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A REVIEW OF THE

ADMINISTRATIVE RECESS SYSTEM

IN THE HIGH COURT

BY

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AND

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FOREWORD

The Minister of Justice and Constitutional Development and the National Director of Public Prosecutions are to be commended for sanctioning a formal investigation and report on the thorny issue of the **recess system** in our country.

It is a matter of public record that, for years, I have been **opposed** to the recess system and, in the process, have elicited strong and emotive responses from all quarters - not least of whom the **judiciary**.

Unfortunately, other debates on this important issue have also generated more heat than light.

A proper study of the current recess system in the South African context of overcrowded prisons, accommodation shortages, court delays and criminal case backlogs which have assumed serious proportions, shows that recesses do not belong in our **overburdened criminal justice system**.

Elsewhere, foreign jurisdictions have tackled the problem in a structured fashion and developed alternate ways of balancing the interests of the judiciary with the interests of the community.

There are many facets to any proposed solutions and this report does not pretend to have found the Holy Grail.

If anything, I would like to think that this report shows that there is ample room for **common ground** and that it is possible to find solutions, which could be welcomed by everyone concerned.

Any alteration to working patterns in the High Court is likely to affect a wide spectrum of people, and arouse strong emotions.

Accordingly, I consider it **essential** that those who wish to **comment** on the proposals contained herein, be given the opportunity to do so. For that reason, the report will not be considered final until all **submissions**[1] have been considered and included, where appropriate or necessary.

Finally, I would like to **thank** the many people who gave me the benefit of their experience and wisdom in contributing to this report.

Others, who assisted in various ways, are too numerous to mention. Two, in particular, must be singled out for thanks: Amy Bell-Mulaudzi at the American Consulate, for her overwhelming helpfulness and efficiency, and my secretary, Dawn Greyvensteyn, for her long-standing loyal support and invaluable assistance.

F W KAHN SC
OCTOBER 2003

[1] See p. 95 *infra*

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APPENDICES:

A REVIEW OF THE ADMINISTRATIVE RECESS SYSTEM IN THE HIGH COURT

INTRODUCTION

Productivity in the High Court is dependant on the **optimal utilisation** of the **hours** available, per calendar day, per court, on the one hand, and, on the other, the **number of** such **calendar days available**, per court, to dispose of the business of the courts.

The former problem is in the process of being carefully scrutinized and reviewed on an ongoing basis by all the relevant role players in the criminal justice system. My mandate[2], however, is to review the latter problem, with special reference to the **recess system** and the **criminal business** of the High Court.

Approximately **5%** of all serious criminal cases manage to be heard in the High Court, where cases are finalized approximately two years after the date of the commission of the offence, while witnesses struggle to remember and accused persons languish in jail.

The recess system dates back to **civil recesses** in colonial times and causes a loss in court time, countrywide, of some **4624 days** per year[3]. In modern times, this is a luxury which the country cannot afford, given that "*there is presently a crisis in our courts which should receive the*

[2] My mandate refers specifically to productivity in the High Courts; it **preceded**, and was **unrelated** to, the Management Meeting held subsequently on 26 May 2003. Any suggestion to the contrary, in a letter signed by the Chief Justice and the National Director of Public Prosecutions, is factually incorrect.
[3] See page 52 *infra*

urgent attention of the authorities".[4]

The **poor performance** of our criminal justice system is not simply an issue of governance.

In South Africa, it risks affecting the **stability** of the State and the well-being of the constitutional order; increasingly, communities are engaging in **vigilante** activity. This is largely a result of popular perceptions that the country's constitution and the criminal justice system are, at best, ineffectual when it comes to fighting crime or, at worst, afford greater protection to criminals than law-abiding citizens.[5]

Public trust and **confidence** are unlikely to be achieved if there is a **perception** that the **courts** are **inaccessible** or **wasting public resources**.

It is unarguable that a well nigh complete **shut-down** of **fourteen weeks** of the year, in each of the well-equipped and -staffed High Courts across the country, is not a waste of public resources which is almost **criminal** in itself.

It is the **duty** of the courts to engender **public trust** and **confidence** by justifying their performance[6].

Similarly, it is the **responsibility** of the political branches, and the prerogative of the public, as users of the courts, to voice concern about the **accountability** and **performance** of the courts and how the courts are performing against the **resources** at their disposal.

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[4] Colloquium, Commission 2: Court Management and Effective and Efficient Resource Utilization under the Chairperson The Honourable Justice J H M Traverso, October 2000.

[5] Institute for Security Studies, Paper 56, May 2002.

[6] Judicial accountability and court performance standards: managing court delay, Ziyad Motala, XXXIV CILSA 2001, p. 172.

In this regard, it is regrettable that there has been considerable **controversy** surrounding statements by the Minister of Justice and the Chairperson of the Justice Portfolio Committee, questioning the workload of certain high courts and the Constitutional Court.[7]

After all,

> *'[a]nyone who is not an anarchist wants the courts at all levels to be fair, efficient and so far as possible **cost-effective**; wants to see the acquittal of the innocent and the conviction of the guilty; and wants to see the guilty appropriately sentenced. There is room for legitimate differences of opinion as to how these ends are best achieved in practice, but it should be an argument about **means**, and not **ends**.*
>
> *It is very unfortunate if those who hold differing views seek to brand their opponents as lacking sincerity in their opposition to crime, or as indifferent to the evils which flow from it. Historically, issues of this kind have not occupied the foreground of political debate; it would be welcome if the future were to bring a return to a more measured and bi-partisan approach.'*[8]

A number of **foreign jurisdictions** have considered the time-worn system of fixed recesses, found it wanting, and developed alternative ways of accommodating judicial vacations and judgment-writing time. One such innovation has been the system of **staggered recesses**, whereby not all the judges take leave at the same time and the courts are able to operate **continuously**.

It seems evident that courts are becoming increasingly mindful that judicial independence does not remove the need to **manage public resources appropriately** and to account for their performance.

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[7] Speech made by the Minister of Justice in September 1999 and remarks by the Chairperson made in June 2003.

[8] Speech by the Lord Chief Justice, the Right Honourable Lord Bingham of Cornhill to Gloucester magistrates in 1997.

A proper study of the current recess system, set against the South African context of overcrowded prisons, accommodation shortages, court delays and criminal case backlogs, which have assumed serious proportions, creates the impression that our High Courts are presently **failing** the people they are meant to serve.

While courts elsewhere have examined and adapted their court systems to suit modern times and exigencies, there has never been a proper **assessment** of our own, archaic recess system.

In 1982, it was very briefly touched upon and endorsed by the Hoexter Commission[9] and again, in 1989, when the recess system became a negotiation point for a new salary package[10]. At that stage, the judges elected to '**sacrifice**' **two weeks** of their **sixteen week recess** and one month of their **4½ month extended leave** in order to secure their new salary benefits[11]. One such benefit, the full current salary, payable for life (under certain circumstances), is an extraordinarily generous benefit.

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[9] The Hoexter Commission on the Courts, 1983, Volume 1 of the Final Report, part III, page 225.

[10] An Attractive Deal for Judges, by Ellison Kahn, SALJ 1989, page 701. The 'new deal' for judges includes the basic principle that 'once a judge, always a judge'. A judge has a period of active service and then normally joins the 'reserves' from which he might be called on to do judicial service until he turns 75 years of age. While he is in the 'reserves', if he meets certain conditions, he will have the salary and benefits of those on active service, and if he actually does service he gets an additional salary.
After he has left the 'reserves', he is still on the normal roll and is allowed, if called on, to do judicial service at an additional salary. The basic salary on the nominal roll is calculated to a scale with complex rules: basically, however, **15 years of active service** will yield a **full current salary**. A judge is automatically discharged from active service when he turns 70 years of age if he has completed 10 years of service or, if he has not, once he has done so (section 3(2)(a) of Act 47 of 2001). If, on attaining 70 years, a judge has not yet completed 15 years' active service, he/she may continue to perform active service to the date on which he/she completes a period of 15 years' active service or attains the age of 75 years, whichever occurs first. (Section 4(4) of the Judges' Remuneration and Conditions of Employment Act 47 of 2001). There are also gratuities payable to judges, as well as to their surviving spouses.

[11] See regulation 3(1) in footnote 143 *infra*. This reduction in extended leave was controversial, as some judges were upset at the reduction. Ellison Kahn, *op. cit.* states: *"one wonders whether the loss of a month is really a hardship. In the UK, leave is not known. As far as I am aware, it does not exist in the federal courts of the United States. Very likely, it was introduced in this country to enable judges to travel abroad from time to time, a commendable aim. But the days of the mailboat and obligatory train travel are over; and surely three and a half months every four years are enough*."

Section 16(6)(a) of Schedule 6 of our Constitution[12] provides that:

> *"[a]s soon as is practical after the new Constitution takes effect, all courts, including their structure, composition, functioning and jurisdiction, and all relevant legislation, must be rationalized with a view to establishing a judicial system suited to the requirements of the new Constitution*."

As a result of this provision, in October 2000, the Minister of Justice and Constitutional Development held a **Colloquium** with all the role players to discuss the strengths and weaknesses of the **judicial system**, *inter alia*,

> *"the **long recess periods** in the High courts which **create case backlogs** and **prevent optimal utilization** of the courts and prosecuting services".*

Although no final conclusions were drawn, a number of points emerged from the discussions[13], including the possibility of **staggering** the recesses:

> *"(i) Recesses are **essential** to prepare judgments and read appeals.*
> *(ii) Where possible, 2 or 3 judges should be **on duty** during recesses to deal with **criminal cases, especially** (there was sympathy for the position of the prosecuting authority).*
> *(iii) This issue can only be addressed properly on the strength of **facts** which need to be analysed (there is no easy answer and a balanced approach will have to be found).*
> *(iv) The question was raised whether **staggered recesses** could not be introduced.*
> *(v) Where long **criminal cases** run into recess time, they should be **finalized during the recess**.*
> *(vi) The possibility of using **acting judges** during recesses should be explored.*
> *(vii) The debate about recesses is aimed at ensuring that **resources are used optimally** and not at pointing fingers at the judiciary.*

[12] Constitution of the Republic of South Africa, Act 108 of 1996.
[13] These discussions were held by Commission 1, under the chairmanship of Mr Justice Bernard Ngoepe, Judge President of the High Court, Pretoria. As a result of discussions at Commission 2, under the chairmanship of the Honourable Justice JHM Traverso, it was likewise agreed that for efficient Court management, resources had to be used effectively and efficiently. Included in the areas which may improve efficient Court administration issues, was the question of Court recesses.

*(viii) The question of recesses is, in essence, a **management** issue.*

(ix) If there is a move towards intermediate appeal courts, there will not be a need for long recesses.

*(x) A change in the recess position will not address present problems unless **extra judges** are appointed."*

Despite these promising discussion points, it appears that, to date, this has been the end of the debate.

The aim of this report is, firstly, to consider whether the recesses are suited to the requirements of the new Constitution and secondly, to consider in what ways it may be improved upon.

In the latter regard, three ideas, in particular, will be considered, namely:

- the introduction of a system of both **fixed and staggered recesses**,
- the reduction of the High Court recesses by the creation, and gradual introduction, of a **new rank** of (**criminal**) **High Court judge**, and
- a **separate criminal bench** within the present High Court system.

1. THE HISTORICAL DEVELOPMENT OF THE SUPREME COURT OF SOUTH AFRICA:

The historical development of the Supreme Court of South Africa was influenced, primarily, by considerations of "how **efficiency**, **justice** and **humanity** could best be promoted", as also political considerations and an ongoing tension between the executive and the judiciary.

A look at the historical development of our High Courts provides insight into what the original practices of the day were and the philosophies which formed and guided them. Aspects which are relevant to the current report are the following:

- overcrowded prisons, unacceptable awaiting trial times and case backlogs, are just as much problems of the present criminal justice system as the past;

- the drive for greater productivity, likewise, led, as early as the nineteenth Century, to various measures being employed, such as sitting more hours each day, altering the number and length of recesses, enlarging the Bench, creating more Courts, giving increased jurisdiction to the lower Courts and increasing the number of circuits;

- the development of our legal system has been guided by the principles of speedy and accessible justice, tempered by cost factors;

- one of the few 'innovations' which our twentieth Century legal system has contributed, is the concept of a defined **criminal term**

and **shutting down** the criminal justice machinery for recess periods: historically, **civil terms** were a defined period, with a starting and closing date, whereas **criminal sessions** had only a commencement date and would "*continue by adjournment, as the case may require*"[1];

- over the years, there seems to have been a great capacity (and appreciation of the need) for **flexibility** in 'thought, word and deed'.

1.1 The Supreme Court at the Cape, its offshoots, the Eastern Districts Local Division and Griqualand West Local Division, and the Natal Supreme Court[2]:

Within the South African legal context of the nineteenth century, the pre-eminent legal tribunal was the **Cape Supreme Court**[3] and, to a lesser extent, its offshoots, the Eastern Districts Court and the High Court of Griqualand[4].

In 1891, the Supreme Court took over the functions of the Vice-Admiralty Court, and before the end of the decade, was empowered to hear appeals from, *inter alia*, the Matabeleland High Court, British Bechuanaland and the High Court of Southern Rhodesia.

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[1] This may, however, have been more attributable to a dearth of criminal cases, rather than industry on the part of the judges.

[2] For a brief history of the development of the Transvaal Provincial Division and the Orange Free State Provincial Division, see Appendix B.

[3] While every attempt has been made to keep this historical development truncated, more detail has been given in regard to the Cape Supreme Court than any other, as this was the 'mother colony', which gave birth to much of the historical development of the other major divisions in South Africa.

[4] By the first decade of the twentieth century, the two major courts in South Africa had become the Cape and Transvaal Supreme Courts, and they over-shadowed the subsidiary Cape courts and the Natal and Orange River Colony Supreme Courts. – A History of the District and Supreme Courts of Natal, 1846 – 1910, Spiller, Butterworths, 1986, p.112 – 113.

This exalted position was achieved chiefly as a result of three significant events which took place in the **early 1800's**, during the **second British Occupation**, namely:

- the Proclamation of 5th July, 1822, whereby **English** became the official language of the colony,
- the appointment (by the Imperial Government) of a **Commission of Inquiry**, and
- the new machinery of justice set up by the **Charter of Justice**[5], expanded and modified by a **Second Charter**.

The **Charter** made provision[6] for the establishment of an **independent Supreme Court**, consisting of a Chief Justice and three puisne judges (although later economic considerations led to the Bench being reduced, for a while, from a total of four, to three judges).[7]

Later, it was decided to appoint a **fourth judge** to the Bench[8] as an extension of the circuit system (to **three circuits**) was envisaged[9] and

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[5] The first Charter of Justice came into operation on January 1, 1828, spurred by the Proclamation of 5th July 1822 which made January 1827 the effective date for the use of English in the courts. The first Charter was subsequently followed by a second Charter, constituted by letters patent of 4th May 1832, and coming into operation on 13th February 1834, which superseded and modified it in certain respects.

[6] *Inter alia*, the Charter provided for: -

- circuit courts
- trial by jury
- the right of appeal to the Privy Council
- the sheriff
- the registrar
- the master
- minor officers of the court
- legal practitioners
- appointments and financial arrangements

The changes introduced by the Charter resulted in the complete separation of the executive from the judicial power.

[7] When, in 1831, it was decided that the colony should become self-supporting financially, it became necessary to reduce both the number and salary of some officials. One of the most noteworthy reductions in status was that of the Chief Justice, whose salary was reduced from £2,500 to £2,000; in addition, he was henceforth required to go on circuit, whereas previously only the puisne judges were called upon to do so.

[8] The Better Administration of Justice Act, Act No. 10 of 1855, section 2.

[9] This plan was implemented by Sir George Grey before the judges had submitted their written opinions on the subject, and was met with much resistance from that quarter. See The History of the Cape Supreme Court and

the number of judges were insufficient to hold courts '**as frequently as the wants of the inhabitants required**'[10] (but the fourth appointment was only made in 1858)[11].

The **Supreme Court** at the Cape, sitting with open doors, had full original and review jurisdiction. In civil cases, the Chief Justice and two judges formed a quorum. Civil appeals lay to the Privy Council as of right in matters above £1,000, otherwise only by special leave of that body. Criminal trials came before one, or more, of the judges and a jury of nine men whose verdict had to be unanimous. Criminal sentences of death, transportation or banishment required executive fiat.

Civil terms were to be held in March, June, September and December and there were to be **eight criminal sessions** every year. While the civil terms had set starting and closing times, the criminal sessions were stipulated "*to be continued by adjournment, **as the case may require, until the whole of the criminal business is disposed of…**"*

The court would also **sit during vacation** and provision was made for one of the judges to attend at chambers.

During the next seven years, the judicial system in the Cape was completely transformed. Furthermore, the new and revolutionized legal order was to have a profound influence on subsequent legal developments in Southern Africa.

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its Role in the Development of Judicial Precedent for the Period 1827 – 1910, unpublished dissertation by H. B. Fine, University of Cape Town, 1986, p. 195*ff*

[10] Preamble to the Better Administration of Justice Bill, 1855.

[11] In March 1856, the Finance Committee of the House of Assembly considered the disparity that existed between the salary of the Chief Justice and the puisne judges – at that time, the latter received a salary equivalent to three fifths of that of the former. After debate and the input from various interested parties, they decided to maintain the *status quo*, aligning themselves with Judge Bell's view that "*the colony would gain more than the difference in money [was] worth from an officer who, as Chief Justice, lived in the style and dignity becoming his position.*' Cape of Good Hope Parliamentary Papers, Select Committee Reports, 1856.

With a **Supreme Court** at Cape Town and **Circuit Courts** staffed by judges of the Cape bench a **centralized system** of judicial administration had been put into practice at the Cape.

The period **1834** to Union (**1910**) saw representative government in 1854, leading to responsible government in 1872; a great territorial expansion of the Colony, bringing in its wake the founding of two offshoots[12] of the Supreme Court, the Eastern Districts Court (E.D.C.) in **1864**, and the High Court of Griqualand (H.C.G.) in **1880**.[13]

In order to provide for the new courts, the Supreme Court Bench was enlarged from time to time until, in 1882, the Kimberley (Griqualand) Bench was enlarged to three judges[14] and the structure of all the superior courts made uniform (Administration of Justice Act, No. 40 of 1882).

