Overall Score:

79 - Moderate

Legal Framework Score:

88 - Strong

Actual Implementation Score:

70 - Weak

Category 1. Non-Governmental Organizations, Public Information and Media

1. Are anti-corruption/good governance NGOs legally protected?

67

01a. In law, citizens have a right to form NGOs focused on anti-corruption or good governance.

Yes | No

Comments:
The right to assemble is enshrined and guaranteed in Chapter 2, Section 17 of the Constitution, which specifies that everyone has the right to assemble peacefully and unarmed, to demonstrate, to picket and to present petition.

Civil society organizations are legally protected by the Non-Profit Organizations Act of 1997 and the Non-Profit Organizations Amendment Act of 2000.

The Non-Profit Organizations Act of 1997 creates a conducive environment for CSOs, and also prescribes standards of accountability and transparency. CSOs and other related institutions are further empowered and encouraged to work on anti-corruption issues through various laws aimed at combating corruption, i.e. Prevention and Combating of Corrupt Activities Act of 2004, so as to encourage good governance principles.

References:

Non-Profit Organization Act (Act 71 of 1997)

Non-Profit Organization Amendment Act (Act 17 of 2000)

Prevention and Combating of Corrupt Activities Act (Act 12 of 2004)

Yes: A YES score is earned when freedom to assemble into groups promoting good governance or anti-corruption is protected by law, regardless of political ideology, religion or objectives. Groups with a history of violence or terrorism (within last ten years) may be banned. Groups sympathetic to or related to banned groups must be allowed if they have no history of violence. Non-governmental organizations (NGOs) are defined here as any organized group that is separate from the state working on issues of governance, transparency, and/or anti-corruption.

No: A NO score is earned when any single non-violent group is legally prohibited from organizing to promote good governance or anti-corruption. These groups may include non-violent separatist groups, political parties or religious groups.
01b. In law, anti-corruption/good governance NGOs are free to accept funding from any foreign or domestic sources.

Yes | No

Comments:
The Non-Profit Organizations Act of 1997 permits civil society organizations (CSOs) to obtain funding from either domestic or foreign sources. CSOs are, however, obliged to have systematic accounting practices aimed at upholding and promoting transparency and accountability. CSOs also need to conduct their financial business through the use of bank accounts as required in section 17 of the Non-Profit Organization Act.

References:
Non-Profit Organization Act (Act 71 of 1997)

Yes: A YES score is earned if anti-corruption/good governance NGOs face no legal or regulatory restrictions to raise or accept funds from any foreign or domestic sources. A YES score may still be earned if funds from groups with a history of violence or terrorism (within last ten years) are banned.

No: A NO score is earned if there any formal legal or regulatory bans on foreign or domestic funding sources for NGOs focused on anti-corruption or good governance.

01c. In law, anti-corruption/good governance NGOs are required to disclose their sources of funding.

Yes | No

Comments:
The Non-Profit Organizations Act of 1997 governs the activities of registered non-profit organizations in South Africa. While section 17 of the Act requires registered non-profit organizations to keep accounting records of income, expenditure, assets and liabilities, they are not required to disclose the sources of their income.

Non-profit organizations may also apply to the South African Revenue Services (SARS) for tax exemption, which requires specific accounting and financial practices, including the disclosure of income above a specified threshold, as per Sections 10 and 30 of the Income Tax Act (Act 58 of 1962) and subsequent amendments. However, again, disclosure of sources of income is not required.

References:
Income Tax Act (Act 58 of 1962)
Non-Profit Organizations Act (Act 71 of 1997)
Correspondence with Mr. Ivor Jenkins, Director of IDASA.

Yes: A YES score is earned if anti-corruption/good governance NGOs are required to publicly disclose their sources of funding.

No: A NO score is earned if no such public disclosure requirement exists.

2. Are anti-corruption/good governance NGOs able to operate freely?

02a. In practice, the government does not create barriers to the organization of new anti-corruption/good governance NGOs.
Comments:
The government does not intentionally create barriers to prevent CSOs from taking part in anti-corruption related activities. This is due to the fact that the institutional and legal frameworks that are in place prevent the government from deliberately impeding anti-corruption activities carried out by CSOs.

South African CSOs must be legally registered, and could pursue legal action against any suspicious activities or impediments imposed by the government.

Many CSOs working on issues related to corruption participate in the Civil Society Network Against Corruption (CSNAC), which comprises organizations committed to an open and democratic society based on human dignity, equality and freedom, which believe that combating corruption is important to achieving democracy and social justice.

The CSNAC also works in conjunction with government and business in the National Anti-Corruption Forum (NACF), which is chaired by the minister for the Public Service and Administration.

References:

National Anti-Corruption Forum
http://www.nacf.org.za/


100: NGOs focused on promoting good governance or anti-corruption can freely organize with little to no interaction with the government, other than voluntary registration.

75:

50: NGOs focused on promoting good governance or anti-corruption must go through formal steps to form, requiring interaction with the state such as licenses or registration. Formation is possible, though there is some burden on the NGO. Some unofficial barriers, such as harassment of minority groups, may occur.

25:

0: Other than pro-government groups, NGOs focused on promoting good governance or anti-corruption are effectively prohibited, either by official requirements or by unofficial means, such as intimidation or fear.

02b. In practice, anti-corruption/good governance NGOs actively engage in the political and policymaking process.

Comments:
Anti-corruption and good governance CSOs do engage in the political and policy-making process to a certain extent. However, there have been concerns that it is generally the better organized, funded and resourced organizations that are most able to participate in the decision-making process. Examples here are Idasa, Open Democracy Advice Centre (ODAC) and Institute for Security Studies (ISS). These NGOs are able to be so involved in these processes due to fairly adequate and secure funding.

Many of these CSOs make submissions to Parliament on a regular basis, as captured by PMG. These CSOs provide valued insight on various matters and play a leading role in informing citizens on a range of issues. There are numerous other smaller CSOs that do not have all the right resources available to engage on a level that would make a difference and on some occasions will be able to influence public opinion, but not necessarily influence decision making.

Thus there is room for improvement, and for better quality policy engagement, particularly through the National Anti-Corruption Forum. Anti-Corruption CSOs have the ability to play an important role in shaping civil society’s opinion on corruption and governance issues. This can be done by following many different paths, including through publishing surveys on corruption.

References:
Parliamentary Monitoring Group (PMG)
http://www.pmg.org.za/

National Anti-Corruption Forum
http://www.nacf.org.za/

Non-governmental organizations focused on anti-corruption or good governance are an essential component of the political process. NGOs provide widely valued insights and have political power. Those NGOs play a leading role in shaping public opinion on political matters.

Anti-corruption/good governance NGOs are active, but may not be relevant to political decisions or the policymaking process. Those NGOs are willing to articulate opinions on political matters, but have little access to decision makers. They have some influence over public opinion, but considerably less than political figures.

Anti-corruption/good governance NGOs are effectively prohibited from engaging in the political process. Those NGOs are unwilling to take positions on political issues. They are not relevant to changes in public opinion.

There have been no reports of anti-corruption/good governance CSOs that have been shut down by the government for their work on corruption-related issues.

References:
- Phone conversation with Mr. Hennie van Vuuren, the Institute for Security Studies, Dec. 8, 2010
- Interview with Ms. Nonhlanhla Chanza, the Political Information and Monitoring Services, IDASA, Dec. 8, 2010
- National Anti-Corruption Forum

**Yes:** A YES score is earned if there were no NGOs shut down by the government or forced to cease operations because of their work on corruption-related issues during the study period. YES is a positive score.

**No:** A NO score is earned if any NGO has been effectively shut down by the government or forced to cease operations because of its work on corruption-related issues during the study period. The causal relationship between the cessation of operations and the NGO’s work may not be explicit, however the burden of proof here is low. If it seems likely that the NGO was forced to cease operations due to its work, then the indicator is scored as a NO. Corruption is defined broadly to include any abuses of power, not just the passing of bribes.

3. Are anti-corruption/good governance NGO activists safe when working on corruption issues?

03a. In practice, in the past year, no anti-corruption/good governance NGO activists working on corruption issues have been imprisoned.

**Comments:**
There have been no reports of any civil society activists being imprisoned in the last year.
Yes: A YES score is earned if there were no NGO activists imprisoned because of their work covering corruption. YES is a positive score.

No: A NO score is earned if any activist was jailed in relation to work covering corruption. The causal relationship between the official charges and the person's work may not be explicit, however the burden of proof here is low. If it seems likely that the person was imprisoned due to his or her work, then the indicator is scored as a NO. Corruption is defined broadly to include any abuses of power, not just the passing of bribes. "Imprisoned" is defined here as detention by the government lasting more than 24 hours.

03b. In practice, in the past year, no anti-corruption/good governance NGO activists working on corruption issues have been physically harmed.

| Yes | No |

Comments:
There have been no reports of any anti-corruption/good governance NGO activists that have been physically harmed in the last year.

However, Prof. Friedman points out that if broader ‘social movements’ in South Africa are included, then this question becomes more difficult to answer, since there is some evidence that members of such movements have been at the receiving end of physical violence.

References:
Correspondence with Prof. Steven Friedman, Director, Center for the Study of Democracy, University of Johannesburg/Rhodes University


Yes: A YES score is earned if there were no documented cases of NGO activists covering corruption being assaulted in the specific study period. A YES score can be earned if there was an attack but it was clearly unrelated to the activist’s work. YES is a positive score.

No: A NO score is earned if there were any documented cases during the study period of assault to an activist who covers corruption. Corruption is defined broadly to include any abuses of power, not just the passing of bribes.

03c. In practice, in the past year, no anti-corruption/good governance NGO activists working on corruption issues have been killed.

| Yes | No |

Comments:
There have been no reports of any civil society activists being killed in the last year.

References:
Interview with Ms. Nonhlanhla Chanza, the Political Information and Monitoring Services, IDASA, Dec. 8, 2010

National Anti-Corruption Forum
http://www.nacf.org.za/

4. Can citizens organize into trade unions?

100

04a. In law, citizens have a right to organize into trade unions.

Yes | No

Comments:
Section 17 of the constitution guarantees everyone the right to assemble peacefully and unarmed, to demonstrate, to picket and to present petitions.

In addition, Section 23 of the constitution specifically provides inter alia that every worker has the right to form and join a trade union, to participate in its activities, to engage in collective bargaining, and to strike. These rights are elaborated in the Labor Relations Act.

References:

Labor Relations Act (Act 66 of 1995)

04b. In practice, citizens are able to organize into trade unions.

100 | 75 | 50 | 25 | 0

Comments:
Having formed an important part of the struggle against apartheid, South Africa’s trade unions continue to be influential, with large numbers of members across the country. Any person has the right to join any trade union of their choice. COSATU, an umbrella organization with unions from multiple sectors and over 2 million members, is also part of the ruling Tripartite Alliance with the African National Congress and the South African Communist Party.

About 56 percent of the 1.3 million sector employees in South Africa are unionized, and a recent public sector strike confirmed the significant support base and influence of unions in South Africa.

References:

Congress of South African Trade Unions (COSATU)
http://www.cosatu.org.za/

100: Trade unions are common and are an important part of the political process and political discourse. Trade union organizers have widely understood rights. Trade unions are free from intimidation or violence.
Trade unions exist, but are not always relevant to politics or policy debates. Barriers to organizing trade unions exist, such as intimidation at work, or retribution firings. Trade union organizers have some rights, but these may not be commonly known, or are difficult to defend.

Trade unions are rare. Significant barriers to organization exist, including direct violence. Rights of union organizers are not widely known, or are ineffective in protecting organizers.

1.2. Media's Ability to Report on Corruption

5. Are media and free speech protected?

05a. In law, freedom of the media is guaranteed.

Yes | No

Comments:
Section 16 of the constitution states that everyone has the right to freedom of expression, which includes freedom of the press and other media; freedom to receive or impart information or ideas; freedom of artistic creativity and academic freedom and freedom of scientific research. These rights do not extend to propaganda for war, incitement of imminent violence or advocacy of hatred based on race ethnicity, gender or religion, and that constitutes incitement to cause harm.

References:
Khumalo and Others v Holomisa (CCT53/01) [2002] ZACC 12; 2002 (5) SA 401; 2002 (8) BCLR 771 (June 14, 2002)

Yes: A YES score is earned if freedom of the press is guaranteed in law, including to all political parties, religions, and ideologies.

No: A NO score is earned if any specific publication relating to government affairs is legally banned, or any general topic is prohibited from publication. Specific restrictions on media regarding privacy or slander are allowed, but not if these amount to legal censorship of a general topic, such as corruption or defense. A NO score is earned if non-government media is prohibited or restricted.

05b. In law, freedom of speech is guaranteed.

Yes | No

Comments:
Section 16 of the constitution states that everyone has the right to freedom of expression, which includes freedom of the press and other media; freedom to receive or impart information or ideas; freedom of artistic creativity and academic freedom and freedom of scientific research. These rights do not extend to propaganda for war, incitement of imminent violence or advocacy of hatred based on race ethnicity, gender or religion, and that constitutes incitement to cause harm.

References:
Yes: A YES score is earned if freedom of individual speech is guaranteed in law, including to all political parties, religions, and ideologies.

No: A NO score is earned if any individual speech is legally prohibited, regardless of topic. Specific exceptions for speech linked with a criminal act, such as a prohibition on death threats, are allowed. However, any non-specific prohibition earns a NO score.

6. Are citizens able to form print media entities?

100

06a. In practice, the government does not create barriers to form a print media entity.

Comments:
The government does not create barriers for anyone wanting to form a print media entity. However, forming such an entity would require a lot of resources and huge capital investment. The acquiring of such resources would pose immediate barriers to any person wishing to undertake such an endeavor.

References:
Interview with Shepi Mati, Radio Unit Manager: IDASA; Nov. 23, 2010
Global Integrity, South Africa Country Report, 2008

100: Print media entities can freely organize with little to no interaction with the government. This score may still be earned if groups or individuals with a history of political violence or terrorism (within last ten years) are banned from forming media entities.

75:

50: Formation of print media groups is possible, though there is some burden on the media group including overly complicated registration or licensing requirements. Some unofficial barriers, such as harassment of minority groups, may occur.

25:

0: Print media groups are effectively prohibited, either by official requirements or by unofficial means, such as intimidation or fear.

06b. In law, where a print media license is necessary, there is an appeals mechanism if a license is denied or revoked.

Comments:
A license is not necessary to start a print media entity. Put differently, print media is not licensed in South Africa.

References:
Interview with Shepi Mati, Radio Unit Manager: IDASA; Nov. 23, 2010

Yes: A YES score is earned if there is, in law or in accompanying regulations, a formal process to appeal a denied print media license, including through the courts. A YES score is also earned if no print license is necessary.
### 06c. In practice, where necessary, citizens can obtain a print media license within a reasonable time period.

| 100 | 75 | 50 | 25 | 0 |

**Comments:**
A license is not necessary to start a print media entity. Put differently, print media is not licensed in South Africa.

**References:**
Benjamin, Chantelle,
*Media Tribunal as Icasa-Like Body 'Doomed to Failure',*  
Available at: [http://allafrica.com/stories/201009140937.html](http://allafrica.com/stories/201009140937.html)

Interview with Shepi Mati, Radio Unit Manager: IDASA; Nov. 23, 2010

### 06d. In practice, where necessary, citizens can obtain a print media license at a reasonable cost.

| 100 | 75 | 50 | 25 | 0 |

**Comments:**
A license is not necessary to start a print media entity. Put differently, print media is not licensed in South Africa.

**References:**
Benjamin, Chantelle,
*Media Tribunal as Icasa-Like Body 'Doomed to Failure',*  
Available at: [http://allafrica.com/stories/201009140937.html](http://allafrica.com/stories/201009140937.html)

Interview with Shepi Mati, Radio Unit Manager: IDASA; Nov. 23, 2010

### 7. Are citizens able to form broadcast (radio and TV) media entities?

100: Licenses are not required or can be obtained within two months.

75:

50: Licensing is required and takes more than two months. Some groups may be delayed up to six months.

25:

0: Licensing takes close to or more than one year for most groups.

### 7d. In practice, where necessary, citizens can obtain broadcast licenses at a reasonable cost.

| 100 | 75 | 50 | 25 | 0 |

**Comments:**
A license is not necessary to start a broadcast media entity. Put differently, broadcast media is not licensed in South Africa.

**References:**
Benjamin, Chantelle,
*Media Tribunal as Icasa-Like Body 'Doomed to Failure',*  
Available at: [http://allafrica.com/stories/201009140937.html](http://allafrica.com/stories/201009140937.html)

Interview with Shepi Mati, Radio Unit Manager: IDASA; Nov. 23, 2010

100: Licenses are not required or can be obtained at minimal cost to the organization. Licenses can be obtained on-line or through the mail.

75:

50: Licenses are required, and impose a financial burden on the organization. Licenses may require a visit to a specific office, such as a regional or national capital.

25:

0: Licenses are required, and impose a major financial burden on the organization. Licensing costs are prohibitive to the organization.
07a. In practice, the government does not create barriers to form a broadcast (radio and TV) media entity.

Comments:
The government does not create barriers for anyone wanting to form a media entity. However, forming such an entity would require a lot of resources and huge capital investment. The acquiring of such resources would pose immediate barriers to anyone wishing to undertake such an endeavor.

In 2002 through the MODA Act No 14 of 2002, the Media Development and Diversity Agency, a joint government-private sector (print and broadcasting industry) body, was set up to assist in developing community and small commercial media. Its other purpose was to diversify media ownership in the country. Since then, community radio stations and community television stations have mushroomed, though there are challenges in terms of the viability and sustainability of these and community – owned newspapers.

In South Africa, anyone wishing to form a broadcast entity has to apply for a license with the Independent Communication Authority of South Africa (ICASA), the broadcast regulator. The license comes with conditions which an entity has to meet, failing which they face the risk of losing the license. Reported barriers in particular for community television services or community radio stations have included the scarcity of available frequencies. Other challenges for television services relate to operating on one year licenses and obtaining and renewing licenses. In March 2010, ICASA put a moratorium on the issuing of new television licenses until there is a complete migration from analogue to digital broadcasting.

Licenses are being renewed on an annual basis. Commenting on Icasa’s decision to refuse Cape Town TV (CTV) a permanent license due to the moratorium, the station’s manager Karen Thorne is reported to have said that “community TV broadcasters were operating in a “largely hostile environment”, with only temporary one-year licenses granted and the imposition of the same signal distribution tariffs as commercial and public service broadcasters of R65,000 [US$9,450]”.

References:
Interview with Shepi Mati, Radio Unit Manager: IDASA; Nov. 23, 2010

100: Broadcast media entities can freely organize with little to no interaction with the government. Media groups have equal access to broadcast bandwidth through a reasonably fair distribution system. This score may still be earned if groups or individuals with a history of political violence or terrorism (within last ten years) are banned from forming media entities.

75:

50: Formation of broadcast media groups is possible, though there is some burden on the media group including overly complicated registration or licensing requirements. Some unofficial barriers, such as harassment of minority groups, may occur. Division of broadcast bandwidth is widely viewed to be somewhat unfair.

25:

0: Broadcast media groups are effectively prohibited, either by official requirements or by unofficial means, such as intimidation or fear. This score is appropriate if the division of broadcast bandwidth is widely viewed to be used as a political tool.

07b. In law, where a broadcast (radio and TV) media license is necessary, there is an appeals mechanism if a license is denied or revoked.

Comments:
The Independent Communication Authority of South Africa (Icasa), established in 2000, has a legal responsibility of regulating the telecommunications and broadcasting industries in South Africa. It derives its mandate from statutes like the ICASA Act of 2005, The Independent Broadcasting Act, the Telecommunications Authority Act and the Electronic Communications Act of 2005. Part of its responsibility involves the issuing of licenses to providers in telecommunication services and broadcasters. Any decision concerning the denial or revoking of licenses can be challenged through the Independent Communications Authority of South Africa (ICASA). Section 11 (8) (b) and 18 of the Electronic Communications Act specifically say that applicants can appeal to Icasa if their applications have been denied.
References:


Interview with Shepi Mati, Radio Unit Manager: IDASA; Nov. 23, 2010

**Yes:** A YES score is earned if there is, in law or in accompanying regulations, a formal process to appeal a denied broadcast media license, including through the courts. A YES score is also earned if no broadcast license is necessary.

**No:** A NO score is earned if there is no appeal process for broadcast media licenses.

| 07c. In practice, where necessary, citizens can obtain a broadcast (radio and TV) media license within a reasonable time period. |
|---|---|---|---|---|
| 100 | 75 | 50 | 25 | 0 |

Comments:
The Independent Communications Authority of South Africa (Icasa) is required by the Electronic Communications Act to grant a license, within sixty (60) days of receipt of a registration notice. However, questions have been raised around the delays in obtaining licenses promptly. At a hearing before Parliament’s Communications Committee, Mr Paris Mashile, Icasa’s CEO, conceded that there were delays in the issuing of licenses. He mentioned that Icasa was looking into the issue and has initiated an investigation to determine the causes for the delays in finalizing the applications. Acquiring a television broadcast license may take approximately 12 months or longer depending on a number of issues.

References:


| 100: Licenses are not required or licenses can be obtained within two months. |
| 75: |
| 50: Licensing is required and takes more than two months. Some groups may be delayed up to six months. |
| 25: |
| 0: Licensing takes close to or more than one year for most groups. |

| 07d. In practice, where necessary, citizens can obtain a broadcast (radio and TV) media license at a reasonable cost. |
|---|---|---|---|---|
| 100 | 75 | 50 | 25 | 0 |

Comments:
In March 2009, Icasa invited applications for individual electronic communications network services (I-ECNS) licenses for the provisioning of broadcasting services. Applicants were required to pay a non-refundable application fee of R50,000 (US$7,267). According to Icasa General License Fees Regulations 2009, a community broadcasting license would cost R3,000 (US$436). These costs are not significant, considering the nature of the entities concerned.

References:
Global Integrity, South Africa Country Report, 2008

Licenses are not required or can be obtained at minimal cost to the organization. Licenses can be obtained on-line or through the mail.

Licenses are required, and impose a financial burden on the organization. Licenses may require a visit to a specific office, such as a regional or national capital.

Licenses are required, and impose a major financial burden on the organization. Licensing costs are prohibitive to the organization.

8. Can citizens freely use the Internet?

100: In practice, the government does not prevent citizens from accessing content published on-line.

Comments:
The South African Government does not engage in online censorship. Put differently, South Africans enjoy a high level of digital media freedom. Freedom House, an "international non-governmental organization that publishes annual reports assessing the degree of perceived democratic freedoms in each country", notes that about 9 percent of the population enjoyed regular internet access in 2009; "content is not censored", "bloggers are not prosecuted for online activities" and more South Africans are "accessing the internet on their mobile phones than from computers". Also the Internet Access in South Africa 2010 study, conducted by World Wide Worx and Cisco, found that the number of South African internet users has surpassed the five million mark.

However, it is important to note again that a large section of the population in rural areas, informal settlements and urban townships still does not have access to the internet. Also, internet costs and language barriers provide further barriers for easy access to the internet. Shepi Mati, the Radio Unit Manager at Idasa, notes that South Africans may be able to overcome Internet access limits due to government regulations to promote cheaper cellphone tariffs and other related costs.

Lastly, the former Deputy Minister of Home Affairs Malusi Gigaba is reported to have said that the department will introduce legislation that will ban child pornography on the internet. It is not yet clear when this bill will be introduced before Parliament.

References:
Interview with Shepi Mati, Radio Unit Manager: IDASA; Nov. 23, 2010

100: The government does not prevent Internet users from accessing online content. While some forms of content may be illegal to download or own (such as child pornography), the government does not manipulate networks to prevent access to this information. This indicator addresses direct government intervention in the transfer of information, not indirect deterrents such as intimidation, surveillance or technical difficulties in countries with poor infrastructure.

75:

50: Internet users are prevented by the government from reaching online content in some cases. Government tactics may include firewalls preventing access to networks in other countries, or manipulating search engine results to exclude politically sensitive topics.

25:
0: Internet users are routinely prevented from accessing online content. Government restrictions are in place at all times for certain topics. Government tactics may include firewalls preventing access to networks in other countries, or manipulating search engine results to exclude politically sensitive topics.

8b. In practice, the government does not censor citizens creating content on-line.

Comments:
The South African government does not engage in online censorship. South Africans, with access to the internet, are at liberty to create content on-line. Freedom House, an "international non-governmental organization that publishes annual reports assessing the degree of perceived democratic freedoms in each country", notes that Internet access in South Africa remain unrestricted and is "increasing rapidly, with approximately 9 percent of the population enjoying regular access during 2009". The Internet Access in South Africa 2010 study, conducted by World Wide Worx and Cisco, found that the number of South African internet users surpassed the five million mark. There have been reports though that the Home Affairs department was working on legislation that will ban child pornography on the internet. It is not yet clear when this bill will be introduced before Parliament and what its impact will be.

References:
Interview with Shepi Mati, Radio Unit Manager: IDASA; November 23, 2010


100: The government never removes online information or disables servers due to their political content. All political speech is protected with limited exceptions, such as legitimate intellectual property restrictions; direct calls to violence; or pornography.

75: In some cases, the government restricts political speech by its citizens on the Internet. This is accomplished either directly by controlling servers hosting restricted content, or indirectly through threats or intimidation against the persons posting political content.

50: The government regularly restricts political speech by its citizens on the Internet. This is accomplished either directly by controlling servers hosting the restricted content, or indirectly through threats or intimidation against the persons posting political content.

0: The government does not engage in online censorship. South Africans, with access to the internet, are at liberty to create content on-line.

9. Are the media able to report on corruption?

75

9a. In law, it is legal to report accurate news even if it damages the reputation of a public figure.

Comments:
There is no legislation that currently prevents the media from reporting freely on any issue. Freedom of the media is guaranteed in Section 16 of the constitution, which states that everyone has the right to freedom of expression, which includes freedom of the press and other media; freedom to receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research. These rights do not extend to propaganda for war; incitement of imminent violence or advocacy of hatred based on race ethnicity, gender or religion which also constitutes incitement to cause harm.
Over the past few years, the media has unreservedly published a significant number of exposés of corruption by various public figures in government and within the ruling party. Often, the government has reacted quite defensively to such reports. Recently, the government was found willing to use a court order to stop a publication of a corruption related story. In October 2010, the Sunday Independent Newspaper received a court interdict which prevented it from publishing a story on nepotism within the Crime Intelligence Unit of the SAPS.

Over the past months, the media and civil society organizations have consistently raised concerns around the negative impacts that the Protection of Information Bill, currently before Parliament, will have on media freedom. The Bill makes provision for the protection of state information against unlawful disclosure, loss, alteration and destruction; provides categories for classification and subsequently allows state officials at all levels of government to classify state information as either confidential, secret or top secret and provides offenses and sentences of up to 25 years for anyone found guilty of contravening the provisions. At present, the bill contains no public interest exemption provisions and journalists argue that they would not be able to use the public interest defense to publish stories in the public interest including corruption related stories.

Again, the mooted Media Appeals Tribunal, whose feasibility is to be investigated by Parliament, is also seen as a way of restricting the ability of the media to do its work freely.

References:


Yes: A YES score is earned if it is legal to report accurate information on public figures regardless of damage to their reputations. Public figures are defined broadly, including anyone in a position of responsibility in the government or civil service; any political leader; leaders of civil society groups including religious groups, trade unions, or NGOs; leaders or officers of large businesses. A YES score can still be earned if a reckless disregard for the truth (i.e. slander) is prohibited.

No: A NO score is earned if privacy laws protect any public figures (as defined in the YES coding) from accurate information.

09b. In practice, the government or media owners/distribution groups do not encourage self-censorship of corruption-related stories.

100 | 75 | 50 | 25 | 0

Comments:
There is no evidence to suggest that the government; media owners and distribution groups directly encourage self-censorship. Over the past months, the print media have written a significant number of stories which revealed several corrupt activities by various public figures both in government and within the ruling party. At times the government has reacted quite strongly to such negative reports.

There have been longstanding concerns around political interference in the editorial independence of the South African Broadcasting Corporation, while the Media Monitoring Africa report notes that self-censorship is an on-going problem. Commenting on the SABC’s TV news department, while acknowledging the existence of capable reporters, the 2010 African Media Barometer South Africa Country Report notes that “there is less and less hard news and an apparent ever-increasing emphasis on “developmental news” that celebrates achievements in the fight against poverty. Stories on government corruption are rare and “bad news” is the exception rather than the rule”.

Certain legislative developments and other incidents in the past few months have led many to believe that an attempt is being made at muzzling media freedom which might encourage self-censorship. For example, the arrest of Mzilikazi wa Afrika, a Sunday Times journalist, was perceived by many as a way of intimidating journalists seeking to expose corruption. At the time of his arrest, the police maintained that his arrest was related to his being in possession of a fraudulent resignation letter by Mpumalanga Province Premier David Mabuza to President Jacob Zuma. He was charged with fraud and forgery.

Mzilikazi had authored an article which alleged that National Police Commissioner General Bheki Cele, without following proper tender procedures, had signed a R500 million (US$72.7 million) lease agreement for police headquarters in Pretoria. Mzilikazi wa Afrika has also authored several other corruption stories involving public figures in the Mpumalanga Province. After his arrest, he reported that the police had questioned him on the negative articles he had written about Mpumalanga. This incident raised fears of the creation of an environment conducive for encouraging self censorship.

In addition, the Protection of Information Bill (known as the ‘Secrecy Bill’), currently before Parliament, contains several provisions which many argue will threaten media freedom, make the investigation of corruption more difficult and, through the creation of new offenses and harsh associated sentences, lead to self-censorship. The Bill’s overall aim is to protect unlawful
or exhibition examination and classification by the Board before such publication is distributed, exhibited, offered or advertised for distribution. 

Certain forms of pre-publication censorship were introduced by the Films and Publications Amendment Act 3 of 2009. The main purpose of the Act is to protect against child pornography. With the exception of newspapers, which fall under the press exemption provisions and journalists argue that they would not be able to use the public interest defense to publish stories in the public-interest.

Furthermore, at its National General Council in September 2010, the ruling party resolved for Parliament to conduct a feasibility study on the creation of a Media Appeals Tribunal. The tribunal’s aim is to complement the current system of self-regulation and hear complaints against journalists. All these developments are widely regarded as encroachments on media freedom; and have been severely questioned by a diverse range of both local and foreign critics.

The media have also raised concerns about the Protection from Harassment Bill; particularly in terms of its broad definition of harassment. The media argues that this broad definition will affect the ability of journalists to seek responses and answers from potential sources. Viewed together, the developments of 2010 are seen as having a real potential of muzzling the media and creating an environment encouraging self-censorship.

References:


100: The government, its proxies, or media ownership/distribution groups make no attempt to restrict media coverage of corruption-related issues through unofficial means.

75:

50: The government, its proxies, or media ownership/distribution groups make some attempts to restrict media coverage of corruption-related issues through unofficial means, such as restricting access by disfavored media outlets, or other short-term consequences. Violent reprisals against media outlets are rare.

25:

0: The government, its proxies, or media ownership/distribution groups actively use illegal methods to restrict reporting of corruption-related issues. This may include harassment, arrests, and threats. Journalists and publishers take a personal risk to report on corruption, and media outlets who commonly report on corruption face long-term consequences or violent reprisals.

Comments:
The government does not place restraint on the publication of corruption related stories. However, it has strongly criticized the media for excessive negative reporting. In one troubling instance, the government successfully obtained a court interdict preventing a newspaper from publishing a story which alleged corruption within the South African Police. On Oct. 29, 2010, the police successfully got a High Court order which stopped the Sunday Independent Newspaper from publishing information about alleged nepotism in the appointments in its crime intelligence division. The newspaper was ordered by the Pretoria High Court to refrain from publishing the story, and to return documents in its possession. The National Police Commissioner General Bheki Cele maintained in a radio interview that the newspaper had wanted to reveal the names of crime intelligence operatives. This was denied by the newspaper, which later appealed the High Court decision. It also transpired that the court order had been granted in the absence of the newspaper’s legal team which had been held up in traffic and arrived at court only after the interdict had been granted.

In late 2009, the Mail and Guardian Newspaper criticized the presidency for issuing a press statement on the eve of the publication of its leading story on the president’s expansion of his family compound at Nkandla. The story alleged that a large chunk of tax payers’ money would be used to foot the bill. The newspaper claimed that it had, during the course of the week, asked the presidency and the Public Works Department for comment, but both had denied the existence of such a construction. The newspaper argued that the government’s behavior was meant to undermine the impact of its lead story.

In another instance, the South African National Police Commissioner, General Bheki Cele, wrote to the National Editor of the Sunday Independent and made threats to the newspaper’s legal team. The letter alleged corruption-related issues through unofficial means, such as restricting access by disfavored media outlets, or other short-term consequences. Violent reprisals against media outlets are rare.

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In another instance, the South African National Police Commissioner, General Bheki Cele, wrote to the National Editor of the Sunday Independent and made threats to the newspaper’s legal team. The letter alleged corruption issues through unofficial means. This may include harassment, arrests, and threats. Journalists and publishers take a personal risk to report on corruption, and media outlets who commonly report on corruption face long-term consequences or violent reprisals.
There have also been concerns that the SABC, the public broadcaster, was practicing self-censorship. The 2010 African Media Barometer South Africa Country Report, while commenting on the SABC’s TV news department, despite acknowledging the presence of capable reporters in the department, noted that “there is less and less hard news and an apparent ever-increasing emphasis on “developmental news” that celebrates achievements in the fight against poverty. Stories on government corruption are rare and “bad news” is the exception rather than the rule”.

Lastly, recent legislation and policy developments in the form of the Protection of Information Bill and the controversial Media Appeals Tribunal have also been severely criticized for the negative impacts they will have on media freedom.

References:


Correspondence with Anton Harber, Caxton Professor of Journalism and Media Studies and director of the Journalism Program at the University of the Witwatersrand in Johannesburg, Nov. 25, 2010

10. Are the media credible sources of information?

65

10a. In law, print media companies are required to publicly disclose their ownership.

Comments:
In South Africa, companies are formed in terms of and governed by the Companies Act of 2008. In terms of the Act, all companies have to register with the Companies and intellectual property registration office (CIPRO). As per requirements of the Act, public companies are subjected to disclosure requirements that include the submission of annual and interim financial statements to the Registrar of Companies. This disclosure and other details about the company are available to the public for inspection. Private companies are not required to file their annual financial statements to the Registrar of Companies. Information about their ownership is not publicly disclosed to the public, but may be requested from them directly. Print Media companies in South Africa are privately owned and their ownership is concentrated among four major players namely; Naspers, through its subsidiary Media24; Avusa; Caxton and the foreign owned Independent Newspapers.

References:


Yes: A YES score is earned if print media companies are required by law to publicly disclose all owners of the company.
No: A NO score is earned if there is no such requirement or if the requirement is optional, only partially applicable, or exempts certain types of entities or agents from being publicly disclosed.

10b. In law, broadcast (radio and TV) media companies are required to publicly disclose their ownership.

Yes  |  No

Comments:
Broadcast companies are required to disclose their ownership and other related details to the Independent Communications Authority of South Africa (ICASA), the broadcasting regulator, when applying for a license. In terms of the Companies Act of 2008, all companies are required to list themselves at the Companies and Intellectual Properties Registration Office (CIPRO) of the Department of Trade and Industry. Further, in line with the government’s prerogative to make media accessible to all sections of the population, the Media Development and Diversity Authority (MDDA) was launched to enable historically disadvantaged communities and persons not adequately served by the media to gain greater access. The MDDA’s stated objectives include the encouragement of ownership, access to and control of media by historically disadvantaged communities and historically diminished indigenous language and cultural groups.

References:
Available at: [http://www.acts.co.za/company/index.htm](http://www.acts.co.za/company/index.htm)


Yes: A YES score is earned if broadcast media companies are required by law to publicly disclose all owners of the company.

No: A NO score is earned if there is no such requirement or if the requirement is optional, only partially applicable, or exempts certain types of entities or agents from being publicly disclosed.

10c. In practice, journalists and editors adhere to strict, professional practices in their reporting.

100  |  75  |  50  |  25  |  0

Comments:
Journalists and editors in South Africa generally follow professional codes of conduct in their reporting. However, questions have often been raised around the declining standards of journalism largely due to the shrinking size of newsrooms and the juniorization of newsroom staffs. Media houses’ attempts at reducing costs by reducing staff numbers and reducing the provision of on-going training have negatively affected the quality of media reporting.

This juniorisation of newsrooms is also a result of more experienced, but overworked and underpaid reporters leaving the profession for better opportunities in government and the private sector. The 2010 African Media Barometer South Africa Country Report notes that “there are many examples of inaccurate, poor quality and unfair reporting, pointing to a systemic problem”. However, the same report also states that the media has recently begun introducing interventions aimed at addressing these challenges. For example, the media has strengthened its training programs and its self-regulatory mechanisms. However, the ruling party has criticized the media’s self regulation framework and proposed the introduction of a statutory Media Appeals Tribunal to complement it. At its 2010 National General Council, it resolved that Parliament conduct a feasibility study on the desirability of such a body.

Other commonly-held concerns regarding the media include the rise of sensationalist reporting and ‘brown-envelope’ journalism. The latter concern is highlighted by the admission of a former Cape Argus reporter that he took money from an ANC politician to discredit the politician’s opponents within the party. Nevertheless, there is no evidence to suggest that this is a widespread phenomenon, but it has raised concerns around journalistic standards.

The media’s other alleged sins, in particular those of the print media, are captured in the ANC discussion document for its September 2010 National General Conference titled ‘Media Transformation, Ownership and Diversity’. The document states that a “cursory scan on the print media reveals an astonishing degree of dishonesty, lack of professional integrity and lack of independence.” Despite these concerns, journalists and editors at major newspapers generally conduct themselves professionally.

References:

Correspondence with Anton Harber, Caxton Professor of Journalism and Media Studies and director of the Journalism Program at the University of the Witwatersrand in Johannesburg, Nov. 25, 2010;
Editors and journalists at the major media outlets abide by a strict journalistic code of conduct and are unwilling to alter their coverage of a particular issue, event or person in exchange for money, gifts, or other favors or remuneration.

Editors and journalists at the major media outlets generally avoid altering coverage in exchange for favors but some exceptions have been noted. Not all newsrooms abide by a formal journalistic code of conduct.

Editors and journalists are widely known to "sell" favorable or unfavorable coverage in exchange for money, gifts, or other remuneration. The major media outlets do not abide by any formal journalistic code of conduct.

In practice, during the most recent election, political parties or independent candidates received fair media coverage. The research study further pointed out the inappropriateness of the level of coverage which was given to the then newly-established COPE. The report states that, though the party was newsworthy, its 'news-worthiness' overshadowed "the attention that potentially should have been paid in the public interest' to other parties with seats in Parliament". Other concerns identified by the report include the failure to properly cover or engage with the election manifestos of parties in favor of the actual focus on campaigning activities, personalities, and party politics.

All political parties and independent candidates have some access to media outlets. Individual media outlets may have biases, but on balance, the national media coverage reflects the interests of the electorate. Media groups generally act as disinterested parties in an election. In places where a government is popular with the public, opposition viewpoints can access the public via media outlets.

Major popular media outlets have a persistent bias regarding some parties or independent candidates. Some major parties may be partially excluded from media coverage, or draw more negative coverage. Media sectors may have distinct biases, such as newspapers favoring one party, while radio favors another.

The mass media, on balance, have clear preferences in election outcomes and coverage is driven to achieve these goals. Some major parties or independent candidates are excluded or consistently negatively portrayed by mass media. Dissenting political opinions are only found on fringe or elite media outlets, such as Web sites.

In practice, political parties and candidates have equitable access to state-owned media outlets.
Comments:
Prior to all elections, the Electronic Communications Act of 2005 requires the Independent Communications Authority of South Africa (ICASA) to produce guidelines for the coverage of elections. Media Monitoring Africa (MMA), an organization which monitored media coverage of the 2009 national elections, found that the South African media, including the SABC (the public broadcaster), gave fair media coverage in particular to big political parties. Where bias occurred, the research maintained that there is no evidence to suggest that it was intentional.

The ruling party received a larger share of coverage averaging 47 percent, with COPE on 15 percent and the DA on 12 percent. The MMA study further raised concerns around the exceptionally low coverage given to smaller parties “which may be proportional to seats in Parliament but is inadequate in terms of voters making an informed choice”. However, it does provide examples where smaller parties were afforded positive coverage. The research further pointed out the inappropriateness of the level of coverage given to COPE. The report states that though the party was newsworthy its “news worthiness” overshadowed “the attention that potentially should have been paid in the public interest” to other parties with seats in Parliament.

References:
Correspondence with William Bird, the Director & Ashoka Fellow of Media Monitoring Africa, Nov. 25, 2010


100: The government ensures that equal access and fair treatment of election contestants is provided by all state-owned media outlets, including all electronic and print media. This obligation extends to news reports, editorial comment, and all other content. All parties and candidates are offered consistent and equivalent rates for campaign advertising on state-owned media outlets.

75:

50: The government generally ensures equal access and fair treatment of all candidates and parties by state-owned media outlets but some exceptions exist. State-owned media may occasionally discriminate against particular parties or candidates and advertising rates may be confusing or non-transparent.

25: The government uses state-owned media to routinely discriminate against opposition candidates and parties. Advertising space may be denied to opposition candidates and parties or higher rates may be charged.

11. Are journalists safe when investigating corruption?

Yes | No

Comments:
On Aug. 4, 2010, a Sunday Times journalist, Mzikazi wa Afrika, was arrested by several members of the special police unit, the Hawks. The police maintained that his arrest was related to his being in possession of a fraudulent resignation letter by Mpumalanga Province Premier David Mabuza to President Jacob Zuma. He was charged with fraud, forgery and uttering. At the time of his arrest, Mzikazi had authored an article which alleged that National Police Commissioner General Bheki Cele, without following proper tender procedures, had signed a R500 million (US$72.7 million) lease agreement for police headquarters in Pretoria.

General Bheki Cele denied the allegations, arguing that he had only signed a ‘needs’ assessment. The Sunday Times maintained that it had the copy of the signed lease agreement. It was further reported that a day before Mzikazi’s arrest, General Bheki Cele had referred to him as a ‘very shady’ journalist and hinted at a reprisal when asked if he would take action. These developments and the line of questioning that the journalist was subjected to, in particular questions relating to discrediting senior ANC office bearers in Mpumalanga, led many to conclude that the journalist’s arrest was related to various articles he had written exposing corruption in government.

Throughout the incident, the police maintained that his arrest had nothing to do with the articles he had written, in particular the article on the R500m police headquarters lease agreement.
There has again been on-going concern regarding the state’s willingness at times to invoke Section 205 of the Criminal Procedure Act, which provides that a judge or magistrate may summon “any person who is likely to give material or relevant information as to any alleged offense”. Section 189(1) allows anyone to refuse to give information if they have a “just cause”. Though the state rarely uses this provision on journalists, there have been instances when it has used it to force reporters to reveal their sources and other material related to an alleged offense.

Currently, there exists a Memorandum of Understanding (MOU) between the South African National Editors’ Forum (Sanef) and government which sets out a process to be followed by officials when seeking information from journalists. According to the agreement Sanef has to be consulted prior to the issuing of a subpoena against a journalist. Earlier in the year, Sanef criticized the police’s decision to institute court proceedings against two E-TV news journalists, Ben Said and Mpho Lakaje, after the station screened, in January 2010, an interview with two unidentified criminals who revealed their intentions of robbing visitors during the Soccer World Cup. The two were subpoenaed to appear before court and reveal the identity of the two criminals and further, to produce the unedited footage of the interview. Sanef argued that the police had simply ignored the MOU. The case was eventually postponed to allow for the SANEF agreement to be honoured.

Also, on Oct. 26, 2010, the Daily Dispatch Online, based in the Eastern Cape, reported that jail threats had been leveled against two journalists, Dispatch reporter David Macgregor and Port Alfred Talk of the Town (ToT) editor Jon Houzet, over “an anonymous letter threatening the safety of a national government minister”.

References:
Wa Afrika, Mzilikazi, “Journalist’s harrowing account: Wa Afrika tells how he was carted about in fear of his life,” Aug. 8, 2010, Timeslive.
Available at: http://www.timeslive.co.za/sundaytimes/article591780.ece/Journalists-harrowing-account

Grobler, Fanie “Media freedom under spotlight as reporter arrested,”
Aug. 4, 2010, Mail & Guardian.
Available at: http://www.mg.co.za/article/2010-08-04-media-freedom-under-spotlight-as-reporter-arrested

Sapa, “Journalists-arrest-to-intimidate-media,”
Available at: http://www.timeslive.co.za/local/article587996.ece/Journalists-arrest-to-intimidate-media

Available at: http://www.dispatch.co.za/article.aspx?id=443382

Yes: A YES score is earned if there were no journalists imprisoned related to work covering corruption during the study period. A YES score is positive.

No: A NO score is earned if any journalist was jail because of his/her work covering corruption during the study period. The causal relationship between the official charges and the journalist’s work may not be explicit, however the burden of proof here is low. If it seems likely that the journalist was imprisoned because of his or her work, then the indicator is scored as a NO. Corruption is defined broadly to include any abuses of power, not just the passing of bribes. “Imprisoned” is defined here as detention by the government lasting more than 24 hours.

11b. In practice, in the past year, no journalists investigating corruption have been physically harmed.

Yes | No

Comments:
There is no recorded case of any journalist being physical harmed while investigating corruption. However, concerns have been raised around the harassment; intimidation and safety of journalists working on such and other related issues particularly in the Mpumalanga Province. The arrest on Aug. 4, 2010, of a Sunday Times journalist Mzilikazi wa Afrika; and the experience of Sam Yende, a City Press Nelspruit based reporter who was accosted outside his home by a gunman renewed fears for some journalists. It has not been confirmed that the Nyende incident was an instance of intimidation aimed at curtailing his journalistic activities or merely an ordinary instance of crime. Nevertheless, both journalists have written widely on Mpumalanga politics and corruption in the province. City Press Newspaper reported it would provide 24-hour security for Yende. Mondli Makhanya, the head of the South African National Editors Forum (SANEF), is reported to have promised to place the experiences of Mpumalanga’s journalists on SANEF’s agenda. Mzilikazi’s arrest was purportedly based on his being in possession of a fraudulent resignation letter by Mpumalanga Province Premier David Mabuza to President Jacob Zuma. He was charged with fraud, forgery and uttering. At the time of his arrest Mzilikazi had authored an article which alleged that Police Commissioner General Bheki Cele, without following proper tender procedures, had signed a R500 million (US$72.7 million) lease agreement for police headquarters in Pretoria.

References:
Machele, Marumo, “Narrow escape for City Press,”
Aug. 7, 2010
Available at: http://www.citypress.co.za/SouthAfrica/News/Narrow-escape-for-City-Press-journo-20100807


Mcleanec, Taralyn, “Journos face jail threat”
Oct. 26, 2010, Dispatch,
Available at: http://www.dispatch.co.za/article.aspx?id=443382
Yes: A YES score is earned if there were no documented cases of journalists being assaulted during the specific study period for their work covering corruption issues. A YES score is positive.

No: A NO score is earned if there were any documented cases of assault to a journalist covering corruption during the study period. Corruption is defined broadly to include any abuses of power, not just the passing of bribes.

11c. In practice, in the past year, no journalists investigating corruption have been killed.

Yes | No

Comments:
In South Africa, there have been no recorded killings of journalists investigating corruption. However, concerns have been raised around the safety of journalists working in the Mpumalanga Province, especially those writing about the province's politics and corruption related stories. In August 2010, Sizwe Sama Yende, a City Press's Nelspruit-based reporter is reported to have been accosted outside his home by a gunman. On that day he had been returning from a meeting with a source. Ferial Hafajee, the City Press Editor, mentioned at that time that it was difficult to say whether the incident was just a normal crime or related to Nyende's professional work. Mr. Nyende has written widely on corruption in the province. Other journalists working in the province told journalism.co.za that "threats against them and their sources were par for the course when they wrote about the province’s politics.” City Press reported that it would provide Nyende with security on a 24-hour basis.

References:


Yes: A YES score is earned if there were no documented cases of journalists being killed because of their work covering corruption-related issues during the study period. A YES score is positive.

No: A NO score is earned if there were any documented cases where a journalist was killed in relation to his or her work covering corruption-related issues in the study period. The relationship between a mysterious death and an individual’s work may not be clear, however the burden of proof here is low. If it is a reasonable guess that a person was killed in relation to his or her work on corruption issues, then the indicator is scored as a NO. Corruption is defined broadly to include any abuses of power, not just the passing of bribes.

1.3. Public Requests for Government Information

12. Do citizens have a legal right to request information?

100

12a. In law, citizens have a right to request government information and basic government records.
Yes: A YES score is earned if there is a formal right to request government documents, including constitutional guarantees. Exceptions can be made for national security reasons or individual privacy, but they should be limited in scope. All other government documents should be available upon a public request.

No: A NO score is earned if there is no such right.

12b. In law, citizens have a right of appeal if a request for a basic government record is denied.
In terms of section 25 of PAIA, if an access to information appeal is either granted or refused, the information officer’s notice must state that the requester may lodge, depending on the circumstances, an internal appeal or an application with a court, against the access fee to be paid, the form of access granted or the procedure for lodging the internal appeal or application, as the case may be.

Also, section 74 of PAIA guarantees citizens the right to lodge an internal appeal against any government agency in cases where the right of access to government information is denied. The Act further prescribes procedural requirements that need to be followed when lodging an internal appeal. For instance, section 75 (1) (a) (i) requires that an internal appeal be lodged within 60 days of the decision or incidence.

Section 77 (5) (c) states that the appellant, third party or requester, as the case may be, may lodge an application with a court against the decision on internal appeal- (i) within 60 days;

Section 78 (1) of PAIA further states that a requester or third party referred to in section 74 may only apply to a court for appropriate relief in terms of section 82 after that requester or third party has exhausted the internal appeal procedure against a decision of the information officer of a public body provided for in section 74.

The Promotion of Administrative Justice Act of 2002 (PAJA) promotes procedurally fair administrative actions, and requires that administrators at national, provincial and local level inform the public of their rights to review, appeal or request reasons for administrative actions and that they are entitled to institute legal action in a court of law in order to seek such a review.

References:
Department of Justice and Constitutional Development guidelines. Available at: http://www.justice.gov.za/paja/about/terms.htm

Yes: A YES score is earned if there is a formal process of appeal for rejected information requests. A YES score can still be earned if the appeals process involves redress through the courts rather than administrative appeal.

No: A NO score is earned if there is no such formal process.

12c. In law, there is an established institutional mechanism through which citizens can request government records.

Comments:
The Promotion of Access to Information Act (PAIA) (Act 54 of 2000) establishes legal mechanisms, requirements and procedures regulating access to information from both public and private bodies.

Section 10 of the PAIA mandated the South African Human Rights Commission (SAHRC) to produce a comprehensive Guide to the PAIA, published in all official languages, distributed to government departments, and available to the public.

Section 3 of the SAHRC Guide details procedures for requesting access to information, and includes the relevant forms required for requests to public and private bodies. The Guide explains procedural requirements for requesters, costs involved, appeal mechanisms, and grounds for refusal of requests. Individuals who are unable to read or write can also make oral requests from the information officer of a public body.

Section 14 of the PAIA also requires public bodies to develop manuals, within six months of their establishment, detailing the function of that body and providing an index of records held. Manuals must be published in at least three of the official languages, and must contain: a description of its structure and functions; contact details of all deputy information officers; a description of the SAHRC guide and details on how to access it; details to facilitate a request for access to a record; categories of records available without a request; details of services available from the public body, and how these can be accessed; descriptions of arrangements for participating in policy formulation or performance of duties; remedies available in respect of an act, or failure to act by the body and other information as prescribed.

Section 14 also specifies that public bodies must update and publish manuals, if necessary, at intervals of no more than one year.

Section 16 of the PAIA also requires that the Department of Government Communication and Information Systems (GCIS) must, at its own cost, ensure the publication of the contact details of every information officer, of every public body, in every telephone
directory issued to the public, as prescribed.

Section 17 (1) of the PAIA also specifies that each public body, subject to legislation governing the employment of personnel of the public body concerned, should designate such number of persons as deputy information officers as are necessary to render the public body as accessible as reasonably possible to requesters of its records. In spite of the framework created within the PAIA, legal remedies do exist in cases where requesters of information have complied with the requirements of the PAIA, but access to information is refused.

Within public bodies, an internal appeal procedure is in place, failing which a requester may also approach the courts. Requesters may also approach the courts in cases where information is refused by private bodies.

References:


Yes: A YES score is earned if there is a formal government mechanism/institution through which citizens can access government records available under freedom of information laws. This mechanism could be a government office (or offices within agencies or ministries) or an electronic request system.

No: A NO score is earned if there is no such formal mechanism or institution.

13. Is the right to information requests effective?

13a. In practice, citizens receive responses to information requests within a reasonable time period.

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Comments:
In general, government bodies reportedly take substantial periods of time to respond to requests for access to information, if they respond at all, although this is sometimes dependent on the nature of the information requested and on how well the system of records management (i.e. the manner in which information records are generated, organized and stored) is established in government bodies. Failure to comply can result in legal action, although this is costly and time-consuming. In terms of section 32 of PAIA, public bodies are obliged to submit annual reports to the South African Human Rights Commission (SAHRC). These reports are the statistical indicators of the number of requests submitted to public bodies and respective response rates. However, the SAHRC, who are mandated to oversee the implementation of PAIA, states in its 2010 Annual Report that although “PAIA requires public bodies to submit section 32 reports to the Commission. It imposes no sanction on public bodies, which do not submit reports.” This results in a high non-compliance rate as well as a diminished incentive to register the responses to citizens’ requests to public bodies. In addition, according to Allison Tilley of the Open Democracy Advice Center (ODAC), “the Promotion of Access to Information Act (PAIA), which is supposed to facilitate public access to official information, is so misunderstood in government circles that officials deny applications for fear of disclosing more than they are allowed to. This forces people to go to court, and the government has already lost so many of these cases. It is like a soccer team that just keeps losing. At some point, the coach must realize that there is something wrong.”

Research conducted by ODAC in 2007 found that: “One in five respondents (21 percent) said that they had used their right to access information, in terms of the Promotion of Access to Information Act. The majority (79 percent) said that they had not done so. Almost two-thirds (62.7 percent) of those who had used their right to access information, received the information that they had requested. 37.3 percent said that they had not received the information they had requested.”

In analyzing the departmental implementation of the PAIA, the independent Public Service Commission (PSC) found that 23 percent of departments did not have Deputy Information Officers (DIO) (the Director-General or Executive Director is automatically considered to be the Information Officer). Further, 47 percent of departments had only one DIO, while 6 percent had more than ten DIOs.

The PSC also reported that 44 percent of departments had not developed PAIA manuals as required by the Act, often because DIOs had not been appointed. The PSC additionally found that 21 percent of manuals in place had never been updated, problematic as just over one-third (38 percent) contained outdated information.

Nonetheless, the PSC has identified a number of departments with good practices in terms of implementing the PAIA, including the South African Police Services (SAPS), the Department of Environmental Affairs and Tourism (DEAT) and the Department of Water Affairs and Forestry (DWAF).
The PSC reports that the SAPS has appointed a DIO at each police station, and that unambiguous guidelines describe what is required of the DIO. Each DIO submits a monthly PAIA return to Head Office, and these reports are consolidated by the national DIO, who in turn submits an annual report to the SAHRC.

A joint ODAC and SAHRC, 2010 Research Survey, conducted to test the responsiveness to information requests and compliance with PAIA among the government bodies, revealed that non-responsiveness is systemic and of particular concern. The research findings indicate that, "a total number of 82 institutions were sampled in 2010 with only 26 institutions responding to the requests. 8 institutions out of 23 responded in the national department category, 9 out of 25 institutions responded on the provincial level, while 8 out of 34 municipalities' responded at the local government level." The research findings raise a concern over the decreasing level of the overall response rate, "the 2010 31 percent results is a cause for concern as it is significantly lower than the 2009 and 2008 results where we recorded a response of 40 percent and 39 percent respectively from the sampled institutions." At the same time, 69 percent of respondents basically did not respond, which would be considered an automatic refusal in terms of PAIA. In such a case the information requester would have to go to a court or the public protector to ask for help to force the information holder to respond with a reason.

In 2010, several controversial cases, between the ruling ANC Government and the Democratic Alliance, regarding access to government information have received a high level of media coverage. In October, the Democratic Alliance (DA) was refused access to the State Security Agency’s (SSA) copy of a presentation it made to a parliamentary committee at a meeting open to public and media. "Disclosure could reasonably be expected to cause prejudice to the defense and the security of the Republic,” the SSA said in a letter sent in response to Member of Parliament Mr. David Maynier’s (DA) request to obtain a copy, a request he had made in terms of the Promotion of Access to Information Act (PAIA).

On October 6, the DA also made a submission to the presidency and the Defense minister in terms of the Promotion of Access to Information Act in order to obtain classified information regarding President Jacob Zuma’s flight details such as flight dates, routes and exact associated costs. Mr. Maynier argued that this information was previously in public domain and the fact that the Defense Minister Lindiwe Sisulu, whose department had operated the flights, has made the information classified indicated "an increasing appetite for secrecy and restrictions on the free flow of information”. However the information regarding the president’s flight details was refused, and on November 8, Minister Sisulu also refused to disclose her own flight-cost information.

On October 24, DA submitted an access to information request in terms of PAIA for all documents relating to the Arms Deal in the possession of the Directorate of Priority Crime Investigation (Hawks) and the National Prosecuting Authority (NPA). General Anwar Dramat, head of the Hawks, told Parliament that there were 460 boxes of documents and 4.7 million computer generated documents relating to the arms deal in the possession of the Hawks, and Mr. Maynier told “that access to these documents is likely to expose the biggest case of corruption and the biggest cover-up of corruption in the history of South Africa.”

References:
AfroNews24, “DA applies to have Zuma’s flight schedule made public,” Available at http://www.afronews24.com/de-jacobs-to-have-zumas-flight-schedule-made-public-1608.html


100: Records are available on-line, or records can be obtained within two weeks. Records are uniformly available; there are no delays for politically sensitive information. Legitimate exceptions are allowed for sensitive national security-related information.

75:

50: Records take around one to two months to obtain. Some additional delays may be experienced. Politically-sensitive information may be withheld without sufficient justification.

25:

0: Records take more than four months to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records. National security exemptions may be abused to avoid disclosure of government information.

13b. In practice, citizens can use the information request mechanism at a reasonable cost.
The costs of accessing information are prescribed by the Regulations to the Promotion of Access to Information Act (PAIA) (Act 2 of 2000) and are also listed in The Guide on how to use the Promotion of Access to Information Act (Act 2 of 2000) developed by the South African Human Rights Commission (SAHRC).

The costs of accessing information from a public body are reasonable, and are not prohibitive. A fee of R35 (US$4.99) is payable by all requesters, with the exception of individuals requesting personal information about themselves.

Fees prescribed by the Regulations in terms of accessing information from private bodies are marginally higher, but still reasonable. Again, a general requester’s fee of R50 (US$7.13) is applied, except in cases where individuals are requesting personal information about themselves.

It is important to note that, according to the Open Democracy Advice Center (ODAC), an exemption has also been introduced, whereby individuals who are unemployed or earn below a determined annual income no longer have to pay any fees associated with accessing information from either a public or private body.

However, while the costs specified are reasonably low, a requester may incur other costs, for example, in terms of communication and travel to access information from either a public or private body. Also, if a requester was denied information and initiated legal proceedings, costs would likely increase substantially.

