South African Law Reform Commission

DISCUSSION PAPER 178

MERCY AND PARDON

PROJECT 151: THE REVIEW OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 (A SUB-PROJECT OF THE REVIEW OF THE CRIMINAL JUSTICE SYSTEM)

Closing date for comments: 02 October 2026

ISBN: 978-0-621-52307-2

All rights reserved.
No part of this publication may be reproduced, photocopied, or transmitted in any form, nor part thereof be distributed for profit making purposes, without prior written permission of the South African Law Reform Commission

Copyright: © 2026 South African Law Reform Commission

Date of first publication: 26 August 2026

SOUTH AFRICAN LAW REFORM COMMISSION

The South African Law Reform Commission (SALRC) is established under the South African Law Reform Commission Act 19 of 1973.

The members of the Commission are:

Justice Chris Jafta (Chairperson)
Professor Wesahl Domingo (Deputy Chairperson)
Professor Karthigasen Govender
Dr Jacob Buti Skosana
Dr Keneilwe Radebe
Dr Nazreen Shaik-Peremanov
Advocate Sejako Joseph Senatle SC
Professor Debbie Collier
Professor Tshepo Tong-Mongalo

The members of the Advisory Committee for this project are:

Judge Francis Legodi (Chairperson of Advisory Committee)
Professor Nina Mollema
Dr Mabona Thomas Mokoena
Professor Lukas Muntingh
Professor Concetta Lorizzo
Ms Matshego Ramagaga
Professor Geert Phillip Stevens
Professor Shannon Vaugh Hoctor
Professor David Stephanus De Villiers
Advocate Bharatdatt Hansjee
Advocate Mashau Silas Ramaite
Advocate Charlie Eric Mhlari

There is no sub-committee for this thematic area. In the absence of a sub-committee, the issues discussed and highlighted in this paper consist largely of a contribution by the Department of Justice and Constitutional Development (DoJ&CD), authored by Ms Liana Nieuwoudt. The Secretary for the SALRC is Mr Nelson Matibe. The researcher assigned to this part of the investigation is Ms Joleen Richter.

Enquiries about the investigation should be directed to Ms Joleen Richter.

Telephone: (012) 622 6326
Email: JoRichter@justice.gov.za / CPAreform@justice.gov.za

REQUEST FOR COMMENTS

This discussion paper has been prepared to elicit responses from various stakeholders and interested members of the public and to serve as a basis for the Commission's deliberations during its consultative process on the discussion paper. Following an evaluation of the responses and any final deliberations on the matter, the SALRC will issue a report on this subject, which will be submitted to the Minister of Justice and Constitutional Development.

The views, conclusions and recommendations in this paper are not the final views of the Commission. The paper is published in full to provide persons and bodies wishing to comment or to make suggestions for the reform of this particular area of the law with sufficient background information to enable them to place focused submissions before the SALRC.

The SALRC will assume that respondents agree to the SALRC quoting from or referring to comments and attributing comments to respondents unless representations are marked "Confidential". Respondents should be aware that the SALRC may, in any event, be required, under the Promotion of Access to Information Act 2 of 2000, to release information contained in representations.

Respondents are requested to submit written comments or representations on the Discussion Paper to the SALRC by no later than 02 October 2026. Comments can be sent by email or post. However, comments by email are preferred to CPAreform@justice.gov.za

TABLE OF CONTENTS

SOUTH AFRICAN LAW REFORM COMMISSION 2
REQUEST FOR COMMENTS 3
ABBREVIATIONS 5
EXECUTIVE SUMMARY 6
CHAPTER 1: BACKGROUND 7
A Context of investigation 7
B Scope of Paper 8
CHAPTER 2: Mercy and Free Pardon in South Africa 10
A Introduction 10
B Distinguishing Mercy and Free Pardon from Parole and Expungement 11
C Current Law 12
LIST OF SOURCES 21

ABBREVIATIONS

	Abbreviation	Explanation
1.	CJS	Criminal Justice System
2.	CJSR	Criminal Justice System Reform
3.	CPA	Criminal Procedure Act 51 of 1977
4.	DoJ&CD	Department of Justice and Constitutional Development
5.	ICJS	Integrated Criminal Justice System
6.	SALRC	South African Law Reform Commission
7.	TRC	Truth and Reconciliation Commission

EXECUTIVE SUMMARY

1 This paper is narrow in scope and focuses on whether the provisions in the Criminal Procedure Act 51 of 1977 (CPA) are able to pass the constitutional muster, as the CPA predates the Constitution[1].

