South African Law Reform Commission

DISCUSSION PAPER 180

CRIMINAL JURISDICTION

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

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SOUTH AFRICAN LAW REFORM COMMISSION

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Dr Keneilwe Radebe
Dr Nazreen Shaik-Peremanov
Advocate Sejako Joseph Senatle SC
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Professor Tshepo Tong-Mongalo

The members of the Advisory Committee for this project are:

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Professor Geert Phillip Stevens
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Advocate Bharatdatt Hansjee
Advocate Mashau Silas Ramaite
Advocate Charlie Eric Mhlari

The Secretary of the SALRC is Mr TN Matibe. The researcher assigned to this part of the investigation is Ms Ronel van Zyl. Enquiries and correspondence about the discussion paper may be directed to and marked for the attention of Ms Ronel van Zyl. Her contact information is as follows:

Telephone: (012) 622-6337
E-mail: RovanZyl@justice.gov.za / CPAreform@justice.gov.za

REQUEST FOR COMMENTS

The main object of the SALRC, in terms of section 4 of the SALRC Act, is to do research with reference to all branches of the law of South Africa and to study and investigate all such branches of the law to make recommendations for the development, improvement, modernisation or reform thereof.

This discussion paper was prepared to elicit responses from 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 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 people 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.

Respondents are requested to submit written comments and representations to the SALRC by **02 October 2026**. Comments and representations sent electronically should be submitted in MS Word format. Address correspondence to the Secretary of the SALRC, for the attention of Ms Ronel van Zyl, the researcher assigned to this part of the investigation. Contact details appear on the previous page.

The researcher wishes to express her gratitude to Justice Chris Jafta, the chairperson of the Commission, for his guidance on the paper and input on sections 110, 110A and 111 of the Criminal Procedure Act 51 of 1977, and contributing paragraphs 4.3 to 4.7, 4.12 to 4.14, 4.20, 4.25 to 4.27 and 4.30 of Chapter 4 to this discussion paper.

The SALRC assumes that respondents agree that the SALRC may quote from or refer to their comments, and may attribute comments to the respondent concerned, unless marked as confidential. Respondents should be aware that the Commission may be required to release information contained in submissions under the Promotion of Access to Information Act 2 of 2000.

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ABBREVIATIONS AND ACRONYMS

	Abbreviation	Explanation
1.	CC	Constitutional Court
2.	CJS	Criminal Justice System
3.	CPA	Criminal Procedure Act 51 of 1977
4.	DPP	director of public prosecutions
5.	ICJS	Integrated Criminal Justice Strategy
6.	NDPP	National Director of Public Prosecutions
7.	NPA	National Prosecuting Authority
8.	NPA Act	National Prosecuting Authority Act 32 of 1998
9.	SA	South Africa / South African
10.	SALRC	South African Law Reform Commission
11.	SALRC Act	South African Law Reform Commission Act 19 of 1973
12.	SCA	Supreme Court of Appeal
13.	ZACC	Constitutional Court of South Africa
14.	ZASCA	Supreme Court of Appeal of South Africa

EXECUTIVE SUMMARY

1. Mr Ronald Lamola, MP, the Minister of Justice and Correctional Services at the time, requested the Chairperson of the South African Law Reform Commission (SALRC) on 26 August 2020 to include the review of the criminal justice system in the SALRC's research programme. The request was included in the SALRC's research programme as Project 151: Review of the Criminal Justice System. The reform of the Criminal Procedure Act 51 of 1977 (CPA) is a sub-project of Project 151.

2. The jurisdiction of the Constitutional Court, Supreme Court of Appeal, the High Courts and other courts is primarily determined in Chapter 8 of the Constitution of the Republic of South Africa, 1996 (the Constitution), as well as in the Superior Courts Act 10 of 2013, the Magistrates' Courts Act 32 of 1944 and the CPA.

3. This discussion paper deals with the concept of criminal jurisdiction in the context of the Criminal Procedure Act 51 of 1977, in particular Chapter 16 of the CPA, which is titled "Jurisdiction". The Constitutional Court adopted the following definition of "jurisdiction": "Jurisdiction means the power or competence of a Court to hear and determine an issue between parties".[1] In other words, the jurisdiction of a court refers to the authority to hear and decide a matter. In criminal cases "jurisdiction is determined by the area in which the offences have been committed (territorial jurisdiction), the nature of the offence (substantive jurisdiction) and also the nature of the penalty that should be imposed (punitive jurisdiction)."[2] Extra-territorial jurisdiction is an exception to the territorial rule and prosecuting offences committed abroad would require a recognised exception or statutory extension.

4. Chapter 16 of the CPA comprises three sections, namely sections 110, 110A and 111. Each section deals with a different aspect of jurisdiction. This paper aims to determine, among other matters, whether these sections are constitutionally compliant and if they should be retained in the proposed new CPA. This exercise includes considering whether these provisions are still useful to the administration of justice.

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1 Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board at 424 as quoted in Gcaba v Minister for Safety and Security 2010 1 SA 238 (CC) par 74.

2 Savoi and Others v National Prosecuting Authority and Another 2021 (2) SACR 278 (KZP) at par 53.

5. Section 110 is intended to address situations where a court has jurisdiction to try an offence but is not the appropriate forum because of another jurisdictional factor. Section 110 provides that once an accused person pleads to a charge without first objecting to the jurisdiction of the court, such court is deemed to have jurisdiction to try him or her, regardless of the position that under the law it does not have jurisdiction. Effectively under this section the omission by the accused gives the court jurisdiction by default. The question is whether jurisdiction can be assumed by default.

6. Section 110A regulates prosecution in South Africa of crimes committed outside the country, provided the perpetrator is a South African citizen who could not stand trial in the country in which the offence was committed because of the diplomatic immunity that person enjoyed in the foreign country.

7. Before the amendment of section 111 of the CPA by the National Prosecuting Authority Act 32 of 1998 (NPA Act), section 111(1) granted the Minister of Justice the authority to direct that an offence committed in the area of jurisdiction of one attorney-general be tried in the area of jurisdiction of another attorney-general. Section 111 now has to be read with section 22(3) of the NPA Act, which allows the National Director of Public Prosecutions (NDPP) to direct that an offence committed within the area of jurisdiction of one Director of Public Prosecutions (DPP) be investigated and tried within the area of jurisdiction of another DPP.

8. Section 111 of the CPA deals primarily with the formal requirements (in writing, copy served on accused, original handed in at court etc) that the NDPP's direction must comply with. Section 111(2) states that the court in which the proceedings commence will have jurisdiction with regard to the offence as if the offence had been committed within the area of jurisdiction of that court. Although section 111 does not make much sense unless read with section 22(3) of the NPA Act, section 111 does not refer to the NPA Act and the heading of section 111 still refers to the Minister and the attorney-general. Section 111 is clumsily drafted: the heading and content of section 111 are not aligned and the purpose of section 111 does not appear from the current wording.

9. This discussion paper proposes the following in Chapter 5:

Section 110

Require that the court that has jurisdiction to hear a charge should be indicated in the charge sheet, in which case section 110 would become superfluous and could be

removed. If it appears that section 110 should be retained, section 110 should be redrafted to determine that a court must have jurisdiction to hear a case.

Section 110A

Section 110A appears to address a legitimate purpose. It is therefore proposed that section 110A be retained, however, the proper location of a provision such as section 110A within the structure of a redrafted CPA should be considered.

Section 111

Section 111 seeks to achieve a legitimate purpose and is necessary. Section 111 in its present format, however, is poorly drafted. The heading and content of section 111 are not aligned, and the purpose of section 111 does not appear from the current wording. It is therefore proposed that section 111 be redrafted to refer to section 22(3) of the NPA Act, to align the heading of the section with the content thereof, and to provide guidelines for the exercise of the powers of the NDPP under this section.

Issues for comment

10. The Commission requires assistance and invites both commentators and interested parties to comment and make written submissions on the discussions in this paper, the proposals in Chapter 5, and in particular on the following issues:

1) Should Chapter 16 of the CPA be retained in the present form?
2) Are the provisions of Chapter 16 consistent with the Constitution?
3) If the provisions of Chapter 16 are not consistent with the Constitution, how should the provisions in Chapter 16 be framed in order to render them constitutionally compliant?
4) Criminal proceedings are ordinarily started in the magistrate's court. Should that happen in all cases as a rule, or might there be instances where cases should start in the High Court?
5) Might there be circumstances, in the interest of justice, when there could be concurrent jurisdiction between a division of the High Court of South Africa and a local seat established for that division?
6) Regarding the 4 km rule in section 90 of the Magistrates' Courts Act 32 of 1944, is the rule still necessary and is it still being utilised?

CHAPTER 1: INTRODUCTION

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, 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; the National Development Plan: Vision 2030 of 2012 that outlines a roadmap for the transformation of society; and the adoption of Outcome 3 of the Medium Term Strategic Framework (2014-2019) “All People in South Africa are, and feel safe”.

