. Consequently, in cases where a trial might be unreasonably delayed due

to outstanding forensic investigations, (such as a blood-alcohol or district surgeon's report), withdrawal rates are high.

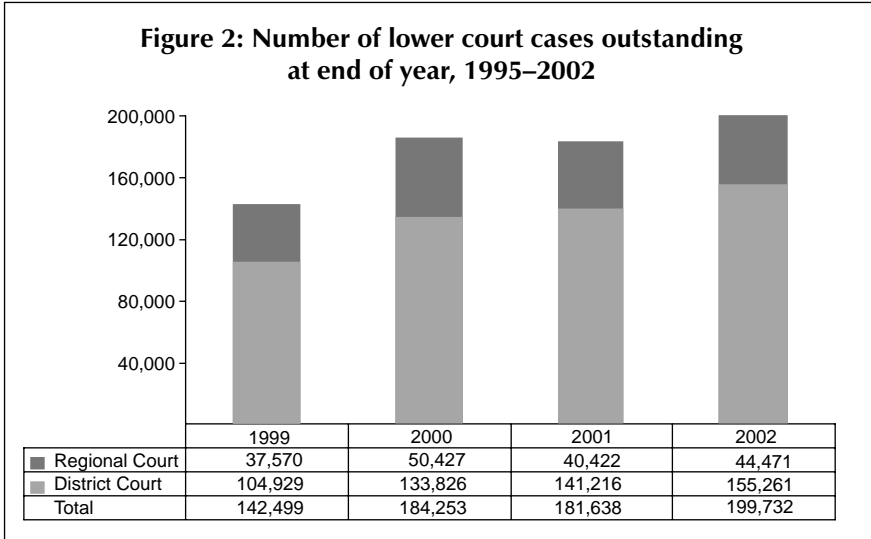
Generally about half of all residential housebreaking, robbery, and car theft cases referred to court are also withdrawn by the prosecution service. For these crimes it is unlikely that ambivalent victims are the reason for the high number of withdrawals. The more likely reason is the often inordinate delay in the investigation of these crimes, and the consequent failure of witnesses to testify in court.<sup>118</sup> The latter might be because many witnesses tire of going to court with the expectation to testify, only to be told that the case will be postponed because of outstanding investigations or because the court is too busy to accommodate their case. Some witnesses are also intimidated from attending court by the accused they are supposed to testify against. The more often and the longer witnesses have to wait outside busy court rooms, the greater the opportunity for their intimidation. In parts of the country, many burglaries, robberies and car thefts are committed by crime syndicates whose members do not hesitate to intimidate those who might testify against them. Moreover, some witnesses might have no faith in the criminal justice system, and elect not to testify for this reason.<sup>119</sup>

### ***Outstanding cases***

The backlog of outstanding cases is high. At the end of 2001, about 182,000 lower court cases were 'outstanding' or had not been finalised. This represents the backlog of cases the courts had to contend with at the beginning of 2002. At the end of 2002, some 200,000 lower court cases were outstanding or had not been finalised (Figure 2). At the end of 2002, the number of outstanding cases was equal to almost half of all cases prosecuted during that year. Already in October 2000, the National Director of Public Prosecutions, Bulelani Ngcuka, pointed out that the 180,000 criminal cases outstanding in the country's courts at the time, would take prosecutors two years to deal with, excluding any new cases.<sup>120</sup>

### ***Court productivity***

During 2002 the average district court secured 273 convictions; the average regional court 64 convictions. Given that district courts mainly deal with minor offences, 273 convictions per average court per year – or a conviction about every working day – is low. While some regional court trials take a long time to finalise, an average of one conviction per court every fourth working day is also low.<sup>121</sup>



Source: NPA Court Management Unit

During 2002 the average district court sat for 4 hours and 10 minutes, and the average regional court for 4 hours (excluding periodical courts). The courts are working far below their potential capacity. In theory, courts are open six hours per day. While courts sitting six hours a day are probably impossible to achieve in practice, there is considerable room for improvement for the many courts that sit for even shorter periods than the present average of around four hours.

## Policy Dilemma

No empirical research has been done to show why many cases are being withdrawn by the prosecution service, a high number of outstanding cases are overwhelming the courts' rolls, and the courts are unable to sit for longer periods of time given the large backlog of cases that need to be finalised. It is likely that the core problem facing the courts is one of too few experienced investigators and prosecutors who can expeditiously finalise the investigations, and prosecute the cases referred to court.