**References:**

- Legal Deposit Act (Act 54 of 1997).

- ODAC, “Whistle-blowing, the Protected Disclosures Act, Accessing Information and the Promotion of Access to Information Act: Views of South Africans, 2007.”

- Promotion of Access to Information Act (PAIA) (Act 2 of 2000).


- Promotion of Administrative Justice Act (PAJA) (Act 3 of 2000).
  Available at: [http://www.justice.gov.za/paja/docs.htm](http://www.justice.gov.za/paja/docs.htm)

  Available at: [http://www.sahrc.org.za/home/21/files/Reports/PAIA%20GUIDE%20contact.pdf](http://www.sahrc.org.za/home/21/files/Reports/PAIA%20GUIDE%20contact.pdf)

**100:** Records are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line.

**75:**

**50:** Records impose a financial burden on citizens, journalists or NGOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

**25:**

**0:** Retrieving records imposes a major financial burden on citizens. Records costs are prohibitive to most citizens, journalists, or NGOs trying to access this information.

13c. In practice, responses to information requests are of high quality.

**Comments:**

The quality of the responses to government information is not officially assessed or measured by any government or non-government agency. However, certain indicators with regard to information requests help to assess whether the responses are of a high quality or not.

First, the reports by South African Human Rights Commission (SAHRC) as well as non-governmental organizations such as Open Democracy Advice Center (ODAC) indicate that the response rate for 2010 among the public sector institutions has decreased as opposed to figures from previous years.
A joint ODAC and SAHRC 2010 Research Survey conducted to test the responsiveness to information requests and compliance with PAIA among the government bodies revealed that non-responsiveness is systemic and of particular concern.

Second, SAHRC observes a sharp decrease in request volumes at national and provincial levels since 2007/08 and attributes such a drop to “low levels of [PAIA] implementation, poor response rates and concomitant drop in requester confidence”. In addition, the SAHRC 2010 report indicates that both national and provincial departments are now less inclined to grant requests in full. As opposed to requests granted by local governments, in terms of the national government, the report found that the number of fully-granted requests has dropped by a worrying total of 3,500 from the previous financial year.

Comments:
The Promotion of Access to Information Act (PAIA)(Act 54 of 2000) establishes legal mechanisms, requirements and procedures regulating access to information from both public and private bodies. Section 10 of the PAIA mandated the South African Human Rights Commission (SAHRC) to produce a comprehensive Guide to the PAIA, published in all official languages, distributed to government departments, and available to the public.

Section 3 of the SAHRC Guide details procedures for requesting access to information, and includes the relevant forms required for requests to public and private bodies. The Guide explains procedural requirements for requesters, costs involved, appeals mechanisms, and grounds for refusal of requests.

Requesters who have complied with the provisions of the PAIA and are refused information by a public body have the right to lodge an internal appeal. Appeals may also be lodged on the basis of dissatisfaction with fees charged, the time taken to deal with the request, or the form of information required.

The SAHRC Guide states that in accordance with the PAIA, an internal appeal must be lodged within 60 days of the decision to refuse access to information. Public bodies must then decide on the outcome of the appeal within 30 days.

Time frames differ to some extent when a third party is involved and must be notified, for example, in cases where the disclosure of information sought would involve; the unreasonable disclosure of personal information about a third party, certain records of the South African Revenue Services (SARS), confidential information regarding a third party, specific commercial information of a public body. In such cases, the PAIA specifies that the internal appeal must in fact be lodged within 30 days.

However, the PAIA compels authorities to allow for late appeals in cases where there is good cause, and to give notice if a late appeal is disallowed. After an internal appeal has been concluded, the PAIA instructs the relevant authority to notify the requester and all third parties immediately, following which there is a period of 60 days in which an application may be lodged within the courts against the decision of the internal appeal. In cases where third party notice is required, this period is reduced to 30 days.

However, the Open Democracy Advice Center (ODAC) observes that in practice, the entire process of requesting information and initiating an appeal can be time-consuming, in spite of the periods prescribed in legislation and the accompanying regulations. ODAC estimates that this process may take up to six months on average, not including any subsequent court proceedings.

Once court proceedings are initiated, it is difficult to anticipate the waiting period that an applicant might face, particularly given the substantial backlogs in South African courts. The Public Service Commission (PSC) has observed that while citizens can turn to the High Court to compel government bodies to release information, legal processes take time and can be very costly, effectively excluding poor people from exercising their right of access to information.

The PSC has also reported, based on research conducted in 1997 that about 35 percent of departments had not advised clients of their right to appeal. Departments responding to the PSC have generally claimed that they had no opportunity to inform the public about this entitlement because they had not dealt with any appeals. The PSC maintains, however, that this is an
unfortunate perspective because it ignores the fact that the public should be informed of their rights as a matter of course, and suggests that lack of public awareness may reduce the impetus to improve compliance with the PAIA.

Regarding the refusal of access to information, the PSC reported [in 2007] that 35 percent of departments indicated that clients were not informed of their right to an appeal.

The PSC’s State of the Public Service Report 2010 further raised the importance of the matter by proposing an idea of introducing an external appeal authority that will be more accessible for the public than the current arrangement with the High Court as an appeal authority.

In respect of private bodies, where internal appeals processes do not apply, an individual requesting information or a third party may make an application to the courts in response to an unfavorable decision, within 30 days. According to the SAHRC Guide, the court will then review the request and decide whether in fact the head of the private body should grant the requested information. However, again, it is difficult to anticipate the possible duration of court proceedings, particularly given current backlogs.

The Protection of Information Bill, aimed at regulating the classification, protection and dissemination of state information and currently before the Parliament, threatens to severely limit the right of access to government information if passed in the currently proposed version. According to the currently proposed version of the Bill, the Minister of State Security is the sole arbiter of classification and declassification decisions. No independent appeal body and/or dispute resolution mechanism is provided. It also allows all heads of the organs of state to classify information, which would make certain currently publicly available information secret if the Bill is passed.

References:


100: The agency/entity acts on appeals quickly. While some backlog is expected and inevitable, appeals are acknowledged promptly and cases move steadily towards resolution.

75:

50: The agency/entity acts on appeals quickly but with some exceptions. Some appeals may not be acknowledged, and simple issues may take more than two months to resolve.

25:

0: The agency/entity does not resolve appeals in a timely fashion quickly. Appeals may be unacknowledged for many months and simple issues may take more than three months to resolve.

13e. In practice, citizens can resolve appeals to information requests at a reasonable cost.

Comments:
The Promotion of Access to Information Act (PAIA) (Act 54 of 2000) establishes legal mechanisms, requirements and procedures regulating access to information from both public and private bodies. Requesters who have complied with the provisions of the PAIA and are refused information by a public body have the right to
lodge an internal appeal. Appeals may also be lodged on the basis of dissatisfaction with fees charged, or with the time taken to deal with the request, or the form of information required.

Although Section 75 (3) of the PAIA does specify that a requester lodging an internal appeal against the refusal of his or her request for access must pay the prescribed appeal fee (if any), such a fee has not been prescribed through the Regulations to the Act, and is therefore not applied.

Requesters, therefore, are only liable for the basic access fee of R35.00 (US$4.99), as well as any costs of reproducing records as specified in the Regulations, if their appeal is successful. These costs are generally reasonable.

However, if the requester is unsatisfied with the outcome of the internal appeal and initiates legal proceedings, costs would potentially increase significantly.

Similarly, an individual denied information from a private body does not have the recourse of an internal appeal, and must rather approach the courts. It is difficult to estimate the potential costs involved with litigation, particularly given substantial backlogs in South African courts.

The Open Democracy Advice Centre (ODAC) observes that generally, cases involving access to information are heard at the High Court level. The associated costs, which would include fees for both an advocate and attorney, are estimated to range from R300,000 (US$42,819) to upwards of R2 million (US$285,461). The Public Service Commission’s State of Public Service Report 2010 further raises a concern that the currently existing “appeal process tends to involve legal costs, which the general public may not always be in a position to afford” and suggests making arrangements more accessible to the public.

There have been growing calls for the Rules Board to finalize rules for the use of the PAIA, and to develop an adjudication system for speedy resolution of contested decisions to withhold release of records. The rules as developed by the Rules Board have been tabled in Parliament for consideration by the Justice Committee. As ODAC confirms, on Oct. 9, 2009, rules of procedure were promulgated that set down the standards by which PAIA requests could be enforced in the Magistrates’ Courts. ODAC states that these rules fulfilled the last of the conditions necessary to enable enforcement of PAIA in the courts far more accessible to the majority of the national population than the High Courts. The rules came into operation on Nov. 16, 2009.

The adjudication authority has been endorsed by the findings of a Parliamentary Ad Hoc Committee investigation into the functioning of the state institutions supporting democracy, but the Committee’s report has not yet been discussed by Parliament, and it is unlikely that it will be discussed this session.

The Regulations also do not anticipate other costs that may arise in the appeals process: for example, the costs of communicating with a public body, and possibly travel.

References:


100: In most cases, the appeals mechanism is an affordable option to middle class citizens seeking to challenge an access to information determination.

75: In some cases, the appeals mechanism is not an affordable option to middle class citizens seeking to challenge an access to information determination.

25: The prohibitive cost of utilizing the access to information appeals mechanism prevents middle class citizens from challenging access to information determinations.

13f. In practice, the government gives reasons for denying an information request.
Comments:
The Promotion of Access to Information Act (PAIA) (Act 54 of 2000) establishes legal mechanisms, requirements and procedures regulating access to information from both public and private bodies. Section 10 of PAIA mandated the South African Human Rights Commission (SAHRC) to produce a comprehensive Guide to the PAIA, published in all official languages, distributed to government departments, and available to the public.

The Guide details procedures for requesting access to information, and includes the relevant forms required for requests to public and private bodies. The Guide explains procedural requirements for requesters, costs involved, appeals mechanisms, and grounds for refusal of requests.

Chapter 4 of the PAIA details grounds for refusal of access to records held by public bodies. These include protection of: the privacy of a third party who is a natural person; certain records of the South African Revenue Service (SARS); commercial information of a third party; confidential information of a third party; safety of individuals and protection of property; police dockets in bail proceedings, and law enforcement and legal proceedings; records privileged from production in legal proceedings; defense, security and international relations of the Republic; economic interests and financial welfare of the Republic and commercial activities of public bodies; and, research information of a third party or public body; operation of public bodies.

Section 46 also specifies that a request may be refused on the grounds that it is frivolous or vexatious, or if the work involved in processing the request would substantially and unreasonably divert the resources of the public body.

Section 25(3) of the PAIA also states that if a request for information is refused, the notice informing the requester of such refusal must state adequate reasons for the refusal, including the provisions of this Act relied upon.

In addition, the Promotion of Administrative Justice Act (PAJA) (Act 3 of 2000) can be used to obtain an explanation for a refusal of access to information, but cannot be used to request information in the first instance.

The Open Democracy Advice Center (ODAC) contends that responses to requests for information are poor in general. ODAC suggests that in cases where a request for information is denied, a reason for this is almost always given. However, the problem lies in a very poor rate of response to the information request in the first instance, meaning that many requesters do not receive any response, nor do they receive any explanation for the granting or denial of their request. A joint ODAC and SAHRC 2010 Research Survey conducted to test the responsiveness to information requests and compliance with PAIA among the government bodies revealed that non-responsiveness is systemic and of particular concern. The research findings raise a concern over the overall decreasing level of response rate. “The 2010 31 percent results is a cause for concern as it is significantly lower than the 2009 and the 2008 results where we recorded a response of 40 percent and 39 percent respectively from the sampled institutions.” At the same time, 69 percent of respondents basically did not respond, which would be considered an automatic refusal in terms of PAIA. In other words, the rate of automatic denials of information requests is increasing in and of itself. In such a case the information requester will then have to go to a court or the public protector to ask for help to force the information holder to respond with a reason. Since the cost of going through a court procedure is high, the majority of information requesters cannot access the information they might be entitled to.

The Public Service Commission (PSC) also reported in 2007 that the capacity of the Public Service to provide information is still a challenge, and that this is particularly the case with information requested by individuals (compared to general information released through reports).

In analyzing departmental implementation of the PAIA, the PSC found that 23 percent of departments did not have Deputy Information Officers (DIO) (the Director-General or executive director is automatically considered to be the Information Officer). Further, 47 percent of departments had only one DIO, while 6 percent had more than ten DIOs.

The PSC also reported that 44 percent of departments had not developed PAIA manuals as required by the Act, often because DIOs had not been appointed. The PSC also found that 21 percent of manuals in place had never been updated, and this was of concern, as just over one-third (38 percent) contained outdated information.

Regarding the refusal of access to information, the PSC reported that 35 percent of departments indicated that clients were not informed of their right to an appeal.

In assessing the performance of selected Public Service departments in complying with the principle of information as required by the Batho Pele White Paper to serve as policy and legislative framework, PSC also conducted a study and reported in 2009 that “thirty five percent (35 percent) of the departments had a communication strategy or policy in place. Twenty four percent (24 percent) of departments indicated that they had developed Promotion of Access to Information Act40 (PAIA) manuals and that the manuals are used to support the implementation of the Batho Pele principles of Information. Twenty percent (20 percent) of departments make use of an information strategy to guide their efforts in implementing the principle of Information.”

References:


Available at: [http://www.sahrc.org.za/home/21/files/Reports/PAIA%20GUIDE%20contact.pdf](http://www.sahrc.org.za/home/21/files/Reports/PAIA%20GUIDE%20contact.pdf)

100: The government always discloses to the requestor the specific, formal reasons for denying information requests.

75:

50: The government usually discloses reasons for denying an information request to the requestor, with some exceptions. The reasons may be vague or difficult to obtain.

25:

0: The government does not regularly give reasons for denying an information request to the requestor.

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Category 2. Elections

2.1 Voting and Party Formation

14. Is there a legal framework guaranteeing the right to vote?

100

<table>
<thead>
<tr>
<th>14a. In law, universal and equal adult suffrage is guaranteed to all citizens.</th>
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<tbody>
<tr>
<td>Yes</td>
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</table>

Comments:
The Constitution of South Africa guarantees every adult citizen the political right to vote. Section 19(3) of the Constitution states that "every adult citizen has the right to vote in elections for any legislative body established in terms of the Constitution."

References:

| Yes | A YES score is earned if the right to vote is guaranteed to all citizens of the country (basic age limitations are allowed). A YES score can still be earned if voting procedures are, in practice, inconvenient or unfair.
| No | A NO score is earned if suffrage is denied by law to any group of adult citizens for any reason. Citizen is defined broadly, to include all ethnicities, or anyone born in the country. A NO score is earned if homeless or impoverished people are legally prohibited from voting. |

<table>
<thead>
<tr>
<th>14b. In law, there is a legal framework requiring that elections be held at regular intervals.</th>
</tr>
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<tbody>
<tr>
<td>Yes</td>
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</tbody>
</table>

Comments:
The Constitution in section 19(2) states that "every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution." The Constitution further requires in sections 49(1); 108(1); 159(1) that elections for the National Assembly, Provincial Legislatures and Municipal Councils, respectively, be held every five years.
15. Can all citizens exercise their right to vote?

100

15a. In practice, all adult citizens can vote.

Comments:
Every adult citizen has a constitutionally guaranteed right to vote in legislative elections. In the recent 2009 general elections, voter registration drives exceeded expectations, including millions more citizens on the common voters roll. Moreover, the right of South African expatriates to vote was upheld by the Constitutional Court, thus leading to their successful inclusion in the 2009 elections.

A survey conducted by the Human Sciences Research Council made very positive findings with regards to voters' access to polling stations, especially voters who were infirm and required mobile voting stations as permitted under section 67(1) of the Electoral Act (Act 73 of 1998). Voters are also able to check their registration and other election-related information via SMS or online, which further increased levels of access among new voters between the ages of 18 and 29.

But some concerns do remain, including the fact that because many voting stations received far higher volumes of voters on Election Day than anticipated, serious logistical challenges were created.

Despite political instability in the run-up to the elections, particularly in terms of the emergence of Cope, as well as numerous logistical challenges with regards to identification books and the difficult geography of South Africa, 90 percent of voters expressed satisfaction with the polls.

The IEC has also, over a series of successive elections, shown itself to be the best performing, most transparent and accountable of South Africa’s democratic institutions.

References:


15b. In practice, ballots are secret or equivalently protected.

Comments:
Under the system of voting and vote counting used by the IEC, ballots are unidentifiable by voter. Strong systems are in place to protect the secrecy of ballots and voters are afforded a high level of secrecy when casting their ballots.

The South African electorate has high levels of public trust in the freedom and fairness of elections. This is further substantiated by the question of ‘secrecy of ballots’ receiving an eight out of 10 score in Idasa’s recent study on elections and democracy in South Africa; that 72 percent of respondents in a 2008 Afro-barometer study felt that elections in South Africa were legitimate and fair; and that 78 percent of respondents in a HSRC survey said that they were “happy with absence of irregularities” in voting stations.

References:
February, Judith

Human Sciences Research Council,

Sylvester, Justin and Eshetu, Paulos,

15c. In practice, elections are held according to a regular schedule.

Comments:
National, provincial and local government elections have been held regularly, as prescribed in the constitution, since 1994.

References:


Sylvester, Justin and Eshetu, Paulos

100: Ballots are secret, or there is a functional equivalent protection, in all cases.

75:

50: Ballots are secret, or there is a functional equivalent protection, in most cases. Some exceptions to this practice have occurred. Ballots may be subject to tampering during transport or counting.

25:

0: Ballot preferences are not secret. Ballots are routinely tampered with during transport and counting.

100: Ballots are secret, or there is a functional equivalent protection, in all cases.

75:

50: Ballots are secret, or there is a functional equivalent protection, in most cases. Some exceptions to this practice have occurred. Ballots may be subject to tampering during transport or counting.

25:

0: Ballot preferences are not secret. Ballots are routinely tampered with during transport and counting.

100: Elections are always held according to a regular schedule, or there is a formal democratic process for calling a new election, with deadlines for mandatory elections.

75:
Elections are normally held according to a regular schedule, but there have been recent exceptions. The formal process for calling a new election may be flawed or abused.

Elections are called arbitrarily by the government. There is no functioning schedule or deadline for new elections.

16. Are citizens able to participate equally in the political process?

95

16a. In law, all citizens have a right to form political parties.

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
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</table>

Comments:
Section 19(1) of the constitution states that “every citizen is free to make political choices, which includes the right (a) to form a political party; (b) to participate in the activities of, or recruit members for, a political party and (c) to campaign for a political party or cause.”

References:

Yes: A YES score is earned if citizens have the right to form political parties without interference from government. A YES score may still be earned if groups or individuals with a history of violence or terrorism (within last ten years) are banned from forming political parties. Non-discriminatory minimal criteria (e.g. minimum age) are also allowed.

No: A NO score is earned if there are any legal or regulatory restrictions or prohibitions barring any types of political parties from being formed.

16b. In law, all citizens have a right to run for political office.

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
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</thead>
</table>

Comments:
Section 19(3b) of the constitution states that “every adult citizen has the right to stand for public office and, if elected, to hold public office.”

References:

Yes: A YES score is earned if all citizens (citizen is defined broadly, to include all ethnicities, or anyone born in the country) have the right under law to run for political office. A YES score may still be earned if individuals with a history of violence, terrorism, or criminality are banned from running for office.

No: A NO score is earned if there are any legal restrictions barring certain individuals or groups from running for political office.

16c. In practice, all citizens are able to form political parties.

100 | 75 | 50 | 25 | 0
The electoral system is based on proportional representation in addition to the use of closed party lists. This creates a situation where a flourish of minority parties exist within legislatures (some with only single seat representation) as all votes count and none are wasted. This effectively promotes multi-partyism and very little institutional constraints thus exist to negate the formation of new parties. Also, the closed party list system also promotes party cohesion and stability.

However, the deep levels of poverty and the costs of running a political party can be prohibitive, especially given the monopoly of resources enjoyed by the ruling and main opposition parties. Nevertheless, despite the prohibitive costs of campaigning, the costs of registration to contest elections are relatively minimal.

References:
Sylvester, Justin and Eshetu, Paulos

Global Integrity, Country Report: South Africa, 2008,
Available at: http://report.wordpress-158395-729720.cloudwaysapps.com/South%20Africa/2008

100: While there is no guarantee of electoral success, political parties can form freely without opposition.

75:

50: Some barriers to formation are present, such as burdensome registration requirements that may not be fairly applied. Some parties' political viewpoints may draw pressure from the government, such as surveillance or intimidation. Some political parties or organizations may have extra barriers to getting on a ballot.

25:

0: Some political parties are effectively barred from forming through some manner of official or unofficial pressure. This may include threats, arrest, or violence from competing parties or other groups.

16d. In practice, all citizens can run for political office.

Comments:
Despite the constitutionally guaranteed right to run for public office, prohibitive costs exist for citizens who wish to register for and contest in elections. High levels of poverty and inequality in society favour citizens with access to resources, effectively marginalizing and excluding poor citizens.

Section 26 of the Electoral Act (Act 73 of 1998) requires political parties to provide a financial deposit, determined by the type of election and the prescriptions of the IEC, in order to contest an election. Political parties contesting the 2009 national and provincial elections were required to submit deposits of R180,000 (US$26,164) and R40,000 (US$5,814) respectively, in addition to a R500 (US$73) registration fee.

References:
Global Integrity, Country Report: South Africa, 2008,
Available at: http://report.wordpress-158395-729720.cloudwaysapps.com/South%20Africa/2008

Electoral Act (Act 73 of 1998),
Available at: http://www.elections.org.za/content/WorkArea/DownloadAsset.aspx?id=989

Sylvester, Justin and Eshetu, Paulos

100: While there is no guarantee of electoral success, anyone can run for office under transparent and equitable guidelines. There is a formal process for access to the ballot which is fairly applied. The costs of running a campaign are reasonable and do not deter candidates from entering a race.

75:

50: Some barriers exist to getting on the ballot and bureaucratic or regulatory requirements for doing so may be unfairly applied. The costs of running a political campaign are significant and result in dissuading some candidates from running for office. A system of party lists may discourage or prevent independent candidates from running for office.

25:

0: Citizens can effectively be barred from the ballot through government abuse of official rules and/or unofficial pressure. The costs of running a campaign are extremely high and result in most average citizens being unable to run an effective
campaign for office.

16e. In practice, an opposition party is represented in the legislature.

| 100 | 75 | 50 | 25 | 0 |

Comments:
Opposition political parties have representation in all legislative spheres, including the National Assemble, provincial legislatures and Municipal Councils. Currently 12 opposition political parties occupy seats in the National Assembly.

References:


100: The opposition party always has some influence on the proceedings of the legislature. The opposition party can introduce legislation or bring pending matters to a vote without the consent of the ruling party.

75:

50: The opposition party has influence on the proceeding of the legislature, but it is limited in scope. The opposition's ability to force votes or publicly debate certain topics may be limited.

25:

0: The opposition party has only token participation in the legislature’s proceedings and cannot advance legislation or force a debate.

2.2. Election Integrity

17. In law, is there an election monitoring agency or set of election monitoring agencies/entities?

| 100 |

17a. In law, is there an election monitoring agency or set of election monitoring agencies/entities?

Yes | No

Comments:
Chapter 2 of the Electoral Commission Act (Act 51 of 1996), establishes the Independent Electoral Commission. This is in accordance with Chapter 9 of the Constitution (Act 108 of 1996), that requires the establishment of six independent institutions that protect South Africa’s constitutional democracy. The IEC is tasked with managing, administering and running all elections in the national, provincial and local spheres of government.

References:

Yes: A YES score is earned if there is a domestic agency or set of domestic agencies/entities formally assigned to ensure the integrity of the election process.

No: A NO score is earned if no domestic agency or set of domestic agencies/entities exists that monitors elections. A NO score is earned if elections are only monitored by an agency informally, such as poll booth monitoring by the police, only by international observers, or only by NGOs. A NO score is earned if the domestic election agency or set of domestic agencies simply facilitates the process of voting but is not empowered to report violations or abuses.

18. Is the election monitoring agency effective?

100

18a. In law, the agency or set of agencies/entities is protected from political interference.

Yes | No

Comments:
The Electoral Commission Act (Act 51 of 1996) constitutes the Independent Electoral Commission (IEC) as an independent institution as prescribed in the constitution. Section 181 (4) of the Constitution (Act 108 of 1996) prohibits any person or organ of State from interfering with the functioning of the IEC.

References:

Yes: A YES score is earned only if the agency or set of agencies/entities has some formal organizational independence from the bodies contesting in the election. A YES score is still earned even if the entity is legally separate but in practice staffed by partisans.

No: A NO score is earned if the election monitoring agency or set of agencies/entities is legally tied to bodies contesting the election (i.e. an executive branch agency such as the Interior Ministry, or a committee of the legislature). A NO score is automatically earned if there is no domestic election monitoring agency.

18b. In practice, agency (or set of agencies/entities) appointments are made that support the independence of the agency.

100 | 75 | 50 | 25 | 0

Comments:
The Electoral Commission Act (Act 51 of 1996) requires that the IEC be comprised of six commissioners, of which one must be a judge. Commissioners are also not to have a high profile within any political party (this is a unique requirement as far as Chapter 9 institutions that support democracy are concerned).

Section 193 of the constitution also requires that the president appoint IEC commissioners upon recommendation of the National Assembly via a special panel. This panel must be comprised of the president of the Constitutional Court, who acts as chairperson of the panel; a representative from the Human Rights Commission; a representative from the Commission for Gender Equality; as well as the public protector.

The recommended list of candidates must include no less than eight candidates, from whom the president must choose. Despite some concerns raised over the past decade by a few leading opposition political party figures as well as significant discussion on the IEC’s independence during a review of the Chapter 9 institutions, there is no serious empirical evidence to suggest that the independence of the IEC has ever been compromised.

Although, the IEC is dependent on the state for its budget and is accountable to Parliament, it enjoys an especially high degree of independence in relation to other Chapter 9 institutions, which has resulted in the high levels of public trust that the institution enjoys in South African society.
References:


Sylvester, Justin and Eshetu, Paulos

Global Integrity, Country Report: South Africa, 2008,
Available at: http://report.wordpress-158395-729720.cloudwaysapps.com/South%20Africa/2008

Appointments to the agency or set of agencies/entities are made based on professional qualifications. Individuals appointed are free of conflicts of interest due to personal loyalties, family connections or other biases. Individuals appointed usually do not have clear political party affiliations.

75:

50: Appointments are usually based on professional qualifications. However, individuals appointed may have clear party loyalties.

25:

0: Appointments are often based on political considerations. Individuals appointed often have conflicts of interest due to personal loyalties, family connections or other biases. Individuals appointed often have clear party loyalties.

100: The agency or set of agencies/entities has a professional, full-time staff.

75:

50: The agency or set of agencies/entities has limited staff, or staff without necessary qualifications to fulfill its basic mandate.

25:

0: The agency or set of agencies/entities has no staff, or such a limited staff that is clearly unqualified to fulfill its mandate.

18c. In practice, the agency or set of agencies/entities has a professional, full-time staff.

100 | 75 | 50 | 25 | 0

Comments:
The IEC is a professionally run organization with an adequate full-time staff complement. The IEC also requires large increases in temporary staff when managing elections. In the 2009 Annual Report, the IEC stated that it had recruited over 90 percent of its required electoral staff before the close of the financial year indicating its strong human resources management.

References:
Global Integrity, Country Report: South Africa, 2008,
Available at: http://report.wordpress-158395-729720.cloudwaysapps.com/South%20Africa/2008

Available at: http://www.elections.org.za/content/WorkArea/DownloadAsset.aspx?id=1156

100: The agency or set of agencies/entities has staff sufficient to fulfill its basic mandate.

75:

50: The agency or set of agencies/entities has limited staff, or staff without necessary qualifications to fulfill its basic mandate.

25:

0: The agency or set of agencies/entities has no staff, or such a limited staff that is clearly unqualified to fulfill its mandate.

18d. In practice, the agency or set of agencies/entities makes timely, publicly available reports following an election cycle.

100 | 75 | 50 | 25 | 0

Comments:
Section 14(3) of the Electoral Commission Act (Act 51 of 1996) requires the IEC to publish a report as soon as possible after an election. The reports have indeed been published timely and they have been widely disseminated in society through a variety of mediums, including Parliament, online sources and in hard copy.
Comments:
The IEC requires that all political parties or candidates contesting an election sign a pledge to adhere to the Electoral Code of Conduct. Breach of this code is considered a criminal offense under South African law. The IEC has the power to penalize political parties and candidates that breach the electoral code of conduct and other electoral procedures. This power is afforded by the Electoral Commission Act (Act 51 of 1996). The IEC is thus mandated to deal with all complaints and disputes regarding an election. However, political parties and candidates can lodge appeals to decisions made by the IEC at the Electoral Court.

The Electoral court is, however, a secondary recourse and so the IEC is the first arbiter in the case of complaints and disputes. During the 2009 National and Provincial elections, the IEC was not forced to use these powers to discipline political parties and candidates. Its role was mainly that of an arbiter during disputes and complaints brought forward by political parties; there were a total of 20 interventions by the IEC to diffuse disputes and tensions between political parties.

18e. In practice, when necessary, the agency or set of agencies/entities imposes penalties on offenders.

100: When rules violations are discovered, the agency or set of agencies/entities is aggressive in penalizing offenders and/or in cooperating with other agencies in penalizing offenders.

75:

50: The agency or set of agencies/entities enforces rules, but is limited in its effectiveness. The agency may be slow to act, unwilling to take on politically powerful offenders, reluctant to cooperate with other agencies, or occasionally unable to enforce its judgments.

25:

0: The agency or set of agencies/entities does not effectively penalize offenders and/or cooperate with other agencies in penalizing offenders. The agency may make judgments but not enforce them, or may fail to make reasonable judgments against offenders. The agency may be partisan in its application of power.
19. Are elections systems transparent and effective?

100

19a. In practice, there is a clear and transparent system of voter registration.

References:


100: There is a transparent system of voter registration that provides voters with sufficient time to understand their rights, check the accuracy of their registration, and ensure that errors are corrected before they vote.

75:

50: There is a transparent voter registration system that provides voters with sufficient time to understand their rights, check the accuracy of their registration, and ensure that errors are corrected before they vote but there are some problems. Voters may have not access to registration lists with sufficient time to correct errors before voting or registration lists may at times be inaccessible.

25:

0: The system of voter registration is incomplete or does not exist. Government may routinely falsify registration lists to affect voting patterns and limit access to the polls. Double voting and "ghost" voting by non-existent voters is common.

19b. In law, election results can be contested through the judicial system.

Comments:
The Electoral Court is established by Chapter 5 of the Electoral Commission Act (Act 51 of 1996), and is tasked with reviewing decisions made by the IEC. Any party or candidate is able to bring disputes or complaints to the Electoral Court, and all appeals must also be made to the Electoral Court.
Yes: A YES score is earned if citizens or political parties can challenge allegedly fraudulent election results through the courts or other judicial mechanisms.

No: A NO score is earned if there is no legal right for citizens or political parties to challenge allegedly fraudulent election results in the courts or other judicial mechanisms.

| 19c. In practice, election results can be effectively appealed through the judicial system. |
|---|---|---|---|---|
| 100 | 75 | 50 | 25 | 0 |

Comments: Legal challenges to election results are not commonplace in South Africa in recent elections. Much of this has to do with the mediating mechanisms that are put in place by the IEC. The IEC is able to deal with disputes and complaints very effectively through the use of Party Liaison Committees that comprise representatives from all political parties, thus lending a great deal of legitimacy to the electoral process.

References:


100: The electoral appeals mechanism takes cases from both candidates complaining of flaws in the electoral process as well as citizens bringing complaints related to denial of suffrage or registration errors. There is an expedited process for resolving such complaints to avoid delaying a timely announcement of electoral results.

75:

50: The electoral appeals mechanism takes complaints from both candidates and voters but may not always act on complaints promptly. The appeals mechanism may be abused at times by parties or candidates seeking to delay the announcement of electoral results.

25:

0: The electoral appeals mechanism rarely or never acts on complaints brought by candidates or citizens. Citizens may not be able to bring complaints related to denial of suffrage or voter registration errors.

| 19d. In practice, the military and security forces remain neutral during elections. |
|---|---|---|---|---|
| 100 | 75 | 50 | 25 | 0 |

Comments: The security forces have played a supportive and protective role during all of South Africa’s democratic elections. By securing voting stations and deploying to areas with the potential for electoral violence, the security forces help to ensure peaceful environments for the electoral process to take place. The South African Police Service is also mandated to investigate any breaches of the Electoral Code of Conduct and any other criminal activities that threaten the integrity of the election.

There have been no reported instances where any members of the security forces have interfered in the electoral process or influenced the outcome in favor of a political party.
19e. In law, domestic and international election observers are allowed to monitor elections.

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Comments:

In 2009, the IEC accredited various international bodies to send observer teams to observe the 2009 elections. The Commonwealth, the African Union, and a number of international civil society organizations sent observer teams. It is notable that the United Nations has not sent observer teams to monitor South African elections since 2004, citing its faith in South Africa’s ability to run free and fair elections.

References:


Yes: A YES score is earned if domestic and international election observers are allowed to monitor the electoral process.

No: A NO score is earned if there are any legal or regulatory prohibitions on the monitoring of the electoral process by domestic or international election observers.

19f. In practice, election observers are able to effectively monitor elections.

| 100 | 75 | 50 | 25 | 0 |

Comments:
In accordance with the Electoral Act (Act 73 of 1998), as amended in 2003, any juristic person may apply to the IEC for...
accreditation as an election observer in South Africa.

For the 2009 National and Provincial elections, 15 international organizations sent observer missions to South Africa. These organizations included the International Foundation for Electoral Systems from the US, the African Union, the SADC Parliamentary Forum, the Electoral Institute for Southern Africa, the Electoral Commission Forum of the SADC, the Association for African Electoral Authorities and a number of continental and regional non-governmental organizations.

Political parties that are contesting elections are also empowered to send observers to various voting stations in order to monitor compliance with election and voting procedures. These monitors and observers are also present during the counting process.

References:

100: Election observers have unfettered access to polling sites, counting stations, and voters themselves. The government does not interfere with the observers’ activities.

75: 

50: Election observers generally have access to polling sites, counting stations, and voters but encounter restrictions in certain areas. The government may impose burdensome regulatory or bureaucratic requirements on observers to discourage their involvement.

25: 

0: Election observers' movements are significantly limited by the government and many polling and counting sites are restricted or barred from observers. The government imposes so many bureaucratic or regulatory burdens on the observers that their mission is rendered ineffective.

2.3. Political Financing Transparency

20. Are there regulations governing the financing of political parties?

0

20a. In law, there are limits on individual donations to political parties.

Yes | No

Comments: There is no regulation or legislation that requires that individual donors limit or cap their value of their donations to political parties.

References:
Yes: A YES score is earned if there are any limits in size on individual contributions to political parties. A YES score is also earned if individual contributions are prohibited.

No: A NO score is earned if there are no limits on contributions from individuals. A NO score is also earned if limits are applied by the government on opposition parties in a discriminatory manner.

20b. In law, there are limits on corporate donations to political parties.

| Yes | No |

Comments:
There is no legislation or regulation that requires corporations to limit or cap their donations to political parties.

References:
Global Integrity, Country Report: South Africa, 2008,
Available at: http://report.wordpress-158395-729720.cloudwaysapps.com/South%20Africa/2008

Sylvester, Justin and Eshetu, Paulos

Idasa and Institute for Security Studies,
"Who Funds Who: Money in South African Politics."
Available at: http://www.whofundswho.org.za/problem/index.htm

Yes: A YES score is earned if there are any limits in size on corporate contributions to political parties. A YES score is earned if corporate contributions are prohibited.

No: A NO score is earned if there are no limits on corporate contributions to political parties. A NO score is also earned if limits are applied by the government on opposition parties in a discriminatory manner.

20c. In law, there are limits on total political party expenditures.

| Yes | No |

Comments:
There is no limitation placed on total expenditure by political parties through regulation or legislation, be it private or public funding. However, with respect to public funding, political parties are expected to disclose their expenditure in relation to: personnel expenditure; accommodation; travel expenses; arrangement of meetings and rallies; administration, and promotions or publications.

References:
Global Integrity, Country Report: South Africa, 2008,
Available at: http://report.wordpress-158395-729720.cloudwaysapps.com/South%20Africa/2008

Sylvester, Justin and Eshetu, Paulos

Idasa and Institute for Security Studies,
"Who Funds Who: Money in South African Politics."
Available at: http://www.whofundswho.org.za/problem/index.htm

Independent Electoral Commission (IEC), "Party Funding."
Available at: http://www.elections.org.za/content/Dynamic.aspx?id=557&name=Parties&LeftMenuId=102&BreadCrumbId=216

Yes: A YES score is earned if there are any limits in size on political party expenditures during the course of an election.
No: A NO score is earned if there are no limits on political party expenditures during an election. A NO score is also earned if limits are applied by the government on opposition parties in a discriminatory manner.

20d. In law, there are requirements for the disclosure of donations to political parties.

Yes  |  No

Comments:
There are no regulations or legislation in South Africa that require political parties to disclose the source of their donations or the value of these donations.

References:
Global Integrity, Country Report: South Africa, 2008,
Available at: http://report.wordpress-158395-729720.cloudwaysapps.com/South%20Africa/2008

Sylvester, Justin and Eshetu, Paulos

Idasa and Institute for Security Studies,
"Who Funds Who: Money in South African Politics."
Available at: http://www.whofundswho.org.za/problem/index.htm

Yes: A YES score is earned if there are any requirements mandating the disclosure of financial contributions to political parties.

No: A NO score is earned if there are no requirements mandating the disclosure of contributions to political parties, existing regulations do not require a donor’s name or amount given, or the regulations allow for anonymous donations. Systems where only certain donation amounts are required to be made public (above a non-trivial amount) also earn a NO score.

20e. In law, there are requirements for the independent auditing of the finances and expenditure of political parties when financial irregularities are uncovered.

Yes  |  No

Comments:
There are no regulations or legislation that require that political parties have audits of their finances and expenditure derived from private sources of funding. However, in terms of the Public Funding of Represented Political Parties Act (1997), independent audits are required of finances and expenditure that relates to the public funding of political parties.

The Chief Executive Officer of the IEC is expected to audit political parties' disclosures in this regard. However, due to the heavy influence of private funding in the South African political system, it cannot be said that there are adequate requirements for independent auditing.

References:
Public Funding of Represented Political Parties Act (Act of 1997).
Available at: http://www.elections.org.za/content/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=985

Global Integrity, Country Report: South Africa, 2008,
Available at: http://report.wordpress-158395-729720.cloudwaysapps.com/South%20Africa/2008

Yes: A YES score is earned if there is a legal or regulatory requirement for the independent auditing of party finances and expenditures when irregularities are uncovered. The auditing is performed by an impartial third-party.

No: A NO score is earned if there are no legal or regulatory requirements for the independent auditing of political parties’ finances and expenditures when financial irregularities are uncovered. A NO score is also earned if such requirements exist but allow for parties to self-audit.

20f. In law, there is an agency or entity that monitors the financing of political parties.
21. Are there regulations governing the financing of individual political candidates?

21a. In law, there are limits on individual donations to political candidates.

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
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Comments:
There are no regulations governing individual donations to political candidates. Private political candidates only exist at the local government sphere of government and are not funded by the Independent Electoral Commission.

References:


| Yes | No |

Yes: A YES score is earned if there are any limits in size on individual contributions to political candidates. A YES score is also earned if individual contributions are prohibited.

No: A NO score is earned if there are no limits on contributions from individuals. A NO score is also earned if limits are applied by the government on opposition candidates in a discriminatory manner.

21b. In law, there are limits on corporate donations to individual political candidates.

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
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Comments:
There is no law or regulation that imposes limits on corporate donations to individual candidates.

References:
Global Integrity, Country Report: South Africa, 2008,
Yes: A YES score is earned if there are any limits in size on corporate contributions to individual political candidates. A YES score is earned if corporate contributions are prohibited.

No: A NO score is earned if there are no limits on corporate contributions to individual political candidates. A NO score is also earned if limits are applied by the government on opposition candidates in a discriminatory manner.

21c. In law, there are requirements for the disclosure of donations to individual political candidates.

| Yes | No |

Comments:
There are no legal requirements for disclosure of donations to individual political candidates.

References:
Global Integrity, Country Report: South Africa, 2008,

Idasa and Institute for Security Studies,
"Who Funds Who: Money in South African Politics."


Yes: A YES score is earned if there are any requirements mandating the disclosure of financial contributions to individual political candidates.

No: A NO score is earned if there are no requirements mandating the disclosure of contributions to individual political candidates, existing regulations do not require a donor’s name or amount given, or the regulations allow for anonymous donations. Systems where only certain donation amounts are required to be made public (above a non-trivial amount) also earn a NO score.

21d. In law, there are requirements for the independent auditing of the campaign finances of individual political candidates when irregularities are uncovered.

| Yes | No |

Comments:
There are no legal requirements for the independent auditing of the campaign finances of individual political candidates, in respect to private party financing.

References:
Global Integrity, Country Report: South Africa, 2008,

Idasa and Institute for Security Studies,
"Who Funds Who: Money in South African Politics."

No: A NO score is earned if there are no legal or regulatory requirements for the independent auditing of an individual candidate’s campaign finances and expenditures when financial irregularities are uncovered. A NO score is also earned if such requirements exist but allow for candidates to self-audit.

21e. In law, there is an agency or entity that monitors the financing of individual political candidates’ campaigns.

Yes | No

Comments:
There is no agency tasked with monitoring private political party financing.

References:
Global Integrity, Country Report: South Africa, 2008,
Available at: http://report.wordpress-158395-729720.cloudwaysapps.com/South%20Africa/2008

Idasa and Institute for Security Studies,
Available at: http://www.whofundswho.org.za/problem/index.htm

Yes: A YES score is earned if there is a domestic agency or set of domestic agencies/entities formally assigned to monitor and enforce laws and regulations around the financing of individual political candidates’ campaigns. A YES score is earned even if the agency/entity is ineffective in practice.

No: A NO score is earned if there is no such agency or entity. A NO score is also earned if this monitoring is solely carried out by the media and non-governmental organizations.

22. Are the regulations governing the political financing of parties effective?

22a. In practice, the limits on individual donations to political parties are effective in regulating an individual’s ability to financially support a political party.

100 | 75 | 50 | 25 | 0

Comments:
There are no limits on individual donations to political parties.

References:
Global Integrity, Country Report: South Africa, 2008,
Available at: http://report.wordpress-158395-729720.cloudwaysapps.com/South%20Africa/2008

Sylvester, Justin and Eshetu, Paulos

Idasa and Institute for Security Studies,
Available at: http://www.whofundswho.org.za/problem/index.htm

100: Existing limits represent the full extent to which an individual can directly or indirectly financially support a political party. Limits are reasonably low enough in the context of the total costs of running a campaign.

75:

50: Existing limits generally represent the full extent to which an individual can directly or indirectly financially support a political party. However, exceptions and loopholes exist through which individuals can indirectly support political parties above and beyond those formal limitations. Such loopholes could include making donations to third-party groups that advocate on behalf of (or against) a particular party; unregulated loans to parties (rather than direct donations); or in-kind support that is not explicitly regulated by laws or regulations. The limits may be too high in the context of the overall costs of running a campaign.
Existing limits are routinely bypassed or willfully ignored. The vast majority of individual contributions to a political party are made outside of the formal limitation system. There is no enforcement of violations. Limits are so high that they are meaningless in the context of the overall costs of running a campaign.

In practice, the limits on corporate donations to political parties are effective in regulating a company’s ability to financially support a political party. However, exceptions and loopholes exist through which companies can indirectly support political parties above and beyond those formal limitations. Such loopholes could include making donations to third-party groups that advocate on behalf of (or against) a particular party; unregulated loans to parties (rather than direct donations); or in-kind support that is not explicitly regulated by laws or regulations. The limits may be too high in the context of the overall costs of running a campaign.

In practice, the limits on total party expenditures are effective in regulating a political party’s ability to fund campaigns or politically-related activities. There are no limits on total party expenditures.


Sylvester, Justin and Eshetu, Paulos

Idasa and Institute for Security Studies,
Available at: http://www.whofundswho.org.za/problem/index.htm
Existing limits represent the full extent to which political parties are able to finance their activities. Limits are reasonably low enough in the context of the total costs of running a party to be meaningful.

Existing limits generally represent the full extent to which a political party can finance its activities. However, exceptions and loopholes exist through which parties can generate revenue or finance their activities beyond the scope of existing regulations. Such loopholes could include taking loans that are outside of the scope of regulations covering direct donations; links to revenue-generating business activities that are beyond the scope of electoral or campaign-related regulations; or accepting in-kind support that is not explicitly regulated by laws or regulations. The limits may be too high in the context of the overall costs of running a party.

Existing limits are routinely bypassed or willfully ignored. The majority of expenditures are made outside of the formal limitation system. Limits are so high that they are meaningless in the context of the overall costs of running a party.

In practice, when necessary, an agency or entity monitoring the financing of political parties independently initiates investigations.

There is no agency tasked with monitoring private political party financing. In respect of public financing, the Independent Electoral Commission (IEC) is mandated by the Electoral Act (Act 73 of 1998) to initiate investigations independently.

References:
Global Integrity, Country Report: South Africa, 2008,
Available at: http://report.wordpress-158395-729270.cloudwaysapps.com/South%20Africa/2008
Sylvester, Justin and Eshetu, Paulos
Idasa and Institute for Security Studies,
"Who Funds Who: Money in South African Politics."
Available at: http://www.whofundswho.org.za/problem/index.htm

The agency or entity aggressively starts investigations into allegations of wrong doing with respect to the financing of political parties, or cooperates well with other agencies that do. The agency is fair in its application of this power.

The agency or entity will start investigations, but often relies on external pressure to set priorities, has limited effectiveness when investigating, or is reluctant to cooperate with other agencies in politically sensitive cases. The agency, though limited in effectiveness, is still fair in its application of power.

The agency or entity rarely investigates on its own, is uncooperative with other agencies, or the agency or entity is partisan in its application of this power.

In practice, when necessary, an agency or entity monitoring the financing of political parties imposes penalties on offenders.

In respect to public political party funding, the Independent Electoral Commission (IEC) is empowered by the Electoral Act (Act 73 of 1998) to impose penalties when necessary on offenders. In practice, this is rare. There is no agency tasked with monitoring private party financing, and therefore no penalties can or have been imposed.

References:
Global Integrity, Country Report: South Africa, 2008,
22f. In practice, contributions to political parties are audited.

| 100 | 75 | 50 | 25 | 0 |

Comments:
Private financing to political parties is not disclosed or audited, and there is no regulation. Public financing is audited in terms of Public Funding of Represented Political Parties Act, 103 of 1997. The chief electoral officer is responsible for the management and administration of the fund, while the party will appoint an accounting officer to report to the chief electoral officer.

However, it is important to note that for the ruling and main opposition parties, private sources of financing far outweigh what these parties receive via the public funding mechanism.

References:
Available at: http://report.wordpress-158395-729720.cloudwaysapps.com/South%20Africa/2008

Sylvester, Justin and Eshetu, Paulos

Idasa and Institute for Security Studies,
"Who Funds Who: Money in South African Politics."
Available at: http://www.whofundswho.org.za/problem/index.htm

23. Are the regulations governing the political financing of individual candidates effective?

0
23a. In practice, the limits on individual donations to political candidates are effective in regulating an individual's ability to financially support a particular candidate.

- 100: Existing limits represent the full extent to which an individual can directly or indirectly financially support a political candidate. Limits are reasonably low enough in the context of the total costs of running a campaign.
- 75:
- 50: Existing limits generally represent the full extent to which an individual can directly or indirectly financially support a particular candidate. However, exceptions and loopholes exist through which individuals can indirectly support particular political candidates above and beyond those formal limitations. Such loopholes could include making donations to third-party groups that advocate on behalf of (or against) a particular candidate; unregulated loans to candidates (rather than direct donations); or in-kind support that is not explicitly regulated by laws or regulations. The limits may be too high in the context of the overall costs of running a campaign.
- 25:
- 0: Existing limits are routinely bypassed or willfully ignored. The vast majority of individual contributions to a particular political candidate are made outside of the formal limitation system. There is no enforcement of violations. Limits are so high that they are meaningless in the context of the overall costs of running a campaign.

Comments: There are no regulations governing the political financing of particular candidates in South Africa. Private political candidates only exist at local government level and they are not funded by the Independent Electoral Commission (IEC).

References:
Global Integrity, Country Report: South Africa, 2008,
Available at: http://report.wordpress-158395-729720.cloudwaysapps.com/South%20Africa/2008

Sylvester, Justin and Eshetu, Paulos

Idasa and Institute for Security Studies,
"Who Funds Who: Money in South African Politics."
Available at: http://www.whofundswho.org.za/problem/index.htm

23b. In practice, the limits on corporate donations to individual candidates are effective in regulating a company's ability to financially support a candidate.

- 100: Existing limits represent the full extent to which a company can directly or indirectly financially support an individual candidate. Limits are reasonably low enough in the context of the total costs of running a campaign to be meaningful.
- 75:
- 50: Existing limits generally represent the full extent to which a company can directly or indirectly financially support an individual candidate. However, exceptions and loopholes exist through which companies can indirectly support individual candidates above and beyond those formal limitations. Such loopholes could include making donations to third-party groups that advocate on behalf of (or against) a particular candidate; unregulated loans to candidates (rather than direct donations); or in-kind support that is not explicitly regulated by laws or regulations. The limits may be too high in the context of the overall costs of running a campaign.
- 25:
- 0: Existing limits are routinely bypassed or willfully ignored. The vast majority of corporate donations to a particular political candidate are made outside of the formal limitation system. There is no enforcement of violations. Limits are so high that they are meaningless in the context of the overall costs of running a campaign.

Comments: There are no limits on corporate donations to individual candidates.

References:
Global Integrity, Country Report: South Africa, 2008,
Available at: http://report.wordpress-158395-729720.cloudwaysapps.com/South%20Africa/2008

Idasa and Institute for Security Studies,
"Who Funds Who: Money in South African Politics."
Available at: http://www.whofundswho.org.za/problem/index.htm
or in-kind support that is not explicitly regulated by laws or regulations. The limits may be too high in the context of the overall costs of running a campaign.

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<tr>
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<tbody>
<tr>
<td>Existing limits are routinely bypassed or willfully ignored. The majority of corporate contributions to individual candidates are made outside of the formal limitation system. There is no enforcement of violations. Limits are so high that they are meaningless in the context of the overall costs of running a campaign.</td>
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**23c. In practice, when necessary, an agency or entity monitoring the financing of individual candidates’ campaigns independently initiates investigations.**

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<tr>
<td><strong>Comments:</strong></td>
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<tr>
<td>There is no agency tasked with monitoring the financing of individual candidates.</td>
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**References:**
Global Integrity, Country Report: South Africa, 2008,

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**23d. In practice, when necessary, an agency or entity monitoring the financing of individual candidates’ campaigns imposes penalties on offenders.**

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<td><strong>Comments:</strong></td>
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<tr>
<td>There is no agency tasked with monitoring individual candidates financing, and therefore no penalties can be or have been imposed.</td>
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**References:**
Global Integrity, Country Report: South Africa, 2008,

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**100:** When rules violations are discovered, the agency or entity is aggressive in penalizing offenders or in cooperating with other agencies that do.

**75:**
50: The agency or entity enforces rules, but is limited in its effectiveness. The agency or entity may be slow to act, unwilling to take on politically powerful offenders, reluctant to cooperate with other agencies, or occasionally unable to enforce its judgments.

25:

0: The agency or entity does not effectively penalize offenders. The agency or entity may make judgments but not enforce them, or may fail to make reasonable judgments against offenders. The agency or entity may be partisan in its application of power or may refuse to cooperate with other agencies.

23e. In practice, the finances of individual candidates' campaigns are audited.

100 | 75 | 50 | 25 | 0

Comments:
Financing of individual candidates is not disclosed or audited; there is no regulation stipulating this.

References:
Global Integrity, Country Report: South Africa, 2008,
Available at: http://report.wordpress-158395-729720.cloudwaysapps.com/South%20Africa/2008

Idasa and Institute for Security Studies,
"Who Funds Who: Money in South African Politics."
Available at: http://www.whofundswho.org.za/problem/index.htm

100: The finances of individual candidates' campaigns are regularly audited using generally accepted auditing practices. The auditing may be regular and comprehensive or only initiated after an initial review reveals irregularities.

75:

50: The finances of individual candidates' campaigns are audited, but audits are limited in some way, such as using inadequate auditing standards, or the presence of exceptions to disclosed contributions.

25:

0: The finances of individual candidates' campaigns are not audited, or the audits performed have no value in tracking contributions. Audits may be performed by entities known to be partisan or biased in their practices.

24. Can citizens access records related to the financing of political parties?

31

24a. In practice, political parties disclose data relating to financial support and expenditures within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:
In respect of public funding only, political parties and candidates are required to disclose data relating to financing support and expenditure within a reasonable time period.

In terms of the public fund administered by the Independent Electoral Commission (IEC), parties must file audited annual financial statements by June 30, every year.

However, different financial statements and the closing of books are required, for example, before a general election and/or after a floor crossing window period. In respect to private funding, there are no legal requirements for disclosure of data. This is particularly important given that private funding totally dwarfs the value of public financing in the political system.

References:
Global Integrity, Country Report: South Africa, 2008,
Available at: http://report.wordpress-158395-729720.cloudwaysapps.com/South%20Africa/2008

100: Political parties disclose their sources of funding and expenditures at least every quarter.

75:

50: Political parties disclose their sources of funding and expenditures only one or two times per year. Delays may occur when sensitive political information is involved.

25:

0: Political parties never publish their sources of funding or expenditures or publish that information only rarely with more than a year in between publication. Politically sensitive information is regular withheld from public disclosure.

24b. In practice, citizens can access the financial records of political parties within a reasonable time period.

100  75  50  25  0

Comments:
Citizens can access reports of the Independent Electoral Commission (IEC) on public funding given to political parties for free, and within a reasonable time period.

However, political parties are not required to allow citizens access to information on private funding. Idasa’s attempts to gain access to financial records of political parties by litigation in terms of the Promotion of Access to Information Act (Act 2 of 2000) proved unsuccessful.

References:


100: Records are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

75:

50: Records take two to four weeks to obtain. Some delays may be experienced.

25:

0: Records take more than a month to acquire. There may be persistent delays in obtaining politically sensitive records.

24c. In practice, citizens can access the financial records of political parties at a reasonable cost.

100  75  50  25  0

Comments:
Citizens can access reports of the Independent Electoral Commission (IEC) on public funding given to political parties for free.

However, political parties are not required to allow citizens access to information on private funding. Given that NGO's have in recent times failed to acquire such information, it is highly unlikely that ordinary citizens, particularly the poor, would be able to do so.
Promotion of Access to Information Act (PAIA) (Act 2of 2002).
Available at: [link]

Global Integrity, Country Report: South Africa, 2008,
Available at: [link]

Idasa and Institute for Security Studies,
"Who Funds Who: Money in South African Politics."
Available at: [link]

100: Records are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line.

75:

50: Records impose a financial burden on citizens, journalists or NGOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving records imposes a major financial burden on citizens. Records costs are prohibitive to most citizens, journalists, or NGOs trying to access this information.

24d. In practice, the publicly available records of political parties' finances are of high quality.

100 | 75 | 50 | 25 | 0

Comments:
Citizens can access reports of the Independent Electoral Commission (IEC) on public funding given to political parties for free.

However, political parties are not required to allow citizens access to information on private funding. Given that NGO's have in recent times failed to acquire such information, it is highly unlikely that ordinary citizens, particularly the poor, would be able to do so.

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Available at: [link]

Global Integrity, Country Report: South Africa, 2008,
Available at: [link]

Idasa and Institute for Security Studies,
"Who Funds Who: Money in South African Politics."
Available at: [link]

100: Publicly available records of political parties' finances are complete and detailed, itemizing all significant sources of income and expenditures.

75:

50: Publicly available records of political parties' finances are available but are often lacking in important details, are overly general, or are otherwise incomplete.

25:

0: Publicly available records of political parties' finances, when available, are so incomplete or overly general as to render them useless in understanding a party’s sources of income and its expenditures.

25. Can citizens access records related to the financing of individual candidates' campaigns?

0

25a. In practice, individual political candidates disclose data relating to financial support and expenditures within a reasonable time period.
There are no regulations governing the financing of individual candidates.

References:
Global Integrity, Country Report: South Africa, 2008,

Idasa and Institute for Security Studies,
"Who Funds Who: Money in South African Politics."

Pienaar, Gary and Sylvester, Justin,

### Score Grid

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50: Individual candidates disclose their sources of funding and expenditures only one or two times per year. Delays may occur when sensitive political information is involved.

25:

0: Individual candidates never publish their sources of funding or expenditures or publish that information only rarely with more than a year in between publication. Politically sensitive information is regular withheld from public disclosure.

25b. In practice, citizens can access the financial records of individual candidates (their campaign revenues and expenditures) within a reasonable time period.

### Score Grid

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Comments:
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Global Integrity, Country Report: South Africa, 2008,

Idasa and Institute for Security Studies,
"Who Funds Who: Money in South African Politics."

Pienaar, Gary and Sylvester, Justin,

100: Records are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

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25c. In practice, citizens can access the financial records of individual candidates (their campaign revenues and expenditures) at a reasonable cost.
Comments:
There are no regulations governing the financing of individual candidates.

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50: Publicly available records of political candidates' campaign finances are available but are often lacking in important details, are overly general, or are otherwise incomplete.

25:

0: Publicly available records of political candidates' campaign finances, when available, are so incomplete or overly general as to render them useless in understanding a candidate's sources of income and expenditures.
3.1 Conflicts of Interest Safeguards & Checks and Balances: Executive Branch

26. In law, can citizens sue the government for infringement of their civil rights?

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Comments:
In terms of the Institution of Legal Proceedings Against Certain Organs of State Act (Act 40 of 2002), legal proceedings can be instituted for the recovery of a debt. According to the Act, a ‘debt’ includes any delictual, contractual or any other liability or cause of action for which an organ of state is liable to pay damages.

Citizens can also pursue their actions in terms of the law of delict. The criteria for negligence would have to be proven. This can be seen clearly in the case of Carmichele, where an accused in a rape case was released on bail and, while awaiting trial, assaulted a citizen. In developing the law, the court observed that section 7(2) of the constitution imposed a duty on the state to respect, protect, promote and fulfill the fundamental human rights. These included the right to dignity, life, freedom and security of all persons.

The responsibility for these constitutional duties imposed on the state rested inter alia on the police and the prosecution services. The court found that in the determination of any particular case, officials of the state owed the public in general, and women in particular, a duty in private law to exercise reasonable care in the prevention of violent crime. The proper application of the test required courts to attach primary significance to the constitutional imperatives imposed by section 7(2). In addition, the absence of a public law remedy compelled the recognition of a private law claim against the state for damages in delict.

References:
Carmichele v Minister of Safety and Security and Another 2002 (10) BCLR 1100. Available at: [http://www.saflii.org/za/cases/ZASCA/2003/117.html](http://www.saflii.org/za/cases/ZASCA/2003/117.html)

Yes: A YES score is earned if all citizens (citizen is defined broadly, to include all ethnicities, or anyone born in the country) can receive compensation or redress through the courts for civil rights violations committed by the government, such as failure to follow due process of law when detaining suspected criminals.

No: A NO score is earned if any group of citizens is excluded from the right to sue the government, or no such mechanism exists.