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, the result of which was the Integrated Criminal Justice Strategy (ICJS) for South Africa of 2019. This document sets out several strategic goals of which Legislative Reforms is Strategic Goal 1. The Implementation Plan for the ICJS proposes that the overhaul of the Criminal Procedure Act 51 of 1977 (CPA) be implemented in a phased manner. However, the immediate focus should be on determining the critical weaknesses of the CPA and its Regulations.

1.3 On 26 August 2020, Mr Ronald Lamola, MP, the Minister of Justice and Correctional Services at the time, requested the Chairperson of the SALRC to include, on an urgent basis, the review of the CJS in the SALRC’s research programme. Under 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 as Project 151: Review of the Criminal Justice System. In view of the urgency to reform the CPA, the SALRC is following a two-pronged approach in executing the review. The reform of the CPA is being dealt with in terms of an accelerated process under the Criminal Procedure Reform Project, a sub-project of the broader Criminal Justice System Reform Project. Both these processes are part of Project 151.

B Criminal jurisdiction

1.4 This paper deals with the concept of criminal jurisdiction in the context of the Criminal Procedure Act 51 of 1977. The Constitutional Court, in the case of *Gcaba v Minister for Safety and Security*,[1] adopted the definition of "jurisdiction" as coined in the matter of *Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board*,[2] which stated that: "Jurisdiction means the power or competence of a Court to hear and determine an issue between parties".[3] In other words: the jurisdiction of a court refers to the authority to hear and decide a matter.

1.5 The criminal jurisdiction of South African courts is not a single doctrine but a layered statutory and constitutional framework. Section 165 of the Constitution grants judicial power to the courts.[4] In South African criminal law, criminal jurisdiction refers to the authority of a court to hear and decide a criminal matter. It determines which court may try an offence, based mainly on territory, the nature or seriousness of the offence, and the powers of the court concerned.

1.6 While territoriality remains the point of departure, the Magistrates' Courts Act, Criminal Procedure Act and offence-specific legislation extend jurisdiction through local connecting factors, sentencing competence and, in limited cases, extra-territorial reach. It is therefore important to distinguish between the power to try an offence, the territorial basis for doing so, the punishment a court may impose, and the exceptional circumstances in which South African courts may adjudicate conduct occurring beyond the Republic. The following terminology is important in this context:

- Territorial jurisdiction: where the offence, conduct, omission, consequence, possession, detention, or other jurisdictional fact occurred.
- Subject-matter/offence jurisdiction: whether the court may try that type of offence.
- Sentencing jurisdiction: whether the court may impose the required punishment.

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1 Gcaba v Minister for Safety and Security 2010 1 SA 238 (CC) par 74.

2 Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board 1950 2 SA 420 (A).

3 *Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board* at 424. See also Mervyn Dendy "Jurisdiction" in WA Joubert (founding ed) *The Law of South Africa* (*LAWSA*) Vol 23(2) 3ed (updated March 2023) par 2 [Dendy in *LAWSA* vol 23(2) 3ed (updated 2023)].

4 D Smythe & J Omar "Criminal Procedure" in WA Joubert (founding ed) *The Law of South Africa* (*LAWSA*) Vol 12 3ed (updated January 2020) par 15 [Smythe & Omar in *LAWSA* vol 12 3ed (updated 2020)].

- Extra-territorial jurisdiction: whether South African courts may try conduct occurring outside South Africa, usually because a statute expressly allows it.

1.7 Jurisdiction must generally exist at the start of proceedings. A court must have jurisdiction when the trial begins, otherwise the proceedings may be invalid. Multiple courts may have jurisdiction; hence more than one court could try the same offence in some instances. The prosecution chooses the appropriate forum. The presence of the accused in court is important. The accused must be physically present in court, which ties jurisdiction to control over the person.

1.8 Some principles have been developed through case law. The courts generally have jurisdiction where any element of the crime occurs within the area, but jurisdiction may be extended where there is a sufficient territorial link. In terms of the concept of a real and substantial link, courts may assume jurisdiction if there is a meaningful connection between the offence and South Africa

CHAPTER 2: CRIMINAL JURISDICTION OF SOUTH AFRICAN COURTS

A Introduction

2.1 The court said the following about jurisdiction in a criminal matter in the case of *Savoi and Others v National Prosecuting Authority and Another*: [1]

> In a criminal matter, jurisdiction is determined by the area in which the offences have been committed (territorial jurisdiction), the nature of the offence (substantive jurisdiction) and also the nature of the penalty that should be imposed (punitive jurisdiction).

2.2 When an offence is committed within the court's jurisdictional area, it will have territorial jurisdiction. When the type of offence is one which a particular court may try, it has substantive (or subject matter) jurisdiction. In order to impose a valid sentence, a court must have the authority to order a sentence that is appropriate to the offence, hence, it must have the necessary punitive or sentencing jurisdiction.[2]

B Territorial jurisdiction

2.3 Territorial jurisdiction refers to a court's authority based on the geographical area where the crime occurred.[3] Territorial jurisdiction is the primary and most important form of jurisdiction. A court has territorial jurisdiction in the following instances:

- A crime was committed within its geographical area, or
- a part of the crime occurred in its geographical area, or
- the result or consequence of the crime occurred in the court's geographical area.

2.4 South African criminal courts generally exercise jurisdiction over crimes committed within South Africa's territory.[4] Territorial jurisdiction can be altered or

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1 Savoi and Others v National Prosecuting Authority and Another 2021 (2) SACR 278 (KZP) at par 53.

2 Smythe & Omar in *LAWSA* vol 12 3ed (updated 2020) par 15.

3 Section 21(1) of the Superior Courts Act 10 of 2013; *Ewing McDonald & Co. Ltd. v M & M Products Company and Others* (199/89) [1990] ZASCA 115; 1991 (1) SA 252 (AD); [1991] 1 All SA 319(A) (28 September 1990) 256 G-H.

4 Smythe & Omar in *LAWSA* vol 12 3ed (updated 2020) par 26.

centralised through prosecutorial direction.[5] It is therefore not only the physical location of the offence that matters, as statutory mechanisms can deem a designated court to have jurisdiction.[6]

C Substantive jurisdiction

2.5 Substantive or subject matter jurisdiction refers to the court's authority based on the nature and severity of an offence, determining whether a court may try a particular type of offence. It is closely linked to institutional jurisdiction, relating to the court within the judicial system that has the power to hear a case. This is determined by the structure of the court system and legislative provisions. The Constitutional Court, the Supreme Court of Appeal and the High Court make up the superior courts, while the regional magistrates' courts and the district magistrates' courts make up the lower courts.[7]

2.6 The Constitutional Court holds ultimate jurisdiction over constitutional interpretations. The High Court have inherent jurisdiction over all crimes and over matters assigned to them by statute or prosecutorial decision. The High Court will generally deal with the most serious offences and complex or high-profile matters, including treason.[8] The regional magistrates' courts can deal with all offences except treason. Serious offences such as murder, rape, armed robbery and serious assault therefore fall within regional court jurisdiction, although sentencing jurisdiction may be affected by minimum sentence legislation and, historically, by referral mechanisms to the High Court. District magistrates' courts may try all offences except treason, murder, rape and compelled rape.[9] Child offenders and international crimes complicate this ordinary framework: child offenders may be dealt with in child justice courts under the Child Justice Act, while genocide, crimes against humanity and war crimes depend on statutory universal jurisdiction provisions.

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5 Section 111 of the CPA.

6 Section 110 of the CPA.

7 Smythe & Omar in *LAWSA* vol 12 3ed (updated 2020) par 15.

8 Section 172(2) of the Constitution.

9 Section 89 of the Magistrates' Courts Act 32 of 1944.

D Punitive jurisdiction

2.7 Punitive or sentencing jurisdiction refers to the maximum punishment a court may impose after conviction. South African sentencing law is structured by constitutional limits, statutory sentencing powers and judicial discretion. Section 276 of the CPA provides for the general sentencing options available after conviction, while the Magistrates' Courts Act limits the penal jurisdiction of lower courts.

2.8 The Constitution excludes punishments that violate dignity, life and the prohibition on cruel, inhuman or degrading punishment. Within the remaining lawful range courts exercise a sentencing discretion guided by the *Zinn* triad,[10] but that discretion is narrowed where minimum sentence legislation applies. In such cases the prescribed sentence has to be imposed unless substantial and compelling circumstances justify departure. It is important to note that a court can sometimes try an offence but is then limited in its sentencing power. This is regulated by statute, such as the Magistrates' Courts Act and Criminal Law Amendment Acts.

2.9 The district magistrates' courts are subject to a sentencing limit of up to 3 years' imprisonment, as well as a cap on the fines that may be imposed. Regional magistrates' courts may generally impose a sentence of imprisonment of up to 15 years.[11] The magistrates' courts may deviate from these limits where empowered to do so in terms of other legislative provisions, for example as provided by section 51 of the Criminal Law Amendment Act 105 of 1997.