Experienced prosecutors can assist inexperienced police investigators by giving the latter guidance and advice during the investigation process. A sufficient number of experienced prosecutors should thus be able to reduce the number

of cases going to court that end up being withdrawn because of a lack of sufficient evidence against the accused, or because of inordinate delays in the investigation process. Investigations conducted under the guidance of experienced prosecutors avoid unnecessary enquiries, and instead focus on the core issues that need to be proved to convict the accused. A shorter period between arrest and prosecution, reduces the risk that victims change their minds to testify because of the inconvenience of repeatedly attending court or intimidation. Moreover, the shorter the period between the commission of a crime and the prosecution thereof, the greater the likelihood that witnesses can recall what they saw, thereby increasing the chances of a successful prosecution.

Shorter investigation times and faster prosecutions reduce the average period accused persons remain incarcerated awaiting trial, thereby relieving pressure on the overcrowded prison system. With fewer accused persons awaiting trial, the proportion of time prosecutors spend postponing cases and conducting bail applications should decrease. This, and the fact that experienced prosecutors are able to finalise trials more rapidly than their inexperienced colleagues, should decrease the number of outstanding cases within the system.

Since the creation of the National Prosecuting Authority in 1998, a number of recruitment drives have increased the number of prosecutors. Moreover, new career paths for prosecutors have been developed to retain the services of experienced prosecutors. Provided the National Treasury allocates the necessary resources, it is relatively easy for the NPA to recruit new prosecutors. However, the disadvantage to recruiting large numbers of new prosecutors is that they are a considerable and recurring expense in the long run. As is the case with the public service generally, prosecutors are paid more the longer they stay within the service. A prosecutor with ten years experience, for example, generally receives a relatively high salary irrespective of how good or productive that particular individual is.

As the public service tends to be inflexible in terms of its hiring and firing policy, with very little individualised performance review, badly performing prosecutors are rarely dismissed. The prosecution service is able to react only slowly and inflexibly to changes in the demand for prosecutors. Once the senior management of the NPA realise there is an increased demand for prosecutorial capacity, it needs to persuade the National Treasury to allocate more money for the recruitment of prosecutors, go through a lengthy recruitment process and train the new recruits. Such a process can take a few years. By the time newly recruited prosecutors are able to take on their positions in court rooms throughout the country, the increased demand for additional

prosecutorial capacity may have subsided. For example, with the launch of the police's Operation Crackdown in 2000 the number of cases referred to court increased dramatically.<sup>122</sup> It is likely, however, that as the Operation begins to wind down during 2003, and as recorded crime begins to stabilise and even decrease, the need for additional prosecutors will decrease too. The new prosecutors hired in response to the increased case load brought about by Operation Crackdown will, however, continue to be an expensive drain on the NPA's coffers after the need for their services subsides.

A surplus in the number of prosecutors can, of course, be managed through the natural attrition of staff the NPA experiences all the time. On balance, however, the most qualified and skilled prosecutors are the first to leave the NPA to seek work in the lucrative private sector. These are usually prosecutors with skills in demand by both the NPA and private law firms or financial institutions, such as prosecutors with experience in prosecuting serious commercial crimes and the activities of organised crime syndicates. As the public service allocates rewards for prosecutors primarily for being loyal employees (i.e. by length of service), rather than by the scarcity of their skills, commercial crime prosecutors generally receive the same remuneration as, for example, violent crime prosecutors of the same rank and years of service.

In summary, the dilemma policy makers face is that hiring new prosecutors is expensive, and there is no guarantee they will remain in the prosecution service once they have gained work-related experience and practical litigation skills. Moreover, should a large number of new prosecutors be hired to get rid of the backlog of cases, the state may end up with a surplus of prosecutors if there is a significant decrease in recorded crime.

## **Outsourcing solutions**

An effective way of addressing the state's dilemma of meeting the changing demand for prosecutorial services, and for the state to be in a position to provide rare and expensive prosecutorial skills only when there is a justified demand for such services, is through outsourcing some of the services presently provided by the NPA.<sup>123</sup> As is discussed in greater detail below, by outsourcing certain types of prosecutions, and making use of outsourced prosecutorial services when there is a spike in the demand for prosecutors, the state could at all times guarantee a complete and effective prosecutorial service in a cost-effective manner. The categories of cases suitable for outsourcing, and the concept of private prosecutions, are discussed below.