In **1900**, crimes arising out of the South African War created pressure on the system. A special court was set up to hear these matters and the quorum of the Supreme Court and district courts was reduced to a single judge. These courts themselves created further pressure and meant that the judges could no longer cope with the work if still required to sit in pairs in civil trials. Thus, in 1904, such a **single member court**, termed a **divisional court**, was empowered to sit at all times.

When the **union** of Southern African States was achieved in 1909, a single Supreme Court of South Africa was established 'with an Appellate Division at its apex, and provincial and local divisions at its foundation.'[15]

[12] See Appendix A for a brief history of the development of these courts.
[13] Hahlo and Kahn: South Africa, the Development of its Laws and Constitution, p. 208.
[14] By 1907, when the diamond rush had ended, the High Court of Griqualand was again reduced to a single judge court.
[15] Hugh Corder, Judges at Work: The Role and Attitudes of the South African Appellate Judiciary, 1910 – 1950, Cape Town : Juta, 1984, p.21.

The Cape Supreme Court became a **provincial division** of the Supreme Court; and the Eastern Districts Court, the High Court of Griqualand and the various circuit courts became **local divisions**. The Cape courts retained their original jurisdiction and the judges remained in office with the same rights to salary and pensions as had prevailed in the colony.

1.2 The Natal Provincial Division

On 31 May 1844, Natal was annexed by the British as a separate District of the Cape Colony and when, at the end of **1845**, the new British administration arrived to take up its duties, it also set up a **District Court**[16] with one judge (styled a 'Recorder'), administering Roman-Dutch law as applied at the Cape[17]. The Court had its seat at Pietermaritzburg.

The system of Roman-Dutch law which Ordinance 12 of 1845 introduced into Natal was that "accepted and administered by the legal tribunals of the Colony of the Cape of Good Hope."

Natal remained a District of the Cape Colony until **15 July 1856**, when a Charter established Natal as a **separate Colony**. Befittingly, the District Court was abolished and, in its place, in **1857**, a new Supreme Court, with full original competency and comprising a Chief justice and 2 puisne judges, was set up.

The restyled Supreme Court commenced sittings on 15 April 1858 and enjoyed 52 years of Supreme Court jurisdiction under British colonial rule[18].

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[16] The District Court was established as a kind of circuit court of the Cape Colony: a right of appeal was granted to the Cape Supreme Court in civil matters, and criminal cases could be removed to Cape Town for the determination of points of law.

[17] Ordinance No. 14, patterned on the Charter of Justice, was passed by the Cape Parliament in 1845, creating a District Court of Natal.

[18] In the Supreme Court, in non-jury civil cases, two judges made up the quorum. An appeal lay from a non-jury civil judgement of a circuit court to the Supreme Court. A verdict by a criminal jury could be rendered on the strength of a six to three majority and Privy Council appeals remained on the old basis. Later there were many changes, including the granting of civil jurisdiction to a single judge sitting in chambers in the Supreme Court,

Natal kept her judicial seat at the capital, **Pietermaritzburg**, while Durban, her commercial centre and main urban area, was granted only a circuit court, which sat every alternate month.[19]

At Pietermaritzburg, during 'term' months (alternate months of the year), a full Bench heard most civil matters, and a judge and jury conducted criminal cases. During the alternate months, the judges rotated the duty of hearing matters in chambers, in the early years of the Court they conducted further criminal sessions, and in the later years heard civil cases with a jury[20].

'The Natalier'[21] sketches a picture of persons abandoning small civil claims rather than risking costs of a Supreme Court suit, and of lengthy pre-trial detention periods of accused persons.

On 31 May 1910, the Colony of Natal entered the Union and the Natal Supreme Court became the **Natal Provincial Division** of the Supreme Court of South Africa.

1.3 Management of the Supreme Court:

The historical development of the Cape Supreme Court, as sketched briefly above, was primarily dictated by issues relating, firstly, to the

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the creation of a separate hierarchy of native tribunals, the conferring on the Supreme Court of the power to hear appeals from all single-judge court, and the repeal of statutory provisions relating to appeals to the Privy Council.

[19] Laws Nos. 9 of 1866, 15 of 1868, 3 of 1885.
[20] Spiller, Natal Supreme Court, p. 253-4 and Rules of Court of 28 January 1885, October 1903 and 11 March 1908.
[21] 28 July 1846.

management of both its **human** and **financial**[22] resources, and, secondly, the need for an **efficient**, **speedy** and **accessible (criminal) justice system**.

The Circuit Courts, productivity and accessibility to justice:

The introduction, development and history of the circuit courts show an enormous **commitment**, on the part of the judges, to productivity and speedy and accessible justice. These courts were often held under intolerable conditions, and there was a constant tension between the **needs** of both the inhabitants and the judges, as countered by the **costs** involved in conducting these courts.

The object and intention of introducing circuit courts was, in essence, to make justice as widely **accessible** as possible or, as stated by Judge Menzies, *"[t]o bring the administration of criminal and civil justice by superior tribunals of the colony as near to the residences of the inhabitants as the extent and circumstances of the colony would permit…"*[23]

In the Cape, when appointing the time and place of the circuits, the Governor had to bear the **convenience** of the inhabitants and the '**health and proper comforts**'[24] of the circuit judges in mind, subject only to the requirement that at least **two circuits** were to be held every year.

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[22] In June 1827, the Secretary for Colonies informed the Governor that thirty thousand pounds had been set aside for the judicial establishment. The importance of keeping within the budget was stressed, and it was suggested that, if necessary to achieve this aim, some of the positions in the judicial establishment should remain vacant. Later, in August 1827, a request for law books was turned down as it exceeded the limits of the contingent expenditure which had been allowed for the judicial establishment.
When the new judges, unaccustomed to local regulations and practice, requested that the opening of the Supreme Court be postponed pending the establishment of the new rules of procedure, they were informed that the government could not afford to pay both the 'new' servants as well as the 'old', even for a few months; accordingly, the new system and new appointees had to take up the reins as previously decided.

[23] Report from the Committee of Inquiry into the Judicial Establishment, Cape Town: Saul Solomon, 1845, p. 71.

[24] G. M. Theal, Records of the Cape Colony, London, 1897 – 1905, vol. 32 (of 36), p. 260

After his October 1828 circuit, Judge Menzies penned the following report:

> *"I was able to accomplish it in nine weeks, only by continuing the sittings of the court, at the different towns, frequently till eleven and twelve o' clock at night, and sometimes till the morning of the following day, and by riding at the rate of between sixty and seventy miles a day, for several days successively and, on one occasion, riding eighty four miles, and, on another, one hundred and thirty miles in one day. I was sometimes under the necessity of causing the waggons [*sic*], which conveyed the circuit clerk and my baggage, to travel all night in order that it might be able to reach the circuit towns in proper time.*
>
> *During the nine weeks of my absence from home, I can safely say that, at a very moderate average, I was either on the Bench or on horseback, for ten hours a day…*
>
> *During the journey I was often compelled to sleep in the waggon…[*sic*] From the experience I have acquired, during the last circuit, I feel myself warranted in stating that 'due regard to the health and proper comfort of the judge on circuit' requires that some alteration should be made on the present arrangements for holding the circuits."* [25]

Circuit courts were held twice a year in each of the districts into which the colony was divided and the Colony was divided into three distinct circuits, that is, the **western** circuit, the **eastern** circuit and the **midland** circuit.

The circuits were carefully worked out having regard to the **distance** between the various districts and the time it would take to travel there by wagon. By way of example, the route from Cape Town to Swellendam would take 27 hours by wagon, and from there a further 23 hours to get to George, 50 hours to Uitenhage, 26 hours to Grahamstown, 22 hours to Somerset, 20 hours to Cradock, 17 hours to Colesberg, 37 hours to

[25] Judge Menzies' account of the October 1828 circuit, Colonial Office 372, 1829. Observations on some parts of the Judicial System and Civil Establishment of the Colony of the Cape of Good Hope. In fact, in Cape Parliamentary Papers, G.45-'59, in a letter dated 12 January 1859, it was suggested that the deaths of Judges Menzies and Musgrave had been accelerated by the rigours of the circuit system

Beaufort, 31 hours to Patats River, 18 hours to Worcester and then, finally, 23 hours to get back to Cape Town, resulting in a total travelling time of 312 hours[26].

In order to retain **three judges**[27] for **duty** in the Cape Supreme Court at all times, **no two circuits** were to be held at the same time. For the expenses incurred by the circuit judges, the princely sum of six hundred pounds was allocated annually, such allowance to be disbursed in proportion to the length and expense of the circuit.

The **costs** in maintaining the circuit courts, in particular, were of great concern to the Government, and a Commission of inquiry was formally instituted in 1845.

Instead of the terms of reference provided by the Governor, however, the majority of the Commissioners decided to adopt, as their frame of reference, a general test of how "**efficiency, justice and humanity could best be promoted**".[28] This included the principle that an accused should obtain an impartial trial as soon after his committal as was consistent with the ends of justice, regard being had to the nature of the country and the extent of its financial resources[29].

As a result of their investigations, the **majority report** concluded, *inter alia*, that –

> "*the system of dispensing criminal justice in the country districts, by means of circuit courts, was attended with* ***serious evils*** *both to individuals and society, because of the* ***long***

[26] Fine, *op. cit.* p. 259.
[27] In civil suits a single judge sat, but there was a right of appeal to the Supreme Court in matters above £100, otherwise only by leave of the court *a quo*. Criminal cases came before a judge and a jury consisting of not less than six nor more than nine jurors. Provision was furthermore made for the establishment of courts having jurisdiction in civil cases of small amount or value and in cases of crimes or offences not punishable with death or transportation.
[28] Addenda to the Report and Minutes of Evidence of the Committee of the Legislative Council on the Judicial Establishment, Cape Town: Saul Solomon, 1846, p. 5.
[29] Fine, *op. cit.* p. 120

> ***period*** *that often intervened between the committal and the trial of accused parties"*

and

> *"the administration of civil justice in the country districts would be rendered* ***cheaper and more accessible****, if the court sessions were held more frequently."*[30]

These conclusions were based, at least in part, on the statistics gathered during their investigation, as shown on the table below.

For example, it was ascertained that during the period 1828 – 1833, **awaiting trial prisoners** who were facing prosecution in the Supreme and circuit courts, spent an average of **119,1 days** in **custody**. In Cape Town and the Cape district, where quarterly sessions were held, the average period of detention was 53,6 days. In country districts, where twice yearly circuit courts were held, the average period of detention was 134,8 days.

The Average Period of Confinement for Prisoners Awaiting Trial, during the Period 1828 – 1833

Court where held	No. sessions/ year	No. tried during 6 yrs	No. committed	No. bailed	No. confined for 100 days & more	% of the no. committed	Ave. length confinement
Cape Town	4	307	294	13	9	3,0%	53,6 days
Graham's Town	2	230	184	46	123	66,8	141,9
Uitenhage	2	187	162	25	84	51,9	115,6
Somerset	2	206	177	29	128	72,3	153,8
Graff-Reinet	2	261	241	20	147	61.0	157,1
Stellenbosch	2	110	99	11	44	44.4	98,1
Worcester	2	191	191	0	104	54.5	122,7
George	2	35	25	10	12	48,0	83,9
Swellendam	2	82	64	18	38	59,4	127,2
Beaufort	2	103	99	4	76	76,8	178,1
Clanwilliam	2	47	47	0	36	76,6	181,6
	Total no. tried - - - - -				1760		
	Total no. bailed - - - - -				175		
	Total no. Committed - - -				1585		

[30] Report, *loc. cit.,* p. x – xi.

In **1858**, it was decided to **increase** the number of circuits to **three** per year in the hope that this would **reduce** the **detention time of awaiting trial prisoners**[31].

At that stage, the prevailing **court calendar** comprised the holding of **four civil terms**, **four criminal sessions** and **two circuits** during the year. The civil terms, which lasted a month, were held in February, May/June, August and November/December. The circuit therefore travelled throughout the second and fourth civil terms with its attendant Bar. This meant that there were only two civil terms in the year during which the full strength of the Bar was in Cape Town.

The proposed increase, to three circuits, was met with the united **opposition** of the Bench. This opposition notwithstanding, the three-circuit plan was put into operation during the middle of February, 1859. In 1860, however, the contentious third circuit was discontinued, ostensibly on the ground that there had been a **reduction in crime figures** in the colony.

Other measures were then adopted in an attempt to **reduce** the **detention time of awaiting trial prisoners**, such as (in 1860) granting resident magistrates **increased sentencing jurisdiction**. Cases which had originally been intended for trial in the Supreme and circuit courts, were instead remitted for trial to the resident magistrates, who could now impose sentences of up to two years' imprisonment.

Despite these measures, however, the circuit court business continued to **increase**.

[31] Fine, *op. cit.* p. 202.

In 1865, when a **separate** court was established in the **Eastern districts**, many of the problems were resolved and, in future, simultaneous circuits could be held in both the Eastern and the Western provinces.

Table depicting the number of Criminal and Civil Cases tried in the Supreme and Circuit Courts, during the period 1854 to 1863, both inclusive[32]				
YEAR	**SUPREME COURT**		**CIRCUIT COURTS**	
	CRIMINAL	**CIVIL**	**CRIMINAL**	**CIVIL**
1854	43	382	307	443
1855	45	475	242	578
1856	56	439	230	521
1857	43	380	306	280
1858	42	325	398	258
1859	42	422	729	348
1860	48	606	466	324
1861	40	563	406	287
1862	52	855	344	485
1863	66	1286	512	573

Today, the position regarding the circuit courts is governed by section 7 of Act 59 of 1959, which states that the Judge President may divide the area under his jurisdiction into circuit districts, in which circuit courts shall be held at least twice every year. The times and places of such circuit courts are to be determined by the Judge President.

1.4 Natal Circuit courts

In Natal, circuit courts of a single judge were established. During the years 1846 – 1858 (the District Court years), conditions in Natal were described as being "*rude and plain*".[33]

For example, the following description is provided by Spiller[34]:

> *"In April 1856, such heavy rains fell that the Recorder had to swim the local river to reach the court-house. He was greeted by a crowd gathered with sandwiches and 'grog' for the*

[32] Table adapted from Fine, *op. cit.* p. 221 – 222.
[33] The Natal Mercury, 4 September 1901.
[34] Spiller, A History of the District and Supreme Courts of Natal, 1846 – 1910. p.12

> *eagerly-awaited session, but the session was postponed because the witnesses (unlike the judge) were unable to master the floods. The Recorder's journeys by ox-wagon to the Durban Circuit Court were nightmarish, but the local government was unable to afford even the improvement of a mule-wagon. By the early Supreme Court era, … the government allowed a mule-wagon for circuits, but conditions remained extremely uncomfortable and even dangerous. In 1864, the travelling judge narrowly escaped drowning in the flooded Sterk Spruit River, and lost his cart, guns, gown, bands, wig and books. Williams J, on the Bench in the early 1880's, described the up-country circuits at Estcourt, Ladysmith and Newcastle as involving 'the really terrible fatigue of a fortnight's tumbling and jolting about in a mule-wagon on the veldt.'"*

During vacation months, the judges proceeded separately on circuit to other centres of the Colony. The pre-eminent and most regular circuit session was held in Durban.

From the commencement of Durban circuits in 1851, until 1886, sessions were held up to three or four times a year. Thereafter, statute required the holding of a Durban circuit every month. This remained the position until after the turn of the century, when the amount and importance of Durban litigation required more frequent visits from the judges.

By 1908, a Supreme Court judge or commissioner visited Durban every month, and alternately conducted civil and criminal sessions[35].

Periodically, the judges would also visit centres such as Ladysmith and Newcastle, and by the 1900's other towns such as Dundee and Umzinto had been added to the itinerary.[36] However, long periods would elapse between the sessions held in outlying areas: for example, in March 1908, Vryheid held its first circuit court in three years[37].

[35] Rules of Court of 11 March 1908.
[36] Natal Mercury, 16 August 1902 and 19 May 1904.
[37] Natal Mercury, 17 March 1908.

Eventually, the Rules of Court of 1908 committed the Bench to holding bi-annual circuits in the up-country, midland and coastal districts, where necessary[38]. To a limited extent, then, the Supreme Court achieved one of the purposes of its creation: that of carrying justice to every man's door[39].

1.5 The Supreme Court to date

Today, the position of the Supreme Court[40] is governed by the **Supreme Court Act**[41], and owes its legitimacy to sections 166 and 169 of the Constitution of the Republic of South Africa, Act 108 of 1996.

Act 108 of 1996 also makes provision for a Constitutional Court overseeing all matters relating to the Constitution, a Supreme Court of Appeal, Magistrate's Courts and other Courts.

The Supreme Court Act provides for the following divisions[42]:

i. Cape of Good Hope provincial division of the High court of South Africa with its seat in Cape Town (**CPD**);
ii. Eastern Cape division of the High court of South Africa with its seat in Grahamstown (**ECD**)[43];
iii. Northern Cape division of the High court of South Africa with its seat in Kimberley (**NC**);
iv. Transvaal provincial division of the High court of South Africa with its seat in Pretoria (**TPD**);

[38] Rules of Court of 11 March 1908.
[39] See Spiller, A History of the District and Supreme Courts of Natal, 1846 – 1910, p. 65.
[40] The erstwhile Supreme Court is now called the High Court. Depending on the context and the era to which it refers, either name is used in referring to that Court.
[41] The Supreme Court Act, 1959 (Act 59 of 1959).
[42] It should be noted that provision has been made for concurrent jurisdiction between provincial divisions and the local divisions within their area of jurisdiction. This means that the parent provincial divisions are not denied jurisdiction in a cause of action merely because the facts determining jurisdiction fall within the area of their local divisions.
[43] The Eastern Districts Court, under the new name 'Eastern Cape Division', was elevated in status to that of a provincial division in 1957.

v. Natal provincial division of the High court of South Africa with its seat in Pietermaritzburg (**NPD**);
vi. Orange Free State provincial division of the High court of South Africa with its seat in Bloemfontein (**OPD**);
vii. Durban and Coast Local Division of the High Court of South Africa, with its seat in Durban (**D&CLD**)[44];
viii. Witwatersrand Local Division of the High Court of South Africa (**WLD**);
ix. South-Eastern Cape Local Division of the Supreme Court of South Africa, with its seat in Port Elizabeth (**SECLD**)[45].

In addition to the above structure of our courts, the courts of the **TBVC States** have now been re-incorporated into the SA judicial hierarchy and also need to be mentioned briefly:

x. On 18 July 1978, the supreme court of **Transkei** was constituted.
xi. On 25 June 1982, the supreme court of **Bophuthatswana** (BSC) was established.
xii. On 10 May 1984, the supreme court of **Ciskei** was established.