2 The discussion of the power, where it originates from, what the process entails and what the implication of the wrong person being convicted results in comments being invited on the identified issues:

a) The correct formulation of the provision;
b) Whether the inclusion of the President and the Minister in the provision is consistent with the Constitution;[2]
c) Whether the exclusion of judicial review and appeals against decisions taken by those functionaries is in line with the Constitution;[3]
d) Assess the constitutionality of section 327 in assigning judicial functions to members of the Executive;
e) How the *quantum* of compensation should be determined following incarceration of persons found to have been wrongfully convicted under this section and associated process; and[4]
f) The consultation of victims of the crime, as the person convicted wrongfully is not the assailant and the true perpetrator has therefore still not been brought to justice.

---

1 Constitution of the Republic of South Africa, 1996.

2 *Supra*.

3 *Supra*.

4 See *R (on the application of Hallam) (Appellant) v Secretary of State for Justice (Respondent) R (on the application of Nealon) (Appellant) v Secretary of State for Justice (Respondent)* [2019] UKSC 2, on appeal from [2016] EWCA Civ 355. The court referred to *R (Adams) v Secretary of State for Justice* [2011] UKSC 18, where the Supreme Court identified four different categories in their discussing and widening the scope of the meaning of "miscarriage of justice" for which an applicant could be compensated in terms of the governing laws.

CHAPTER 1: BACKGROUND

A Context of investigation

1.1 Since 1996, several programmes and initiatives have been developed to ensure the establishment and maintenance of a transformed, efficient, effective, victim-friendly and modernised criminal justice system (CJS) for South Africa. Key among these initiatives are the National Crime Prevention Strategy of 1996,[5] as a vehicle to transform and align the CJS to the new democratic dispensation; the Seven Point Plan of 2008, which listed seven fundamental transformative measures in recognition that the CJS in South Africa was performing sub-optimally and needed to change;[6] the National Development Plan: Vision 2030 of 2012 that outlines a roadmap for the transformation of society;[7] and the adoption of Outcome 3 of the Medium Term Strategic Framework (2014-2019), "All People in South Africa are, and feel safe".[8]

1.2 In 2017 Cabinet approved a broad framework for the development of an Integrated Criminal Justice Strategy to promote a transformed, efficient, effective and modernised integrated CJS,[9] the result of which was the Integrated Criminal Justice System (ICJS) Strategic Framework for South Africa.[10] The Implementation Plan for the ICJS proposes that the overhaul of the CPA be implemented in a phased manner.[11] However, the immediate focus should be on determining the critical weaknesses of the CPA and its Regulations.

---

5 Department: Safety and Security *National Crime Prevention Strategy: Summary* (May 1996, South African Government).

6 Department: Justice and Constitutional Development *Annual Report 2008/09* at 7.

7 National Planning Commission National Development Plan 2030: Our Future – make it work (August 2012).

8 Department: Government Communication and Information System *Medium-Term Strategic Framework 2014-2019* (September 2014) at 19–20.

9 Department: Government Communication and Information System "Justice and Correctional Services" *South Africa Yearbook 2019-2020* at 2.

10 Integrated Justice System "Profile" accessed 24 August 2026 ijs.gov.za/profile.

11 Ronald Lamola, Minister of Justice and Correctional Services "Opening and welcome address" Strengthening the Integrated Criminal Justice System and Reviewing the Criminal Procedure Act, 1977 to keep our people safe and secure Conference (27 February 2024) www.gov.za/news/speeches/minister-ronald-lamola-strengthening-integrated-criminal-justice-system-and-reviewing.