## **Complex cases**

Most prosecutors enter their profession directly from law school. The typical academic qualification of a prosecutor is a bachelor degree in the social sciences, followed by a law degree. Prosecutors have little or no training in subjects such as forensic accounting, computer science or the natural sciences. As a result, computer related fraud cases, intricate commercial crimes and environmental offences are often not prosecuted, or prosecuted unsuccessfully, because of the lack of technical knowledge on the part of prosecutors.

Such specialised prosecutions could be outsourced to legal specialists in the private sector.<sup>124</sup> Bruce Benson, an economist from Florida State University, argues that there are advantages in specialisation, and the use of specialised personnel.<sup>125</sup>

One reason that the private sector might be expected to do well what the government criminal justice system does badly is that consumers generally have narrowly focused concerns. Thus, when they pay a private firm to alleviate those concerns, they can hire someone with expertise. When resources *specialize* in their area of comparative advantage, economic efficiency is enhanced. More is produced with the same resources, or fewer resources are needed to produce the same level of output.

There are many law firms in South Africa which specialise in commercial crime and, to a lesser extent, environmental issues of a legal nature. They have qualified and experienced personnel to handle intricate fraud cases. While outsourcing such prosecutions to the private sector might be an additional expense to the state in the short-term, the long-term benefits of an increase in the number of successful convictions would be considerable. Through the effective combating of such crime, the economy as a whole would benefit. Moreover, diverting selected cases to the private sector will permit state prosecutors to concentrate their efforts on other priority crimes which strongly undermine public safety, such as murder, rape and robbery.

### **Outsourcing selected commercial crime prosecutions**

Outsourcing selected prosecutions in South Africa would not be new. For some time the Specialised Commercial Crime Unit (SCCU) of the NPA has been outsourcing the prosecution of selected cases falling within the juris-

diction of the Specialised Commercial Crime Court in Pretoria (which has been operating since 1999).

The NPA has, on a number of occasions, made use of private legal counsel to prosecute particularly difficult and complicated commercial crimes tried at the Specialised Commercial Crime Court. The specific objectives of this outsourcing initiative include:

- the successful prosecution of high profile, complex cases, where the guilty are appropriately sentenced; and
- the transfer of skills from private counsel to state advocates.

The Specialised Commercial Crime Court is supported by Business Against Crime (BAC). Through BAC-facilitated negotiations between the NPA and the business sector, a trust fund has been set up so that money donated by the private sector – primarily banks and other financial institutions – is available to the NPA to finance outsourced prosecutions.

Consequently, in cases where the prosecution service lacks the skills or the confidence to prosecute a particularly intricate commercial crime, the NPA may use the money in the trust fund to hire senior counsel in private practice to assist the state in the prosecution of such cases. Usually a senior private advocate is teamed up with one or two state advocates. In this way a mentoring relationship can develop through which the private sector specialist can transfer some of his skills to the state prosecutors allocated to him. When similar cases come up in the future, the state (through its mentored prosecutors) should have gained the necessary skills to prosecute the matter without outside assistance.<sup>126</sup>

By all accounts the Specialised Commercial Crime Court has performed well.<sup>127</sup> During 2001, the two magistrates of the court handed down judgments in 171 cases, with 88% resulting in a conviction.<sup>128</sup> Each case was finalised in an average of two days of court time. Nationally the average regional court takes about four days to complete a trial, and this includes simpler-to-prosecute and adjudicate violent crimes. While it is not possible to determine the extent to which outsourced prosecutions have assisted the NPA to boost its performance in respect of prosecutions at the Specialised Commercial Crime Court, there is general agreement that outsourcing the prosecution of selected cases has been a success.

## ***Seasonal cases***

Certain crimes have a seasonal prevalence. Over the December holiday period there is an upsurge of drunken driving, shoplifting, assault, and domestic violence cases. These are normally not complicated cases to prosecute. Because of their sheer numbers, however, and the fact that many prosecutors go on leave over the December period, a congestion of cases usually builds up at the beginning of every year.

The solution to effectively deal with the seasonally-determined changes in case-load is not to employ more prosecutors on a full-time basis as this would bring about a surplus of prosecutors for the remainder of the year. Rather, the prosecution of such cases should be outsourced to articled clerks and junior attorneys in the private sector.<sup>129</sup> This would assist the state to deal cost effectively with the annual increase in cases referred to court at the end of every year.