In addition, an **appellate division** was later established in each of these states.

A **provincial division** consists of a judge president and, if the President so determines, a deputy judge president, and so many judges as the President may from time to time determine[46].

The President can appoint any 'fit and proper person' to **act** in the place of any judge, or in addition to the judges of a particular division, or in any

[44] The Witwatersrand Local Division and Durban and Coast Local Division have continued to share the judges of the provincial division of their areas, and (unlike the G.W.L.D.) to be devoid of circuit courts or appellate jurisdiction.
[45] This new local division was established in Port Elizabeth under the Eastern Cape Division. It was established after the Honourable Mr Justice F L H Rumpff had investigated the position and had found that the creation of such a division was justified. General Law Amendment Act, No. 68 of 1957, s. 2(1) (a), subsequently superseded by Act No. 59 of 1959, s. 1(ix).
[46] Section 3(2), Act 59 of 1959.

vacancy in a division, whenever it is expedient to do so, for **such period** as he may determine, on the advice of the Judicial Service Commission.

In terms of section 174(7) of the Constitution (Act 108 of 1996), **other judicial officers** are appointed in terms of an **Act of Parliament**, which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take place without favour or prejudice.

The **Minister** is able to make any acting appointment – this power, however, is limited to appointments for a period **not exceeding a month**[47].

The most notable **differences** between **permanent local** divisions and **provincial** divisions are that the former, except in the case of the Witwatersrand Local Division, have **no appellate or review** jurisdiction in respect of the proceedings in lower courts, do not have their own **Judges President** or Masters and, except again in the case of the Witwatersrand Local Division, do not have their own **Directors of Public Prosecution**. For administrative purposes, a local division falls under the Judge President of the provincial division.

The divisions as described above are **permanent** divisions. Apart from these divisions, there are also **circuit** courts, which go on circuit at least twice a year to the outlying districts of a province.[48] These circuit local divisions are constituted by the Judges President of the provincial division of the Supreme Court.

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[47] Act No. 68 of 1957, s. 13, subsequently superseded by Act No. 59 of 1959, s. 10(4).

[48] Section 7, Act 59 of 1959. It should be noted that provision has been made for concurrent jurisdiction between provincial divisions and the local divisions within their area of jurisdiction. This means that the parent provincial divisions are not denied jurisdiction in a cause of action merely because the facts determining jurisdiction fall within the area of their local divisions.

1.6 Lower Courts

In the lower courts, there are **Regional Courts** that have jurisdiction in all matters except treason, and **District courts**, which have jurisdiction in all matters except treason, murder and rape.

A **Regional cour**t may impose imprisonment not exceeding 15 years and/or a fine not exceeding R300 000,00 (or other amount as determined by notice in the Government Gazette). The jurisdiction of the Regional Court in terms of offences, as well as its penal jurisdiction, has been amended/increased from time to time.

More than **90%** of the serious criminal matters are dealt with by the regional courts. In certain cases, where minimum sentences apply, the Regional Court may impose sentences of up to **30 years' imprisonment**[49].

The **District court** may impose imprisonment not exceeding 3 years and/or a fine not exceeding R60 000 (or other amount as determined by notice in the Government Gazette).

Magistrates, excluding assistant magistrates, are appointed by the Minister of Justice, after consultation with the Magistrates' Commission. No such consultation is required in respect of the appointment of either **additional** or **assistant** magistrates.

The **vacations** of the judicial officers in both these courts are **staggered**, that is, not all the judicial officers take leave at the same time; magistrates with less than 10 years' experience are entitled to 30 calendar days' leave and those with more than 10 years' experience, 38 calendar days'.

[49] See footnote 164 *infra*

2. HISTORICAL DEVELOPMENT OF TERMS AND RECESSES:

The most noteworthy aspects of the terms and recesses over the years, have been:

(1) there have always been **set terms** for **civil** business, with **defined** starting and **ending** dates;

(2) until relatively recently, there were no terms but only **open-ended 'sessions'** for **criminal** business[1] (with isolated exceptions) with commencement dates and the further provision that the session would **continue** by adjournment, **as the case may require**;

(3) there would always be at least one judge **on duty** during **vacation** for the despatch of some specified limited business;

(4) the **relative civil** term, **criminal** session and **vacation** dates mean that, at least to some extent, there must have been some system whereby not all the judges took leave/vacation at the same time, that is, a **staggered** system of duty had to be in place.

Originally, in the Cape Supreme Court, **civil terms** were to be held in March, June, September and December and there were to be **eight criminal sessions** every year. The court would also **sit during vacation** and provision was made for one of the judges to attend at chambers.

In terms of Rules 1 and 2, promulgated on 10 August, 1843, the court calendar looked as follows:

TERM/ SESSION	CIVIL TERM (4)	VACATION	CRIMINAL SESSION (4)
1st	February		15/01 →

[1] There were certain isolated *ad hoc* exceptions to this rule: see, for instance, the Witwatersrand Local Division, on page 36 *supra.*

2nd	15/05 – 14/06		10/05 →
3rd	August		15/07→
4th	15/11 – 14/12		10/11→

While the civil terms had set starting and closing times, the criminal sessions were stipulated "*to be continued by adjournment,* ***as the case may require, until the whole of the criminal business is disposed of…***"

The Court would also sit in **vacation**, for so many days as was necessary, for the despatch of any business which the Court saw cause to appoint to be heard and determined out of term.

Rules 1 and 2, as referred to above, were repealed and replaced by the following, promulgated on 26 December 1872:

TERM/ SESSION	CIVIL TERM (4)	VACATION	CRIMINAL SESSION (4)
1st	February	10/03 – 15/04	15/01→
2nd	15/05 – 14/06		01/05→
3rd	August	10/09 – 15/10	15/07→
4th	20/11 – 19/12		07/11→

The criminal business, having commenced on the days indicated, would "**be continued by adjournment, as the case may require…**"

The **dates** of the terms and sessions were **changed frequently**, thus in 1893, the position looked slightly altered, as follows:

TERM/ SESSION	CIVIL TERM (4)	VACATION	CRIMINAL SESSION (4)
1st	February	10/03 – 30/04	15/01→
2nd	01/05 – 31/05	10/06 – 31/07	15/04→
3rd	August	10/09 – 31/10	15/07→
4th	01/11 – 30/11	10/12 – 31/01	15/10→

There were **different dates** prescribed for the Supreme Court and its two offshoots, respectively, although the **same basic** noteworthy features, as stated above, remained common to all.

A study of the terms, sessions and vacations of all the various divisions over the years, shows that they were in a **constant state of flux**.

By way of example, in the **High Court of Griqualand** there were **five civil** terms and **six criminal** sessions until **1881**, when there were **five** terms/sessions **each**. By **1905**, however, there were again only **four** civil terms and criminal sessions each, as follows:

TERMS/ SESSIONS	CIVIL TERMS (4)	VACATIONS	CRIMINAL SESSIONS (4)
1st	20/02 – 19/03	All the days not included in the term	10/02→
2nd	15/05 – 14/06		05/05→
3rd	August		20/07→
4th	November		20/10→

Further by way of example, in **1938**, while there were still **four** terms/sessions, the **dates** had been altered thus:

TERM/ SESSION	CIVIL TERMS (4)	VACATION	CRIMINAL SESSION (4)
1st	01/03 – 31/03	All the days outside the civil terms	15/02→
2nd	15/05 – 14/06		25/04→
3rd	15/08 – 14/09		01/08→
4th	01/11 – 30/11		15/10→

By **1956**, however, the High Court of Griqualand had increased their **criminal sessions** to **six**, while retaining only **four civil terms**.

TERM	CIVIL TERMS (4)	VACATION	CRIMINAL SESSIONS (6)
1st crim		All the days outside the civil terms.	01/02→
1st civil	01/03 – 31/03		
2nd crim			01/04→
2ndcivil	01/05 – 31/05		
3rd crim			01/06→

TERM	CIVIL TERMS (4)	VACATION	CRIMINAL SESSIONS (6)
4th crim			01/08→
3rd civil	01/09 – 30/09		
5th crim			01/10→
4th civil	01/11 – 30/11		
6th crim			01/12→

From the above table, it can be seen that the court sat during **every month** of the year, for either civil or criminal business, save for January and July.

In 1961, there were **two civil** terms of approximately four months each, and **nine criminal** sessions, commencing on the first business day of each calendar month, except January, July and December. In 1969, the **civil terms** had increased to **four**, while the **criminal** sessions remained **nine** in number.

By the 1980's, the open-ended criminal sessions had disappeared, with the introduction of one calendar for the despatch of both civil and criminal business. The rest of the year was to be regarded as **vacation**, and there was a **closed period** from approximately 24 December to 2 January. With minor date changes, this has remained the position to this day.

Likewise, the court calendar of the **Cape Supreme Court** underwent regular changes. Thus, in **1903**[2], the following calendar was introduced, providing for **five civil** terms and **six criminal** sessions[3]:

TERMS/ SESSIONS	CIVIL TERMS (5)	VACATIONS	CRIMINAL SESSIONS (6)
1st	February	01/03 – 14/04	15/01→
2nd	15/04 – 14/05	15/05 – 31/05	15/03→
3rd	01/06 – 14/07	15/07 – 31/07	15/05→
4th	August	01/9 – 14/10	15/07→
5th	15/10 – 14/11	15/11 – 31/01	15/09→
6th			15/11→

[2] Rule 399, Government Notice No. 792, 1903 dated 29 August 1903.
[3] As always, to be continued by adjournment, as the case may require.

It was further stipulated[4] that '*no [civil] case shall without special leave of the Supreme Court be set down for trial or for argument in the said Court for any day later than seven days before the last day of term.'*

In 1938, a new set of Rules was brought out, in terms of which, in the Cape of Good Hope, there were **four civil** terms and **ten criminal** sessions during the year. **Vacations** would be all the days falling **outside the civil terms**, and **circuit courts** would be held twice a year, from the 1st March and 1st September, respectively.

TERM/ SESSION	CIVIL TERMS (4)	VACATION	CRIMINAL SESSION (10)
		All the days falling outside the civil terms	February
1st	15/02 – 30/04		March
			April
2nd	15/05 – 23/06		May
			June
3rd	01/08 – 15/10		August
			September
4th	01/11 – 15/12		October
			November
			December

There were **no criminal** sessions during **January** and **July**. While the sessions remained open-ended, the provision that the sessions would '*continue by adjournment as the case may require'*, was not included that year.

In **1944**, the **Cape Provincial Division** had **four civil** terms and **six criminal** sessions, subsequently increased to **ten criminal** sessions. This remained the position for some 15 years until, in **1970**, the criminal and civil terms were made to **coincide**. Up **until then**, the criminal sessions were '*to continue by adjournment, as the case may require*':

[4] Rule 400, Government Notice No. 792, 1903, dated 29 August 1903.

YEAR	TERM	CIVIL	CRIMINAL	VACATION	CLOSE PERIOD
1944	1st civil/crim	15/02 – 30/04	01/02→	The rest of the year, falling outside the civil terms, i.e.: 01/05 – 14/05	16/12 – 15/01
	2nd crim		01/04→		
	2ndcivil/3rdcrim	15/05 – 23/06	01/06→	24/06 – 31/07	
	3rdcivil/4thcrim	01/08 – 15/10	01/08→		
	5th crim		01/10→	16/10 – 31/10	
	4thcivil/6th crim	01/11 – 15/12	01/12→	16/12 – 14/02	
1970	**1**	**08/02 – 31/03**		**The rest of the year.**	
	2	**15/04 – 15/06**			ditto
	3	**01/08 – 30/09**			
	4	**15/10 – 15/12**			
2003	1	27/01 – 28/03		ditto	
	2	07/04 – 20/06			
	3	28/07 – 26/09			15/12 – 16/01
	4	13/10 – 12/12			

The **Eastern Districts Local Division**[5] had the following calendar in 1938:

TERM/ SESSION	CIVIL TERMS (4)	VACATION	CRIMINAL SESSION (4)
1st	01/02 - 09/03	All the days outside the civil terms	4th Tues in Jan→
2nd	10/05 – 15/06		4th Tues in April→
3rd	01/07 – 15/08		1st Tues in July→
4th	21/10 – 30/11		3rd Tues in Oct→

In the **Transvaal Supreme Court**[6], in **1930**, there were **four criminal** sessions and only **three civil** terms:

[5] In contrast to the provincial and local divisions, the Appellate Division had **four** set terms for the despatch of **both civil and criminal business** alike, with the rest of the year being vacation:

TERM	DATES	VACATION
1st	01/03 – 31/03	The rest of the year.
2nd	01/05 – 14/06	
3rd	15/09 – 14/10	
4th	01/11 – 30/11	

TERMS/ SESSIONS	CIVIL TERMS (3)	VACATION	CRIMINAL SESSIONS (4)
1st civil/1st criminal	15/02 – 15/06	16/06 – 31/07	01/02→
2nd criminal			01/05→
2nd civil/3rd criminal	01/08 – 30/09	01/10 – 15/10	01/08→
3rd civil/4th criminal	16/10 – 15/12	16/12 – 14/02	01/11→

As was the practice in all the divisions, the criminal cases were to continue by adjournment as the case may require, and there was accordingly no cut-off date marking the close of criminal business.

In 1972, the **criminal** sessions were increased to **six**, while retaining the **three civil** terms:

TERMS/ SESSIONS	CIVIL TERMS (3)	VACATION	CRIMINAL SESSIONS (6)
1st civil/1st criminal	15/02 – 15/06	(No mention)	01/02→
2nd crim			01/04→
3rd crim			01/06→
2nd civil/4th criminal	01/08 – 30/09		01/08→
5th crim			01/10→
3rd civil/6th criminal	16/10 – 15/12		01/12→

This calendar remained unchanged until **1991** when, for the **first time** in that province, the civil and criminal terms were made to **coincide**. As a result, the **criminal business** could no longer 'continue by adjournment, as the case required', but **ended** on the same date as the civil business.

Since that date, the following calendar has been in force in **Pretoria**:

YEAR	TERMS	CIVIL and CRIMINAL	VACATION (or 'administrative recess')	CLOSE PERIOD
1991	1	01/02 - 31/03	(no mention)	
	2	09/04 – 15/06		
	3	01/08 – 30/09		
	4	09/10 – 15/12		
1992		Ditto	(no mention)	

[6] The Witwatersrand Local Division had **six criminal sessions**, commencing 1st February, 1st April, 1st June, 1st August, 1st October and 1st December.

YEAR	TERMS	CIVIL and CRIMINAL	VACATION (or 'administrative recess')	CLOSE PERIOD
1993	1	27/01 – 27/03	(no mention)	
	2	07/04 – 19/06		
	3	27/07 – 25/09		
	4	05/10 – 04/12		
2003	1	27/01 – 11/04	12/04–28/04	
	2	29/04 – 27/06	28/06-03/08	
	3	04/08 – 26/09	27/09-05/10	20/12/3 – 04/01/04
	4	06/10 – 05/12	06/12-24/01	

The calendar of the **Witwatersrand Local Division** underwent similar changes.

Thus, whereas in **1930** there had been **six criminal sessions**, by **1944**, these had been reduced to only **two (long) criminal sessions** and **three civil terms**. The vacations were referred to as 'civil vacations'. Unusually, these criminal sessions were **closed** sessions, that is, they had an **end date**.

In **1957**, the WLD again reverted to **six open-ended criminal sessions**, while retaining only three civil terms.

As was the case with its sister court in Pretoria, this differentiation in civil and criminal terms (both in number and in nature) remained until **1991**, when the two were made to **coincide**.

YEAR	**TERM**	**CIVIL**	**CRIMINAL**	**VACATION**	**CLOSE PERIOD**
1944	1	15/02 – 15/06	01/02 - 15/06	16/12 – 14/02	
	2	01/08 – 30/09	01/08 – 15/12	16/06 – 31/07	
	3	16/10 – 15/12		01/10 – 15/10	
1957	1 crim/civil	15/02 – 15/06	01/02→		
	2 crim		01/04→		
	3 crim		01/06→		
	2civil/4crim	01/08 – 30/09	01/08→		

…

YEAR	TERM	CIVIL	CRIMINAL	VACATION	CLOSE PERIOD
	3civil/5crim	16/10 – 15/12	01/10→		
	6crim		01/12→		
1991	**1**	**01/02 – 31/03**		**01/04 - 08/04**	
	2	**09/04 – 15/06**		**16/06 – 31/07**	
	3	**01/08 – 30/09**		**01/10 – 08/10**	
	4	**09/10 – 15/12**		**16/12 – 31/01**	
2003	1	27/01 – 11/04		12/04 – 28/04	
	2	29/04 – 27/06		28/06 – 03/08	
	3	04/08 – 26/09		27/09 – 05/10	20/12/03-02/01/04
	4	06/10 – 05/12		06/12 – 24/01	

In the **Natal Provincial Division**, there was much fluctuation.

For instance, in **1944**, there were **six civil** terms (for the months of February, April, June, August, October and half of December) and **four criminal** sessions, commencing on the first Tuesday of March, June, September and December, respectively. The month of July, and the second half of December were **vacation** periods, and the period 21 December to 3 January was regarded as a **closed period**.

The criminal sessions would "***continue until the completion of every trial for which proper notice of trial at those Sessions has been given***", subject to any order of adjournment, postponement or change of venue made by the presiding Judge.

In **1957**, there were only **two**, **closed** criminal sessions, that is, roughly for the months of February and March, and again from 1 May until 15 December. (The civil terms still numbered six.)

In **1959**, there were **two terms** for **civil** and **criminal** business, alike, which ran approximately from February to June, and again from August

to December. Each month within the four month criminal 'session' was regarded as a separate session.

In **1961**, civil and criminal divisions shared a four term calendar; for the purposes of criminal work, however, each **calendar month** was to be regarded as a **separate session**.

At the **Durban and Coast Local Division**, in **1944**, there were **five** civil terms and **four**, **open-ended criminal** sessions, the latter commencing on the first Tuesday of February, May, August and November, respectively.

The **civil terms** started on the third day of March, May, July, September and November, respectively and were to continue '*until the last day of the month or until such earlier day as the business set down for such sittings shall had been completed'*.

In **1956**, there was only **one criminal session**, running from the second business day of **February until 15 December**. The session would '*continue until the completion of every trial for which the proper notice of trial had been given'*.