2.10 High Court sentencing jurisdiction is not similarly capped and may extend to life imprisonment, which is the maximum lawful sentence in South Africa. Special sentencing options, such as correctional supervision, suspended sentences, non-parole periods, and options provided for in the Child Justice Act 75 of 2008 are also available. Section 276 of the CPA, which is headed "Nature of punishments", lists the sentences that may be imposed after conviction, subject to the CPA, other legislation and the common law.

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10 "What has to be considered is the triad consisting of the crime, the offender and the interests of society." *S v Zinn* 1969 (2) SA 537 (A) at 540G.

11 Section 92 of the Magistrates' Courts Act 32 of 1944.

E Extra-territorial jurisdiction

2.11 At common law, South African criminal jurisdiction is primarily territorial. The ordinary rule is that South African courts try offences committed within the Republic. Extra-territorial jurisdiction refers to a court's power to try offences committed outside South Africa. Extra-territorial jurisdiction is an exception to the territorial rule and prosecuting offences committed abroad would require a recognised exception or statutory extension.[12] South African courts may have extra-territorial jurisdiction to try crimes committed outside the country, but only in specific circumstances. This happens when the offence has a substantial connection with South Africa, or legislation specifically grants jurisdiction.[13]

2.12 The Constitutional Court confirmed this in *S v Basson*,[14] stating that, as a general proposition, South African courts have declined to exercise jurisdiction over persons who commit crimes in other countries. The Court described this as connected to sovereignty and the presumption against the extra-territorial operation of criminal law.[15] The common-law territorial rule is not absolute. The common law recognises limited exceptions to strict territoriality, the crime of treason being a good example of common law extending jurisdiction beyond ordinary territorial limits.[16] Because treason concerns allegiance to the state, it may be committed outside the country by a person owing allegiance to South Africa.

2.13 There is also authority recognising that certain offences may be triable despite cross-border elements, especially where part of the criminal conduct has a real connection to South Africa. In *S v Basson* the Constitutional Court accepted that the facts showed a "real and substantial link" between South Africa and the alleged conspiracies relating to Namibia, including planning, direction and military involvement from within South Africa.[17]

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12 Smythe & Omar in *LAWSA* vol 12 3ed (updated 2020) par 26.

13 See for example section 12 of the Prevention and Combating of Trafficking in Persons Act 7 of 2013.

14 *S v Basson* (CCT30/03A) [2005] ZACC 10; 2005 (12) BCLR 1192 (CC); 2007 (3) SA 582 (CC); 2007 (1) SACR 566 (CC) (9 September 2005).

15 *S v Basson* par 223.

16 *S v Basson* par 225.

17 *S v Basson* par 226–228.

2.14 South African courts do not ordinarily exercise jurisdiction over crimes committed abroad, but common law and statute recognise limited exceptions where there is a sufficient South African connection, a protected state interest, or an express legislative basis.[18] Common law may explain the background territorial rule and limited exceptions, but it does not give South African courts a broad, free-standing power to try crimes committed anywhere in the world. Modern extra-territorial jurisdiction usually depends on express legislation.[19]

2.15 This is apparent from *S v Okah*,[20] where the Constitutional Court dealt with extra-territorial jurisdiction under anti-terrorism legislation. The Court considered whether the relevant statute conferred jurisdiction over offences committed outside South Africa. It noted that the statute was the main basis for trying terrorism offences committed abroad.[21]

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18 Smythe & Omar in *LAWSA* vol 12 3ed (updated 2020) par 26; Jamil Ddamulira Mujuzi "The Prosecution in South Africa of International Offences Committed Abroad: The Need to Harmonise Jurisdictional Requirements and Clarify Some Issues" *African Yearbook on International Humanitarian Law* 2015 (1) 96–117 at 96–97; Graham Bursey "The extra-territorial commission of the offences of attempt, incitement, conspiracy and accessory after the fact – culpable or not?" *De Rebus* (November 1992) 821–822 at 821.

19 See for example: section 327(1) of the Merchant Shipping Act 57 of 1951; section 2 of the South African Citizens in Antarctica Act 55 of 1962; section 110A of the Criminal Procedure Act 51 of 1977; section 56A of the Nuclear Energy Act 32 of 1998; section 4 of the Anti-Personnel Mines Prohibition Act No 36 of 2003; section 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007; sections 150 and 151 of the Civil Aviation Act 13 of 2009; and section 12 of the Prevention and Combating of Trafficking in Persons Act No 7 of 2013 [Mujuzi fn 4].

20 *S v Okah* (CCT 315/16; CCT 193/17) [2018] ZACC 3; 2018 (4) BCLR 456 (CC); 2018 (1) SACR 492 (CC) (23 February 2018).

21 *S v Okah* par 35.

CHAPTER 3: CONSTITUTIONAL PROVISIONS

A Judicial authority

3.1 Section 165(1) of the Constitution of the Republic of South Africa, 1996 (the Constitution) vests the judicial authority of the Republic of South Africa in the courts. Section 166 lists the courts, naming the Constitutional Court; the Supreme Court of Appeal; the High Courts; and the Magistrates' Courts; while providing for other high courts of appeal and any other court established or recognised by an Act of Parliament. The jurisdiction of the Constitutional Court, Supreme Court of Appeal and the High Courts is determined in sections 167, 168 and 169 respectively. The Supreme Court of Appeal and the High Courts will additionally have jurisdiction in instances provided for by an Act of Parliament, while the High Courts may be excluded from hearing certain matters if assigned to another court of similar status by an Act of Parliament.

B Section 167: Constitutional Court

3.2 Section 167 of the Constitution pertains to the Constitutional Court, setting out the powers, composition, status and jurisdiction of the Constitutional Court:

> **Constitutional Court**
>
> 167 (1) The Constitutional Court consists of the Chief Justice of South Africa, the Deputy Chief Justice and nine other judges.
>
> (2) A matter before the Constitutional Court must be heard by at least eight judges.
>
> (3) The Constitutional Court –
>
> *(a)* is the highest court of the Republic; and
>
> *(b)* may decide
>
> (i) constitutional matters; and
>
> (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court; and
>
> *(c)* makes the final decision whether a matter is within its jurisdiction.
>
> (4) Only the constitutional Court may –
>
> *(a)* decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;

> *(b)* decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;
> *(c)* decide applications envisaged in section 80 or 122;
> *(d)* decide on the constitutionality of any amendment to the Constitution;
> *(e)* decide that Parliament or the President has failed to fulfil a constitutional obligation; or
> *(f)* certify a provincial constitution in terms of section 144.
>
> (5) The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force.
>
> (6) National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court –
> *(a)* to bring a matter directly to the Constitutional Court; or
> *(b)* to appeal directly to the Constitutional Court from any other court.
>
> (7) A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution.

3.3 The Constitutional Court and the Supreme Court of Appeal initially had equal status. The Constitutional Court could originally only decide constitutional matters and issues connected with decisions on constitutional matters[1] and was the highest court in respect of all constitutional matters.[2] The Supreme Court of Appeal was the highest court of appeal in respect of any matter, except constitutional matters.[3]

3.4 The Constitution Seventeenth Amendment Act of 2012 effected critical changes to the status and jurisdiction of the Constitutional Court and the Supreme Court of Appeal.[4] The amendment elevated the status of the Constitutional Court to that of the highest court in the country,[5] and extended the jurisdiction of the Constitutional Court to

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1 Section 167(3)*(b)* **before** amendment by the Constitution Seventeenth Amendment Act of 2012.

2 Section 167(3)*(a)* **before** amendment by the Constitution Seventeenth Amendment Act of 2012.

3 Section 168(3) **before** amendment by the Constitution Seventeenth Amendment Act of 2012.

4 See in general Sarah Pugsley "Jurisdiction and Status of the Courts" in WA Joubert (founding ed) *The Law of South Africa* (*LAWSA*) Vol 7(2) 3ed (updated November 2025) par 321 [Pugsley in *LAWSA* vol 7(2) 3ed (updated 2025)].

5 Section 167(3)*(a)* **after** amendment by the Constitution Seventeenth Amendment Act of 2012.

any matter in respect of which "the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court."[6] In addition, the amended section 167(3)*(c)* stipulates that the Constitutional Court now decides whether it has jurisdiction over a matter.[7] Excluding the jurisdiction of the Constitutional Court would therefore be unconstitutional, as stated by the Constitutional Court in the matter of *African National Congress v Chief Electoral Officer of the Independent Electoral Commission*:[8]

> It is clear that were s 96(1) to be interpreted to oust this court's jurisdiction to consider constitutional matters, it would be inconsistent with s 167(3)*(a)* of the Constitution, which provides that this court is the highest court in all constitutional matters. Accordingly, s 96(1) should in the light of s 2 of the Electoral Act be read in a manner consistent with s 167(3)*(a)*.