Similarly, in the aftermath of extended SAPS crime combating operations – such as Operation Crackdown – an increase in the number of cases referred to court can be expected. In such situations it may not be cost effective, or even possible within a short period of time, to employ a large number of new prosecutors on a full-time basis. New prosecutors would need to be trained first to have the necessary level of skill to deal with many of the serious cases investigated by the police. Rather, it may be more appropriate to outsource the prosecution of such a short-term influx of cases to private lawyers who are appointed as prosecutors for a limited period of time only.

## **Private Prosecutions**

A number of countries permit private prosecutions under certain circumstances. In 1985 the Council of Europe's Committee of Ministers adopted a recommendation that crime victims should have "the right to ask for a review by a competent authority of a [prosecutor's] decision not to prosecute, or the right to institute private proceedings".<sup>130</sup> In England, victims perform about 3% of criminal prosecutions.<sup>131</sup> In Germany, private prosecutions are permitted in two circumstances. First, a class of minor offences, including violations such as domestic trespass, can be prosecuted by victims. Second, a crime victim can demand that the public prosecutor pursue a case, and if the demand is refused, the victim can appeal to the court. If the court orders a prosecution, the victim can act as a 'supplementary prosecutor' to ensure that the public prosecutor adequately presents the case.<sup>132</sup> In Mexico, an amendment

to the constitution in 2000, provides for the right of victims to appoint a lawyer to assist the public prosecutor's office with the investigation and trial, and to adduce evidence.<sup>133</sup>

In a report on private prosecutions, produced by the Law Reform Commission of Canada, a case is made for expanding the use of private prosecutions.<sup>134</sup> While the report focuses on the Canadian criminal justice system, the arguments presented by the Commission are appropriate to South Africa as well. The Commission argues that a criminal justice system that makes full provision for the private prosecution of criminal offences has advantages over one that does not:

In any system of law, particularly one dealing with crimes, it is of fundamental importance to involve the citizen positively. The opportunity for a citizen to take his case before a court, especially where a public official has declined to take up the matter, is one way of ensuring such participation.<sup>135</sup>

The Commission felt that certain kinds of offences are more likely to motivate individuals or public interest groups to launch a private prosecution. For example, offences relating to the protection of consumers, the environment or animals are likely to bring forth citizens who are committed to the enforcement of the values contained in this type of legislation. At the same time these types of offences – usually of the regulatory kind – are most likely to be given a lower priority by the state prosecution service.

In another comment applicable to South Africa, the Commission concludes that society benefits where formal, positive citizen interaction with the justice system results in some additional control over official discretion:

The form of retribution which is exacted by the citizen's resort to legal processes is clearly preferable to other unregulated forms of citizen self-help. Further, the burgeoning case-loads which our public prosecutors routinely shoulder are, in some small measure at least, assisted by a system which provides an alternative avenue of redress for those individuals who feel that their cases are not being properly attended to within the public prosecution system. Finally, this form of citizen/victim participation enhances basic democratic values while at the same time it promotes the general image of an effective system of administering justice.<sup>136</sup>

As in many other common law jurisdictions, South African legislation provides for private prosecutions but it is very rarely used in practice.<sup>137</sup> In South Africa

a private prosecution may occur only if a Director of Public Prosecutions declines to prosecute a case at the instance of the state. Moreover, private prosecutions are possible only in a limited number of circumstances, specified by statute. In essence, only a private person who proves some “substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered” can institute a private prosecution.<sup>138</sup> Companies and legal persons cannot do so.

There are a number of statutory safeguards to prevent persons misusing the limited right to institute a private prosecution:

- A private prosecutor must deposit with the court a fixed sum of money, and an amount the court may determine, as security for the costs which the accused person may incur in respect of his defence on a charge brought by a private prosecutor. Where a private prosecutor fails to prosecute a charge against an accused person without undue delay these sums of money are forfeited to the state.<sup>139</sup>
- In a private prosecution the accused person cannot be arrested, and may be brought to court only by way of a summons.<sup>140</sup>
- A court may set aside a private prosecution which is irregular or vexatious or constitutes an abuse of the process of court. If a court is of the opinion that a private prosecution is unfounded and vexatious, it must award to the accused person, at his request, such costs and expenses as the court deems fit.<sup>141</sup>
- Where an accused person is acquitted a court may order the private prosecutor to pay to the accused person the whole or part of the latter’s costs and expenses incurred in connection with the prosecution.<sup>142</sup>