In contrast, there were **nine civil** sessions, which ran during each month of the year with the exception of January, February and August. The sessions would start on the third day of the month and continue until the last day of the month or earlier, as indicated above. In **1957**, there were **ten** such **civil sessions**, with only **one criminal** session.

In **1959**, the D.&C.L.D. calendar was altered radically, to **two terms**, for **civil** and **criminal** business alike, the first of which ran approximately from February to June, and the second from August to December. For the

purposes of criminal work, each month within the four month 'session' was regarded as a separate session.

From here onwards, this division shared a calendar with its sister Court, the NPD.

In the **Orange Free State**, there were **separate** civil and criminal terms. Typically, there were **four criminal** sessions, although the number of **civil** terms fluctuated, from four (of about one month each) in 1944, to two (for three months each) in 1964, and back to four in 1969.

In **1969**, the civil terms and criminal sessions were **combined**, and referred to as '***civil terms****, for the despatch of both civil and criminal business*'. From that date, therefore, criminal cases no longer 'continued by adjournment.'

The position, therefore, is that, between the mid-1950's and the early 1990's, our various Supreme Courts **abandoned** the system of open-ended criminal 'sessions'; it was decided, instead, to make the civil terms and fixed recesses applicable to criminal trials.

Whereas, probably, the incidence of crime and the absence of court roll backlogs at the relevant time could **accommodate** this revised criminal trial calendar, it has become abundantly clear that the present context can do so no longer.

3. OVERVIEW OF THE RECESS SYSTEM

3.1. THE DETRIMENTAL EFFECTS OF THE RECESS SYSTEM

Recesses militate against the concept of **speedy justice**, which has been a basic tenet of our justice system in both the pre- and post-Constitutional eras.

Historically, as has been shown above, our whole legal system developed in consideration of "*how efficiency, justice and humanity could best be promoted*"[1] and the necessity to hold courts "*as frequently as the wants of the inhabitants required*."[2]

Since the advent of the **Constitution**, sections 35(1)(d) and 35(1)(e) of Act 108 of 1996 have entrenched an accused person's right to be brought before an ordinary court and to be informed of the charge against him or her **within a reasonable time**. This 'reasonable time' should be no later than 48 hours after arrest, or the first court day thereafter. Section 35(3)(d) of the same Act confers the right to have a trial begin and conclude without unreasonable delay.

On the other hand, the **Criminal Procedure Act**, 1977 provides, in section 342A(2), a host of considerations to determine whether or not a **delay** is **unreasonable**, and steps which may be taken to deal with undue delays.

Besides our own legal system, the concept of speedy justice is echoed throughout **international legal systems** and instruments[3].

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[1] Addenda to the Report and Minutes of Evidence of the Committee of the Legislative Council on the Judicial Establishment, Cape Town: Saul Solomon, 1846, p. 5.
[2] Preamble to the Better Administration of Justice Bill, 1855, see page 14 *supra.*
[3] The right to be tried without undue delay or within reasonable time is protected in the International Bill of Human Rights by article 14(2)(c) of the International covenant of Civil and Political Rights, and is also

Apart from the actual **loss** of some **4624 court days**[4] during the recess periods, there are **other consequences** to the recess system.

Recesses undermine the **efficient operation** of the courts and, as such, impact on how efficiently **public funds** are expended.

Additionally, recesses cause a **delay** in real time of some three and a half months per year and contribute to the **awaiting-trial period** of approximately **one and a half years**, from the date of the first district court appearance to the start of the High Court trial[5].

The so-called **Minimum Sentences Act**, **1997**[6] causes a **delay** from conviction to enrolment in the High Court of 227 days, and, from **crime to sentence**, of **677 days**[7]. This unfortunate piece of legislation has been the subject of scrutiny by both the judiciary and the National Director of Public Prosecutions. Representations to **amend** the legislation in order to obviate the need for cases to be referred to the High Court for sentencing, are presently under consideration and will hopefully be successful.

An **audit** of the **New South Wales** court system described the effects of **delays**, as follows:

> *"a] **evidence** dissipates or deteriorates; witnesses' memories fade with time, and witnesses may die or go missing;*
> *b] **gaols** become overcrowded, with detainees on remand awaiting trial for lengthy periods of time;*
> *c] [delays] cause **anxiety** for the victims of crime, the persons accused of crime and close family members of both the victims and the accused;*

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contained in the regional human rights instruments in article 7(1)(d) of the African Charter on Human and Peoples' Rights, articles 5(3) and 6(1) of the European Convention on Human Rights, and article 8(1) of the American Convention on Human Rights.

[4] 68 criminal divisions are closed for, on average, 68 court days, amounting to 4624 court days nationally.

[5] See Appendix 'C'

[6] Criminal Law Amendment Act, 1997 (Act 105 of 1997)

[7] See Appendix 'D'

*d] the **deterrent effect** of the criminal justice system becomes undermined;*
*e] **community respect** for the justice system becomes eroded;*
*f] delay has a **compounding effect**; for example, delay can be used, in some instances by some parties, to postpone a hearing which would be detrimental to the interests of that party; this may reinforce the power of the financially stronger party – the one better able to withstand the financial consequences of delay;*
*g] court **resources** are wasted;*
*h] witnesses, juries and other participants in the system are **inconvenienced**."*[8]

These factors become even more serious in the **South African context** when seen against

- overcrowded prisons,
- backlogs and cycle times,
- community respect and vigilantism,
- new cases exceeding the rate of cases disposed of,
- crime rates which have doubled, with no corresponding increase in the number of prosecutors and courts.

Can we honestly **justify** a loss, through an outdated recess system, of **4624 court days** per year?

1. 'overcrowded prisons'

The **detention cycle time**, or the average length of time unsentenced prisoners remain incarcerated until the finalisation of their trials, **rose** considerably in South Africa between 1996 and early 2002.

In June 1996, the average unsentenced prisoner spent **76 days**[9] in custody – by February 2002, this had increased to **139 custody days**.

[8] Introduction to the report on an audit by the New South Wales Government into court waiting times, 1999.
[9] Tough Choices: Prioritising criminal justice policies, Martin Schönteich, ISS Paper 56, May 2002. These figures include unsentenced prisoners who are awaiting trial in all the courts, that is, district, regional and High Courts.

This means that, on average, accused persons (who are awaiting trial at the lower court) are imprisoned for four and a half months awaiting the finalisation of their trial. Most High Court accused spend approximately **553 days** from first appearance in the district court, to sentence in the High Court[10].

Such **delays** involving **unsentenced prisoners** place a considerable **financial burden** on the department of correctional services. A prisoner costs the department some **R111 per day**. Multiplied over an average of 139 custody days, this comes to R15 429 per average unsentenced prisoner. It costs hundreds of millions of Rand to construct a reasonably sized prison in South Africa, and another R40 515 a year for every prisoner detained there. The country's 55 000 unsentenced prisoners cost the department of correctional services **R2, 23 billion** a year.

By the end of February 2003, South African prisons, with a capacity for 110 924 prisoners, were housing some **188 307 prisoners**, of whom 130 449 were sentenced prisoners and 57 858 were awaiting-trial prisoners. While the number of sentenced prisoners is too high, the number of **awaiting-trial prisoners** is extraordinarily high.

Number of awaiting trial ('AWT') prisoners, per Court, per province, as at 29 September 2003:

COURT	-	(ABBREVIATION)	AWT PRISONERS
Circuit Court	-	(C/C)	**115**
Magistrates Court	-	(M/C)	**29 849**
Regional Court	-	(R/C)	**19 132**
Supreme Court/High Court	-	(S/C)	**747**
TOTAL			**49 843**

PROVINCE	AWT	TOTAL per PROVINCE
M/C **Eastern Cape**	4 600	
R/C Eastern Cape	1 006	
S/C Eastern Cape	107	**5 713**

[10] See Appendix 'A'

PROVINCE	AWT	TOTAL per PROVINCE
C/C **Free State**	5	
M/C Free State	1 933	
R/C Free State	1 038	
S/C Free State	39	**3 015**
C/C **Gauteng**	10	
M/C Gauteng	6 186	
R/C Gauteng	10 250	
S/C Gauteng	368	**16 814**
C/C **Kwazulu-Natal**	45	
M/C Kwazulu-Natal	7 254	
R/C Kwazulu-Natal	2 535	
S/C Kwazulu-Natal	117	**9 951**
C/C **Limpopo**	7	
M/C Limpopo	550	
R/C Limpopo	179	**736**
C/C **Mpumalanga**	20	
M/C Mpumalanga	1 369	
R/C Mpumalanga	973	
S/C Mpumalanga	1	**2 363**
C/C **North West**	18	
M/C North West	1 134	
R/C North West	871	
S/C North West	26	**2 049**
C/C **Northern Cape**	7	
M/C Northern Cape	791	
R/C Northern Cape	346	
S/C Northern Cape	14	**1 158**
C/C **Western Cape**	3	
M/C Western Cape	6 032	
R/C Western Cape	1 934	
S/C Western Cape	75	**8 044**
GRAND TOTAL		**49 843**

Between June 1994 and December 2001, the number of **unsentenced** prisoners in South African prisons **increased** by a massive **183%**. Over the same period, the number of **sentenced** prisoners increased by **50%**. According to the Department of Correctional Services, **overcrowding** has an "**adverse effect** on offenders, staff and the safe custody of prisoners"[11].

Overcrowding exacerbates tension, hostility and aggression between prisoners, and between prisoners and prison personnel. The Annual Report of the Department of Correctional Services, 1 January 2000 to 31

[11] Footnote 39 to the Department's presentation to the Select Committee on Security and Constitutional Affairs, Cape Town, 7 June 2000.

March 2001, reports that during 2000/1, **2 361 assaults** by prisoners on prisoners were recorded by the department (up from 2 271 in 1999/2000), and **619 assaults** by prison personnel on prisoners (up from 559 during the previous period). High overcrowding levels also impede the department's ability to **rehabilitate** prisoners.

One of the unfortunate solutions for overcrowding is the **early release** of prisoners. Between 30 April 1984 and 13 October 2000, there were 19 **amnesties** and **burstings**. The largest of these were in May 1986 (25 045 reduction in prisoners), December 1990 (18 054 reduction) and June 1994 (16 386 reduction). The last was in October 2000 (1 732 reduction). There was one release of awaiting-trial prisoners with unpaid bail up to R 1000 in September 2000 (6901 reduction).

2. 'backlogs and cycle times'

As at June 2003, in the district courts, there were **15 356** cases (12%) on the court roll which were older than 6 months, out of a total of 131 275 such cases.

At the Regional Court, **15 076 cases** (36%) on the roll are older than 6 months, out of a total of **42 081 cases**.

Cases **waiting** to be heard in the High Court **remain** on the lower court rolls for extended periods as they struggle to get through the High Court **bottleneck**.

3. 'community respect for the justice system becomes eroded'

Recesses are not in line with the **working patterns** of most public and private sector working organisations and, accordingly, create the unfortunate perception that the High Courts are **unproductive** and the judiciary **idle**.

One way for the communities to regain confidence in the criminal justice system would be for criminals to be prosecuted and convicted without **undue delay**. This would also encourage more people to report crime and testify against criminals, and reduce acts of vigilantism[12].

4. Court resources are wasted

Court buildings

It is unarguable that recesses do not permit the **optimal use** of court facilities. At a conservative estimate, **68** High Courtrooms, with excellent facilities, are unused for some **three and a half months** per year[13].

The fact that the Department of Justice has had to allocate **R271 million** to the construction of court buildings during the year 2002/2003, and has allocated a further **R229 million** for the year 2003/2004, highlights this waste of resources.

Judiciary and support staff

A serious problem in the high court is not so much to ensure that the judges have time, but that they have it when they need it.

The fixed recess system creates this problem rather than addresses it. The recess system causes an **unequal distribution of work** by granting time indiscriminately to all judges at the same time, whether or not they either want it or need it, **at that time**.

It is a well-known fact that judges involved in **criminal trials** require considerably **less time** (outside the allotted time for the hearing of the trial) to write judgments than judges who find themselves mainly in the '**civil** pool'.

[12] Institute for Security Studies, Paper 56, May 2002.
[13] This figure refers only to the present number of criminal divisions and excludes the civil courtrooms that are unused due to the recess periods.

One controversial aspect of the recess periods has been the employment of **Judges' secretaries** during the recess. These administrative support staff are not entitled to recess periods. At present, however, there is some uncertainty whether secretaries are obliged to complete leave forms for leave taken during recess periods.

Having a continuous criminal court roll, with staggered recess periods, should go some way towards ensuring that all the administrative staff (including interpreters) are able to be more efficiently redeployed in the High Court when not required by their own judge.

5. Efficient court management

If all the courts were open throughout the year, more efficient roll-planning and **continuity** would be achieved. It would be easier to place long trials, for example, and court rolls would be unaffected by **disruptions** caused by winding-down periods and recesses. There would be continuous access to justice.

Lord Beeching stated: "*a **peak** in **court loading** … is bound to follow a **shut-down** of two months' duration, with consequent disturbances to listing for months thereafter and a recurrent danger that each peak, in turn, may cause a permanent extension of average delay time*."[14]

Finally:

All the evils of the recess system, as listed above, can be addressed by a system which allows for the **continuous criminal sessions** of the High Court.

[14] Report of the Royal Commission on Assizes and Quarter Sessions, 1966 – 1969, chaired by Lord Beeching, paragraph 423.

3.2. THE HIGH COURT OF SOUTH AFRICA: TERMS, RECESSES AND OPTIMAL USE OF RESOURCES

3.2.1 RULES OF COURT

History of the Rules of Court:

Initially, in the Charter, **extensive powers** were given to the **judges** to enable them to establish the rules necessary for improving the course of judicial proceedings. The judges were authorized to frame rules, orders and regulations -

> *"Touching and concerning the **time** and **place** of holding the Supreme Court; and touching the **forms** and **manner** of proceedings to be observed in the Supreme and circuit courts respectively; and the **practice** and **pleadings** upon all actions, suits and other matters, both civil and criminal, indictments and information to be therein brought; the appointing of commissioners to take bail and examine witnesses; the examination of witnesses de bene esse and allowing the same as evidence; the proceedings of the sheriff and other ministerial officers of the said courts respectively; the process of the courts and the mode of executing the same; the summoning, impaneling and challenging of jurors; the admission of barristers, advocates, attorneys, solicitors and proctors in the said courts respectively; and touching and concerning all such other matters and things necessary for the **proper conduct** and dispatch of business in the said Supreme and circuit courts respectively."*[15]

The judges were free to revoke, alter, amend or renew all such rules, orders and regulations. These powers were subject to a number of important provisions, *inter alia*, that the rules 'had to be framed so as to **promote economy and expedition in the dispatch of the business of the courts** and with reference to the corresponding rules and forms in use in the Courts at Westminster'[16].

[15] Section 47 of the Charter of Justice
[16] Fine, *op.cit*,. par. 2.3.3, p.36.

Later, several skirmishes between the legislature and the judiciary eventually led[17] to **legislative changes** to the judges' previously enjoyed authority to regulate the business of the Supreme and circuit courts.

Ordinance No. 32 of 1846 provided that all future rules had to be enacted by Ordinance before they could take effect. The Ordinance further provided that the Legislative Council could itself, initiate, alter, amend or revoke any such rule, order or regulation pertaining to the business of the Supreme and circuit courts.

On 4 June 1856, however, Act No. 26 of 1856 was promulgated, which reaffirmed the **judges' authority** to frame rules in terms of section 46 of the Charter of Justice. The judges were henceforth required to place the rules before the Governor for approval or disallowance. Once the rules had been approved by the Governor, who was required to act on the advice of the Executive Council, they had to be promulgated in the Government Gazette before they be of any force or effect. After proclamation, the rules had to be tabled in **Parliament**. If they were not confirmed by an Act, during the session in which they had been laid before both Houses, they were to cease to have any force or effect.

Prior to the introduction of the Uniform Rules in 1965, every division of the Supreme Court of South Africa had its own set of **rules**. These rules were repealed by rule 71, save to the extent indicated in the schedule to the rule. The rules which were not repealed related to 'local' matters such as the **time** for the holding of courts and the **placing on the roll** of actions for hearing.

The Rules were made by the **Chief Justice**, in consultation with the

[17] In 1844, as a result of several skirmishes between the legislature and the judiciary, the Charter was amended in such a way so as to subordinate the judiciary to the legislature and the Cape Legislative Council was empowered to alter the Charter. The Legislative Council immediately decided to exercise greater control over the judges' authority to establish the rules of court.

Judges President, with the approval of the State President, in terms of section 43(2)(a) of the Supreme Court Act, 1959[18].

In terms of the **Rules Board for Courts of Law Act, 1985**[19], which came into operation during 1987, a Rules Board for Courts of Law was established which has the power to make, amend or repeal rules for the High Court (and the lower courts), subject to the approval of the Minister. In terms of **section 6** of the Act,

> "*the [Rules] Board may, with a view to the efficient, expeditious and uniform administration of justice in the Supreme Court and the lower courts, from time to time on a regular basis review existing* ***rules of court*** *and, subject to the approval of the Minister,* ***make, amend or repeal*** *rules for the Supreme Court and the lower courts regulating –*
> *(l) generally* ***any matter*** *which may be necessary or useful to be prescribed for the proper despatch and conduct of the functions of the Supreme Court and the lower courts in civil as well as in criminal proceedings."*

In terms of the Act, Rules must be made so as to promote the "**efficient, expeditious and uniform administration of justice** in the Supreme Court and the lower courts", an echo of the corresponding exhortation to the Judges in the Charter of Justice.

The President may, after consultation by the Minister with the Chief Justice, the president of the Supreme Court of Appeal and the judges president of the respective High Courts, make **regulations**, *inter alia*, as to arrangements regarding administrative recesses.[20]

Although the judges' extensive power to establish the rules of court was, therefore, first drastically diminished and subsequently somewhat restored, it never again became **absolute**.

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[18] Act 59 of 1959
[19] Act No. 107 of 1985
[20] Section 13(1)(a), Judges' Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001).

In terms of s 43(2)(b) of the Act, the **Judge President** of a provincial division may make rules for regulating the proceedings of that division or of any local division within the area of jurisdiction of the provincial division. The Judges President of the various provincial divisions have in terms of their powers under that subsection amended the pre-1965 rules which still apply in their divisions and made new rules where necessary[21].