27. Can the chief executive be held accountable for his/her actions?

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27a. In practice, the chief executive gives reasons for his/her policy decisions.
The executive is constitutionally obliged to account to Parliament. Section 92 (2) and (3) of the Constitution prescribe the roles and responsibilities of the executive towards Parliament. It states:
(2) Members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions.
(3) Members of the Cabinet must – (b) provide Parliament with full and regular reports concerning matters under their control.

Since 1994, Parliament has introduced various mechanisms to hold the executive accountable. One of these mechanisms is "question time", during which members of parliament and provincial legislatures have the opportunity to question members of the executive. Other measures for ensuring accountability include scrutiny of departmental reports, the annual budget process, and briefings before Parliamentary committees.

However, since 1994, there have also been some concerns over Parliament’s poor oversight record, though some committees have been more robust in performing oversight functions, particularly since the 2007 ANC National Conference in Polokwane.

Due to South Africa’s proportional representation and closed list party system, MPs are directly accountable to party executives rather than to the electorate. Thus, the state executive tends to dominate the legislature as it is occupied by members of the ruling party’s executive.

References:


100: The chief executive and/or cabinet ministers give formal explanations of all policy matters. The chief executive regularly takes critical questions from journalists or an opposition party, usually at least once a month. There is no censoring of such sessions.

75:

50: The chief executive and/or cabinet ministers give explanations of policy, but not always in a timely or complete way. The chief executive occasionally takes critical questions from journalists or an opposition party, but not in a regular or formalized process. Particular issues of political sensitivity may be censored by government broadcasters.

25:

0: The chief executive and/or cabinet ministers do not give substantial justifications for policy. Public appearances by the chief executive offer no exposure to critical questions. The government and government-run media routinely sensor such sessions.

27b. In law, the judiciary can review the actions of the executive.

Comments:
The Constitution is the highest law in South Africa, and binds all people and organs of the state. Any action or decision by government has to stand up to constitutional scrutiny and can be declared unconstitutional by the superior courts in terms of section 172(1) of the Constitution. Section 167(3)(a) of the Constitution provides that the Constitutional Court is the highest court in the land, while section 165(5) provides that orders of the courts bind ‘all persons to whom and organs of state to which they apply and section 165(2) asserts that the courts are subject only to the Constitution and the law. Section 165(4) requires all organs of state to assist and protect the independence of the courts.

Section 239 of the Constitution contains a definition of ‘organs of state’ that includes the executive branch of government.

The Promotion of Administrative Justice Act (Act 3 of 2000) also sets out the procedures and grounds for challenging government's administrative actions. Under the Act, any person can approach a court for a judicial review of government's decision if they feel it is unlawful and unreasonable.

References:
Available at: http://www.info.gov.za/documents/constitution/index.htm


Yes: A YES score is earned if there is a formal process by which the judiciary can pass judgments on the legality or constitutionality of actions taken by the executive.

No: A NO score is earned if no such mechanism exists. A NO score is earned if judicial review is vaguely established in law or regulation without formal procedures. A NO score is earned if general exemptions exist with respect to executive actions that are reviewable (a national security exemption, for example).

27c. In practice, when necessary, the judiciary reviews the actions of the executive.

100 | 75 | 50 | 25 | 0

Comments:
In the past, South African courts have successfully delivered judgments challenging executive decisions, and in some cases this has led to the re-writing of laws. For example, the Constitutional Court has in the past reviewed an exercise of the President’s power to pardon prisoners.

Another case concerned the National Department of Health’s Operational Plan for Comprehensive HIV/AIDS Care Management and Treatment for South Africa, which excluded the prisoners of Westville Correctional Center from accessing anti-retroviral treatment at an accredited public health facility. The matter was taken to court by the Treatment Action Campaign, where the executive policy on HIV/AIDS was successfully challenged. The court ordered the respondent, namely the Ministers of Health and Correctional Services and the KwaZulu-Natal MEC for Health, to immediately remove the restrictions that prevented the applicants, and all other similarly situated prisoners at Westville Correctional Center, from gaining access to the treatment.

More recently, the leading opposition party has launched an application before the North Gauteng High Court against the president’s decision to appoint Menzi Simelane as the new National Director of Public Prosecutions (NDPP). The case is ongoing at time of writing, but has included representations by the president, the minister of Justice and the NDPP, indicating that judicial review remains a strong dimension of governance.

References:


TAC and Others v Government of the RSA and Others (Case 4576/2006 KZN High Court). Available at: http://41.208.61.234/htmlbin/cgiass/20101108123208/SIRSI/0/520J-CCT8-0E/A


100: When constitutional or legal questions or possible violations are raised, the judiciary is aggressive in reviewing executive actions and can void illegal or unconstitutional actions. The judiciary is fair and nonpartisan in its application of this power. It does not need to rely upon the executive to initiate a constitutional or legal review.

75:

50: The judiciary will review executive actions, but is limited in its effectiveness. The judiciary may be slow to act, unwilling to take on politically sensitive issues, or occasionally unable to enforce its judgments.

25:

0: The judiciary does not effectively review executive policy. The judiciary may make judgments but not enforce them, or may fail to pass judgments on executive abuses. The judiciary may be partisan in its application of power. It must rely on instructions from the executive in order to initiate a legal or constitutional review.

27d. In practice, the chief executive limits the use of executive orders for establishing new regulations, policies, or government practices.
According to Section 101 of the South African Constitution, a decision by the president must be in writing if it is taken in terms of legislation or has legal consequences. Section 101 (2) of the constitution further states that a written decision by the president must be countersigned by another cabinet member, if that decision concerns a function assigned to that other cabinet member.

Generally, the president’s preferred mode of conducting government business is by Cabinet consensus and through legislation.

References:

100: The chief executive utilizes executive orders only when there is no constitutional or legal requirement for official legislative action or approval. Executive orders are limited in number and narrow in scope.

75:

50: The chief executive sometimes relies on executive orders to implement policies and regulations opposed by the legislature. Some executive orders are overly broad in scope and are designed to circumvent constitutional or legal requirements for legislative action or approval.

25:

0: The chief executive routinely abuses executive orders to render the legislature practically useless. Executive orders are the norm, not the exception, and directly contravene constitutional or legal requirements for legislative action or approval.

28. Is the executive leadership subject to criminal proceedings?

100

28a. In law, the heads of state and government can be prosecuted for crimes they commit.

Yes | No

Comments:
No one is above the law in South Africa. Sections 7(1) and 9(1) of the constitution provide for equality before the law and equal protection of the law. The law applies to all, irrespective of their positions in society.

Members of the executive are not immune from prosecution while in office, and there is currently no law that provides special exemptions and treatment for individual members of government.

References:

Yes: A YES score is earned if the heads of state and government can be investigated, charged or prosecuted for criminal allegations. Figurehead officials (symbolic figures without day-to-day authority) may be exempt.

No: A NO score is earned if either the head of state or government cannot be investigated, charged or prosecuted for criminal allegations or the executive branch controls whether investigative or prosecutorial immunity can be lifted on the heads of state or government.

28b. In law, ministerial-level officials can be prosecuted for crimes they commit.
**Comments:**
One of the most important principles contained in the constitution is the rule of law, enshrined in section 1(c). The law applies to all; ministerial level officials are treated like any other citizen. No-one is above the law or immune from prosecution. 7(1) and 9(1) of the constitution provide for equality before the law. The law applies to all, irrespective of their positions in society. For example, section 6 of the Executive Members Ethics Act, 82 of 1998, states that nothing contained in the Act may prevent or delay the prosecution of a cabinet member, deputy minister or MEC in a court.

**References:**
Global Integrity, Country Report: South Africa, 2008,
Available at: http://report.wordpress-158395-729720.cloudwaysapps.com/South%20Africa/2008

Available at: http://www.info.gov.za/documents/constitution/index.htm

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<th>29. Are there regulations governing conflicts of interest by the executive branch?</th>
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In terms of sections 5 of the Executive Ethics Code, prescribed by section 2 of the Executive Members Ethics Act, every member of the executive, including the president, is required to disclose to the secretary of cabinet (currently the director-general in the presidency) particulars of all financial interests. The first disclosure must be made within 60 days after the promulgation of the Code or of assumption of office or of becoming aware of such interest, and thereafter annually.

**References:**
Global Integrity, Country Report: South Africa, 2008,
Available at: http://report.wordpress-158395-729720.cloudwaysapps.com/South%20Africa/2008

Executive Members Ethics Act (Act 82 of 1998).


Yes: A YES score is earned if the heads of state and government are required by law to file an asset disclosure form while in office, illustrating sources of income, stock holdings, and other assets. This form need not be publicly available to score a YES. Figurehead officials (symbolic figures without day-to-day authority) may be exempt.

No: A NO score is earned if either the head of state or government is not required to disclose assets.

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<th>29b. In law, ministerial-level officials are required to file a regular asset disclosure form.</th>
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**References:**
Global Integrity, Country Report: South Africa, 2008,
Available at: http://report.wordpress-158395-729720.cloudwaysapps.com/South%20Africa/2008

Executive Members Ethics Act (Act 82 of 1998).


Yes: A YES score is earned if ministerial-level officials, or their equivalents, can all be investigated, charged or prosecuted for criminal allegations.

No: A NO score is earned if any ministerial-level official, or equivalent official, cannot be investigated, charged or prosecuted for criminal allegations or the executive branch controls whether investigative or prosecutorial immunity can be lifted on ministerial-level officials.
Comments:
In terms of sections 5 of the Executive Ethics Code, prescribed by section 2 of the Executive Members Ethics Act, every member of the executive, including the president, ministers and deputy ministers, is required to disclose to the secretary of cabinet (currently the director-general in the presidency) particulars of all financial interests. Members of Provincial executives, including premiers and MECs, are also subject to the Act and Code, and must disclose to a senior official in the offices of the Provincial premiers. The first disclosure must be made within 60 days after the promulgation of the Code or of a member’s assumption of office or of a member becoming aware of such interest, and thereafter annually.

References:
Global Integrity, Country Report: South Africa, 2008,
Available at: http://report.wordpress-158395-729720.cloudwaysapps.com/South%20Africa/2008


Yes: A YES score is earned if ministerial-level officials, or their equivalents, are all required by law to file an asset disclosure form while in office, illustrating sources of income, stock holdings, and other assets.

No: A NO score is earned if ministers are not required to disclose assets. A NO score is earned if some ministers must disclose assets, but other ministers are not required.

29c. In law, there are regulations governing gifts and hospitality offered to members of the executive branch.

Yes | No

Comments:
According to the Executive Ethics Code of 2007, a member may not solicit or accept a gift or benefit in return for any benefit received from the member in the member’s official capacity. The Code adds the proviso that the prohibition on members soliciting or accepting gifts or benefits extends only to those gifts or benefits which constitute improper influence on the member, or an attempt to exert such influence.

When a member, in the course of the member’s duties, receives or has been offered a gift the member may request permission from the president to retain or accept it. If a member is given permission, he/she must disclose particulars of the gift. Where such permission has not been requested or granted, the member must return the gift, decline the offer or donate the gift to the state.

References:
Global Integrity, Country Report: South Africa, 2008,
Available at: http://report.wordpress-158395-729720.cloudwaysapps.com/South%20Africa/2008


Yes: A YES score is earned if there are formal guidelines regulating gifts and hospitality offered to members of the executive branch of government.

No: A NO score is earned if there are no guidelines or regulations with respect to gifts and hospitality offered to members of the executive branch. A NO score is earned if the guidelines are overly general and do not specify what is and is not appropriate.

29d. In law, there are requirements for the independent auditing of the executive branch asset disclosure forms (defined here as ministers and heads of state and government).

Yes | No

Comments:
There are no legislative provisions requiring the auditing of executive branch asset disclosure forms. However, the auditor-general can, within his discretion, audit these records in terms of section 4 of the Public Audit Act.

In addition, in terms of section 7 of the Public Protector Act, the public protector can conduct, out of its own initiative, investigations, which includes the possibility of monitoring compliance with the provisions of the Executive Code of Ethics.
29e. In law, there are restrictions on heads of state and government and ministers entering the private sector after leaving the government.

| Yes | No |

Comments:
There are currently no legal restrictions. However, the ANC's 2007 National Policy Conference resolved to request their National Executive Committee to develop a clear framework to guide the flow of skills between the public and private sectors. This is intended to include a cooling off period and compensation for opportunities lost as a result of such restrictions.

The inclusion in the draft Single Public Service Bill of provisions related to post-employment restrictions for certain members of the civil service involved in procurement processes reflects a growing appreciation of the existence of a problem in this regard.

However, there has not been any progress on this issue, even though it has been raised as an important lacuna (gap) in the otherwise impressive anti-corruption framework that has been developed by the government over the past ten years.

References:

29f. In practice, the regulations restricting post-government private sector employment for heads of state and government and ministers are effective.

| 100 | 75 | 50 | 25 | 0 |

Comments:
Despite the ruling party's resolutions that the problem exists and needs to be addressed, no such conditions yet exist. Similarly, the inclusion in the draft Single Public Service Bill of provisions related to post-employment restrictions for certain members of the civil service involved in procurement processes reflects a growing appreciation of the existence of a problem in this regard.

Many media reports reflect public concern about the absence of post-employment restrictions governing senior members of the executive branch of government.

References:


The regulations restricting post-government private sector employment for heads of state/government and ministers are uniformly enforced. There are no cases or few cases of those officials taking jobs in the private sector after leaving government where they directly lobby or seek to influence their former government colleagues without an adequate “cooling off” period.

The regulations are generally enforced though some exceptions exist. In certain sectors, heads of state/government or ministers are known to regularly take jobs in the private sector that entail directly lobbying or seeking to influence their former government colleagues. Cooling off periods are short and sometimes ignored.

The regulations are rarely or never enforced. Heads of state/government or ministers routinely take jobs in the private sector following government employment that involve direct lobbying or influencing of former government colleagues. Cooling off periods are non-existent or never enforced. A zero score is also earned if heads of state and government or minister are allowed to hold private sector jobs while in office.

In practice, the regulations governing gifts and hospitality offered to members of the executive branch are effective.

| 100 | 75 | 50 | 25 | 0 |

In practice, the provisions of the Code are sometimes interpreted generously. Thus, in terms of the regulations governing gifts and hospitality offered to executive members, the public protector investigated the alleged non-disclosure of a gift of accommodation by the government of the United Arab Emirates during an unofficial trip by Deputy President Phumzile Mlambo-Ngcuka. The public protector found that the accommodation did not constitute a gift in terms of the Code. It did not, therefore, need to be disclosed.

By contrast, in a more recent report, the public protector found that the minister of Public Service and Administration had failed to comply with the Code’s provisions to disclose a gift valued at R2,500 (US$365) and to obtain permission from the president to retain it.

In practice, executive branch asset disclosures (defined here as ministers and above) are audited.

| 100 | 75 | 50 | 25 | 0 |

References:


The regulations governing gifts and hospitality to members of the executive branch are regularly enforced. Members of the executive branch never or rarely accept gifts or hospitality above what is allowed.

The regulations governing gifts and hospitality to members of the executive branch are generally applied though exceptions exist. Some ministers in certain sectors are known to accept greater amounts of gifts and hospitality from outside interest groups or private sector actors than is allowed.

The regulations governing gifts and hospitality to members of the executive branch are routinely ignored and unenforced. Ministers and other members of the executive branch routinely accept significant amounts of gifts and hospitality from outside interest groups and actors seeking to influence their decisions.
Comments:
In principle, disclosures can be, and are audited from time to time, for example by the Auditor-General. The Public Protector can, in principle, conduct, on its own initiative, investigations into the level of compliance. In practice, however, such auditing does not take place on a regular basis. Given the intermittence of these audits, there is no sufficient mechanism to audit executive branch asset disclosures, particularly given the problematic history with these disclosures in recent years.

References:


100: Executive branch asset disclosures are regularly audited using generally accepted auditing practices.

75: Executive branch asset disclosures are audited, but audits are limited in some way, such as using inadequate auditing standards, or the presence of exceptions to disclosed assets.

50: Executive branch asset disclosures are not audited, or the audits performed have no value. Audits may be performed by entities known to be partisan or biased in their practices.

30. Can citizens access the asset disclosure records of the heads of state and government?

44

30a. In law, citizens can access the asset disclosure records of the heads of state and government.

Yes | No

Comments:
In terms of section 7.1 of the Executive Members Ethics Code of 2000, each cabinet secretary (i.e. in the national and provincial cabinets), is required to keep a register of all financial interests disclosed by members. The register must have a confidential and a public part. Section 7.5 states that any person has access to the public part of a register during office hours. Section 2(2)(d) of the Act prescribes that access to the public part of the Register of Interests must be available, at the least, under the same conditions as is required by members of the National Assembly.

References:

Yes: A YES score is earned if the heads of state and government file an asset disclosure form that is, in law, accessible to the public (individuals, civil society groups or journalists).

No: A NO score is earned if there is no asset disclosure for either the head of state or government. A NO score is earned if the form is filed, but not available to the public.

30b. In practice, citizens can access the asset disclosure records of the heads of state and government within a reasonable time period.

Yes | No
Section 7.1 of the Executive Ethics Code states that the register held by the secretary to cabinet (Director-General in the presidency and the Provincial Premiers' offices) must have a confidential and a public part. Section 7.5 of the Code states that any person has access to the public part of a register during the office hours of the Secretary concerned. Members of the public seeking access to the asset disclosure records of the head of state and government must write a formal letter to the presidency requesting access. However, it is unclear how long it takes the requester to receive the records, if their request is granted. The presidency's website does not disclose that the Director-General in the presidency bears this responsibility. Nor does it provide any information regarding the Act or Code, apart from a link to the constitution, including section 96, which provides for legislation to prescribe a code of ethics.

According to research conducted by Idasa’s Parliamentary Information and Monitoring Service (PIMS) in 2003, there was a lack of clarity in the presidency about whether the records could be accessed or not. The research also showed that while it was established that the public section of the records could be accessed, it was not clear what procedure needed to be followed. It is not known whether the public part of the records of heads of state and government has been accessed by citizens. The secretary in the office of the presidency stated that an application in the form of a letter would have to be made to access the asset disclosure records of the president; the office said each department would deal with the application of each cabinet minister. The official was unable to provide any statistics regarding the number of cases where citizens had accessed the asset disclosure records of the president. More recent attempts to establish whether these processes in the presidency are now characterized by any greater degree of clarity and user-friendliness did not receive any response.

In terms of the Executive Members Ethics Act and the Executive Ethics Code cabinet members must disclose all their financial interests and liabilities as well as those of their spouses and dependent children within 60 days of assuming office. The issue of asset disclosures by the executive came under the spotlight in 2010 when it emerged in March of that year that President Jacob Zuma had not yet disclosed his financial interests as required by law.

References:

Political Information and Monitoring Service (PIMS)
"Government Ethics in Post-Apartheid South Africa," 2003, IDASA: Cape Town. Available at: [http://www.idasa.org/index.asp?page=output_details.asp%3FRID%3D94%26plang%3DDen%26Pub%3DY%26OTID%3D2](http://www.idasa.org/index.asp?page=output_details.asp%3FRID%3D94%26plang%3DDen%26Pub%3DY%26OTID%3D2)


Johwa, Wilson,

February, Judith,

100: Records are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

75:

50: Records take around two weeks to obtain. Some additional delays may be experienced.

25:

0: Records take more than a month to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

30c. In practice, citizens can access the asset disclosure records of the heads of state and government at a reasonable cost.
References:
Available at: http://www.pmg.org.za/bills/020728execethicscode.htm

Available at: http://report.wordpress-158395-729720.cloudwaysapps.com/South%20Africa/2008

Available at: http://www.idasa.org/index.asp?page=output_details.asp%3FRID%3D94%26oplang%3Den%26Pub%3DY%26OTID%3D2

100: Records are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line.

75:

50: Records impose a financial burden on citizens, journalists or NGOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving records imposes a major financial burden on citizens. Records costs are prohibitive to most citizens, journalists, or NGOs trying to access this information.

30d. In practice, the asset disclosure records of the heads of state and government are of high quality.

100       75       50       25       0

Comments:
Given our unsuccessful attempt to acquire more information on how to access asset disclosure records from the presidency (as discussed in question 30c), it is not possible for us to answer this question conclusively.

References:
Available at: http://www.idasa.org/index.asp?page=output_details.asp%3FRID%3D94%26oplang%3Den%26Pub%3DY%26OTID%3D2

100: The asset disclosure records of the heads of state and government are complete and detailed, providing the public with an accurate and updated accounting of the individuals’ sources of income, investments, and other financial interests.

75:

50: The asset disclosure records of the heads of state and government contain some useful information but may be lacking important details, including politically sensitive investment or other financial arrangements in which the individual has an interest.

25:

0: The asset disclosure records of the heads of state and government are overly general, lack any meaningful detail, and do not provide a clear accounting of the individuals’ sources of income, investments, and other financial assets.

31. In practice, official government functions are kept separate and distinct from the functions of the ruling political party.

50

31a. In practice, official government functions are kept separate and distinct from the functions of the ruling political party.
Comments:
There is a view that at times the ruling African National Congress Party has used its political dominance to subordinate and even interfere with state or independent institutions. Civil servants taking leave to campaign for the ANC in the 2009 election and the enrichment of the party through a World Bank loan to the state-owned electricity company, Eskom, are two examples of this.

In the first instance, it was reported that in some provinces civil servants took time off from their public sector jobs to help the ANC run its 2009 election campaign. The opposition Democratic Alliance (DA) accused the National Education, Health and Allied Workers' Union (Nehawu) of asking the Free State Head of Health to allow 160 workers paid leave so they could campaign for the ANC. The Congress of the People (Cope) claimed that teachers aligned to the South African Democratic Teachers Union (Sadtu) in KwaZulu-Natal and the Eastern Cape were abandoning classes to campaign for the ANC.

In April 2010, it was reported that the ANC stood to make R1 billion (US$145.5 million) from the World Bank's loan to Eskom because Chancellor House owns 25 percent of Hitachi Africa, which was awarded a contract for work on the Medupi power station being financed by the loan. In spite of promises that the party would instruct Chancellor House to exit its stake in Hitachi Power, this has not happened. It was later reported that Chancellor House had also acquired a 75 percent stake in a coal mine in Swaziland, which would provide coal to Eskom. The Chancellor House.Hitachi incident has highlighted the issue of the ruling party using state resources to enrich itself and keep itself in power.

References:


100: Clear rules are followed distinguishing state functions from party activities. Government funds are never used for party activities. The civil service is completely distinct from party bureaucracy.

75:

50: The ruling party is, in principal, separate from the state, but exceptions to this standard sometimes occur. Examples may be the use of civil servants to organize political rallies, use of government vehicles on campaign trips, or use of government funds for party purposes.

25:

0: The government bureaucracy is an extension of the ruling party. There are few boundaries between government and party activities. Government funds, equipment and personnel are regularly used to support party activities.

3.2. Conflicts of Interest Safeguards & Checks and Balances: Legislative Branch

32. Can members of the legislature be held accountable for their actions?

100

32a. In law, the judiciary can review laws passed by the legislature.

Yes  |  No
Comments:
As stated in section 8 (1) of the Constitution, the Bill of Rights applies to all law, in that it binds the legislature, the executive, the judiciary and all organs of state. In section 34, it is clear that everyone has access to the courts, and section 38 provides that anyone listed may approach the courts in order to enforce the rights that are protected by the Bill of Rights, and for appropriate relief. It is important to note that judiciary review of legislation lies with the courts.

References:

Yes: A YES score is earned if there is a formal process by which the judiciary or constitutional courts can pass judgments on the legality or constitutionality of laws passed by the legislature.

No: A NO score is earned if no such mechanism exists. A NO score is earned if judicial review is vaguely established in law or regulation without formal procedures. A NO score is earned if general exceptions exist exempting certain legislative actions from being reviewed (a national security exemption, for example).

32b. In practice, when necessary, the judiciary reviews laws passed by the legislature.

100 | 75 | 50 | 25 | 0

Comments:
The Constitutional Court handed down judgment in an application brought by members of the Merafong community, challenging the validity of parts of the Constitution Twelfth Amendment Act of 2005, as well as of the Cross-boundary Municipalities Laws and Repeal Related Matters Act 23 of 2005. Similarly, the Constitutional Court has held, in the Matatiele and Doctors for Life decisions that the KwaZulu-Natal Provincial legislature and Parliament, respectively, had failed to comply with its obligations to facilitate public participation in the legislative process. The SCA considered the implications of the Special Investigating Units and Special Tribunals Act, No. 74 of 1996 for the separate juristic entities established in terms of the Act, and found that liability for the wrongful acts of the one does not devolve upon the other. A study by the Legal Resources Center shows how the courts have undertaken reviews of legislation.

References:
Merafong Demarcation Forum and Others v President of the RSA And Others CCT 41/07
http://www.saflii.org/za/cases/ZACC/2008/10.html

Chagi and 29 others v Special Investigating Unit 89/07, Nov. 29, 2007

Matatiele Municipality and Others v President of the Republic of South Africa and Others CCT 73/05 Aug. 18, 2006
http://www.saflii.org/za/cases/ZACC/2006/12.html

Doctors for Life v Speaker of the National Assembly and Others CCT 12/05 2006 (12) BCLR 1399 (CC)
http://www.saflii.org/za/cases/ZACC/2006/11.html

"Road accident fund law constitutional: Court rules" Nov 25, 2010
http://www.timeslive.co.za/local/article784142.ece/Road-Accident-Fund-law-constitutional–Court-rules

100: When constitutional or legal questions or possible violations are raised, the judiciary is aggressive in reviewing laws passed and can void illegal or unconstitutional actions. The judiciary is fair and nonpartisan in its application of this power.

75:

50: The judiciary will review laws passed, but is limited in its effectiveness. The judiciary may be slow to act, unwilling to take on politically sensitive issues, or occasionally unable to enforce its judgments.

25:

0: The judiciary does not effectively review laws passed. The judiciary may make judgments but not enforce them, or may fail to pass judgments on executive abuses. The judiciary may be partisan in its application of power.

32c. In law, are members of the national legislature subject to criminal proceedings?
In section 9 of the constitution, it is clear that everyone is equal before the law. Thus every individual will be treated equally.

Section 165 of the constitution provides for the independence and authority of the courts. The courts are independent and subject only to the constitution and the law, which they must apply impartially and without fear, favor or prejudice and no person or organ of state may interfere with the functioning of the courts.

During September 2010, the last of those accused in the parliamentary travel-voucher saga, pleaded guilty to fraud. 31 Members of Parliament were brought before the courts over allegations regarding the abuse of parliamentary travel vouchers. All these MPs concluded plea bargains. Most of the MPs that were found guilty have left Parliament, but some are still public representatives, like the Portfolio Committee on Defense Chairperson, Mr. Nyami Booi.

In terms of section 47 of the constitution, MPs can still retain their seats in Parliament, although they were publicly sanctioned by the Speaker of Parliament.

In S v Yengeni 2006 (1) SACR 405 (T), the Chief Whip of the ANC in Parliament, was convicted of fraud in connection with the government's arms deal procurement contract. He failed to admit to Parliament that he had received a significant discount on the purchase price of a motor vehicle.

References:

Powers, Privileges and Immunities of Parliaments and Provincial Legislature (Act 4 of 2004)

Last Travelgate accused bites the dust, Sept 21, 2010. Mail & Guardian
http://www.mg.co.za/article/2010-09-21-last-travelgate-accused-bites-the-dust

33. Are there regulations governing conflicts of interest by members of the national legislature?

Yes: A YES score is earned if all members of the legislature can, in law, be investigated and prosecuted for criminal allegations.

No: A NO score is earned if any member of the legislature cannot, in law, be investigated and prosecuted for criminal proceedings. A NO score is also earned if the legislative branch itself controls whether investigative or prosecutorial immunity can be lifted on members of the legislature.

33a. In law, members of the national legislature are required to file an asset disclosure form.

Yes: A YES score is earned if all members of the legislature are required by law to file an asset disclosure form while in office, illustrating sources of income, stock holdings, and other assets. This form does not need to be publicly available to score a YES.

No: A NO score is earned if any member of the legislature is not required to disclose assets.

References:
Code of Conduct with regard to Financial Interest for Assembly and Permanent Council Members

Yes: A YES score is earned if all members of the legislature are required by law to file an asset disclosure form while in office, illustrating sources of income, stock holdings, and other assets. This form does not need to be publicly available to score a YES.

No: A NO score is earned if any member of the legislature is not required to disclose assets.
33b. In law, there are restrictions for national legislators entering the private sector after leaving the government.

| Yes | No |

Comments:
There is no legislation in place that governs such matters. Neither does the Code of Conduct deal with it. However, the Public Administration Management Bill, introduced in 2008 but subsequently withdrawn, contains provisions proposing the regulation of post-employment opportunities, but only in respect of public servants involved in procurement functions. Although there are no post-employment restrictions in place, national legislators who are still in office may not enter into the private sector if there could be a conflict of interest. In terms of section 14 of the Code of Conduct, a Member may only engage in remunerated employment outside Parliament when such employment is sanctioned by the political party to which the Member belongs; and is compatible with that Member’s function as a public representative.

The Joint Committee on Ethics and Members’ Interests does have a proposed document that might allow such legislation to be adopted. This proposed document has been tabled, but no further discussions have accrued.

References:
Code of Conduct with regard to Financial Interests for Assembly and Permanent Council Members


Interview with Ms. Fazela Mohammed, Registrar of Members’ Interests, Nov. 16, 2010, Cape Town.

Yes: A YES score is earned if there are regulations restricting national legislators’ ability to take positions in the private sector after leaving government that would present a conflict of interest, including positions that directly seek to influence their former government colleagues.

No: A NO score is earned if no such restrictions exist.

33c. In law, there are regulations governing gifts and hospitality offered to members of the national legislature.

| Yes | No |

Comments:
Section 7(f) read with section 8(i)-(iii) of the Code of Conduct require members to disclose gifts (other than from family members) and to provide a description and the value and source of the gift, if it is in excess of R1,500 (US$150). Disclosure must also take place where the cumulative value of gifts in a calendar year is in excess of R1,500. A member must also disclose any hospitality which was intended as a gift in kind. A limiting feature of the Code is that it is preventative, lacking prescribed punitive measures, which are left to the discretion of the Speaker and the political party to which the offending member belongs.

References:
Code of Conduct with regards to Financial Interests for Assembly and Permanent Council Members

Interview with Ms. Fazela Mohammed, Registrar of Members’ Interests, Nov. 16, 2010, Cape Town.

Yes: A YES score is earned if there are formal guidelines regulating gifts and hospitality for members of the legislature.

No: A NO score is earned if there are no guidelines or regulations with respect to gifts or hospitality offered to members of the legislature. A NO score is earned if the guidelines are general and do not specify what is and is not appropriate.

33d. In law, there are requirements for the independent auditing of the asset disclosure forms of members of the national legislature.
In the Public Audit Act there are no provisions that govern the auditing of the asset disclosure forms of members of the national legislature. However, Section 188(4) of the constitution states that the Auditor General has additional powers and functions prescribed by national legislation. Thus if this section is read with the Public Audit Act, it can be possible for the Auditor General to audit asset disclosure forms from members, if he finds it necessary.

When looking at section 3 of the Code of Conduct, it is clear that the Registrar must open and keep a register of all the members' interests. The Registrar will only conduct further inquiries regarding certain disclosures, if so instructed by the Committee on Ethics and Members' Interest.

Although there is no legislation specifically governing this matter, and previously the Auditor General would only do random checks, in 2010 the Auditor General did a full audit of all the disclosures.

According to Ms. Fazela Mohammed, the Registrar of Members' Interest, this will happen on a continual basis, although there is no legislation in place.

31 MPs have been found guilty of failing to fully disclose their business interests in the latest declarations, but they only received warnings that they were in breach of the Code of Conduct. These findings were made by the Auditor-General when doing testing of the declarations that were made by members.

References:

Public Audit Act (Act 25 of 2004)

Code of Conduct with regards to Financial Interests for Assemble and Permanent Council Members

Interview with Ms. Fazela Mohammed, Registrar of Members' Interests,

"MPs warned after failing to disclose interests”,
Business Day, Nov 19, 2010
http://www.businessday.co.za/articles/Content.aspx?id=127241

**Yes:** A YES score is earned if there is a legal or regulatory requirement for independent auditing of legislative branch asset disclosures. The auditing is performed by an impartial third-party.

**No:** A NO score is earned if there are no legal or regulatory requirements for the independent auditing of legislative branch asset disclosures or if such requirements exist but allow for self-auditing.

33e. In practice, the regulations restricting post-government private sector employment for national legislators are effective.

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There is no legislation in place that governs such matters. Nowhere in the Code of Conduct is this issue dealt with either.

The Committee on Ethics and Members’ Interest have considered the inclusion of such regulations, but the Committee has not made any progress on these thoughts.

References:
Code of Conduct with regards to Financial Interests for Assemble and Permanent Council Members

**100:** The regulations restricting post-government private sector employment for national legislators are uniformly enforced. There are no cases or few cases of legislators taking jobs in the private sector after leaving government where they directly lobby or seek to influence their former government colleagues without an adequate “cooling off” period.
The regulations are generally enforced though some exceptions exist. In certain sectors, legislators are known to regularly take jobs in the private sector that entail directly lobbying or seeking to influence their former government colleagues. Cooling off periods are short and sometimes ignored.

The regulations are rarely or never enforced. Legislators routinely take jobs in the private sector following government employment that involve direct lobbying or influencing of former government colleagues. Cooling off periods are non-existent or never enforced. A zero score is also earned if legislators are allowed to hold private sector positions while in office.

In practice, the regulations governing gifts and hospitality offered to national legislators are effective.

Comments:
Although, there are measures in place for disclosure of gifts and hospitality received (as seen in the Code of Conduct), there are several weaknesses in the rules.

Firstly, unlike the rule applicable to members of the executive, there is currently no rule requiring members of the national legislature to seek permission to retain a gift or gifts cumulatively exceeding the current threshold value of R1,500 (US$150). They are required merely to make subsequent disclosure. The absence of such a requirement means that there is, secondly, no obligation on legislature members to avoid the possibility of a conflict of interest.

Furthermore, there is no upper limit to the value of the gifts and hospitality that are received by national legislators. The Joint Committee on Ethics and Members’ Interests are looking into this matter, and might be making changes to this.

In terms of Rule 124(2) of Part 11, Joint Committee on Ethics and Members’ Interests of the Rules of Parliament, the Committee is required to report annually to both Houses of Parliament on the implementation and effectiveness of the Code.

As seen in the most recent Register of Members Interest 2010, all members made disclosures. Not many MPs received a significant amount of gifts, but those who did receive gifts received mostly FIFA World Cup 2010 complimentary tickets and other relevant sports event tickets.

References:
Code of Conduct with regards to Financial Interests for Assemble and Permanent Council Members

Rules of Parliament
http://www.pmg.org.za/node/17028

Register of Members’ Interest 2010

Phone conversation with Ms. Fazela Mohammed, Registrar of Members’ Interest, Nov. 9, 2010.

Conversation with Nonhlanhla Chanza, Political Researcher, Political Information and Monitoring Service, IDASA.

The regulations governing gifts and hospitality to national legislators are regularly enforced. Legislators never or rarely accept gifts or hospitality above what is allowed.

The regulations governing gifts and hospitality to national legislators are generally applied though exceptions exist. Some legislators in certain sectors are known to accept greater amounts of gifts and hospitality from outside interest groups or private sector actors than is allowed.

The regulations are rarely or never enforced. Legislators routinely take jobs in the private sector following government employment that involve direct lobbying or influencing of former government colleagues. Cooling off periods are non-existent or never enforced.

In practice, national legislative branch asset disclosures are audited.
Comments:
Although there are no specific laws in place that regulate this matter, it has become a habit of the Auditor General to do full audits on the disclosures made by national legislators. According to Ms. Mohammed, this will happen on a continual basis, although there is no legislation in place.

References:
Phone conversation with Ms. Fazela Mohammed, Register of Members' Interest. Nov. 9, 2010.

“MPs warned after failing to disclose interests”,
Business Day, Nov. 19, 2010
http://www.businessday.co.za/articles/Content.aspx?id=127241

34. Can citizens access the asset disclosure records of members of the national legislature?

34a. In law, citizens can access the asset disclosure records of members of the national legislature.

Yes | No

Comments:
In terms of section 10(1) and (2) of the Code of Conduct for Assembly and Permanent Council Members, any person has access to the public part of the register on a working day during office hours.

The registrar must publish the public part of the register during April of each year in a manner determined by the Joint Committee on Ethics and Members Interests. Section 9 of the Code makes provision for a confidential part of the register, to which only a committee member, the registrar and staff assigned to the committee have access. The Register of Members Interests’ is available on Parliament’s website, and a hard copy can be obtained from the Committee Secretary on request.

References:
Code of Conduct with regards to Financial Interests for Assemble and Permanent Council Members

Parliament of the Republic of South Africa

Interview with Registrar of Members’ Interests, Ms. Fazela Mohammed, Nov. 16, 2010, Cape Town.

Yes: A YES score is earned if members of the national legislature file an asset disclosure form that is, in law, accessible to the public (individuals, non-governmental groups or journalists).

No: A NO score is earned if there is no asset disclosure for members of the national legislature. A NO score is earned if the form is filed, but not available to the public.

34b. In practice, citizens can access legislative asset disclosure records within a reasonable time period.
Comments:
The public part of the Register of Members’ Interests is accessible on the Parliament's website. In a telephonic interview with the Registrar of Members’ Interests, it was discovered that on request, a hard copy of the Register can also be obtained. It will be posted directly to the person who requested it.

References:
Code of Conduct with regards to Financial Interests for Assemble and Permanent Council Members

Parliament of the Republic of South Africa

Interview with Registrar of Members’ Interests, Ms. Fazela Mohammed, November 16, 2010, Cape Town.

100: Records are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

75:

50: Records take around two weeks to obtain. Some delays may be experienced.

25:

0: Records take more than a month to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

34c. In practice, citizens can access legislative asset disclosure records at a reasonable cost.

Comments:
These records are accessible electronically on Parliament's website. However, the majority of citizens do not have access to the Internet. Apart from the costs of a telephone call or a letter, there are no additional costs involved in obtaining an extract from the register, which will be provided free of charge in the format requested, for example, by email, fax or post.

References:
Parliament of the Republic of South Africa

Interview with Ms. Fazela Mohammed, Registrar of Members’ Interests, Nov. 16, 2010, Cape Town.

100: Records are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line.

75:

50: Records impose a financial burden on citizens, journalists or NGOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving records imposes a major financial burden on citizens. Records costs are prohibitive to most citizens, journalists, or NGOs trying to access this information.

34d. In practice, the asset disclosure records of members of the national legislature are of high quality.
Comments:
When trying to determine if the Register is of high quality, it is important to look at a number of factors. The quality of the disclosures that are captured should be of high standard, and the information that members disclose should be conveyed correctly.

When looking at the process that is followed by the Registrar to collect the information, it is clear that it is a thorough process. Members need to fill out a disclosure form, which then gets sent to the Registrar, this gets electronically documented and then gets sent back to the members to finally approve.

References:
Interview with Ms. Fazela Mohammed, Registrar of Members’ Interests, Nov. 16, 2010, Cape Town.

100: The asset disclosure records of members of the national legislature are complete and detailed, providing the public with an accurate and updated accounting of the individuals’ sources of income, investments, and other financial interests.

75:

50: The asset disclosure records of the members of the national legislature contain some useful information but may be lacking important details, including politically sensitive investment or other financial arrangements in which the individual has an interest.

25:

0: The asset disclosure records of the members of the national legislature are overly general, lack any meaningful detail, and do not provide clear accounting of the individuals’ sources of income, investments, and other financial assets.

35. Can citizens access legislative processes and documents?

35a. In law, citizens can access records of legislative processes and documents.

Yes | No

Comments:
The right of access to information is enshrined as a fundamental right in South Africa’s Constitution. Section 32 (1) of the Bill of Rights states that everyone has the right of access to any information held by the state and any information that is held by another person and that is required for the exercise or protection of any rights.

More specifically, to access the records of the legislative processes and documents in Parliament, one can look at section 59 of the constitution of the Republic of South Africa. In this section it states that the National Assembly must facilitate public involvement in the legislative and other processes of the Assembly and its committees, and should conduct its business in an open manner, hold its sittings, and those of its committees, in public, but reasonable measures may be taken to regulate public access. This includes access of the media, to the Assembly and its committees.

In section 157 of the National Assembly Rules, it states that all documents officially before, or emanating from, a committee or subcommittee are open to the public, including the media, subject to certain exceptions. Parliament’s website contains a Manual of Parliament on the Promotion of Access to Information. This main purpose of this Manual is to inform the public about how to obtain information from Parliament. This manual is used to facilitate public involvement in the legislative processes in Parliament. According to the Manual, the Information Officer of Parliament is the Secretary to Parliament. He, in terms of the Promotion of Access to Information Act 2000 (Act No 2 of 2000), is responsible to provide and assist the public in accessing certain information.

The Promotion of Access to Information Act (Act 2 of 2000) gives effect to the constitutional right of access. The Act provides for the right of access to any information held by the state and any information that is held by another person and that is required for the exercise of protection of any rights. Section 11 (1) states that a requester must be given access to a record of a public body if the requester complies with all the procedural requirements in the Act relating to a request for access to that record.

Section 18 (1)-(3) of the Promotion of Access to Information Act (Act 2 of 2000) sets out the procedure which the requester must follow. Nevertheless, there are certain exceptions to the above which are contained in section 41 of the Act. According to this section, the record of a public body can be refused if, among other considerations, it reasonably could cause prejudice to the security and defense of the Republic. However, most legislative processes and documents do not fall within these exclusions, and access is mostly a matter of routine.

References:
Yes: A YES score is earned if there is a general legal right to access records of legislative proceedings including voting records. A YES score can still be given if there are formal rules for specific exemptions to the right to disclosure (special secret sessions related to national security).

No: A NO score is earned if there is no general right to access documents recording legislative proceedings. A NO score is earned if there are exemptions to the general right that are not clearly defined by formal rules.

35b. In practice, citizens can access records of legislative processes and documents within a reasonable time period.

100  |  75  |  50  |  25  |  0

Comments:

As seen in Section 59 of the constitution of the Republic of South Africa, the National Assembly must facilitate public involvement in the legislative and other processes of the Assembly and its committees, and should conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken to regulate public access, including access of the media, to the Assembly and its committees; and to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.

Thus, as a citizen it is reasonably easy to attend committee meetings in Parliament and collect documents from the meeting. All you need to enter Parliament is an Identification Document or valid driver's license.

If following a different route, records of legislative processes and documents are easily accessible, within a relatively short period of time through the Independent Parliamentary Monitoring Group (PMG). This non-government organization captures informal minutes of all open parliamentary committee meetings, which are posted online along with audio recordings and all relevant public documents. Audio recordings are made available immediately, while meeting reports and relevant documents are available within three working days of the committee proceedings.

The only problem arising here is that Parliament has no form of monitoring committee meetings, and the public rely solely on PMG, an independent organization, that is not affiliated to the government at all.

Transcripts of National Assembly Parliamentary proceedings are also captured in the Hansard system, and can be accessed for free from the Parliament’s web site, although the website is not always up to date.

Other information can be requested through the Promotion of Access to Information Act (Act 2 of 2000). Requests for access to records that are automatically available to the public can be made by phone, fax, e-mail or letter. Other records have to be requested in terms of the PAIA and the requester is required and expected to comply with all the procedural requirements of the Act. Such records include decisions related to procurement, employment contracts, etc.

The PAIA states that public bodies currently have 30 days to respond to requests for information (reduced from 60 days before March 2003 and 90 days before March 2002). The Clerk of the Papers in Parliament is delegated in terms of the Act to provide information and assist the public with accessing parliamentary records.

References:

Parliamentary Monitoring Group (PMG)
http://www.pmg.org.za/

Parliament of the Republic of South Africa

Promotion of Access to Information Act (PAIA) (Act 2 of 2000)


100: Records are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

75:

50: Records take around two weeks to obtain. Some delays may be experienced.
Records take more than a month to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

In practice, citizens can access records of legislative processes and documents at a reasonable cost. The independent Parliamentary Monitoring Group (PMG) captures informal minutes of all open parliamentary committee meetings, which are posted online along with audio recordings and all relevant public documents. Audio recordings are made available immediately, while meeting reports and relevant documents are available within three working days of the committee proceedings. While some information is freely accessible, other content requires a subscription for access.

However, subscription fee exemptions exist for: non-governmental and community-based organizations; public educational institutions; government departments; legislatures; municipalities; trade unions; and journalists.

Transcripts of Parliamentary proceedings are also captured in the Hansard system, and can be accessed for free from the Parliament’s web site. However, these transcripts only cover proceedings in the National Assembly.

The other information before Parliament like decisions related to procurement, employment contracts etc. can be requested through the Promotion of Access to Information Act (Act 2 of 2000).

While the costs specified are reasonably low, a requester may incur other costs, for example, in terms accessing the internet, or communication and travel to access information. Also, if a requester was denied information and initiated legal proceedings, costs would likely increase substantially, to levels beyond the financial means of most citizens. This is problematic, as not all citizens will then be able to apply again for certain information required.

References:

Parliamentary Monitoring Group (PMG)
http://www.pmg.org.za/

Promotion of Access to Information Act (PAIA) (Act 2 of 2000)

Records are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line.

Records impose a financial burden on citizens, journalists or NGOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

Retrieving records imposes a major financial burden on citizens. Records costs are prohibitive to most citizens, journalists, or NGOs trying to access this information.

3.3. Conflicts of Interest Safeguards & Checks and Balances:
Judicial Branch

Are judges appointed fairly?

In law, there is a transparent procedure for selecting national-level judges.
Section 174 of the Constitution and other Acts of Parliament explicitly sets out the appointment procedure for all judicial officers in South Africa. In terms of the Constitution, the President of the Republic of South Africa appoints the Chief Justice and Deputy Chief Justice, after consulting the Judicial Service Commission (JSC) and the leaders of the political parties in the National Assembly. He further appoints the President and Deputy President of the Supreme Court of Appeal after consulting the Judicial Service Commission (JSC).

Constitutional Court judges are also appointed by the President following consultations with the President of the Constitutional Court and leaders of political parties represented in the National Assembly. In such instance, the JSC is obligated in terms of Section 174(4)(a) of the Constitution to provide the President of the Republic with a list of nominees with three names more than the number of appointments to be made; and submit the list to the President. Section 174(4)(b) specifies that the President may, from this list of nominees, make appointments to the Constitutional Court. This section also requires the President to advise the JSC, with reasons, if any of the nominees are unacceptable and to indicate whether appointments remain.

Section 174(6) of the Constitution also requires the President to appoint all other judges in other courts on the advice of the JSC.

The criterion for appointment of judges is specified in Section 174 of the Constitution which states that a candidate for judicial office must be "appropriately qualified and a fit and proper person" and must also be a "South Africa citizen". Section 174(2) also spells out that "the need for the judiciary to reflect broadly the racial and gender composition of South Africa be taken into consideration when new judicial officers are appointed.

The JSC, established in terms of Section 178 (1) of the constitution, has a significant and central role to play in the appointment process of judicial officers. Both the Constitution and the Judicial Service Commission Act of 1994 as amended provide, in detail, the functions and powers of the JSC.

The JSC calls for nominations; conducts public and open interviews; invites comments on the candidates from professional bodies and the public; deliberates but in private on the candidates and finally make recommendations to the President. This procedure represents a significant break from the pre-1994 system which was characterized by unchecked and complete executive control of judicial appointments.

The openness of the proceedings in light of the open interviews lends transparency to the appointment process. However, questions have been raised against certain aspects of the appointment process, in particular the JSC's deliberations on the candidates. This aspect of the process has been getting negative reviews for quite some time. The deliberations are held in private; are confidential; and in line with the JSC's determined criteria and guidelines. They are basically not subject to public scrutiny. The JSC's response has always been that this is done to protect candidates especially those who are unsuccessful.

The appointment process for acting judges has however not changed even under the new democratic dispensation. The executive has complete control over the process in that the Minister of Justice and Constitutional Development Justice in consultation with the head of the court concerned appoints acting judges.

References:


Interview with Susan Cowen, Advocate, Nov. 26, 2010


Yes: A YES score is earned if there is a formal process for selecting national level justices. This process should be public in the debating and confirmation stages. National-level judges are defined as judges who have powers that derive from a national law or constitution; are nominated/appointed by a national governmental body (head of state/government or national legislature); and/or are elected nationally.

No: A NO score is given if there is no formal process of selection or the process is conducted without public oversight. National-level judges are defined as judges who have powers that derive from a national law or constitution; are nominated/appointed by a national governmental body (head of state/government or national legislature); and/or are elected nationally.

36b. In practice, professional criteria are followed in selecting national-level judges.
The criteria for the appointment of judges is specified in Section 174 (1) of the Constitution which states that a candidate for judicial office must be “appropriately qualified and a fit and proper person” and must also be a “South Africa citizen”. Section 174(2) further specifies “the need for the judiciary to reflect broadly the racial and gender composition of South Africa” when new judicial officers are appointed.

However, legal experts have noted that the criterion provided for by the Constitution is too broad and not detailed enough. Put differently, the Constitution offers little guidance on what criteria the JSC should apply when assessing candidates that qualify for judicial selection. The words “appropriately qualified” or “fit and proper person” are too broad and it has been left to the JSC over the years to give meaning to them.

The JSC has been criticized for not being transparent on the criteria it uses. In 1998, under the leadership of Mohamed CJ, the JSC did make a decision to make public the discussions relating to the formulation of criteria and guidelines for appointment. Nevertheless, there has not been that much clarity or public awareness on how it reaches its final decisions on the candidates it recommends for appointment. In September 2010, Chief Justice Sandile Ngcobo assembled a special sitting of the JSC, the Judges President and the Provincial Premiers, where participants reflected upon the criteria for the appointment of judges. At the meeting, and in addition to the criteria set out in the Constitution participants agreed on supplementary criteria namely:

1. Is the proposed appointee a person of integrity?
2. Is the proposed appointee a person with the necessary energy and motivation?
3. Is the proposed appointee a competent person?
   (a) Technically competent
   (b) Capacity to give expression to the values of the Constitution
4. Is the proposed appointee an experienced person?
   (a) Technically experienced
   (b) Experienced in regard to values and needs of the community
5. Does the proposed appointee possess appropriate potential?
6. Symbolism. What message is given to the community at large by a particular appointment?

There is, despite some concerns, general agreement that the JSC to a certain extent does conform to democratic principles in the appointment process, with most of its decisions consensus-based than the more flexible official procedural rules which require only a simple majority. The public and relevant professional bodies are further afforded an opportunity to comment and make representations on candidates selected for interviews.

References:

Davis, Denis.

Interview with Susan Cowen, Advocate, Nov. 26, 2010

Naidoo, Prakash


Susannah Cowen,

100: National-level judges selected have relevant professional qualifications such as formal legal training, experience as a lower court judge or a career as a litigator.

75: Most national-level judges selected meet these qualifications, with some exceptions.

50: National-level judges are often unqualified due to lack of training or experience.

36c. In law, there is a confirmation process for national-level judges (i.e. conducted by the legislature or an independent body).
Section 174 (3) of the Constitution specifically establishes procedures for the confirmation of all judicial officers in South Africa. This section states that the President of the Republic has to consult with both the Judicial Service Commission (JSC), and leaders of political parties represented in the National Assembly prior to appointing the Chief Justice and Deputy Chief Justice. The President also has to consult the JSC prior to appointing the President and Deputy President of the Supreme Court of Appeal. The Constitution further requires the President to consult with the President of the Constitutional Court and leaders of political parties represented in the National Assembly before appointing judges to the Constitutional Court. In this case, once the JSC has completed both the interview and the selection process for Constitutional court judges it is required to prepare a list of nominees consisting of three names more than the number of appointments to be made. Section 174(4) (b) stipulates that the President may make appointments to the Constitutional Court from this list of nominees. This section also obligates the President to advise the JSC if any nominees are unacceptable and provide reasons for this, and also indicate if there are any outstanding appointments. In such instances, the JSC is required to provide the President with a list of further nominees, from which the President may make an appointment.

AfriMAP and the Open Society Foundation for South Africa, in their 2005 report for South Africa argue that “no formal confirmation procedure of judges in the legislature”, and that the only scope for civil society input would be in terms of nominating candidates when invited to do so by the JSC.

References:

37. Can members of the judiciary be held accountable for their actions?

Yes: A YES score is earned if there is a formal process establishing a review of national-level judicial nominees by an agency or entity independent from the body appointing the judges.

No: A NO score is earned if there is no formal review. A NO score is earned if the review is conducted by the same body that appoints the judges (such as the Prime Minister approving judicial nominees put forward by the Minister of Justice, both of whom are part of the executive).

37a. In law, members of the national-level judiciary are obliged to give reasons for their decisions.

Yes: A YES score is earned if there is a formal and mandatory process for judges to explain their decisions.

No: A NO score is earned if there is no formal law requiring judges to give reasons for their decisions.

Comments: A court judgment comprises of both a court order and the reasons for the order. However, there are instances where orders have been given without reasons (but usually reasons will follow shortly thereafter), failing which reasons can be requested in terms of rule 49(1)(c) of the Supreme Court Rules. Commenting on the need for judges to provide reasons for their decisions, the President of the Constitutional Court Justice Sandile Ngcobo recently maintained that “exposing the reasons for decisions to the public enables society to criticize, understand and—one hopes—perhaps even applaud the reasoning that has informed the judicial decision-making”.

References:
No: A NO score is earned if justices are not required to explain decisions. A NO score is earned if there is a general exemption from explaining some decisions (such as national security).

37b. In practice, members of the national-level judiciary give reasons for their decisions.

100 | 75 | 50 | 25 | 0

Comments:
The provision of reasons for court decisions is a standard procedure for all courts in the country. The Draft Code for Judicial Conduct, still to be considered by Parliament, stresses the need for judges to give adequate reasons for decisions they make; and maintains that this is an element of a fair trial. It states that the reasons that judges give should be “clear, cogent, complete and succinct”.

References:
Available at: http://constitutionallyspeaking.co.za/chief-justice-sandile-ngcobo-claude-leon-lecture/


100: Judges are formally required to explain their judgments in detail, establishing a body of precedent. All judges comply with these requirements.

75:

50: Judges are compelled to give substantial reasons for their decisions, but some exceptions exist. These may include special courts, such as military courts or tribunals.

25:

0: Judges commonly issue decisions without formal explanations.

37c. In law, there is a disciplinary agency (or equivalent mechanism) for the national-level judicial system.

Yes | No

Comments:
Section 178 (1) of the Constitution establishes the Judicial Services Commission whose powers, functions and composition are stipulated in the Constitution; and the Judicial Services Commission Act of 1994 as amended by the Judicial Services Commission Amendment Act (Act 20 of 2008). Besides advising national government on any issue pertaining to the judiciary or the administration of justice, the commission further has powers of dealing with complaints lodged against judicial officers.

The Judicial Services Commission Act (Act of 1994 as amended) establishes a complaints mechanism against judicial officers in South Africa. In terms of the Act, a Judicial Conduct Committee (committee of the Judicial Service Commission) will deal with complaints against judges. Chaired by the Chief Justice, the committee also consists of the deputy chief justice and four judges, two of whom must be women. Section 14 provides the procedure for lodging complaints against judges while section 14 (4) lays down in detail the grounds upon which any complaint against a judge maybe lodged. Section 15, 16 and 17 provides processes and procedures to be followed when a complaint against a judge is lodged with the Chief Justice who is the chairperson of the Judicial Conduct Committee. The amendments to the Act of 1994 which lay down the complaints mechanism against judicial officers only came into operation in June 2010.

Lesser complaints may be summarily dismissed if the complaint 1) does not fall within the parameters of any of the grounds set out in section 14(4); 2) is a matter that can be taken on appeal or 3) is frivolous or 4) is hypothetical. The Act does provide an appeal mechanism for complainants that are not happy with the decision and reasons for the dismissal of the complaint. Complaints with substance may be investigated either by the chair of the Conduct committee or a member of the committee. If necessary a hearing into the matter may be held. Serious complaints that could lead to a finding of incapacity, gross misconduct or gross incompetence are to be referred to the Judicial Service Commission with a recommendation for the establishment of the Judicial Conduct Tribunal. A Two-third parliamentary majority vote is needed before a judge can be fired on the grounds of incapacity, gross incompetence or gross misconduct.

References:
Judicial Services Commission Amendment Act (Act 20 of 2008) Available at:


Seedat, Shameela, “Setting the Scene.” Democratic Governance and Rights Unit UCT and IDASA Judicial Ethics in South Africa Round Table, Vineyard Hotel, June 29, 2006.
Available at: www.epolitics.org.za/gbOutputFiles.asp?WriteContent=Y&amp;RID=2573

Yes: A YES score is earned if there is a disciplinary agency (or equivalent mechanism) for the judicial system. A disciplinary agency is defined here as an agency or mechanism specifically mandated to investigate breaches of procedure, abuses of power or other failures of the judiciary. A YES score can still be earned if the judicial disciplinary agency (or mechanism) is internal to the judiciary.

No: A NO score is earned if no agency or mechanism is specifically mandated to act as a disciplinary mechanism for the national-level judiciary.

37d. In law, the judicial disciplinary agency (or equivalent mechanism) is protected from political interference.

Yes | No

Comments:
The South African Constitution guarantees the independence of the courts. Section 165 of the Constitution vests all judicial authority in the courts and demands that the courts be “independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favor or prejudice”. The Constitution further forbids any person or organ of state from interfering with the functioning of the courts and requires that “organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.”

References:


Judicial Services Commission Amendment Act (Act 20 of 2008)


Yes: A YES score is earned if there are formal rules establishing that the judicial disciplinary agency (or equivalent mechanism) is protected from political interference by the executive and legislative branches.

No: A NO score is earned if there are no formal rules establishing the independence of the judicial disciplinary agency (or equivalent mechanism). A NO score is given if the judicial disciplinary agency or equivalent mechanism function is carried out by an executive ministry or legislative committee.

37e. In practice, when necessary, the judicial disciplinary agency (or equivalent mechanism) initiates investigations.

100 | 75 | 50 | 25 | 0

Comments:
The Judicial Service Commission (JSC), established in terms of Section 178(1) of the Constitution, has powers and functions
assigned to it by the Constitution and National Legislation. Part of its powers involves investigating complaints against judges. The Judicial Services Commission Act of 1994 as amended by the Judicial Services Commission Amendment Act (Act 20 of 2008 establishes a Judicial Conduct Committee whose responsibility will be to receive, consider and deal with complaints against judges. Complaints received by the chair of the committee will be dealt with in accordance with the procedures and processes stipulated by sections 15, 16, and 17. Serious complaints that could lead to a finding of incapacity, gross misconduct or gross incompetence are to be referred to the Judicial Service Commission with a recommendation for the establishment of the Judicial Conduct Tribunal. The amendments to the Act of 1994 which lays down the complaints mechanism against judicial officers only came into operation in June 2010.

In the past year, the Commission has not yet, on its own initiated any investigation, and has in the past mostly responded to complaints brought before it. In the past months and besides holding interviews for judicial appointments, the JSC has had to deal with court challenges from the Democratic Alliance and Freedom Under Law to its proceedings and procedures to dismiss a complaint of gross misconduct against the Cape High Court Judge Hlophe. In May 2008, two Constitutional Court Judges alleged that Judge Hlophe had lobbied two of its members to rule in favour of African National Congress President Jacob Zuma and French arms company Thint in four matters heard by that court. The judges of the Constitutional Court lodged a complaint with the JSC. The JSC found that there was no prima facie case; and decided not to hold a formal inquiry into the complaint. Pending the outcome of Judge Motata’s appeal against the Johannesburg Magistrate Court sentence, the JSC still has to consider a case brought against the judge by Civil rights group AfriForum over the racist remarks he allegedly made after he crashed his car in 2007.