There is much to be said for private prosecutions.<sup>143</sup> Public prosecutors’ offices often do not have the personnel, time and resources to adequately peruse the police dockets presented to them. Prosecutors also do not always have the time to confer with state witnesses or crime victims prior to a trial. Victims of crime have a right to a fair hearing of their grievance. In certain situations this right can best be upheld through the use of private prosecution. Tim Valentine, an American legal practitioner in favour of expanding the use of private prosecutions, says:<sup>144</sup>

The employment of private prosecution is in some cases and in some jurisdictions the only way for victims of crime to get justice. If you hire

an attorney [to conduct a private prosecution] and he allows your case to be continued into oblivion (or into the trash can) without putting up a spirited fight in open court, or if he otherwise fails to perform adequately, he can be subject to disciplinary action by the grievance committee of the bar association.

The argument that the concept of private prosecutions is flawed, because such prosecutions are accessible only to those with the means to pay for them, is misconstrued. Private prosecutions do not damage the rights of poorer victims of crime who have to rely on the public prosecution system. Private prosecutions reduce the workload of public prosecutors, allowing the latter to concentrate their limited resources on cases where, *inter alia*, poor people have been victimised by crime. Moreover, concerned citizens, victims' rights groups (such as rape crisis centres), and non-governmental organisations (NGOs) can assist indigent crime victims obtain the services of a private prosecutor.

### **Paying for private prosecutions**

Bruce Benson, a proponent of expanding private prosecutions, concedes that an important question in the debate around private prosecutions is: How would a private citizen finance the prosecution of an accused? Benson comments as follows:<sup>145</sup>

One possibility is a voucher system as has been suggested for privatizing indigent defense and eliminating the public-defender bureaucracy.<sup>146</sup> A superior way to pay for private prosecution (and one that simultaneously creates incentives to pursue prosecution) is the refocusing of the criminal justice system on restitution... including repayment of the costs of collection (e.g., prosecution and supervision of payment). Effectively, this procedure turns crimes with victims into torts, creating strong incentives to pursue prosecution in order to collect damages. This is not a far-fetched idea. For instance, in France, a crime victim can file a civil claim against the accused, and it can be filed in the criminal proceedings. Furthermore, if a judge in France finds a claim to be groundless, the accuser pays the court expenses and damages to the accused, and if the accusation is believed intentionally false, charges can be brought against the accuser.

Companies are loath to wait long periods for the finalisation of fraud cases involving their employees. Numerous, drawn-out court appearances are bad publicity, and costly as staff members have to spend time at court to testify. The loss for such companies is especially harsh if the prosecution is unsuccessful. Firms which are prepared to spend large sums of money on private investigators to track down a fraud suspect among their employees, might be willing to pay for an experienced and competent commercial lawyer to conduct the criminal prosecution of their cases as well – in particular if they were assured of a speedier finalisation of the trial, and a greater chance of obtaining a conviction.<sup>147</sup> Commercial insurance policies could even be adapted to cover the additional costs of a private prosecutor.

The law would need to be amended to permit companies and legal persons to institute private prosecutions. The law would also have to be amended to make it easier for individuals to institute private prosecutions. In terms of the present system, victims of crime may proceed with a private prosecution only after a Director of Public Prosecutions declines to prosecute the case in question. It may be prudent to explore the benefits of amending the law to permit private prosecutions which are not conditional upon a Director of Public Prosecution's decision not to prosecute in a matter. The decision whether to institute a private prosecution could be left to the victim of a crime – the person who arguably has the most to lose from a bungled prosecution.

There could be a number of benefits to such a change to the law. By instituting private prosecutions, crime victims improve their chances of obtaining a speedy conviction against an accused person. Accused persons benefit as their trials are finalised more rapidly than would otherwise be the case. Frequent delays in criminal trials place considerable financial and emotional strains on accused persons and their families, even if the trials end in their acquittal. Finally, private prosecutions would alleviate some of the pressures on the state-run prosecution system, as state prosecutors should be able to devote more time to other cases they have to deal with.

## **Arbitration and Mediation**

Most of the criminal cases heard in the lower or magistrate's courts, which are filling the court rolls beyond capacity, focus on factual rather than legal disputes. Such cases require a minimal application of the law. If used appropriately, private arbitration and mediation schemes could go some way towards

dealing with many of such minor criminal offences outside of the formal criminal justice process.