1.3 On 26 August 2020, the then Minister of Justice and Correctional Services, Mr Ronald Lamola (MP), requested the Chairperson of the SALRC to include, on an urgent basis, the review of the CJS in the SALRC's research programme. Under the cover of a letter dated 31 March 2021, the Minister submitted the terms of reference for the review to the Commission. The review was included in the SALRC's research programme under Project 151. In view of the urgency to reform the CPA, the SALRC is following a two-pronged approach in executing the review. First, the reform of the CPA is being dealt with in terms of an accelerated process under the Criminal Procedure Reform (CPR) Project, a sub-project of the broader Criminal Justice System Reform (CJSR) Project. Both of these processes are part of Project 151.

1.4 As part of the accelerated process, DoJ&CD and the SALRC hosted consultative stakeholder workshops on 23 June 2023 and 21 – 22 September 2023. The purpose of the workshops was to gather insights from stakeholders on the problems experienced in the CJS and the challenges and inadequacies that need to be addressed, as these relate to the CPA. The workshops provided an important platform for conversation and debate among the Departments and institutions in the criminal justice value chain. The outcome of the workshops assisted the SALRC in developing a framework for the scope of the review of the CJS and conceptualising the issues to be addressed. The framework outlines several thematic areas related to the pre-trial, trial and post-trial phases. These thematic areas have been identified as they relate to areas of our criminal law, particularly the CPA, that need reform.[12] This discussion paper stems from the thematic area Mercy and Free Pardon, under the post-trial phase.

B Scope of Paper

1.5 The scope of the paper is narrow and it is limited to the review of public powers vested in the President by Chapter 32 of the CPA. These powers include the power to show mercy to persons convicted of crime by courts, the power to substitute a verdict of a court and the power to grant free pardon and direct that a particular conviction be expunged from official records. The paper considers how these powers are exercised and whether the provisions which confer them are in line with the Constitution. The paper also ponders whether these powers should be retained in the new Criminal Procedure

---

12 See also Chapter 1 of SALRC Discussion Paper 171 on Project 151: The Review of the Criminal Procedure Act 51 of 1977 (a sub-project of the Review of the Criminal Justice System) – Ensuring the Continuity of Criminal Trials: Reforming the "De Novo" Rule and Court Record Management in South Africa (February 2026).

Act and if so, what form they should take.

CHAPTER 2: MERCY AND FREE PARDON IN SOUTH AFRICA

A Introduction

2.1 Mercy and free pardon in criminal cases is an executive power reserved exclusively for the President.[13] This power was shaped over a number of years[14] before ultimately being included in the Constitution as it currently stands.

2.2 This power has historically been used in targeted cases such as the granting of amnesties in matters such as the Truth and Reconciliation Commission (TRC) cases,[15] political offenses, or where vulnerable groups are involved and are pardoned on humanitarian grounds.[16] It is also used to address issues such as overcrowding in prisons, where sentences are then reduced in order to alleviate the situation.[17] Pardon can be granted for the whole or part of a sentence. This will be discussed later in this paper.

2.3 The process of applying for pardon is contained in the CPA. After a convicted prisoner has exhausted all judicial remedies,[18] the President may extend mercy or a free pardon to the prisoner. [19] While this right or prerogative can be exercised *mero motu,* in practice the prescribed process, including petitioning the President, is usually followed.[20]

---

13 Section 84(2)(j) of the Constitution of the Republic of South Africa, 1996.

14 For the history of how the power had developed and was ultimately incorporated into current law, see *President of the Republic of South Africa and Another v Hugo* [1997] ZACC 4; 1997 (6) BCLR 708 (CC); 1997 (4) SA (1) (CC).

15 *Albutt v Centre for the Study of Violence and Reconciliation and Others* (CCT 54/09) [2010] ZACC 4; 2010 (3) SA 293 (CC) ; 2010 (2) SACR 101 (CC) ; 2010 (5) BCLR 391 (CC).

16 *President of the Republic of South Africa and Another v Hugo* [1997] ZACC 4; 1997 (6) BCLR 708 (CC); 1997 (4) SA (1) (CC).

17 In 2023, President Ramaphosa exercised this power for the reason of overcrowding in prisons. See Ciaran Ryan “Thousands of non-violent offenders due for early release from prison” *News24* (17 August 2023).