It is at least implicit from all the Rules of Court, that normal business will not be conducted during the **recess periods**[22]. In almost all the Rules[23], however, it is clear that the Judge President of a given division has the supervening authority to direct which court(s) shall sit during recess for the hearing of which business[24].

While there is some degree of variance between the High Courts[25] in the exact dates of the various recess periods, each court is in recess for roughly **14 weeks** each year, comprising a winter vacation of approximately **5 weeks**, a summer vacation of approximately **6 weeks**, an April vacation of approximately 1 week and an October vacation of

[21] Superior Court Practice, p. C2-1, Erasmus, Juta & Co., Ltd.

[22] Provision is variously made for the hearing of provisional cases, applications, summonses for civil imprisonment, applications for judgement, certain criminal appeals and reviews and other like matters during recess, and/or any further business which the Judge President may direct.

[23] See also Regulation 2(2) of the regulations promulgated in terms of section 13 of the Judges' Remuneration and Terms of Employment Act, 2001 (Act 47 of 2001).

[24] Rule 8(4) of the Northern Cape Rules, for instance, states that the Judge President may authorize any departure from the Rules which he deems expedient.

[25] Court calendar 2003: Recesses 1 and 5 should be regarded as one recess.

SEAT OF COURT	RECESS 1	RECESS 2	RECESS 3	RECESS 4	RECESS 5
Western Cape	01/01–26/01	29/03–06/04	21/06–27/07	27/09–12/10	13/12–31/12
Witwatersrand	01/01-26/01	12/04-28/04	28/06-03/08	27/09-05/10	06/12-31/12
Pretoria	01/01-26/01	12/04-28/04	28/06-03/08	27/09-05/10	06/12-31/12
Bisho	01/01-26/01	05/04-21/04	28/06-27/07	27/09-12/10	13/12-31/12
Bloemfontein	01/01-19/01	29/03-21/04	21/06-20/07	27/09-12/10	16/12-31/12
Mmabathu	01/01-31/01	01/04-15/04	01/07-31/07	01/10-15/10	16/12-31/12
Kimberley	01/01-28/01	29/03-13/04	28/06-27/07	27/09-12/10	13/12-31/12
Durban	01/01-02/02	01/04-14/04	01/07-31/07	01/10-14/10	16/12-31/12
Pietermaritzburg	01/01-02/02	01/04-14/04	01/07-31/07	01/10-14/10	16/12-31/12
Grahamstown	01/01-26/01	05/04-21/04	28/06-27/07	27/09-12/10	13/12-31/12
Port Elizabeth	01/01-26/01	05/04-21/04	28/06-27/07	27/09-12/10	13/12-31/12
Umtata	01/01-19/01	05/04-21/04	28/06-20/07	27/09-12/10	13/12-31/12
Venda	01/01-26/01	12/04-28/04	28/06-03/08	27/09-05/10	06/12-31/12

approximately 2 weeks.

When these roughly fourteen weeks (translated into an average of **68** court days, across the divisions) are multiplied by the total number of criminal divisions (i.e. **68**) which are usually in session during term in all the High Courts, it can be seen that the **recess system** *per se* is responsible for the **loss**, on average, of some **4 624 court days per year**.[26]

DIVISION	NUMBER OF COURT DAYS DURING TERM EXCL PUBLIC HOLIDAYS PER COURT PER YEAR	NUMBER OF COURT DAYS DURING RECESS EXCL PUBLIC HOLIDAYS PER COURT PER YEAR	NUMBER OF PUBLIC HOLIDAYS [COURT DAYS] DURING RECESS PER COURT PER YEAR	NUMBER OF CRIMINAL DIVISIONS	NUMBER OF DAYS DURING TERM MADE AVAILABLE FOR CRIMINAL TRIALS PER COURT PER YEAR
CAPE PROVINCIAL DIVISION	183	67	4	12 courts	Mon – Thurs [147]
WITWATERS-RAND LOCAL DIVISION	180	70	6	12 courts	Mon – Fri [180]
TRANSVAAL PROVINCIAL DIVISION	180	70	6	8 courts	Mon – Fri [180]
CISKEI HIGH COURT	184	66	4	3 courts	Mon – Fri [184]
ORANGE FREE STATE PROVINCIAL DIVISION	185	65	3	3 courts	Mon – Fri [185]
BOPHUTHATS-WANA HIGH COURT	174	76	3	4 courts	Mon – Fri [174]
NORTHERN CAPE DIVISION	181	69	4	3 courts	Mon – Fri [181]
DURBAN	176	74	3	4 courts	Mon – Fri [176]
PIETER-MARITZBURG	176	74	3	6 courts	Mon – Fri [176]
GRAHAMS-TOWN	184	66	4	3 courts	Mon – Fri [184]
PORT- ELIZABETH	184	66	4	2 courts	Mon – Fri [184]
UMTATA, TRANSKEI	194	56	4	6 courts	Mon – Fri [194]
VENDA HIGH COURT	180	70	6	2 courts	Mon, Wed & Fri [107]
TOTAL	**2 361**	**889**	**54**	**68**	**2 252**

In addition to the above, **36 court days** are lost in the Cape Provincial Division annually by not sitting on Fridays and **73 days** are lost annually

[26] This does not take into account the skeleton vacation courts which perform a limited amount of work and are not material to the overall picture.

in Venda High Court by not sitting on Tuesdays and Thursdays.

Whereas, in the lower courts, a special effort was made to contain the burgeoning backlogs with **Saturday courts** and **additional courts**[27], the High courts have unfortunately not played a meaningful role in this exercise.

The recesses have generally been left largely intact and some **68 courtrooms** stand empty and unused for approximately **3 months** of each year.

Although the Judges President have the discretion to allow **criminal trials** and **appeals** to be conducted within the recesses, this discretion is exercised very sparingly and then, only in certain *ad hoc* situations, which do not materially ameliorate the situation.

Some Judges President do, on occasion, allow **limited criminal business** during the long recesses. Thus, at the Witwatersrand Local Division, 2 or 3 criminal courts, on average, sit per day during the recess periods. During the 2003 June/July recess, at the Cape Provincial Division, 8 court sittings were held for the hearing of 2 minimum sentences per week while, at the Natal Provincial Division, two courts sat for the hearing of criminal trials.

There is a greater degree of relaxation in the no-business rule when it comes to the hearing of criminal **appeals**. Thus, in the **NPD**, appeals are

[27] iafrica.com – 29 October 2002, quoting the National Director of Public Prosecutions: The total number of new cases heard in South Africa's courts almost doubled during 2001. New cases in district courts increased from 49 040 in March 2001 to 88 465 in November while, in the regional courts, the number rose from 4 280 to 7 715. The High Courts heard 288 cases in November 2001, compared with 183 in March. Despite the rise in the number of new cases, there was no corresponding rise in backlogs due to the Saturday and additional courts established in the lower courts, which disposed of 14 884 cases between February 2001 and December 2001.
Cape Times, 12 August 2002: Between January and September 2002, there had been 3 027 Saturday and additional court sittings, which translated into 10 153 extra court days. Between January 2002 and March 2003, 27 570 cases had been finalised by Saturday and additional courts.

heard on **every Tuesday during recess**[28] and, in the **OPD**, the Rules[29] state that criminal appeals and reviews may be set down for hearing during vacation periods upon the instructions of the **Judge President**; in practice, however, this rarely happens.

From time to time, some Judges President direct that *ad hoc* **appeal courts** be held during the recess. Thus, during the June/July 2003 recess, at the Witwatersrand Local Division, some **70 appeals** were enrolled for hearing in 15 appeal courts.

As a general rule, therefore, it can be stated that criminal courts or appeals are not heard during the recesses in any material sense.

As was seen previously, this (practically) complete shut-down of criminal work between the terms is a relatively **new feature** of our High Court business, with the **TPD**, for instance, only introducing it as late as the **1990**'s.[30]

There has, however, always been a traditionally **'closed period'** of approximately **two weeks** over the Christmas period, in all the divisions, during which no business (neither criminal nor civil) is conducted[31]. This falls within the end of the year recess period and remains a feature of the modern High Court calendar.

3.2.2 FURTHER DAYS 'LOST' AND DELAYS:

Besides the formal 'shut-down' during the recess periods, further days

[28] Rule 2(5) of the Rules regulating the conduct of the proceedings of the Natal Provincial Division of the Supreme Court of South Africa.
[29] Rule 2(2) of the Orange Free State rules.
[30] As has been stated previously, however, such 'shut-downs' may, in fact, have existed in practice, merely due to there being a limited volume of criminal work.
[31] Again, this restriction is subject to the proviso that the Judge President or judge on duty, as the case may be, may direct that urgent business may be heard during that period.

are lost, in varying degrees, due to other factors **related** to the recess periods, as shall be seen hereunder.

In dealing with these factors, not only do the **Rules vary** from division to division but, often, so also does the **practice** at a particular division vary from the relevant Rules pertaining to that division.

3.2.2.1 Winding-down periods:

Of all the provincial and local Rules, only the **CPD Rules** make provision for a formal so-called '**winding-down**' period. Thus, Rule 3(5) stipulates that no 'defended actions, special cases and other cases not specially provided for' may be set down for hearing on any day during the **last seven days of term**, unless the Judge President directs otherwise.

In practice, this is confined to a ban on the placing of **new** cases and, often, partly-heard matters are enrolled for hearing during the last week of term[32].

At all the **other divisions**, while there is no formal winding-down period stipulated in the Rules, the **practice** is to set only part-heard cases down during the last week of term.

This winding-down period causes further **disruption** in the rolls, as invariably, days are not utilized in anticipation of the long break in proceedings.

3.2.2.2 Full bench appeals

At the **Cape** Provincial Division, in addition to the days lost through the recesses and the winding-down periods, criminal trials are effectively delayed for a further **two weeks** per year when only full bench appeals

[32] It has also happened that the Judge President has, by special concession, allowed the placing of new minimum sentence matters during the last week of term.

are heard[33]. This amounts to a total 'loss' (or delay) of a further **120** court days per year.

At the **Natal** Provincial Division, full bench appeals are likewise heard twice a year, that is, during the second week in February and the second week of August, while, in the other divisions which hear appeals full bench appeals[34], these are fitted in during the term in various ways which do not impact on the ordinary business of the criminal trial courts.

At the **Orange Free State** Provincial Division, ordinary appeals are usually heard on Mondays. After a recess, however, during the first week of term, no appeals are heard, although extra appeals are allowed to be heard on the Monday, Tuesday and Wednesday of the last week of term in order to **compensate** for this loss in court time.

3.2.2.3 Delays caused by not having a calendar

Yet another consequence of the recess system, is the fact that **calendars** are published each year to announce the dates of the terms for the coming year.

In practice, **uncertainty** about the court dates for the coming year leads to difficulties in the **placement** of matters and, often, cases have to remain on the lower court rolls for extended periods of time in anticipation of the High Court calendars for the next year. This bottleneck at the lower courts impacts negatively on their productivity and, on occasion, has also led to matters being **struck from the roll** by the lower Court magistrate[35].

This unfortunate consequence is avoided in some divisions, such as the

[33] The first week of term after each long recess.
[34] Neither Port Elizabeth nor the Durban and Coast Local Divisions hear any appeals.
[35] In the Cape Provincial Division.

Transvaal (and the Witwatersrand) and Venda, where calendars are published for up to **four years in advance**.

The Rules of the Eastern[36] and Northern Cape provincial divisions, respectively, **stipulate a date** by which the court calendar must be published (by notice in the Gazette) each year.

At the Natal Provincial Division, there has traditionally been calendar certainty in that the **same fixed dates** have applied each year. By notice dated 27 August 2003, however, Rule 2 of the rules regulating the conduct of proceedings in that division in regard to Sittings of the Court and Vacations has been **changed**.

In terms of the amended rule, the dates of the ensuing year's terms shall be published by notice in the Government Gazette not later than **30 September** of each year. The rest of the year shall be recess, save during the period 24 December to 2 January, and on Good Friday, during which period no courts shall sit.

[36] According to rule 2(1) of the Eastern Cape Division rules, the calendar must be published by no later than 31 October of each year, while the corresponding rule in the Northern Cape makes the deadline for that calendar 30 September.

4. FOREIGN JURISDICTIONS: RECESSES OF THE SUPERIOR COURTS

In comparing our recess system to other recess systems internationally, it must always be borne in mind that circumstances **differ** from country to country, and from court to court.[1]

A **comparison** of the South African High Court terms and recesses with those of foreign courts of similar jurisdiction, shows the following:

1. Our **recesses**, at **14 weeks**, are among the **lengthiest** in the world.
2. Where the need has arisen, **other countries** have **altered** their **recess system**. This they have done in three chief ways:
   - 2.1 by **staggering recesses** (in varying degrees), and/or
   - 2.2 by creating **hybrid courts** (consisting of both high court judges and lower court judges), and/or
   - 2.3 by establishing **separate criminal benches** in order to ensure continuous sessions.
3. In some jurisdictions, pressure of work has effectively caused recesses to be **abolished** in practice.

Length of recesses

4.1 In the **United Kingdom**, the Crown Courts (which deal exclusively with criminal matters) consist of Circuit Court judges who have approximately **7 weeks** of (staggered) leave per year

[1] In **Denmark**, **Hong Kong**, **Australia**, **Ireland**, **Northern Ireland**, **India**, **New Zealand**, **U K and U S A** there is a jury system.
In **Ireland** and **Northern Ireland** the jury system is excluded in terrorist type cases.
In the **Netherlands**, **Israel**, **Germany**, **Sweden** and **Singapore** there is no jury system.
Hong Kong, **Australia**, **Israel**, **Ireland**, **Northern Ireland**, **India**, **New Zealand**, **Singapore**, **U K** and **U S A** have an adversarial system.
Germany, **Sweden**, **Denmark**, **Netherlands and Uruguay** are countries with a civil law system. **Denmark** has, however, introduced aspects of trial found in common law countries.

and High Court judges who have **14 weeks** of recess per year.[2] [see Appendix E].

4.2 In **Ireland**, the Central Criminal Court, similarly, has a recess of **14 weeks** per year, spread over **4 vacations**. [see Appendix F].

4.3 In **Northern Ireland** the High Court, the Crown Court and the County Court have a recess of **14 weeks** per year spread over **4 vacations**.

4.4 **Australia:** [see Appendix G]

4.4.1 The Supreme Court of **New South Wales** has a vacation of **10 weeks** annually, consisting of a **fixed** summer vacation of **6 weeks** (starting the week before Christmas) and a variable vacation of not more than **4 weeks**, regulated by the Chief Justice, who can stagger these vacations if he so wishes. A further **week** of leave is allocated for judgment writing.

4.4.2 The Supreme Court in **Queensland** has a recess of **8 weeks** a year – **6 weeks**, from before Christmas to the end of January, and **2 weeks** at midyear, with **4 weeks** scattered across the year for judgment writing.

4.4.3 The Supreme Court of **Victoria** has a recess of **12 weeks** a year – **6 weeks** in summer [starting a week before Christmas], **2 weeks** in winter and **4 weeks** at Easter [following Easter Monday].

4.4.4 The Supreme Court of **Western Australia** has a recess of **6**

[2] 3 weeks at Christmas, 2 weeks at Easter, 1 week at Whitsun and the two summer months of July and August.

weeks per year – **4 weeks** in summer and **2 weeks** in winter.

4.5 The High Court of **New Zealand** has a recess of **7 weeks** a year: a **long vacation** from the 20th December to the end of January, and an **Easter vacation** from the day before Good Friday to the close of the Saturday following Easter. [see Appendix H]

4.6 The Court of First Instance in **Hong Kong** has a recess of **7 weeks** a year. This recess does **not** apply to **criminal trials**, which sit continuously. [see Appendix I]

4.7 In Supreme Court of **Singapore**, the recesses of **9 weeks** a year comprise a **midyear** court vacation which for the year 2003 ran from 26 May to 20 June and the **end of the year** vacation, which will run from 1 December 2003 to 2 January 2004. [see Appendix J]

4.8 **India:** [see Appendix K]

4.8.1 The **Supreme Court** of India has a recess of **9 weeks** a year:
1 - 3 January 2003
17 - 23 March 2003
11 May - 6 July 2003
1 - 5 October 2003
20 - 26 October 2003
22 - 31 December 2003

4.8.2 The **High Courts** of India, however, are more comparable to our High Courts:

4.8.3 The High Court of **Delhi**:
The recesses consist of **6 weeks**, namely a summer vacation

from 2 June to 5 July 2003 inclusive, and a winter vacation from 25 December 2003 to 1 January 2004 inclusive. Although there are some 23 public holidays, this is offset to a degree by **6 working Saturdays** per year.

4.8.4 High Court of **Chhattisgarh**:

The recesses consist of **6 ½ weeks** namely, a summer vacation from 12 May to 13 June 2003 inclusive, and a winter vacation from 22 December 2003 to 1 January 2004 inclusive. The 28 public holidays are offset to a degree by **12 working Saturdays** per year.

4.8.5 High Court of **Himachal Pradesh**:

The recesses consist of **11½ weeks**, with two summer vacations from 16 June to 21 June 2003 inclusive and 2 to 31 July 2003 inclusive, and a winter vacation from 13 January to 22 February 2003 inclusive. The 22 public holidays are offset by **28 working Saturdays** per year.

4.8.6 High Court of **Bombay**:

The recesses consist of **7½ weeks**, with a **summer** vacation from 5 May to 1 June 2003 (both days inclusive), an **October** vacation from 20 October to 2 November 2003 (both days inclusive) and a **winter** vacation from 22 December 2003 to 4 January 2004 (both days inclusive). The 25 public holidays are offset to a degree by **5 working Saturdays** per year.

4.9 The District Court in **Israel** enjoys **6 weeks'** recess annually, from 15 July – 1 September. The court sits from 08:30 – 13:00, Sundays to Thursdays and on Fridays there is a duty roster for emergency rosters only. [see Appendix L]

4.10 The District Courts in the **Netherlands** ('rechtbanken') have an annual leave of approximately **4 weeks**, which is normally taken during the summer holiday period, from 15 June to the end of August. The winter holidays apply at the end of December and the beginning of January. During these periods there will be **half** the amount of court sessions as compared to other months. [see Appendix M]

4.11 In **Denmark**, all the courts sit **throughout the year** except for a short recess during the **summer** holiday, usually **3 weeks**. Only urgent cases are being dealt with during the summer recess. The judges are granted **5 weeks**' vacation a year provided that such vacation does not interfere with the daily work of the court. [see also Appendix M]

4.12 In **Germany**, all criminal cases are dealt with on a **continuous** basis and leave is staggered. Court holidays were **abolished** with effect from 1 January 1997.