There is however nothing in law that prevents the JSC from initiating its own investigations.

References:


http://www.timeslive.co.za/local/article410261.ece/Hlophe-ruling-unconstitutionalJSC response


Rabkin, Franny “No about-turn by JSC’in Hlophe case”, Business Day, Aug. 23, 2010,
http://www.businessday.co.za/articles/Content.aspx?id=118759

100: The judicial disciplinary agency (or equivalent mechanism) aggressively starts investigations — or participates fully with cooperating agencies’ investigations — into judicial misconduct. The judicial disciplinary agency (or equivalent mechanism) is fair in its application of this power.

75:

50: The judicial disciplinary agency (or equivalent mechanism) will start or cooperate in investigations, but often relies on external pressure to set priorities, or has limited effectiveness when investigating. The judicial disciplinary agency (or equivalent mechanism), though limited in effectiveness, is still fair in its application of power.

25:

0: The judicial disciplinary agency (or equivalent mechanism) rarely investigates on its own or cooperates in other agencies’ investigations, or the judicial disciplinary agency (or equivalent mechanism) is partisan in its application of this power.

37f. In practice, when necessary, the judicial disciplinary agency (or equivalent mechanism) imposes penalties on offenders.

Comments:
The Judicial Service Commission (JSC) established in terms of Section 178(1) of the Constitution has powers and functions assigned to it by the Constitution and National Legislation. Part of its powers involves investigating complaints against judges. The Judicial Services Commission Act of 1994 as amended establishes a Judicial Conduct Committee whose responsibility will be to receive, consider and deal with complaints against judges. Complaints received by the Chief Justice, the chairperson of the committee will be dealt with in accordance with the procedures and processes stipulated by section 15, 16, and 17 of the Act. Complaints that could lead to a finding of incapacity, gross misconduct or gross incompetence are to be referred to the Judicial Service Commission with a recommendation for the establishment of the Judicial Conduct Tribunal. Put differently, the committee may recommend appointment of Tribunal in respect of impeachable complaints. A two-thirds majority in Parliament is needed before a judge can be fired on the grounds of incapacity, gross incompetence or gross misconduct.

For serious but non impeachable cases the following penalties are applicable: namely (a) Apologizing to the complainant, in a manner specified; (b) A reprimand.; (c) A written warning; (d) Any form of compensation; (e) Subject to subsection (9), appropriate counseling.; (f) Subject to subsection (9) Attendance of a specific training course; and any other appropriate
corrective measure. Section 18 of the Judicial Service Commission Act of 1994 as amended stipulates the procedure to be followed by the committee when considering appeals from the respondent.

In 2010, the Commission considered the ruling of the High Court which found that its proceedings to dismiss a complaint of gross misconduct against the Cape High Court Judge Hlophe were invalid and unconstitutional. In May 2008, two Constitutional Court Judges alleged that Judge Hlophe had lobbied two of its members to rule in favor of African National Congress President Jacob Zuma and French arms company Thint in four matters heard by that court. The judges of the Constitutional Court lodged a complaint with the JSC which decided not to hold a formal inquiry into the complaint.

References:

Judicial Services Commission Amendment Act (Act 20 of 2008)

http://www.timeslive.co.za/local/article410261.ece/Hlophe-ruling-unconstitutional/JSC response

Essop, Rahima
"Motata appeal could delay racism complaint”, Sept. 10, 2010, Eyewitness News,

Rabkin, Franny
http://www.businessday.co.za/articles/Content.aspx?id=118759

100: When rules violations are discovered, the judicial disciplinary agency (or equivalent mechanism) is aggressive in penalizing offenders or in cooperating with other agencies who penalize offenders.

75:

50: The judicial disciplinary agency (or equivalent mechanism) enforces rules, but is limited in its effectiveness. The judicial disciplinary agency (or equivalent mechanism) may be slow to act, unwilling to take on politically powerful offenders, resistant to cooperating with other agencies, or occasionally unable to enforce its judgments.

25:

0: The judicial disciplinary agency (or equivalent mechanism) does not effectively penalize offenders. The judicial disciplinary agency (or equivalent mechanism) may make judgments but not enforce them, does not cooperate with other agencies in enforcing penalties, or may fail to make reasonable judgments against offenders. The judicial disciplinary agency (or equivalent mechanism) may be partisan in its application of power.

38. Are there regulations governing conflicts of interest for the national-level judiciary?

64

38a. In law, members of the national-level judiciary are required to file an asset disclosure form.

Yes    No

Comments:
The Judicial Services Commission Act of 1994 as amended by the Judicial Services Commission Amendment Act ( Act 20 of 2008) makes provision for the establishment of a Register of Judges’ Registrable Interests which requires judges to disclose financial or other interests as to be defined in regulations made by the Minister acting in consultation with the Chief Justice. The Amendment Act states that the regulations should be tabled in Parliament, for approval, within four months of the commencement of the Act. The amendments came into operation in June 2010. The Minister of Justice and Constitutional Development tabled the regulations in Parliament in September/ October 2010. Parliament has resolved to establish an Ad Hoc Committee which will consider the regulations, invite public comments and report to the house by Jan. 28, 2011.

Until such time that the regulations are approved by Parliament judicial financial accountability is to some extent regulated in an informal manner by the 2000 Voluntary Guidelines for Judges. These guidelines are not obligatory and lack sanctions for breach. However in terms of Rule 9 judges are encouraged to avoid conflict of interests and to recuse themselves in the face of conflict of interests between their private interests and official duties.

References:
The Judicial Services Amendment Act (Act of 2008)


Seedat, Shameela,
“Setting the Scene.”
Democratic Governance and Rights Unit UCT and IDASA Judicial Ethics in South Africa Round Table Vineyard Hotel, June 29, 2009. www.epolitics.org.za/gbOutputFiles.asp?WriteContent=Y&RID=2573

Yes: A YES score is earned if all members of the national-level judiciary are required by law to file an asset disclosure form while in office, illustrating sources of income, stock holdings, and other assets. This form does not need to be publicly available to score a YES.

No: A NO score is earned if any member of the national-level judiciary is not required to publicly disclose assets.

38b. In law, there are regulations governing gifts and hospitality offered to members of the national-level judiciary.

| Yes | No |

Comments:
The Judicial Services Commission Act of 1994, as amended by the Judicial Services Commission Amendment Act (Act 20 of 2008) makes provision for the establishment of a Register of Judges’ Registrable Interests which requires judges to disclose financial or other interests as to be defined in regulations made by the Minister acting in consultation with the Chief Justice. The Amendment Act states that the regulations should be tabled in Parliament, for approval, within four months of the commencement of the Act. The amendments came into operation in June 2010. The Minister of Justice and Constitutional Development tabled the regulations in Parliament in September/October 2010. Parliament has resolved to establish an Ad Hoc Committee which will consider the regulations, invite public comments and report to the house by Jan. 28, 2011.

Section 13 (3) states that ‘every judge must disclose to the Registrar, in the prescribed form, particulars of all his or her registrable interests and those of his or her immediate family members’. Section 13 (4) requires that “the first disclosure in terms of subsection (3) must be within 60 days of a date fixed by the President by proclamation, and thereafter annually and in such instances as prescribed.

The draft regulations currently before Parliament states that judges must declare “gifts other than a gift received from immediate family member, with a value of more than R1,000 (US$146) or gifts received from a single source with a cumulative value of more than R1,000 in a calendar year, and including a hospitality intended as such” Subject to s13 (4) of the Act, the draft regulations stipulates further that “judges must lodge the first disclosure with the Registrar within 30 days of his/her appointment as a judge, and thereafter within 30 days after the acquiring or learning of the existence of a new registrable interests”.

Until such time that the regulations are formally considered by Parliament; and the President by proclamation fix a date for judges’ first disclosure, judicial accountability in terms of gifts and hospitality will be somewhat regulated by the 2000 voluntary Guidelines for Judges. Rule 23 of the guidelines encourage judges not to directly or indirectly accept any gift, advantage or privilege that can be reasonably be perceived as being intended to influence the judge in the performance of judicial duties or to serve as a reward therefore.

References:

The Judicial Services Amendment Act (Act of 2008)


Seedat, Shameela,
“Setting the Scene.”
Democratic Governance and Rights Unit UCT and IDASA Judicial Ethics in South Africa Round Table Vineyard Hotel, June 29, 2009. www.epolitics.org.za/gbOutputFiles.asp?WriteContent=Y&RID=2573

Yes: A YES score is earned if there are formal guidelines regulating gifts and hospitality offered to members of the national-level judiciary.

No: A NO score is earned if there are no guidelines or regulations with respect to gifts or hospitality offered to members of the national-level judiciary. A NO score is earned if the guidelines are general and do not specify what is and is not appropriate.
38c. In law, there are requirements for the independent auditing of the asset disclosure forms of members of the national-level judiciary.

**Comments:**
The Judicial Services Commission Act (Act of 1994) as amended provides for the establishment of a Register of Judges’ Registrable Interests which requires judges to disclose their financial or other interests as to be defined in regulations made by the Minister acting in consultation with the Chief Justice. The JSC amendment Act of 2008 states that the regulations should be tabled in Parliament, for approval, within four months of the commencement of the Act. The amendments came into operation in June this year. The Minister of Justice and Constitutional Development tabled the regulations in Parliament in September/October 2010. Parliament has resolved to establish an Ad Hoc Committee which will consider the regulations, invite public comments and report to the house by Jan. 28, 2011.

There is currently no legislative requirement for the independent auditing of the asset disclosure forms of members of the judiciary. However, in terms of 188(4) of the Constitution, which states that the Auditor General has additional powers and functions prescribed by national legislation, it may be possible for the Auditor General to audit judges’ asset disclosure forms. This provision should be read with the Public Audit Act.

**References:**

The Judicial Services Amendment Act (Act of 2008)


Seedat, Shameela, “Setting the Scene”. Democratic Governance and Rights Unit UCT and IDASA Judicial Ethics in South Africa Round Table Vineyard Hotel, June 29, 2009.
http://www.epolitics.org.za/seOutputFiles.asp?WriteContent=Y&RID=2573

**Yes:** A YES score is earned if there is a legal or regulatory requirement for independent auditing of national-level judiciary asset disclosures. The auditing is performed by an impartial third-party.

**No:** A NO score is earned if there are no legal or regulatory requirements for the independent auditing of national-level judiciary asset disclosures or if such requirements exist but allow for self-auditing.

38d. In law, there are restrictions for national-level judges entering the private sector after leaving the government.

**Comments:**
The Judicial Services Commission Act of 1994 as amended by the Judicial Services Commission Amendment Act (Act 20 of 2008) and subject to certain exceptions, outlaws the performance of extra judicial work by judges and further prohibits judges from receiving payment for any service outside of their official duties as judges. Section 11 (1) states that “a judge performing active service— (a) may not hold or perform any other office of profit; and (b) may not receive in respect of any service any fees, emoluments or other remuneration or allowances apart from his or her salary and any other amount which may be payable to him or her in his or her capacity as a judge: Provided that such a judge may, with the written consent of the Minister acting in consultation with the Chief Justice, receive royalties for legal books written or edited by that judge.”

With regard to discharged judges, the act provides exceptions and state in section 11 (2) that “a judge who has been discharged from active service may only with the written consent of the Minister, acting after consultation with the Chief Justice, hold or perform any other office of profit or receive in respect of any fees, emoluments or other remuneration or allowances apart from his or her salary and any other amount which may be payable to him or her in his or her capacity as a judge: Provided that such a judge may, with the written consent of the Minister acting in consultation with the Chief Justice, receive royalties for legal books written or edited by that judge.”

In addition, the Minister acting after consultation with the Chief Justice may, by notice in the Gazette, issue guidelines regarding any other criteria to be applied when considering the granting of consent to discharged judges. Also, the minister inform the Registrar of Judges’ registrable interests and of all instances where written consent has been granted. Once every 12 months,
the minister must table a report in Parliament containing all the details of the applications made including the outcome and any conditions attached to any application granted, during the period covered by the report.

Before the commencement of this law, judges’ extra judicial activities were regulated by the Voluntary Guidelines for Judges (2000). In terms of the Guidelines judges wishing to perform extra judicial work had to seek written consent from the Minister of Justice. The provisions of the 2008 Amendment Act nullify the previous arrangement.

References:

The Judicial Services Amendment Act (Act of 2008)


Seedat, Shameela, “Setting the Scene”, Democratic Governance and Rights Unit UCT and IDASA Judicial Ethics in South Africa Round Table Vineyard Hotel, June 29, 2009.
http://www.epolitics.org.za/gbOutputFiles.asp?WriteContent=Y&RID=2573

Yes: A ‘YES’ score is earned if there are regulations restricting national-level judges’ ability to take positions in the private sector after leaving government that would present a conflict of interest, including positions that directly seek to influence their former government colleagues.

No: A NO score is earned if no such restrictions exist.

38e. In practice, the regulations restricting post-government private sector employment for national-level judges are effective.

| 100 | 75 | 50 | 25 | 0 |

Comments:
It is too early to determine the effectiveness of the regulations introduced in terms of the Judicial Service Commission Act of 1994 as amended. The regulations were introduced in Parliament in September/October 2010 by the Minister of Justice and Constitutional Development. Parliament has resolved to establish an Ad Hoc Committee which will consider them; invite public comments and report to the house by Jan. 28, 2011.

The Judicial Service Commission Act of 1994 as amended prohibits acting judges from performing extra judicial work while discharged judges would be required to seek written consent from the Minister of Justice and Constitutional Development acting in consultation with the Chief Justice. Written consent will only be granted if certain conditions as stipulated in Section 11 (3) (a) are met. The Minister acting in consultation with the Chief Justice may, by notice in the Gazette, issue guidelines regarding any other criteria to be applied when considering the granting of consent to discharged judges.

References:
Draft Regulations on Judges’ Disclosure of Registrable Interests, 2010
http://www.parliament.gov.za


100: The regulations restricting post-government private sector employment for national-level judges are uniformly enforced. There are no cases or few cases of judges taking jobs in the private sector after leaving government where they directly lobby or seek to influence their former government colleagues without an adequate “cooling off” period.

75:

50: The regulations are generally enforced though some exceptions exist. In certain cases, judges are known to regularly take jobs in the private sector that entail directly lobbying or seeking to influence their former government colleagues. Cooling off periods are short and sometimes ignored.

25:

0: The regulations are rarely or never enforced. Judges routinely take jobs in the private sector following government employment that involve direct lobbying or influencing of former government colleagues. Cooling off periods are non-existent.
or never enforced. A zero score is also earned if judges are allowed to hold private sector jobs while serving on the bench.

38f. In practice, the regulations governing gifts and hospitality offered to members of the national-level judiciary are effective.

100 | 75 | 50 | 25 | 0

Comments:
It is too early to determine, in practice, the effectiveness of the regulations introduced by the Judicial Service Commission Act of 1994 as amended. The regulations were introduced in Parliament in September/October 2010 by the Minister of Justice and Constitutional Development. Parliament has resolved to establish an Ad Hoc Committee which will consider them; invite public comments and report to the house by Jan. 28, 2011.

The draft regulations still awaiting Parliament’s approval states that judges must declare “gifts other than a gift received from immediate family member, with a value of more than R1,000 (US$146) or gifts received from a single source with a cumulative value of more than R1,000 in a calendar year, and including a hospitality intended as such.” Subject to s13 (4) of the Act, the draft regulations stipulates further that “judges must lodge the first disclosure with the Registrar within 30 days or his/her appointment as a judge, and thereafter within 30 days after the acquiring or learning of the existence of a new registrable interest.” Section 13 (4) requires that “the first disclosure must be within 60 days of a date fixed by the President by proclamation, and thereafter annually and in such instances as prescribed.

References:
Draft Regulations on Judges’ Disclosure of Registrable Interests, 2010
http://www.parliament.gov.za


100: The regulations governing gifts and hospitality to members of the national-level judiciary are regularly enforced. Judges never or rarely accept gifts or hospitality above what is allowed.

75:

50: The regulations governing gifts and hospitality to members of the national-level judiciary are generally applied though exceptions exist. Some judges are known to accept greater amounts of gifts and hospitality from outside interest groups or private sector actors than is allowed.

25:

0: The regulations are rarely or never enforced. Judges routinely take jobs in the private sector following government employment that involve direct lobbying or influencing of former government colleagues. Cooling off periods are non-existent or never enforced.

38g. In practice, national-level judiciary asset disclosures are audited.

100 | 75 | 50 | 25 | 0

Comments:
There is currently no legal requirement in the Judicial Service Commission Act of 1994, as amended, for the auditing of asset disclosures of members of the judiciary. However, it is impossible at this stage to conclusively say that the asset disclosures will not be audited. The draft regulations are still to be considered by Parliament; and it is still early to determine what the final document will look like.

However, in terms of section 188(4) of the Constitution which states that the Auditor General has additional powers and functions prescribed by national legislation, it may be possible for the Auditor General to audit judges’ asset disclosure forms. This provision should be read with the Public Audit Act.

References:

The Judicial Services Amendment Act (Act of 2008)
100: National-level judiciary asset disclosures are regularly audited using generally accepted auditing practices.

75:

50: National-level judiciary asset disclosures are audited, but audits are limited in some way, such as using inadequate auditing standards, or the presence of exceptions to disclosed assets.

25:

0: The regulations are rarely or never enforced. Judges routinely take jobs in the private sector following government employment that involve direct lobbying or influencing of former government colleagues. Cooling off periods are non-existent or never enforced.

39. Can citizens access the asset disclosure records of members of the national-level judiciary?

63

39a. In law, citizens can access the asset disclosure records of members of the national-level judiciary.

Yes  |  No

Comments:
The Judicial Service Commission Act of 1994 as amended requires the Minister to provide mechanisms to facilitate public access to the public section of the register. The Register of Judges Registrable Interests will have both a public and a confidential section. The regulations will prescribe what kind of interests will be recorded in both sections. Section 13 (5) (f) states that the minister, acting in consultation with the Chief Justice, must make regulations regarding the content and management of the Register which regulations must at least prescribe "a procedure providing for public access to the public part of the Register and a procedure for providing access to, and maintaining confidentiality of the confidential part of the Register".

The draft regulations still awaiting Parliament’s approval states that “the public part of the register may be inspected by any person at the office of the Registrar or at any other venue agreed to by the Registrar, during office hours and under the supervision of the person designated by the Registrar. Only the Heads of Court, the Registrar, and any official designated in writing by the Registrar have unrestricted access to the confidential part of the register. Any other person wishing to have access to the information recorded in the confidential part of the register must “apply in writing for such access; and lodge the application in duplicate with the Registrar”.

The draft regulations further specify the procedures to be followed by the Registrar when considering such request.

There is also the Promotion of Access to Information Act of 2000 which gives effect to section 32 of the Bill of Rights contained in the South African Constitution. Section 32 (1) stipulates that “everyone has the right of access to any information held by the state” and “any information that is held by another person and that is required for the exercise or protection of any rights.”

References:

The Judicial Services Amendment Act (Act of 2008)

Draft Regulations on Judges’ Disclosure of Registrable Interests, 2010

Yes: A YES score is earned if members of the national-level judiciary file an asset disclosure form that is, in law, accessible to the public (individuals, civil society groups or journalists).

No: A NO score is earned if there is no asset disclosure for members of the national-level judiciary. A NO score is earned if the form is filed, but not available to the public.

39b. In practice, citizens can access judicial asset disclosure records within a reasonable time period.
Judges still have to disclose their registrable interests in line with the disclosure regime introduced by the amendments to the Judicial Service Commission Act of 1994. Until such time that judges actually disclose it is impossible to give a definite answer.

Section 13 (4) of the Act requires that "the first disclosure must be within 60 days of a date fixed by the President by proclamation, and thereafter annually and in such instances as prescribed. The regulations governing the disclosure regime still have to be approved by Parliament. Parliament has resolved to establish an Ad Hoc Committee which will consider them; invite public comments and report to the house by Jan. 28, 2011.

The draft regulations further specify the procedures to be followed by the Registrar when considering such requests.

References:

The Judicial Services Amendment Act (Act of 2008)

Draft Regulations on Judges’ Disclosure of Registrable Interests, 2010
http://www.parliament.gov.za


100: Records are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

75: Records take around two weeks to obtain. Some delays may be experienced.

50: Records take more than a month to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

25: Records are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

0: Records take more than a month to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

39c. In practice, citizens can access judicial asset disclosure records at a reasonable cost.
The asset disclosure records of the national-level judiciary are complete and detailed, providing the public with an accurate and updated accounting of the individuals’ sources of income, investments, and other financial interests.

Comments:
Judges still have to disclose their assets in line with the disclosure regime introduced by the amendments to the Judicial Service Commission Act of 1994. Section 13 (4) of the Act requires that “the first disclosure must be within 60 days of a date fixed by the President by proclamation, and thereafter annually and in such instances as prescribed. While the Act is operational, the regulations still have to be approved by Parliament. Until such time that judges actually disclose, and until we have sight of the public section of the Register of Judge’s Registrable Interests, it is impossible to give a definite answer.

References:

The Judicial Services Amendment Act (Act of 2008)

Draft Regulations on Judges’ Disclosure of Registrable Interests, 2010

3.4. Budget Process Oversight & Transparency

40. Can the legislature provide input to the national budget?
40a. In law, the legislature can amend the budget.

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<th>Yes</th>
<th>No</th>
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Comments:
Section 77 (3) of the Constitution of the Republic of South Africa (Act 108 of 1996) requires that an Act of Parliament provide for a procedure to amend money Bills before Parliament. Section 120(3), dealing with money Bills with respect to provinces, similarly provides that a provincial Act be provided for a procedure by which the provincial legislatures may amend the budget through amending a money Bills.

The Money Bills Amendment Procedure and Related Matters Act (No.9, 2009) gives effect to this Constitutional requirement thereby formally and practically assigning the power to amend the budget to Parliament and Provincial Legislatures.

References:


"Parliament, the Budget and Poverty in South Africa" (2009), Idasa, Cape Town

Yes: A YES score is earned if the legislature has the power to add or remove items to the national government budget.

No: A NO score is earned if the legislature can only approve but not change details of the budget. A NO score is earned if the legislature has no input into the budget process.

40b. In practice, significant public expenditures require legislative approval.

| 100 | 75 | 50 | 25 | 0 |

Comments:
Public expenditures in South Africa are subjected to legislative approval and the scope of required approval has increased with the introduction of the Money Bills Amendment Procedure and Related Matters Act (2009), which has enabled Parliament to amend the budget.

Through the passing of the Division of Revenue Bill, Parliament approves both vertical and horizontal division of revenue- that is, between and across the three spheres of government. This is in line with Section 214 (1) of the Constitution, which requires an Act of Parliament to provide for the equitable division of nationally raised revenue between the three spheres of government (National, Provincial and Local); the determination of each province’s equitable share of nationally raised revenue and any other allocations to the provinces and municipalities/local government.

In line with section 9(1)(2) of the Money Bills Amendment Procedure and Related Matters Act the Division of Revenue Bill is referred to the Committee on Appropriations of the National Assembly for consideration and report; the National Council of Provinces and then to its committee on appropriations for consideration and reporting (section 9(2)). In terms of Section 9(4) of the aforementioned Act, Parliament reviews the Division of Revenue Bill for possible amendments on the condition that such amendments are consistent with the adopted fiscal framework and section 214 of the Constitution.

Parliament also approves any appropriations from the National Revenue Fund (NRF) through the passing of the Division of Revenue Act (DORA). This is in line with Section 213 (2) of the Constitution requiring an Act of Parliament to provide for withdrawals from the National Revenue Fund (NRF). In terms of provincial legislatures, section 226 of the Constitution requires a provincial Act to provide for withdrawals from the Provincial Revenue Fund (PRF). In terms of Section 10(1) (a) and Section 10(2) of the Money Bills and Amendment procedure and Related Matters Act the Appropriation Bill goes through the Committee on Appropriations of the National Assembly; the National Council of Provinces (NCOP) and then to its committee on appropriations (section 10(2)). In terms of Section 10 (7) of this Act Parliament can either pass, amend or reject the Appropriation Bill within four months after the start of the relevant financial year. Adjustments to the funds appropriated during the start of the financial year are also subject to legislative approval through the passing of the Adjustments Appropriation Bill into Act.

References:


"Parliament, the Budget and Poverty in South Africa" (2009), Idasa, Cape Town
Available at: [http://www.idasa.org.za](http://www.idasa.org.za)
100: All significant government expenditures (defined as any project costing more than 1% of the total national budget), must be approved by the legislature. This includes defense and secret programs, which may be debated in closed hearings.

75:

50: Most significant government expenditures (as defined) are approved by the legislature, but some exceptions to this rule exist. This may include defense programs, an executive’s personal budget, or other expenses.

25:

0: The legislature does not have the power to approve or disapprove large portions of the government budget, or the legislature does not exercise this power in a meaningful way.

40c. In practice, the legislature has sufficient capacity to monitor the budget process and provide input or changes.

Comments:
Currently a Parliamentary Research Office exists. However, there are concerns about the existing legislative capacity to effectively monitor the budget process and provide meaningful input and amendments. These concerns have gained momentum owing to the assignment of powers to amend the budget to Parliament in terms of the Money Bills Amendment Procedure and Related Matters Act in 2009.

The call-in section 15 (2)(3) of the aforementioned Act- for the establishment of an independent and non-partisan Parliamentary Budget Office (PBO) intended to undertake budgetary research and analysis on behalf of Parliament, its committees and members has not materialized. The absence of this office coupled with the added budgetary oversight role of Parliament has added more pressure on the already constrained research capacity of Parliament, and this despite the establishment of a task team responsible for this task.

References:
“Parliament, the Budget and Poverty in South Africa: A Shift in Power” (2009); Idasa; Cape Town

Interview with Len Verwey, Idasa, PIMS Budget Unit Manager
Nov. 9, 2010

The Parliamentary Monitoring Group (PMG): “Establishment of Parliamentary Budget Office; Tracking System to follow-up on resolutions made by Committee”, Standing Committee on Appropriations.

100: Legislators benefit from a sufficient and qualified staff as well as adequate financial and physical resources. Lack of capacity is never a reason why legislators cannot carry out their duties effectively.

75:

50: Legislators have some staff and financial resources but are limited by a shortfall of resources to adequately perform all of their budgetary oversight functions. Legislators are occasionally overwhelmed by the volume of work to be performed.

25:

0: Legislators have little to no staff and virtually no financial resources with which to perform their budgetary oversight role. Lack of resources is a regular and systemic problem that cripples the performance of the legislature.

41. Can citizens access the national budgetary process?
41a. In practice, the national budgetary process is conducted in a transparent manner in the debating stage (i.e. before final approval).

Comments:
Except for the drafting phase which is virtually limited to the executive under the stewardship of the National Treasury, the South African budget process is highly transparent and open to the general public including civil society organizations and the media. For instance the Parliamentary Monitoring Group (PMG) – which was formed in 1995 as a partnership between Black Sash, Human Rights Commission and Idasa- directly attends parliamentary committee meetings and provides accurate, objective, and timely information on all proceedings of committees dealing with the budget.

A good record of the proceedings of Parliamentary Committees, such as the Select and Standing Committees on Finance and Appropriation, is published on the PMG website (http://www.pmg.org.za/about). In terms of the recent findings of the Open Budget Index (OBI) – a survey that measures budget transparency using indicators including public participation opportunities in national budget decision-making processes – South Africa remains the highest performer on budget transparency.

South Africa's score of 92 in the 2010 Open Budget Index (OBI) and topped the list of 94 surveyed countries, following a score of 87 in the 2008. As also noted in the OBI recommendations, greater budget transparency at sub-national levels, especially local government, is required.

References:


Interview with Len Verwey, Idasa, PIMS Unit Manager
Nov. 9, 2010.

100: Budget debates are public and records of these proceedings are easily accessible. Authors of individual budget items can easily be identified. Nearly all budget negotiations are conducted in these official proceedings.

75:

50: There is a formal, transparent process for budget debate, but major budget modifications may be negotiated in separate, closed sessions. Some items, such as non-secret defense projects, may be negotiated in closed sessions. Authors of individual line items may be difficult to identify.

25:

0: Budget negotiations are effectively closed to the public. There may be a formal, transparent process, but most real discussion and debate happens in other, closed settings.

41b. In practice, citizens provide input at budget hearings.

Comments:
The recent findings of the Open Budget Index (OBI) survey- in which South Africa topped the list of 94 surveyed countries with a 92 out of 100 score- confirms South Africa's positive commitment to allow for citizens' input in the budget process. As shown on the Parliamentary Monitoring Group's (PMG) website and other sources, entities such as NGO's, business alliances, academics and trade unions regularly provide input at budget hearings.

The assignment of budget amendment powers to Parliament in 2009 has also increased appetite for citizen's input at budget hearings. For instance, the People's Budget Coalition (PBC) and other groupings which had opted to abstain from participating at budget hearings have since the introduction of the Money Bills Procedure and Related Matters Act resumed their participation.
However, concerns regarding the limited variety of entities who actually take part at budget hearings remain unresolved. A large pool of groupings, especially grass-root organizations, still does not take part in these hearings despite their vast interests on budget policy issues. In its recent submission, the PBC also maintained that “real input and influence into the process is still insufficient and there is still a long way to go before the official budget can be regarded as a People’s Budget which will be a genuine product of a thoroughgoing process of consultation and engagement with key stakeholders”. The 2010 Open Budget Index (OBI) also suggested that opportunities be made available at sub-national level through increased transparency.

References:
The Parliamentary Monitoring Group (PMG):
http://www.pmo.org.za/

People’s Budget Coalition response to the Medium-term Budget statement
(Oct. 29, 2010).

Interview with Len Verwey, Idasa, PIMS Budget Unit Manager
Nov. 9, 2010

“Parliament, the Budget and Poverty in South Africa: A Shift in Power” (2009); Idasa; Cape Town,
http://www.idasa.org.za


100: Citizens, usually acting through NGOs, can provide information or commentary to the budget debate through a formal process. This information is essential to the process of evaluating budget priorities.
75:
50: Citizens or NGOs can provide input, but this information is often not relevant to budget decisions.
25:
0: Citizens or NGOs have no formal access to provide input to the budget debate.

41c. In practice, citizens can access itemized budget allocations.

Comments:
The National Treasury publishes numerous in-year, mid-year and end-year budget documents containing detailed and comprehensive information on budget allocations. The findings of the 2008 and 2010 Open Budget Index’s (OBI)- in which South Africa scored highly- confirmed the continued commitment to releasing extensive, detailed and comprehensive budget information in terms of the pre-budget statement, enacted budget, in year-reports, mid-year reports and the end-year report.

Schedule 2 of the Appropriations Act clearly indicates budget allocations of all National Departments in terms of departmental votes and main divisions within a vote and for specifically listed purposes. Any mid-year adjustments are presented in the Adjustments Appropriation Act in similar fashion.

The Division of Revenue Act clearly indicates the division of revenue between the three spheres of government (national, provincial and local), as well as its division ‘horizontally,’ that is between various local government and various provinces. The ‘Estimates of National Expenditure’ (ENE)’s published annually provides allocation information for all national departments by program and sub-program and has made significant progress in linking these allocations to measurable objectives. Provincial budgets documents are also comprehensive and extensive. At the local level, the quality of budget is uneven with some municipalities unable to publish basic budget documents. In some cases this is attributed to insufficient capacity whereas in others unwillingness to adhere to existing financial management norms and regulations remains the problem.

References:
http://us-cn.creamermedia.co.za/assets/articles/attachments/25902_est_of_national_expenditure_2010.pdf


Division of Revenue Act 2010(B 4-2010).
http://www.pmo.org.za/files/bills/100217b4-10_1.pdf

Appropriations Act 2009 (No 3, 2010),
### 42. In law, is there a separate legislative committee which provides oversight of public funds?

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<td>100</td>
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#### 42a. In law, is there a separate legislative committee which provides oversight of public funds?

<table>
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<tr>
<th>Answer</th>
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<tbody>
<tr>
<td>Yes</td>
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<tr>
<td>No</td>
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</table>

**Comments:**

Section 4(1) (2) of the Money Bills Amendment Procedure and Related Matters Act (No 9, 2009) requires each house of Parliament (National Assembly and National Council of Provinces) to establish a committee on finance whose task is to consider matters relating to the national macro policy and fiscal policy, fiscal framework and revenue proposals, actual revenue published by the National Treasury, etc.

Section 4(3) (4) of the above mentioned Act further requires each house of Parliament to establish a committee on appropriations whose task is to consider and report on matters relating to: spending issues; amendments to the Division of Revenue Bill, Appropriation Bill, Supplementary Appropriations Bill and the Adjustment Appropriations Bill; recommendations of the Finance and Fiscal Commission (FFC); and reporting on actual expenditure published by the National Treasury. Part 4 of the Rules of the National Assembly sketches out the rules on the following matters relating to the appropriation committee: referral of business to appropriation committee (section 35); membership (Section 36); Chairpersonship (section 37); relief of chairperson (section 38); Sitting Days and times of meeting (section 39).

Section 204 of the Rule of the National Assembly of the Republic of South Africa also provides rules for the establishment of the Committee on Public Accounts whose functions and powers, as sketched out in section 206 (1)(a), are to consider financial statements of all executive organs of State and constitutional institutions before Parliament and any audit reports issued on those statements; audit reports issued by the Auditor-General on the Affairs of any executive organ of state, constitutional institution or public body; and any other reports or financial statements referred to in terms of the rules of Parliament. In terms of Section 206(1) (c), the Committee on Public Accounts may initiate any investigation in its area of competences.

**References:**


**Yes:** A YES score is earned if there is a dedicated legislative committee (or equivalent group located in the legislature) that oversees the expenditure of public funds.

**No:** A NO score is earned if no such body exists within the legislature. A NO score is earned if there is a body executing this function but it is not part of the legislature (such as a separate supreme audit institution).
43. Is the legislative committee overseeing the expenditure of public funds effective?

43a. In practice, department heads regularly submit reports to this committee.

100  75  50  25  0

Comments:
Save for the quality of the content, large improvements have been made in this regard, in part facilitated by the Public Finance Management Act (PFMA) and the Municipal Finance Management Act (MFMA). However, incidents of late submission are still notable.

References:
The Parliamentary Monitoring Group (PMG):
http://www.pmg.org.za/


Interview with Len Verwey, Idasa, PIMS Budget Unit Manager
Nov. 9, 2010

100: Heads of ministry- or cabinet-level agencies submit regular, formal reports of expenses to a budget oversight committee.

75: Agency heads submit reports to a budget oversight committee, but these reports are flawed in some way. The reports may be inconsistently delivered, or lacking important details.

50: There is no budget oversight committee or equivalent, or heads of agencies do not submit meaningful reports to the agency.

43b. In practice, the committee acts in a non-partisan manner with members of opposition parties serving on the committee in an equitable fashion.

100  75  50  25  0

Comments:
In the case of committees on finance and appropriations (for both the National Assembly and the National Council of Provinces) the way in which business is conducted is fairly non-partisan. As captured in the record of parliamentary proceedings on the website of the Parliamentary Monitoring Group (PMG) (http://www.pmg.org.za), the nature of debates and discussions is often lively and dynamic, with members of opposition parties making significant contribution at times. However, the situation is different with respect to the Committee on Public Accounts. Despite being chaired by a member of an opposition party, this committee is perceived as operating in a partisan manner to serve the interests of the ruling party when dealing with major or critical affairs.

Practitioners have been inclined to assert that, in general, SCOPA is weak mostly due to political interference resulting from party discipline, and this is, in turn, often blamed on the country’s electoral system which renders political parties more powerful than Parliament, including committees, as an institution.

References:

Anele Lewis, “N2 officials asked to return money or else”, Cape Times, Aug. 7, 2009.
Interview: Nonhlanhla Chanza, Idasa, Political Researcher.
Nov. 29, 2010

The Parliamentary Monitoring Group (PMG)
http://www.pmg.org.za/

100: The committee is comprised of legislators from both the ruling party (or parties) and opposition parties in a roughly equitable distribution. All members of the committee — including opposition party members — are able to fully participate in the activities of the committee and influence the committee’s work to roughly the same extent as any other member of the committee.

75: The committee is comprised of legislators from both the ruling party (or parties) and opposition parties although the ruling party has a disproportionate share of committee seats. The chairperson of the committee may be overly influential and curb other members’ ability to shape the committee’s activities.

50: The committee is dominated by legislators of the ruling party and/or the committee chairperson. Opposition legislators serving on the committee have in practice no way to influence the work of the committee.

0: The committee is comprised of legislators from the ruling party (or parties) and opposition parties in a roughly equitable distribution. All members of the committee — including opposition party members — are able to fully participate in the activities of the committee and influence the committee’s work to roughly the same extent as any other member of the committee.

Comments: The Committee on Public Accounts, in the form of the Standing Committee on Public Accounts (SCOPA), which is empowered to initiate independent investigation into financial regulations, has —despite some isolated incidences of excellence- shown a notable degree of ineffectiveness in this regard. The Arms Deal issue as discussed in the 2008 Global Integrity Country Report is a case in point in which SCOPA's incapacity and inability to initiate independent investigation leading to prosecution is evident.

Practitioners have been inclined to assert that in general SCOPA is weak mostly due to political interference, caused by party discipline, and this is often blamed on the country’s electoral system which renders political parties more powerful than Parliament, including committees, as an institution.

However, in recent years, the Standing Committee on Public Accounts (SCOPA) initiated an investigation on the implementation of a pilot housing project called the N2 Gateway Project which was concurrently run and funded by the National Department of Housing, the Western Cape Housing Department, and the City of Cape Town. The object of the investigation was to track down all financial regularities associated with the implementation of this project, and this is regarded as one of the few successful cases.

References:
Anele Lewis, “N2 officials asked to return money or else”. Cape Times, Aug. 7, 2009.
http://www.capetimes.co.za/?fSectionId=&fArticleId=vn20090807033743284C761918.

“Arms deal update: Hawks and National Prosecuting Authority briefings.” PMG, Date of Meeting: Sept. 8, 2010


Brümmer, Stefaans and Sole, Sam, “NPA Mum on end of Arms-Deal Probes,” Mail & Guardian, Oct. 22, 2010

Interview: Sylvester, Justin, Idasa, Political Researcher
Nov. 23, 2010

100: When irregularities are discovered, the committee is aggressive in investigating the government.

75: The committee starts investigations, but is limited in its effectiveness. The committee may be slow to act, unwilling to take on politically powerful offenders, or occasionally unable to enforce its judgments.

50:

25:
The committee does not effectively investigate financial irregularities. The committee may start investigations but not
complete them, or may fail to detect offenders. The committee may be partisan in its application of power.

Category 4. Public Administration and Professionalism

4.1 Civil Service: Conflicts of Interest Safeguards and Political Independence

44. Are there national regulations for the civil service encompassing, at least, the managerial and professional staff?

75

44a. In law, there are regulations requiring an impartial, independent and fairly managed civil service.

Yes | No

Comments:
In the Constitution of South Africa, Chapter 10 outlines the principles governing public administration, specifically in section 195(1), which states that public services must be provided “impartially, fairly, equitably and without bias.” This section also states that the public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness and the need to redress the issues resulting from the legacy of the country’s past.

These principles are further elaborated on in the Public Service Act and Regulations, which establish a framework of norms and standards relating to recruitment, training, promotion, management and evaluation of civil servants. The recruitment and performance management of the senior management service are determined separately in the Regulations, as well as in the “Handbook for Senior Managers,” issued in terms of the regulations.

References:


Yes: A YES score is earned if there are specific formal rules establishing that the civil service carry out its duties independent of political interference.

No: A NO score is earned if there are no formal rules establishing an independent civil service.

44b. In law, there are regulations to prevent nepotism, cronyism, and patronage within the civil service.

Yes | No

Comments:
The appointment of officials within the public service is specifically targeted by the regulations and procedures set out within the
Public Service Regulations, which are guided by the Constitution as well as the Public Service Act. Deviation from these procedures requires proper justification.

Furthermore, as stipulated in the Constitution at section 196(4), the Public Service Commission (PSC) is charged with ensuring that the recruitment, transfer, promotion, and dismissal of public service personnel adheres to the principles of objectivity, fairness, ability (i.e. competence); balanced with the need to redress historical inequalities.

References:
Public Service Regulations (2001), in terms of the Public Service Act (1994).

Yes: A YES score is earned if there are specific formal rules prohibiting nepotism, cronyism, and patronage in the civil service. These should include competitive recruitment and promotion procedures as well as safeguards against arbitrary disciplinary actions and dismissal.

No: A NO score is earned if no such regulations exist.

44c. In law, there is an independent redress mechanism for the civil service.

Yes

Comments:
The Public Service Commission (PSC) is an independent entity established in Chapter 10, Section 196, of the Constitution of South Africa. The full operative parameters of the PSC are stipulated in sections 8 to 10 the Public Service Commission Act. Essentially, the PSC is required to be an impartial entity charged with investigating, monitoring, and evaluating the organization, administration, and personnel management of the entire civil service. It is generally regarded as independent.

Investigations can be triggered either through the PSC’s own volition, or via the receipt of a complaint. Section 196(4)(f)(ii) of the Constitution specifically allows the commission to investigate grievances of employees in the public service concerning official acts or omissions, and to recommend appropriate remedies.

In the 2009/10 financial year the PSC received a total of 614 personnel grievances from government departments, of which 298 were referred back to the respective departments for internal closure and 165 were finalized by the PSC itself.

References:
Public Service Commission Act (Act 46 of 1997).
Public Service Commission:
“Fact Sheet on Grievance Resolution for the 2009/10 financial year.”

Yes: A YES score is earned if there is a mechanism to which civil servants and applicants for the civil service can take grievances regarding civil service management actions. The mechanism should be independent of their supervisors but can still be located within the government agency or entity (such as a special commission or board). Civil servants are able to appeal the mechanism’s decisions to the judiciary.

No: A NO score is earned if no such mechanism exists, or if the only recourse civil servants have is directly through the courts.

44d. In law, civil servants convicted of corruption are prohibited from future government employment.

Yes

Comments:
Sections 28 to 33 of the Prevention and Combating of Corrupt Activities Act require the creation of a Register of persons
convicted of corrupt activities related to contracts and/or the procurement and withdrawal of tenders. This register therefore can act as a “blacklist” of persons convicted of corruption. Furthermore, the Public Service Regulations states, at Clause B.3.1 that under certain conditions a former employee may not be re-appointed by an executing authority, these conditions include consideration of the grounds for previous employment termination. It is not, however, stipulated whether these conditions involve taking the Register into consideration.

Ultimately, there is, as yet, no legislation that specifically prohibits the employment of civil servants who have been convicted of corruption even though it was proposed within the Public Service Anti-Corruption Strategy. Although there are regulations in place allowing the tracking of convicted corrupt persons which could consequentially make re-employment difficult, there is nothing that legally prohibits their re-employment within the civil service.

Although the DPSA has indicated its intention to create a corruption database (Corruption Management Information System), its purposes do not overtly include the identification and prevention of re-employment of public servants convicted of corruption (MACC at p58).

A recent PSC report states as follows:

“There is an expectation that the Public Service will employ persons of good character. In fact the Public Service Act, 1994, states that “no person shall be appointed permanently, whether on probation or not, to any post on the establishment of a department unless he or she is a fit and proper person”. When bringing a new employee on board, the Public Service assesses competence, skills and whether the person is of good character, but must also assess the potential risks that such person poses to the institution by indicating whether they have a criminal record. The seeming intention with such disclosure is not necessarily to ban employment of people with a criminal record, but for the prospective employer to assess the potential impact this may have on the job requirement and on the organization as a whole.

Currently, however, there are limited policy guidelines on the employment of persons with criminal records in the Public Service. Managers may therefore not be clear as to the process to be followed in the case of an applicant with a criminal record, and could unwittingly, through their actions create legal difficulties for themselves if challenged. Also the process of conducting criminal record checks may not be clear.”

It appears from this report that about 19 percent of such persons appointed had been convicted of offenses related to dishonesty, primarily theft.

The Report concluded that not all such appointments were necessarily inappropriate, for example in cases where the length of time since the offense was committed and subsequent employment history was considered. However, there is a significant problem in practice, in that employing departments frequently undertook background checks only after appointment, which clearly exposed the employer to undue risk.

References:


Yes: A YES score is earned if there are specific rules prohibiting continued government employment following a corruption conviction.

No: A NO score is earned if no such rules exist or if the ban is not a lifetime ban.

45. Is the law governing the administration and civil service effective?

56

45a. In practice, civil servants are protected from political interference.

Comments:
The ruling African National Congress party has a committee that implements a policy of deploying cadres to various senior and influential positions in the public and private sectors. The impact of the policy is difficult to measure although, at least ostensibly, deployments have been primarily to political positions, such as Premiers and Mayors and their MECs and Mayoral Committees.
More recently, the targeted positions have included state-owned enterprises and even the previously largely independent National Prosecuting Authority.

The PSC Reports are often a useful measure of public service professionalism, albeit that they are only an indirect measure of political interference.

A previous PSC report (2008) on public service compliance with the Constitutional imperative that public services be provided impartially, fairly, equitably and without bias (s. 195(1)(d)), suggests an overall 50 percent compliance rate (see p 37ff). This measures a government department’s ability to prove that it has complied with four standards of objective and apolitical service delivery, viz. (1&2) All decisions are taken in accordance with prescribed legislation/policies and in terms of delegated authority; (3) All decisions are justified and fair considering the evidence submitted; and (4) The procedures required in terms of the Promotion of Administrative Justice Act, No. 3 of 2000, to communicate administrative decisions, are followed. The 2008 SOPS Report concluded, at p50, that a majority of government departments do not comply with standards of administrative fairness.

However, the 2010 SOPS Report chapter on employment practices focuses only on progress towards representation targets regarding women and people with disabilities.

It is particularly senior officials of government departments or agencies who are widely considered vulnerable to political interference. In the past, there have been reports of politically motivated suspension or firing of civil servants, including the removal of Vusi Pikoli from his position as National Director of Public Prosecutions and of constant political interference in some agencies such as the South African Police Service (SAPS).

More recently, there has been recognition by government that political deployment has had a serious impact on service delivery, especially at local government level. This recognition has resulted in the tabling in Parliament of the ‘Local Government: Municipal Systems Amendment’ Bill [B22 – 2010], which seeks to prevent the appointment of political party office bearers to senior positions in local government.

At the same time, however, President Jacob Zuma has reaffirmed that this will not affect deployments to senior positions in other spheres of government, or in state-owned enterprises.

Moreover, public servants need not resign their jobs while standing as an electoral candidate, although they will be deemed to have resigned if they accept public office having been duly elected. This is not to be considered as contradictory to Regulations C.2.7 and C.3.7 of Chapter 2 of the Regulations (Code of Conduct for Public Servants) to the Public Service Act, which prohibit the abuse of office and of public resources to promote or prejudice the interests of any political party or the prohibition of political activity in the workplace.

The intersection between political party business and financial interests and those of the state is increasingly seen as creating numerous conflicts of interest, where deployed ‘cadres’ are, at the least, perceived to act in a manner sympathetic to public tender bids by businesses with party affiliations or associations. It is unclear whether public servants appear to treat bids from such companies more favorably for reasons of voluntary sympathy or because of pressure and interference.

A primary example of this type of situation is recounted in the Public Protector’s report into an alleged conflict of interest – ultimately found to be present – on the part of Mr Valli Moosa, a former Cabinet Minister, when Chairperson of the Board of the state-owned electricity utility, Eskom.

References:
Global Integrity, Country Report: South Africa, 2008,

“ANC stake in Hitachi splits party”,
http://www.businessday.co.za/articles/Content.aspx?id=106105

“ANC cadres to fill top jobs – Zuma”,

“ANC blames deployment”,
Oct.18, 2009, City Press.
http://www.citypress.co.za/Content/SouthAfrica/2166/c99a55c5b41d42b3b077086895d140e3/18-10-2009-02-00/ANC_blames_deployment

Democratic Alliance,
“Will cadre deployment grind the wheels of justice to a halt for Zuma?”
April 1, 2009.

Deputy Minister Yunus Carrim, Address to the Institute of Local Government Managers, Nov. 18, 2009.

Ministry of Public Service and Administration, 2009.
“Participation of Public Service Employees in Elections”,

Public Protector, 2009. Public Protector Report No. 30 of 2008/9,
“Report on an investigation into an allegation of improper conduct by the former Chairperson of the Board of Directors of Eskom Holdings Limited, Mr V Moosa, relating to the award of a contract”.
http://www.publicprotector.org
100: Civil servants operate independently of the political process, without incentive or pressure to render favorable treatment or policy decisions on politically sensitive issues. Civil servants rarely comment on political debates. Individual judgments are rarely praised or criticized by political figures. Civil servants can bring a case to the courts challenging politically-motivated firings.

75:

50: Civil servants are typically independent, yet are sometimes influenced in their judgments by negative or positive political or personal incentives. This may include favorable or unfavorable treatment by superiors, public criticism or praise by the government, or other forms of influence. Civil servants may bring a case to the judicial system challenging politically-motivated firings but the case may encounter delays or bureaucratic hurdles.

25:

0: Civil servants are commonly influenced by political or personal matters. This may include conflicting family relationships, professional partnerships, or other personal loyalties. Negative incentives may include threats, harassment or other abuses of power. Civil servants are unable to find a remedy in the courts for unjustified or politically-motivated firings.

45b. In practice, civil servants are appointed and evaluated according to professional criteria.

Comments:
The procedures for recruitment of civil servants are clearly stipulated within the Public Services Regulations, which give clear descriptions of how vacancies should be advertised as well as how the selection process should proceed. In practice, however, according to a number of reports by the independent Public Service Commission (PSC), these regulations are poorly adhered to by the majority of departments. Jobs were often not described in the job advertisements, the criteria for short-listing were rarely accurately documented, potential conflict of interests within the members of the selection committee were rarely documented, and in general the entire selection process was often very poorly recorded.

“The PSC has found that there is widespread disregard of elementary processes such as compiling job descriptions, conducting job evaluations and obtaining approval of job adverts prior to their placement in the media. These procedural omissions undermine the credibility of the selection process and open the Public Service up to legal challenges by disgruntled applicants. At a national level various steps have been taken to improve the quality of recruitment and selection processes. However, most of these initiatives focus on the senior and middle management layers of the Public Service while the vast majority of public servants are employed at the lower levels.” (pg vii, Executive Summary)

In addition, a post hoc verification of civil servant qualifications, however, found that only a very small minority of civil servants had dubious qualification records, and such persons were usually only found within the lower levels of public service. As such, it would seem that in general the civil servants who are appointed are suitably qualified and the appointment of those that are not can be blamed on the poor recording of the entire selection process. This lack of organization and documentation is one of the largest weaknesses of the civil servant recruitment processes.

References:

Public Service Commission, “Audit of Selection Processes in Selected Departments”, August 2008, PSC. 
100: Appointments to the civil service and their professional evaluations are made based on professional qualifications. Individuals appointed usually do not have clear political party affiliations. Individuals appointed are free of conflicts of interest arising from personal loyalties, family connections or other biases.

75:

50: Appointments and professional assessments are usually based on professional qualifications. Individuals appointed may have clear party loyalties, however.

25:

0: Appointments and professional assessments are often based on political considerations. Individuals appointed often have conflicts of interest due to personal loyalties, family connections or other biases. Individuals appointed often have clear party loyalties.

45c. In practice, civil service management actions (e.g. hiring, firing, promotions) are not based on nepotism, cronyism, or patronage.

100 | 75 | 50 | 25 | 0

Comments:
Due to the poor documentation and general lack of organization in the selection process of new personnel, there exists the possibility for a significant degree of nepotism, cronyism and patronage in civil service management actions with regards to recruitment. There has also been considerable debate around the political motivations of certain high-level public service appointments, as well as the impact of ANC cadre deployments.

The PSC reports that in at least one province recently studied there is a severe weakness in the training of civil servants with regards to the Code of Conduct in that there are very few, if any, workshops and training seminars that are specifically geared towards ethical conduct education. As such, the PSC believes that there is a large possibility that civil servants will claim ignorance of the proper ethical behavior required in a particular situation, on the basis that they have not received sufficient formal training. Consequently, this could lead to unethical civil service management actions being perpetrated. Furthermore, in at the same province, there is a complete lack of implementation for the Promotion of Administrative Justice Act, which could further increase injustice, bias, and unfairness with regards to civil service management actions. Most other legislation aimed at combating corruption has fairly adequate implementation within the particular provincial government. Another provincial government, however, has displayed an adequate performance with regard to professional ethics in an overall assessment for the 2009/10 evaluation cycle.

More comprehensive national evaluations of performance in terms of professional ethics are required before a more accurate picture of civil management actions can truly be drawn. Thus far it would seem that in general there is a significant scope for at least some level of nepotism, cronyism, and patronage occurring within civil service management actions, especially with regards to recruitment.

References:


Nepotism (favorable treatment of family members), cronyism (favorable treatment of friends and colleagues), and patronage (favorable treatment of those who reward their superiors) are actively discouraged at all levels of the civil service. Hirings, firings, and promotions are based on merit and performance.

50: Nepotism, cronyism, and patronage are discouraged, but exceptions exist. Political leaders or senior officials sometimes appoint family member or friends to favorable positions in the civil service, or lend other favorable treatment.

25: Nepotism, cronyism, and patronage are commonly accepted principles in hiring, firing and promotions of civil servants.

45d. In practice, civil servants have clear job descriptions.

Comments: The Public Service Regulations stipulate that the heads of departments are required to establish a job description for each post or group of posts available in their department. A recent report by the PSC concluded that when it came to the advertising of posts the majority of departments did not have job descriptions in the advertisements, nor had proper job evaluations been conducted prior to the posting of the advertisement in many cases.

Furthermore, it is a requirement, stipulated in the Public Service Regulations, that all senior management servants sign performance agreements within three months of entering a post. The PSC, however, reports that the total number of performance agreements signed and submitted by heads of departments (both national and provincial) has been steadily declining over the past few years. It had become such a significant problem that the issue was raised in the 2008 State of the Nation address by President Mbeki. Non-compliance with the performance agreement regulations makes accountability a difficult process, since it is difficult to hold an employee accountable if no agreement as to their duties has been completed.

President Zuma has established a high-level Monitoring and Evaluation Unit within the Presidency, which is based on signed performance agreements between the President and members of his Cabinet. These agreements have not yet been published, and it is consequently unclear whether an improvement in human resource practices generally, or in this respect in particular, is required by these agreements.

References:
Office of the President. Department of performance Evaluation and Monitoring.


Public Service Commission, “Audit of Selection Processes in Selected Departments”, August 2008, PSC.

Public Service Regulations (2001), in terms of the Public Service Act (1994).


PMG Committee Meeting, 2010: “Signing and Filing of Performance Agreements by Heads of Department: briefing by Public Service Commission.”
Civil servants often have formal job descriptions, but exceptions exist. Some civil servants may not be part of the formal assignment of duties and compensations. Some job descriptions may not map clearly to pay or responsibilities in some cases.

Civil servants do not have formal roles or job descriptions. If they do, such job descriptions have little or nothing to do with the position’s responsibilities, authority, or pay.

In practice, civil servant bonuses constitute only a small fraction of total pay.

Comments:
A wide range of problems persist in the public sector in connection with compliance with acceptable human resource practices, as described above. It is not improbable that this has led to the payment of bonuses where they have not been warranted. Given the findings in the PSC’s report indicating that human resource management practices are so poor, it may be reasonable to infer that bonuses may have been paid without proper performance assessments. However, during a recent meeting between the National Treasury and the Standing Committee on Public Accounts regarding outstanding issues of concern, excessive bonuses to public service employees was not raised for consideration.

Although there have been no recent reports of excessive bonuses in the public service, the situation has been different as regards incorporated state-owned enterprises (SOEs), such as Eskom, Denel (the state-owned armaments manufacturer), the South African Broadcasting Corporation (SABC) and South African Airways (SAA).

In these instances, executives received large bonuses despite the fact that their companies incurred large financial losses. In the case of Denel, the CEO received a R1.6 million (US$233,405) bonus in addition to a R5.6 million (US$816,921) salary. Eskom’s and SAA’s executives have benefited from a controversial ‘retention bonus’ scheme that reportedly cost SAA R60.7 million (US$8.7 million). Many of these SOEs were recently rescued through large, unbudgeted, financial ‘bailouts’.

Despite an instruction from the National Treasury to public sector entities prohibiting them from spending public funds on Football World Cup tickets (which amount to a form of bonus in kind), since doing so would be in contravention of the Public Finance Management Act of 1999, it has emerged that several government departments and SOEs contravened this instruction. Examples include the cash-strapped SABC, which spent R3.3 million (US$481,400) on 2,000 tickets for the sporting event, signal regulator Sentech, which spent R1.7 million (US$247,994) on 96 tickets, and the SA Post office, which spent R800,000 (US$116,700) on 500 tickets. The Department of Public Service and Administration paid R65,400 (US$9,540) for 25 tickets to World Cup matches.

The National Treasury warned that officials who signed off on World Cup ticket purchases could face charges of financial misconduct and irregular expenditure in terms of the Public Finance Management Act. Finance Minister Pravin Gordhan has asked Auditor-General Terence Nombembe to identify budget funds allocated to ticket buying when undertaking the audits for the 2009/10 financial year. Various departments reportedly paid out a total of R10.9 million (US$1.6 million) for tickets.

When recently announcing the expected performance review of SOEs’ and its terms of reference, Minister Collins Chabane stated: “The President appointed the Review Committee guided by the Polokwane resolution of the ruling party and the Medium Term Strategic Framework (MTSF) 2009 – 2014. The MTSF states the need for the review of State Owned Enterprises as part of the economic transformation agenda of government. The MTSF further states that while these entities remain financially viable, SOEs, development-finance institutions as well as companies in which the state has a significant shareholding must respond to a clearly defined public mandate and help government to build a developmental state.”

He continued: “SOEs form a significant portion of South Africa’s vital industries that drive the economy. Inputs such as electricity, transportation and telecommunications are dominated by SOEs. These sectors are principal drivers of the formal sector of the economy, and provide for the bulk of economic growth. SOEs are the principal entities that deliver many social goods and services to ensure quality of life of all South Africans.”

References:


Brown, Karima.
“Ministers to review state-owned corporations after all”, June 23, 2010, Business Day,
http://www.businessday.co.za/articles/Content.aspx?id=112523

Business Report,
“SOEs face test as state reviews performance”, Oct.13, 2010, Business Report,
http://www.iol.co.za/businessindex.php?fSetId=664&SSectionId=1761&Date=2010-10-13


100: Civil servant bonuses constitute no more than 10% of total pay and do not represent a major element of take-home pay.

75:

50: Civil servant bonuses are generally a small percentage of total take-home pay for most civil servants though exceptions exist where some civil servants’ bonuses represent a significant part of total pay.

25:

0: Most civil servants receive bonuses that represent a significant amount of total take-home pay. In some cases bonuses represent the majority of total pay to civil servants.

45f. In practice, the government publishes the number of authorized civil service positions along with the number of positions actually filled.

| 100 | 75 | 50 | 25 | 0 |

Comments: Organizational details and staffing, including the number of authorized posts and the number of posts filled, must be and are
included in the annual reports of departments as tabled in the various legislatures on an annual basis. They are verified in the course of the PSC’s annual reports.