18 Such remedies are contained in ss 309, 316, 317 and 318 of the CPA.

19 S 84(2)*(j)* of the Constitution, 1996); *Chonco & others v Minister of Justice and Constitutional Development & another* 2008 (2) SACR 39 (T). See also Du Toit et al *Commentary on the Criminal Procedure Act* (Juta loose-leaf RS 41, 2022) ch32-p3-4.

20 Du Toit et al *Commentary on the Criminal Procedure Act* (Juta loose-leaf RS 41, 2022) ch32-p3-4.

Section 325 of the CPA also states that “Nothing in this Act shall affect the power of the State President to extend mercy to any person.”

2.4 The concept of separation of powers becomes relevant in granting a Presidential pardon. This is an executive power which has the potential of interfering with the role of the judiciary in the criminal sphere of law and may have implications for the principle of judicial independence as it has the effect of nullifying the finding on the guilt of the prisoner. While the power is not absolute21 and is subject to judicial review and constitutional compliance, it remains a power exclusive to the President. The Minister of Justice and Constitutional Development plays an advisory role in this arena. The power cannot be delegated (there is no explicit provision for the power to be delegated), and it should also be exercised in good faith. 22 This is also not a substitute for an appeal or review process (hence the exhaustion of all judicial remedies should forego a petition of this nature).

B Distinguishing Mercy and Free Pardon from Parole and Expungement

2.5 There exists a clear distinction in the nature, legal consequence, timing and who holds the authority to grant reprieve in the respective concepts. A very brief overview of each concept follows below.

2.6 The granting of parole entails an administrative action exercised by the Parole Board (Department of Correctional Services) which does not remove or expunge the criminal record nor the criminal conviction of a person eligible for and subsequently granted parole. This is, furthermore, an event which may occur during the time in which

---

21 The decision to exercise this power must comply with the constitutional norms such as equality (section 9) and other rights enshrined in the Bill of Rights (Chapter 2) enshrined in the Constitution of the Republic of South Africa, 1996.

22 *Albutt v Centre for the Study of Violence and Reconciliation and Others* (CCT 54/09) [2010] ZACC 4; 2010 (3) SA 293 (CC) ; 2010 (2) SACR 101 (CC) ; 2010 (5) BCLR 391 (CC) (23 February 2010) at par 49: “It is by now axiomatic that the exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of the rule of law. More recently, and in the context of section 84(2)(j), we held that although there is no right to be pardoned, an applicant seeking pardon has a right to have his application “considered and decided upon rationally, in good faith, [and] in accordance with the principle of legality”. It follows therefore that the exercise of the power to grant pardon must be rationally related to the purpose sought to be achieved by the exercise of it.”

the sentence is still active and being served.

2.7 Expungement of criminal records entails the process of removing entries of a person's particulars on those records after the passage of a prescribed period post-conviction. This process is regulated by the CPA in terms of section 271B. This is not an act of mercy but rather an administrative function with the power to do so vested in the Director-General of the Department of Justice and Constitutional Development. This does not pardon an offender in any manner and is merely the removal of a criminal conviction (sentence served) from one's personal record. [23]

2.8 The power to extend mercy to a person is held by the President, is executive in nature,[24] takes place during the post-trial phase and may have the effect of removing the legal consequences of the conviction (it removes or replaces the criminal record and/or conviction for the specific incident).

C Current Law

2.9 The power to grant a pardon, which may be exercised only by the President, in his or her capacity as the Head of State, is now derived from the Constitution. It is a constitutional power that flows directly from our supreme law, the Constitution. It is contained in section 84 of the Constitution, which lists powers and functions reserved for the President. Section 84 provides:

> **84. Powers and functions of President**
>
> (1) The President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive.
>
> (2) The President is responsible for–
>
> (a) assenting to and signing Bills;
>
> (b) referring a Bill back to the National Assembly for reconsideration of the Bill's constitutionality;
>
> (c) referring a Bill to the Constitutional Court for a decision on the Bill's constitutionality;
>
> (d) summoning the National Assembly, the National Council of Provinces or Parliament to an extraordinary sitting to conduct special business;

---

[23] S 271B of the CPA.