Arbitration is a substitute for a court trial. It involves a hearing and an enforceable decision, but the process takes place outside the court system, thus avoiding many of the delays, expenses, and stresses associated with litigation. Arbitration is usually quicker than litigation. It is also more convenient as hearings are set up at a mutually acceptable time and place. The arbitrator selected can be an expert on the offence in question, for instance domestic violence or reckless driving, which aids in shortening the presentations of the parties and in producing a sensible result.<sup>148</sup>

In the United States arbitration and mediation are used to reduce criminal court caseloads. Such alternatives have the advantage over the formal court system in that the needs of victims are adequately addressed. The following analysis, which looks at the position of victims of crime in the state-run US legal system, is equally applicable to South Africa:

Victims [of crime] feel abused and betrayed by the system when the conviction does not reflect the nature of the acts committed, and the penalty is disproportionately small in relation to the suffering and hardships that have resulted. In addition, victims and other witnesses are expected to attend repeated court hearings where they are taken for granted or ignored entirely. They are rarely informed of continuances or informal dispositions that make their presence unnecessary. They must endure the anxiety of waiting for hours upon end, often in the same room with, or even seated beside the person against whom they have been called to testify. They are expected to assume the financial hardship that the loss of their time entails, a hardship that can sometimes exceed the punishment that results for the defendant if he is convicted. In a very real sense, the victim and witnesses of crime become the victims of the criminal justice system itself.<sup>149</sup>

In Rochester, New York, a programme has been in operation since 1973 whereby less serious criminal charges are referred to arbitration. This is a programme whereby minor criminal charges are converted into civil actions which are then submitted by the parties to arbitration. "The rationale for the project is that not only are the courts relieved of a host of private minor complaints, but the disputes themselves are resolved in a more effective and positive way."<sup>150</sup>

In the Rochester programme, the first enquiry is about the nature of the offence and the relationship between the parties. The programme is available only to parties who know each other, such as husband and wife, landlord and tenant, neighbours, or employer and employee. The complaint must be over conduct which is of a minor criminal nature. Once this is established by the court complaint clerk, the complainant is advised of the arbitration option. Only if the complainant, the local senior prosecutor, and the accused person agree to opt for arbitration does the process proceed. If the accused person does not wish to proceed, the charge is prosecuted in the normal manner.

The arbitrator's primary aim is to mediate the dispute and work out a consent agreement. "Lacking successful mediation, the arbitrator has the authority to render his decision. The award can include civil damages and injunctive relief but not assessment of criminal penalties."<sup>151</sup> Part of the consent agreement concentrates on the needs of the victim and compensation by the accused person.

It would be fruitful to explore the role arbitration and mediation could play, to reduce the pressure on the formal criminal justice system in South Africa. Appropriate and effective arbitration and mediation schemes can assist the victims of crime, the courts and even accused persons who often have to wait months and even years for the finalisation of their trials. The high cost of criminal litigation, and the lack of capacity of the state run criminal justice system, adds to the appeal of an arbitration programme to deal with minor criminal offences in South Africa. The National Institute for Crime Prevention and the Rehabilitation of Offenders (NICRO), points out: "It would be in the best interests of justice and those affected by crime that a situation of judicial pluralism evolves, giving individuals more than one recourse to justice in order that their specific needs are addressed."<sup>152</sup>

A South African arbitration or mediation programme should bring about cost savings to the state. "Although the establishment of a mediator's office obviously has cost implications, these costs should be outweighed by cost-savings from staff reductions and smaller prison populations."<sup>153</sup> A 1992 pilot 'victim-offender mediation programme', undertaken by the Cape Town branch of NICRO, found that cases handled by such a programme are less expensive for the state compared to those processed through the normal criminal courts.<sup>154</sup> Arbitration and mediation centres do not need to be staffed by prosecutors, magistrates or judges. Centre staff could come from the ranks of attorneys (as is the case with the successful Small Claims Court system), community organisations, and even senior law students.