References:
Departments’ annual reports to Parliament.
http://www.reb.orn.co.za


Public Service Commission:

100: The government publishes such a list on a regular basis.
75: The government publishes such a list but it is often delayed or incomplete. There may be multiple years in between each successive publication.
50: The government rarely or never publishes such a list, or when it does it is wholly incomplete.
25: The independent redress mechanism for the civil service is effective.
0: The independent redress mechanism for the civil service can control the timing and pace of its investigations without any input from the bodies that manage civil servants on a day-to-day basis.

Comments:
The Public Service Commission (PSC) is an independent entity established in terms of Chapter 10, Section 196, of the Constitution of South Africa. The full operative parameters of the PSC are stipulated in the Public Service Commission Act. Essentially, the PSC is required to be an impartial entity charged with investigating, monitoring, and evaluating the organization, administration, and personnel management of the entire civil service. Investigations can be triggered either through the PSC’s own volition, or via the receipt of a complaint. Section 196(4)(f)(ii) of the Constitution specifically allows the commission to investigate grievances of employees in the public service concerning official acts or omissions, and recommend appropriate remedies.

In the 2009/10 financial year, the PSC received a total of 614 personnel grievances from government departments of which 298 were referred back to the respective departments for internal closure and 165 were finalized by the PSC itself. As of March 31, 2010, 84 grievances were still pending, 54 of which had been referred back to the respective departments due to a failure to exhaust all internal measures and the remaining 30 pending due to insufficient information received from the respective departments from whom the PSC has requested such information.

The Ad Hoc Committee established in 2007 to review Chapter 9 of the Constitution and associated institutions reported that, in general, the performance of the PSC as an independent redress mechanism for the civil service, to be satisfactory, but that the scope of its mandate is not matched by an appropriately sized budget and human resource capacity.

References:
Ad hoc Review Committee:
http://www.parliament.gov.za/content/chapter_9_report.pdf


Public Service Commission: Fact Sheet on Grievance Resolution for the 2009/10 financial year.
50: The independent civil service redress mechanism can generally decide what to investigate and when but is sometimes subject to pressure from the executive or the bodies that manage civil servants on a day-to-day basis on politically sensitive issues.

25:

0: The civil service redress mechanism must rely on approval from the executive or the bodies that manage civil servants on a day-to-day basis before initiating investigations. Politically sensitive investigations are almost impossible to move forward on.

45h. In practice, in the past year, the government has paid civil servants on time.

Comments:
In general, regular and prompt payment of salaries is not an issue of concern. There have been no reports during the past year of late payment of civil servants' salaries. There was, however, in the current year a large scale civil servant strike due to the perceived inadequacy of civil service salaries as a result of inflation, medical aid, and meager housing allowances.

References:


100 | 75 | 50 | 25 | 0

45i. In practice, civil servants convicted of corruption are prohibited from future government employment.

Comments:
In law, sections 28 to 33 of the Prevention and Combating of Corrupt Activities Act require the creation of a Register of persons convicted of corrupt activities related to contracts and/or the procurement and withdrawal of tenders. This register can therefore act as a "blacklist" of persons convicted of corruption. Furthermore, the Public Service Regulations states at Clause B.3.1. that under certain conditions a former employee may not be re-appointed by an executing authority which includes grounds for previous employment termination, especially if these reasons would militate against re-appointment, as a conviction of corruption probably would. It is not, however, stipulated whether these conditions involve taking the Register into consideration.

In terms of paragraph B.3.1(b) of Part VII of the Public Service Regulations, an employee may not be reappointed where the circumstances of the initial termination of employment militate against such re-employment. This is a vague and weak legal framework and is unlikely to provide clear guidance in practice.

In the 2008/09 financial year, the most common sanction meted out to persons found guilty of financial misconduct was receipt of a final written warning, while the second most common was a combination of sanctions, e.g. final written warning as well as suspension without pay.

There is however, as yet, no official legislation that specifically prohibits the employment of civil servants who have been convicted of corruption even though it was proposed within the Public Service Anti-Corruption Strategy. As such, although there are regulations in place that keep track of convicted corrupt persons which could consequently make re-employment difficult, there is nothing that legally prohibits their re-employment within the civil service. Consequently, in practice, there is still a fair chance of a person who has been convicted of corruption being re-appointed after being discharged, especially due to the poor documentation and monitoring of the selection process, as discussed in more detail above.
100: A system of formal blacklists and cooling off periods is in place for civil servants convicted of corruption. All civil servants are subject to this system.

75: A system of formal blacklists and cooling off periods is in place, but the system has flaws. Some civil servants may not be affected by the system, or the prohibitions are sometimes not effective. Some bans are only temporary.

50: There is no such system, or the system is consistently ineffective in prohibiting future employment of convicted civil servants.

46. Are there regulations addressing conflicts of interest for civil servants?

64

46a. In law, senior members of the civil service are required to file an asset disclosure form.

Yes | No

Comments:
Chapter 10 of the Constitution of the Republic of South Africa, 1996, provides, inter alia, for the values and principles governing public administration. One of these basic values is that a high standard of professional ethics must be promoted and maintained in the Public Service.

Observance of this basic value can contribute to eliminating and/or mitigating sources of corruption. To this end, all members of the Senior Management Service (SMS, i.e Director, Level 13) are, in terms of Chapter 3 C.1 of the Public Service Regulations, required to disclose to their respective Executive Authorities, particulars of all their registrable interests not later than 30 April each year, in respect of the period 1 April of the previous year to 31 March of the current year. Any person who assumes duty as an SMS member (or a designated employee) after April 1 in a year is required to make such a disclosure within 30 days after assumption of duty in respect of the period of 12 months preceding her/his assumption of duty. The Public Service Regulations further requires that the Executive Authorities submit copies of the forms on which the designated employees disclosed their financial interests, to the Public Service Commission (PSC) by no later than May 31 of each year.

References:

Chapter 3 of the Public Service Regulations (2001), in terms of the Public Service Act (1994).

Yes: A YES score is earned if senior members of the civil service are required by law to file an asset disclosure form while in office, illustrating sources of income, stock holdings, and other assets. This form does not need to be publicly available to score a YES.
46b. In law, there are requirements for civil servants to recuse themselves from policy decisions where their personal interests may be affected.

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**Comments:**
Clause C.4.5 of the Public Service Code of Conduct requires that a public servant refrains engaging in any transaction or action that is in conflict with or infringes on the execution of his or her official duties. Clause C.4.6 of the Public Service Code of Conduct requires recusal from any transaction or action or decision-making process that may result in improper personal gain, and disclosure of the reasons for such recusal.

**References:**
Chapter 3 of the Public Service Regulations (2001), in terms of the Public Service Act (1994).


46c. In law, there are restrictions for civil servants entering the private sector after leaving the government.

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**Comments:**
At present, there are no post-employment restrictions which apply to ministers or senior government officials, which makes the move through the revolving door from government to business very easy. The current Public Service Act and Regulations contain no post-employment restrictions. The moribund Public Administration Management Bill [2008] contains provisions proposing post-employment restrictions in certain limited situations.

**References:**
Public Service Regulations (2001), in terms of the Public Service Act (1994).

Public Administration Management Bill [B47-2008],


46d. In law, there are regulations governing gifts and hospitality offered to civil servants.

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**References:**

Comments:
Clause C.5.3 of the Code of Conduct rather weakly provides that an employee shall not, without prior written approval of the Head of Department obtain or accept any gifts, benefits or item of monetary value (the approval of which must contain a description and the value and source of gift with a value in excess or R350 – US$35) from any person for himself or herself during the performance of duties as these may be construed as bribes. Gifts and hospitality other than from a family member must be disclosed in terms of Section D(a) to (g) of Chapter 3 of the Public Service Regulations.

References:

Chapter 3 of the Public Service Regulations (2001), in terms of the Public Service Act (1994).

http://report.wordpress-158395-729720.cloudwaysapps.com/

Yes: A YES score is earned if there are formal guidelines regarding gifts and hospitality given to civil servants.
No: A NO score is earned if there are no such guidelines or regulations.

46e. In law, there are requirements for the independent auditing of the asset disclosure forms of senior members of the civil service.

Yes | No

Comments:
In terms of the Public Service Regulations, the Public Service Commission conducts annual audits of the number and percentage, as well as the contents, of disclosure forms submitted to it.

References:
Section G of Chapter 3 of the Public Service Regulations (2001), in terms of the Public Service Act (1994).


Yes: A YES score is earned if there is a legal or regulatory requirement for independent auditing of civil service asset disclosures. The auditing is performed by an impartial third-party.
No: A NO score is earned if there are no legal or regulatory requirements for the independent auditing of civil service asset disclosures or if such requirements exist but allow for self-auditing.

46f. In practice, the regulations restricting post-government private sector employment for civil servants are effective.

100 | 75 | 50 | 25 | 0

Comments:
The current Public Service Act and Regulations contain no post-employment restrictions. The Public Administration Management Bill [2008] contains provisions proposing post-employment restrictions in certain limited situations, but the Bill has been withdrawn from Parliament.

References:

Public Service Regulations (2001), in terms of the Public Service Act (1994).
100: The regulations restricting post-government private sector employment for civil servants are uniformly enforced. There are no cases or few cases of civil servants taking jobs in the private sector after leaving government where they directly lobby or seek to influence their former government colleagues without an adequate "cooling off" period.

75:

50: The regulations are generally enforced though some exceptions exist. In certain sectors, civil servants are known to regularly take jobs in the private sector that entail directly lobbying or seeking to influence their former government colleagues. Cooling off periods are short and sometimes ignored.

25:

0: The regulations are rarely or never enforced. Civil servants routinely take jobs in the private sector following government employment that involve direct lobbying or influencing of former government colleagues. Cooling off periods are non-existent or never enforced.

46g. In practice, the regulations governing gifts and hospitality offered to civil servants are effective.

Comments:
The PSC's Report on the Management of Gifts found that "very few departments have gift registers as 27 percent of the respondents [to the PSC's survey] were of the view that gifts were 'never' noted in a register, 1 percent indicated that gifts were 'rarely' noted in a register, 13 percent indicated that gifts were 'sometimes' captured in the register, only 1 percent indicated that gifts were 'often' captured in a register, and only 26 percent indicated that gifts were 'always' captured in the register; whilst 32 percent 'did not know.'" (pg. 24)

Further, an "equal percentage (39 percent) of respondents indicated their department have a gift policy, as opposed to those who indicated that their department didn't have a gift policy, with the balance of 22 percent not knowing whether or not their department had a gift policy. The figure below depicts results of the survey questionnaire with regard to gift policies." (pg. 24)

The report indicates that only "(34 percent) of respondents indicated their department had a gift register, as opposed to those (39 percent) who indicated that their department didn't have a gift register; with the balance (22 percent) not knowing whether or not their department had a gift register. With regard to the monitoring of the gifts register, only 22 percent of the respondents indicated that the gift register was properly monitored on a regular basis by a senior official." (pg. 25)

The PSC's report notes that the results of the survey on whether departments have gift policies and gift registers are “disturbing as it would appear that more than half of the government departments do not have gift policies and gift registers. This relates to a serious lack of managing the acceptance of gifts received by public servants. The inference could also be made that if there is no gift policy and gift register in a department it could be accepted that departments do not monitor the acceptance of gifts by officials in their departments. Even in cases where departments do have a gift policy and a gift register respondents indicate that there is a serious lack of management and monitoring regarding the implementation of the policy and adherence to registering the receipt of gifts in the gift register. Some of the respondents also indicated that the existence of a gift policy and a gift register is not communicated to officials and therefore there is a lack of awareness of such policy and register." (pg. 26)

Related to the issue of ineffective management of gifts, is the management of annual financial disclosures, where senior staff should report gifts offered and whether permission has been sought to accept them.

The PSC's latest Fact Sheet in this regard indicates that the compliance rate for the entire Public Service on or before the due date for the 2008/2009 financial year was only 49 percent. As by May 31, 2010, the PSC had received only 46 percent of the financial disclosure forms of designated officials for the 2009/2010 financial year. This represents a decrease of three percent (3 percent) in comparison to the previous financial year (2008/2009).

The PSC indicated its "concern" that the level of compliance does not seem to be improving. In the 2007/2008 financial year the compliance rate stood at 48 percent. There was a slight improvement of one percent (1 percent) in the 2008/2009 where it stood at 49 percent. Overall, the submission rate of the disclosure forms by the due date over the last three financial years has "never been more than 50 percent".

References:
Public Service Commission,  

Public Service Commission,  
"Report on the Management of Gifts in the Public Service",  
http://www.psc.gov.za

Public Service Commission,  
http://www.psc.gov.za
The regulations governing gifts and hospitality to civil servants are regularly enforced. Civil servants never or rarely accept gifts or hospitality above what is allowed.

The regulations governing gifts and hospitality to civil servants are generally applied though exceptions exist. Some civil servants in certain sectors are known to accept greater amounts of gifts and hospitality from outside interest groups or private sector actors than is allowed.

The regulations governing gifts and hospitality to the civil service are routinely ignored and unenforced. Civil servants routinely accept significant amounts of gifts and hospitality from outside interest groups and actors seeking to influence their decisions.

In practice, the requirements for civil service recusal from policy decisions affecting personal interests are effective.

The levels of non-compliance with disclosure regulations would tend to suggest a decreasing level of non-compliance with recusal requirements. Nevertheless, the PSC identified up to 89 percent of senior management in some departments with potential conflicts of interest. According to the PSC’s 2008 SOPS Report (p21), citing the Auditor-General’s 2006 report, conflicts of interest arising from designated employees being directors in companies that in turn do business with government, are fairly widespread.

In the 2008 Country report, a 2007 PSC study was cited, which found that, as a result of a legislative gap in the management of public servants who are elected as full-time or part-time municipal councillors, conflicts of interest may arise from dual employment. Further, the Democratic Alliance had highlighted that electing Charles Makola as the governing African National Congress’ (ANC) Mpumulanga Province deputy chairperson demonstrated a conflict of interest with his position as Nkangala district municipal manager.

The Local Government: Municipal Systems Amendment Bill [B22-2010] has been introduced into Parliament to address the acknowledged problems arising from senior political office bearers employed in local authorities exerting inappropriate influence over municipal managers who are their juniors within political parties. The negative impact on service delivery has been recognized, as discussed above.

References:
http://www.ag.za

http://www.psc.gov.za

http://www.psc.gov.za

http://www.psc.gov.za


“Conflict of Interest in Makola election,” Aug. 18, 2008, IOL.

The requirements that civil servants recuse themselves from policy decisions where their personal interests are affected are routinely followed by most or all civil servants.
The requirements that civil servants recuse themselves from policy decisions where their personal interests are affected are followed by most civil servants though exceptions exist. In certain sectors, civil servants are known to routinely participate in policy decisions where their personal interests are affected.

Most civil servants routinely ignore recusal requirements and continue to participate in policy decisions where their personal interests are affected.

In practice, civil service asset disclosures are audited.

Civil service asset disclosures are regularly audited using generally accepted auditing practices.

Civil service asset disclosures are audited, but audits are limited in some way, such as using inadequate auditing standards, or the presence of exceptions to disclosed assets.

Civil service asset disclosures are not audited, or the audits performed have no value. Audits may be performed by entities known to be partisan or biased in their practices.

Can citizens access the asset disclosure records of senior civil servants?

With the exclusion of the persons identified in Paragraph F of Chapter Three of the Public Service Regulations, disclosure records of senior civil servants are available only via court order. The cost of litigation makes this prohibitive for most citizens.
A NO score is earned if senior civil servants do not file an asset disclosure. A NO score is earned if senior civil servants file an asset disclosure, but it is not available to the public.

47b. In practice, citizens can access the asset disclosure records of senior civil servants within a reasonable time period.

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Comments:
With the exclusion of the persons identified in Paragraph F of Chapter Three of the Public Service Regulations, disclosure records of senior civil servants are available only via court order. The cost of litigation is prohibitive for most citizens.

References:
Paragraph F of Chapter Three of the Public Service Regulations (2001) in terms of the Public Service Act (1994).

100: Records are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

75:

50: Records take around two weeks to obtain. Some delays may be experienced.

25:

0: Records take more than a month to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

47c. In practice, citizens can access the asset disclosure records of senior civil servants at a reasonable cost.

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Comments:
With the exclusion of the persons identified in Paragraph F of Chapter Three of the Public Service Regulations, disclosure records of senior civil servants are available only via court order. The cost of litigation is prohibitive for most citizens.

References:
Paragraph F of Chapter Three of the Public Service Regulations (2001) in terms of the Public Service Act (1994).

100: Records are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line.

75:

50: Records impose a financial burden on citizens, journalists or NGOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving records imposes a major financial burden on citizens. Records’ costs are prohibitive to most citizens, journalists, or NGOs trying to access this information.

47d. In practice, the asset disclosure records of senior civil servants are of high quality.
Comments:
With the exclusion of the persons identified in Paragraph F of Chapter Three of the Public Service Regulations, disclosure records of senior civil servants are available only via court order. The cost of litigation is prohibitive for most citizens.

References:
Paragraph F of Chapter Three of the Public Service Regulations (2001) in terms of the Public Service Act (1994).

100: The asset disclosure records of senior civil servants are complete and detailed, providing the public with an accurate and updated accounting of the individuals' sources of income, investments, and other financial interests.

75:

50: The asset disclosure records of senior civil servants contain some useful information but may be lacking important details, including politically sensitive investment or other financial arrangements in which the individual has an interest.

25:

0: The asset disclosure records of senior civil servants are overly general, lack any meaningful detail, and do not provide a clear accounting of the individuals' sources of income, investments, and other financial assets.

4.2. Whistle-blowing Protections

48. Are employees protected from recrimination or other negative consequences when reporting corruption (i.e. whistle-blowing)?

75

48a. In law, civil servants who report cases of corruption, graft, abuse of power, or abuse of resources are protected from recrimination or other negative consequences.

Yes | No

Comments:
The ODAC 2010 report on the status of whistle-blowing lists four whistle-blowing frameworks in South Africa:

1. The first governs disclosures by the general public not protected by the Protected Disclosures Act (Act 26 of 2000, (PDA)) or the Companies Act.
2. The second is the framework created by the PDA which governs whistle-blowing by employees in the public and private sectors.
3. The third is the framework created by the Companies Act, which governs whistle-blowing within all companies registered in terms of the Companies Act, including profit and not-for-profit companies.
4. The fourth is the framework of rights and obligations imposed on “public” and “state-owned” profit companies registered in terms of the Companies Act.

The Protected Disclosures Act (26 of 2000), in particular, protects all employees in the public and private sectors from occupational detriment when disclosing information relating to suspected or alleged criminal or other irregular conduct in the workplace. The Act also protects disclosures of civil servants related to a failure to comply with a legal obligation, a miscarriage of justice, endangering the health or safety of an individual, damaging of the environment, or unfair discrimination.

The Act details how instances of criminal or irregular conduct should be reported, preferably within the organization and only outside of the organization under certain circumstances. If the reported wrongdoing concerns one of the instances described above and is reported correct, the Act protects the whistle-blower from occupational detriment, including victimization or dismissal. To get the protection of the Act, employees must make sure that the disclosure is reported to a person listed in the Act and that disclosure of information is protected if made in “good faith” versus any personal gain.

The Act also specifies remedies in cases where an employee is subjected to occupational detriment, including approaching a court with jurisdiction, such as the Labor Court. The remedy for unfair treatment may include re-instatement, removal of the discrimination, or two years' salary as compensation.
The Act further specifies that employees making protected disclosures, who reasonably believe that they may be adversely affected, must, at their request, be transferred to another post or position in the same or another division.

However, there are some weaknesses in the Act. The confidentiality of the whistle-blower is not protected, nor does the Act deal with defamation charges brought against a whistle-blower. The maximum compensation amount of 24 months’ salary is also low, particularly when costs including protracted legal proceedings and negative perceptions by potential employers and the community are taken into account. In addition, ODAC notes that the PDA limits the scope of protection to whistle-blowers in a formal employment relationship and excludes “citizen” whistle-blowers and further, that the range of recipients to whom a protected disclosure may be made is too narrow. Likewise, the ODAC report further notes that although the Companies Act also obliges private and state-owned companies to develop and implement whistle-blowing policies, there is no guidance for these companies as to what the policies and procedures ought to contain and achieve.

Under section 187(1)(h) of the Labor Relations Act, a dismissal of an employee is automatically unfair if the employer in dismissing the employee, acts contrary to section 5 or if the reason for the dismissal is a contravention of the PDA by the employer, on account of an employee having made a protected disclosure defined in that Act.

Also, under section 191(13)(a) of the Labor Relations Act: An employee may refer a dispute concerning an alleged unfair labor practice to the Labor Court for adjudication if the employee has alleged that the employee has been subjected to an occupational detriment by the employer in contravention of s 3 of the PDA, 2000 for having made a protected disclosure defined in that Act.

The whistle-blowing provisions under section 159 of the new Companies Act (71 of 2008) supplement the provisions of the Protected Disclosures Act.

Section 159(4) widens the scope of the Protected Disclosures Act to cover independent contractors, service providers and trade union shop stewards. Section 159(4) holds that a shareholder, director, company secretary, prescribed officer or employee of a company, a registered trade union that represents employees of the company or another representative of the employees of that company, a supplier of goods or services to a company, or an employee of such a supplier, who makes a disclosure contemplated in this section — (a) has qualified privilege in respect of the disclosure; and (b) is immune from any civil, criminal or administrative liability for that disclosure.

Section 159(7) imposes a duty on companies to introduce whistle-blowing policies and publicize them.

A public company and state-owned company must directly or indirectly (a) establish and maintain a system to receive disclosures contemplated in this section confidentially, and act on them; and (b) routinely publicize the availability of that system to the categories of persons contemplated in subsection (4).

Idasa’s Democracy Index notes that the Public Service Code of Conduct requires that “in the course of his/her official duties, an employee shall report to the appropriate authorities; fraud, corruption, nepotism, maladministration and any other act which constitutes an offense, or which is prejudicial to the public interest.” This is reinforced by the provisions of section 34 of the Prevention and Combating of Corrupt Activities Act, 2004, which imposes a statutory duty on anyone in a “position of authority” to report suspected corrupt activities or conflicts of interest.

References:


Yes: A YES score is earned if there are specific laws against recrimination against public sector whistleblowers. This may include prohibitions on termination, transfer, harassment or other consequences.

No: A NO score is earned if there are no legal protections for public-sector whistleblowers.

48b. In practice, civil servants who report cases of corruption, graft, abuse of power, or abuse of resources are protected from recrimination or other negative consequences.
Comments:
While the Protected Disclosures Act (26 of 2000) does provide legal protection for civil servants reporting criminal activity or other misconduct in the workplace; research and several high-profile recent cases suggest that civil servants do suffer recrimination or other negative consequences.

A 2007 survey conducted by the Open Democracy Advice Center (ODAC) found that one in four South African respondents had blown the whistle, while three in four had not. Less than one-third of respondents had heard of the Protected Disclosures Act. Almost one-half of respondents felt the law does not effectively protect whistle-blowers, while less than one-third felt that the law does provide adequate protection. No similar survey has been conducted since the 2007 Markinor Survey conducted by ODAC.

Nevertheless, over the course of the last few years, several cases of individuals employed in the public sector who suffered negative consequences as a result of whistle-blowing gained a high profile in media coverage and were taken to Labor Court. These particular cases focused on poor conditions at medical treatment facilities and other issues such as misconduct at workplaces. Two such cases related to medical staff at the Pollsmoor Prison, who disclosed a health care crisis to the Inspecting Judge of Prisons and Parliament.

Following this disclosure, nurse and hospital manager Adries Slinger was charged with keeping expired medicines in the hospital unit at Pollsmoor and failing to dispose of them, and was dismissed after a disciplinary hearing. However, his dismissal was found to be unfair by an arbitrator for the Public Health and Welfare Sectoral Bargaining Council, and he was awarded six months remuneration. The arbitrator found that the Department of Correctional Services failed to prove that the same rules and standards were applied to other hospital managers, although it was also noted that Slinger had been negligent in failing to ensure that all expired medication had been removed.

Dr. Paul Theron was suspended by the Department of Correctional Services following this disclosure, but this was overturned by the Labor Court. Theron subsequently reached a settlement with the Departments of Health and Correctional Services, but stated that he would no longer work at Pollsmoor Prison, in spite of an order allowing him to do so. He stated, “I can’t work at Pollsmoor without the full cooperation of the Department of Correctional Services. I accept that in the present circumstances, that cooperation will not be forthcoming’.

Theron also faced a defamation claim brought against him by Correctional Services Minister Ngconde Balfour.

In late 2007, Dr. Nokuzola Ntshona also faced disciplinary charges after making public statements on a spate of preventable infant deaths at the Frere Hospital Maternity Ward. After writing two letters raising concerns about the maternity ward, including one addressed to the Director-General in the Presidency, Ntshona was dismissed. In response, the Freedom of Expression Institute (FXI) commented: “the FXI remains highly disturbed by the state of free speech in the public sector& the ‘acceptable’ ways of voicing one’s concerns seem consistently ignored, and the moment that public servants begin to be truly heard, they are victimized or criminalized.”

Also in 2007, Mike Tshishonga, former Deputy-Director General in the Department of Justice, was awarded 12 months’ salary as well as legal costs by the Labor Courts. Tshishonga was suspended after he publicly disclosed corruption and nepotism within the liquidation industry, and blew the whistle when then-Justice Minister Peneul Madunas insisting on appointing his friend in lucrative cases.

In 2008, advocate Jeanetha Brink won a case against the Gauteng Shared Services Center. In 2006, Brink exposed fraud related to the provincial anti-corruption hot line, which included tip-offs not being investigated and the derailment of probes against senior Gauteng government officials. Several months after reporting, she was stripped of her duties and pushed to resign from the Gauteng Audit Services. This year, her resignation was declared forced and she was awarded one year’s salary.

In an attempt to encourage the reporting of corrupt activities, the Public Service Commission operates a National Anti-Corruption Hotline (NACH) that allows for anonymous disclosures. In a 2007 report, the Public Service Commission (PSC) found that between Sept. 1, 2006 and Nov. 30, 2006, a total of 4,182 cases of alleged corruption were evaluated, it was found that only 2,296 related to corruption. Most cases (60 percent) were reported anonymously, while 30 percent of callers were willing to disclose their personal details. About 8 percent of disclosures were made via e-mail, and 2 percent in person. Most cases referred (320) related to unethical behavior by public servants, including abuse of power and non-compliance with official working hours. Others included procurement irregularities (234), abuse of government vehicles (233), mismanagement of school funds (121) and corruption related to government RDP housing (115). In its 2010 annual report, PSC reported 1,430 cases of alleged corruption among provincial, national departments and public bodies for the year of 2009-2010. In 2010 State of the Public Service Report, PSC registered 1,204 cases of financial misconduct for 2009-08 financial year showing a steady increase over the last six years.

In addition, several high profile whistle-blower-related cases gained major attention in 2008/09. The Law Journal Preview for August 2009 issue lists a few of these cases as following:

Young v Coega Development Corporation (Pty) Ltd (1) and Young v Coega Development Corporation (Pty) Ltd (2) both concern applications to the High Court by an employee of a state organization for urgent interdicts arising from certain disclosures which he had made, and which he claimed were protected under the Protected Disclosures Act 26 of 2000. In Coega (1) the employee applied for and was granted an interdict to prevent his employer from proceeding with disciplinary action against him pending the determination of a court application to have such action declared an occupational detriment as envisaged in s 4(1)(a) of the PDA. The following day the employer dismissed the employee, who made a further application for an interdict to prevent his employer from proceeding with disciplinary action against him pending the determination of a court application to have such action declared an occupational detriment as envisaged in s 4(1)(a) of the PDA. This order was also granted, the court being satisfied that he had established that his dismissal was a continuation of the previous unlawful action taken against him in reprisal for his disclosures. In both applications the High Court confirmed that it had jurisdiction to hear the matter, pointing out that the Labor Court is not the only court with jurisdiction where an employee has been subjected to an occupational detriment.

The applicants in Radebe & another v Marshoff, Premier of the Free State Province & others had made a number of allegations of corruption and nepotism within the Department of Education in the Free State, and called on various authorities in the field of education to undertake a high level investigation into these. When the investigators reported that the employees’ allegations were unfounded they were disciplined by way of demotion or suspension, and contended before the Labor Court that they had suffered an occupational detriment which amounted to an unfair labor practice in terms of s 186(2)(b) of the LRA 1995. The court noted that the real issue was whether the employees had in fact made a ‘disclosure’ as envisaged by the PDA. After a detailed analysis of the definitions of ‘disclosure’ and of ‘employer’ and ‘employee’ in the Act, and of the elements necessary to qualify disclosures of information as ‘protected’, the court concluded that the employees' complaints were not ‘disclosures’ as contemplated, and that they were not worthy of protection.
In Ramsammy v Wholesale & Retail Sector Education & Training Authority, the Labor Court was similarly required to determine, initially, whether the applicant had made one or more protected disclosures in terms of the PDA. After an in depth consideration of the provisions of the Act and of the various allegations made, the court found that the employee had no ‘information’ to sustain his allegations, which were mere conjectures, and that he could not have had a reasonable belief in their truth. They were therefore not protected in terms of the Act. In this decision and in Radebe the courts made detailed reference to the earlier Labour Court decision in Tshishonga v Minister for Justice & Constitutional Development & another(2007) 28 ILJ 195 (LC) which, as already indicated, was varied on appeal only on the issue of compensation.

The case with the commonly known “Travelgate whistle-blower”, Harry Charlton has gone through Labor Court, Labor Appeal Court and is shortly to be referred to Supreme Court’s arbitration. Harry Charlton believes that his dismissal from Parliament in 2006 was unfair after he was reported to have uncovered travel voucher scam involving Members of Parliament, travel agents and what is believed to be the taxpayers’ money. He was reported to have been dismissed under the charges of misconduct.

In 2009 Jimmy Mohlala, a member of the local organizing committee for the World Cup football tournament, was reported shot dead. The Telegraph refers to reports one year prior to the incident where apparently some members of the ruling African National Congress (ANC) wanted him sacked for allegedly turning in a colleague over corruption claims in the construction of the Mbombela stadium in Nelspruit. It was reported that Mohlala’s claims over corruption claims in the construction of the Mbombela stadium “sparked an investigation into a range of allegations, including the manipulation of tenders in 2010 construction contracts.”

The protection of Information Bill which is before the Parliament contains clauses that increase the government’s power to keep state information out of the public domain. Specific sections such as Chapter 11, section 32, and section 38 introduce strict penalties for those who disclose classified information even if it is in public interest. This would have a chilling effect on whistle-blowers and investigative journalists who reveal any possible corrupt practices or wrongdoings in government and private sectors.

In practice, Ms. Emma Levy, a whistle-blowing advocacy co-coordinator at ODAC and who also manages the projects with unions and their commitment to whistle-blowing in South Africa explains that a completely new development is taking place in whistle-blowing in South Africa today. She observes that despite the fact that the unions are a part of government in South Africa, they are now starting to take up and act as intermediaries for individual whistle-blowers. Ms. Levy further notes that the Congress of South African Trade Unions (Cosatu) also made whistle-blowing a part of a national anti-corruption strategy for service delivery and also demonstrated an increased commitment to whistle-blowing law in response to Protection of Information Bill’s controversial provisions that introduce severe penalties for whistle-blowers for disclosing classified information. In addition, Ms. Levy explains that sometimes it is also hard to distinguish whether whistle-blowing is used for political purposes or in good faith as indicated in law.

References:
Elseev, A,
“DA: explain corruption hotline irregularities,”
http://www.thestar.co.za/?fSectionId=&fArticleId=vn2008050705333287C556581

http://www.legalbrief.co.za/article.php?story=200908240858299802

Interview with Ms. Emma Levy, Whistle-blowing Advocacy Coordinator, Open Democracy Advice Center (ODAC), Nov. 10, 2010.

ODAC.
“Pollsmoor nurse vindicated: awarded six months salary by bargaining council”, Press Statement.

ODAC.
http://www.opendemocracy.org.za

Public Service Commission (PSC).
“Measuring the effectiveness of the National Anti-Corruption Hotline (NACH),” Pretoria: Public Service Commission, 2007

SAPA.
“Frere hospital chief fired”,
Sept. 28, 2007, Mail & Guardian.

SAPA.
“Whistleblowers risk being fired, says FXI”,
Aug. 24, 2007, IOL.

“Land Bank graft whistleblower lives in fear.”

Tilley, A,
“Navy whistle-blowers bring debate to the surface”,

“Whistleblower’s lawyer hits back,”
http://www.sundayindependent.co.za/?fSectionId=&fArticleId=vn20100723124208430C259818

“World Cup Whistleblower Shot Dead in South Africa,”
Jan. 5, 2009, Telegraph,

<
100: Public sector whistleblowers can report abuses of power without fear of negative consequences. This may be due to robust mechanisms to protect the identity of whistleblowers or may be due to a culture that encourages disclosure and accountability.

75:

50: Public sector whistleblowers are sometimes able to come forward without negative consequences, but in other cases, whistleblowers are punished for disclosing, either through official or unofficial means.

25:

0: Public sector whistleblowers often face substantial negative consequences, such as losing a job, relocating to a less prominent position, or some form of harassment.

48c. In law, private sector employees who report cases of corruption, graft, abuse of power, or abuse of resources are protected from recrimination or other negative consequences.

Yes | No

Comments:
The Protected Disclosures Act (26 of 2000) protects all employees in both the public and private sector from occupational detriment when disclosing information relating to suspected or alleged criminal or other irregular conduct in the workplace. The Act also protects disclosures related to a failure to comply with a legal obligation, a miscarriage of justice, endangering the health or safety of an individual, damaging of the environment, or unfair discrimination.

The Act details how instances of criminal or irregular conduct should be reported, preferably within the organization and only outside of the organization under certain circumstances. If the reported wrongdoing concerns one of the instances described above and is reported correctly, the Act protects the whistle-blower from occupational detriment, including victimization or dismissal.

The Act also specifies remedies in cases where an employee is subjected to occupational detriment, including approaching a court with jurisdiction, such as the Labor Court. The remedies for unfair treatment may include re-instatement, removal of the discrimination, or two years' salary as compensation.

The Act further specifies that employees making protected disclosures, who reasonably believe that they may be adversely affected, must, at their request, be transferred to another post or position in the same or another division.

However, there are some weaknesses in the Act. The confidentiality of the whistle-blower is not protected, nor does the Act deal with defamation charges brought against a whistle-blower.

The maximum compensation amount of 24 months' salary is also low, particularly when costs including protracted legal proceedings and negative perceptions by potential employers and the community are taken into account.

The whistle-blowing provisions under section 159 of the New Companies Act (71 of 2008) supplement the provisions of the Protected Disclosures Act.

Section 159(4) widens the scope of the Protected Disclosures Act to cover independent contractors, service providers and trade union shop stewards.

Section 159(4) states that a shareholder, director, company secretary, prescribed officer or employee of a company, a registered trade union that represents employees of the company or another representative of the employees of that company, a supplier of goods or services to a company, or an employee of such a supplier, who makes a disclosure contemplated in this section —
(a) has qualified privilege in respect of the disclosure; and
(b) is immune from any civil, criminal or administrative liability for that disclosure.

Section 159(7) imposes a duty on companies to introduce whistle-blowing policies and publicize them. (See section on introducing a whistle-blowing policy)(7)

A public company and state-owned company must directly or indirectly (a) establish and maintain a system to receive disclosures contemplated in this section confidentially, and act on them; and (b) routinely publicize the availability of that system to the categories of persons contemplated in subsection (4).

References:
Open Democracy Advice Centre (ODAC).
http://www.opendemocracy.org.za

Protected Disclosures Act (Act 26 of 2000).

The Labor Relations Act (Act 66 of 1995).
The Companies Act (Act 71 of 2008).

Yes: A YES score is earned if there are specific laws against recrimination against private sector whistleblowers. This may include prohibitions on termination, transfer, harassment or other consequences.

No: A NO score is earned if there are no legal protections for private-sector whistleblowers.

48d. In practice, private sector employees who report cases of corruption, graft, abuse of power, or abuse of resources are protected from recrimination or other negative consequences.

100 | 75 | 50 | 25 | 0

Comments:
In law, private sector employees who report cases of corruption, graft, abuse of power or abuse of resources are protected under the Protected Disclosures Act (Act 26 of 2000). Some private companies have outsourced reporting hot lines to independent companies, to ensure that employees who disclose wrongdoing do not suffer negative consequences. However, when companies themselves are behind wrongdoing, for example through tax irregularities or the flouting of rules and regulations, whistle-blowers may be victimized or dismissed. Also, there have been some earlier cases of private sector whistle-blowers who have suffered negative consequences as a result of disclosure. For example, independent bread distributor Imraahn Mukaddam reported to the Competition Commission over price-fixing by Premier Foods, Pioneer Foods and Tiger brands, when bakeries raised bread prices in the Western Cape by identical amounts and cut the distributors' commission. Following this disclosure, he was subject to defamation and underwent numerous financial difficulties. However, the response of the Competition Commission has been to assert that the Commission functions “to protect competition and not individuals”.

In addition, a recent study conducted by organized business on Corruption in the South African Private Sector highlighted the need for greater attention and support to whistle-blowers.

References:


100: Private sector whistleblowers can report abuses of power without fear of negative consequences. This may be due to robust mechanisms to protect the identity of whistleblowers or may be due to a culture that encourages disclosure and accountability.

75:

50: Private sector whistleblowers are sometimes able to come forward without negative consequences, but in other cases, whistleblowers are punished for disclosing, either through official or unofficial means.

25:

0: Private sector whistleblowers often face substantial negative consequences, such as losing a job, relocating to a less prominent position, or some form of harassment.
49a. In law, is there an internal mechanism (i.e. phone hotline, e-mail address, local office) through which civil servants can report corruption?

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Comments:
The Department of Public Service and Administration (DPSA) has issued Minimum Anti-Corruption Capacity for Departments and Organizational Components in the Public Service guidelines, which require all government departments to establish internal information systems to record allegations, and ensure capacity to investigate them.

The Public Service Commission also has operated a National Anti-Corruption Hotline for Public Service since September of 2004 – a national, toll-free, non-stop hotline, along with a fax, email and mail reporting system. Based on its assessment of the National Anti-Corruption Hotline (NACH), PSC confirms that whistle-blowing hotlines are available outside normal office hours, allowing employees and members of the public to make calls and discuss their concerns in complete 24 hours a day, seven days a week. Reports to the hotline are re-directed to the relevant departments. However, PSC’s recently released ‘State of the Public Service Report 2010’ states that the feedback from those departments on reported cases of corruption is minimal. It observes that the feedback rate on all the cases referred to departments since 2004 stands at only 36 percent. The feedback, in percentage terms for 2008/2009 was 27 percent and 10 percent for a similar time period in 2009/2010 financial year. Currently, some other government departments have also established reporting lines, such as the Ethical Helpline of the Independent Complaints Directorate (ICD) and the Anti-Fraud and Corruption Hotline of the South African Revenue Services (SARS). Moreover, anti-corruption hotlines have been established in some provinces, such as the Eastern Cape.

However, the PSC’s National Anti-Corruption Hotline will eventually replace other existing hotlines in government departments and provincial administrations.

Civil servants, as well as members of the public, are also able to report suspicious activities, or lodge complaints online or via email, through the Office of the Public Protector and SARS. Each province also has an office where individuals can make walk-in disclosures. Finally, in cases where there are implications of organized crime, one could also make a report to the Scorpions crime-fighting unit in person or on the phone, but the Scorpions was officially disbanded in late January 2009.

References:


Public Protector of South Africa. http://www.publicprotector.org


Yes: A YES score is earned if there is a mechanism, or multiple mechanisms for multiple national government agencies, through which civil servants can report cases of graft, misuse of public funds, or corruption.

No: A NO score is earned if no such mechanism (or equivalent series of mechanisms) exists.

50. In practice, is the internal mechanism (i.e. phone hotline, e-mail address, local office) through which civil servants can report corruption effective?
50a. In practice, the internal reporting mechanism for public sector corruption has a professional, full-time staff.

Comments:
As the government’s main mechanism for allowing disclosures and detection corruption in the public service, the National Anti-Corruption Hotline (0800701701) has professional, full-time staff. Callers can report in any of the eleven official languages, and Hotline operators are provided with a checklist to assist in communication with callers. PSC confirms that the interpreters are also carefully screened and tested in telephone interpretation, customer service skills, confidentiality issues and customer specialized terminology. The PSC also established a dedicated standby unit for the management of case referral. However, the Public Service Commission (PSC) has confirmed the operators are trained to obtain maximum relevant information but also acknowledged that the interrogation skills of operators as a problem area that hinders the effective functioning of the Hotline, and this has been confirmed in feedback from both national and provincial government departments.

Other government departments with internal reporting mechanisms in place, including the Independent Complaints Directorate, the South African Revenue Service, and the Department of Home Affairs, also employ full-time, professional staff in the operation of these mechanisms. However, a number of sources suggest that other national and provincial departments lack adequate institutional capacity to establish and maintain the reporting and investigating of cases of corruption.

For litigation, ODAC also provides assistance for reporting corruption and/or whistle-blower protection through its toll-free helpline number 0800 52 53 52, e-mail: help@opendemocracy.org.za and SMS: HELP to 0737860459.

Although the internal reporting mechanism is in place and fully staffed, reports indicate that employees are not fully aware of the proper disclosure procedure. Ms. Emma Levy, a whistle-blowing advocacy co-coordinator at ODAC and who also works over projects with unions and their commitment to whistle-blowing in South Africa observes that despite the fact that anonymous hotlines have been set up, employees have known very little of their statutory labor rights to protection for making a disclosure. "Our experience has been that employees only ring for confidential advice when the process has gone wrong and the employee is being called to a disciplinary hearing, transferred or already dismissed. Nine times out of 10, the employee did not know the disclosure procedure and reported the wrongdoing incorrectly” says Ms Levy.

References:

Interview with Ms. Emma Levy,
Whistle-blowing Advocacy Coordinator, Open Democracy Advice Center (ODAC), Nov. 10, 2010.

Open Democracy Advice Center.
http://www.opendemocracy.org.za


100: The agency/entity has staff sufficient to fulfill its basic mandate.
75:
50: The agency/entity has limited staff, a fact that hinders its ability to fulfill its basic mandate.
25:
0: The agency/entity has no staff, or a limited staff that is clearly unqualified to fulfill its mandate.

50b. In practice, the internal reporting mechanism for public sector corruption receives regular funding.

Comments:
The National Anti-Corruption Hotline operated by the Public Service Commission (PSC) receives consistent funding, as reflected in the 2010 Estimates of National Expenditure released by National Treasury. However, the PSC also contends that funding has been concentrated primarily on the operation of the call center, to the detriment of the dedicated unit established to manage case referrals and other initiatives. In its 2008 report, PSC notes that the volume of calls received through the NACH increases on an
annual basis and that the NACH call volumes has increased by nearly 200 percent since its inception. In order to meet the
increased call volumes, PSC is of a view that it needs to match the capacity of the call center by increasing the funding. It
recommended that additional funding for the operation and management of the NACH be considered by National Treasury as a
priority. PSC also states that it has not been able to market the NACH widely due to funding constraints.

Other permanent anti-corruption units within various departments also receive regular funding, including those located in the
Independent Complaints Directorate and the South African Revenue Service. Nonetheless, limited resources, especially in the
provincial departments, are often cited as the reason behind poor feedback and investigation performance rates.

References:


"Measuring the effectiveness of the National Anti-Corruption Hotline (NACH)". Pretoria: Public Service Commission.


100: The agency/entity has a predictable source of funding that is fairly consistent from year to year. Political considerations
are not a major factor in determining agency funding.

75:

50: The agency/entity has a regular source of funding but may be pressured by cuts, or threats of cuts to the agency budget.
Political considerations have an effect on agency funding.

25:

0: Funding source is unreliable. Funding may be removed arbitrarily or as retaliation for agency actions.

50c. In practice, the internal reporting mechanism for public sector corruption acts on complaints within a reasonable time
period.

Comments:
The Call Center for the National Anti-Corruption Hotline (NACH) must submit cases to the Public Service Commission (PSC)
within 24 hours for approval and referral to departments. Although government departments are then required to provide
feedback to the PSC on the status of cases originating from the NACH within 40 days of referral, PSC reports suggest that
performance has been disappointing overall in this regard. For instance, in 2006-2007, the PSC received feedback on only 30
percent of cases referred to provincial departments. Between September 2004 and November 2006, only 142 cases out of 2,296
referred to departments were closed, following the conclusion of an investigation. Reportedly, in some provinces such as
KwaZulu-Natal, investigations have only begun six months after the original referral from the PSC. Similar trend has been
observed steadily up until today. The PSC 2010 report indicates that the feedback rate received by the PSC on NACH on all the
cases referred to departments since 2004 stands at only 36 percent. The feedback, in percentage terms for 2008/2009 was 27
percent and 10 percent for a similar time period in the 2009/2010 financial year.

In spite of these reports, sources highlight that most of the serious allegations reported to the NACH have been dealt with in an
appropriate period of time.

Reports suggest that other internal reporting mechanisms have also yielded positive results. For example, the 2009/10 Annual
Report of the South African Revenue Service (SARS) underscored successful responses to fraud and corruption through
numerous internal investigations that resulted in dismissing a number of senior employees for breaches of conduct and
corruption. The Independent Complaints Directorate also reported success in the handling of corruption and fraud allegations
during 2009 and 2010 and that the percentage of fraud out of total number of criminal offenses was minimal.

References:

SAPA,
"Reported cases of Public Sector Corruption on the Rise."
April 20, 2008, Mail & Guardian,
http://www.mg.co.za/article/2008-04-20-reported-cases-of-publicsector-corruption-on-the-rise
100: The agency/entity acts on complaints quickly. While some backlog is expected and inevitable, complaints are acknowledged promptly and investigations into serious abuses move steadily towards resolution. Citizens with simple issues can expect a resolution within a month.

75:

50: The agency/entity acts on complaints quickly, with some exceptions. Some complaints may not be acknowledged, and simple issues may take more than two months to resolve.

25:

0: The agency/entity cannot resolve complaints quickly. Complaints may be acknowledged for more than a month, and simple issues may take more than three months to resolve. Serious abuses are not investigated with any urgency.

Comments:
The Public Service Commission (PSC) has neither the power nor the institutional capacity, to initiate investigations, and instead refers allegations reported through the National Anti-Corruption Hotline (NACH) to relevant departments to investigate. The State of the Public Service report of 2010 observes that departmental capacity to follow up on these cases and investigate them is lacking. It further suggests that building of such capacity in each department may take much longer, and recommends creating a centralized capacity (in the Offices of Premiers, for example) to help fight corruption. Also, it has been suggested that increasing the PSC’s investigative capacity would enable the Commission to handle a number of sensitive investigations that are not being followed through by departments.

Instead, a number of actions have been taken, which are reflected in the budget of the PSC. Each public service department is required to meet a minimum requirement of investigative capacity. However, it is also apparent, as stated above, that this is lacking in a number of departments. In addition to a lack of investigative capacity in departments, the 2008/09 research study by PSC found that departments do not have appropriate structures or specialized units to deal with cases of alleged corruption as required by the Minimum Anti-Corruption Capabilities as set out by Cabinet. Investigative capacity is stronger in other national and provincial departments, indicating varying degrees of compliance, capacity and implementation.

References:


100: When irregularities are discovered, the agency/entity is aggressive in investigating the government or in cooperating with other agencies’ investigations.

75:

50: The agency/entity starts investigations, but is limited in its effectiveness. The agency/entity may be slow to act, unwilling to take on politically powerful offenders, reluctant to cooperate with other investigative agencies, or occasionally unable to enforce its judgments.

25:

0: The agency/entity does not effectively investigate. The agency/entity may start investigations but not complete them, may refuse to cooperate with other investigative agencies, or may fail to detect offenders. The agency/entity may be partisan in its application of power.
4.3. Government Procurement: Transparency, Fairness, and Conflicts of Interest Safeguards

51. Is the public procurement process effective?

51a. In law, there are regulations addressing conflicts of interest for public procurement officials.

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
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Comments:
Conflict of interest in respect of public procurement is regulated in terms of the Public Finance Management Act (2009), the National Treasury Regulations for Supply Chain Management, and the Public Service Regulations.

References:
- Public Finance Management Act (Act 1 of 1999).
- Public Service Regulations (2001), in terms of the Public Service Act (1994).
- Telephonic interview with Marcia Sheraton, economist, Provincial Treasury Western Cape Provincial Administration, Sept. 3, 2008, Cape Town
- Public Service Act. (No 38 of 1994).

Yes: A YES score is earned if there are specific formal regulations defining and regulating conflicts of interest between official public duty and private interests for public procurement officials. A YES score is earned if such regulations cover all civil servants, including procurement officials.

No: A NO score is earned if no such rules exist.

51b. In law, there is mandatory professional training for public procurement officials.

<table>
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<tr>
<th>Yes</th>
<th>No</th>
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</table>

Comments:
Section 2.6.1 of the Supply Chain Management Framework Regulations requires that Chief Financial Officers (CFOs) ensure adequate training of any procurement related personnel, in addition to the training support they receive from the National Treasury and other service providers.

References:
- Public Finance Management Act (Act 1 of 1999).
The Standards for Uniformity in Construction Procurement Procedures were amended to specifically address conflicts of interest in procurement. In February 2008, the Construction Industry Development Board introduced standardized bidding documents, directives for the appointment of consultants and a code of conduct applicable to all Supply Chain Management practitioners. The Framework is applicable to all national and provincial departments, constitutional institutions and public entities listed in schedules 3A and 3C of the PFMA.

In some cases, sector-specific guidelines have also been developed. For example, in February 2008, the Construction Industry Development Board amended the Standards for Uniformity in Construction Procurement Procedures to specifically address conflicts of interest in procurement, among other issues. The Standards explicitly define conflicts of interest as any situation in which: someone in a position of trust has competing professional or personal interests which make it difficult to fulfill his or her duties impartially, an individual or organization is in a position to exploit a professional or official capacity in some way for their personal or corporate benefit or where incompatibility or contradictory interests exist between an employee and the organization which employs that employee. The Standards also detail circumstances in respect of persons involved in the procurement process, which include direct, indirect or family interests in the tender or outcome of the procurement process and any personal bias, inclination, obligation, allegiance or loyalty which would in any way affect any decisions taken. The Standards compel employers, tenderers, agents and employees involved in tender process to avoid conflicts of interest, and declare conflicts where they exist. The Standards further require that employees, agents and advisors of the employer shall declare any conflict of interest to whoever is responsible for overseeing the procurement process at the start of any deliberations relating to the procurement process or as soon as they become aware of such conflict, and abstain from any decisions where such conflict.

The Financial Disclosure Framework, which provides guidelines on managing conflicts of interest and the submission of financial disclosure forms, and which requires all members of the Senior Management Service (SMS) to disclose their financial interests, is in operation. The enforcement of this regulation is not strictly adhered to with the low and gradually shrinking compliance rate providing clear evidence in this regard. For instance, the Fact Sheet on the Financial Discloser Framework for the 2009/2010 Financial year by the PSC confirmed a 3 percent decline in the compliance rate from 49 percent in 2008/09 to 47 percent in 2009/10.

More directly related to procurement process, in 2003 Cabinet adopted the ‘Policy to Guide Uniformity in Procurement Reform Processes in Government’, which preceded the implementation of a number of procurement reform initiatives, and the issuing of the Regulations for the Framework for Supply Chain Management, as per section 76(4) (c) of the Public Finance Management Act (PFMA) (Act 1 of 1999).

The Supply Chain Management Framework required all accounting officers/authorities to establish and implement a supply chain management function that promotes sound financial management and uniformity in all spheres of government. Subsequent ‘Practice Notes’ issued by the National Treasury introduced standardised bidding documents, directives for the appointment of consultants and a code of conduct applicable to all Supply Chain Management practitioners. The Framework is applicable to all national and provincial departments, constitutional institutions and public entities listed in schedules 3A and 3C of the PFMA.

The Regulations to the State Tender Board Act (Act 86 of 1968) were also amended: whereas previously the Regulations required that procurement of all goods and services had to be done only through the State Tender Board, the amended Regulations now allow for accounting officers of national departments to procure goods and services either through the State Tender Board or alternatively in terms of the Public Finance Management Act, No. 1 of 1999 (as amended by Act 29 of 1999) (PFMA).
exists or recuse themselves from the procurement process, as appropriate. However, the effectiveness of implementation and enforcement of these regulations remains questionable.

Transparency International's 2010 Report rates South Africa amongst the poorest enforcers of anti-corruption legislations and regulations. In direct reference to procurement enforcement issues, the report notes the 2009 incident in which a former chairman of a state-owned enterprise (ESKOM) was reportedly found to have failed to manage a conflict of interest that arose when the utility awarded the R16 billion contracts to supply boilers for the Medupi power station to the Hitachi consortium.

References:

Khumalo, Junior, Nqojela Pamela & Njisane, Yongama
"Cover pricing in the construction industry: understanding the practice within a competition context," (2009)

Interview (telephonic) with John Van Rheede, Deputy Director: Economic Empowerment Unit, Department of Economic Development and Tourism, Western Cape Provincial Administration, Sept. 4, 2008, Cape Town.

Interview (telephonic) with Jan Breytenbach, Chief Director: Norms and Standards, National Treasury, Oct. 17, 2008.


Public Finance Management Act (Act 1 of 1999).

http://www.psc.gov.za/

http://www.psc.gov.za/home.asp

Public Service Regulations, 2001, in terms of the Public Service Act (1994).


http://www.psc.gov.za/documents/2010/FAC%20SHEET%20FOR%202009%202010%20Approved%20FINAL.pdf


Wa Afrika, Mzilikazi and Hofstatter, Stefan
"ANC provincial boss bust for tender fraud: Former premier John Block charged in R40m fraud case". Nov. 4, 2010, Timeslive.

100: Regulations regarding conflicts of interest for procurement officials are aggressively enforced.

75:

50: Conflict-of-interest regulations exist, but are flawed. Some violations may not be enforced, or some officials may be exempt from regulations.

25:

0: Conflict-of-interest regulations do not exist, or are consistently ineffective.
The public service regulations requiring annual asset disclosures by all senior officials are monitored by the Public Service Commission. The Public Service Act, 1994, read with the Code of Conduct for Public Servants of 2001, provides that employees must serve the public in an unbiased and impartial manner in order to create confidence in the Public Service. In terms of this regulation a public servant may not engage in any transaction or action that is in conflict with or infringes on the execution of his or her official duties. Public servants must refrain from any official action and recuse themselves from any decision-making process which may result in improper personal gain, and such recusal should be properly declared by the employee. The Code also requires that a public servant does not abuse his or her position in the Public Service to promote or prejudice the interest of any political party or interest group.

Moreover, the PFMA provides in Section 50(3) for a mechanism requiring that a member of an accounting authority must disclose to the accounting authority any direct or indirect personal or private business interest that that member or any spouse, partner or close family member may have in any matter before the accounting authority, and withdraw from the proceedings of the accounting authority when that matter is considered. The accounting authority may grant an exemption if the interest is trivial or irrelevant.

A Treasury Circular prescribes a procedure for members of the Committee to declare their interests annually. At each meeting of the Committee, each Committee member and each official providing administrative support to the Committee must sign a declaration that they will not purposefully favor or prejudice anybody.

The Code also requires in strict and unequivocal terms that an attendance register must be signed by members at each meeting; that this register must include a declaration of interests, including all gifts and invitations accepted to social events received from suppliers or potential suppliers, irrespective of the value; and that the register must form part of the official minutes. The Code also requires that no discussions may take place until each member (including the chairperson or vice-chairperson) declares every reasonably possibly relevant interest concerning any matter serving before the Committee and until affected members have recused themselves.

The guidelines are explicitly stated to be supplementary to the Code of Conduct for the Public Service as contained in Chapter 2 of the Public Service Regulations, 2001, as well as to the Code of Conduct for Supply Chain Management Practitioners, issued on Dec. 5, 2003, as practice note number SCM 4 of 2003.

Additionally, in terms of section 23(3)(b) of the Prevention and Combating of Corrupt Activities Act, a judge may authorize an investigation of an allegation of corruption if satisfied, among others things, that there are reasonable grounds to believe that a person maintains a standard of living above that which is commensurate with his or her present or past known sources of income or assets, or is in control or possession of pecuniary resources or property disproportionate to his or her present or past known sources of income or assets; and that person maintains such a standard of living through the commission of corrupt activities or the proceeds of unlawful activities or that such pecuniary resources or properties are instrumentalities of corrupt activities or the proceeds of unlawful activities.

Section 34(1) imposes a responsibility on any person who holds a position of authority and who knows or ought reasonably to have known or suspected that any other person has committed an offense in terms of the Act to report such knowledge or suspicion to a police official. Failure to do so is an offense.

References:
Section G of Chapter 3 of the Public Service Regulations (2001), in terms of the Public Service Act (1994).


Yes: A YES score is earned if there is a formal mandate to some agency to monitor the assets, incomes and spending habits of public procurement officials, such as an inspector general, or ombudsman.

No: A NO score is earned if no such mandate exists.
### Yes:
A YES score is earned if all major procurements (defined as those greater than 0.5% of GDP) require competitive bidding.

### No:
A NO score is earned if competitive bidding is not required by law or regulation for major procurement (greater than 0.5% of GDP).

| 51f. In law, strict formal requirements limit the extent of sole sourcing. |
|---|---|
| **Yes** | **No** |

### Comments:
In terms of Section 217 of the Constitution, any organ of state must contract for goods or services in accordance with a system which is fair, equitable, transparent, competitive and cost effective. In accordance with the aforementioned Constitutional Requirement, Section 76(4) (c) of the Public Finance Management Act of 1999 obliges accounting officers and authorities of a department, trading entity or constitutional institution to ensure an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective. The National Treasury regulations do, however, allow competitive bidding to be bypassed in circumstances where such bidding is impractical, but they specify that the responsible authority must document the reasons for the deviation. Minor procurements below a threshold amount, determined annually by proclamation in the Government Gazette (currently R5,000 – US$500), need not follow a competitive bidding process.

### References:

Public Finance Management Act (Act 1 of 1999).


### Yes:
A YES score is earned if sole sourcing is limited to specific, tightly defined conditions, such as when a supplier is the only source of a skill or technology.

### No:
A NO score is earned if there are no prohibitions on sole sourcing. A NO score is earned if the prohibitions on sole sourcing are general and unspecific.

| 51g. In law, unsuccessful bidders can instigate an official review of procurement decisions. |
|---|---|
| **Yes** | **No** |

### Comments:
In terms of Clause 9 of Treasury’s Supply Chain Management Framework Regulations state, authorities responsible for procurement must investigate any allegations against an official or other role player of corruption, improper conduct or failure to comply with the supply chain management system. Further, in terms of the aforementioned regulations, the National Treasury and each provincial treasury is required to establish a mechanism to receive and consider complaints regarding alleged non-compliance with prescribed norms and standards; and to make recommendations for remedial actions to be taken if non-compliance with norms and standards is established, including recommendations of criminal steps.
**Yes:** A YES score is earned if there is a formal appeal process for unsuccessful bidders.

**No:** A NO score is earned if no such process exists.

**Comments:**

Sections 8 of the Constitution provides that the Bill of Rights, of which Sections 34 and 38 form part, applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. Section 34 provides that everyone has access to the courts, and Section 38 provides that anyone listed may approach the courts in order to enforce the rights in the Constitution and for appropriate relief. Unsuccessful bidders can, in terms of the Public Finance Management Act, challenge the bidding process in court. In terms of standard legal principles and the law, litigation can be undertaken if dissatisfaction persists after pursuing the complaints mechanisms of the various treasuries (National and Provincial), which can, after investigating a particular matter, also recommend criminal steps.