[24] The nature of the power is discussed further in this paper.

(e) making any appointments that the Constitution or legislation requires the President to make, other than as head of the national executive;
(f) appointing commissions of inquiry;
(g) calling a national referendum in terms of an Act of Parliament;
(h) receiving and recognising foreign diplomatic and consular representatives;
(i) appointing ambassadors, plenipotentiaries, and diplomatic and consular representatives;
(j) pardoning or reprieving offenders and remitting any fines, penalties or forfeitures; and
(k) conferring honours.

2.10 Notably, the Constitution[25] confers various powers in subsection (2)(j). These are the power to pardon; the power to reprieve offenders; and the power to remit fines, penalties and forfeitures. These powers are conferred without any limitations, nor does the Constitution[26] prescribe a manner in which these powers should be exercised. Despite the absence of restrictions, the exercise of them is not untrammelled. In a number of decisions the Constitutional Court has pointed out that the exercise of original constitutional powers in section 84(2)(j) is subject to the principles of legality and rationality. [27] These principles apply to the exercise of pubic power regardless of its nature. In addition, case law indicates that the power to grant a pardon must be exercised in good faith and without undue delay. Significantly, nobody has an entitlement to be pardoned, but the applicant, once an application for pardon is submitted to the relevant officials, has a right to have the application considered by the President without undue delay.

2.11 Ordinarily, applications for pardon are submitted to the President through the DoJ&CD.[28]

2.12 Case law further indicates that decisions of the President in granting or refusing to grant a pardon are not beyond judicial review. They may be challenged on review, but

---

25 Constitution of the Republic of South Africa, 1996.

26 *Supra*.

27 See for example *President of the Republic of South Africa and Another v Hugo* [1997] ZACC 4; 1997 (6) BCLR 708 (CC); 1997 (4) SA (1) (CC); *Chonco & others v Minister of Justice and Constitutional Development & another* 2008 (2) SACR 39 (T).

28 S 327 of the CPA prescribes the process. Once the President granted a pardon, the record is removed against his/her name by the Criminal Records Centre of the SAPS. If a pardon is granted, a person need not apply for an expungement, as the Department of Justice and Constitutional Development informs the relevant authorities of the decision.

only on limited grounds. These include legality, rationality and bad faith. Even a failure on the part of the President to take a decision may be attacked on review on the grounds of undue delay or a failure to exercise a constitutional power diligently.

2.13 However, as mentioned earlier, the focus of this paper is not the exercise of the constitutional power to grant a pardon. Instead, the focus is on the exercise of statutory powers to extend mercy to offenders, granting them free pardon or substituting their conviction and sentence in Chapter 32 of the CPA. Previously, the chapter had four sections, but two of them were repealed in 1997. Now the chapter remains with sections 325 and 327. It is titled "Mercy and Free Pardon" and reads as follows:

> **325. Saving of power of State President to extend mercy**
>
> Nothing in this Act shall affect the power of the State President to extend mercy to any person.
>
> **325A.** ...
>
> [S 325A inserted by s 15 of Act 107 of 1990; repealed by s 44 of Act 105 of 1997.]
>
> **326.** ...
>
> [S 326 repealed by s 44 of Act 105 of 1997.]
>
> **327. Further evidence and free pardon or substitution of verdict by State President**
>
> (1) If any person convicted of any offence in any court has in respect of the conviction exhausted all the recognised legal procedures pertaining to appeal or review, or if such procedures are no longer available to him or her, and such person or his or her legal representative addresses the Minister by way of petition, supported by relevant affidavits, stating that further evidence has since become available which materially affects his or her conviction, the Minister may, if he or she considers that such further evidence, if true, might reasonably affect the conviction, direct that the petition and the relevant affidavits be referred to the court in which the conviction occurred.
>
> [S 327(1) substituted by s 16(a) of Act 107 of 1990, s 45(a) of Act 105 of 1997.]
>
> (2) The court shall receive the said affidavits as evidence and may examine and permit the examination of any witness in connection therewith, including any witness on behalf of the State, and to this end the provisions of this Act relating to witnesses shall apply as if the matter before the court were a criminal trial in that court.