4.13 In **Sweden**, the court structure is based on a three-tier structure comprising the District Courts, Courts of Appeal and the Supreme Court. Swedish Courts do not sit in terms nor do they have any court vacations. However, the months of July and August are traditionally **"light schedule" months** for the courts and they tend to deal with urgent matters only. Most court personnel take their vacation leave during this period.

Swedish courts do not sit every working day of the year but rather sit as pressure of business in the courts demand.

4.14 In **Uruguay**, the courts of first instance (sometimes referred to as

lawyer courts – "juzgados lerados") have a recess of **8 weeks** a year namely 25 December to 31 January and a midyear recess from 1 – 20 July. [see Appendix N]

4.15 In the **United States of America**, there exists a **Federal Court** System and a separate, **State Court** System in each of the States.

There are as many State legal systems as there are States[3]. All State criminal trial Courts with a jurisdiction similar to our High Courts, do **not** have **recesses** and have a policy of not closing their doors, except on public holidays. The courts continue throughout the year, while the judges take their annual vacation on a staggered basis. Most State judges work between 195 and 230 days each year. [4] The **average** is between **215 to 220 working days** a year.[5]

A chart relating to the working days of probate judges demonstrates this point.[6]

Accordingly the **average leave** of a State judge varies **between 3**

[3] The **structure of State Courts**, like that of the Federal Courts, is in the form of a pyramid. Most States have a three-tiered judicial system composed of a **trial court** level (variously called Superior Courts, District Courts or Circuit Courts), an **Appellate Court** (often called the **Court of Appeals**) and a **court of last resort** (usually called the **Supreme Court**). Some States have only one level of appeal.

[4] Don Kelman, National Centre for State Courts: There are 365 days each year, from which must be subtracted: weekends [104], legal holidays [10/12, according to the State], annual leave and sick days [a minimum of 15 and as many as 30 days and sometimes more].

[5] Judge Roger Warren, president and CEO of the National Centre for State Courts, Washington.

[6]

STATE	YEAR [DAYS]	STATE	YEAR [DAYS]	STATE	YEAR [DAYS]
KANSAS	224	MISSOURI	224	DELAWARE	222
NEW YORK	221	COLORADO	220	GEORGIA	220
OREGON	220	RHODE ISLAND	220	ARKANSAS	218
HAWAII	218	CALIFORNIA	216	SOUTH DAKOTA	216
MICHIGAN	215	NEW MEXICO	214	WASHINGTON	214
CONNECTICUT	213	WISCONSIN	213	NEBRASKA	211
UTAH	211	LOUISIANA	209	WEST VIRGINIA	209
NORTH DAKOTA	205	MINNESOTA	202	ALABAMA	200
24 STATE AVERAGE IS 215					

and 6 weeks, as shown below.

4.15.1 The **Connecticut Superior Court** hears cases all year round. However, the **Supreme and Appellate Courts** have a **recess** period in July and August. Judges of the Superior Court (which is the equivalent of our High Court) are entitled to vacation and personal leave at any stage during the vacation year, which runs from 1 September to 31 August. Each judge is entitled to **20 vacation days** and **5 personal leave** days.

4.15.2 In **Delaware,** all courts sit **all year round**. Traditionally, the Supreme Court (the State Appellate Court) used to close during July and August; however, now, although the Supreme Court has **a light schedule during August**, it nevertheless remains open for business. Each justice is entitled to **6 weeks' annual leave** to be taken at his/her own discretion during the year.

4.15.3 The trial Courts of **New Jersey** are open throughout the year, except for the week between Christmas and New Year's day. [see Appendix O]

4.15.4 In **Alaska**, the courts sit on a **continuous basis** and each Supreme Court justice, Court of Appeal judge and Superior Court judge is entitled to an annual vacation of not more than **30 working days**. The Chief Justice of the Supreme Court may assign one or more justices, judges or magistrates to attend conferences, seminars or schools to further legal educations or professional qualifications. **Administrative leave** authorised for such purpose shall not be counted as vacation leave.

4.15.5 **Federal trial Courts** are known as **U S District Courts** and are

not required to hold formal terms of court. Recognizing that court terms have become an **anachronism**, in 1968, congress abolished statutory requirements for the holding of formal terms in the District courts[7].

4.15.6 While an **entire** court of Appeals or District Court is rarely, if ever, in recess for any significant period of time, individual judges may travel on judicial business, take vacations or go on sick leave. In 1967, the Judicial Conference (the policy-making body of the Federal Judiciary) adopted a policy that the vacations of individual judges should **not exceed 1 month per year** in Circuit and District Courts.

Recently the idea of **sabbatical leave** programs for judges has been proposed and is being discussed.

CONCLUSION:

The recess system in the Supreme Court of Appeal and the Constitutional Court, in South Africa, is **consistent** with that of their counterparts in other jurisdictions. As these courts are Appellate Courts, its judges give many **written**, as opposed to *ex tempore*, judgements. **Preparation** of such written judgements takes time; also there are large amounts of material to be **read** before an appeal is heard.

Although it could be argued that the **jury system** leaves less work for the judge, who does not have to pronounce judgement, it should nevertheless be borne in mind that, in the High Courts, (criminal) judges are **assisted** by assessors and researchers and are given time to prepare judgements which are, generally, oral.

[7] See 28 U.S.C. p. 138

5. ASSESSMENT OF THE SYSTEM OF FIXED RECESSES

To date, there has **never** been a **proper assessment** of the High Court recess system[1] in South Africa, and whether it properly meets the competing needs of our criminal case backlogs and our judges' necessary judgment-writing time.

Elsewhere, however, the issue of **fixed long recesses** has received such attention.

As a result, three key solutions have been adopted, in other prominent Commonwealth jurisdictions, namely:

- having a **hybrid** bench, with two tiers of judge occupying the same Bench,
- the concept of **staggering the judicial vacations**, and
- having a **separate criminal** Bench.

5.1 Hybrid Bench

The Royal Commission on Assizes and Quarter Sessions, 1966 – 1969, chaired by Lord Beeching, was the Parliamentary body which first mooted the idea of the **restructuring** of the **court system** to improve **productivity**.

The Commission devised an innovative scheme whereby recesses (and consequent delays) could be effectively reduced **without interfering** in any way with **existing rights and privileges** of the High Court judges.

5.1.1 Circuit and High Court judges in one Crown court

As a result of the Beeching report, the previous criminal system of Assizes and Quarter Sessions were **abolished**, and the new **Crown**

[1] In 1982, it was briefly touched upon by the Hoexter Commission and, in 1989, the recess system became a negotiation point when the judiciary received a vastly improved salary.

Courts created by the Courts Act of 1971, which provided that:

> "*The places at which the Crown Court sits and the days and times at which the Crown Court sits at any place shall be determined in accordance with directions given by or on behalf of the Lord Chancellor."*[2]

The Crown Courts[3] hear all the serious **criminal** trials in the United Kingdom and sit throughout the year. They are manned by both **Circuit judges** and, from time to time, **High Court Judges**.

The **Circuit Court** Judges, who do the majority of the work, are required to sit for a minimum of **210 days** of the year, and their leave period is **staggered**[4].

Where circumstances demand it,[5] High Court Judges also sit in Crown Courts. These (High Court) Judges have a commitment of only **189 days** per year, and are entitled to certain formal vacations[6].

In other words, the vacation period attaches to the Judge, not the Court.

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[2] This provision is now repealed; however, s.78(3) of the Supreme Court Act, 1981 preserves it, in exactly the same terms. Neither Act makes reference to vacation times.

[3] The creation of the Crown Court was first mooted by the Royal Commission on Assizes and Quarter Sessions, 1966 – 1969, chaired by Lord Beeching as a result of the difficulties created, *inter alia,* by the system of Assizes and the limited time the judges were available to hear cases.

[4] See page 72 *infra*

[5] For purposes of trial in the Crown Court, offences are divided into four classes of seriousness, according to directions given by the Lord Chief Justice, with the concurrence of the Lord Chancellor: ***Class 1*** offences are the most serious offences and are **generally** to be tried by a High Court judge, unless a particular case is released on the authority of a Presiding judge to a circuit judge. These offences include treason and murder. ***Class 2*** offences are **generally** also to be tried by a High Court judge unless a particular a case is released on the authority of a Presiding judge to a circuit judge or other judge. These offences include manslaughter and rape. ***Class 3*** offences **may** be listed for trial by a High Court judge, but may be tried by a circuit judge or recorder if the listing officer, acting under the directions of a judge, so decides. Class 3 offences include all offences triable only on indictment other than those specifically assigned to classes 1, 2 and 4, for example, aggravated burglary, kidnapping and causing death by dangerous driving. ***Class 4*** offences are normally tried by a circuit judge, recorder or assistant recorder, although they may be tried by a High Court judge. They include grievous bodily harm, robbery and conspiracy, and all 'either way' offences – those which may be tried whether on indictment at the Crown Court or summarily, i.e. at magistrates' courts. The offences include treason and murder.

[6] Prior to the Courts Act, 1971, the (now abolished) Assizes Courts were presided over by High Court Judges only and, consequently, the traditional High Court vacation times applied to the Assizes Courts. These High Court vacations are: 3 weeks at Christmas, 2 weeks at Easter, 1 week at Whitsun and the two summer months of July and August.

By creating a new **'hybrid' criminal court**, comprised of both High Court Judges, with their traditional High Court vacation time, and Circuit Court Judges with no such traditional vacation time (and staggered vacations), Parliament attempted to ensure the **continuous session** of the Crown Court.

The High Court vacation times still technically apply to High Court Judges when sitting in the Crown Court, although it is widely noted that even this appears to be coming to an end, with even the High Court Judges now **sitting through the summer** where required in serious criminal cases.

5.1.2 'Ticketing'

In addition, the so-called 'ticketing' system was introduced.

'Ticketing' is an **authorization** to hear more serious cases, and is given by the Presiding judge to **Circuit judges** whom he feels have the aptitude and experience necessary to deal with these cases, which were hitherto the prerogative of High Court judges only[7].

5.2 'Staggering' the judicial vacations

5.2.1 New South Wales, AUSTRALIA

When, in the mid to late 1990's, **delays** in the criminal justice system became of particular concern to the NSW Government, one of the proposed possible solutions was the **elimination** of the **long summer vacation**.

[7] Lord Justice Auld, in his Review of the Criminal Courts of England and Wales, September 2001, remarked that "at present, authorizations are given primarily, not as a badge of recognition or advancement, but to relieve High Court judges from having to try certain cases of a particular class or category, where there are too many for them to try." (Chapter 6, para 23) He recommended that "most of the rigidities of the present 'ticketing' system should be removed and replaced by the conferment on the Resident Judges wide responsibility, subject to general oversight of the Presiding Judges, for allocation of judicial work at their court centres, but coupled with, (firstly,) regular and systematic appraisal enabling Resident Judges and Presiding Judges to determine the experience and interests of the judges; and (secondly), the undertaking by judges of such training by the JSB as may be required as a pre-condition for the trial of particular categories of work." (Chapter 6, para 25)

The problem was summed up by the Director of the New South Wales Bureau of Crime Statistics and Research, who stated (in 1998) that the delays in criminal matters had far-reaching **social effects** which had to be addressed quickly:

> "*Firstly, many innocent people who are not guilty are being kept in prison for more than a year and, plainly, that is neither fair nor desirable*.
>
> *Secondly, the length of time before the matter comes to trial when somebody is guilty means they have a greater chance of getting off because it is harder for people to remember what they saw and evidence becomes less reliable."*

Mindful of the fact that 'comparisons are odious', and that different Australian States have widely differing complexity of cases, workload and resources, it was nonetheless regarded as significant that New South Wales had been found to have the **longest finalization time, nationally**[8], for processing matters before both the **Supreme** Court and the **District** court in the **criminal** jurisdiction[9], for the period 1997/1998[10].

As a result, a number of **steps** were taken to deal with the **backlogs** that

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[8] Comparative tables showing the rate of finalisation of criminal matters in the different States are to be found in Appendix 'G'.

[9] Statistics released by the Australian Bureau of Statistics [ABS] show that, in 1996, the mean time for matters going to trial before the New South Wales [NSW] district Court stood at 62,7 weeks for a guilty verdict and 55,8 weeks for an acquittal. Guilty verdicts in Victoria took 55,2 weeks, in Western Australia [WA] 42,4 weeks, in Queensland 38,3 weeks and in Tasmania 18,5 weeks. The 29,7 weeks median duration it took until NSW defences and prosecutions prepared their cases, and courts listed, and heard, the cases, was also the longest in the country, the ABS figures showed. Victoria came next with 23,2 weeks; Tasmania and WA had the shortest median duration of just over 12 weeks. The ABS figures show NSW took longer to put cases through the District Court in 1996, even though the number of defendants dropped by 14 percent to 3,835 from 4,458 the previous year.
NSW also failed to register much of an impact in reducing the waiting time for defended cases. At the start of 1996, NSW defendants were waiting 24,4 weeks for a verdict after their case had been initiated, but by the end of that year the pending time had blown out to 28,9 weeks.
Sydney Morning Herald, 28 August '98
50% of the awaiting trial prisoners in the NSW district court have been waiting for 6 months in custody and close to 30% spend between 6 and 12 months in custody.
The NSW Bureau of Crime Statistics and Research, *Higher Quarts Quarterly Report Series*, December Quarter, 1998

[10] 1999 Report by the Council of Australian Governments, covering the 1997/1998 financial year.

had accumulated in the **higher courts**. **Two** of these, above all others, were considered to be **crucial** to the success of the exercise –

- *firstly*, there was an extensive program of appointing **acting judges**[11], run in conjunction with -
- *secondly*, the **abandoning** of **fixed judicial terms**, and **staggering the judicial vacations**, thereby allowing the court to sit for **more weeks** of the year[12].

The **rostered sittings** of both the District and Supreme Courts were increased[13] and, in addition, certain **legislative changes** (in **jurisdiction**) were made, by which many Supreme Court Common Law Division cases became appropriate for hearing in the **District Court** (which was given increased jurisdiction), where the **waiting times** were generally **shorter**[14].

Today, the **Courts of New South Wales**, and their Judges, operate according to the following schedule:

The **local courts** deal with the more petty criminal and civil matters and sit continuously from around 15 January to 15 December each year; the **District Court**[15] has a variable timetable for both **civil and criminal**

[11] In the Supreme Court, several acting judges were appointed for varying periods to assist in the hearing of the backlog of cases. In the District court, the Government provided special funding for the implementation of an Acting Judge Scheme.
[12] In 1996/97, the District court's judicial sitting capacity was increased by 310 weeks and, in 1997/1998, by about 490 weeks. This was equivalent to the workload of around 12 extra judges.
[13]The Supreme Court, in 1998/1999, increased its rostered sittings in the Criminal jurisdiction by about 64%, to 315 sitting weeks, while the District Court increased its rostered sittings in the criminal jurisdiction by 12%, most markedly in country areas where an additional 61 weeks were scheduled (being an increase of 22% over 1997).
[14] The entire Supreme Court Common Law Division caseload was screened for suitability for transfer to the District Court and a total of 3 199 cases were transferred to the District Court. This reduced estimated waiting times, from completing case management to hearing, by 6 – 13 months for remaining Common Law Division cases.
[15] The District Court hears appeals from the local court and deals with all indictable criminal offences in practice except murder, treason and piracy in its criminal jurisdiction. It also enjoys civil jurisdiction. Country and region courts have different sittings, according to the local needs.

courts, which all sit from 30 June to 25 June each year. Vacations are thus **staggered**.

The judges of the **Supreme Court**[16] have an entitlement to **10 weeks** of leave per year as set out in Part 1A, Rule 2(2) of the Supreme Court Rules, which stipulates as follows:

> *"**2** **Vacations***
> *(1) There shall be a **fixed** vacation and a **variable** vacation in each year.*
> *(2) The **fixed** vacation shall be a period of **six weeks** from the beginning of the Monday before the 24th of December.*
> *(3) The **variable** vacation shall be a period not exceeding **four weeks** regulated by the Chief Justice.*
> (4) *A hearing or trial shall not be held in the fixed vacation, unless the Court otherwise orders."*[17]

If a judge is rostered to sit during the fixed vacation as either a Vacation Judge or a Bail Judge, or for some other reason, the time so 'lost' from the fixed vacation is given as **compensatory leave** later in the year.

The balance of **4 weeks' variable vacation** is taken **outside** the fixed vacation period.

Judicial officers also have an entitlement to **extended leave**[18]. If part or all of the fixed vacation falls during a period of extended leave, this time will not be 'reimbursed' at a later time but will be counted as part of that period of extended leave. Public holidays that fall within a period of extended leave are similarly not 'reimbursed'.

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[16] The Supreme Court has appellate jurisdiction in criminal and civil matters and is a court of first instance in regard to criminal trials of the most serious nature. It enjoys unlimited jurisdiction in civil disputes.

[17] A fuller explanation of how the vacation works is set out in Appendix 'G'.

[18] Six months of extended leave is available to judges after 5 years of service. Thereafter, extended leave accrues at a rate of 1 month and 6 days for every completed year of service. For the purpose of calculating leave, periods of leave already taken are regarded as periods of service.

One of the advantages of the New South Wales Supreme Court system is its **flexibility**, which makes it beneficial for Judges, practitioners and the public alike.[19]

5.2.2 The United Kingdom

The **Beeching Commission** also considered the annual **two month summer vacations** enjoyed by High Court judges and found that the vacations [caused] -

> "*i an inevitable increase in the **delay time** of some cases by two months – two months of real time to those who are not lawyers; and*
> *ii the **peak** in **court loading** which is bound to follow a shut down of two months' duration, with consequent disturbances to listing for months thereafter, and a recurrent danger that each peak in turn may cause a permanent extension of average delay time*."[20]

A joint Committee of the Bar Council and the Council of Law Society presented an impassioned argument by for **retaining** the **long vacation**. After hearing them, Lord Beeching made the wry comment that "*proposals for any reduction in the length of vacations are understandably likely to arouse strong feelings, and arguments for leaving the holiday period undisturbed, therefore, need to be examined dispassionately*."[21]

The argument propounded by the Bar Council and Law Society, was that the general public might find their **holidays interfered** with, and that most of the other courts in the country did not close for such a lengthy period. In response, the Commission stated that the second argument

[19] During September 1999, the Chief Justice of the NSW Supreme Court announced that 3 weeks of the variable vacation for the year 2000 were to be fixed for the period commencing Monday 11 September 2000 and concluding on Friday 29 September 2000. This vacation was fixed pursuant to Part 1A Rule 2(3) of the Supreme Court Rules 1970 in order to coincide with the Olympic Games. The arrangement also took into account the availability of police for court work during the period, the impact of transport congestion on prisoner transport, court personnel, witnesses, jurors, the legal profession and court reporters and accommodation difficulties for witnesses and litigants. During the vacation, duty judges and registrars were available to deal with urgent applications and registry services were maintained. Arrangements were made to ensure that there was no reduction in the courts' sitting time.