**References:**


**Yes:** A YES score is earned if unsuccessful bidders can use the courts to appeal a procurement decision.

**No:** A NO score is earned if no such process exists.

**Comments:**

Clause 9 of Treasury’s regulations stipulate that officials responsible for procurement must reject a proposal for the award of a contract if the recommended bidder has committed a corrupt or fraudulent act in competing for particular bid. The regulations require that procurement officials must check the national treasury’s database prior to awarding any contract to ensure that no recommended bidder, nor any of its directors are listed as companies or persons prohibited from doing business with the public sector. The database is the Register established in terms of Chapter 6 of the Prevention and Combating of Corrupt Activities Act.

**References:**


Yes: A YES score is earned if there are formal procurement blacklists, designed to prevent convicted companies from doing business with the government.

No: A NO score is earned if no such process exists.

51. In practice, companies guilty of major violations of procurement regulations (i.e. bribery) are prohibited from participating in future procurement bids.

100 75 50 25 0

Comments:
Accounting Officers and state institutions in general are required to check the National Treasury's database with a list of suppliers and Register of Tender Defaulters, prior to awarding contracts for procurement. The National Treasury has however – in its July 10, 2010, Supply Chain Management (SCM) circular- noted gross negligence by state institutions in this regard, and this has put the state at risk of accepting major procurement violators in the bidding system and subsequently advising CFO’s to be cautious.

References:
Public Finance Management Act (Act1 of 1999).


100: A system of formal blacklists and cooling off periods is in place for companies convicted of corruption. All companies are subject to this system.

75:

50: A system of formal blacklists and cooling off periods is in place, but the system has flaws. Some procurements or companies may not be affected by the system, or the prohibitions are sometimes not effective.

25:

0: There is no such system, or the system is consistently ineffective in prohibiting future hiring of blacklisted companies.

52. Can citizens access the public procurement process?

100

52a. In law, citizens can access public procurement regulations.

Comments:
In terms of Section 217 (1) of the Constitution, procurement processes undertaken by any state organ or entity must be subject to a system that is fair, equitable, transparent and competitive. This is in line with the Promotion of Access to Information Act (PAIA) which ensures citizens the right to access the record of public bodies. More specifically, Section 38(1)(a)(iii) of the Public Finance Management Act gives effect to Section 217(1) of the Constitution by requiring, among other things, that procurement regulation processes are made available and accessible to the public.
However, the Promotion of Access to Information Bill—which proposes further regulation and classification of state information—leaves the future policy environment regarding access to information, including access to privatization, regulations uncertain.

References:


Public Finance Management Act (Act 1 of 1999).

Promotion of Access to Information Act (Act 2 of 2000).

Protection of Information Bill (B6 – 2010).

Yes: A YES score is earned if procurement rules are, by law, open to the public. These regulations are defined here as the rules governing the competitive procurement process.

No: A NO score is earned if procurement rules are officially secret for any reason or if there are no procurement rules.

52b. In law, the government is required to publicly announce the results of procurement decisions.

| Yes | No |

Comments:
Section 76(4)(c) of the Public Finance Management Act of 1999 obliges accounting officers and authorities of a department, trading entity or constitutional institution to ensure an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective. This provision necessitates the publication of results of procurement decisions. In terms of Section 63(4) of ‘A Framework for Supply Chain Management’, awards must be published in the Government Tender Bulletin and other media by means of which the bids were advertised.

However, the Promotion of Access to Information Bill, which proposes further regulation and classification of state information, renders the future policy environment regarding access to information, including access to privatization, regulations uncertain.

References:
Public Finance Management Act (Act1 of 1999).


Protection of Information Bill (B6 – 2010).

Yes: A YES score is earned if the government is required to publicly post or announce the results of the public procurement process. This can be done through major media outlets or on a publicly-accessible government register or log.

No: A NO score is earned if there is no requirement for the government to publicly announce the results of the public procurement process.

52c. In practice, citizens can access public procurement regulations within a reasonable time period.
Comments:
All procurement regulations are easily accessible on the web site of the National Treasury. In addition, new regulations and amendments are posted on the web site immediately.

However, the Promotion of Access to Information Bill, which proposes further regulation and classification of state information, renders the future policy environment regarding access to information, including access to privatization, regulations uncertain.

References:

Telephonic interview with Aletta Mbuyani, Supply Chain Specialist, the National Treasury, Sept. 5, 2008.


100: Records are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information. These records are defined here as the rules governing the competitive procurement process.

75:

50: Records take around two weeks to obtain. Some delays may be experienced.

25:

0: Records take more than a month to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

52d. In practice, citizens can access public procurement regulations at a reasonable cost.

Comments:
The Web site of the National Treasury publishes all regulations relating to procurement and can be accessed free of charge. Alternatively, a minimum charge can be paid to obtain hard copies from the Government Printer.

However, the Promotion of Access to Information Bill, which proposes further regulation and classification of state information, renders the future policy environment regarding access to information, including access to privatization, regulations uncertain.

References:


Telephonic interview with Aletta Mbuyani, Supply Chain Specialist, the National Treasury, Sept. 5, 2008.


100: Records are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line. These records are defined here as the rules governing the competitive procurement process.

75:

50: Records impose a financial burden on citizens, journalists or NGOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.
Retrieving records imposes a major financial burden on citizens. Records costs are prohibitive to most citizens, journalists, or NGOs trying to access this information.

In practice, major public procurements are effectively advertised.

Comments:
Public procurements are widely advertised through the weekly state and provincial tender bulletins and through the print media, particularly newspapers. According to Sabinet, there are over 100 sources in South Africa where tenders are announced and advertised. The Government Tender Bulletin is available online for free and in print for a small charge. Other professional tender databases, such as Tenderscan and Sabinet Online Tender Database, also charge to provide full and up-to-date information on all tenders. Free electronic procedures and training for bidders are provided by the National Treasury free of charge.

However, the Promotion of Access to Information Bill, which proposes further regulation and classification of state information, renders the future policy environment regarding access to information, including access to privatization regulations, uncertain.

References:


Telephonic interview with Aletta Mbuyani, Supply Chain Specialist, the National Treasury, Sept. 5, 2008.

Web site of the National Treasury:
and

Government web site:

Protection of Information Bill (B6 – 2010).

There is a formal process of advertising major public procurements. This may include a government website, newspaper advertising, or other official announcements. All major procurements are advertised in this way. Sufficient time is allowed for bidders to respond to advertisements.

There is a formal process of advertisement but it is flawed. Some major procurements may not be advertised, or the advertising process may not be effective. The time between advertisements and bidding may be too short to allow full participation.

There is no formal process of advertising major public procurements or the process is superficial and ineffective.

Tenders are generally opened in public on the closing date and the names of the bidders are announced. In compliance with the Supply Chain Management Regulations, the National Treasury publishes the results of major public procurement bids, including the names of the successful bidders, price and the scores they earned in regards to the established criteria. Unsuccessful bidders can also make inquiries to relevant authorities, and responses are generally forthcoming. The costs of accessing information are prescribed by the Regulations to the PAIA, and are also listed in 'The Guide on how to use the Promotion of Access to Information Act- Act 2 of 2000,’ as developed by the South African Human Rights Commission (SAHRC).
The costs of accessing information from a public body are reasonable, and are not prohibitive. A fee of R35.00 (US$3.5) is payable by all requesters, with the exception of individuals requesting personal information about themselves.

The Regulations also prescribe the following costs in respect of information from public bodies: photocopies, R0.60 (US$0.06) per A4-page; printing, R0.40 (US$0.04) per A4-page; copy onto a stiffy disc, R5.00 (US$0.5); copy onto a compact disc, R40 (US$4); transcription of visual images, R22 (US$2.2) per A4-page; copy of visual images, R50 (US$5); transcription of an audio record, R12 (US$1.2) per A4-page; copy of an audio record, R17 (US$1.7).

In addition, an access fee of R15 (US$1.5) is applicable for each hour or part of an hour, excluding the first hour, reasonably required for search and preparation of a record for disclosure. A deposit must be paid where search and preparation will exceed six hours, and one-third of the fee is payable as a deposit by the requester.

However, the Promotion of Access to Information Bill, which proposes further regulation and classification of state information, renders the future policy environment regarding access to information, including access to privatization regulations, uncertain.

References:
Tenders section on Western Cape Provincial government web site,
http://www.capegateway.gov.za/eng/tenders/open/


Telephonic interview with Aletta Mbuyani, Supply Chain Specialist, the National Treasury, Sept. 5, 2008.

Protection of Information Bill (B6 – 2010).


100: Records of public procurement results are publicly available through a formal process.

75:

50: Records of public procurements are available, but there are exceptions to this practice. Some information may not be available, or some citizens may not be able to access information.

25:

0: This information is not available to the public through an official process.

4.4. Privatization of Public Administrative Functions:
Transparency, Fairness, and Conflicts of Interest Safeguards

53. Is the privatization process effective?

92

53a. In law, all businesses are eligible to compete for privatized state assets.

Comments:
All businesses can compete for privatized state-owned enterprises/assets, in the same way as in any activity related to the management of public assets. However, guidelines for Broad-Based Black Economic Empowerment, as gazetted in 2007, set...
certain criteria to be met by businesses bidding for state enterprises/assets. The rationale for these criteria is to broaden the ownership base so as to benefit communities and individuals from previously disadvantaged backgrounds.

References:


Yes: A YES score is earned if all businesses are equally eligible to compete for privatized assets. A YES score is still earned if the government did not privatize any state-owned assets during the study period.

No: A NO score is earned if any group of businesses (other than those blacklisted due to corruption charges) is excluded by law.

53b. In law, there are regulations addressing conflicts of interest for government officials involved in privatization.

Yes | No

Comments:
There is no legislation dealing specifically with privatizations. However, various legislative measures, taken together, apply to the conduct of all public officials. The Public Service Regulations generally require public sector employees to declare any potential conflict of interest. These are monitored by the Public Service Commission. Furthermore, disclosure of personal assets and financial interests, including shares and interests in companies, land and property owned, paid outside employment, directorships and partnerships, consultancies, and gifts received from sources other than friends and family, is required from elected officials, senior public servants, Members of Parliament and Cabinet as well as their spouses and dependent children. However, the register of such assets has a public and private part which restricts access to these disclosure records.

Chapter 1 of the 2008 draft regulations also provides that if a possible conflict of interest arises in the performance of any act by any functionary in terms of these regulations, that functionary shall perform the act after considering a recommendation of an independent panel consisting of at least two persons, appointed by the relevant executive authority, and if the functionary is the relevant executive authority, the Minister shall appoint the panel.

The Public Service Act, 1994, read with the Code of Conduct for Public Servants, 2001 provide that employees must serve the public in an unbiased and impartial manner in order to create confidence in the Public Service. A public servant may not engage in any transaction or action that is in conflict with or infringes on the execution of his or her official duties. They must refrain from any official action and recuse themselves from any decision-making process which may result in improper personal gain and this should be properly declared by the employee. The Code also requires that a public servant does not abuse his or her position in the Public Service to promote or prejudice the interest of any political party or interest group.

Moreover, the PFMA provides in Section 50(3) for a mechanism requiring that a member of an accounting authority must disclose to the accounting authority any direct or indirect personal or private business interest that that member or any spouse, partner or close family member may have in any matter before the accounting authority and withdraw from the proceedings of the accounting authority when that matter is considered. The accounting authority may grant an exemption if the interest is trivial or irrelevant.

A Treasury Circular prescribes a procedure for members of tender committees to declare their interests annually. At each meeting of the Committee, each Committee member and each official providing administrative support to the Committee must also sign a declaration that they will not purposefully favor or prejudice anybody. The Code also requires in strict and unequivocal terms that an attendance register must be signed by members at each meeting; that this register must include a declaration of interests, including all gifts and invitations accepted to social events received from suppliers or potential suppliers, irrespective of the value, and that the register form part of the official minutes. The Code also requires that no discussions may take place until each member (including the chairperson or vice-chairperson) declares every reasonably possibly relevant interest concerning any matter serving before the committee and until affected members have recused themselves. The guidelines are explicitly stated to be supplementary to the Code of Conduct for the Public Service as contained in Chapter 2 of the Public Service Regulations, 2001, as well as to the Code of Conduct for Supply Chain Management Practitioners, issued on 5 December 2003 as practice note number SCM 4 of 2003.

Additionally, in terms of section 23(3)(b) of the Prevention and Combating of Corrupt Activities Act, a judge may authorize an investigation of an allegation of corruption if satisfied, among others things, that there are reasonable grounds to believe that a person maintains a standard of living above that which is commensurate with his or her present or past known sources of income or assets, or is in control or possession of pecuniary resources or property disproportionate to his or her present or past known sources of income or assets; and that person maintains such a standard of living through the commission of corrupt activities or maintains such a standard of living through the commission of corrupt activities or the proceeds of unlawful activities or that such pecuniary resources or properties are instrumentalities of corrupt activities or the proceeds of unlawful activities. Section 34(1) imposes a responsibility on any person who holds a position of authority and who knows or ought reasonably to have known or suspected that any other person has committed an offense in terms of the Act to report such knowledge or suspicion to a police official. Failure to do so is an offense.
Yes: A YES score is earned if there are specific formal regulations defining and regulating conflicts of interest between official public duty and private interests for privatization officials. A YES score is earned if such regulations cover all civil servants, including privatization officials.

No: A NO score is earned if there are no such formal regulations.

53c. In practice, conflicts of interest regulations for government officials involved in privatization are enforced.

Comments:
Various legislative measures, taken together, apply to the conduct of all public officials in relation to conflict of interest regulations of those involved in privatization. However, in practice this issue is not recently or currently applicable within the South African context. Primarily because South Africa has not seen the privatization of entities for over a decade and therefore it is impossible to judge the practical playing out of conflict of interest regulations for government officials involved in privatization.

In the 1990-2000 period, portions of State Owned Entities (SOEs) were sold to private stake holders. These SOEs included the Airports Company, Sun Air, Telkom, Eskom, Autonet, Abakor, South African Airways, Denel, South African Broadcast Association, South African Post Office and SAfcol amongst others. The methods adopted to privatize entities ranged from total to partial sale, introduction of a strategic partner or a Public-Private management contract. However given that the government has changed leadership a number of times since then it would be remiss to assess current state officials on experiences from 10-20 years ago.

In 2009, Department of Public Enterprises’ former Minister Barbara Hogan stated that state owned enterprises are not for sale and that the privatization debate is an old one which is a "fairly passé debate in many ways". She used the partial privatization of Telkom as an example of how the exercise of privatization did not aid or better the status quo as promised it would. This was reiterated in her 2010 Budget Vote speech with privatization of state entities being described as a "glib solution".

Currently there are members of political parties calling for the nationalization of assets which is completely contrary to the notion of privatization. However, this too has been disputed as the current modus operandi by President Jacob Zuma.
References:
Interview with Gary Pienaar, Snr Researcher, Governance and Ethics: Political Information Monitoring Service (PIMS) and Economic Governance Program (EGP), Idasa Cape Town, Nov. 17, 2010


100: Regulations regarding conflicts of interest for privatization officials are aggressively enforced.

75:

50: Conflict-of-interest regulations exist, but are flawed. Some violations may not be enforced, or some officials may be exempt from the regulations.

25:

0: Conflict of interest regulations do not exist, or are consistently ineffective.

54. Can citizens access the terms and conditions of privatization bids?

90

54a. In law, citizens can access privatization regulations.

Yes | No

Comments:
Whilst no specific legislation regulating privatization exists, the Promotion of Access to Information Act, the scope of which includes information relating to privatization, serves as the basis in this regard. It is accessible to the public. However, the Promotion of Access to Information Bill, which proposes further regulation and classification of state information, makes the policy environment regarding access to information, including access to privatization regulations, uncertain in the foreseeable future.

References:


Yes: A YES score is earned if privatization rules (defined here as the rules governing the competitive privatization process) are, by law, open to the public. Even if privatization is infrequent or rare, the most recent privatization should be used as the basis for scoring this indicator.
No: A NO score is earned if privatization rules are officially secret for any reason or if there are no privatization rules.

54b. In practice, privatizations are effectively advertised.

<table>
<thead>
<tr>
<th>Score</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>100</td>
<td>In cases where privatization of state-owned enterprise is to take place, requests for expressions of interest, a preliminary step prior to actual privatization, are advertised in both the print and electronic media.</td>
</tr>
<tr>
<td>75</td>
<td>There is a formal process of advertising privatizations. This may include a government website, newspaper advertising, or other official announcements. All major procurements are advertised in this way. Sufficient time is allowed for bidders to respond to advertisements.</td>
</tr>
<tr>
<td>50</td>
<td>There is a formal process of advertisement but it is flawed. Some privatizations may not be advertised, or the advertising process may not be effective. The time between advertisements and bidding may be too short to allow full participation.</td>
</tr>
<tr>
<td>25</td>
<td>There is no formal process of advertising privatizations or the process is superficial and ineffective.</td>
</tr>
<tr>
<td>0</td>
<td></td>
</tr>
</tbody>
</table>

Comments:
In cases where privatization of state-owned enterprise is to take place, requests for expressions of interest, a preliminary step prior to actual privatization, are advertised in both the print and electronic media.

References:
Interview with Nigel Gwynne Evans, Director: Trade and Industry, Western Cape Department of Economic Development and Tourism, Aug. 21, 2008, Cape Town.
The Department of Public Enterprise.
http://www.dpe.gov.za/

100: There is a formal process of advertising privatizations. This may include a government website, newspaper advertising, or other official announcements. All major procurements are advertised in this way. Sufficient time is allowed for bidders to respond to advertisements.

75:

50:

25:

0:

54c. In law, the government is required to publicly announce the results of privatization decisions.

<table>
<thead>
<tr>
<th>Score</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>In law, the government is required to publicly announce the results of privatization decisions.</td>
</tr>
<tr>
<td>No</td>
<td></td>
</tr>
</tbody>
</table>

Comments:
Section 1(d) of the Constitution entrenches the culture of openness as one of its founding values. The Promotion of Access to Information Act (PAIA) put forward general transparency standards for all state activities. Section 51 of the Public Finance Management Act (PFMA) and the Municipal Finance Management Act (MFMA) sets transparency standards with specific reference to the management of all public assets. There is, however, no legislative framework focused specifically on privatization, but the above mentioned are most relevant. However, the Promotion of Access to Information Bill, which proposes further regulation and classification of state information, makes the policy environment regarding access to information, including access to privatization regulations, uncertain in the foreseeable future.

References:
Promotion of Access to Information Act (PAIA) (Act 2 of 2000).
Public Finance Management Act (Act 1 of 1999).
Municipal Finance Management Act (No 56 of 2003).
Protection of Information Bill (B6 – 2010).

Yes: A YES score is earned if the government is required to publicly post or announce the results of the privatization process. This can be done through major media outlets or on a publicly-accessible government register or log.

No: A NO score is earned if there is no requirement for the government to publicly announce the results of the privatization process.

54d. In practice, citizens can access privatization regulations within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:
There have been no recent instances of privatization in South Africa, save for those which occurred in the late 1990s. Regulations governing privatization are, however, available to download at no cost from the website of the Department of Trade and Industry (DTI). In terms of Section 10 of the Promotion of Access to Information Act (PAIA) the South African Human Rights Commission (SAHRC) must produce a comprehensive Guide to the PAIA, published in all official languages, distributed to government departments, and available to the public. Section 3 of the SAHRC Guide provides procedures for requesting access to information, and includes the relevant forms required for requests to public and private bodies. The Guide explains procedural requirements for requesters, costs involved, appeals mechanisms, and grounds for refusal of requests. Individuals who are unable to read or write can also make oral requests from the information officer of a public body.

Section 14 of the PAIA also requires public bodies to develop specific manuals on how to access information. The DTI has developed a specific manual on accessing information for any DTI institutions, which can be downloaded for free online. Individuals may submit a request for information by fax, e-mail or hand delivery. The PAIA states that public bodies currently have 30 days to respond to requests for information (reduced from 60 days before March 2003 and 90 days before March 2002).

However, the Promotion of Access to Information Bill, which proposes further regulation and classification of state information, makes the future policy environment regarding access to information, including access to privatization regulations, uncertain in the foreseeable future.

References:


Interview with Nigel Gwynne Evans, Director, Trade and Industry: Western Cape Department of Economic Development and Tourism, Aug. 21, 2008, Cape Town.


Protection of Information Bill (B6 – 2010).

100: Records (defined here as the rules governing the competitive privatization process) are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

75:

50: Records take around two weeks to obtain. Some delays may be experienced.

25:

0: Records take more than a month to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records.
54e. In practice, citizens can access privatization regulations at a reasonable cost.

Comments:
There have been no recent instances of privatization in South Africa, save for those which occurred in the late 1990s. Regulations governing privatization are, however, available to download at no cost from the website of the Department of Trade and Industry (DTI).

Citizens can use the Promotion of Access to Information (PAIA) to request any information that is not published online. The costs of accessing information are prescribed by the Regulations to the PAIA, and are also listed in The Guide on how to use the Promotion of Access to Information Act – Act 2 of 2000 developed by the South African Human Rights Commission (SAHRC). The Regulations to the PAIA specify that this Guide must be made available in each official language to: the head of the national department responsible for Government Communications and Information Services (GCIS); to every place of legal deposit, as defined by the Legal Deposit Act (Act 54 of 1997), and every tertiary institution established under law; and, upon request, to the head of a private body.

The Regulations also require that the Guide be made available in each official language to the information officers of public bodies, and the Director-General of Communications. The Guide must be published in each official language in the government Gazette, made available in each official language for public inspection during at the SAHRC during office hours, and made available on the SAHRC web site. The costs of accessing information from a public body are reasonable, and are not prohibitive. A fee of R35.00 (US$3.5) is payable by all requesters, with the exception of individuals requesting personal information about themselves.

The Regulations also prescribe the following costs in respect of information from public bodies: photocopies, R0.60 (US$0.06) per A4-page; printing, R0.40 (US$0.04) per A4-page; copy onto a stiffy disc, R5.00 (US$0.5); copy onto a compact disc, R40 (US$4); transcription of visual images, R22 (US$2.2) per A4-page; copy of visual images, R60(US$6); transcription of an audio record, R12(US$1.2) per A4-page; copy of an audio record, R17 (US$1.7).

In addition, an access fee of R15 (US$1.5) is applicable for each hour or part of an hour, excluding the first hour, reasonably required for search and preparation of a record for disclosure. A deposit must be paid where search and preparation will exceed six hours, and one-third of the fee is payable as a deposit by the requester.

Further, the actual postage is payable when a copy of a record must be posted to a requester.

It is important to note that, according to the Open Democracy Advice Center (ODAC), an exemption has been introduced, whereby individuals who are unemployed or earn below a determined annual income no longer have to pay any fees associated with accessing information from either a public or private body.

The direct costs specified are reasonably low; however in practice such costs are coupled with unspecified indirect costs which are also circumstantial (i.e. communication and traveling costs). This is particularly the case when litigation forms part of the process.

The Promotion of Access to Information Bill- which proposes further regulation and classification of state information- makes the policy environment regarding access to information, including access to privatization regulations, uncertain in the foreseeable future.

References:
Department of Trade and Industry.
http://www.thedti.gov.za/

Interview with Mukelani Dimba, Deputy Chief Executive Officer, Open Democracy Advice Centre (ODAC), Oct.16, 2008.

Interview with Nigel Gwynne Evans, Director, Trade and Industry: Western Cape Department of Economic Development and Tourism, Aug. 21, 2008,


Protection of Information Bill (B6 – 2010).
100: Records (defined here as the rules governing the competitive privatization process) are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line.

75:

50: Records impose a financial burden on citizens, journalists or NGOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving records imposes a major financial burden on citizens. Records costs are prohibitive to most citizens, journalists, or NGOs trying to access this information.

Category 5. Government Oversight and Controls

5.1. National Ombudsman

55. In law, is there a national ombudsman, public protector or equivalent agency (or collection of agencies) covering the entire public sector?

100

55a. In law, is there a national ombudsman, public protector or equivalent agency (or collection of agencies) covering the entire public sector?

Yes | No

Comments:
Chapter 9 of the Constitution provides for the Office of the Public Protector. In terms of section 182, the office has the power to investigate any conduct in state affairs or in the public administration in any sphere of government that is alleged or suspected to be improper or to result in impropriety or prejudice. The office may then report on that conduct and to take appropriate remedial action. The mandate and powers of the public protector are expanded on in the Public Protector Act.

References:
http://www.info.gov.za

Public Protector Act (Act 23 of 1994).
http://www.publicprotector.org

Yes: A YES score is earned if there is a specific agency or set of agencies whose primary mandate is to investigate the actions of government on the behalf of common citizens. This agency or set of agencies should be specifically charged with seeking out and documenting abuses of power.

No: A NO score is earned if no such agency or set of agencies exists, or that function is a secondary concern of a larger body, such as the legislature.

56. Is the national ombudsman effective?

75

56a. In law, the ombudsman is protected from political interference.
All institutions established in terms of Chapter 9 of the Constitution, including the Public Protector, must be impartial and must exercise their powers and perform their functions without fear, favor or prejudice.

The provisions of the Constitution, read with s. 1 of the Public Protector Act, require that the incumbent must have significant legal experience and must be a ‘fit and proper person’.

However, in terms of s. 1A(3)(e) of the Act, the Public Protector can be appointed from among members of Parliament. In reality, therefore, the potential influence of political considerations is not legally excluded.

Nevertheless, political influence is expressly moderated, if not entirely excluded, by the terms of s.193 (4) and (5) of the Constitution, which require the President to appoint a person nominated by a committee of the Assembly proportionally composed of members of all parties represented in the Assembly and approved by the Assembly by a resolution adopted with a supporting vote of ‘at least 60 percent of the members of the Assembly’.

Additionally, the Public Protector is appointed to serve a single term of seven years. In a further step to insulate the Public Protector from political influence, in terms of the provisions of s.194 ‘Removal from office’ of the Constitution, the Public Protector may be removed from office only after a ‘supporting vote of at least two thirds of the [National] Assembly’, and then only on the grounds of ‘misconduct, incapacity of incompetence’, which approximates the grounds for removal from office of members of the judiciary (s.177).

The ruling African National Congress party can, however, given its strong electoral performance in the 2009 general elections, if required, be virtually certain of a two thirds majority.

References:

Public Protector Act (Act 23 of 1994).
http://www.publicprotector.org


Van Rooyen and Others v S and Others 2002 (8) BCLR 810 CC

Independent Electoral Commission v Langeberg Municipality 2001 (9) BCLR 883 (CC)

Yes: A YES score is earned only if the agency (or set of agencies) has some formal organizational independence from the government. A YES score is earned even if the entity is legally separate but in practice staffed by partisans.

No: A NO score is earned if the agency is a subordinate part of any government ministry or agency, such as the Department of Interior or the Justice Department.

56b. In practice, the ombudsman is protected from political interference.

Comments:
The erstwhile Public Protector, Lawrence Mushwana, was appointed from the ruling African National Congress’ parliamentary caucus. This, along with the fact that certain high-profile investigations have appeared to favor the ANC, has led to perceptions of political bias or favoritism.

Critics often refer to his investigation of the Deputy President’s trip to the United Arab Emirates, and to what has become known as the ‘Oilgate affair’ as an example. In 2004 it emerged in the media that PetroSA, a major public entity involved in trading crude oil had, in 2003, advanced R15 million to a privately owned black economic empowerment company, Imvume Management, contracted to provide oil condensate for its operations. Imvume, instead of paying its supplier, diverted the sum of R11 million (US$1.6 million) to the ruling party. Subsequently, PetroSA repeated the payment to Imvume’s supplier, resulting in a further loss of public funds. Following accusations of collusion between PetroSA and Imvume, opposition parties asked the public protector to investigate. Controversially, the public protector ruled that there was no misconduct or maladministration by PetroSA or any other public official, and that the R15 million (US$2.2 million) lost its designation as public money when it was paid by PetroSA, and was thus beyond his jurisdiction.

However, he did in later reports make significant findings against the Minister of Public Service and Administration (failure to disclose a gift), and the Minister of Health (possible contempt of court). This suggests that, while the possibility of political
interference exists, it is not always or necessarily the case in practice. The extent to which any of these rulings may be the result of either ‘interference’ or inclination, is, however, unclear.

By contrast, the current incumbent, Advocate Thulisile Madonsela, was unanimously nominated by a multi-party sub-committee and thereafter by Parliament’s National Assembly to be the new Public Protector with effect from October 2009. Despite her ANC background, her strong legal experience and this broad political support suggests her performance in the post may be less susceptible to perceptions of being politicized.

Jurisprudence from the country’s highest court, the Constitutional Court (CC), provided guidelines to assist in assessing the existence, extent and robustness of independence. According to de Vos, it found that the determining factor is whether, from the objective standpoint of a reasonable and informed person, there will be a perception that the institution enjoys the essential conditions of independence. The stringency of the requirements will differ according to context. Observes de Vos: “An institution dealing with complaints against the legislature and the executive, such as the Public Protector, could be said to require more vigorous policing of its independence to ensure its legitimacy in the eyes of the public.”

De Vos concludes that “in principle – if not always in practice – Chapter Nine institutions do have the requisite independence from government”. He notes that the ad hoc Committee’s recommendations, for example, that the Chapter 9 institutions’ budgetary independence should be enhanced, and that appointment procedures should be depoliticized, have not even been considered by Parliament in the three years since they were made. He concludes that despite the political dominance of the ruling party in the national legislature, its democratic immaturity is a disincentive to strengthening key oversight institutions such as these.

References:

de Vos, Pierre,

"Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions. A report to the National Assembly of the Parliament of South Africa, Cape Town, South Africa.”
(the Prof Kader Asmal Committee), July 31, 2007.

"Thuli Madonsela: A Public Protector Worthy Of The Name"
NewsTime July 18, 2010

Office of the Public Protector, 2009.
"Profile of Advocate Thulisile Madonsela".
http://www.publicprotector.org

IOL, 2009.
"New public protector nominated"

"Manto may be in contempt of court, says Public Protector"
Mail & Guardian, May 21, 2008

"Dismal. Depressing. Disingenuous.”
Mail & Guardian, Aug. 8, 2005.


Interview with Gary Pienaar, Senior Researcher: Governance and Public Ethics, Institute for Democracy in Africa, and erstwhile Western Cape Provincial Manager of the Office of the Public Protector, Nov. 25, 2010, Cape Town.

100: This agency (or set of agencies) operates independently of the political process, without incentive or pressure to render favorable judgments in politically sensitive cases. Investigations can operate without hindrance from the government, including access to politically sensitive information.

75:

50: This agency (or set of agencies) is typically independent, yet is sometimes influenced in its work by negative or positive political incentives. This may include public criticism or praise by the government. The ombudsman may not be provided with some information needed to carry out its investigations.

25:

0: This agency (or set of agencies) is commonly influenced by political or personal incentives. This may include conflicting family relationships, professional partnerships, or other personal loyalties. Negative incentives may include threats, harassment or other abuses of power. The ombudsman cannot compel the government to reveal sensitive information.

56c. In practice, the head of the ombudsman agency/entity is protected from removal without relevant justification.
Sections 183 and 194 of the Constitution stipulate that the Public Protector is appointed for a fixed, non-renewable term of seven years, and that the Public Protector may be removed from office only on the grounds of misconduct, incapacity or incompetence, and with a supporting vote of at least 60 per cent of the members of the Assembly. This approximates to the grounds for removal from office of members of the judiciary (s.177). No such early removal has occurred to date.

References:
http://www.info.gov.za

Interview with Gary Pienaar, Senior Researcher: Governance and Public Ethics, Institute for Democracy in Africa, and erstwhile Western Cape Provincial Manager of the Office of the Public Protector, Nov. 25, 2010, Cape Town.

100: The director of the ombudsman (or directors of multiple agencies) serves a defined term and cannot be removed without a significant justification through a formal process, such as impeachment for abuse of power.

75:

50: The director of the ombudsman (or directors of multiple agencies) serves a defined term, but can in some cases be removed through a combination of official or unofficial pressure.

25:

0: The director of the ombudsman (or directors of multiple agencies) can be removed at the will of political leadership.

56d. In practice, the ombudsman agency (or agencies) has a professional, full-time staff.

In 2007/8, the Office of the Public Protector had a full-time staff of about 205 of 238 available posts, with a reduction in the vacancy rate from 32 percent to 13,9 percent. The Office has continued to show improved performance by reducing the number of its backlogged cases.

However, the Ad hoc Committee's Report expressed concern at the lengthy vacancies in senior posts, specifically those of chief financial officer and chief executive officer, saying that these 'seriously impinged' on the operations of the Office.

The Public Protector reported to Parliament that in 2008/09 financial year, 6,780 complaints were brought forward from the 2007/08 financial year and 12,435 received. A total of 19 215 complaints were received and considered and 13,220 were finalized, while 5,995 were carried over to 2009/10 financial year.

Chart 3: Comparison of statistics received and finalized in 2005/06 until 2008/09 financial years.

<table>
<thead>
<tr>
<th>Financial year</th>
<th>Complaints received</th>
<th>Complaints finalized</th>
</tr>
</thead>
<tbody>
<tr>
<td>2005/06</td>
<td>17,415</td>
<td>17,619</td>
</tr>
<tr>
<td>2006/07</td>
<td>12,629</td>
<td>13,434</td>
</tr>
<tr>
<td>2007/08</td>
<td>13,195</td>
<td>11,280</td>
</tr>
<tr>
<td>2008/09</td>
<td>12,435</td>
<td>13,220</td>
</tr>
</tbody>
</table>

The OPP reported that it has “generally achieved its objectives except for own initiative, systemic investigations and reducing the turnaround time for the finalization of complaints”.

In October 2010, the Office reported that the organization had taken several step to improve its services. This included a more concentrated focus on remedial action for complainants, and a commitment to reducing the turnaround time for cases. 14 738 cases were finalized. The case turnaround time was as follows: 52 percent of cases were resolved between 0-3 months; 18% between 4-6 months; 19 percent between 7-12 months and 11 percent were 13+ months.

In order to resolve complaints as efficiently and quickly as possible, the Public Protector reported her intention to establish an early resolution unit, a group that focused on good governance and a group that focused on service delivery improvement.

The vacancy rate at the organization had improved to only 4.5 percent.

References:
Public Protector Act (Act 23 of 1994).
http://www.publicprotector.org

http://www.pmg.org.za
100: The ombudsman agency (or agencies) has staff sufficient to fulfill its basic mandate.

75:

50: The ombudsman agency (or agencies) has limited staff that hinders its ability to fulfill its basic mandate.

25:

0: The ombudsman agency (or agencies) has no staff, or a limited staff that is clearly unqualified to fulfill its mandate.

56e. In practice, agency appointments support the independence of the ombudsman agency (or agencies).

Comments:
Generally, appointments have supported the independence of the Office. Fewer vacant posts exist and critical senior positions, such as chief financial officer and chief executive officer, have been filled. Generally, appointment of investigators is based on relevant qualifications and competence. More recently, however, the quality and quantity of applicants for advertised investigators posts has declined significantly.

The second Public Protector, Advocate Lawrence Mushwana, struggled to attract general support for his independence from the ruling party and his personal integrity. During his tenure, his report on his investigation into the ‘Oilgate’ scandal, which was widely perceived as further evidence of his predisposition to avoid strong action against executive misconduct, was successfully taken on review to the North Gauteng High Court. The court ordered the Public Protector to re-investigate the matter. Judge Poswa’s ruling criticized Adv Mushwana for refusing to investigate certain allegations and drawing conclusions without launching a proper probe. Adv Mushwana’s office subsequently indicated that it was likely appeal the ruling.

His relationship with his Deputy Public Protector was fractious and he was criticized by the Parliamentary ad hoc Committee’s inquiry for underestimating his powers and misconstruing the nature and extent of the independence of his Office.

By contrast, new third Public Protector, Advocate Thulisile Madonsela was unanimously nominated by a multi-party sub-committee and thereafter by Parliament’s National Assembly to be the new Public Protector with effect from October 2009. Despite her ANC background, her subsequent strong legal experience and this broad political support suggests her performance in the post may be less susceptible to perceptions of susceptibility to politicization.

In one of her first reports, she did not shrink from direct confrontation with the highest office, finding that President Jacob Zuma’s almost year-long failure to declare his financial interests, assets and liabilities, was in breach of the provisions of the Executive Members’ Ethics Act and Code, and recommending that the Act be amended within three months by Parliament to include sanctions for breaches similar to those applicable to Members of Parliament in terms of the Parliamentary Code of Ethics. The Cabinet has announced interim sanctions, pending tabling in Parliament of draft amending legislation. However, at the time of writing in late November 2010, the Presidency has failed to table such legislation.

In remarkably different tone to her predecessor, Adv Madonsela recently publicly expressed regret that the Office under her predecessor had failed to uphold the complaint of occupational detriment by a high-profile whistle-blower from the Department of Justice and Constitutional Development, Mr Mike Tshisonga. She noted that his complaint had subsequently been upheld by the courts after “a costly and lengthy litigation process” – whereas the Office was established precisely in order to spare complainants this expense and delay.

References:
"Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions. A report to the National Assembly of the Parliament of South Africa, Cape Town, South Africa" (the Prof Kader Asmal Committee), July 31, 2007.

"Thuli Madonsela: A Public Protector Worthy Of The Name"
NewsTime, July 18, 2010

Public Protector, 2010.
http://www.pmg.org.za

Public Protector Report No. 1 of 2010/11, "Report on an investigation into an alleged breach of Section 5 of the Executive Ethics Code by President JG Zuma".
http://www.publicprotector.org

Office of the Public Protector, 2009.
"Profile of Advocate Thulisile Madonsela".
http://www.publicprotector.org

http://www.mg.co.za/article/2009-10-30-shock-r7m-payout-for-mushwana

IOL, 2009.
"New public protector nominated"

http://www.publicprotector.org

Mail & Guardian and Others v Public Protector Case No. 2263/06 North Gauteng High Court, July 29, 2009.
http://www.saflii.org

"Judgement reopens can of worms"
http://www.mg.co.za/article/2009-08-07-judgment-reopens-can-of-worms

"Annual Report of the Public Protector 2006/07".
http://www.publicprotector.org

http://www.pmg.org.za

Calland, R., 2005.
http://www.mg.co.za

Interview with Gary Pienaar, Senior Researcher: Governance and Public Ethics, Institute for Democracy in Africa, and erstwhile Western Cape Provincial Manager of the Office of the Public Protector, Nov. 25, 2010, Cape Town.

100: Appointments to the agency (or agencies) are made based on professional qualifications. Individuals appointed are free of conflicts of interest due to personal loyalties, family connections or other biases. Individuals appointed usually do not have clear political party affiliations.

75: Appointments are usually based on professional qualifications. Individuals appointed may have clear party loyalties.

50: Appointments are often based on political considerations. Individuals appointed often have conflicts of interest due to personal loyalties, family connections or other biases. Individuals appointed often have clear party loyalties.

25: Appointments are often based on political considerations. Individuals appointed often have conflicts of interest due to personal loyalties, family connections or other biases. Individuals appointed often have clear party loyalties.

0: In practice, the ombudsman agency (or agencies) receives regular funding.

Comments:
The Public Protector’s office receives an annual budget, allocated through the Department of Justice and approved by a vote in Parliament. The allocation trend reflects a steady increase in the budget for the Office. For the 2005/06 financial year, the budget was R59.238 million (US$8.6 million); R68.304million (US$9.7 million) in 2006/7; R78.722million (US$11.5 million) in 2007/8; and R86.475 million (US$12.6 million) by 2008/09. The medium-term estimate for 2009/10 (the latest available) is projected to be R106.945 million (US$15.6 million), while the actual allocation in terms of the Appropriation Bill in 2010/11 was R112.816 million (US$16.5 million).
Despite this, in 2010 the institution reported to Parliament that it was working under “severe” funding constraints to discharge its mandate properly. There were 93 investigators who dealt with about 16,000 cases.

One of the obstacles encountered by the Office was the implementation of the approved structure. Treasury had informed the Public Protector that funds had not been appropriated for the expanded structure despite its approval by the Portfolio Committee.

References:


100: The agency (or agencies) has a predictable source of funding that is fairly consistent from year to year. Political considerations are not a major factor in determining agency funding.

75:

50: The agency (or agencies) has a regular source of funding, but may be pressured by cuts, or threats of cuts to the agency budget. Political considerations have an effect on agency funding.

25:

0: Funding source is unreliable. Funding may be removed arbitrarily or as retaliation for agency functions.

56g. In practice, the ombudsman agency (or agencies) makes publicly available reports.

Comments:
Reports are routinely furnished to complainants and to the organ of state complained against. While the Public Protector may declare all or part of a report confidential, this is extremely rare and reports are usually freely available on request from the office. Most significant reports are published on the Public Protector’s website.

In addition, the new Public Protector has begun to hold quarterly media briefings to publicize the work of the Office.

References:
Public Protector’s website: http://www.publicprotector.org
Interview with Gary Pienaar, Senior Researcher: Governance and Public Ethics, Institute for Democracy in Africa, and erstwhile Western Cape Provincial Manager of the Office of the Public Protector, Nov. 25, 2010, Cape Town.

100: The agency (or agencies) makes regular, publicly available, substantial reports either to the legislature or directly to the public outlining the full scope of its work.

75:

50: The agency (or agencies) makes publicly available reports to the legislature and/or directly to the public that are sometimes delayed or incomplete.

25:

0: The agency (or agencies) makes no reports of its activities, or makes reports that are consistently out of date, unavailable to the public, or insubstantial.

56h. In practice, when necessary, the national ombudsman (or equivalent agency or agencies) initiates investigations.

Comments:
Due primarily to a caseload backlog and some earlier uncertainty regarding the interpretation and application of the Office's mandate, relatively few own initiative investigations have been initiated, viz. 41 during the period 2002/3 to 2006/7. Very few of these involved contentious issues. Parliament's ad hoc Committee's investigation expressed concern at the under-utilization of this important power.

According to the Office's 2008/9 Performance Report submitted to Parliament, the Office did not meet its own target of at least 1 own initiative investigation per province and per investigative unit. This was attributed to "high staff [sic] turnover of investigative staff in Provincial offices, capacity constraints and high workload. However, 5 own initiative investigations were conducted[,] 2 finalized, 3 [were] still under investigation."

References:


Interview with Gary Pienaar, Senior Researcher: Governance and Public Ethics, Institute for Democracy in Africa, and erstwhile Western Cape Provincial Manager of the Office of the Public Protector, Nov. 25, 2010, Cape Town.

100: The agency aggressively starts investigations — or participates fully with cooperating agencies' investigations — into judicial misconduct. The agency is fair in its application of this power.

75:

50: The agency will start or cooperate in investigations, but often relies on external pressure to set priorities, or has limited effectiveness when investigating. The agency, though limited in effectiveness, is still fair in its application of power.

25:

0: The agency rarely investigates on its own or cooperates in other agencies' investigations, or the agency is partisan in its application of this power.
In practice, when necessary, the national ombudsman (or equivalent agency or agencies) imposes penalties on offenders.

Comments:
In terms of its constitutive and empowering legislation, the Public Protector may not impose penalties on offenders, but can, in terms of the Constitution, take appropriate remedial action. This usually takes the form of facilitated resolution of complaints, and informal or formal recommendations for corrective or punitive action. Most recommendations are complied with by the organs of state concerned. Comparable institutions in several other developing countries are empowered to enforce compliance with their findings.

However, given a persistent pattern of non-cooperation with her Office during investigations and delays amounting to non-compliance with the legal obligation to assist and cooperate with her Office, the new Public Protector recently commenced the process consulting publicly on the drafting rules in terms of the Public Protector Act. The purpose of the rules is to ensure that state organs will be "fully aware of what is expected of them in terms of cooperating and complying with investigations and recommendations respectively. They would also be aware of punitive measures regarding failure to cooperate with investigations."

"Failure by the state to cooperate and comply impacts on our ability to deliver on our promise to provide prompt remedial action to complainants. As a result complainants will end up suffering secondary prejudice. This may also dent our credibility in the eyes of the public," the Public Protector said at a media briefing.

References:
Public Protector Act (Act 23 of 1994).
http://www.publicprotector.org

http://www.rno.co.za and

http://www.rno.co.za

http://www.rno.co.za/library/article/31812


http://www.rno.co.za

http://www.publicprotector.org

http://www.rno.co.za

Interview with Gary Pienaar, Senior Researcher: Governance and Public Ethics, Institute for Democracy in Africa, and erstwhile Western Cape Provincial Manager of the Office of the Public Protector, Nov. 25, 2010, Cape Town.
The agency does not effectively penalize offenders. The agency may make judgments but not enforce them, does not cooperate with other agencies in enforcing penalties, or may fail to make reasonable judgments against offenders. The agency may be partisan in its application of power.

In practice, the government acts on the findings of the ombudsman agency (or agencies).

Most recommendations are complied with by the organs of state concerned. On the other hand, critics argue that this compliance rate is a function of the Public Protector’s failure to make negative findings in ‘hard’ or contentious cases.

The newly-appointed third Public Protector, Adv. Madonsela, has however complained to Parliament that some organs of state do not readily comply with her recommendations without providing reasonable cause for not doing so, and despite the constitutional obligation to assist the Office to be effective – s.181(3). She noted that one government agency had even expressed the view, based on a state legal adviser’s opinion, that there was no obligation to comply with her Office’s recommendations. She requested Parliament to assist her Office by considering her reports more promptly and regularly, and by requiring organs of state, against which she had negative findings, to comply unless they provided adequate reasons for not doing so.

Further, given a persistent and fairly widespread pattern of non-cooperation with her Office during investigations, and delays amounting to non-compliance with the legal obligation to assist and cooperate with her Office, the Public Protector recently commenced the process consulting publicly on the drafting rules in terms of the Public Protector Act. The purpose of the rules is to ensure that state organs will be “fully aware of what is expected of them in terms of cooperating and complying with investigations and recommendations respectively. They would also be aware of punitive measures regarding failure to cooperate with investigations.”

“Failure by the state to cooperate and comply impacts on our ability to deliver on our promise to provide prompt remedial action to complainants. As a result complainants will end up suffering secondary prejudice. This may also dent our credibility in the eyes of the public,” the Public Protector said at a media briefing.

References:
- Interview with Gary Pienaar, Senior Researcher: Governance and Public Ethics, Institute for Democracy in Africa, and erstwhile Western Cape Provincial Manager of the Office of the Public Protector, Nov. 25, 2010, Cape Town.
56k. In practice, the ombudsman agency (or agencies) acts on citizen complaints within a reasonable time period.

Comments:
The Public Protector’s office is making progress in its efforts to reduce the turnaround time within which it finalizes investigation of complaints. During the 2006/7 financial year, seventy two percent of complaints were resolved within 6 months, fifteen percent took seven to twelve months, eight percent took 13-24 months, and five percent took more than two years to finalize.

In its most recent performance report to Parliament, the Office reported the following improvements in case turnaround times: 52 percent of cases were resolved between 0-3 months; 18 percent between 4-6 months; 19 percent between 7-12 months, and 11 percent were 13+ months.

References:


Interview with Gary Pienaar, Senior Researcher: Governance and Public Ethics, Institute for Democracy in Africa, and erstwhile Western Cape Provincial Manager of the Office of the Public Protector, Nov. 25, 2010, Cape Town.

100: The agency (or agencies) acts on complaints quickly. While some backlog is expected and inevitable, complaints are acknowledged promptly and investigations into serious abuses move steadily towards resolution. Citizens with simple issues can expect a resolution within a month.

75:

50: The agency (or agencies) acts on complaints quickly, with some exceptions. Some complaints may not be acknowledged, and simple issues may take more than two months to resolve.

25:

0: The agency (or agencies) cannot resolve complaints quickly. Complaints may be unacknowledged for more than a month, and simple issues may take more than three months to resolve. Serious abuses are not investigated with any urgency.

57. Can citizens access the reports of the ombudsman?

92

57a. In law, citizens can access reports of the ombudsman(s).
Comments:
The Constitution, read with the Public Protector Act, requires reports to be open to the public unless circumstances dictate complete or partial confidentiality.

References:
http://www.info.gov.za

Public Protector Act (Act 23 of 1994).
http://www.publicprotector.org

Yes: A YES score is earned if all ombudsman reports are publicly available.

No: A NO score is earned if any ombudsman reports are not publicly available. This may include reports made exclusively to the legislature or the executive, which those bodies may choose not to distribute the reports.

57b. In practice, citizens can access the reports of the ombudsman(s) within a reasonable time period.

100  |  75  |  50  |  25  |  0

Comments:
Complainants receive a copy of the investigation report as a matter of routine and promptly after completion of the investigation. Most high-profile or significant reports are posted on the website periodically. Where required, the Public Protector tables particular reports in Parliament.

The new Public Protector has initiated quarterly media briefings, which also serve to publicize significant findings. In addition, the Office has reported to Parliament that it has implemented a new electronic case management system (CMS), after a period of several years during which an exclusively manual system replaced an older and modest, but relatively effective, CMS. This is likely to enhance accessibility of reports, as they will be easier to identify and locate.

References:
Public Protector’s reports.
http://www.publicprotector.org

Public Protector, 2010.
http://www.pmg.org.za

Public Protector, 2009.
http://www.pmg.org.za

Interview with Gary Pienaar, Senior Researcher: Governance and Public Ethics, Institute for Democracy in Africa, and erstwhile Western Cape Provincial Manager of the Office of the Public Protector, Nov. 25, 2010, Cape Town.

100: Reports are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

75:

50: Reports take around two weeks to obtain. Some delays may be experienced.

25:

0: Reports take more than a month to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

57c. In practice, citizens can access the reports of the ombudsman(s) at a reasonable cost.
Comments:
Complainants receive a copy of the investigation report as a matter of routine after completion of the investigation. Most high-profile or significant reports are posted on the website periodically and can be accessed without charge.

Requests by third party members of the public for hard copies of a small or reasonable number or reports are acceded to without charge.

References:
Public Protector’s reports.
http://www.publicprotector.org

Interview with Gary Pienaar, Senior Researcher: Governance and Public Ethics, Institute for Democracy in Africa, and erstwhile Western Cape Provincial Manager of the Office of the Public Protector, Nov. 25, 2010, Cape Town.

100: Reports are free to all citizens, or available for the cost of photocopying. Reports can be obtained at little cost, such as by mail, or on-line.

75:

50: Reports impose a financial burden on citizens, journalists or NGOs. Retrieving reports may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving reports imposes a major financial burden on citizens. Reports costs are prohibitive to most citizens, journalists, or NGOs trying to access this information.

5.2. Supreme Audit Institution

58. In law, is there a national supreme audit institution, auditor general or equivalent agency covering the entire public sector?

100

58a. In law, is there a national supreme audit institution, auditor general or equivalent agency covering the entire public sector?

Yes | No

Comments:
The Auditor-General is an independent institution established through Section 188, Chapter 9 of the 1996 Constitution.

The Public Audit Act of 2004 establishes the Auditor-General as the supreme audit institution for the public sector, and compels the Auditor-General to audit and report on the accounts and financial management of all spheres of government and other publicly-funded bodies, including national departments, provincial entities, municipal governments and state-owned enterprises. Some of the Auditor-General’s responsibilities include disclosing non-compliance with laws and regulations and reporting on performance information.

The Auditor-General is appointed by the National Assembly and must submit audit reports (including matters of accountability) to the relevant national or provincial legislatures. The Public Audit Act also established a Parliamentary Standing Committee on the Auditor General, which provides assistance, protection and oversight, and ensures independence, impartiality and effectiveness. The Act provides an auditing framework for all public sector entities, and specifies that audit reports must reach Parliament within a reasonable time, while also providing for the means to do so. Through the Public Audit Act, the Auditor-General has the power to perform search and seizure procedures, if there is reasonable suspicion that information needed is being withheld.

References:
Auditor-General of South Africa,
59. Is the supreme audit institution effective?

84

59a. In law, the supreme audit institution is protected from political interference.

Yes | No

Comments:
The Auditor-General is a chapter 9 institution which has a mandate to strengthen democracy in the country by performing without fear, favor or prejudice while remaining independent and accountable to the National Assembly. It is expected to report all activities as well as on the performance of its functions on an annual basis to the National Assembly. Thus the independence of the Auditor-General is guaranteed in Section 188 of the Constitution, and in the Public Audit Act. The Public Audit Act also provides for the establishment of a parliamentary Standing Committee on the Auditor General, which provides additional safeguards of independence and impartiality, and protection against interference.

References:
Auditor-General of South Africa,
http://www.agsa.co.za/

http://www.capegateway.gov.za/eng/pubs/constitutions/5297


http://41.193.80.205/Portals/1/Audit%20Reports/Annual%20Reports/Annual%20report%2009-10%20-%20final.pdf

According to Section 189 of the Constitution, the Auditor-General serves a fixed, non-renewable term of between five and 10 years.

In terms of section 194 of the Constitution, special majorities are required for both the appointment, and removal from office of the Auditor-General. Dismissal would require a resolution adopted with a supporting vote of at least a two-thirds majority in the National Assembly, on specific grounds of misconduct, incapacity or incompetence. Such a removal has not occurred.

Terence Nombembe was appointed to fill the position of Auditor-General from Dec. 1, 2006, when the previous Auditor-General's term ended. Currently, Nombembe is just over halfway through his seven-year term.

References:
http://41.193.80.205/Portals/1/Audit%20Reports/Annual%20Reports/Annual%20report%2009-10%20-%20final.pdf
http://www.capegateway.gov.za/eng/acts/constituitions/5297

100: The director of the agency serves a defined term and cannot be removed without a significant justification through a formal process, such as impeachment for abuse of power.

75: The director of the agency serves a defined term, but can in some cases be removed through a combination of official or unofficial pressure.

50: The director of the agency can be removed at the will of political leadership.

25: The director of the agency can be removed at the will of political leadership.

0: The director of the agency can be removed at the will of political leadership.

59c. In practice, the audit agency has a professional, full-time staff.

In addition to 927 Trainee Auditors the Office of the Auditor General (OAG) currently employs 333 Accountants, 224 Registered Government Accountants. A total staff of 2,300 personal was reported in June 2009. The OAG continues to make use of the services of external audit firms, during peak auditing times. This is to defray costs of having a larger than necessary staff for the majority of the year during which fewer audits are carried out.

Vacancy rates have decreased from 724 (2007) to 383 (2010) which is a lower attrition rate than other departments. Staff turnover has successfully been decreased from 11 percent to 6.6 percent over this last year. This is below the industry turnover rate of 8.2 percent. Of the Trainee Auditors who passed their qualifying certification examinations, 100 percent were retained.

A Minimum Qualifications Framework for staff was introduced, which is based on either a Chartered Accountant qualification or equivalent. This has had a positive impact on the Auditor General Office, such that by the end of the 2009/10 financial year, 94 percent of all audit staff met minimum qualification requirements, which is a 4 percent increase from the previous financial year.

Additionally the capacity within the Auditor General’s office has been increased such that 69 members of the auditing staff worked on international auditing assignments during 2009/10.

References:
http://41.193.80.205/Portals/1/Audit%20Reports/Annual%20Reports/Annual%20report%2009-10%20-%20final.pdf
The agency has staff sufficient to fulfill its basic mandate.

Comments:
The Public Audit Act of 2004 assigns the process of initiating the appointment of an Auditor-General to the Speaker of the National Assembly, consistent with Section 193 of the Constitution. A National Assembly committee then nominates a candidate for appointment, and makes recommendations on conditions of employment. The Auditor-General is then appointed by the President on the recommendation of at least 60 percent of National Assembly members. Section 194 of the Constitution specifies that the Auditor-General serves a fixed, non-renewable term of seven years. The Auditor-General may only be removed from office through the passing of a 2/3rds (60 percent) majority resolution vote in Parliament.

The Report of the Parliamentary Ad Hoc Committee on the Review of Chapter 9 and Associated Institutions underscored the importance of public perception, noting that the Auditor-General must not only be independent but must be seen to be independent.

Only South African citizens, who have experience of specialist knowledge in auditing, state finance and public administration are eligible for the position of Auditor-General. The seven-year term of Auditor-General Shauket Fakie expired on Nov. 30, 2006, and Terence Nombembe was appointed to fill the position from Dec. 1, 2006. Nombembe was previously the Deputy Auditor-General, and is the first African to hold the Auditor-General position. Nombembe remains in the position of Auditor-General. This appointment supported the independence of the Auditor-General.

References:


http://www.parliament.gov.za/content/chapter_9_report.pdf


http://41.193.80.205/Portals/1/Audit%20Reports/Annual%20Reports/Annual%20report%202009-10%20-%20final.pdf


Appointments to the agency are made based on professional qualifications. Individuals appointed are free of conflicts of interest due to personal loyalties, family connections or other biases. Individuals appointed usually do not have clear political party affiliations.

100: The agency has staff sufficient to fulfill its basic mandate.

75:

50: The agency has limited staff that hinders it ability to fulfill its basic mandate.

25:

0: The agency has no staff, or a limited staff that is clearly unqualified to fulfill its mandate.

59d. In practice, audit agency appointments support the independence of the agency.
Appointments are usually based on professional qualifications. Individuals appointed may have clear party loyalties.

Appointments are often based on political considerations. Individuals appointed often have conflicts of interest due to personal loyalties, family connections or other biases. Individuals appointed often have clear party loyalties.

In practice, the audit agency receives regular funding.

Comments:
The previous position of the Office of the Auditor General was such that even though it was set up to be self-funding, through the recovering of fees from audit clients, which are used to defray expenses, fundamental deficiencies existed in the funding model such that the office ran at a deficit. The deteriorating funding position was such that in April 2008 the Auditor-General requested that National Treasury give immediate relief though an unconditional grant of R154.8 million (US$22.6 million).

However, this situation has been significantly reversed. For the last financial year the Office of the Auditor General has reported a surplus of funds. It is therefore in a much stronger financial position than previous years. It is expected that this will continue into the future. This stronger position has come about due to a determined strategy to improve financial performance and manage working capital more efficiently. In particular a redefined funding model was initiated such that tariffs were market related, increased efficiency was sought as well as an increase in the ratio of recoverable vs. non-recoverable (administrative) work and a reduction of outsourcing of work to private firms. The latter was made increasingly possible through the decreased vacancies / staff turnover and increased retention of trainee auditors once qualified.

References:


The agency has a predictable source of funding that is fairly consistent from year to year. Political considerations are not a major factor in determining agency funding.

The agency has a regular source of funding, but may be pressured by cuts, or threats of cuts to the agency budget. Political considerations have an effect on agency funding.

Funding source is unreliable. Funding may be removed arbitrarily or as retaliation for agency actions.

In practice, the audit agency makes regular public reports.

Comments:
Section 188, Part 3 of the Constitution requires that the Auditor-General must submit audit reports to any legislature that has a direct interest in the audit, and to any other authority prescribed by national legislation. All reports must be made public.

Audit reports are publicly available online through the web site of the Auditor-General.

In the past, the Auditor-General has reported that making regular public reports has been constrained to some extent by late submissions from various government departments of their financial records. The 2006/2007 Annual Report from the Auditor-General, notes that many audit clients do not meet the reporting requirements set out in the Public Finance Management Act
PFMA (Act 1 of 1999) and the Municipal Finance Management Act (MFMA) (Act 56 of 2003). The 2006/2007 Report also states that receiving financial statements after the prescribed deadline not only impacts on the ability of the AG to perform its function in this regard, but could impact on the ability of the auditees to perform within the accountability framework.