(3) Unless the court directs otherwise, the presence of the convicted person shall not be essential at the hearing of further evidence.

[S 327(3) substituted by s 45(b) of Act 105 of 1997.]

(4) (a) The court shall assess the value of the further evidence and advise the President whether, and to what extent, such evidence affects the conviction in question.

(b) The court shall not, as part of the proceedings of the court, announce its finding as to the further evidence or the effect thereof on the conviction in question.

[S 327(4) substituted by s 45(b) of Act 105 of 1997.]

(5) The court shall be constituted as it was when the conviction occurred or, if it cannot be so constituted, the judge-president or, as the case may be, the senior regional magistrate or magistrate of the court in question, shall direct how the court shall be constituted.

(6) (a) The State President may, upon consideration of the finding or advice of the court under subsection (4)—

(i) direct that the conviction in question be expunged from all official records by way of endorsement on such records, and the effect of such a direction and endorsement shall be that the person concerned be given a free pardon as if the conviction in question had never occurred; or

(ii) substitute for the conviction in question a conviction of lesser gravity and substitute for the punishment imposed for such conviction any other punishment provided by law; or

(iii) ...

[S 327(6)(a)(iii) repealed by s 45(c) of Act 105 of 1997.]

(b) The State President shall direct the Minister to advise the person concerned in writing of any decision taken under paragraph (a), other than a decision taken under subparagraph (iii) of that paragraph, and to publish a notice in the *Gazette* in which such decision, other than a decision taken under the said subparagraph (iii), is set out.

(7) No appeal, review or other proceedings of whatever nature shall lie in respect of—

(a) a refusal by the Minister to issue a direction under subsection (1) or by the State President to act upon the finding or advice of the court under subsection (4)(a); or

[S 327(7)(a) substituted by s 16(b) of Act 107 of 1990.]

(b) any aspect of the proceedings, finding or advice of the court under this

section.

2.14 It is apparent from the language that section 325 preserves the President's power to extend mercy to another person. It expressly states that nothing in the CPA will affect this power. This language suggests that the power is derived elsewhere and that the CPA does not interfere with its exercise.

2.15 The question that arises is whether the provision should be retained in the new Act. A reading of the provision does not reveal why it has to keep alive a power which does not come from the CPA when no other provision suggests that the President may have lost the relevant power.

2.16 A careful reading of section 327 of the CPA indicates that its primary purpose[29] is to correct wrong verdicts and sentences imposed by courts in circumstances where judicial appeals and reviews have failed to pick up and correct the defect. Section 327(1) of the CPA introduces conditions which must be satisfied before the process outlined later in the provision may be triggered. First, it requires that the applicant must have exhausted all procedures pertaining to appeals and reviews before initiating an application to lead further evidence that supports an expungement or substitution of a verdict and sentence. The applicant may still initiate such proceedings if he or she has not exhausted such procedures but can show that judicial remedies are no longer available. This means that either one of the two conditions must be met for the proceedings to be initiated. In the absence of these conditions, no application can be instituted under section 327 of the CPA.

2.17 Second, the applicant must have in his or her possession further evidence which would materially affect his or her conviction. Importantly, the evidence must have become available to the applicant after the relevant trial was finalised. If the applicant was aware of such evidence during the course of the trial but chose not to lead it, his or her application will fail. The application to place further evidence before the court which tried the applicant takes the form of a petition supported by an affidavit which in detail sets out the nature of the further evidence and its materiality to the conviction.

2.18 Such petition is submitted to the Minister of Justice and Constitutional Development, who must consider the new evidence. If the Minister is convinced that, if

---

[29] This is not the only purpose, as various other scenarios exist where such an application may be brought.

it is true, the evidence might reasonably affect the conviction, the Minister may refer the petition to the court that tried the applicant. That court must receive the relevant affidavits as evidence and may hear oral testimony from witnesses called by the applicant and the prosecution. The court must be constituted as it was during the trial in which the applicant was convicted. If this is not possible, the Head of Court may direct how the court would be composed.