3.5 Except for the matters over which it enjoys exclusive jurisdiction, the Constitutional Court now shares jurisdiction over all matters with other courts. When exercising jurisdiction over shared matters, the Constitutional Court sits as a court of final appeal and not as a court of first instance. The Constitutional Court may, however, grant direct access in exceptional cases, when the Court then sits as a court of first instance. The court will only grant direct access if there are compelling reasons to do so.[9]

3.6 The matters that are within the exclusive jurisdiction of the Constitutional Court are listed in section 167(4) of the Constitution. When the Constitutional Court exercises jurisdiction over these exclusive matters it sits as a court of first and final instance and it must be approached directly.[10] Only the Constitutional Court may do the following:[11]

(a) Decide disputes between organs of state in the national or provincial spheres of government about their constitutional status, powers or functions;

(b) decide on the constitutionality of a parliamentary bill referred to the court by the President;

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6 Section 167(3)*(b)*(ii) **after** amendment by the Constitution Seventeenth Amendment Act of 2012. See also *Competition Commission of SA v Media 24* (*Pty*) *Ltd* 2019 9 BCLR 1049 (CC); [2019] 1 CPLR 27 (CC); [2019] JOL 45025 (CC); 2019 5 SA 598 (CC) par 35.

7 Pugsley in *LAWSA* vol 7(2) 3ed (updated 2025) par 322.

8 African National Congress v Chief Electoral Officer of the Independent Electoral Commission 2009 10 BCLR 971 (CC); [2009] JOL 23692 (CC); 2010 5 SA 487 (CC) par 8.

9 Pugsley in *LAWSA* vol 7(2) 3ed (updated 2025) par 326.

10 Pugsley in *LAWSA* vol 7(2) 3ed (updated 2025) par 325.

11 Section 167(4) of the Constitution.

(c) decide on the constitutionality of a provincial bill referred to the court by the premier;
(d) decide on the constitutional validity of a parliamentary Act on application of a third of the members of Parliament;
(e) decide on the constitutional validity of a provincial Act on application of a fifth of the members of the provincial legislature;
(f) decide on the constitutionality of an amendment to the Constitution;
(g) decide whether Parliament or the President has failed to fulfil a constitutional obligation; or
(h) certify that the text of a provincial constitution or amendments to a provincial constitution comply with section 144 of the Constitution.

3.7 In the general course of events, most constitutional matters will first be decided in the High Court or a court of similar status.[12] If the High Court or a court of similar status or the Supreme Court of Appeal makes an order declaring an Act of Parliament, a provincial Act or conduct of the President to be unconstitutional, the order must be confirmed by the Constitutional Court before it has any force.[13] This was confirmed by the Constitutional Court in matters pertaining to the powers of the President and institutions supporting democracy.[14]

C Section 168: Supreme Court of Appeal

3.8 Section 168 of the Constitution pertains to the Supreme Court of Appeal (SCA), setting out the powers, composition, status and jurisdiction of the SCA:

> **Supreme Court of Appeal**
>
> 168 (1) The Supreme Court of Appeal consists of a President, a Deputy President and the number of judges of appeal determined in terms an Act of Parliament.
>
> (2) A matter before the Supreme Court of Appeal must be decided by the number of judges determined in terms of an Act of Parliament.
>
> (3) *(a)* The Supreme Court of Appeal may decide appeals in any matter arising from the High Court of South Africa or a court of a status similar to the High Court of South Africa, except in respect of labour or

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12 Pugsley in *LAWSA* vol 7(2) 3ed (updated 2025) par 327.

13 Section 167(5) read with section 172 of the Constitution.

14 *President of the Republic of SA v Tembani* 2024 9 BCLR 1152 (CC); 2025 2 SA 371 (CC); [2024] ZACC 5 (CC) par 99; *Democratic Alliance v Public Protector of SA* 2023 11 BCLR 1281 (CC); [2023] JOL 59998 (CC); 2024 3 SA 1 (CC) pars 108 & 109.

> competition matters to such extent as may be determined by an Act of Parliament.
>
> *(b)* The Supreme Court of Appeal may decide only –
>
> (i) appeals;
> (ii) issues connected with appeals; and
> (iii) any other matter that may be referred to it in circumstances defined by an Act of Parliament.

3.9 As indicated above, the Constitutional Court and the SCA initially had equal status. Following the enactment of the Constitution Seventeenth Amendment Act of 2012, the Constitutional Court was designated as the highest court in the Republic and its jurisdiction extended to both constitutional and non-constitutional matters. The SCA is no longer the highest court of appeal in respect of non-constitutional matters, now being an intermediate court of appeals.[15] The SCA may decide appeals in any matter arising from a high court or a court of a status similar to a high court, except in respect of labour or competition matters to such extent as may be determined by an Act of Parliament. Being an exclusive appeal court, the Supreme Court of Appeal exercises no original jurisdiction.[16]

3.10 The Constitutional Court, however, determined in the matter of *Amod v Multilateral Motor Vehicle Accidents Fund* [17] that the Supreme Court of Appeal has jurisdiction to develop the common law in all matters including constitutional matters:[18]

> When a constitutional matter is one which turns on the direct application of the Constitution and which does not involve the development of the common law, considerations of costs and time may make it desirable that the appeal be brought directly to this Court [the Constitutional Court]. But when the constitutional matter involves the development of the common law, the position is different. The Supreme Court of Appeal has jurisdiction to develop the common law in all matters including constitutional matters. Because of the breadth of its jurisdiction and its expertise in the common law, its views as to whether the common law should or should not be developed in a "constitutional matter" are of particular importance.

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15 Pugsley in *LAWSA* vol 7(2) 3ed (updated 2025) par 328.

16 Section 168(3)*(a)* of the Constitution. See also Pugsley in *LAWSA* vol 7(2) 3ed (updated 2025) par 330.

17 *Amod v Multilateral Motor Vehicle Accidents Fund* 1998 10 BCLR 1207 (CC); [1998] JOL 3144 (CC); 1998 4 SA 753 (CC).

18 Amod v Multilateral Motor Vehicle Accidents Fund par 33.

D Section 169: High Court of South Africa

3.11 Section 169 of the Constitution deals with the powers, composition and jurisdiction of the High Court of South Africa:

> **High Court of South Africa**
>
> 169 (1) The High Court of South Africa may decide –
> *(a)* any constitutional matter except a matter that –
> (i) the Constitutional Court has agreed to hear directly in terms of section 167(6)*(a)*; or
> (ii) is assigned by an Act of Parliament to another court of a status similar to the High Court of South Africa; and
> *(b)* any other matter not assigned to another court by an Act of Parliament.
> (2) The High Court of South Africa consists of the Divisions determined by an Act of Parliament, which Act must provide for –
> *(a)* the establishing of Divisions, with one or more seats in a Division; and
> *(b)* the assigning of jurisdiction to a Division or a seat within a Division.
> (3) Each Division of the High Court of South Africa –
> *(a)* has a Judge President;
> *(b)* may have one or more Deputy Judges President; and
> *(c)* has the number of other judges determined in terms of national legislation.

3.12 The High Court consists of the divisions determined by section 6 of the Superior Courts Act 10 of 2013. The High Court of South Africa may hear any matter, as long as it has not been assigned to another court by an Act of Parliament. With regard to constitutional matters, the High Court may decide any constitutional matter, except the following:

- Matters that the Constitutional Court has agreed to hear directly, as provided for by section 167(6)*(a)* of the Constitution;
- Matters assigned by an Act of Parliament to another court of a status similar to the High Court.

3.13 Most cases dealing with constitutional matters will be decided first in the High Court. High court orders regarding the unconstitutionality or invalidity of an Act of Parliament, a provincial Act or conduct of the President must be confirmed by the Constitutional Court. The parties to such cases do not have to apply for leave to appeal, as these cases are referred to the Constitutional Court automatically. Other cases raising

constitutional matters, however, are not automatically referred to the Constitutional Court. A party wishing to appeal against a decision of a high court in such an instance will have to follow the normal appeals process and apply for leave to appeal.[19]

E Section 172: Powers of courts in constitutional matters

3.14 Section 172 of the Constitution sets out the powers of the Supreme Court of Appeal, the High Court of South Africa and courts of similar status to the High Court:

> **Powers of courts in constitutional matters**
>
> 172 (1) When deciding a constitutional matter within its power, a court –
>
> *(a)* must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> *(b)* may make any order that is just and equitable, including –
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to a low the competent authority to correct the defect.
>
> (2) *(a)* The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.
>
> *(b)* A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.
>
> *(c)* National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.
>
> *(d)* Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection.

3.15 Section 172 sets out the powers of the superior courts, namely the Constitutional Court, Supreme Court of Appeal and high courts, in relation to constitutional matters. Section 172 gives the SCA and the High Courts the authority to make an order on the constitutional validity of an Act of Parliament, a provincial Act or conduct of the President,

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19 Pugsley in *LAWSA* vol 7(2) 3ed (updated 2025) par 333.

but stipulates that an order of constitutional invalidity has no force unless confirmed by the Constitutional Court. When deciding a constitutional matter within its powers, a court:

- Must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency;
- may make any order that is just and equitable, including an order limiting the retrospective effect of the declaration of invalidity;
- may order suspension of a declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

3.16 Although an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court, the court making an order of constitutional invalidity may do the following:

- Grant a temporary interdict or other temporary relief to a party;
- Adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.