For the financial year, 2008/2009, of the possible 256 departments and entities the Auditor-General could audit, the Auditor-General compiled 250 reports. The latest 2009/2010 Annual Report similarly notes that non-compliance of timorously released reports was due to late or non-reporting on audit performance information by auditees. Furthermore, non-compliance with the Public Finance Management Act (PFMA) (Act 1 of 1999) was due to insufficient supervision on a day-to-day basis by all levels of management and a general failure of leadership. However, the 2009/2010 Annual Report reports that 86.6 percent of all PFMA reports were completed within two months of submission of financial statements and 88 percent of MTMA audit reports were completed within three months of receipt of financial statements. This is an improvement with regard to both previous year outcomes and targets set for the latest year.

References:


100: The agency makes regular, publicly available, substantial reports to the legislature and/or to the public directly outlining the full scope of its work.

75:

50: The agency makes publicly available reports to the legislature and/or to the public directly that are sometimes delayed or incomplete.

25:

0: The agency makes no reports of its activities, or makes reports that are consistently out of date, unavailable to the public, or insubstantial.

59g. In practice, the government acts on the findings of the audit agency.

Comments:
Though the various legislatures are required to oversee the management of state finances, no specific mechanisms exist to track the progress of government departments in responding to audit reports.

At the end of 2009, Government reported that the number of qualified options by the Auditor-General on government departments had increased from 29 (2007/08) to 55 (2008/09). This signals an increased compliance and improved performance with progress and timely submissions by a growing number of departments. However, certain departments’ compliance and progress remains consistently poor.

Most recent reports released by the Auditor-General also indicate that a number of departments have received consistently poor audit results in recent years. For example, the South African Local Government Association (SALGA) deteriorated from a qualified audit opinion to a disclaimer and the Property Management Trading Entity deteriorated from a financially unqualified (with other matters) to an adverse audit opinion. Furthermore offices such as the Presidency received a recoucurring qualification for continued lack of supporting documents for adjustments to opening balances and disposal of assets as well as for the lack of an assets register. Common reasons for deterioration of compliance and of compliance with Auditor-General suggestions included lack of documents (The Presidency), Irregular Spending (Department of Agriculture, Forestry and Fisheries), Non-compliance with Public Service Act with regard to leave taking and Delays of receipt of requested financial information (Department of Trade and Industry) and Failure to produce an Audit Trail (National Youth Commission). In their report to the Standing Committee, the Auditor-General stated that the underlying causes of these and other reasons for non-compliance or deterioration of compliance was due to problematic leadership, financial management and governance.

References:

100: Audit agency reports are taken seriously, with negative findings drawing prompt corrective action.

75:

50: In most cases, audit agency reports are acted on, though some exceptions may occur for politically sensitive issues, or particularly resistant agencies.

25:

0: Audit reports are often ignored, or given superficial attention. Audit reports do not lead to policy changes.

59h. In practice, the audit agency is able to initiate its own investigations.

Comments:
The Public Audit Act (Act 25 of 2004) allows for the Auditor-General to initiate its own investigations. The Auditor-General has also initiated its own investigations in practice. In this last financial year, the Auditor-General has created a dedicated investigations unit with newly updated policies and guidelines.

Two examples of investigations carried out by the Auditor-General in 2009 are an investigation into financial mismanagement, procurement irregularity and abuse of power by the South African Broadcast Cooperation (SABC), and an investigation of the Gauteng Health Department’s appointment of a consultant.

References:
Auditor-General of South Africa,
http://www.agsa.co.za

http://41.193.80.205/Portals/1/Audit%20Reports/Annual%20Reports/Annual%20report%2009-10%20-%20final.pdf


“Are We Winning the War on Corruption?”, Nov. 27, 2009, Mail & Guardian.
http://www.mg.co.za/article/2009-11-27-are-we-winning-the-war-on-corruption

100: The supreme audit institution can control the timing and pace of its investigations without any input from the executive or legislature.

75:

50: The supreme audit institution can generally decide what to investigate, and when, but is subject to pressure from the executive or legislature on politically sensitive issues.

25:

0: The supreme audit institution must rely on approval from the executive or legislature before initiating investigations. Politically sensitive investigations are almost impossible to move forward on.

60. Can citizens access reports of the supreme audit institution?

100

60a. In law, citizens can access reports of the audit agency.
Section 188(3) of the Constitution requires that the Auditor-General must submit audit reports to any legislature that has a direct interest in the audit, and to any other authority prescribed by national legislation. All reports must be made public.

Section 21 of the Public Audit Act reinforces this obligation, which requires reports to be submitted to legislatures, where they are accessible to the public.

Audit reports are publicly available without charge online through the website of the Auditor-General.

Individual government departments must also publish audit results in their Annual Reports, which are available to download from departmental websites, and from the government website.

References:

**Yes:** A YES score is earned if all supreme auditor reports are available to the general public.

**No:** A NO score is earned if any auditor reports are not publicly available. This may include reports made exclusively to the legislature or the executive, which those bodies may choose not to distribute.

60b. In practice, citizens can access audit reports within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:
Section 188(3) of the Constitution requires that the Auditor-General must submit audit reports to any legislature that has a direct interest in the audit, and to any other authority prescribed by national legislation. All reports must be made public.

Section 21 of the Public Audit Act reinforces this obligation, which requires reports to be submitted to legislatures, where they are accessible to the public.

Individual government departments must also publish audit results in their Annual Reports, which are available to download from departmental web sites, and from the government web site. Delays have occurred when government departments themselves are late in finalizing or submitting Annual Reports and financial statements. However, there has been an movement over the last year on department's timorous submissions and general all around performance.

Audit reports are publicly available for free online through the web site of the Auditor-General and are thereby easily accessible by all who request them. However, with the possible advent of the proposed Protection of Information Bill, it is conceivable that the ease at which reports are made available and in their entirely could change.

References:
100: Reports are available on-line, or records can be obtained within two days. Reports are uniformly available; there are no delays for politically sensitive information.

75:

50: Reports take around two weeks to obtain. Some delays may be experienced.

25:

0: Reports take more than a month to acquire. In some cases, most reports may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

60c. In practice, citizens can access the audit reports at a reasonable cost.

Comments:
Section 188, Part 3, of the Constitution requires that the Auditor-General must submit audit reports to any legislature that has a direct interest in the audit, and to any other authority prescribed by national legislation. All reports must be made public.

Section 21 of the Public Audit Act reinforces this obligation, which requires reports to be submitted to legislatures, where they are accessible to the public.

Audit reports are publicly available for free online through the web site of the Auditor-General. Individual government departments must also publish audit results in their Annual Reports, which are available to download from departmental websites, and from the government website.

References:
Auditor-General of South Africa.
http://www.agsa.co.za/


http://www.gov.za/

100: Reports are free to all citizens, or available for the cost of photocopying. Reports can be obtained at little cost, such as by mail, or on-line.

75:

50: Reports impose a financial burden on citizens, journalists or NGOs. Retrieving reports may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving reports imposes a major financial burden on citizens. Report costs are prohibitive to most citizens, journalists, or NGOs trying to access this information.

5.3. Taxes and Customs: Fairness and Capacity

61. In law, is there a national tax collection agency?

100
61a. In law, is there a national tax collection agency?

| Yes | No |

Comments:
The South African Revenue Services (SARS) collects national tax revenue. SARS was established by legislation to collect revenue and ensure compliance with tax law. According to the South African Revenue Service Act (Act 34 of 1997), the service is an administratively autonomous organ of the state.

References:
South African Revenue Service Act (Act 34 of 1997).

62. Is the tax collection agency effective?

100

62a. In practice, the tax collection agency has a professional, full-time staff.

| 100 | 75 | 50 | 25 | 0 |

Comments:
The South African Revenue Service (SARS) has a dedicated professional staff employed across regional and head offices. At the end of March 2010, SARS employed 15,263 personal, of whom 14,738 were permanent employees and 525 temporary employees. Over the last financial year, SARS has reported a negative net staff turnover.

SARS has various training and leadership programs in place, such as coaching sessions and the Making Great Leaders programme (MGL). In 2009/2010 SARS invested an average of 2.84 days of training per employee. Additionally, SARS has established partnerships with institutions such as the University of South Africa (UNISA), Stellenbosch University, the Gordon Institute of Business Science, and Franklin Covey SA to ensure customized training for SARS managers.

The e-Filing system through which individuals have been able to file tax returns has resulted in increased efficiency, collection and returns. This has helped contribute to an increased collection of tax revenue (revised by R8.3 billion, US$1.2 billion) during the recessionary period.

SARS continues to be praised by the Minister of Finance for its exceptional and innovative work in recent budget reports and speeches.

References:
South African Revenue Service, 2009, South African Revenue Service Annual Report 2009-2010,

Interview with Len Verwey, PIMS Budget Unit Manager, Dec. 3, 2010

National Treasury, 2010.
2010 Medium Term Budget Policy Statement (MTBPS), MTBPS Speech by Minister of Finance Pravin Gordhan, Oct. 27, 2010

South African Reserve Bank, Nov. 11, 2010, Currency Exchange Rates
http://www.resbank.co.za/sarbdata/rates/tales.asp?type=cmr

100: The agency has staff sufficient to fulfill its basic mandate.

75:

50: The agency has limited staff that hinders its ability to fulfill its basic mandate.
The agency has no staff, or a limited staff that is clearly unqualified to fulfill its mandate.

62b. In practice, the tax agency receives regular funding.

Comments:
SARS is largely funded by a National Treasury transfer. This money is for SARS’s operational and capital requirements and is allocated according to those provisions which govern the Medium Term Expenditure Framework (MTEF). Furthermore SARS may render services to a government department or institution charging an agreed rate for services rendered.

In the 2009/10 financial year, SARS received R7.1 billion (US$1 billion) in revenue to fund its operations. Over the medium term transfers from National Treasury are expected to increase to R8.1 billion (US$1.2 billion) in 2010/2011 and R9.3 billion (US$1.4 billion) in 2012/13.

References:
Interview with Len Verwey, PIMS Budget Unit Manager, Dec. 3, 2010

100: The agency has a predictable source of funding that is fairly consistent from year to year. Political considerations are not a major factor in determining agency funding.
75:
50: The agency has a regular source of funding, but may be pressured by cuts, or threats of cuts to the agency budget. Political considerations have an effect on agency funding.
25:
0: Funding source is unreliable. Funding may be removed arbitrarily or as retaliation for agency actions.

63. In practice, are tax laws enforced uniformly and without discrimination?

100

63a. In practice, are tax laws enforced uniformly and without discrimination?

Comments:
In 2009, two acts were passed which dealt with aspects of supporting enhanced compliance to taxation: The Taxation Laws Amendment Act, 2009, and the Taxation Laws Second Amendment Act, 2009. In 2010, the Draft Tax Administration Bill was released for public comment, its purpose is to provide a framework so as to better enable all taxpayers and traders to be tax compliant. Tax laws are enforced uniformly such that any citizen who earns income within a South African source is subject to a Standard Income Tax on Employees (SITE) / Income Tax / Provisional Tax. Value Added Tax is levied on all goods except those eligible for exemption and is paid by all consumers within the country. Additionally, companies are taxed accordingly under company tax laws.

South African Revenue Service (SARS) releases public documents to help businesses, individuals and tax consultants gain certainty about the way legislation will be applied. SARS aims to enforce tax laws consistently for all citizens. SARS undertakes various activities to reduce tax avoidance and evasion, as well as illegal or fraudulent activities (for example, the SARS Fraud and...
Anti-Corruption Hotline encourages compliance through information, education, and enforcement, if necessary. The SARS Taxpayer Service Charter binds SARS to service delivery standards and to regularly carry out independent, publicly reported taxpayer satisfaction surveys.

SARS also launched several initiatives in recent years to decrease assessment errors. These include staff training, quality awareness, improved experience levels and improved templates. If taxpayers believe they have been treated unfairly, they can contact the SARS Service Monitoring Office, established in 2004, which operates independently of SARS branch offices. It facilitates the resolution of service issues that have not been resolved through the normal channels by SARS branch offices. The alternative dispute resolution appears an increasingly popular option among taxpayers for resolving tax disputes in view of its speed and relatively low costs, compared with litigation.

SARS also has a user-friendly website where businesses, individuals and tax consultants can access information related to the application of legislation. SARS also operates dedicated call centers for local and international businesses seeking more information. SARS also operates a 24-hour fraud and anti-corruption hotline.

Recently a number of persons have been arrested in relation to tax fraud and tax evasion. SARS does not discriminate in terms of office held, race or gender when it comes to ensuring tax compliance throughout the country.

References:

100: Tax laws (which may be economically unfair as written) are enforced consistently for all citizens. No general group of citizens is more or less likely to evade tax law than another.

75:

50: Tax laws are generally enforced consistently, but some exceptions exist. For example, some groups may occasionally evade tax law. Some arbitrary and discriminatory tax rules exist.

25:

0: Tax law is unequally applied. Some groups of citizens are consistently more or less likely to evade tax law than others. Tax regulations are, as a rule, written to be discriminatory and/or arbitrary.

64. In law, is there a national customs and excise agency?

100

64a. In law, is there a national customs and excise agency?

Yes | No

Comments:
The South African Revenue Service is led by a Commissioner to whom the general manager of Customs reports. The South African Revenue Service (SARS) is mandated to collect excises and inspect customs. Duties and Levies are levied in terms of The Customs and Excise Act, Act No 91 of 1964, Schedule No. 1 Parts 2, 3 and 5. SARS is also responsible for facilitating legitimate trade, ensuring compliance with customs legislation and providing a customs service which ensures maximum revenue collection and protects South Africa’s boarders.

References:
South African Revenue Service
65. Is the customs and excise agency effective?

65a. In practice, the customs and excise agency has a professional, full-time staff.

100  75  50  25  0

Comments:
A General Manager of Customs reports to the South African Revenue Service Commissioner. The Customs and excise agency is thus part of SARS.

The South African Revenue Service (SARS) has a dedicated professional staff employed across regional and head offices. At the end of March 2010, SARS employed 15,263 personal, of whom 14,738 were permanent employees and 525 temporary employees. Over the last financial year, SARS has reported a negative net staff turnover.

SARS has various training and leadership programs in place such as coaching sessions and the Making Great Leaders programme (MGL). In 2009/2010 SARS invested an average of 2.84 days of training per employee. Additionally SARS has established partnerships with institutions such as the University of South Africa (UNISA), Stellenbosch University, the Gordon Institute of Business Science, and Franklin Covey SA to ensure customized training for SARS managers.

References:

Interview with Len Verwey, PIMS Budget Unit Manager

100: The agency has staff sufficient to fulfill its basic mandate.

75:

50: The agency has limited staff that hinders its ability to fulfill its basic mandate.

25:

0: The agency has no staff, or a limited staff that is clearly unqualified to fulfill its mandate.

65b. In practice, the customs and excise agency receives regular funding.

100  75  50  25  0

Comments:
The South African Revenue Service (SARS) is led by a Commissioner to whom the general manager of Customs reports.

SARS is largely funded by a National Treasury transfer. This money is for SARS’s operational and capital requirements and is allocated according to those provisions which govern the Medium Term Expenditure Framework (MTEF). Furthermore SARS may render services to a government department or institution charging an agreed rate for services rendered.
In the 2009/10 financial year, SARS received R7.1 billion (US$1 billion) in revenue to fund its operations. Over the medium term, transfers from National Treasury are expected to increase to R8.1 billion (US$1.2 billion) in 2010/2011 and R9.3 billion (US$1.4 billion) in 2012/13.

References:


Interview with Len Verwey, PIMS Budget Unit Manager, Dec. 3, 2010

100: The agency has a predictable source of funding that is fairly consistent from year to year. Political considerations are not a major factor in determining agency funding.

75:

50: The agency has a regular source of funding, but may be pressured by cuts, or threats of cuts to the agency budget. Political considerations have an effect on agency funding.

25:

0: Funding source is unreliable. Funding may be removed arbitrarily or as retaliation for agency actions.

66. In practice, are customs and excise laws enforced uniformly and without discrimination?

100

66a. In practice, are customs and excise laws enforced uniformly and without discrimination?

100 | 75 | 50 | 25 | 0

Comments:
In an ongoing bid to reduce the administrative burden on taxpayers and traders, the Tax Administration and draft Customs Duty Bill and Customs Control Bill were released in October 2009. These bills are aimed at streamlining legislation and providing certainty as well as clarity for both SARS and its clients thereby increasing tax compliance. Additionally, the Customs Duty and Control Bills provide a legislative platform to modernize Customs.

Accordingly, SARS has defined a new strategic direction for customs due to the challenges posed by the integration of the South Africa into the global economy. Customs is being repositioned to play a more proactive role in facilitation of legal trade. This strategic direction is aimed at facilitating trade and travelers, establishing electronic data interchange which seeks to provide traders with quicker and simpler ways to conduct business, locating industrial development zones aimed at promoting foreign direct investment and the establishment of a specialized anti-smuggling unit. Accordingly, Customs is moving towards replacing the Custom’s Legacy Program with a locally developed software platform, as well as moving towards a “paperless” declaration and release system. Already a significant increase in number of imports and exports electronically processed has been seen.

Additionally, SARS continues to play a leading role in various international multilateral tax and customs forums such as the World Customs Organization (WCO) and the Organization for Economic Co-operation and Development (OECD).

All Customs laws and duties are applied without discrimination and uniformly. Customs units are stationed at all major import and export locations. In July 2010, SARS submitted court papers alleging that LG Electronics SA was responsible for avoiding millions of Rands worth of import duty taxes on television sets brought into the country. In October 2010 SARS, together with various law enforcement agencies, focused on second hand vehicle trading which was non-compliant with the Customs and Excise Act amongst license holders and bonded warehouses. This resulted in 46 motor vehicles worth over R1.8 million (US$262,000) being detained.

References:

South African Revenue Service, “SARS clamps down on illegal second-hand car importers”,

http://www.resbank.co.za/sarbdata/rates/rates.asp?type=cmr
5.4. Oversight of State-Owned Enterprises

67. In law, is there an agency, series of agencies, or equivalent mechanism overseeing state-owned companies?

100

67a. In law, is there an agency, series of agencies, or equivalent mechanism overseeing state-owned companies?

Yes | No

Comments:
State-owned enterprises (SOEs) play a strategic role in South Africa by driving investments in the economy. The Department of Public Enterprises (DPE) is the body responsible for the efficient operation and oversight of SOEs, primarily through Shareholder Compacts concluded between the Minister and each SOE. While the National Energy Regulator of South Africa (NERSA) is responsible for regulation of the energy sector, which includes the state-owned electricity utility Eskom, the Executive, represented by the DPE, exercises immediate oversight over both Eskom and the other state-owned companies such as South African Airways, Transnet, Denel, Safcol and Alexkor.

Ultimate governance oversight over SOEs vests in Parliament, to which the Executive is accountable for effective implementation of Shareholder Compacts by SOEs. The Boards of corporatised SOEs also play a significant role in day-to-day management, for which they are accountable to the DPE.

Parliament, through the Portfolio Committee on Public Enterprises, as well as line-function Committees such as Energy for Eskom, Transport for Transnet and SAA; Agriculture for Safcol, exercises its role primarily by evaluating the performance of SOEs by considering their annual financial statements. The Standing Committee on Public Accounts (SCOPA) also reviews SOEs’ annual financial statements and the audit reports of the Auditor-General, and of private auditors in the case of individual SOEs. The Portfolio Committees also exercise oversight in regard to the service delivery performance and economic growth contribution of SOEs and, as such, review the non-financial information contained in the annual reports of SOEs.

The Executive Authority, as owner/shareholder, is concerned with and accountable for appropriate returns on investments and ensuring financial viability of SOEs, as well as with achievement of the key performance indicators identified in Shareholder Compacts.

References:


Parliament of South Africa,
"Department of Public Enterprises Strategic Plan & Budget 2010: State Owned Enterprises management & administrative issues",
March 18, 2010, Parliamentary Portfolio Committee on Public Enterprises.

Electricity Governance Initiative of South Africa and Idasa,
"The Governance of Power: Shedding a light on the electricity sector in South Africa"
Idasa, 2010,
http://www.idasa.org

Yes: A YES score is earned if there is an agency, series of agencies, or equivalent mechanism tasked with overseeing the conduct and performance of state-owned companies on behalf of the public. A YES score can be earned if several government agencies or ministries oversee different state-owned enterprises. State-owned companies are defined as companies owned in whole or in part by the government.

No: A NO score is earned if this function does not exist, or if some state-owned companies are free from government oversight.

68. Is the agency, series of agencies, or equivalent mechanism overseeing state-owned companies effective?

68a. In law, the agency, series of agencies, or equivalent mechanism overseeing state-owned companies is protected from political interference.

| Yes | No |

Comments:
The executive branch of the government determines the legal and policy context for governance, which includes ensuring that SOEs provide economically sustainable public services. The state has the further duty to improve the value of the assets, while guaranteeing that appropriate levels of regulation are in place. Sections 50 and 51 of the Public Finance Management Act (PFMA) provide a clear statement of the fiduciary responsibility roles. This includes the requirement to protect the assets, act with integrity in overseeing the managing financial affairs and acting with fidelity, honesty, and integrity and in the best interest of the public entity.

However, members of SOE's (and NERSA's) Boards are appointed and removed by the Minister for Public Enterprises. In a recent cabinet reshuffle, the Minister for Public Enterprises, Barbara Hogan, was removed from her position. This was widely regarded as a sign of Presidential disapproval of her publicly expressed support for the position that the Board of Eskom should be allowed the necessary independence to resolve for itself a dispute with Eskom's CEO. The President disagreed and intervened in an attempt to mediate the dispute, which was followed by the Chairperson's resignation. She took a similar position in an internal power struggle at Transnet, upsetting the President, who thereafter declined to appoint her nominees to the Transnet Board.

Parliament is dominated by the executive branch of government, largely due to the impact of the closed party-list electoral system of proportional representation. Even the Standing Committee on Public Accounts (SCOPA), which is by convention chaired by a member of an opposition political party represented in the National Assembly, is not impervious to executive influence and in extreme cases even executive interference in extreme situations, although it is generally well-regarded as a technically effective oversight mechanism that is well supported by the Office of the Auditor-General, an effectively independent institution established in terms of Chapter 9 of the Constitution.

References:


Electricity Governance Initiative of South Africa and Idasa,
http://www.idasa.org

Parliament of South Africa,

"ANC cadres to fill top jobs – Zuma”,

"Public Enterprises – Malusi Gigaba",
http://www.businessday.co.za/Articles/Content.aspx?id=127833
Yes: A YES score is earned only if the agency, series of agencies, or equivalent mechanism has some formal operational independence from the government. A YES score is earned even if the entity is legally separate but in practice staffed by partisans.

No: A NO score is earned if the agency, series of agencies, or equivalent mechanism is a subordinate part of any government ministry or agency.

68b. In practice, the agency, series of agencies, or equivalent mechanism overseeing state-owned companies has a professional, full-time staff.

100 | 75 | 50 | 25 | 0

Comments:
The Department of Public Enterprise organizational structure consists of the Minister of Public Enterprise, the Director General of Public Enterprises and 140 full time staff members, with a vacancy rate of 16.7 percent – reportedly largely due to unavailability of scarce skills and uncompetitive remuneration packages. This is a common problem in the public sector.

The regulatory members at the National Electricity Regulator of South Africa (NERSA) consist of six full time members. These are the Chief Executive Officer, three full time members responsible for electricity, petroleum and piped gas, respectively, the Chairperson, the Deputy Chairperson and two part time members. A part-time member of the Energy Regulator holds office for a period of four years, while a full-time member holds office for a period of five years.

References:
http://www.nersa.org.za/

Department of Public Enterprise Annual Report 2009-2010,
http://www.dpe.gov.za/library9_annualreports

National Energy Regulator Act (Act 40 of 2004),

Interview with Len verweu, PIMS Budget Unit manager, Dec. 3, 2010

100: The agency, series of agencies, or equivalent mechanism has staff sufficient to fulfill its basic mandate.

75:

50: The agency, series of agencies, or equivalent mechanism has limited staff that hinders its ability to fulfill its basic mandate.

25:

0: The agency, series of agencies, or equivalent mechanism has no staff, or a limited staff that is clearly unqualified to fulfill its mandate.

68c. In practice, the agency, series of agencies, or equivalent mechanism overseeing state-owned companies receives regular funding.

100 | 75 | 50 | 25 | 0

Comments:
The Department of Public Enterprises (DPE), which oversees state-owned enterprises (SOEs), is funded directly from the fiscus.
In the 2010/11 fiscal year, the overall allocation to the DPE was R4 billion (US$581 million), which is an average annual increase of 15.5 percent since the 2006/2007 budget of R2.6 billion (US$378 million). The increase was for purposes of transfer payments to SOEs for both capital and current expenditure. Over the same period, current payments increased at an average annual rate of 19.9 percent. Expenditure is expected to decrease during the period 2010/2011 – 2012/2013, from R4 billion to R196.2 million (US$28.5 million), due to a significant reduction of transfer payments to SOEs.

References:
http://www.dpe.gov.za/state

http://www.nersa.org.za/


Interview with Len Verwey, Manager: Budget Unit, Idasa’s Political Information and Monitoring Service (PIMS), Dec. 2, 2010.

100: The agency, series of agencies, or equivalent mechanism has a predictable source of funding that is fairly consistent from year to year. Political considerations are not a major factor in determining agency funding.

75:

50: The agency, series of agencies, or equivalent mechanism has a regular source of funding, but may be pressured by cuts, or threats of cuts to the agency budget. Political considerations have an effect on agency funding.

25:

0: Funding source is unreliable. Funding may be removed arbitrarily or as retaliation for agency functions.

68d. In practice, when necessary, the agency, series of agencies, or equivalent mechanism overseeing state-owned companies independently initiates investigations.

100  75  50  25  0

Comments:
National Treasury (i.e. Department of Finance) has initiated a number of informal investigations into cash-flow and related problems experienced by state-owned enterprises (SOEs) in the recent past. More recently, the Public Enterprises Portfolio Committee asked auditing firm KPMG to extend its investigation mandate to cover the board members of SOEs who have previously not been under scrutiny. This was a direct result of South African Airways’ (SAA) past policy of ignoring the high deficit that board members had left behind, such as the R232 million (US$33.7 million) debt incurred by former Chief Executives Coleman Andrews and Khaya Ngqula. The airline had been making large losses for several years which had required successive government bailouts. Since stricter expenditure monitoring has been implemented, the airline’s balance sheet has seen a significant improvement from a R8.6 billion (US$1.25 billion) loss to an R966 million (US$140 million) net profit.

References:
“SAA board faces probe”,
http://www.iol.co.za/businessindex.php?fSectionId=563&fSetId=662&ArticleId=5565602

“Scathing report slams Ngqula’s wasteful reign at SAA”,
http://www.ioltechnology.co.za/article_page.php?ArticleId=5564032

Interview with Len Verwey, Manager: Budget Unit, Idasa’s Political Information and Monitoring Service (PIMS), Dec. 2, 2010.

100: When irregularities are discovered, the agency, series of agencies, or equivalent mechanism is aggressive in investigating and/or in cooperating with other investigative bodies.

75:

50: The agency, series of agencies, or equivalent mechanism starts investigations, but is limited in its effectiveness or in its cooperation with other investigative agencies. The agency, series of agencies, or equivalent mechanism may be slow to act, unwilling to take on politically powerful offenders, or occasionally unable to enforce its judgments.

25:

0: The agency, series of agencies, or equivalent mechanism does not effectively investigate financial irregularities or cooperate with other investigative agencies. The agency, series of agencies, or equivalent mechanism may start investigations but not complete them, or may fail to detect offenders. The agency may be partisan in its application of power.
68e. In practice, when necessary, the agency, series of agencies, or equivalent mechanism overseeing state-owned companies imposes penalties on offenders.

Comments:
The National Energy Regulator of South Africa (NERSA) has taken an active role in tariff-setting in the sectors it oversees, which has caused disagreements and robust debate with Eskom to whom NERSA had given a far lower three-year tariff increase than originally sought by Eskom (an average 25 percent per year compounded, rather than 45 percent). Similar disagreements have been experienced with local authorities who rely extensively on income generated from the sale of electricity supplied by Eskom. These rumblings of discontent have had significant consequences for Eskom particularly, as it has been obliged to look elsewhere to raise capital for its infrastructure construction program. This has meant concessional loans from the previously-avoided World Bank, as well as large government loans (repayable) and loan guarantees. Nevertheless, NERSA's independence and authority has not been seriously questioned so far.

However, NERSA's willingness to exercise its legal authority to impose penalties for non-compliance with license conditions has yet to be tested. With the state-owned electricity utility responsible for about 95 percent of electricity generation in South Africa, there has been little scope for NERSA to utilize its more punitive powers.

References:


Interview with Gary Pienaar, Senior Researcher: Governance and Ethics, and project manager of the Electricity Governance Initiative of South Africa, Idasa’s Economic Governance Program, Nov. 25, 2010.

100: When rules violations are discovered, the agency, series of agencies, or equivalent mechanism is aggressive in penalizing offenders and/or in cooperating with other agencies that impose penalties.

75:

50: The agency, series of agencies, or equivalent mechanism enforces rules, but is limited in its effectiveness or reluctant to cooperate with other agencies. The agency, series of agencies, or equivalent mechanism may be slow to act, unwilling to take on politically powerful offenders, or occasionally unable to enforce its judgments.

25:

0: The agency, series of agencies, or equivalent mechanism does not effectively penalize offenders or refuses to cooperate with other agencies that enforce penalties. The agency, series of agencies, or equivalent mechanism may make judgments but not enforce them, or may fail to make reasonable judgments against offenders. The agency, series of agencies, or equivalent mechanism may be partisan in its application of power.

69. Can citizens access the financial records of state-owned companies?

100

69a. In law, citizens can access the financial records of state-owned companies.

Comments:
Citizens can access the financial records of state-owned enterprises in accordance with the provisions of the Public Finance Management Act (PFMA) and the Promotion of Access to Information Act (PAIA).

References:
http://www.info.gov.za

**Yes:** A YES score is earned if the financial information of all state-owned companies is required by law to be public. State-owned companies are defined as companies owned in whole or in part by the government.

**No:** A NO score is earned if any category of state-owned company is exempt from this rule, or no such rules exist.

69b. In practice, the financial records of state-owned companies are regularly updated.

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100  |  75  |  50  |  25  |  0

**Comments:**
Annual reports, which are available on the website of the Department of Public Enterprise (DPE), are up to date and outline the budget and expenditure clearly. The DPE reports to Parliament on the state of these entities, as do the individual SOEs, in a punctual and timely manner. The same can be said of the reports of the National Energy Regulator of South Africa (NERSA). All reports are made available on their respective websites, and can be cross-referenced against comprehensive and detailed budget information on National Treasury’s website, all of which can be readily accessed by the public.

According to the IBP Open Budget Survey 2010, South Africa’s budget score tops global rankings.

**References:**
Department of Public Enterprises, 2010.
http://www.dpe.gov.za and at
http://www.nersa.org.za/
http://www.treasury.gov.za
Parliamentary Portfolio Committee on Public Enterprises, 2010. DPE briefings, presentations and deliberations,
http://www.pmg.org.za
“Open Budget Survey 2010”, IBP.
http://www.internationalbudget.org/what-we-do/open-budget-survey/ and
http://www.internationalbudget.org/what-we-do/open-budget-survey/?fa=Rankings

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100: State-owned companies always publicly disclose financial data, which is generally accurate and up to date.

75:

50: State-owned companies disclose financial data, but it is flawed. Some companies may misstate financial data, file the information behind schedule, or not publicly disclose certain data.

25:

0: Financial data is not publicly available, or is consistently superficial or otherwise of no value.

---

69c. In practice, the financial records of state-owned companies are audited according to international accounting standards.

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100  |  75  |  50  |  25  |  0

**Comments:**
Financial records of state-owned companies are audited by established, reputable independent external auditors.

**References:**
Public Finance Management Act (PFMA) (Act 1 of 1999).
Financial records of all state-owned companies are regularly audited by a trained third party auditor using accepted international standards.

| 100 | 75 | 50 | 25 | 0 |

50: Financial records of state-owned companies are regularly audited, but exceptions may exist. Some companies may use flawed or deceptive accounting procedures, or some companies may be exempted from this requirement.

| 100 | 75 | 50 | 25 | 0 |

25: State-owned companies are not audited, or the audits have no functional value. The auditors may collude with the companies in providing misleading or false information to the public.

| 100 | 75 | 50 | 25 | 0 |

69d. In practice, citizens can access the financial records of state-owned companies within a reasonable time period.

| 100 | 75 | 50 | 25 | 0 |

Comments:
DPE has complied with the requirements of Chapter 6, Section 55 of the Public Finance Management Act (Act 1 of 1999), which requires that public entities submit an Annual Report, financial statements and the accompanying external audit opinion to the executive authority as well as to Parliament. The Annual Reports and audited financial statements of the Department of Public Enterprise (DPE), and of the respective SOEs, are submitted to Parliament in a timely and punctual manner.

Annual financial statements can also be accessed through the websites of both the DPE and the respective SOE whose Annual Reports are published online. These documents can be accessed on request, or are generally available online within at most a few months of submission to Parliament.

References:
Public Finance Management Act (Act 1 of 1999).
http://www.treasury.gov.za/legislation

http://www.dpe.gov.za

Records are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

| 100 | 75 | 50 | 25 | 0 |

75: Records take around two weeks to obtain. Some delays may be experienced.

| 100 | 75 | 50 | 25 | 0 |

25: Records take more than a month to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

| 100 | 75 | 50 | 25 | 0 |

69e. In practice, citizens can access the financial records of state-owned companies at a reasonable cost.

| 100 | 75 | 50 | 25 | 0 |

Comments:
Annual financial statements of the Department of Public Enterprise (DPE) and the respective SOEs are published on their websites each year and can be accessed free of charge by any interested individual or organization. These records are discussed in Parliament in open session and copies are often available without charge. Financial statements can, moreover, be requested from the relevant departments in terms of the provisions of the Promotion of Access to Information Act, 2000 (PAIA). Regulations in terms of PAIA allow access to such records at a nominal cost, but can be requested without charge in cases of proven need.
5.5. Business Licensing and Regulation

70. Are business licenses available to all citizens?

70a. In law, anyone may apply for a business license.

| Yes | No |

Comments:
The Business Act (Act 71 of 1991) governs business licensing in South Africa. According to the Act, the role of granting a business license is devolved to the local government sphere. As a result of this devolution of business licensing, there is no uniform interpretation and implementation of the Act. Schedule 1 of the Business Act No 71 of 1991 lists the businesses which need a license. Trading without a valid license is a punishable offense.

According to the World Bank “Doing Business 2011” data for South Africa, the procedure for starting a business includes the following steps: (1) reserve a company name with the Registrar of Companies and pay fees, (2) lodge formation documentation with Companies and Intellectual Property Registration Office (CIPRO) in Pretoria, Gauteng Province for registration, open a bank account, (3) register with the office of the local receiver of revenue (SARS) for income tax, VAT, and employee withholding tax (PAYE and SITE), (4) register with the Department of Labor for Unemployment Insurance, (4) register with the Commissioner according to the Compensation for Occupational Injuries and Diseases Act.

The guidelines on the South African Revenue Service (SARS) website confirm that it requires all companies to register for income tax. Any business, whether in the form of a sole proprietorship, partnership, company, close corporation or something else must register with a local SARS office and receive an income tax reference number. The SARS guidelines also indicate that depending on other factors such as one’s turnover, size of payroll, and involvement in imports and exports, one may also need to register for other taxes and duties such as VAT, PAYE, Customs and Excise and the Skills Development Levy. Also, new proposed amendments into the New Companies Act 2008 relatively simplify a registration of a foreign company as an “external company” in South Africa.
Yes: A YES score is earned if no particular group or category of citizens is excluded from applying for a business license, when required. A YES score is also earned if basic business licenses are not required.

No: A NO score is earned if any group of citizens are categorically excluded from applying for a business license, when required.

70b. In law, a complaint mechanism exists if a business license request is denied.

| Yes | No |

Comments:
Section 3 of the Business Act (Act 71 of 1991) states that any person who feels aggrieved by a decision of a licensing authority may appeal against the decision in accordance with the provisions of a regulation contemplated in Section 6 (1)(a)(vi).

Section 6 of the Act empowers Administrators to make provincial regulations pertaining to appeals, including the referral of appeals to appeals committees, and the constitution, functions, and procedures, and the legal effect, of findings of such committees.

References:

Yes: A YES score is earned if there is a formal process for appealing a rejected license.

No: A NO score is earned if no such mechanism exists.

70c. In practice, citizens can obtain any necessary business license (i.e. for a small import business) within a reasonable time period.

| 100 | 75 | 50 | 25 | 0 |

Comments:
Provided all requirements as stipulated in the Business Act (Act 71 of 1991) are met, citizens can obtain a business license within a reasonable time period. It takes approximately one to two months to register a business. The registration process involves the following six procedural steps:
- Reserving a company name with the registrar (three days).
- Lodging formation documentation (five-seven days).
- Opening of a bank account (one day).
- Registration with the office of the local receiver of revenue (12 days).
- Registration with the Department of Labor for unemployment insurance (four days).
- Registration with the Commissioner according to the Compensation for Occupational Injuries and Diseases Act (10 days). This last step is done concurrently with the registration with the receiver of revenue.

Cipro, a result of the merger of former South African Companies Registration Office (SACRO) and South African Patents and Trade Marks Office (SAFTO) registers businesses, intellectual property rights and maintains related databases. The CIPRO 2010 annual report states that the Companies Act of 1973, Close Corporations Act of 1984 (Act 69 of 1984), and the Co-operatives Act, 2005 (Act 14 of 2005), make provisions for Cipro to register business entities such as companies, close corporations or co-operatives. A business license can be obtained within a reasonable time period but Cipro (or the Company Registrar) seems to be unreliable and its data outdated to a certain extent.

Over the course of the last few years, a few major cases hit the news headlines regarding certain fraudulent activities and security compromises in the Cipro database. For example, the fact that former Chief Whip of the ANC, Tony Yengeni, who served a jail sentence for fraud and is thus disqualified from serving as a company director, in terms of s218 of the Companies Act, was not recorded as such in the Cipro Register. A search into Cipro database revealed that he had been acting as a director of Auburn Avenue Trading 88, Circle Way Trading 231, Duoflex, Abrina 2354, White Rag Investments and Cream Mag Trading, despite the fraud convictions against him.

On Oct. 10, 2010, Business News reported that eight people including Sandle Majali of so-called “Oligate infamy” had been arrested “in connection with alleged fraud at the Companies and Intellectual Property Registration Office (Cipro)” and the hijacking of Kalahari Resources by removing the names of Daphne Mashile-Nkosi and Amos Brian Mashile as directors of Kalahari listed in Cipro’s database (from the list of Kalahari’s directors contained in Cipro’s database). After receiving complaints from companies, Cipro initiated a forensic investigation and suspended five of its staff members for allegedly participating in fraudulent activities.
It was reported in August 2009 that Cipro would be de-registering about 65,000 companies in the near-term either because some of these have been engaged in fraudulent registration or in evading tax payments to SARS. In November, the Department of Trade and Industry admitted that the Cipro needed to beef up its protection of information. Mr. Gary Pienaar notes that similar cases have highlighted Cipro’s disfunctionality and inefficiency, when it should be providing an essential service of providing the information that both underpins confidence between parties to business activities, and on the part of those who use the information to verify possible conflicts of interest or other dishonest activities. He said that these fraudulent activities in connection with Cipro also raise important ethical questions, and make it hard for anyone, whether government or the public, to rely on Cipro’s often apparently vulnerable and inaccurate data.

References:


100: Licenses are not required, or licenses can be obtained within roughly one week.
75:
50: Licensing is required and takes around one month. Some groups may be delayed up to a three months
25:
0: Licensing takes more than three months for most groups. Some groups may wait six months to one year to get necessary licenses.

70d. In practice, citizens can obtain any necessary business license (i.e. for a small import business) at a reasonable cost.

Comments:
Provided that an applicant meets all requirements stipulated in the Business Act (Act 71 of 1991), a business license can be obtained at a reasonable cost.

According to the Companies and Intellectual Property Registration Office (CIPRO), the costs involved in registering the formation of a private, public, or Section 21 company are as follows:

Application for the reservation of a company name (R50-US$7.13)
Application for certificate to commence business (R60-US$8.56)
Companies with share capital are required to pay a fee of R350 (US$51) for R1,000 (US$142.7) capital, plus R5 (US$0.71) per additional R1,000 authorized capital, for the purpose of a Memorandum of Association. Companies without share capital are liable only for the R350 fee.

References:

Interview with Len Verwey, PIMS Budget Unit manager, Dec. 3, 2010


100: Licenses are not required, or licenses are free. Licenses can be obtained at little cost to the organization, such as by mail, or on-line.
75:
Licenses are required, and impose a financial burden on the organization. Licenses may require a visit to a specific office, such as a regional or national capital.

0: Licenses are required, and impose a major financial burden on the organization. Licensing costs are prohibitive to the organization.

71. Are there transparent business regulatory requirements for basic health, environmental, and safety standards?

100

71a. In law, basic business regulatory requirements for meeting public health standards are transparent and publicly available.

Yes | No

Comments:
The Basic Conditions of Employment Act (Act 11 of 2002) and the Occupational Health and Safety Act (Act 85 of 1993) require compliance with public health standards by holders and prospective holders of business licenses and regulations. These standards are available to the public.

References:


Occupational Health and Safety Act (Act 85 of 1993) and amendments.

Yes: A YES score is earned if basic regulatory requirements for meeting public health standards are publicly accessible and transparent.

No: A NO score is earned if such requirements are not made public or are otherwise not transparent.

71b. In law, basic business regulatory requirements for meeting public environmental standards are transparent and publicly available.

Yes | No

Comments:
The regulations to the Business Act require compliance with environmental standards by holders and prospective holders of business licenses. These regulations are publicly available.

The National Environmental Management Act (Act 107 of 1998) seeks to regulate the compliance and enforcement of the prevention of environmental degradation and imposes a responsibility on any person or organization to minimize the risk of harming the environment. It also imposes a duty on any organ of state to prepare an environmental implementation and management plan and thereafter to exercise its functions in accordance with that plan.

References:

Business Act (Act 71 of 1991), Regulations.

Yes: A YES score is earned if basic regulatory requirements for meeting public environmental standards are publicly accessible and transparent.

No: A NO score is earned if such requirements are not made public or are otherwise not transparent.

71c. In law, basic business regulatory requirements for meeting public safety standards are transparent and publicly available.

Yes | No

Comments:
The regulations to the Business Act require compliance with public safety standards by holders and prospective holders of business licenses. These regulations are publicly available.

References:

Business Act (Act 71 of 1991), Regulations.

Global Integrity, Country Report: South Africa, 2008,

Yes: A YES score is earned if basic regulatory requirements for meeting public safety standards are publicly accessible and transparent.

No: A NO score is earned if such requirements are not made public or are otherwise not transparent.

72. Does government effectively enforce basic health, environmental, and safety standards on businesses?

75

72a. In practice, business inspections by government officials to ensure public health standards are being met and are carried out in a uniform and even-handed manner.

100 | 75 | 50 | 25 | 0

Comments:
Routine inspections are conducted by the inspectors from local councils who monitor health standards. However, there have been incidences reported where government inspectors received bribes from business owners. For instance, an incident was reported before in which the government increased the pressure for compliance, but two inspectors were found to have accepted bribes from business owners.

References:
Global Integrity, Country Report: South Africa. 2008,

"Govt inspectors in bribe scam"," Aug. 27, 2007, Fin24,

“Mining-audit inspectors face bribery, intimidation.”
Nov. 15, 2010, Mail & Guardian Online.
100: Business inspections by the government to ensure that public health standards are being met are designed and carried out in such a way as to ensure comprehensive compliance by all businesses with transparent regulatory requirements.

75:

50: Business inspections by the government to ensure public health standards are met are generally carried out in an even-handed way though exceptions exist. Bribes are occasionally paid to extract favorable treatment or expedited processing.

25:

0: Business inspections to ensure that public health standards are met are routinely carried out by government officials in an ad hoc, arbitrary fashion designed to extract extra payments from businesses in exchange for favorable treatment.

72b. In practice, business inspections by government officials to ensure public environmental standards are being met are carried out in a uniform and even-handed manner.

Comments:
Routine inspections are conducted by the inspectors from local councils who monitor environmental standards. In addition specific governmental departments conduct inspections in areas that fall under their jurisdictions. For instance, the Mineral Resources Minister Susan Shabangu was reported as saying that her department has conducted 1,475 prospecting inspections with 2,191 audits pending, to be completed by February 2011. Despite routine inspections, there have been incidents reported where government inspectors received bribes from business owners. For instance, an incident was reported in which the government increased the pressure for compliance, but two inspectors were found to have accepted bribes from business owners.

References:


100: Business inspections by the government to ensure that public environmental standards are being met are designed and carried out in such a way as to ensure comprehensive compliance by all businesses with transparent regulatory requirements.

75:

50: Business inspections by the government to ensure public environmental standards are met are generally carried out in an even-handed way though exceptions exist. Bribes are occasionally paid to extract favorable treatment or expedited processing.

25:

0: Business inspections to ensure that public environmental standards are met are routinely carried out by government officials in an ad hoc, arbitrary fashion designed to extract extra payments from businesses in exchange for favorable treatment.

72c. In practice, business inspections by government officials to ensure public safety standards are being met are carried out in a uniform and even-handed manner.

Comments:
Routine inspections are conducted by the inspectors of the local councils who monitor safety standards. The Basic Conditions
Employment Act also stipulates minimum safety standards. However, there have been incidents reported where government inspectors received bribes from business owners. For instance, an incident was reported before in which the government increased the pressure for compliance, but two inspectors were found to have accepted bribes from business owners.

Concerns over any possible bribery or non-compliance during the inspections seem to have remained a challenge. On Nov. 15, 2010, the Mineral Resources Minister Susan Shabangu was reported as saying that "bribery, intimidation, non-compliance and a lack of cooperation from the holders of mining and prospecting licenses are some of the challenges that the mineral resources department has faced during license audits." The Mail and Guardian quoted Shabangu’s statement that her department had conducted 1,475 prospecting inspections, with 2,191 audits pending and noted further her appeal to rights’ holders not to "compromise the audit process by trying to intimidate, bribe or discredit the process." The report stated further that one mining company in the Northern Cape, whose name was not disclosed, was facing criminal charges for attempting to bribe an official.

References:


"Mining-audit inspectors face bribery, intimidation,"
Nov. 15, 2010. Mail & Guardian Online.

100: Business inspections by the government to ensure that public safety standards are being met are designed and carried out in such a way as to ensure comprehensive compliance by all businesses with transparent regulatory requirements.

75:

50: Business inspections by the government to ensure public safety standards are met are generally carried out in an even-handed way though exceptions exist. Bribes are occasionally paid to extract favorable treatment or expedited processing.

25:

0: Business inspections to ensure that public safety standards are met are routinely carried out by government officials in an ad hoc, arbitrary fashion designed to extract extra payments from businesses in exchange for favorable treatment.

Category 6. Anti-Corruption Legal Framework, Judicial Impartiality, and Law Enforcement Professionalism

6.1. Anti-Corruption Law

73. Is there legislation criminalizing corruption?

100

73a. In law, attempted corruption is illegal.

Yes | No

Comments:
Section 21 of the Prevention and Combating of Corrupt Activities Act specifies that any person who – (a) attempts; (b) conspires with any other person; or (c) aids, abets, induces, incites, instigates, instructs, commands, counsels or procures another person to commit an offense in terms of this Act, is guilty of an offense.

References:
Yes: A YES score is earned if corruption laws include attempted acts.

No: A NO score is earned if this is not illegal.

73b. In law, extortion is illegal.

Yes | No

Comments:
Extortion is made an offense in terms of section 21 (c) of the Prevention and Combating of Corrupt Activities Act of 2004, read with the definition of induce in section 1(x), which makes a statutory offense of the common law crime of extortion.

References:

Yes: A YES score is earned if corruption laws include extortion. Extortion is defined as demanding favorable treatment (such as a bribe) to withhold a punishment.

No: A NO score is earned if this is not illegal.

73c. In law, offering a bribe (i.e. active corruption) is illegal.

Yes | No

Comments:
Section 3 of the Prevention and Combating of Corrupt Activities Act of 2004 makes offering a bribe illegal by providing that: Any person who directly or indirectly – (a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of him/herself or for the benefit of another person; or (b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner – (i) that amounts to the (aa) illegal, dishonest, unauthorized, incomplete, or biased; or (bb) misuse or selling of information or material acquired in the course of the exercise, carrying out or performance of any powers, duties or functions arising out of a constitutions, statutory, contractual or any other legal obligation (ii) that amounts to (aa) the abuse of a position of authority; (bb) a breach of trust; or (cc) the violation of a legal duty or a set of rules; (iii) designed to achieve an unjustified result; or (iv) that amount to any other unauthorized or improper inducement to do or not to do anything, is guilty of the offense of corruption.

References:

Yes: A YES score is earned if offering a bribe is illegal.

No: A NO score is earned if this is not illegal.

73d. In law, receiving a bribe (i.e. passive corruption) is illegal.

Yes | No

Comments:
Section 3 of the Prevention and Combating of Corrupt Activities Act of 2004 makes receiving a bribe illegal by providing that: Any person who directly or indirectly – (a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or (b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner – (i) that amounts to the – (aa) illegal, dishonest, unauthorized, incomplete, or biased; or (bb) misuse or selling of information or material acquired in the course of the exercise, carrying out or performance of

References:

Yes: A YES score is earned if receiving a bribe is illegal.

No: A NO score is earned if this is not illegal.
any powers, duties or functions arising out of a constitution, statutory, contractual or any other legal obligation; (ii) that amounts to (aa) the abuse of a position of authority; (bb) a breach of trust; or (cc) the violation of a legal duty or a set of rules; (iii) designed to achieve an unjustified result; or (iv) that amount to any other unauthorized or improper inducement to do or not to do anything, is guilty of the offense of corruption.

References:

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<td>A YES score is earned if receiving a bribe is illegal.</td>
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<td>A NO score is earned if this is not illegal.</td>
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73e. In law, bribing a foreign official is illegal.

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<td>A YES score is earned if bribing a foreign official is illegal.</td>
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<td>A NO score is earned if this is not illegal.</td>
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Comments:
Bribing a foreign official is illegal in terms of section 5 of the Prevention of Corrupt Activities Act:

(1) Any person who, directly or indirectly gives or agrees or offers to give any gratification to a foreign public official, whether for the benefit of that foreign public official or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner that amounts to the – (i) illegal, dishonest, unauthorized, incomplete, or biased; or (ii) misuse or selling of information or material acquired in the course of the exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation; (b) that amounts to – (i) the abuse of a position of authority; (ii) a breach of trust; or (iii) the violation of a legal duty or a set of rules; (c) designed to achieve an unjustified result; or (d) that amounts to any other unauthorized or improper inducement to do or not to do anything, is guilty of the offense of corrupt activities relating to foreign public officials.

(2) Without derogating from the generality of section 2(4). “to act” in subsection (1) includes – (a) voting at any meeting of a public body; (b) performing or not adequately performing any official functions; (c) expediting, delaying, hindering or preventing the performance of an official act; (d) aiding, assisting or favoring any particular person in the transaction of any business with a public body; (e) aiding or assisting in procuring or preventing the passing of any vote or the granting of any contract or advantage in favor of any person in relation to the transaction of any business with a public body; (f) showing any favor or disfavor to any

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73f. In law, using public resources for private gain is illegal.

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<td>A YES score is earned if using public resources for private gain is illegal.</td>
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<td>A NO score is earned if this is not illegal.</td>
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Comments:
Section 4 of the Prevention and Combating of Corrupt Activities Act criminalizes the misuse of public resources for private gain:

4.(1) Any – (a) public officer who, directly or indirectly accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or (b) person who, directly or indirectly, gives or agrees or offers to give any gratification to a public officer, whether for the benefit of that public officer or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner – (i) that amounts to the – (aa) illegal, dishonest, unauthorized, incomplete, or biased; or (bb) misuse or selling of information or material acquired in the course of the exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation; (ii) that amounts to – (i) the abuse of a position of authority; (ii) a breach of trust; or (iii) the violation of a legal duty or a set of rules; (iii) designed to achieve an unjustified result; or (iv) that amounts to any other unauthorized or improper inducement to do or not to do anything, is guilty of the offense of corrupt activities relating to public officials.

(2) Without derogating from the generality of section 2(4), includes – (a) voting at any meeting of a public body; (b) performing or not adequately performing any official functions; (c) expediting, delaying, hindering or preventing the performance of an official act; (d) aiding, assisting or favoring any particular person in the transaction of any business with a public body; (e) aiding or assisting in procuring or preventing the passing of any vote or the granting of any contract or advantage in favor of any person in relation to the transaction of any business with a public body; (f) showing any favor or disfavor to any
person in performing a function as a public officer; (g) diverting, for purposes unrelated to those for which they were intended, any property belonging to the state which such officer received by virtue of his or her position for purposes of administration, custody or for any other reason, to another person; or (h) exerting any improper influence over the decision making of any person performing functions in a public body.

References:

| Yes | A YES score is earned if using public resources for private gain is illegal. |
| No | A NO score is earned if this is not illegal. |

73g. In law, using confidential state information for private gain is illegal.

| Yes | No |

Comments:
Section 4(1)(bb) criminalizes the misuse of confidential state information for private gain:

4.(1) Any – (a) public officer who, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or (b) person who, directly or indirectly, gives or agrees or offers to give any gratification to a public officer, whether for the benefit of that public officer or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner – (i) that amounts to the – (aa) illegal, dishonest, unauthorized, incomplete, or biased; or (bb) misuse or selling of information or material acquired in the course of the exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation; (ii) that amounts to the – (aa) the abuse of a position of authority; (bb) a breach of trust; or (cc) the violation of a legal duty or a set of rules; (iii) designed to achieve an unjustified result; or (iv) that amounts to any other unauthorized or improper inducement to do or not do anything, is guilty of the offense of corrupt activities relating to public officers.

References:

Yes: A YES score is earned if using confidential state information for private gain is illegal.

No: A NO score is earned if this is not illegal.

73h. In law, money laundering is illegal.

| Yes | No |

Comments:
The Prevention of Organized Crime Act of 1998 makes money laundering an offense. One of the stated purposes of the Act is to introduce measures to combat organized crime, money laundering and criminal gang activities; [and] to provide for the prohibition of money laundering and for an obligation to report certain information. The Act also specifies that any person who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities shall be guilty of an offense.

The Preamble to the Prevention and Combating of Corrupt Activities Act of 2004 (Act 12 of 2004) also makes reference to the link between corrupt activities and other forms of crime, in particular organized crime and economic crime, including money-laundering.

References:

Yes: A YES score is earned if money laundering is illegal. Money laundering is defined as concealing the origin of funds to hide wrongdoing or avoid confiscation.

No: A NO score is earned if this is not illegal.

73. In law, conspiracy to commit a crime (i.e. organized crime) is illegal.

Yes | No

Comments:
Schedule 1 of The Prevention of Organized Crime Act indicates that any conspiracy, incitement or attempt to commit any offense in terms of the Act is punishable under law. In addition, the Prevention and Combating of Corrupt Activities Act provides that: Any person who – (a) attempts; (b) conspires with any other person; or (c) aids, abets, induces, instructs, commands, counsels or procures another person to commit an offense in terms of this Act, is guilty of an offense.

References:


Yes: A YES score is earned if organized crime is illegal.

No: A NO score is earned if this is not illegal.

6.2. Anti-Corruption Agency or Equivalent Mechanisms

74. In law, is there an agency (or group of agencies) with a legal mandate to address corruption?

100

74a. In law, is there an agency (or group of agencies) with a legal mandate to address corruption?

Yes | No

Comments:
South Africa does not have one single body specifically mandated to fight corruption. However, a number of bodies exist with a range of powers to fight corruption. The South African Constitution provides for the establishment of the Public Protector, which protects the public against improper actions in relation to the affairs of government and public functions; the Public Service Commission, which is mandated to promote a high standard of professional ethics in the Public Service; the Auditor General, which ensures financial accountability of public entities; and the National Prosecuting Authority (NPA), which, as the centralized prosecuting authority, institutes and conducts criminal proceedings on behalf of the State and carries out investigations as required. Within the NPA the Assets Forfeiture Unit seizes assets that are the proceeds of crime or have been part of a criminal offense. Previously, another unit of the NPA, the Directorate of Special Operations (DSO), also known as the Scorpions, dealt with high-profile corruption cases and was viewed as South Africa’s primary anti-corruption agency. It was dissolved by Parliament in 2008 (through the National Prosecuting Authority Amendment Act) following the adoption of a resolution to this effect at the African National Congress (ANC) 52nd National Conference in Polokwane in 2007.

The Prevention and Combating of Corrupt Activities Act (2004) requires that corruption exceeding a threshold value be reported to the South African Police Service (SAPS) by persons who are in a position of authority. Within the SAPS, the Commercial Crimes Unit, which investigates all cases of commercial crime including corruption, and the National Anti-Corruption Unit, which investigates cases of alleged corruption within the Police Service, have been the main anti-corruption agencies. The Directorate for Priority Crimes Investigation (DPCI), known as the Hawks, was established in 2008 (through the South African Police Service Amendment Act) to replace the Scorpions. It is also housed within the SAPS. The Independent Complaints Directorate (ICD), investigates complaints regarding offenses and misconduct committed by members of the SAPS. Complaints of corruption are referred to the SAPS National Anti-corruption Unit. The Special Investigating Units and Special Tribunals Act of 1996 created the Special Investigations Unit as a body to investigate serious financial maladministration and misappropriation of funds by state...
institutions and their employees, and recover those funds by civil litigation. In addition, several Specialized Commercial Crime Courts were established in 1999, through an agreement between the NPA, the SAPS, the Department of Justice and Business against Crime (BAC). These courts are reserved for the hearing of commercial crime cases.

References:

Yes: A YES score is earned if an agency is specifically mandated to address corruption. A YES score is earned if there are several agencies or entities with specific roles in fighting corruption, including special prosecutorial entities.

No: A NO score is earned if no agency (or group of agencies/entities) is specifically mandated to prevent or prosecute corruption.

75. Is the anti-corruption agency effective?

75a. In law, the anti-corruption agency (or agencies) is protected from political interference.

Yes | No

Comments:
The Auditor General, Public Protector and National Prosecuting Authority are anti-corruption agencies whose existence is provided for by the Constitution. The Auditor-General and the Public Protector are established in Chapter 9 of the Constitution. The independence of all Chapter 9 institutions is protected in terms of section 181 of the Constitution, which also prohibits interference with or obstruction of their activities.

Chapter 10 of the Constitution establishes the Public Service Commission, which is mandated to promote a high standard of professional ethics in the Public Service. Regarding the PSC, the Constitution specifies in section 196 that the Commission is independent and must be impartial, and must exercise its powers and perform its functions without fear, favor or prejudice in the interest of the maintenance of effective and efficient public administration and a high standard of professional ethics in the public service. No person or organ of state may interfere with the functioning of the Commission.

The National Prosecuting Authority (NPA) is established in terms of section 179 in Chapter 8 of the Constitution. Chapter 8 also establishes the courts. The head of the NPA, the National Director of Public Prosecutions, is appointed by the President, in accordance with the Constitution. Nevertheless, section 179(4) of the Constitution requires that national legislation must ensure that the prosecuting authority exercises its functions without fear, favor or prejudice, while the National Prosecuting Authority Act provides that each member of the NPA should serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favor or prejudice and subject only to the Constitution and the law. According to section
35 of the NPA act, the members of the NPA are accountable to Parliament as opposed to the Executive branch. Legally, this protects it from executive-level political interference.