2.19 The court is charged with the responsibility of admitting evidence into the record, as if it were led during the original trial. Having done so, it must evaluate the further evidence to determine to what extent it affects the impugned conviction. Once findings in this regard are made, the court must prepare an advice for the President. Section 327(4)(b) of the CPA prohibits the court from announcing its findings on the further evidence and its impact on the conviction.

2.20 The record, including the court's findings and advice, is submitted to the President for consideration and a decision. Section 327(6) of the CPA affords the President two options; if persuaded that in view of the further evidence, the conviction cannot stand, the President may direct that the conviction be expunged from all official records by making an endorsement on those records. Under the section, the legal consequences of this are equal to the applicant being given a free pardon as if the conviction in question never happened. It is important to note that under this provision, the President does not expressly grant a pardon, but that the expungement that he or she directs is equivalent to a free pardon.

2.21 If the President is persuaded that an incorrect conviction was made, he or she may replace it with a conviction of a lesser offence and impose appropriate punishment. When the matter is finalised, the President must direct the Minister to inform the applicant in writing about the decision reached.

2.22 Section 327(7) of the CPA places the decision of the President beyond judicial scrutiny. The provision forbids any appeal or review against such a decision. This prohibition also extends to a refusal by the Minister to refer a petition to the court that tried the applicant. Also, no appeal or review lies against the court's findings and advice to the President.

2.23 The issue is whether this provision should be retained at all and if so, whether it should be kept in the present form. There can be no denying that it serves an important

and legitimate government purpose. Its purpose is to provide an avenue through which serious errors that resulted in a conviction can be remedied, in circumstances where ordinary appeal or review procedures were unable to pick them up. For example, this may occur where eyewitnesses were mistaken in identifying the applicant as the perpetrator of the offence and on that basis, he is convicted and sentenced to a long period of imprisonment. During his imprisonment, conclusive evidence in the form of DNA, which indicates that he was not the offender, came to light. In those circumstances, action ought to be taken to remedy the miscarriage of justice. This provision provides a pathway to correcting the error.

2.24 However, what needs to be considered is whether the provision needs to be retained as is. The section in its present form may be unconstitutional as it vests a judicial function in the hands of the executive. In the first place, the provision places the Minister and the President at the centre of what constitutes a judicial function and yet these functionaries are clearly not judicial officers. They are empowered to take judicial decisions which are insulated from scrutiny by the courts. In respect of the President, the relevant decisions may even nullify a conviction and sentence imposed by a competent court and which was upheld by the apex court. This provision appears, therefore, to be placing the President above even the highest court.

2.25 If it is true that the provision is inconsistent with the Constitution,[30] it became invalid to the extent of the inconsistency on the date the Constitution[31] came into operation, because the CPA predates the Constitution.[32] If it was also inconsistent with the *interim* Constitution,[33] its invalidity came into effect on 27 April 1994. This is what the principle of objective constitutional invalidity entails. The invalidity came into effect by operation of law and is triggered by the inconsistency with the Constitution. It does not need a declaration to that effect by a court of law. Judicial declarations of invalidity merely confirm and clarify the legal position which already exists in law.

2.26 Therefore, an invalid legislation which is inconsistent with the Constitution[34] cannot be revived by passing the provision afresh. Any law that is not in line with the

---

30 Constitution of the Republic of South Africa, 1996.

31 *Supra*.

32 *Supra*.

33 Interim Constitution of the Republic of South Africa Act 200 of 1993.

34 Constitution of the Republic of South Africa, 1996.

Constitution[35] is invalid, regardless of when such legislation was passed. This is what the supremacy of the Constitution principle declares. If it is legislation that was passed after the Constitution[36] came into operation, it becomes invalid the moment it is passed. Therefore, this Commission is under an obligation not to recommend a constitutionally flawed Bill.