F Section 170: Other courts

3.17 Section 170 pertains to other courts:

> **Other courts**
>
> 170 All courts other than those referred to in sections 167, 168 and 169 may decide any matter determined by an Act of Parliament, but a court of a status lower than the High Court of South Africa may not enquire into or rule on the constitutionality of any legislation or any conduct of the President.

3.18 As stipulated in section 170, the jurisdiction of magistrates' courts and all other courts is determined by an Act of Parliament. Although all courts other than the Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa may decide any matter determined by an Act of Parliament, section 170 expressly precludes a court of a status lower than a High Court from enquiring into or ruling on the constitutionality of legislation or conduct of the President.[20]

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[20] Pugsley in *LAWSA* vol 7(2) 3ed (updated 2025) par 334.

CHAPTER 4: STATUTORY LAW

A Criminal Procedure Act 51 of 1977

4.1 The current Criminal Procedure Act (CPA) dedicates Chapter 16 to the issue of jurisdiction. The Chapter comprises three sections only, namely, sections 110, 110A and 111. Each section deals with a different aspect of jurisdiction. With regard to these provisions, the focus of this paper is on determining, among other matters, whether they are constitutionally compliant and if they should be retained in the proposed new CPA. This exercise includes considering whether these provisions are still useful to the administration of justice. It is therefore necessary to consider them individually.

1 Section 110

4.2 Section 110 provides as follows:

> **Accused brought before court which has no jurisdiction**
>
> (1) Where an accused does not plead that the court has no jurisdiction and it at any stage –
>
> *(a)* after the accused has pleaded a plea of guilty or of not guilty; or
>
> *(b)* where the accused has pleaded any other plea and the court has determined such plea against the accused,
>
> appears that the court in question does not have jurisdiction, the court shall for the purposes of this Act be deemed to have jurisdiction in respect of the offence in question.
>
> (2) Where an accused pleads that the court in question has no jurisdiction and the plea is upheld, the court shall adjourn the case to the court having jurisdiction.

(a) Discussion

4.3 Although this section does not prohibit a court from raising the issue of its jurisdiction *mero motu* (of its own accord) in a particular case, the section deems a court to have jurisdiction under certain defined circumstances. The section provides that once an accused person pleads to a charge without first objecting to the jurisdiction of the court, such court is deemed to have jurisdiction to try him or her, regardless of the position that under the law it does not have jurisdiction.

4.4 This is an anomaly created by the section. Ordinarily, each court in the Republic derives its jurisdiction from the Constitution and legislation. All courts are established by the Constitution, which, in some respects, also defines their jurisdiction. However, the Constitution does not spell out explicitly the criminal jurisdiction of each court, except that it is apparent that both the Constitutional Court and the Supreme Court of Appeal may only entertain criminal matters on appeal.

4.5 Regarding Divisions of the High Court, usually a Division is taken to have jurisdiction over crimes which are committed within its territorial jurisdiction. Therefore section 110 permits a Division to entertain a criminal case in respect of an offence committed outside its jurisdiction, as long as the accused person has pleaded to the charge and has not raised the issue of jurisdiction before tendering such plea. Effectively under the section, the omission by the accused gives the court jurisdiction which it otherwise does not have in law. In other words, this becomes jurisdiction by default.

4.6 What needs proper attention is the question whether jurisdiction can be assumed by default. This requires a careful consideration of whether the principle that jurisdiction should be defined by law may readily be disregarded on account of an oversight on the part of an accused person. It is also a principle of our law that jurisdiction may only be substantively conferred as it regulates the competence or authority of a court. And as a result, jurisdiction cannot spring from consent or acquiescence of litigants.

4.7 Notably, section 110 could apply even to crimes committed outside the country, even if there is no legislation authorising South African courts to try such crimes. And notionally on the issue of the widely permissive language of the section, a court whose defined authority does not include a particular crime may as well try a case if the accused does not object to its jurisdiction. What compounds matters is the fact that even if the accused raises the issue of jurisdiction after tendering a plea, the court will ignore its lack of jurisdiction and proceed to try a case knowing that it has no authority to do so. This appears to be contrary to the principle of legality which forms part of the rule of law, an integral part of the Constitution.

4.8 Du Toit et al explain that section 110 is primarily intended to address situations where a court has jurisdiction to try an offence but is not the appropriate forum because of another jurisdictional factor, for example the offence was committed outside the court's area of jurisdiction. Section 110 does not confer substantive jurisdiction, nor does it extend a court's jurisdiction beyond that prescribed by law. Rather, it grants territorial

jurisdiction to a court that would otherwise not have it, based solely on the accused's tacit acceptance of that court's jurisdiction by failing to object to the court's lack of jurisdiction when pleading to a charge.[1] This was confirmed in the matter of *S v Pale*,[2] where the court said:[3]

> Section 110 is mainly intended to provide for the instance where a particular court indeed has jurisdiction to try the offence with which the accused has been charged, but is the wrong court because of some or other jurisdictional fact, for example that the crime was committed outside the court's area of jurisdiction. The section does not create substantive jurisdiction and cannot grant a magistrate greater jurisdiction than that which he has by law. For example, it does not grant juristic capacity to a magistrate to try a case which, in terms of section 89 of the Magistrates' Courts Act, hy may not try, even though an accused does not dispute the jurisdiction of the court. … Also, section 110 cannot grant a court jurisdiction to try a crime that was committed in another country. Section 110 indeed grants territorial jurisdiction to a court that did not have it, purely on the grounds of the accused's tacit acceptance thereof, in that he allows the trial to proceed without raising the point when he pleads. [Own translation.][4]

4.9 On the other hand, with regard to jurisdiction over crimes committed beyond the borders of South Africa, there is case law that interprets section 110 differently, indicating that section 110 does not grant extra-territorial jurisdiction. In the matter of *S v Maseki*,[5] the court said the following:[6]

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1 E du Toit, F de Jager, A Paizes, A St Quintin-Skeen, S van der Merwe and S Terblanche *Du Toit: Commentary on the Criminal Procedure Act* (RS 74, 2025) 16-1 to 16-2. [Du Toit et al.].

2 *S v Pale en 'n Ander* 1995 (1) SACR 595 (A).

3 *S v Pale en 'n Ander* 1995 (1) SACR 595 (A) at 598E–G.

4 Original version: "Artikel 110 is hoofsaaklik bedoel om voorsiening te maak vir die geval waar 'n bepaalde hof wel jurisdiksie het om die misdaad waarvan die beskuldigde aangekla word, te bereg, maar die verkeerde hof is vanweë een of ander jurisdiksionele feit soos bv dat die misdaad buite die hof se regsgebied gepleeg is. Die artikel skep nie substantiewe jurisdiksie nie en kan nie aan 'n landdros 'n groter jurisdiksie verleen as wat hy regtens het nie. Dit verleen bv nie regsbevoegdheid aan 'n landdros om 'n saak te verhoor wat hy ingevolge art 89 van die Wet op Landdroshowe nie mag verhoor nie, al betwis 'n beskuldigde nie die regsbevoegdheid van die hof nie. ... So ook kan art 110 nie jurisdiksie verleen aan 'n hof om 'n misdaad wat in 'n ander land gepleeg is, te bereg nie. Artikel 110 verleen wel territoriale jurisdiksie aan 'n hof wat dit nie gehad het nie, suiwer op grond van die beskuldigde se stilswyende aanvaarding daarvan, deurdat hy die verhoor laat voortgaan sonder om die punt te opper wanneer hy pleit." [*S v Pale en 'n Ander* 1995 (1) SACR 595 (A) at 598E–G.]

5 *S v Maseki* 1981 (4) SA 374 (T).

6 *S v Maseki* 1981 (4) SA 374 (T) at 377A–C.