[20] *Loc cit*, para 422 – 425, p. 133*ff*.

[21] See footnote 131.

rather tends to defeat the first – that is, presumably, if all of the other courts in the country are closed for a shorter period of time, they must interfere with the holidays of a larger number of persons.

The Commission then motivated the idea of the **staggering of judicial vacations**, making the following observations:

> *"We recognize …. that national **habits are changing**. Holidays abroad are becoming relatively cheap and common, so that climatic restriction of holiday months is diminishing.*
>
> ***Staggering of holidays is being fostered**, and in many places the 'Wakes week' approach to industrial holidays has disappeared. It will, therefore, become progressively more difficult to sustain the argument that closure for 'the holiday period' will eliminate most of the problems arising from holiday absence. Therefore, although we think it justifiable for the courts to close for **a month**, we recommend that the closure of the High Court for a summer vacation should be **made progressively shorter and less complete** than it is at present.*
>
> *By **staggering** this, we are not proposing that High Court judges should have their total vacation period cut, and certainly not without recompense, but, moved by the same influences as others, many judges may **welcome** a **wider choice** in the timing of holidays, and staggering of their leave should be quite possible.*
>
> *It is also relevant that, with the reduced reliance on part-time judges which we are proposing, it will no longer be necessary for members of the Bar to sit judicially in the Long Vacation to avoid interference with their practices.*
>
> *We firmly believe that, if the Long Vacation is reduced, most of the difficulties foreseen by the legal profession will prove to be unreal, and certainly no more difficult than those which other professional men take in their stride."*[22]

Consequently, Lord Beeching recommended that:

[22] *Loc. cit.* para 424, p.134.

- consideration be given to **reducing** the formal legal vacation periods for High Court Judges sitting in the Crown Court; in particular, to confining that summer vacation to the **month** of August, and,
- that this should be achieved by **greater staggering** of the existing sitting commitments of the High Court Bench, not by increasing them.

Beeching that was of the view that, if implemented, his recommendations regarding the staggering of judicial vacations would be **beneficial** to **judges** and not make any real difference to the lives of the legal practitioners.

Lord Justice Auld recommended that the Beeching Commission's recommendation in respect of the '**staggering**' of the respective Judges' vacations be revisited as, **in practice**, almost all the High Court judges were in fact **working throughout** the formal vacations. In fact, in August, the Crown Courts dealt with about **70%** of its usual monthly workload.

Lord Justice Auld based his recommendation partly on the reasoning that a shorter summer vacation would be –

"*a **useful discipline** in maintaining the **momentum** of case preparation and management. It would be more in line with the **working patterns** of most public and private sector organizations. And, it would help to correct a popular **misconception** about the present **work pattern** and **load** of the **higher judiciary**.*"[23]

Ultimately, as a result of the combined effects of

- the restructuring of the criminal court system[24],
- the creation of a new rank of judge without the traditional

[23] *Op. cit.* Chapter 6, para 39.
[24] See notes on the creation of the Crown Courts and the hybrid bench at Appendix 'E'.

disruptive summer vacation, and staggered vacations throughout the year,

- pressure placed on the courts by the sheer number of cases before it, and
- the commitment of the judiciary to efficient and speedy justice,
- the long summer vacation within the Crown Court has, effectively, been abandoned.

5.2.3 Queensland, AUSTRALIA

In the jurisdiction of Queensland, the court calendar of terms and recesses has also undergone change in recent years.

The original scheme of the court calendar was that Supreme and District Court judges sat throughout the year, except for recesses of **six weeks** from before Christmas to the end of January and **two weeks** at mid-year[25], with **four weeks** scattered across the year for judgment writing.

Except for about a **fortnight** at Christmas/New Year, most **District Court** judges now sit **throughout the year**, taking their annual leave at times that suit both them personally and the Court calendar.

The **Supreme Court** is moving in the same direction. There is **always** at least one judge sitting in civil and one judge in crime in Brisbane during the January vacation. For some reason (probably **flexibility** in holiday-taking time), there is no difficulty in finding Supreme Court judges to sit during what were formerly the vacation times.

The Hon Mr Justice B H McPherson CBE[26] says:

[25] Supreme Court Trial Division Roster: July 2003 – January 2004
Winter break 30 June 2003 – 11 July 2003
Summer break 22 December 2003 – 30 January 2004
[26] Court of Appeal, Supreme Court Brisbane, Australia

*"The secret of success lies in calendaring. The system aims at having **a minimum number of judges sitting at all times** in criminal, civil, chambers, circuits and on appeals, as well as allowing for judgment writing and vacations at **staggered times** throughout the year. The old practice by which all judges sat in fixed term times, and none sat in vacations has now almost disappeared except for the **month** of **January**. The legal profession has shown some resistance to having that month off and, in that respect, can always get their way by applying a form of passive resistance to working when they do not want to.*

*The ultimate limiting factor on sitting constantly through the year is the **annual summer holiday period**. All schools, universities and many businesses (including the building industry) close during January when most people go away to other places. In consequence, it is impracticable to try to assemble witnesses, parties, members of the legal profession and jurors for trials in that month of the year.*

*I can see no reason why courts in South Africa should not sit continuously and **make use of court facilities during the whole year**, provided there are sufficient numbers of judges and court staff, as well as prosecutors and defence counsel, to serve the system at all times.*

*In terms of use of facilities, … Singapore… has a reputation for making the most of its buildings, etc.. For example, school children there attend school either in the morning or in the afternoon session, so that schools are **used twice over** in the same day."*

5.2.4 New Jersey, USA

Chief Justice, Robert N Wilentz through a directive # 1/82 dated 22 October 1982 [amended by Directive #1/98] stated:

"It is the policy of the Supreme Court that the trial courts of New Jersey shall operate on a yearly schedule that affords the greatest possible efficiency of operation and provides the public with maximum access to the courts.

A study of the schedule of judicial work conducted in 1982 has led to the conclusion that greater court efficiency and accessibility to the public could be attained through maintaining court operations throughout the year to the fullest extent practicable. Therefore, to implement the policy of the Supreme

Court, the Judiciary will undertake a court schedule by which trial judges will hold court each business day of the year except for official national and state holidays and the period between Christmas and New Year's Day when only emergency judges will be on duty."[27]

5.2.5 Federal Republic of Germany

Court holidays did exist within the court system of the Federal Republic of Germany and ran each year from the 15th July to 15th September.[28] The court holidays were **abolished** with effect from 1 January 1997.[29] From the year 1997/98, it was intended that formal court holidays would **no longer occur** in the Federal Republic of Germany.

German law does not otherwise prescribe sitting days for courts[30]. In principle, German Courts can sit on any working day of the week. In practice, each ruling body sets aside time for oral hearings. The number of sitting days depends on a variety of factors, including the pressure of business.

Criminal cases are heard on a **continuous** basis.

Professor Dr Reinhard Bork describes how, when Roman Law was adapted in Germany, the concept of court holidays was taken into German Law. During the 19th and 20th centuries there was ongoing debate on the issue of court holidays before the abolition of such holidays.

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[27] See Appendix 'O' for a fuller description of the New Jersey judicial calendar system.
[28] Section 199, Court Constitution Act {GVG] as in force until 31 December 1996.
[29] Bundesgesetzblatt [BGB], 28 October 1996, Federal Law Gazette 1, p 1546.
[30] The courts of the Federal Republic of Germany fall into 5 categories: (contd. on p. 77)
(1) The 'ordinary courts', which are responsible for criminal matters and may be divided into four levels: the Local Court [Amtsgericht], Regional Court [Landgericht], Higher Regional Court [Oblerlandesgericht] and Federal Court of Justice [Bundesgerichtshof]; (2) the Labour Courts [local, higher and federal]; (3) the Administrative Courts [local, higher and federal]; (4) the Social Courts [local, higher and federal]; and (5) the Finance Courts [State and Federal]. Separate from the aforementioned five types of courts is the Federal Constitutional Court, which acts as a Supreme Court and a Constitutional Court.

Professor Bork states[31]:

> *"The court holidays rule applicable to the ordinary courts, and then only to a limited extent, is systematically inconsistent, incoherent and complicated. It fails to fulfil its stated purpose of providing relief for judges and lawyers and enabling them holiday with their families. … It causes considerable additional burdens for courts and lawyers before and after the end of the court holidays and threatens the quality of decisions reached. It inherently involves a risk for parties to disputes of a protracted deferral of cases, and also of a loss of justice as a result of missing deadlines. For lawyers, it involved dangers of liability. On the other hand, its abolition will not create any serious disadvantages for the courts. Lawyers can continue to go on holidays, though will also have to continue to appoint temporary replacements, for whom relief could be provided by conventional means. The risk that parties to disputes could be exposed to particular dangers from missing deadlines and sitting dates is relatively small. All arguments thus favour the* ***complete abolition*** *of court holidays … ."*

5. 3 A separate criminal bench

As early as 1961, the **Streatfeild Commission**[32] was concerned that the **continuously sitting courts** (namely the Central Criminal Court in London and the Crown Courts at Liverpool and Manchester) were able to try almost all their cases **within 8 weeks** of committal, whereas the **other courts**, namely the Quarter Session and the Assize Courts were **not** achieving this goal.

Evidence was led before the Committee that the solution for this problem would be to **set up more Crown Courts**.

Essentially, a **Crown Court** (at that stage) was a continuously sitting criminal court which dealt with the whole of the Quarter session's work and the criminal Assize work of a densely populated area outside London.

[31] 'Do we need court holidays?' Prof Dr Reinhard Bork, Judge of the Hanseatic superior Regional Court of Hamburg, Juristenzeitung, Vol 48, 1993, pp 53 – 108.
[32] Report of the Interdepartmental Committee on the Business of the Criminal Courts, 1961, Command 1289.

An **Assize Court** was presided over by a High Court Judge and dealt with both criminal and civil work, while a **Quarter Sessions Court** dealt with only criminal work and was presided over by a judge of less than High Court status.

Streatfeild considered that the creation of more Crown Courts would lead to the establishment of a **permanent separate criminal bench** (as was eventually established in terms of the Courts Act 1971) and made the following observations:

Advantages:

5.1 Such a bench could **contribute** to the **criminal expertise** of the judiciary. A specialist judge could be expected to interest himself more deeply in current criminological developments and, by reason of his experience, to make his own contribution. Knowledge of the results of **penological research** could be effectively combined with day-to-day decisions on individual cases.

5.2 Such a bench could get to **know the area** served by the court and bring local knowledge and experience to their work on the bench. They could study local habits and attitudes, local shifts of population and local trends in crime.

Disadvantages:

5.3 On the other hand, it was held that such a system had **defects**, as concentration of criminal work tended to cause **staleness** leading to decreased efficiency. They suggested that:

5.3.1 It was a fundamental feature of our system that, as far as possible, the judges of our superior courts dealt with both criminal and civil work and as a result were **refreshed** by the

frequent changes from one to the other.

5.3.2 Similarly, most recorders were saved from excessive concentration on criminal work by their general practice at the Bar. The full-time criminal judge was in danger of becoming **stale**, and even prosecution-minded, as a result of taking nothing but criminal work.

5.3.3 The risk of staleness was increased where the full-time criminal judge sat each day in the same court. The same practitioners, police officers and probation officers were repeatedly concerned in the cases before him, and there was even a similarity in the circumstances of otherwise separate offences. There was a danger that likes and dislikes might develop and produce an atmosphere which might tend to impair the proper relationship between the judge and those appearing or giving evidence before him.

Final observation:

5.4 The Committee conceded that the growing complexity of sentencing would require developments in the equipment and training of sentencers. 'An increased amount of information is becoming available and, as this aspect of criminal work develops, a specialist criminal judge might be in a better position to devote the necessary time to studying new techniques and information. The **time may well come** when these considerations **diminish or outweigh any risk of staleness** being caused by the monotonous course of criminal trials.'[33]

[33] *Loc. cit.,* Chapter 5, paragraph 134.

6. RECOMMENDATIONS AND OBSERVATIONS IN CONNECTION THEREWITH

6.1 OBSERVATIONS

6.1.1 The measures which will be recommended to address the recess system are neither drastic nor alien to the legal world, but have been **implemented** in other foreign jurisdictions some years ago, namely:

- a restructuring of the High Court into a **separate criminal** and civil Bench within the same Court,
- the implementation of **partial staggering**, and
- the creation of a **new tier of criminal judge** in the High Court who will require a shorter recess.

6.1.2 According to section 176(3) of the Constitution (Act 108 of 1996), "[*t*]*he salaries, allowances and benefits of judges may not be reduced*." The measures proposed in this report, however, do **not affect** the **existing rights** and privileges of the present High Court judges; if anything, they should merely provide the judges with **greater flexibility** in the planning of their work and holiday schedules.

6.1.3 There is no reason why the **existing recess system** cannot be **abolished**.

In terms of Regulation 2(1), promulgated in terms of section 13 of the Judges' Remuneration and Conditions of Employment Act, 2001, a judge is entitled to a recess which "*shall not exceed a total of 14 weeks a year*". Moreover, in terms of regulation 2(2), "[*t*]*he* ***Judge President*** *… shall prior to the commencement of*

*the Administrative recesses, **determine** how many and which judges are to perform the functions in his or her divisions during the recess"*.

In terms of Rule 2, the periods between the terms shall be **vacations**, during which the ordinary business of the court shall be suspended, but at least one judge shall be available on such days to perform **such duties as the Judge President shall direct**.

6.1.4 The **Rules** regarding the times and dates (not the total period) of the recesses can be **changed**[1]. In terms of section 43(2)(b) of the Supreme Court Act, 1959, the **Judge President** may make rules for regulating the proceedings of that division with reference, *inter alia*, to the times for the holding of courts.[2]

The **Rules Board for Courts of Law Act, 1985**[3] came into operation during 1987. In terms of section 6 of the Act,

> "*the [Rules] Board may, with a view to the efficient, expeditious and uniform administration of justice in the Supreme Court and the lower courts, from time to time on a regular basis review existing rules of court and, subject to the approval of the Minister, make, amend or repeal rules for the Supreme Court and the lower courts regulating –*
> *(l) generally any matter which may be necessary or useful to be prescribed for the proper despatch and conduct of the functions of the Supreme Court and the lower courts in civil as well as in criminal proceedings."*

The President may, after consultation by the Minister with the

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[1] *"2(1) Administrative recesses in any provincial or local division shall not exceed a total of **14 weeks** a year. 2(2)The **Judge President** concerned shall prior to the commencement of the Administrative recesses, **determine** how many and which judges are to perform the functions in his or her divisions during the recess.*

[2] The Judge President of the Natal Provincial Division recently amended Rule 2 of the rules governing that division in terms of the said section. See page 57 *supra.*

[3] Act 107 of 1985

Chief Justice, the president of the Supreme Court of Appeal and the judges president of the respective High Courts, make regulations, *inter alia*, as to arrangements regarding **administrative recesses**.[4]

6.1.5 It is a fact that each judge is presently entitled to an administrative recess of **fourteen weeks per year**[5], a period which was negotiated as part of an improved package for judges in 1989, along with an increased remuneration. Judges are also entitled to **three and a half months' long leave** after four years of service[6].

The Judge President is empowered to decide how active the judges will be during the recesses.

6.1.6 There is **no reason** why the recesses should be **fixed** and why the whole bench should go on vacation at the same time. Elsewhere, where circumstances have demanded it, foreign

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[4] Section 13(1)(a), Judges' Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001).

[5] No opinion is expressed on the length of this recess, as any debate on the merits of these periods would simply delay any practical or urgently required reform, which this report seeks to achieve.

[6] The President has, under Section 13 of the Judge's Remuneration and Conditions of Employment Act, 2001 (Act 47 of 2001), made the following regulations:

*"2(1) Administrative recesses in any provincial or local division shall not exceed a total of **14 weeks** a year.*

*2(2) The **Judge President** concerned shall prior to the commencement of the Administrative recesses, **determine** how many and which judges are to perform the functions in his or her divisions during the recess.*

*3(1) The Minister may…. on the recommendation of the Judge President concerned grant leave to a judge for a period of **3½ months** for every period of 4 years' actual service … or for a shorter period and subject to such conditions as the Minister may in any particular case deem fit.*

*4. If a … judge waives in writing his or her right to unreduced remuneration in terms of section 176(3) of the Constitution of the Republic of South Africa, 1996 [Act No 108 of 1996], the Minister may in terms of regulation 3 and on the recommendation of the Chief Justice, the President of the Supreme Court of Appeal or the judge president concerned, grant such … judge **additional leave on half pay** for a period not exceeding **one and a half months**.*

*5. If in exceptional circumstances the Minister is satisfied that **leave for which no provision has been made** in these regulations should be granted in a specific case, he or she may, on the recommendation of the Chief Justice, the President of the Supreme Court of Appeal or the judge president concerned, grant such leave on such conditions as he or she may deem necessary, whether it be leave with full remuneration or leave with reduced or no remuneration, provided that the … judge concerned has, in the case of leave with reduced remuneration or leave without remuneration, in writing waived his or her right to unreduced remuneration…*

*6.If, according to a certificate of a medical practitioner, it appears that owing to illness a … judge cannot perform his or her duties for a specified period the Minister may grant the judge **sick leave** for that period.*"

jurisdictions have successfully **staggered** their recesses (either in whole or in part) and referred to these as 'variable recesses'. By allowing judges to take their leave at any time throughout the year, while maintaining a core bench, a Judge President will be able to ensure the **continuous criminal session** of the Courts.