2.27 In addition to constitutional issues flagged above, there are other matters which arise. These include the issue of compensation for persons wrongly detained due to an error that occurred during a judicial process and how such compensation should be determined. The other issue relates to an improved formulation of the provision in order to strike the correct balance between competing principles which apply to criminal trials. These are the need to uphold finality in criminal trials on the one hand and the demand for putting an end to a miscarriage of justice, on the other hand. The provision must be framed in a way that achieves the required balance between preserving the finality of the trial, especially where appeal processes were unsuccessful, and putting a stop to an ongoing miscarriage of justice.

2.28 In the circumstances, the issues listed below emerge from the debate generated in the Paper. Commentators are specifically requested to address them in order to assist the Commission in its attempt to produce a proper draft Bill for the legislative authority. The issues are:

a) The correct formulation of the provision;
b) Whether the inclusion of the President and the Minister in the provision is consistent with the Constitution;[37]
c) Whether the exclusion of judicial review and appeals against decisions taken by those functionaries is in line with the Constitution;[38]
d) Assess the constitutionality of section 327 in assigning judicial functions to members of the Executive;
e) How the *quantum* of compensation should be determined following incarceration of persons found to have been wrongfully convicted under this section and associated process; and[39]

---

35 *Supra*.

36 Constitution of the Republic of South Africa, 1996.

37 *Supra*.

38 *Supra*.

39 See *R (on the application of Hallam) (Appellant) v Secretary of State for Justice (Respondent) R (on the application of Nealon) (Appellant) v Secretary of State for Justice (Respondent)* [2019] UKSC 2, on appeal from [2016] EWCA Civ 355. The court referred

f) The consultation of victims of the crime, as the person convicted wrongfully is not the assailant and the true perpetrator has therefore still not been brought to justice.

to *R (Adams) v Secretary of State for Justice* [2011] UKSC 18, where the Supreme Court identified four different categories in their discussing and widening the scope of the meaning of “miscarriage of justice” for which an applicant could be compensated in terms of the governing laws.

LIST OF SOURCES

Table of cases

South Africa

Albutt v Centre for the Study of Violence and Reconciliation and Others (CCT 54/09) [2010] ZACC 4; 2010 (3) SA 293 (CC) ; 2010 (2) SACR 101 (CC) ; 2010 (5) BCLR 391 (CC) (23 February 2010)

Chonco & others v Minister of Justice and Constitutional Development & another 2008 (2) SACR 39 (T) (16 March 2010)

President of the Republic of South Africa and Another v Hugo [1997] ZACC 4; 1997 (6) BCLR 708 (CC); 1997 (4) SA (1) (CC) (18 April 1997)

International

R (on the application of Hallam) (Appellant) v Secretary of State for Justice (Respondent) R (on the application of Nealon) (Appellant) v Secretary of State for Justice (Respondent) [2019] UKSC 2, on appeal from [2016] EWCA Civ 355

Table of legislation

South Africa

Constitution of the Republic of South Africa, 1996

Criminal Procedure Act 51 of 1977

Bibliography

Ciaran R “Thousands of non-violent offenders due for early release from prison” News24 (17 August 2023)

Department: Government Communication and Information System “Justice and Correctional Services” South Africa Yearbook 2019-2020

Department: Government Communication and Information System Medium-Term Strategic Framework 2014-2019 (September 2014)

Department: Justice and Constitutional Development Annual Report 2008/09

Department: Safety and Security National Crime Prevention Strategy: Summary (May 1996, South African Government)

Du Toit et al Commentary on the Criminal Procedure Act (Juta loose-leaf RS 41, 2008)

Integrated Justice System "Profile" ijs.gov.za/profile

Lamola R, Minister of Justice and Correctional Services "Opening and welcome address" Strengthening the Integrated Criminal Justice System and Reviewing the Criminal Procedure Act, 1977 to keep our people safe and secure Conference (27 February 2024) www.gov.za/news/speeches/minister-ronald-lamola-strengthening-integrated-criminal-justice-system-and-reviewing.

National Planning Commission National Development Plan 2030: Our Future – make it work (August 2012)

South African Law Reform Commission Project 151: The Review of the Criminal Procedure Act 51 of 1977 (a sub-project of the Review of the Criminal Justice System) – Ensuring the Continuity of Criminal Trials: Reforming the "De Novo" Rule and Court Record Management in South Africa (February 2026)