> The underlying reasons for the approaches set out above in respect of the interpretation of both section 110 of Act 51 of 1977 and section 90 of Act 32 of 1944 appear to be the following. Firstly, that they are not applicable where different legal systems are involved; in the foreign country the conduct of the accused might not be a crime and/or different sentences may be imposed; secondly, the common law rule that that a crime is justiciable only by the court of the area where it was committed; thirdly the presumption that our Laws are not applicable abroad.
>
> To summarise: (i) Our courts do not have jurisdiction to decide offences committed in their entirety abroad. (ii) Similarly, our courts do not have jurisdiction to decide matters started in the Republic but completed outside. What are stated above are the general principles. They are subject to exceptions or quasi-exceptions, for example treason and where a continuous offence such as theft is involved. In addition thereto, the Legislator may grant the courts jurisdiction in respect of crimes committed outside the borders of the Republic. [Own translation.][7]

4.10 It is also clear from case law that section 110 cannot be used to expand the offence jurisdiction of a court. The convictions of the accused persons in the matter of *S v M; S v S en Andere*[8] were set aside because the accused were tried and convicted by a magistrate in a magistrate's court, despite the fact that section 89(1) of the Magistrates' Courts Act 32 of 1944 excludes rape from the offence jurisdiction of a magistrate's court. The Court said the following about section 110(1):[9]

> In my opinion the provisions of s 110 (1) [of Act 51 of 1977] do not have the meaning that the jurisdiction of the magistrate was extended to include rape which is expressly excluded by s 89(1) of the Magistrates' Courts Act 32 of 1944. [Own translation.][10]

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7 Original version: "Die onderliggende redes vir die benaderings soos hierbo uiteengesit ten opsigte van die uitleg van beide art 110 van Wet 51 van 1977 en art 90 van Wet 32 van 1944 blyk die volgende te wees. Eerstens dat hulle nie van toepassing is nie waar verskillende regstelsels betrokke is; in die vreemde land mag die optrede van die beskuldigde nie 'n misdaad wees nie en/of mag verskillende vonnisse opgelê word; tweedens, die gemeenregtelike reël dat 'n misdaad beregbaar is alleen deur die hof van die gebied waar dit gepleeg is; derdens die vermoede dat ons Wette nie in die buiteland van toepassing is nie.

Om saam te vat: (i) Ons howe het nie regsbevoegdheid om te beslis oor misdrywe wat in hul geheel in die buiteland gepleeg is nie. (ii) Eweneens het ons howe ook nie regsbevoegdheid om te beslis oor misdrywe wat binne die Republiek begin is maar daarbuite voltooi is. Wat hierbo gesê is, is die algemene beginsels. Hulle is aan uitsonderings of kwasi-uitsonderings onderhewig soos, bv, hoogverraad en waar 'n deurlopende misdaad soos diefstal betrokke is. Daarbenewens kan die Wetgewer jurisdiksie aan die howe verleen ten opsigte van misdade wat buite die grense van die Republiek gepleeg is." [*S v Maseki* 1981 (4) SA 374 (T) at 377A–C.]

8 *S v M; S v S en Andere* 1979 (2) SA 959 (T).

9 *S v M; S v S en Andere* 1979 (2) SA 959 (T) at 961H.

10 Original version: "Na my mening het die bepalings van art 110 (1) nie die betekenis nie dat dit die jurisdiksie van die magistraat uitgebrei het om verkragtings in te sluit wat

2 Section 110A

4.11 Section 110A provides as follows:

> **Section 110A: Jurisdiction in respect of offences committed by certain persons outside Republic**
>
> (1) Notwithstanding any other law, any South African citizen who commits an offence outside the area of jurisdiction of the courts of the Republic and who cannot be prosecuted by the courts of the country in which the offence was committed, due to the fact that the person is immune from prosecution as a result of the operation of the provisions of –
>
> *(a)* the Convention on the Privileges and Immunities of the United Nations, 1946;
>
> *(b)* the Convention on the Privileges and Immunities of the Specialised Agencies, 1947;
>
> *(c)* the Vienna Convention on Diplomatic Relations, 1961;
>
> *(d)* the Vienna Convention on Consular Relations, 1963; or
>
> *(e)* any other international convention, treaty or any agreement between the Republic and any other country or international organisation,
>
> and that person is found within the area of jurisdiction of any court in the Republic which would have had jurisdiction to try the offence if it had been committed within its area of jurisdiction, that court shall, subject to subsection (2), have jurisdiction to try that offence.
>
> (2) No prosecution may be instituted against a person under subsection (1), unless –
>
> *(a)* the offence is an offence under the laws of the Republic; and
>
> *(b)* the National Director of Public Prosecutions instructs that a prosecution be instituted against the person.
>
> (3) At the conclusion of the trial against a person under this section, a copy of the proceedings, certified by the clerk of the court or registrar, together with any remarks as the prosecutor may wish to append thereto, must be submitted to the Minister of Foreign Affairs.

4.12 This provision was introduced and inserted into the CPA by the Judicial Matters Amendment Act 66 of 2008 and came into effect on 17 February 2009. It regulates prosecution in South Africa of crimes committed outside the country, provided the perpetrator is a South African citizen who could not stand trial in the country in which the offence was committed because of the diplomatic immunity that person enjoyed in the foreign country.

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uitdruklik deur art 89 (1) van Wet 32 van 1944 uitgesluit is." [*S v M; S v S en Andere* 1979 (2) SA 959 (T) at 961H.]

4.13 However, there are conditions which must be satisfied before such prosecution commences. First, the accused must be within the area of jurisdiction of the relevant court, and the court must have jurisdiction to entertain such case if the offence is committed within its area of jurisdiction. In other words, it must be competent to try an offence of that kind. Second, the offence in question must also be a crime under the laws of this country. Third, the National Director of Public Prosecutions must issue an instruction that a prosecution be instituted.

4.14 Upon the conclusion of the trial, a certified record of the proceedings, together with any remarks made by the prosecutor, must be submitted to the Minister of Foreign Affairs by the clerk of the court or the registrar, as the case may be. The purpose of submitting the record is not stated and is not apparent from the provision.[11]

4.15 Du Toit et al submit that section 110A is intended to address situations where a South African court would lack effective procedural jurisdiction because of diplomatic immunity. Section 110A seeks to remedy the jurisdictional gap in cases that do not fall under a common law exception (eg high treason) or where there is no express statutory authority granting jurisdiction. However, as is apparent from section 110A(2), no prosecution may be instituted against a South African citizen with diplomatic immunity unless that person's conduct constitutes an offence under South African Law, and the National Director of Public Prosecutions instructs that the person be prosecuted.[12]

4.16 Du Toit et al further explain that section 110A should be understood as a mechanism that enables South African courts to exercise **procedural jurisdiction** over crimes committed abroad. Section 110A neither expands the substantive extraterritorial jurisdiction of South African courts, nor does it broaden the categories of crimes (such as corruption, war crimes, crimes against humanity, and genocide) over which our courts may exercise jurisdiction beyond our borders. Rather, it aims to prevent possible impunity for South African diplomats, in view of the operation of procedural and substantive extraterritorial jurisdiction at present.[13]

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11 Section 110A(3).

12 Du Toit et al 16-14A.

13 Du Toit et al 16-14B.

4.17 Du Toit et al point out that section 110A is in accordance with section IV(8) of the resolutions adopted by the Twelfth International Congress of Penal Law held in Hamburg, Germany in September 1979,[14] which provides as follows:[15]

> The sending State has the obligation to prosecute according to its own law offences committed by beneficiaries of immunity in the receiving State. It should also resolve, at the internal level, legal problems which may interfere with the application of its own penal law to an offence committed abroad (e.g. the repression of narcotics traffic committed by a beneficiary of immunity in the receiving State).

4.18 Section 110A appears to address a legitimate purpose and, in addition, accords with international instruments such as section IV(8) of the resolutions adopted by the Twelfth International Congress of Penal Law held in Hamburg, Germany in 1979. Apart from not explicitly stating why a copy of the proceedings[16] must be submitted to the Minister of Foreign Affairs at the conclusion of the trial against a person under this section, no other criticism has been levelled at this section.

3 Section 111

4.19 Section 111 provides as follows:

> **Minister may remove trial to jurisdiction of another attorney-general**
>
> (1)*(a)* The direction of the National Director of Public Prosecutions contemplated in section 179 (1)*(a)* of the Constitution of the Republic of South Africa, 1996, shall state the name of the accused, the relevant offence, the place at which (if known) and the Director in whose area of jurisdiction the relevant investigation and criminal proceedings shall be conducted and commenced.
>
> *(b)* A copy of the direction shall be served on the accused, and the original thereof shall, save as is provided in subsection (3) be handed in at the court in which the proceedings are to commence.
>
> (2) The court in which the proceedings commence shall have jurisdiction to act with regard to the offence in question as if the offence had been committed within the area of jurisdiction of such court.
>
> (3) Where the National Director issues a direction contemplated in subsection (1) after an accused has already appeared in a court, the original of such direction shall be handed in at the relevant proceedings

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14 Supra.

15 José Luis de la Cuesta Resolutions of the Congresses of the International Association of Penal Law (1926–2004) (2007) 85.

16 As certified by the clerk of the court or registrar, together with any remarks that the prosecutor may wish to append thereto.

> and attached to the record of the proceedings, and the court in question shall –
>
> *(a)* cause the accused to be brought before it, and when the accused is before it, adjourn the proceedings to a time and a date and to the court designated by the Director in whose area of jurisdiction the said criminal proceedings shall commence, whereupon such time and date and court shall be deemed to be the time and date and court appointed for the trial of the accused or to which the proceedings pending against the accused are adjourned;
>
> *(b)* forward a copy of the record of the proceedings to the court in which the accused is to appear, and that court shall receive such copy and continue with the proceedings against the accused as if such proceedings had commenced before it.