## **Administrative Support for Prosecutors**

Prosecutors spend a lot of their time performing routine administrative and clerical tasks because of a lack of support staff. This includes filling in exhibit request forms, drawing up charge sheets, photocopying statements, finding relevant case law, and telephoning witnesses to arrange court appearance times. For example, during 1997, in the only study of its kind it was calculated that prosecutors at the Cape Town magistrates' court spent almost 3,000 hours preparing copies of dockets for defence counsel.<sup>155</sup>

Many senior law students would welcome the opportunity to do an internship at a magistrates' court during their holidays. Law students are likely to do a voluntary internship free of charge if the system is well structured, and the interns are afforded the opportunity to learn. Apart from gaining practical experience about the operation of a criminal court, it would also enhance their CVs, and assist them in making valuable personal contacts in the legal profession. Some law schools allow their students to earn course credits for participating in a 'street law' programme where they teach high school students about their legal rights. In a similar manner law schools could allow their senior students to earn credits for spending a certain number of hours assisting prosecutors with their work.

Prosecutors with families tend to go on leave during the summer and winter school holidays. During these times most prosecutors' offices are particularly understaffed. As school holidays overlap with university vacations, student interns would be available at times when their services would be needed most.

## ***Court Management and Administration***

All larger criminal court centres employ non-legal personnel. These are court managers, clerks of the court, typists, secretaries, and other staff who perform a variety of administrative and clerical functions to ensure the smooth running of the courts. The tasks listed below, which are performed by non-legal court personnel, could be outsourced to the private sector.

### ***Clerical and administrative positions***

Court centres could outsource clerical and administrative positions, taking into account local requirements and budgetary constraints. For example,

outsourcing contracts could specify that the contracting firm is responsible for the information technology equipment necessary for the efficient provision of the service outsourced. It would not be up to the state to determine the optimal level of computerisation for each court centre. Moreover, the state would not be burdened with training its own staff to use the technology. Nor would the state have to purchase expensive information technology equipment that becomes outdated within a short period of time.

### ***Professional court managers***

Traditionally, senior magistrates have been responsible for managing the overall operation of court centres. In terms of the Integrated Justice System (IJS) programme, court managers are replacing these 'managing magistrates' in the busiest court centres. This is a sensible development as magistrates should adjudicate trials and not be distracted by day-to-day management issues.

In South Africa the state lacks an adequate supply of capable and experienced middle-level managers.<sup>156</sup> To overcome this, it would make sense to outsource court management functions to private sector managers. The private sector has a ready supply of capable managers. Moreover, management contracts could take into account the needs of individual courts (which would be almost impossible in the unionised and bureaucratic public service, where job descriptions for middle management positions are usually uniform throughout the country). For example, as part of the IJS programme many court centres will have their case management systems upgraded from a manual to an electronic system. Such court centres should employ managers with project and change management skills and a good understanding of information technology systems.

Court centres need to accommodate the needs of a number of government departments. While prosecutors and judicial officers spend most of their time at a court centre, many police officers, correctional officials and social workers also perform some of their functions within a court environment. The implementation of an electronic case management system, as well as other large departmental projects, involves changing the mind-sets and attitudes of public servants; of persuading public servants to not only think in terms of narrow departmental interests. In such situations it is helpful to have outsider managers who do not appear to be partisan and who can objectively implement projects in the interest of the criminal justice system as a whole, without favouring a particular programme or interest in the public service.

Finally, private sector court managers can be employed on the understanding that they improve the service courts, and the officials who work in them, deliver to the court-going public. This can be facilitated through regular court-user surveys. Such surveys can measure the opinions of court users on a variety of issues such as their feelings of safety while at court, the length of time they had to wait before being assisted by a public official, the cleanliness of public rest rooms, and the readability and usefulness of public signage at court buildings.

### **Court-based income-generating services**

In addition to improving services courts traditionally deliver to the public, private sector court managers can be encouraged to offset some of the costs of operating a court centre by generating an income for the centre they are responsible for. This could be done through an incentive scheme whereby managers receive a bonus calculated on the income they are able to generate (which would be difficult to do in terms of the strict rules governing public sector managers).

Examples of income-generating initiatives, for which a present need exists at most court centres in the country, include:

- Leasing out space of a court centre to catering companies (to open canteens and refreshment stations), banks (to install Automatic Teller Machines) and other small traders (to sell snacks, reading materials and phone cards, and provide photocopying, Internet-access and other basic office facilities for lawyers and witnesses who need to do some work while waiting for their court cases to begin).
- Renting out court rooms after hours to night schools and other training organisations in need of lecture rooms during evenings or over weekends.
- Renting out wall space outside of court rooms for advertisers. Restrictions could be placed on the type of advertisements that would be allowed excluding, for example, political and other controversial advertising. Non-governmental organisations and foreign donor organisations could be approached to rent space for public-interest advertisement to publicise, for example, public health, anti-crime or road safety campaigns.