As a result of its being housed in the National Prosecuting Authority, the Directorate of Special Operations (DSO) enjoyed similar protection of its independence and investigated high profile corruption cases such as those against current President Jacob Zuma and former National Commissioner of Police, Jackie Selebi. The DSO was dissolved in 2008. The Directorate for Priority Crimes investigation (DPCI) was established in 2008 and is housed in the South African Police Service (SAPS). According to Section 17C of the South African Police Service Amendment Act of 2008, the head DPCI is appointed by the Minister of Police in concurrence with cabinet while other the staff is appointed by the National Commissioner on the recommendation of the Head of the Directorate. This means the DPCI is accountable to the National Commissioner of Police, the Minister of Police and ultimately to the President, as head of the executive. Therefore it does not have the legal safeguard against executive interference that the DSO had.

According to the Constitution and the South Africa Police Services (SAPS) Act (Act 68 of 1995), the SAPS is under direct command of the National Police Commissioner, who is appointed by the President. The National Commissioner appoints the Provincial Commissioners. The SAPS Act of 1995 also provides that no member [of the SAPS] shall in any manner further prejudice party-political interests.

References:

http://us-cdn.creamermedia.co.za/assets/articles/attachments/19452_act_56.pdf


Pienaar, G and Seedat, S. 2008. Closure of the Scorpions-Comment to Parliament
http://www.idasa.org.za/index.asp?page=output_details.asp%3F%26TID%3D1560%26oplang%3Den%26Dev%26TID%3D12%26OTID%3D60

Gary Pienaar,
Measuring the Creature that will replace the Scorpions,

Yes: A YES score is earned only if the agency (or agencies) has some formal organizational or operational independence from the government. A YES score is earned even if the agency/agencies is legally separate but in practice staffed by partisans.

No: A NO score is earned if the agency (or agencies) is a subordinate part of any government ministry or agency, such as the Department of Interior or the Justice Department, in such a way that limits its operational independence.

75b. In practice, the anti-corruption agency (or agencies) is protected from political interference.

100 | 75 | 50 | 25 | 0

Comments:
South Africa does not have one single body specifically mandated to fight corruption. However, a number of bodies exist with a range of powers to fight corruption. Until it was disbanded in 2008, the Directorate of Special Operations (The Scorpions), housed in the National Prosecutions Authority (NPA), was South Africa’s leading anti-corruption agency. It initiated a number of high-profile corruption investigations, including those into ANC President Jacob Zuma, and National Police Commissioner Jackie Selebi. These cases were viewed as evidence of the political independence of the NPA. However, events following the initiation of these investigations illustrated the potential threat of political interference. When Selebi was charged with corruption, it emerged that there had been interference by the Presidency, the Justice and Constitutional Development Department, the National Intelligence Agency, and the SAPS to prevent Selebi from being charged. In late 2007, after procuring search warrants and a warrant of arrest against Selebi, National Director of Public Prosecutions Vusi Pikoli was suspended from his position, in what he claims was an attempt to prevent charges being brought against Selebi.

On Sept.12, 2008, Judge Chris Nicholson found that the decision by the Scorpions to prosecute Zuma on charges of fraud and corruption was illegal because they did not follow due process. He further insinuated that the reasons for the prosecution were political. This judgment discredited the NPA's investigation against Zuma. It was also the motivation behind the recall of then President Thabo Mbeki from the presidency, as he was accused of interfering in the Scorpions case against Zuma. The charges against Zuma were dropped on April 6, 2009, enabling him to run for president of the country. This decision was also widely seen as politically motivated.
The Scorpions were dissolved in 2008 for clearly political reasons rather than poor performance by the political unit. At the African National Congress (ANC) National Conference in Polokwane in 2007, a resolution was adopted to dissolve the Scorpions. This was ostensibly based on an interpretation of the Constitution which prefers a single police service, but this interpretation has been rejected by the Constitutional Court. The real reason appears to be the accusations that the Scorpions had been used by former President Thabo Mbeki against his rival current President Jacob Zuma. The Directorate for Priority Crimes Investigation (DPCI also known as the Hawks) was established in 2008 to replace the Scorpions and is housed in the South African Police Service (SAPS).

The closure of the last two active legs on the investigation into Defense department’s Strategic Defense Acquisition (more commonly known as the Arms Deal) by the Hawks in October 2010 is widely seen as the result of political interference in the work of the anti-corruption unit. The Arms Deal has been the subject of South Africa’s largest anti-corruption investigation since 2000. The probe into the sale of R30 billion (US$4.35 billion) of military hardware to the South African government implicated several well-connected South Africans who were accused of receiving or channeling bribes. Among those implicated is current President Jacob Zuma, whose financial adviser was convicted of corruption on May 31, 2005.

References:


100: This agency (or agencies) operates independently of the political process, without incentive or pressure to render favorable judgments in politically sensitive cases. Investigations can operate without hindrance from the government, including access to politically sensitive information.

75:

50: This agency (or agencies) is typically independent, yet is sometimes influenced in its work by negative or positive political incentives. This may include favorable or unfavorable public criticism by the government, political appointments, or other forms of influence. The agency (or agencies) may not be provided with some information needed to carry out its investigations.

25:

0: This agency (or agencies) is commonly influenced by political or personal incentives. These may include conflicting family relationships, professional partnerships, or other personal loyalties. Negative incentives may include threats, harassment or other abuses of power. The agency (or agencies) cannot compel the government to reveal sensitive information.
75c. In practice, the head of the anti-corruption agency (or agencies) is protected from removal without relevant justification.

100: The director(s) cannot be removed without a significant justification through a formal process, such as impeachment for abuse of power.

75: The director(s) can in some cases be removed through a combination of official or unofficial pressure.

50: The director(s) can be removed through official or unofficial pressure.

25: The director(s) can be removed at the will of political leadership.

0: The director(s) can be removed at the will of political leadership.

75d. In practice, appointments to the anti-corruption agency (or agencies) are based on professional criteria.

100: The director(s) cannot be removed without a significant justification through a formal process, such as impeachment for abuse of power.

75: The director(s) can in some cases be removed through a combination of official or unofficial pressure.

50: The director(s) can be removed through official or unofficial pressure.

25: The director(s) can be removed at the will of political leadership.

0: The director(s) can be removed at the will of political leadership.

Comments:

In late 2007, after procuring search warrants and a warrant of arrest against National Police Commissioner Jackie Selebi, National Director of Public Prosecutions (NDPP) Vusi Pikoli was suspended from his position, in what he claimed was an attempt to prevent charges being brought against Selebi. At a Commission of Inquiry into his dismissal headed by former National Assembly Speaker, Frene Ginwala, he stated: “You cannot dispute the attempted concealment of executive interference into this matter immediately prior to my suspension, which is not consistent with all the interaction I have had.”

The media also reported the Presidency, the Justice and Constitutional Development Department, the National Intelligence Agency, and the SAPS worked together to prevent Selebi from being charged. On Dec. 8, 2008, Commission found that the government had failed to provide substantial reasons for his dismissal and that he should be reinstated as NDPP. Pikoli was not reinstated and now works for a private law firm. Selebi was found guilty of corruption on July 2, 2010, and sentenced to 15 years in prison on Aug. 3, 2010.

References:


100: The director(s) cannot be removed without a significant justification through a formal process, such as impeachment for abuse of power.

75: The director(s) can in some cases be removed through a combination of official or unofficial pressure.

50: The director(s) can be removed through official or unofficial pressure.

25: The director(s) can be removed at the will of political leadership.

0: The director(s) can be removed at the will of political leadership.

Comments:

In general, recruitment of public sector officials has been criticized, due to a lack of coherent and clear employment policies and mechanisms. The Public Service Commission’s “Assessment of the State of Human Resources Management in the Public Service” 2010 report indicates that there were serious deficiencies in the recruiting process of many departments which impacted negatively on the recruitment process and its outcome. Among these were the failure to draw up job descriptions for advertised posts, irregular short-listing and selection practices and a failure by selection committee members to declare conflicts of interest in their relationships with candidates. The report also stated that the public service, in general, failed not only to attract suitable skills but also to place people with the right skills and competencies in right places. This resulted in vacancies not being filled or filled with inappropriately skilled people. Another problem highlighted by the report is the challenge of filling vacancies because of scarce skills, the unavailability of selection committee members and salaries that are not market related. The public service also faces problems of staff retention with the high-turnover of staff being one of the most persistent challenges faced by the public service. These general public service challenges affect the anti-corruption agencies as well. However there does not appear to be a deliberate attempt to fill the anti-corruption agencies with non-qualified or under-qualified staff. On the contrary the Auditor General, South African Police Service, National Prosecuting Authority and Public Protector have all put in place programs to recruit skilled staff.

The President of the Republic appoints all the heads of anti-corruption agencies, these appointments are therefore political. Political qualifications are nonetheless required. However, the political appointment of the heads of anti-corruption agencies has been criticized. Senior members or supporters of the ruling African National Congress (ANC) are often appointed to government agencies in a practice referred to as “cadre deployment.” At times this practice has led to poorly qualified people being in charge of crucial government agencies. A recent controversial case of deployment is the appointment of Mziw Simelane as National Director of Public Prosecutions (NDPP). On Nov. 25, 2009, it was announced that Simelane had been appointed by President Jacob Zuma as NDPP and head of the NPA. Simelane was the former Director-General in the Justice department. One reason
his appointment was controversial is that the Ginwala Commission into former NDPP, Vusi Pikoli’s, suspension found that Simelane evidence before the inquiry “contradictory and without basis in fact or in law” and blamed him for suppressing the disclosure of information. The final report also called Simelane "arrogant and condescending" towards Pikoli. The opposition party, the Democratic Alliance (DA) took the Presidency to court for the appointment of Simelane. It argued that Simelane was not fit and proper for the job of NDPP “because he lacked integrity and did not respect the institutional independence of the NPA.” The DA's case was dismissed by the North Gauteng High Court on Nov. 11, 2010.

References:
Republic of South Africa. The Public Service Commission,


100: Appointments to the agency (or agencies) are made based on professional qualifications. Individuals appointed are free of conflicts of interest arising from personal loyalties, family connections or other biases. Individuals appointed usually do not have clear political party affiliations.

75:

50: Appointments are usually based on professional qualifications. Individuals appointed may have clear party loyalties, however.

25:

0: Appointments are often based on political considerations. Individuals appointed often have conflicts of interest arising from personal loyalties, family connections or other biases. Individuals appointed often have clear party loyalties.

Comments:
Despite the shortage of skilled workers in South Africa in general, all of the anti-corruption agencies have professional full-time staff and have made improvements in the skills-level of their staff. The Auditor-General reported that 94 percent of its audit staff met the minimum qualification requirements. The Trainee Auditing scheme allowed it to recruit trainee auditors who wish to acquire a professional auditing qualification. As these trainees qualify, the number of qualified staff will increase further. The Auditor General saw a 32.4 percent decrease in unqualified staff between the 2008/2009 and 2009/2010 financial year. The National Prosecuting Authority (NPA) faced an exodus of experiences and skilled professionals in the run-up to and following the closure of the Scorpions. Currently the agency faces a 14.6 percent vacancy rate in general and special investigations; 16.3 percent among prosecutors; and 16.2 percent among senior managers. The Public Protector’s office has a vacancy rate of 4.5 percent. 65.4 percent of its professional staff underwent additional training in the 2009/2010 reporting period.

In the presentation of the 2009/2010 report to the Standing Committee on Public Accounts (SCOPA), the divisional commissioner for detective services, Raymond Lalla, said that 14 percent of detectives had not undergone the basic 14-week training course. This had a negative effect on overall detective work including that related to corruption. He also said, however, that the number of untrained detectives had decreased from 12,000 to 4,845 in the last few years.

References:
Republic of South Africa. Auditor-General South Africa,

Republic of South Africa. National Prosecuting Authority,

Republic of South Africa. Public Protector South Africa,
"Annual Report 2009-2010", 
Caiphus Kgosana, “Many detectives ‘untrained’”,
Times Live, Oct. 14, 2010,
http://www.timeslive.co.za/local/article707991.ece/Many-detectives-untrained

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<td>100: The agency (or agencies) has staff sufficient to fulfill its basic mandate.</td>
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<tr>
<td>50: The agency (or agencies) has limited staff, or staff without necessary qualifications to fulfill its basic mandate.</td>
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<tr>
<td>0: The agency (or agencies) has no staff, or a limited staff, that is clearly unqualified to fulfill its mandate.</td>
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75f. In practice, the anti-corruption agency (or agencies) receives regular funding.

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<td>100: The agency (or agencies) has a predictable source of funding that is fairly consistent from year to year. Political considerations are not a major factor in determining agency funding.</td>
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<td>50: The agency (or agencies) has a regular source of funding, but may be pressured by cuts, or threats of cuts to the agency budget. Political considerations have an effect on agency funding.</td>
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<td>0: The agency's funding sources are unreliable. Funding may be removed arbitrarily or as retaliation for agency actions.</td>
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75g. In practice, the anti-corruption agency (or agencies) makes regular public reports.

Comments:
All the anti-corruption agencies are allocated funding by the National Treasury in the annual budget. The National Prosecuting Authority (NPA) used to be better funded than other agencies because it housed the Directorate of Special Operations (the Scorpions). However, since the dissolution of the Scorpions and the establishment of the Directorate of Priority Crime Investigations (the Hawks) in the South African Police Service (SAPS), the funds allocated to the SAPS have increased. In 2010, the budget the SAPS was allocated an additional R1.5 billion (US$217.4 million) for an increase in police officers and the establishment of the Hawks. The total allocated for SAPS was R52,556.4 million (US$7.6 million).

Other anti-corruption agencies are generally perceived to be insufficiently funded for the volume of work they have to deal with. The Public Protector, Legal Aid Board, Special Investigating Unit and NPA are allocated funds through the Department of Justice and Constitutional Development. The Public Protector has been allocated R112.8 million (US$16.4 million) for the 2010/2011 financial year, the Legal Aid Board R991.9 million (US$144 million), the SIU R145.8 million (US$24.1 million) and the NPA R243.6 million (US$). The Public Service Commission receives its funds through the Department of Public Service and Administration (DPSA) and was allocated R133,766 million (US$19.4 million) for the 2010/2011 financial year.

References:


All the anti-corruption agencies make annual reports to Parliament at the end of each financial year. These reports are accessible to the public. They are published on the agency websites and the general government information site. The agencies are required to report to the parliamentary Standing Committee on Public Accounts (SCOPA). In addition the National Prosecuting Authority (NPA) and the Public Protector are required to report to the Department of Justice and Constitutional Development and the Portfolio Committee of Justice and Constitutional Development. The Public Service Commission (PSC) produces additional special reports, in addition to its annual reports. These include an annual report on financial misconduct, biennial reports on the effectiveness of the national anti-corruption hotline and reports on professional ethics in different national and provincial government departments.

References:

100: The agency (or agencies) makes regular, publicly available, substantial reports to the legislature and/or to the public directly outlining the full scope of its work.
75:
50: The agency (or agencies) makes publicly available reports to the legislature that are sometimes delayed or incomplete.
25:
0: The agency (or agencies) makes no reports of its activities, or makes reports that are consistently out of date, unavailable to the public, or insubstantial.

75h. In practice, the anti-corruption agency (or agencies) has sufficient powers to carry out its mandate.

Comments:
Anti-corruption cases being blocked from accessing politically sensitive information has not been a major problem. The trials of current President Jacob Zuma and former National Commissioner of Police, Jackie Selebi are examples of prominent political figures being arrested and brought to trial. In a recent case, the MEC (minister) of Finance, Economic Development and Tourism in the Northern Cape Province was arrested by the Directorate of Priority Crimes Investigation (the Hawks) for alleged tender fraud on Nov. 4, 2010.

The difficulties faced by anti-corruption agencies in carrying out their mandates are mostly due to financial and human resource constraints. Although the South African Police Services (SAPS), the Public Protector (PP) and the Public Service Commission (PSC) receive regular funding from the state for their general operations, they struggle to allocate their funding across their broad mandates and operations. They do not enjoy the relative luxury of selecting cases or complaints for investigation: they are obliged to investigate all cases and complaints falling within their respective mandates. The Public Protector reported in 2010 that its high staff turnover and financial constraints impacted negatively on its ability to fulfill its mandate. The current workload per investigator was approximately 50-60 cases. The Directorate of Special Operations (the Scorpions) could choose which cases it investigated. However, it was disbanded in 2008 and it is unclear whether the Hawks, which replaced it, will be able to do the same.
**Comments:**

South Africa does not have one single body specifically mandated to fight corruption. However, a number of bodies exist with a range of powers to fight corruption. The SAPS is the primary anti-corruption agency. The Directorate of Priority Crimes Investigation (the Hawks) and the Commercial Crimes Unit are the central anti-corruption units in the SAPS. They can initiate investigations or act on complaints received. A prominent case currently being investigated by the Hawks is that of the MEC of Finance, Economic Development and Tourism in the Northern Cape who has been accused of tender fraud.

The Public Service Commission (PSC) initiates investigations or conducts investigations on receipt of complaints from public servants, the public, the executive, parliament or provincial legislatures. The number of complaints received by the PSC has increased since 2004. This is partly due to the establishment of the National Anti-corruption Hotline. The PSC undertakes full-scale investigations with the help of other crime fighting agencies or desktop investigations.

The Auditor-General can initiate investigations into financial misconduct, maladministration and impropriety in public sector institutions. Its most highly publicised investigation was into financial mismanagement at the South African Broadcasting Corporation (SABC) in 2009. The Public Protector initiates investigations on its own initiative or through complaints received. Its corruption related investigations have to do with investigating protected disclosures from whistleblowers in terms of the Protected Disclosures Act and alleged violations of the Prevention and Combating of Corrupt Activities Act.

The National Prosecuting Authority (NPA) has powers to institute and conduct criminal proceedings and supervise, direct and coordinate specific investigations. Since the closure of the Directorate of Special Operations (the Scorpions) the NPA has lost its power to initiate investigations into corruption related activities. It now supports the investigations of the Hawks and the SAPS Commercial Crimes Unit. However, according to the NPA's 2009-2010 annual report, it has been unable to perform its support function of the Hawks optimally because the relationship between the two organizations has yet to be formalized.

**References:**


100: When irregularities are discovered, the agency (or agencies) is aggressive in investigating the government or in cooperating with other investigative agencies.

75:

50: The agency (or agencies) starts investigations, but is limited in its effectiveness or is reluctant to cooperate with other investigative agencies. The agency (or agencies) may be slow to act, unwilling to take on politically powerful offenders, or occasionally unable to enforce its judgments.

25:

0: The agency (or agencies) does not effectively investigate or does not cooperate with other investigative agencies. The agency (or agencies) may start investigations but not complete them, or may fail to detect offenders. The agency (or agencies) may be partisan in its application of power.

76. Can citizens access the anti-corruption agency?

50

76a. In practice, the anti-corruption agency (or agencies) acts on complaints within a reasonable time period.

Comments:
Across government, finalization of corruption cases is reportedly often delayed, for a variety of reasons. For example, the 2009 State of the Public Service report released by the Public Service Commission (PSC) states that cases of professional misconduct, including corruption, within state departments are often not resolved within 35 days as required. It was found that departments generally take too long to resolve misconduct cases, sometimes as long as 8 months. In another report the PSC found that for every 100 cases received through the National Anti-Corruption Hotline (NACH) and referred to the departments for investigation, the PSC (and the whistle-blowers) have no idea what is happening to 64 of them. This means that the PSC often cannot determine whether cases of corruption are resolved. The primary reason for failure to resolve cases is a lack of capacity in government departments to follow up on and investigate complaints.

The high caseload and long case duration of the SAPS Commercial Crimes Unit (CCU) has prevented it from acting on complaints and securing convictions within a reasonable time period. In 2010, the SAPS reported an improvement in the rate of conviction in commercial crime cases with 6,451 of the 8,058 suspects arrested in 2010 being convicted. However, those convicted were not necessarily arrested in the same year, so it is difficult to determine the length of time it took for the cases to be resolved.

References:


100: The agency (or agencies) acts on complaints quickly. While some backlog is expected and inevitable, complaints are acknowledged promptly and investigations into serious abuses move steadily towards resolution. Citizens with simple issues can expect a resolution within a month.

75:
The agency (or agencies) acts on complaints quickly, with some exceptions. Some complaints may not be acknowledged, and simple issues may take more than two months to resolve.

The agency (or agencies) cannot resolve complaints quickly. Complaints may be unacknowledged for more than a month, and simple issues may take more than three months to resolve. Serious abuses are not investigated with any urgency.

In practice, citizens can complain to the anti-corruption agency (or agencies) without fear of recrimination.

A number of mechanisms are in place for citizens to make complaints to anti-corruption agencies. Among these is the National Anti-Corruption Hotline (NACH) which was established in 2004 and is operated by the Public Service Commission (PSC). The 2008 biennial report measuring the effectiveness of the NACH states that 40 percent of the corruption cases reported to the hotline were by anonymous callers. In 50 percent of the cases callers identified themselves. In 25 percent of those cases the callers were members of the public, in 15 percent they were officials in the public service (whistle-blowers) and in 10 percent they were detainees requiring investigating officers to call them.

In law, whistle-blowers are protected from recrimination through the Protected Disclosures Act of 2000. However, in practice there still are instances where whistle blowers are victimized and according to research undertaken by the Open Democracy Advice Center (ODAC), the number of whistle-blowers has decreased every year since 2007. According to the ODAC report a large number of employees who are suspended for disclosing information seek relief for their suspension in the Labor or High Courts. Many employees have won their cases, which has created a solid precedent that employers may not suspend employees who have made a protected disclosure.

In a minority of cases it is alleged that whistle-blowing had fatal consequences for the whistle-blower. In the Mpumalanga Province, seven officials have died in mysterious circumstances after blowing the whistle on alleged tender irregularities related to the construction of the province’s Mbombela Stadium for the 2010 Football World Cup. In June 2010, Dumisani “Bomber” Ntshangase, a member of the South African Communist Party (SACP), was found dead after speaking out about a decision which would have financially benefited a few government officials in the province. In October 2010, James Nkambule, another Mpumalanga politician, was also found dead (allegedly from poisoning) after he alleged that certain senior ANC officials were behind politically motivated murders in the province.

The Protection of Information Bill, currently before Parliament, threatens to undermine the whistle-blowing legislation currently in place. This Bill provides for the classification of state information if it is in the national interest. This allows a broad range of information to be classified. It further proposes harsh penalties for officials who disclose classified information even if that information is in the public interest and/or was incorrectly classified. It also proposes harsh penalties for members of the public and journalists that acquire classified information and disclose it. This Bill could severely undermine the work of anti-corruption agencies because citizens will be afraid to report corruption. The Public Protector, Advocate Thuli Madonsela, has been outspoken about how the Bill will negatively affect the operation of her office. The Bill is still being revised by Parliament so it may be improved to prevent these consequences.

References:


Whistleblowers can report abuses of power without fear of negative consequences. This may be due to robust mechanisms to protect the identity of whistleblowers, or may be due to a culture that encourages disclosure and accountability.

Whistleblowers are sometimes able to come forward without negative consequences, but in other cases, whistleblowers are punished for disclosing, either through official or unofficial means.
Whistleblowers often face substantial negative consequences, such as losing a job, relocating to a less prominent position, or some form of harassment.


77. Is there an appeals mechanism for challenging criminal judgments?

77a. In law, there is a general right of appeal.

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Comments:
Section 35 (3) of the South African Constitution guarantees an accused person the right to a fair trial, which includes the right of appeal to, or review by, a higher court. The Criminal Procedure Act (Act 51 of 1977) governs the exercise of the right of appeal or review. Sections 309 to 314 of the Criminal Procedure Act determine the modalities of criminal appeals from the Magistrates’ Court. Section 309(1)(a) of the Criminal Procedure Act (51 of 1977) states that any person convicted of any offense by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted, appeal against such conviction and against any resultant sentence or order to the high court having jurisdiction.

References:


Yes: A YES score is earned if there is a formal process of appeal for challenging criminal judgments.

No: A NO score is earned if there is no such process.

77b. In practice, appeals are resolved within a reasonable time period.

| 100 | 75 | 50 | 25 | 0 |

Comments:
In general, appeals are only sometimes resolved within a reasonable time period, as resolution is dependent on the complexity of a case, the quality of legal representation and the often substantial case backlogs at the various courts. Despite various interventions to speed up the resolution of court cases, generally, court administration still suffers from capacity constraints, including backlogs of cases and undue delays in case processing. According to the 2009/2010 Annual Report of the Department of Justice and Constitutional Development the Supreme Court of Appeals had 39 new criminal appeals enrolled during the reporting year. Of the total case load of 431 (392 old cases plus 39 new cases), 42 appeals were finalized (9.7 percent), seven were withdrawn, 16 were upheld (3.7 percent) and 18 were dismissed (4.1 percent).

References:
100: Appeals are acted upon quickly. While some backlog is expected and inevitable, appeals are acknowledged promptly and cases move steadily towards resolution.

75:

50: Appeals are generally acted upon quickly but with some exceptions. Some appeals may not be acknowledged, and simple cases may take years to resolve.

25:

0: Most appeals are not resolved in a timely fashion. Appeals may go unacknowledged for months or years and simple cases may never be resolved.

Comments:
The Constitution guarantees access to courts of law for all individuals, regardless of their financial means. The right of appeal to, or review by, a higher court is an integral part of a right to a fair trial and where substantial injustice would otherwise result, the accused is entitled to legal representation at state expense for the purpose of an appeal. The Legal Aid Board was established to give effect to this right and its powers are contained in the Legal Aid Amendment Act (Act 20 of 1996). The Legal Aid Board assists citizens who cannot afford legal representation in their appeals on a pro bono (free legal services) basis. However, this depends on whether citizens meet the criteria of the means test of the Legal Aid Board. The means test is only the first step in the process. The eventual decision on whether an individual can afford legal counsel depends on the complexity of the case, the nature of the trial and the duration of the representation. The system is weighted towards providing legal aid for those accused of serious crimes which require longer representation and higher costs.

Where the services of a private counsel are used, the cost of an appeal will depend on the fees set by the Bar Council to which the legal representative belongs. Rule 4(5) of the Constitutional Court Rules provide for the court registrar to waive fees if the individual can show satisfactorily that he or she is indigent. The individual must show that he or she does not possess property to the value of R20,000 (US$2,000) and will not be able, within a reasonable time, to provide the sum total required for the appeal.

In terms of Rule 15 of the Rules Regulating the Conduct of the Proceedings of the Supreme Court of Appeal of South Africa, the registrar is allowed to make a ruling on the indigence of the individual. The ruling is based on establishing that the individual does not own property valued at more than R10,000 (US$1,000) and would be unable to earn the prescribed money for the appeal or obtain legal aid within a reasonable period of time. Rule 67 of the Uniform Rules of Court prescribes the fees for lodging an appeal in the high court. It also provides for an exemption in instances of indigence, where the party does not own property valued at more than R10,000 (US$1,000) and would be unable to earn the prescribed money for the appeal or obtain legal aid within a reasonable period of time.

Despite all these attempts to ensure affordability, there are still concerns about unequal access to the justice system, with the poor and the less-educated lacking adequate knowledge and resources to enjoy all their constitutionally guaranteed rights. In its 2009-2010 annual report the Legal Aid Board cites insufficient funding as a serious hindrance to its work. The Board is unable to employ the sufficient number of legal practitioners which has resulted in the practitioner per court ratio in criminal courts being insufficient to deal with the demand at courts. The report also states that the Legal Aid Board has insufficient funds for civil legal aid matters which has resulted in a decline of people assisted in civil matters.

References:


25:

0: The prohibitive cost of utilizing the appeals mechanism prevents middle class citizens from challenging criminal judgments. Attorney fees greatly discourage the use of the appeals process.

78. In practice, do judgments in the criminal system follow written law?

100

78a. In practice, do judgments in the criminal system follow written law?

100 | 75 | 50 | 25 | 0

Comments:
The South African judiciary follows written law in the form of statutes or previous case law. There is also a system of traditional courts using traditional law and custom, although decisions given in these are appealable in the normal justice system and must conform to principles laid out in the Constitution. Judgments remain within the bounds of statutory law, case law and the Constitution.

References:


100: Judgments in the criminal system are made according to established legal code and conduct. There are no exceptional cases in which individuals are treated by a separate process. Political interference, bribery, cronyism or other flaws are rarely factors in judicial outcomes.

75:

50: Judgments in the criminal system usually follow the protocols of written law. There are sometimes exceptions when political concerns, corruption or other flaws in the system decide outcomes.

25:

0: Judgments in the criminal system are often decided by factors other than written law. Bribery and corruption in the criminal judicial process are common elements affecting decisions.

79. In practice, are judicial decisions enforced by the state?

75

79a. In practice, are judicial decisions enforced by the state?

100 | 75 | 50 | 25 | 0

Comments:
Generally speaking, most judicial decisions are enforced by the state in practice. Respect for the rule of law by the Executive is often evidenced by compliance with unfavorable Constitutional Court rulings in a number of cases. There have, however, been some problems with government implementing court orders, although this is generally understood to be related to the lack of capacity and inefficiency, rather than wilful disregard or lack of concern for the authority of the courts. The actual extent of non-compliance is difficult to determine, though a number of contentious cases have arisen, including the definitive Government of the Republic of South Africa and others v Grootboom and Others 2001, which raised issues related to the realization of constitutionally-guaranteed socio-economic rights.

The draft State Liability Amendment Bill of 2009 and the Constitution Eighteenth Amendment Bill of 2009 raised concerns about whether the judiciary would be able to hold the state to account in future. These Bills would disallow the attachment of state assets or property to satisfy unpaid judgment debts. Gary Pienaar argues that “these Bills represent a failure to comply with the Constitutional Court’s judgment in Nyathi v MEC for Health, Gauteng, which held that the provisions of the existing State Liability...”
Act 20 of 1975 barring such attachment were unconstitutional.” The outcome of Parliamentary proceedings on the Bills is pending.

References:

| 100: | Judicial decisions are enforced quickly regardless of what is being decided or who is appearing before the court. Failure to comply brings penalties enforced by the state. |
| 75: |
| 50: | Judicial decisions are generally enforced by the state, with some exceptions. Certain areas of law may be ignored, or certain parties appearing before the courts may evade or delay enforcement. |
| 25: |
| 0: | Judicial decisions are often ignored. The state lacks the will or capacity to consistently enforce these decisions. |

80. Is the judiciary able to act independently?

69

80a. In law, the independence of the judiciary is guaranteed.

Yes | No

Comments:
Section 165 of the Constitution states that the judicial authority of the republic is vested in courts that are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favor or prejudice. Section 165(3) prohibits interference with the functioning of the courts.

References:

Yes: A YES score is earned if there are formal rules establishing that the judiciary is independent from political interference by the executive and legislative branches. Independence includes financial issues (drafting, allocation, and managing the budget of the courts).

No: A NO score is earned if there are no formal rules establishing an independent judiciary.

80b. In practice, national-level judges are protected from political interference.

| 100 | 75 | 50 | 25 | 0 |

Comments:
Despite the Constitutional protection of judicial independence, the South African judiciary has been subject to political pressure at times, particularly in the high-profile cases arising from the controversial Arms Deal, such as the current corruption case against now-President Jacob Zuma. Following his election as president of the ANC in 2007, Court rulings against him were criticized by his supporters for being “counter-revolutionary” actions by “reactionary” and “racist” judges. This raised concerns of whether the
ruling ANC would act to undermine the independence of the judiciary. Relations between the judiciary and the ANC began to ameliorate after the April 2009 elections when Zuma was elected President of the Republic.

However, the courts have fiercely defended their independence and there is little evidence of political pressure interfering or resulting in undue influence on the outcomes of cases.

References:
Zuma graft trial pitting ANC against S Africa's judiciary, Aug. 1, 2008, AFP
http://afp.google.com/article/ALeqM5gvbtv4kRMvKyTrGc3uVGpCOd0XsO

“We respect judicial independence, says Zuma”, Mail and Guardian, July 6, 2009,

100: National-level judges operate independently of the political process, without incentive or pressure to render favorable judgments in politically sensitive cases. Judges never comment on political debates. Individual judgments are rarely praised or criticized by political figures.

75:

50: National-level judges are typically independent, yet are sometimes influenced in their judgments by negative or positive political incentives. This may include favorable or unfavorable treatment by the government or public criticism. Some judges may be demoted or relocated in retaliation for unfavorable decisions.

25:

0: National-level judges are commonly influenced by politics and personal biases or incentives. This may include conflicting family relationships, professional partnerships, or other personal loyalties. Negative incentives may include demotion, pay cuts, relocation, threats or harassment.

80c. In law, there is a transparent and objective system for distributing cases to national-level judges.

Yes | No

Comments:
In terms of section 173 of the Constitution, the Constitutional Court, Supreme Court of Appeal and the high courts have the inherent power to protect and regulate their own processes. The distribution of cases to national-level judges is an internal process, normally performed by the judge president of a particular high court. The process of and criteria for allocation of cases falls within the discretionary authority of the heads of courts and is discernible only after the court roll is released.

References:


Yes: A YES score is earned if there is an objective system that is transparent to the public that equitably or randomly assigns cases to individual judges. The executive branch does not control this process.

No: A NO score is earned if the case assignment system is non-transparent or subjective where judges themselves have influence over which cases they adjudicate. A NO score is also earned if the executive branch controls this process.

80d. In law, national-level judges are protected from removal without relevant justification.

Yes | No

Comments:
Section 177 of the Constitution states that a judge may be removed from office only if: (a) the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and (b) the National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two-thirds of its members. Subsection (2) requires that the President remove a judge from office upon adoption of such are solution.
The JSC in 2006 issued rules governing complaints and inquiries in terms of section 177(1)(a) of the Constitution. In terms of these rules, a complex procedure is detailed for investigation of complaints. After receipt of a complaint, the JSC passes it on to the judge against whom the complaint has been lodged. She is given 10 days to file a written response to the complaint. The accuser is then given the response and afforded five days to respond thereto. The JSC then determines whether the relevant documentation discloses a prima facie case of gross misconduct that can lead to removal in terms of section 177(1) of the Constitution.

If the JSC decides that, perhaps because of conflicting evidence on the papers, or insufficient evidence, it cannot make a decision, it can appoint a sub-committee to perform the role of an evidence gathering or investigative body, and will hear evidence from the parties. At this preliminary inquiry, the JSC may appoint counsel to act as a pro-forma prosecutor and to prepare a charge sheet, to lead evidence, to cross-examine witnesses, to present argument and do all things that may be necessary to assist the JSC fulfilling its task in terms of section 177(1) of the Constitution. The JSC has the discretion to open this preliminary inquiry to the public.

After this preliminary investigation and inquiry, the sub-committee reports to the JSC, which must then resolve whether or not to accept the recommendation of the subcommittee and proceed to a formal hearing of the issue.

In terms of the rules, the JSC can also choose to dispense with the appointment of this sub-committee and proceed straight to a formal hearing. If the JSC does decide to hold a formal hearing, the rules state that charges will be drawn up against the judge, witnesses may be called and both sides to the dispute may be legally represented. At the commencement of the hearing, the judge will be asked to plead to the charges.

Any member of the JSC is entitled to ask questions. Proceedings before the inquiry shall be recorded and a transcript prepared by the JSC. Again, the JSC has the discretion whether to open the formal hearings to the public. After considering the evidence and argument, the JSC will make a written finding and provide reasons. If it finds that the judge committed gross misconduct, the matter will be referred to the Speaker of the National Assembly (NA) so that the NA can debate and vote on the judge’s removal.

References:


Yes:
A YES score is earned if there are specific, formal rules for removal of a justice. Removal must be related to abuse of power or other offenses related to job performance.

No:
A NO score is earned if justices can be removed without justification, or for purely political reasons. A NO score is earned if the removal process is not transparent, or not based on written rules.

81. Are judges safe when adjudicating corruption cases?

100

81a. In practice, in the last year, no judges have been physically harmed because of adjudicating corruption cases.

Yes | No

Comments:
There have been no reports of judges being physically harmed in connection with their adjudication of corruption cases.

References:
Interview with Hennie Van Vuuren, Office Director of Institute for Security Studies, University of Cape Town, Nov. 30, 2010

Yes:
A YES score is earned if there were no documented cases of judges being assaulted because of their involvement in a corruption case during the specific study period. YES is a positive score.

No:
A NO score is earned if there were any documented cases of assault to a judge related to his/her participation in a corruption trial. Corruption is defined broadly to include any abuses of power, not just the passing of bribes.

81b. In practice, in the last year, no judges have been killed because of adjudicating corruption cases.
There have been no reports of judges being killed in connection with their adjudication of corruption cases. However, Judge Meyer Joffe, the judge presiding over the corruption trial of former National Commissioner of Police Jackie Selebi, was placed under 24-hour police protection in October 2010 after receiving death threats.

References:
Interview with Hennie Van Vuuren, Office Director of Institute for Security Studies, University of Cape Town, Nov. 30, 2010
Adriaan Basson.
Selebi Judge defied death threats.

Yes: A YES score is earned if there were no documented cases of judges being killed related to their involvement in a corruption case during the study period. YES is a positive score.

No: A NO score is earned if there were any documented cases where a judge was killed because of his/her participation in a corruption trial. The relationship between a mysterious death and a judge’s involvement in a case may not be clear, however the burden of proof here is low. If it is a reasonable assumption that a judge was killed in relation to his or her work on corruption issues, then the indicator is scored as a NO. Corruption is defined broadly to include any abuses of power, not just the passing of bribes.

82. Do citizens have equal access to the justice system?

There are guidelines and mechanisms in place to ensure that racial bias does not affect judicial decision-making. There have been no recent formal reports or complaints of racial or ethnic bias related to judicial decisions. The Judicial Service Commission Amendment Act of 2008 establishes an updated and legislated code of ethics governing judicial behavior. It also establishes a Judicial Conduct Committee to receive and deal with complaints about judges. This Committee would be the mechanism through which complaints against the judiciary would be addressed.

However race is a pervasive issue in South Africa, and the judicial system has not been impervious to racial debates and controversies. Much of the debate has centered on the application of the constitutionally mandated requirement (section 172(2)) for racial and gender representation of the courts to redress historical imbalances. The ruling African National Congress (ANC) is of the opinion that the racial and gender transformation of the judiciary is has not taken place with sufficient haste and has tried to put various legislative interventions in place to expedite the process. The argument made by the ANC is that a more representative judiciary will be perceived as more legitimate by citizens.

The debate on the transformation of the judiciary was reignited in September 2010 with the publishing of the criteria used by the Judicial Service Commission (JSC) in making judicial appointments. According to these criteria an applicant must be appropriately qualified and a fit and proper person and his or her appointment should help to reflect the racial and gender composition of South Africa. Supplementary criteria include that the appointee must be a person of integrity, possessed of the necessary energy and motivation, competent, both technically and with the capacity to give expression to the values of the Constitution, as well as being experienced in regard to the values and needs of the community. When the JSC made new appointments to the Courts in October 2010, there was much public debate about how the criteria had been weighted to select the candidates appointed.

References:
Gary Pienaar,
Accountability and Democracy. Testing Democracy: Which way is South Africa going.

For legitimacy, JSC must be transparent about its choices,
Judicial decisions are not affected by racial or ethnic bias.

Judicial decisions are generally not affected by racial or ethnic bias, with some exceptions. Some groups may be occasionally discriminated against, or some groups may occasionally receive favorable treatment.

Judicial decisions are regularly distorted by racial or ethnic bias. Some groups consistently receive favorable or unfavorable treatment by the courts.

82b. In practice, women have full access to the judicial system.

Comments:
Section 34 of the Constitution guarantees all persons the right of access to courts. However, despite the constitutional framework, many people in poor and/or rural communities do not have full access to the judicial system. Given that women tend to form the majority of the poor and marginalized in South African society, they are most limited in their access to the judicial system. One reason access is limited has to do with the geographic location of courts which are often far from rural areas. Women’s access to the judicial system may also be limited by their level of education and cultural discrimination. It has been noted that poor women and men often do not have the resources to see through cases in court, particularly where this requires extensive travel and time off work, and given that limited support is available for public representation in civil matters.

The Department of Justice and Constitutional Development has attempted to improve access by upgrading courts across the country, and constructing new courts in rural and township communities. In its 2009/2010 Annual Report, the Department, states that in the 2008/2009 financial year it embarked on nine new capital projects aimed at the construction of new courts and additional offices at existing courts. Three new courts were completed (in Colesberg, Galeshewe and Lutzville). An additional three courts are still under construction (at Katlehong, the Polokwane High Court and Ntuzuma). A further 15 branch courts, which were prepared last year to be redesignated as magisterial courts with their own areas of jurisdiction, were officially proclaimed. These are the branch courts at Motherwell, Daveyton, Alexandra, Thembisa, Madadeni, Tiyane, Enkangala, Groblershoop, Jan Kempdorp, Kakamas, Keimoes, Pofadder, Kathu, Atlantis and Khayelitsha. The remaining nine branch courts are currently being capacitated to also become magisterial courts with their own jurisdictions.

References:


100: Women enjoy full and equal status in the eyes of the courts. There are no exceptions or practices in which women are treated differently by the judicial system. For this indicator, discrimination against women should reflect specific biases that confront women in the justice system as opposed to difficulties resulting from broader socio-economic disadvantages or discrimination against women.

75:

50: Women generally have use of the judicial system, with some exceptions. In some cases, women may be limited in their access to courts, or gender biases may affect court outcomes. For this indicator, discrimination against women should reflect specific biases that confront women in the justice system as opposed to difficulties resulting from broader socio-economic disadvantages or discrimination against women.

25:

0: Women generally have less access to the courts than men. Court decisions are commonly distorted by gender bias. Women may have to go through intermediaries to interact with the court, or are unable to present evidence. For this indicator, discrimination against women should reflect specific biases that confront women in the justice system as opposed to difficulties resulting from broader socio-economic disadvantages or discrimination against women.

82c. In law, the state provides legal counsel for defendants in criminal cases who cannot afford it.
Comments:
Section 35 of the Constitution guarantees the right to a fair trial, and that every detained person has the right to a legal practitioner. Section 35 (3) also stipulates that every accused person has the right to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result. Legal representation is provided by the Legal Aid Board, an independent, statutory body established by the Legal Aid Act (Act 2 of 1996). Access to the services of the Legal Aid Board is based on a means test, which effectively reserves services for persons unable to afford the cost of representation.

References:

Yes: A YES score is earned if the government is required by law to provide impoverished defendants with legal counsel to defend themselves against criminal charges.

No: A NO score is earned if there is no legal requirement for the government to provide impoverished defendants with legal counsel to defend themselves against criminal charges.

82d. In practice, the state provides adequate legal counsel for defendants in criminal cases who cannot afford it.

B2d. In practice, the state provides adequate legal counsel for defendants in criminal cases who cannot afford it.

References:
Basson, A., 2008. More work, more access, Mail & Guardian, April 22, 2008
http://www.mg.co.za/article/2008-04-22-more-work-access

100: State-provided legal aid is basic, but well-trained and effective in representing the rights of impoverished defendants.

75:

50: State-provided legal aid is available, but flawed. Legal aid may be unavailable to some impoverished defendants. Legal aid/public defenders may be sometimes unable or unwilling to competently represent all defendants.

25:
State-provided legal aid is unavailable to most impoverished defendants. State legal aid/public defenders may be consistently incompetent or unwilling to fairly represent all defendants.

In practice, citizens earning the median yearly income can afford to bring a legal suit.

**Comments:**
South Africa has a very high level of income inequality, with median annual household income (R26,291- US$3,689) far below average annual household income (R74,589- US$10,466), and below the average annual income of black African households (R37,711- US$5,291). According to the Legal Aid Board, legal aid services funded by government are available to unemployed persons, and persons who are employed but earn less than R5,000 (US$701) per month. Persons who earn more than R2,000 (US$290) per month may also be considered for legal aid, depending on the grounds of the matter. Therefore, in some cases, citizens earning the median income level would qualify for free legal assistance through the Legal Aid Board. However, this would not be the case for citizens with an income comparable to the national average. In this case, citizens wishing to pursue a legal suit can approach private lawyers who are willing to work on a contingency fee basis. This is in accordance with Section 2 of the Contingency Fees Act (Act 66 of 1997), which states that a legal practitioner may enter into an agreement with a client to render services if, in his or her opinion, there are reasonable prospects that his or her client may be successful in any proceedings. The legal practitioner is not entitled to fees for services rendered, unless the client is successful in proceedings as set out in the agreement. Nonetheless, it has been suggested that professional legal services are generally unaffordable to average citizens. According to AfriMap and the Open Society Foundation, the rules of each respective court set out tariffs at which attorney’s fees are to be taxed, meaning the amount that can be recovered by a litigant awarded for costs. In some cases, the client may have to pay the difference, even in a successful matter.

The following consultation fees apply for various courts: R67-R80 (US$9.4-11.22) per 15 minutes in the magistrate courts; R100 (US$14.03) per 15 minutes in the high courts; R70-R105 (US$9.82-14.73) per 30 minutes in the higher courts, including the Supreme Court of Appeal and the Constitutional Court. Law societies also publish recommended fees guidelines, and for example, the Cape Law Society has established a guideline of between R75 and R400 (US$10.52-US$56.12) per 15 minutes of consultation. According to AfriMap and the Open Society Foundation, due to the split-bar system in South Africa, at times clients must pay for both the services of an advocate and an attorney, which may increase the costs of representation.

**References:**


**100:** In most cases, the legal system is an affordable option to middle class citizens seeking to redress a grievance. Attorney fees do not represent a major cost to citizens.

**75:**

**50:** In some cases, the legal system is an affordable option to middle class citizens seeking to redress a grievance. In other cases, the cost is prohibitive. Attorney fees are a significant consideration in whether to bring a case.

**25:**

**0:** The cost of engaging the legal system prevents middle class citizens from filing suits. Attorney fees are high enough to discourage most citizens from bringing a case.

In practice, a typical small retail business can afford to bring a legal suit.
Comments:
According to Section 2 of the Contingency Fees Act (Act 66 of 1997), clients wishing to pursue a legal suit can approach private lawyers who are willing to work on a contingency fee basis. The Act does not impose parameters in terms of eligible categories of clients, and therefore there is no reason to believe that a typical small business unit cannot afford to bring a legal suit using this Act. The Act states that a legal practitioner may enter into an agreement with a client to render services if, in his or her opinion, there are reasonable prospects that his or her client may be successful in any proceedings. The legal practitioner is not entitled to fees for services rendered, unless the client is successful in proceedings as set out in the agreement. A client can be a natural person or a juristic person.

The Legal Aid Board provides legal assistance to Section 21 companies (Not for Profit Companies) only and does not provide legal assistance to typical retail businesses. In terms of the Small Claims Courts Act, no business entity may utilize the relatively cheap remedies available in the Small Claims Court in respect of claims with a value of less than R12,000 (US$1,683).

References:


100: In most cases, the legal system is an affordable option to a small retail business seeking to redress a grievance. Attorneys' fees do not represent a major cost to small businesses.

75: In some cases, the legal system is an affordable option to a small retail business seeking to redress a grievance. In other cases, the cost is prohibitive. Attorney fees are a significant consideration in whether to bring a case.

50: The cost of engaging the legal system prevents small businesses from filing suits. Attorney fees are high enough to discourage most small businesses from bringing a case.

82g. In practice, all citizens have access to a court of law, regardless of geographic location.

Comments:
Section 34 of the Constitution guarantees all persons the right of access to courts. In 1999, the Department of Justice and Constitutional Development (DoJCD) prioritized the establishment of courts in rural, as well as urban township areas. The establishment of periodic courts has also improved access. However, in spite of the relative accessibility of magistrate’s courts, often high courts are still located in urban areas. Residents of rural areas often have to travel long distances to reach courts, and at significant cost. An information paper published by the Department of Public Service and Administration (DPSA) in 2009 reports that the range of access to government services, including courts, is varied across rural areas partly because the ISRD nodes are so different to one another when it comes to population characteristics, socio-economic profile, land tenure and use, terrain and climatic conditions. This contributes to the challenge of providing equal access to public services across the country.

References:


### 6.4. Law Enforcement: Conflicts of Interest Safeguards and Professionalism

#### 83. Is the law enforcement agency (i.e. the police) effective?

<table>
<thead>
<tr>
<th>Score</th>
<th>100</th>
<th>75</th>
<th>50</th>
<th>25</th>
<th>0</th>
</tr>
</thead>
</table>

**83a. In practice, appointments to the law enforcement agency (or agencies) are made according to professional criteria.**

**Comments:**

The South African Police Services (SAPS) has developed a fairly sophisticated recruitment and promotions procedure. However, there have been some controversies relating to the application of national employment equity policies in the Police Services. In one such case, a white female police captain, Renate Barnard, sued the SAPS for unfair discrimination, in the Labor Court, after her repeated applications for the position of superintendent of the complaints investigation unit were rebuffed. She first applied for the post in November 2005, which was never filled despite interview panels recommending that she be appointed as she was the most qualified candidate. The Office of the National Police Commissioner declined to appoint Barnard on grounds of representivity. In February 2010, the Johannesburg Labour Court ruled that the SAPS appoint Barnard as superintendent.

Other reports also point to some issues of unprofessional and discriminatory hiring and promotion practices, as well as nepotism and favoritism in appointments under the guise of compliance with employment equity criteria, which have compromised professionalism. In October 2010, the Sunday Independent Newspaper was interdicted by the Pretoria High Court from publishing information on nepotism in staff appointments to the crime intelligence division.

**References:**


clear political party affiliations.

75:
50: Appointments are usually based on professional qualifications. Individuals appointed may have clear party loyalties, however.
25: 
0: Appointments are often based on political considerations. Individuals appointed often have conflicts of interest due to personal loyalties, family connections or other biases. Individuals appointed often have clear party loyalties.

83b. In practice, the law enforcement agency (or agencies) has a budget sufficient to carry out its mandate.

100 | 75 | 50 | 25 | 0

Comments:
The budget for the South African Police Services (SAPS) is secured through an annual appropriation by Parliament from a budget tabled by the Minister of Police. In 2010 SAPS received an additional R1.5 billion (US$217 million) for an increase in police officers and to fund the establishment of the Directorate of Priority Crimes Investigation (the Hawks). The budget is on par with countries around world and above that of some more developed countries. However, police station commanders complain of a lack of resources to maintain and improve stations. Major expansions in funding to the police force and judiciary were announced at the beginning of 2008, to increase the number of police officers, stations and forensic laboratories in an effort to cut crime rates. The SAPS also receives donations from other countries to improve their capacity.

It is widely perceived law enforcement funding is less of a problem than perceived as well as actual incompetence by SAPS. This was clearly evident during the FIFA World Cup when there was a high police presence in all the host cities and there were low incidents of crime reported.

References:


100: The agency (or agencies) has a budget sufficient to fulfill its basic mandate.

75: 
50: The agency (or agencies) has limited budget, generally considered somewhat insufficient to fulfill its basic mandate.
25: 
0: The agency (or agencies) has no budget or an obviously insufficient budget that hinders the agency’s ability to fulfill its mandate.

83c. In practice, the law enforcement agency is protected from political interference.

100 | 75 | 50 | 25 | 0

Comments:
The case of former National Commissioner of Police, Jackie Selebi, illustrates the threat of political interference in the police service. Selebi was suspended 2008 following an announcement from the National Prosecuting Authority (NPA) that he would be charged with corruption and defeating the ends of justice. These charges related to his relationship with convicted drug dealer and crime boss Glenn Agliotti, who it is alleged provided Selebi with favours, loans and money over a period of fifteen years. When Selebi was charged with corruption it emerged that there had been interference by the Presidency, the Justice and Constitutional Development Department, the National Intelligence Agency, and the SAPS to prevent Selebi from being charged. In late 2007, after procuring search warrants and a warrant of arrest against Selebi, National Director of Public Prosecutions (NDPP) Vusi Pikoli was suspended from his position, in what he claims was an attempt to prevent charges being brought against...
Selebi. Despite being found "fit and proper" to hold the office of NDPP by a commission of enquiry into his suspension, Pikoli was never reinstated. Selebi was found guilty of corruption on July 2, 2010, and sentenced to 15 years in prison on Aug. 3, 2010.

References:


84. Can law enforcement officials be held accountable for their actions?

88

84a. In law, there is an independent mechanism for citizens to complain about police action.

Yes | No

Comments:
Section 53 (2) of the South African Police Services (SAPS) Act (68 of 1995) provides for the establishment of an Independent Complaints Directorate (ICD) within the Department of Police. It stipulates that the ICD: 1) May mero motu or upon receipt of a complaint, investigate any misconduct or offense allegedly committed by a member, and may, where appropriate, refer such investigation to the Commissioner concerned; 2) Shall mero motu or upon receipt of a complaint, investigate any death in police custody or as a result of police action; and 3) May investigate any matter referred to the Directorate by the Minister or member of the Executive Council.

Section 64 of the SAPS Act, read with Regulation and Annexure 5 of the Regulations for Municipal Police Services, also grants the ICD the same civilian oversight duties in respect of Municipal Police Services as with SAPS. Further, the ICD also has specific mandate through the Domestic Violence Act (116 of 1998), which specifies that failure of any SAPS member to comply with obligations imposed by the Act constitutes misconduct. The ICD must be informed of failure to comply with these obligations, and unless directed otherwise by the ICD, SAPS must institute disciplinary proceedings accordingly.

There is currently a bill before Parliament that seeks to strengthen the investigative powers of the ICD. The Independent Police Investigative Directorate Bill [B158- 2010]. The Bill proposes the transformation of the ICD into the Independent Police Investigative Directorate (IPID) which would function independently of the Police Service and whose responsibility would be to investigate offenses by police members instead of just receiving complaints. The Bill gives the IPID powers to investigate criminal offenses by police officers and make disciplinary recommendations. The Bill has been positively received by parliamentarians, civil society and the general public. It is likely to pass when it is voted on in the National Assembly in 2011.
Another bill intended to strengthen oversight of the police is the Civilian Secretariat for the Police Bill [B16-2010], which establishes an institution for civilian oversight of the police in line with section 208 of the Constitution. The Secretariat is meant to monitor the police service and assess the extent to which it has effective policies and systems. It is also empowered to give recommendations.

References:


Yes: A YES score is earned if there is a formal process or mechanism by which citizens can complain about police actions. A YES score is earned if a broader mechanism such as the national ombudsman, human rights commission, or anti-corruption agency has jurisdiction over the police.

No: A NO score is earned if there is no such mechanism

84b. In practice, the independent law enforcement complaint reporting mechanism responds to citizen’s complaints within a reasonable time period.

| 100 | 75 | 50 | 25 | 0 |

Comments:
The Independent Complaints Directorate (ICD) aims to register and allocate complaints within 48 hours. In its Annual Report for the 2008/2009 financial year, it reported that this target was met for the reporting period. It further aims to finalize cases of death in custody where there is no police involvement within 30 days. According to the report this target was not met. Only 192 out of 342 cases were finalized representing 56 percent of complaints received. Complaints of death in custody where there is police involvement should be finalized within 120 days. The 2008/2009 report states that only 330 out of 1569 cases, which represents 21 percent, were finalized. With regards complaints of criminal offenses or misconduct the ICD aims to complete 50 percent of investigations within 120 days. In 2008/2009 it only succeeded in finalizing 31 percent of criminal offense cases and 47 percent of misconduct cases.

There was a 5 percent increase in complaints from the 2007/2008 financial year to the 2008/2009 one. A major obstacle in the swift finalization of investigations is a lack of human and financial resources. In 1998 the Department of Public Service and Administration approved a staff structure of 535 for the ICD but by the publication of the 2008/2009 report half of these posts had not been filled because of lack of funding. Despite these resource constraints the ICD has established satellite offices in six provinces to enable easier access to the institution by citizens.

The ICD suggests that the constant flow of complaints against police criminality and misconduct emphasizes the trust and confidence of the public in the ICD’s ability to treat them with dignity and to promptly attend to their complaints. However, research has found that many ICD case dockets are incomplete, that many case files are closed without an indication of the outcome of proceedings, and that the criteria used for the closing of substantiated cases is not always clear or consistent.

References:
### 84c. In law, there is an agency/entity to investigate and prosecute corruption committed by law enforcement officials.

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
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**Comments:**
The Independent Complaints Directorate is charged with investigating complaints of corruption, and in 2004 established an Anti-Corruption Command (ACC) specifically to investigate complaints against officers of the South African Police Service (SAPS) and municipal police services related to corruption. In 2008/2009, the ICD received 2,289 complaints of criminal offenses, of which 6 percent were corruption-related. The ICD refers substantiated corruption cases to the management of the SAPS or the Director of Public Prosecutions (DPP).

### References:

### 84d. In practice, when necessary, the agency/entity independently initiates investigations into allegations of corruption by law enforcement officials.

| 100 | 75 | 50 | 25 | 0 |

**Comments:**
The policy of the South African Police Services (SAPS) is that it is the duty of all SAPS officers to investigate corruption. The 2008/2010 SAPS Annual Report indicates that over the reporting period, 362 police members were charged in terms of the Disciplines Regulation Act of the SAPS for corruption in terms of the Prevention and Combating of Corrupt Activities Act of 2004. 193 of them were suspended without salary and seven with salary. 181 members were not suspended. 381 disciplinary cases were brought against the 362 members charged (17 of them were charged for more than one crime).

The Independent Complaints Directorate (ICD) is charged with investigating misconduct and offenses committed by police officers, as well as deaths in police custody or as a result of police action. In 2008/2009, the ICD received 2,289 cases of criminal offenses, of which 6 percent were corruption related. The types of corruption investigated include abuse of informers’ fees, aiding escape from custody; issuing fraudulent vehicle certificate; sale, theft and/or destruction of police dockets; and sale, theft and/or disposal of exhibits. In practice, the ICD investigates police corruption on a regular basis, and investigations receive media coverage.
For example in January 2010, the ICD concluded an investigation into allegations of corruption by the Free State police chief and some of his deputies. They were accused of manipulating crime statistics, abusing travel allowances and nepotism. The ICD recommended that Minister of Police take disciplinary action. According to recent reports this was not done. On Nov. 24, 2010, it was reported that one of the officials, the former Deputy Commissioner of Police in the Free State, had been transferred to a key position in Police Headquarters in Pretoria. This example illustrates the limitations of the ICD which can only recommend action to the SAPS but cannot ensure it is enforced. The new Independent Police Investigative Directorate (IPID) legislation currently before Parliament seeks to correct this by stipulating the time period within which recommendations must be implemented by the SAPS.

References:


100: When irregularities are discovered, the agency/entity is aggressive in investigating government law enforcement officials or in cooperating with other investigative agencies.

75:

50: The agency/entity starts investigations, but is limited in its effectiveness or is reluctant to cooperate with other investigative agencies. The agency/entity may be slow to act, unwilling to take on politically powerful offenders, or occasionally unable to enforce its judgments.

25:

0: The agency/entity does not effectively investigate or does not cooperate with other investigative agencies. The agency may start investigations but not complete them, or may fail to detect offenders. The agency may be partisan in its application of power.

84e. In law, law enforcement officials are not immune from criminal proceedings.

| Yes | No |

Comments:
Law enforcement officials are not immune from criminal proceedings in law.
In terms of Section 9 (1) of the constitution, all are equal before the law.

References:


Yes: A YES score is earned if law enforcement officers are fully accountable for their actions under the law and can be investigated and prosecuted for their actions.
Law enforcement enjoys a general protection from criminal investigation. This may be due to a formal immunity or an informal understanding that the law enforcement community protects itself.