4.20 On the face of it, this provision replaced a section that regulated the power that was exercised by the Minister of Justice to remove a criminal trial from the jurisdiction of one attorney-general to the jurisdiction of another attorney-general. This much is clear from the heading of the section, which still refers to the Minister even though in the body the provision makes no reference to such Minister. In terms of this power, the Minister could transfer a case, especially a political case, from the court before which it was pending to any other court in the country. This could be done for any reason, including taking a matter to a court which is likely to give a verdict favourable to the state or to prevent the accused from receiving support of his or her community during the trial, by taking the case to a place too far from such community.

4.21 Before the amendment of section 111 by section 44 of the National Prosecuting Authority Act 32 of 1998 (NPA Act), section 111(1) of the CPA granted the Minister of Justice the authority to direct that an offence committed in the area of jurisdiction of one attorney-general be tried in the area of jurisdiction of another attorney-general. Subsection (1), before amendment by the NPA Act, stated the following:

> (1) Where the Minister deems it in the interests of the administration of justice that an offence committed within the area of jurisdiction of one attorney-general be tried within the area of jurisdiction of another attorney-general, he may in writing direct that criminal proceedings in respect of such offence be commenced within the area of jurisdiction of such other attorney-general.

4.22 Subsection (1) of section 111 of the CPA was deleted by section 44 of the NPA Act and subsection (2) was renumbered as subsection (1). As Du Toit et al state, “[t]he heading of s 111 is misleading and should have been changed in 1998 when the NDPP

was given the power to remove a trial to the jurisdiction of another DPP".[17] The deleted subsection (1), with some changes to the wording, now appears in the NPA Act as sub-section (3) of section 22:

> (3) Where the National Director or a Deputy National Director authorised thereto in writing by the National Director deems it in the interest of the administration of justice that an offence committed as a whole or partially within the area of jurisdiction of one Director be investigated and tried within the area of jurisdiction of another Director, he or she may, subject to the provisions of section 111 of the Criminal Procedure Act, 1977 (Act 51 of 1977), in writing direct that the investigation and criminal proceedings in respect of such offence be conducted and commenced within the area of jurisdiction of such other Director.

4.23 The result of the amendment of section 111 of the CPA by the NPA Act is that section 111 has to be read with section 22(3) of the NPA Act. This was confirmed in the matter of *Stanfield and Others v National Director of Public Prosecutions and Another*, where the court said:[18]

> In casu s 111 must be interpreted in context with s 22(3) of the NPA and the apparent purpose to which it is directed. A sensible approach must be followed. The ordinary rules of grammar and syntax must be applied.

4.24 In his summary of the Stanfield case, Pieter du Toit states that:[19]

> Section 22(3) of the National Prosecuting Authority Act 32 of 1998 authorises the National Director of Public Prosecutions (NDPP) or a duly authorised Deputy National Director of Public Prosecutions to direct that an offence committed as a whole or partially within the area of jurisdiction of one Director of Public Prosecutions (DPP) be investigated and tried within the area of jurisdiction of another DPP. Such a decision may only be taken if it is in the interests of justice. The directive must be made in writing. Section 22(3) must be read with s 111 of the Criminal Procedure Act 51 of 1977 … ."

4.25 Now the provision addresses a different issue altogether. It states that the National Director of Public Prosecutions (NDPP) shall issue a written direction reflecting the name of the accused and the Director of Public Prosecutions in whose area of jurisdiction an investigation shall be conducted and criminal proceedings be

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17 Du Toit et al 16-18.

18 Stanfield and Others v National Director of Public Prosecutions and Another 2020 (1) SACR 232 (GP) par 18.

19 Pieter du Toit "Recent cases: Criminal Procedure" *South African Journal of Criminal Justice* (2020) 33:2 480–492 at 481–482.

commenced. A copy of this direction should be served on the accused and the original be handed to the court before which the trial is initiated.

4.26 That court shall have jurisdiction to entertain the case as if the offence had been committed within its area of jurisdiction. In this regard, the direction has the effect of giving a court jurisdiction over an offence committed outside its jurisdiction. However, it is not clear whether the provision is limited to crimes committed in South Africa but outside the jurisdiction of a court or it covers offences committed in other countries as well.

4.27 Where the accused has already appeared before one court, the NDPP can still issue a direction transferring the trial from such court to another. In that event the original copy of the direction must be submitted to the court before which the accused has appeared and that court is obliged to transfer the case to the court mentioned in the direction and the latter court shall continue with the trial as if it had commenced before it. Notably, when such transfer is effected, a copy of the record also is forwarded to the new court.

4.28 To illustrate the utilisation of section 111, Du Toit et al refer to *S v Mashile*,[20] where the Director of Public Prosecutions authorised the investigation and trial of a person accused of rape in different provinces to be conducted in Mpumalanga:[21]

> His violation of women knew no provincial borders, for trails of his DNA could be … found in three different provinces … . This prompted the National Director of Public Prosecutions to give a directive in terms of section 22(3) of Act 32 of 1998 read with section 111 of Act 51 of 1977 (the CPA), authorising the investigations and trial of these crimes in Mpumalanga Province.

4.29 In the matter of *S v P*, on the other hand, it was said that without a direction from the Director of Public Prosecutions a court has no jurisdiction over offences committed in another province. [22]

4.30 Section 111 is clumsily drafted. The purpose of the transfer is not clear from its language. Nor can the circumstances warranting the issuance of the direction be gleaned

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20 *S v Mashile* [2020] JOL 46890 (MG).

21 *S v Mashile* [2020] JOL 46890 (MG) at par 2.

22 *S v P* (unreported, KZD case no CCD39/2019, 11 December 2020) at par 9.

from it. However, it appears objectionable that the NDPP can, without permission from the court, disrupt its business and transfer a case from it to another court. What compounds matters is the fact that in terms of the section, the transfer can happen in the middle of a trial, such that the new court picks up the proceedings where the old court has left them.

B Other legislation

4.31 Subject-matter and sentencing jurisdiction are not primarily governed by the CPA, but by the Superior Courts Act 10 of 2013, the Magistrates' Courts Act 32 of 1944 and Criminal Law Amendment Acts.

1 Superior Courts Act 10 of 2013

4.32 Section 15 of the Superior Courts Act affirms section 172(2)*(a)* of the Constitution, determining that the Supreme Court of Appeal, a Division of the High Court or any competent court must refer an order of constitutional invalidity of an Act of Parliament, a provincial Act or conduct of the President to the Constitutional Court for confirmation. Section 21 sets out the persons and matters falling under the jurisdiction of divisions of the High Court:

> **Persons over whom and matters in relation to which Divisions have jurisdiction**
>
> 15 (1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power –
>
> *(a)* to hear and determine appeals from all Magistrates' Courts within its area of jurisdiction;
>
> *(b)* to review the proceedings of all such courts;
>
> *(c)* in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.
>
> (2) A Division also has jurisdiction over any person residing or being outside its area of jurisdiction who is joined as a party to any cause in relation to which such court has jurisdiction or who in terms of a third party notice becomes a party to such a cause, if the said person resides or is within the area of jurisdiction of any other Division.
>
> (3) Subject to section 28 and the powers granted under section 4 of the Admiralty Jurisdiction Regulation Act, 1983 (Act 105 of 1983), any

Division may issue an order for attachment of property to confirm jurisdiction.

4.33 Section 27 of the Superior Courts Act makes provision for the removal of proceedings from one High Court division to another or from one seat in a High Court division to another in the same High Court division:

> **Removal of proceedings from one Division to another or from one seat to another in same Division**
>
> 27 (1) If any proceedings have been instituted in a Division or at a seat of a Division, and it appears to the court that such proceedings –
> *(a)* should have been instituted in another Division or at another seat of that Division; or
> *(b)* would be more conveniently or more appropriately heard or determined –
> (i) at another seat of that Division; or
> (ii) by another Division,
> that court may, upon application by any party thereto and after hearing all other parties thereto, order such proceedings to be removed to that other Division or seat, as the case may be.
>
> (2) An order for removal under subsection (1) must be transmitted to the registrar of the court to which the removal is ordered, and upon the receipt of such order that court may hear and determine the proceedings in question.

2 Magistrates' Courts Act 32 of 1944

4.34 In relation to criminal matters, the Magistrates' Courts Act 32 of 1944 determines which offences lower courts may try and establishes the sentencing limits of lower courts. In terms of section 89, district magistrates' courts have jurisdiction over all offences, with the exception of treason, murder, rape and compelled rape (as contemplated in sections 3 and 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007), while regional magistrates' courts have jurisdiction over all offences, with the exception of treason.

4.35 Section 90 sets out the local limits of jurisdiction, providing for the territorial jurisdiction of magistrates' courts and jurisdiction over offences begun or completed within the area of a district or regional division. Section 90 also provides for the extension of the territorial jurisdiction of a magistrates' court to:

- offences committed within 4 km beyond the boundary of a district or regional division;

- offences committed in or upon a vehicle within 4 km beyond the boundary of a district or regional division;
- offences committed on board a vessel on a journey upon a river within 4 km of a district or regional division; and
- offences committed on board a vessel within South African territorial waters adjoining a district or regional division.