## ***Security personnel***

Magistrates' courts are allocated guards who control access to court buildings and are responsible for general security. Many guards are employed on a full time basis by the Department of Justice and Constitutional Development. Such guards enjoy all public service benefits, such as generous paid leave provisions, medical aid, pensions, and housing loan assistance. Court-based security personnel are busiest in the morning when witnesses, accused persons, and members of the public enter court buildings. As cases are adjourned and finalised during the course of the day, the amount of human traffic entering and leaving court buildings drops considerably. Outsourcing such guarding functions would be cost effective for the state. Guarding contracts with private security companies could specify that a greater number of guards be on duty during the busier morning periods than in the afternoons. This should improve safety at the courts, and the state would pay only for the number of 'guarding hours' it procures.

High profile court cases often attract a large number of spectators and protestors. An outsourcing contract with a security company could specify that courts would be supplied with additional guards at short notice for a day. This is impossible under the current system, where court guards are employed on a full-time basis, and any additional security services are provided by the over-extended SAPS, which is called upon to assist courts on busy days.

Smaller courts experience a problem when one out of a staff complement of two guards goes on annual leave. This poses a security risk to that particular court as its guarding levels are reduced by half. An outsourced guarding service would obviate such a problem. The contract could commit the guarding company to provide a complete guarding service throughout the year.

### **PPP for justice department cash halls**

Every year public funds, between three and six billion rand, are channelled through 450 courts and state attorneys offices throughout South Africa. Much of this money involves bail payments, maintenance payments and disbursements, fines, administrative payments to the justice department, estate monies and witness fees. These monies are largely administered manually and distributed in cash to members of the public who do not have access to bank accounts. The present system is labour intensive,

burdensome to justice department personnel, and has led to widespread 'leakage' or corruption within the system.

At the time of writing, the Department of Justice and Constitutional Development had begun exploring a potential public private partnership (PPP) to overhaul its financial administration system for these funds. The department aims "to attract a private party which can take responsibility for financing, developing and operating a complete, integrated, appropriate and secure cash hall service". If successful, the project promises "not only to clean up the handling of these large sums [of money], but to go a long way in freeing up the courts and state attorneys offices to deal with their core functions".<sup>157</sup>

## Conclusion

As a result of its central position in the criminal justice process, the performance of the prosecution service is crucial to the smooth running of the whole system. A poorly performing prosecution service detrimentally affects the ability of the prison system to rehabilitate the prisoners in its care. If prosecutors process cases slowly, or do not apply their minds properly to accused persons' request for bail, the number of unsentenced prisoners goes up. This causes overcrowding in the country's prisons and makes it difficult for prison wardens to adequately look after and rehabilitate sentenced prisoners. Moreover, if the prosecution service does not operate optimally, witnesses are discouraged from testifying and many guilty accused are acquitted of the charges against them. This lowers police morale, and fosters public perceptions that crime pays, creating public disillusionment in the ability of the criminal justice system to effectively fight crime.

The expeditious prosecution of accused is consequently a crucial component of a functioning criminal justice system. However, a country such as South Africa lacks the financial resources to employ enough prosecutors to consistently deal with the number of investigated cases that require attention. The country also lacks the resources to retain enough skilled prosecutors to competently prosecute intricate or difficult-to-prosecute offences.

Some readers may have ideological misgivings about outsourcing the prosecution of suspected offenders – a key responsibility of the modern state. The present South African reality, however, demands cost-effective alternatives to

prosecuting cases solely by state-employed prosecutors. Outsourcing the prosecution of both mundane offences with a seasonally determined prevalence and relatively rare, but difficult-to-prosecute, offences has a lot of merit as this chapter has sought to demonstrate. In fact, a small number of commercial crime prosecutions involving millions of rands have already been successfully outsourced to private counsel at the Specialised Commercial Crime Court in Pretoria.

It is the state's responsibility to ensure that all outsourcing agreements involving the criminal justice system – and, by implication, the rights of suspected offenders, victims and the public – are prudently negotiated to leave no ambiguity about the rights, duties and responsibilities of both the state as outsourcer and the private contracting parties. Any outsourcing contract can, and must, contain enough built-in safeguards to guarantee the preservation of rights and the observance of the rule of law.