4.36 Section 92, save as provided elsewhere in the CPA or another Act, limits the sentencing jurisdiction of a district magistrates' court to three years imprisonment, and the sentencing jurisdiction of a regional magistrates' court to 15 years imprisonment. Fines are capped as determined by the Minister by notice in the *Gazette*.

CHAPTER 5: CONCLUSION AND PROPOSALS

A Determination of jurisdiction

5.1 As explained in Chapter 2, courts enjoy three types of jurisdiction, namely territorial jurisdiction, substantive or subject matter jurisdiction, and sentencing or punitive jurisdiction. The Constitution and courts legislation determine the substantive jurisdiction of the various courts, principally the Superior Courts Act 10 of 2013 and the Magistrates' Court Act 32 of 1944. Offence and sentencing jurisdiction are similarly determined by statute.

5.2 The principle of territoriality, however, is considered the foundational principle for establishing jurisdiction in criminal law. Payer explains it as follows:[1]

> The territorial principle, according to which any state may punish the offences committed on its territory, is the only principle used by all legal systems in the world to justify (primarily) their own criminal jurisdiction. It is undisputedly recognized in both international judicial decisions and literature, and is even considered by some scholars to be the 'highest' (i.e., supreme) principle of jurisdiction (e.g., compared to the nationality principle).

5.3 While the Superior Courts Act and the Magistrates' Courts Act determines the area of jurisdiction of each court, the underlying territorial principle is not stated anywhere. It is proposed that the principle of territoriality, namely that jurisdiction is territorial in the first instance, should be stated in new criminal procedure legislation.

5.4 Lack of jurisdiction could delay or scupper a criminal trial; hence it is important that a criminal trial should be started and conducted in the correct court. It is preferable that jurisdiction should be established right at the beginning of a trial to avoid complications later. The CPA does not stipulate which court has jurisdiction in which instances, only providing for some specific jurisdictional issues in Chapter 16 of the CPA.

5.5 Chapter 16, titled "Jurisdiction" appears after Chapter 15, which deals with "The Plea"; and before Chapter 17, which deals with "Plea of guilty at summary trial".

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1 Andrés Payer "The Territorial Principle as a Basis for State Criminal Jurisdiction: Particularly with Regard to Cross Border Offences and Attempts, and to Multiple Parties to an Offence Acting in Different Countries" *International Criminal Law Review* 23 (2023) 175–238 at 176–178.

Considering the progress of a criminal matter, the placement of a chapter providing for specific jurisdictional issues in the middle of provisions pertaining to pleading at a criminal trial seems illogical. The sections pertaining to jurisdiction in a redrafted CPA should be properly located and appear earlier in the Act, not in the part of the Act that deals with pleading in criminal trials. Jurisdiction should be dealt with before the commencement of a trial, not during the trial.

5.6 It should neither be necessary to plead jurisdiction in a criminal trial, nor should it be possible for a litigant to determine jurisdiction on a whim. Jurisdiction is part of the substantive law and should therefore be dealt with by law, not by policy directives or presumptions. Provisions on jurisdiction should be properly located within legislation on criminal procedure. The current location of the chapter on jurisdiction in the CPA is misplaced and does not flow with the process. In criminal trials, jurisdiction is already relevant at the stage when the accused is charged with the crime. Logically speaking, the fact that a specific court has jurisdiction should appear from the charge sheet.

B Chapter 16 of CPA

1 Section 110

5.7 Dealing with jurisdiction right at the outset and not only after an accused has pleaded will avoid problems later on in the trial. If jurisdiction is addressed in the charge sheet, section 110 in Chapter 16 becomes superfluous and could be done away with. On the other hand, if it appears that a provision such as section 110 should be retained in a new CPA, it is proposed that section 110 should be redrafted. From the case law discussed in Chapter 4 of this discussion paper, it transpires that section 110 cannot grant substantive jurisdiction and is primarily used to grant territorial jurisdiction to a court which would otherwise not have territorial jurisdiction.

Proposal 1
Require that the court that has jurisdiction to hear a charge should be indicated in the charge sheet.

Proposal 2
If it appears that section 110 should be retained, section 110 should be redrafted.

Redrafted section 110:

Accused to be brought before court which has jurisdiction

(1) A court may only hear a case in respect of which it has jurisdiction, unless determined otherwise in this Act or any other law.

(2) Where an accused pleads that the court in question has no jurisdiction and the plea is upheld, the court shall adjourn the case to the court having jurisdiction.

2 Section 110A

5.8 From the discussion on section 110A in Chapter 4, section 110A appears to address a legitimate purpose. It is therefore proposed that section 110A be retained. The proper location of a provision such as section 110A within the structure of a redrafted CPA, however, should be considered.

3 Section 111

5.9 As is apparent from the discussion in Chapter 4 of this paper on section 111 in Chapter 16, section 111 seeks to achieve a legitimate purpose and is necessary. Section 111 in its present format, though, is poorly drafted. The heading and content of section 111 are not aligned, and the purpose of section 111 does not appear from the current wording. In addition, section 111 does not indicate that it should be read with section 22(3) of the NPA Act.

5.10 The discretionary power of the National Prosecuting Authority to determine in which court a prosecution should be instituted should be guided by legislation to comply with the rule of law and meet the test of rationality. Directives on substantial jurisdiction should be clear from legislation – it should not be determined by means of policy directives. It is therefore proposed that section 111 be redrafted to refer to section 22(3) of the NPA Act, to align the heading of the section with the content thereof, and to provide guidelines for the exercise of the powers of the NDPP.

Proposal: Redraft section 111

Redrafted section 111:

National Director of Public Prosecutions may remove trial to area of jurisdiction of another Director

(1) The National Director of Public Prosecutions may, if he or she deems it in the interest of the administration of justice that an offence committed as a whole or partially within the area of jurisdiction of one Director of Public Prosecutions be investigated and tried within the area of jurisdiction of another Director of Public Prosecutions as contemplated in section 22(3) of the National Prosecuting Authority Act No. 32 of 1998, in writing direct that the investigation and criminal proceedings in respect of the offence be investigated and tried within the area of jurisdiction of that other Director of Public Prosecutions.

(2)*(a)* The direction of the National Director of Public Prosecutions must state the name of the accused, the relevant offence, the place at which (if known) and the Director of Public Prosecutions in whose area of jurisdiction the relevant investigation and criminal proceedings must be conducted and commenced.

(b) A copy of the direction must be served on the accused, and the original thereof must, save as is provided in subsection (4), be handed in at the court in which the proceedings are to commence.

(3) The court in which the proceedings commence has jurisdiction to act with regard to the offence in question as if the offence had been committed within the area of jurisdiction of such court.

(4) Where the National Director issues a direction contemplated in subsection (1) after an accused has already appeared in a court, the original of such direction must be handed in at the proceedings and attached to the record of the proceedings, and the court in question must –

(a) cause the accused to be brought before it;

(b) when the accused is before it, adjourn the proceedings to a time and a date and to the court designated by the Director in whose area of jurisdiction the said criminal proceedings are to commence, whereupon such time and date and court will be deemed to be the time and date and court appointed for the trial of the accused or to which the proceedings pending against the accused are adjourned; and

(b) forward a copy of the record of the proceedings to the court in which the accused is to appear, which court must continue with the proceedings against the accused as if such proceedings had commenced before it.

(5) If it appears to the court that a direction of the National Director of Public Prosecutions as contemplated in subsection (1) would be more conveniently or more appropriately investigated and tried within the area of jurisdiction of another Director of Public Prosecutions, that court may, upon application by any party thereto and

after hearing all other parties thereto, order such proceedings to be removed to the area of jurisdiction of that other Director of Public Prosecutions.

(6) An order for removal under subsection (5) must be transmitted to the registrar of the court to which the removal is ordered, and upon the receipt of such order that court may hear and determine the proceedings in question.

C Issues for comment

5.11 The Commission requires assistance and invites both commentators and interested parties to comment and make written submissions on the discussions in this paper, the proposals above, and in particular on the following issues:

Issues requiring comment

1) Should Chapter 16 of the CPA be retained in the present form?
2) Are the provisions of Chapter 16 consistent with the Constitution?
3) If the provisions of Chapter 16 are not consistent with the Constitution, how should the provisions in Chapter 16 be framed in order to render them constitutionally compliant?
4) Criminal proceedings are ordinarily started in the magistrate's court. Should that happen in all cases as a rule, or might there be instances where cases should start in the High Court?
5) Might there be circumstances, in the interest of justice, when there could be concurrent jurisdiction between a division of the High Court of South Africa and a local seat established for that division?
6) Regarding the 4 km rule in section 90 of the Magistrates' Courts Act 32 of 1944, is the rule still necessary and is it still being utilised?

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