6.1.7 Experience has shown that it is extremely difficult to convene courts during the so-called December/January '**festive**' period, when most people are either preparing to take their annual vacation or are already on vacation. Traditionally, there has also always been a '**closed period**' over Christmas and New Year, during which no court is in session (except for urgent matters). Thus, there are cogent arguments in favour of **maintaining** a 'closed' period during the festive season (during which the normal business of the courts will be suspended), while implementing a **partially staggered** system of recesses (and continuously open criminal courts) during the rest of the year.

6.1.8 If courts are closed for a period of **three weeks** over the festive period, the remaining recess entitlement could be spread during the course of the year. The **criminal courts** would therefore effectively be closed for only **15 court days**, which translates into a loss of only **1020**[7] **court days**, as opposed to the current 4624 days[8] which are currently being lost due to recesses.

6.1.9 Historically in South Africa, since the Charter of Justice, 1828, and until the latter half of the twentieth century, criminal cases were to '**continue by adjournment, as the case may**

[7] Assuming that there would remain 68 criminal divisions across the country, as there are presently, 68 x 15 = 1020. (See the table of courts on p52 *supra*)
[8] 68 criminal divisions multiplied by approximately 68 recess (court) days = 4624 days.

require'. This practice was abolished when the terms were also made applicable to criminal work; there is no reason, however, why this practice should not now be revived. New South Wales has a similar provision[9].

What is being proposed, therefore, is nothing more than a return to the earliest system where criminal sessions were stipulated "*to be continued by adjournment, **as the case may require, until the whole of the criminal business is disposed of…**"*

6.1.10 A staggered recess system will allow for the **continuous criminal session** of the High Court while at the same time giving the judges **greater flexibility** in the planning of their work and leisure schedules.

6.1.11 **Retaining the existing complement** of judges, while simply spreading their vacation periods over the full year, will <u>not</u> give <u>more 'judge days'</u>. In the CPD, for instance, current resources could provide either 12 criminal divisions sitting for 8,5 months (as they presently do), for instance, or 9 criminal divisions sitting for 12 months[10].

6.1.12 A continuous criminal session, albeit reduced in size, will still have certain **advantages** over the current 'block' recess periods system:

- **roll planning** will be easier as there will be a constant (predictable) number of courts sitting throughout the year;
- with only one annual **winding down** period, before the

[9] See Appendix 'G', p.10

[10] If 12 judges each take 14 weeks' vacation, for instance, that leaves us with 12 judges each having 38 working weeks = 456 'judge weeks'. This could enable nine courts to remain in continuous session for 49 weeks (that is, 52 weeks less the 3-week fixed recess), which would require 9 x 49 = 441 judge weeks. (12 divisions, sitting for 49 weeks, would require 588 judge weeks.)

festive season shut-down, fewer 'winding down' days (at the end of each term) will be lost;

- **delays** in the finalisation of cases will be reduced,
- with a consequent benefit to our **overcrowded prisons**;
- administrative staff will be used more effectively and the court buildings will be utilized throughout the year.

6.1.13 It would also remove the unfortunate perception that our High Courts are unproductive and the judiciary **idle**. As stated earlier, it is the **duty** of the courts to engender **public trust** and **confidence**, which are unlikely to be achieved if there is a **perception** that the **courts** are **inaccessible** or **wasting public resources**.

Crime never shuts down and, with the possible, practical exception of the festive season, neither should the High Court.

6.1.14 An obvious improvement on the above conservative suggestion of merely **staggering the recesses** of the **existing complement** of judges, would be stagger and **enlarge the bench**: in this way, current 'term strength' could be continued throughout the year, with obvious advantages for productivity. Employing more judges, with their current recess and remuneration packages (which appear to be Constitutionally entrenched), would, however, amount to a great increase in **costs**.

6.1.15 A third option would be to staggering the recess periods and **create a new tier of judge** who would do **only criminal trials**.

6.1.16 Undeniably, **criminal work** requires **less** judgement-preparing

and -writing **time** than civil work does. Under the present (mixed bench) system, therefore, when a High court bench goes into recess after a term during which not all judges had equal criminal and/or civil commitments, not all the judges will have equal recess work commitments. Arguably, a judge who only hears **criminal trials** would require **no more than 7 weeks' recess** per year.

6.1.17 A separate criminal bench will ensure a **more equal distribution** of work in the High Court. The problem, after all, is not so much to ensure that the judges have **time**, but that those who need it **have it when they need it**.

6.1.18 As stated above, existing rights cannot be taken away, but a **different package** could be negotiated for this proposed **new** rank of criminal judge.

6.1.19 A **hybrid bench** will improve the productivity of the High Court by **reducing the total recess period** of the judiciary without infringing on the rights enjoyed by the present complement of High Court judges. (There is a precedent for such a hybrid bench: the English Crown Courts, for example, consist of High Court judges, with their formal recess periods and Circuit Court judges whose recesses are staggered.)

6.1.20 The new rank of criminal judge should also **not** be entitled to **extended leave**, that is, 3½ months' leave after four years of service. (Spread over four years, this amounts to a further 'saving' of recess time of an effective 3½ weeks' leave per year.)

6.1.21 Extended leave is an extraordinary **privilege** which is not seen

in many other jurisdictions similar to our High Court. In the USA, for example, extended leave in such jurisdictions will generally only be granted on an *ad hoc* basis, **on application** to the Chief Justice, to judges who may have served on the bench for 15 years or more, and who will be utilising the time for 'judicial purposes'.

6.1.22 This new rank of 'criminal judge', with only **7 weeks' recess** per year, will dramatically affect productivity and also be extremely cost effective. Such a criminal bench will have to be built up slowly by appointing such judges as **vacancies** occur, from time to time.

6.1.23 Ultimately, under the proposed hybrid bench, some **68**[11] criminal judges will, together, account for a **saving** of approximately **714 weeks**[12] **per year (3570 days)**, in relation to the other High Court (civil) judges who will continue to enjoy their full complement of 14 weeks' and three and a half months' extended leave.

6.1.24 Thus, with:

- no increase in the current size of the Bench,
- no increased infrastructure, such as additional offices, judges' clerks, courtrooms, etc.,
- the complete phasing in of the criminal bench, that is 68 new tier 'criminal judges', as opposed to the present 68 'ordinary' judges,

our criminal divisions will be able to be in session continuously throughout the year (except for the three week

[11] The present number of criminal divisions. See the table on p 52 *supra*

[12] 68 criminal judges would be entitled to only 7 weeks' recess, as opposed to the 17½ weeks' recess (i.e. 14 weeks' plus 3½ weeks' extended leave) per year of the civil judges.

recess over the festive period).

6.1.25 As the Streatfeild report suggested[13], **the time has now come** for the establishment of a **separate criminal bench**; the need for, and advantages of, such a separate criminal court will outweigh any possible disadvantages which may be caused by 'staleness' of the judges. In either event, in South Africa a **separate criminal bench already exists**, and adjudicates more than **90%** of all serious criminal trials, namely the Regional Court.

6.1.26 Moreover, in terms of the so-called Minimum Sentences Act[14], Regional Courts can bring out a **conviction** in respect of the **most serious cases** heard in our courts – the only limitation being that, in certain limited circumstances, the matter must be referred, for sentencing, to the High Court. In fact, in terms of the said Act, the prosecuting authority could *de facto* convert the High Court into little more than a sentencing court (in respect of its criminal business), if it so wished.

6.1.27 A separate criminal bench will not require a doubling of **existing facilities** and can easily be accommodated within the confines of the present High Courts.

6.1.28 As in the United Kingdom, where the **need** arises and where the Judge President deems it **expedient**, several ('ordinary') High court judges could also be made available to do certain criminal cases of a more complex nature such as, for instance, complex commercial cases which bear a resemblance to civil work.

6.1.29 **Criminal work** must always be **prioritised**: that is, wherever a

[13] See p78 *supra*
[14] Criminal Law Amendment Act, 1997 (Act 105 of 1997)

court must be closed due to the unavailability of a judge, this should be a civil court, not a criminal one.

6.1.30 A hybrid bench can be achieved by the **creation and gradual phasing in** of a new tier of judge who will do only criminal work and enjoy fewer recess periods. This bench can be sourced from a wide range of **criminal specialists**, including Regional Court magistrates, prosecutors at the various Offices of the Directors of Public Prosecution, academia and any private practitioner who is specialized in criminal work.

6.1.31 As an **interim** measure, the employment of **Regional Court magistrates**, as acting 'criminal' or 'ordinary' judges (until such time as the new rank of judge has been legislated for), would be a **practical** option.

Firstly, the appointment of Regional Magistrates can be achieved with the necessary **speed**. The Magistrates are already in the system and should be easily moved to the bench, with ordinary magistrates being found to act in the Regional Magistrate vacancies so created. It should be a relatively easy matter to find appropriate Regional Magistrates for placement in the High Court, to hear High Court criminal trials – in terms of Act 105 of 1997, they are entitled, in certain specified circumstances, to sentence accused persons to periods of **imprisonment of up to 30 years**[15]. The vacancies this would create at the Regional Court level could be filled with acting Regional Magistrate appointments.

6.1.32 The employment of **Regional Magistrates** as acting judges

[15] In terms of section 51(2)(a)(iii), and the proviso thereto, of Act 105/1997, a regional magistrate shall in respect of a third or subsequent offender of an offence referred to in Part II of Schedule 2, sentence such offender to imprisonment for a period of not less than 25 years, and not more than 30 years.

would also be **cost-effective**. Although, as an acting judge, a Regional Magistrate would be entitled to the **increased salary** of a judge, in real terms the only additional expense, to the State, would be the **difference** between his current Magistrate's salary and that of a judge. The acting, or contract, Regional Magistrate appointed to fill his vacancy, would not require any additional salary.

6.1.33 The alternate solution of merely appointing sufficient members of the bar as acting judges, in order to keep all the courts running during the existing recesses, is both impractical and not financially viable. Across all the divisions in the country, this would require the temporary availability of some **68 advocates**. In the long term, the criminal pool of judges may naturally be drawn from a wide spectrum of legal experts (as stated in paragraph 6.1.30 above), including the bar.

6.2 RECOMMENDATIONS

With reference to all the foregoing, the following recommendations are made:

6.2.1 The present system of recesses should be **abolished** with **immediate** effect.

6.2.2 A **fixed vacation** for a period of three weeks, starting on the Monday before the 24th December of each year, should be introduced.

6.2.3 **No hearing** or trial should be held in the **fixed vacation** unless

the Judge President otherwise orders. Where a matter is urgent or where desirable, however, judges should be **allowed** to sit during the fixed vacation (depending on the availability of counsel). These judges can have the time so spent 'reimbursed' as compensatory leave the following year.

6.2.4 Legislation should be passed making provision for the creation of a **rank** of judges who will deal exclusively with **criminal trials**, with the same financial advantages as the present judges but with leave of only 7 weeks per year (instead of 14 weeks) and no extended leave.

6.2.5 The new rank of criminal judges must be **phased in gradually**, as High court judges vacate their posts, or posts become available in other ways.

6.2.6 While the new rank of criminal judges will do only criminal work, the **other judges** may still opt to have a **mixed 'diet'** of both civil and criminal pool work.

6.2.7 It is recommended that a **variable vacation** be introduced for a period not exceeding 11 weeks in the case of High Court judges, and 4 weeks in the case of the new proposed rank of criminal judges, and regulated by the Judge President in such a way as to ensure a **continuous criminal session** throughout the year (excluding the three week fixed vacation period).

6.2.8 The **civil year** can continue to be divided into **terms** and **vacation periods**, while the **criminal trials** run on every business day, throughout the year, with the exception of the three week fixed vacation period. The Judge President should,

however, always have the discretion in respect of allowing civil business to continue into the vacation period. **The only proviso regarding terms and vacations should be that, at all times, the fixed number of criminal trial courts continue to run.**

6.2.9 A **criminal trial**, once started, should **run to conclusion**. Unless otherwise ordered, trials would generally not be set down at a time that might reasonably cause that trial to proceed during the fixed vacation period.

However, if a trial were to be set down in ordinary circumstances and not be concluded by the start of the fixed vacation, the trial should **proceed during the fixed vacation** until the accused is acquitted or found guilty[16].

6.2.10 Until the full complement of 'criminal judges' is reached, each division must draw up its own **transitional plan**, based on the nature and quantity of its work and the size of its bench.

In the **Cape of Good Hope Provincial Division**, for instance, the following is suggested as a possibility:

- Staggering *per se* will mean that only 9 criminal divisions (instead of the usual 12 divisions which sit during term) will sit continuously throughout the year (except for the compulsory, end of year vacation).
- If, however, staggering is accompanied by the appointment of **4 acting judges** who are appointed for the criminal pool **exclusively,** then it is calculated that the Cape Division would save 103 days a year per court made

[16] This is the position in New South Wales (see Appendix 'G') and was also the position in South Africa, historically.

up through the recesses (67 days) and by sitting on Fridays (36 days).

- In this way, 12 divisions could sit throughout the year and **no court days would be lost** which will mean that 1 236 (103 X 12) judge days will be gained, additional to the present allocation of 1 764 (147 X 12) days.

  This will amount to approximately a **70% improvement** in **productivity** in the criminal pool.
- Consideration should be given to the appointment of regional court magistrates as acting judges, or acting criminal trial judges, on a rotational basis. These magistrates would sit continuously.

7. CONCLUSION:

This report has attempted to find solutions to the criminal court crisis, in ways which are both practical and tried and tested in legal systems internationally.

Achieving optimal use of the hours available each day is a **long-term goal** involving the co-ordination and efficiency of a great number of individuals and departments involved in the court system. Experience has shown that the creation of **extra judge days**, however, makes for dramatic results in the short-term[1].

The improvement of productivity in the High Court can be done in such a way that the existing rights and benefits of our judges are not interfered with. Measures such as the staggering of judges' vacations, for instance, do not take away an existing privilege; indeed, some judges may even welcome the new flexibility it brings.

In essence, there are 3 models whereby the recess system can be altered in order to enhance the productivity in the High Court on a cost effective basis:

1. The **staggering** of the recesses (excluding the summer recess) **without adding additional judges.**

2. The **staggering** of recesses, together with **the appointment of additional judges, allocated exclusively to the criminal pool**, which would improve productivity substantially, as well as having the benefits of the first solution.
3. The **staggering** of recesses **with a new tier of criminal judges**

[1] Through the creation of additional courts on Saturdays and other days. *Vide* footnote 95 *supra*.

> who would only have a recess of **7 weeks a year and no extended leave** and who would do criminal trials exclusively, would have a dramatic impact on productivity and be extremely cost effective. Although this is the most optimum scenario, such a bench would have to be built up slowly by appointing such judges as vacancies occur from time to time in the High Court.
>
> In 1970, such a system was introduced in the United Kingdom in order to achieve better productivity, to great effect. In the Crown Court system, which sits continuously throughout the year, "senior" and "junior" judges co-exist without any problems.

There is ample common ground for a solution which could be in the interests of both the community and the judiciary, and in line with the Constitution.

Finally, during the course of this study, which included both a historical survey of the position in South Africa as also an international survey of other countries, it became abundantly clear that there is simply no place for a **recess** in the **criminal justice system** of South Africa: the question is no longer *whether* it should go, but **how**, and, more importantly, **how soon**.

Elsewhere, where the need has arisen, other countries have altered their recess system accordingly.

There is no reason why South Africa should not follow suit. As stated by the Minister of Justice, Mr Penuell Maduna:

> "*Law, as we all know and should appreciate, is not a static concept. The justice system, in the interests of its own long-*

term survival, must respond dynamically to the changing needs of the society that it serves. Legal reform is ordinarily a complex process and, if anything, this is more so in South Africa where the historical imperative for change has heightened the challenges facing those of us who are charged with the task of progressively transforming our justice system."

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Comments and submissions:

Any person wishing to make comment on, or make a submission regarding, this document, should do so on or before 31 December 2003.

These should be addressed to Adv T L Heunis via any of the following:

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THE EASTERN DISTRICTS COURT

In **1864**, the **Eastern Districts Court**, a local division of the Supreme Court, was established at Grahamstown, having concurrent jurisdiction with the Supreme Court in its area. Normally, in civil cases, two judges were to sit; in the event of an *impasse*, the case would be removed to Cape Town. Appeal lay to the Supreme Court and thence to the Privy Council.[1]

In order to provide for the new court, on **26 July 1864**, an Act was passed which enlarged the Bench to **five judges**[2], **two** of whom were to be assigned to the **Eastern Districts Court**.

Over the next few years, however, as the Frontier wars led to the further **territorial expansion** of the Cape Colony, so also did this lead to the system and hierarchy of **Courts** being accordingly altered and expanded.

In 1866, British Kaffraria, on the Eastern border with the Cape, was incorporated into the Cape Colony, and the functions of the **British Kaffrarian Supreme Court**[3] were absorbed by the Eastern District Court, which nonetheless continued to function as a two-judge court.

In **1876**, a full right of appeal was granted[4] from all convictions to the Supreme Court or, in the Eastern districts, to the Eastern Districts Court, or appropriate circuit court.

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[1] This created years of resentment on the part of the judges of the Eastern Districts Court – while equal in status to their brethren at Cape Town, their judgements were checked by the latter, whose own judgements were subject only to the scrutiny of the Privy Council.

[2] Act No. 21 of 1864.

[3] The British Kaffrarian Supreme Court was established in terms of Ordinance No. 10 of 1861 and consisted of a single judge. The judgements of the Court could be taken on appeal to the Judicial Committee of the Privy Council when the amount in dispute exceeded £300. Civil and criminal cases had to be tried by the judge and a jury of nine men, whose verdict had to be unanimous, and in 1864 provision was made to enable civil cases to be tried by special juries. The Supreme Court of British Kaffraria continued to function until 17 April 1866, when the territory was incorporated into the Cape Colony and all proceedings halted and moved to the Eastern Districts Court.

[4] Act No. 21 of 1876, section 4.

In **1879**, a **Court of Appeal** was established[5] and the Easterners secured a **third judge** for their court.

Griqualand West

In the interim, in 1871, Griqualand West had been annexed by the Crown and given a High Court with a recorder, with its seat at Kimberley.

When, in **1880**, the territory was **annexed** by the Cape, the **recorder** was given the status of an **additional puisne judge** of the Supreme Court, while retaining his previous jurisdiction and powers. Thus the Supreme Court gained concurrent jurisdiction in Griqualand West, with whom it thereafter enjoyed the same relationship as with the Eastern Court.

In 1882, the Kimberley Bench was enlarged to **three judges** and the structure of all the superior courts was made uniform (Administration of Justice Act, No. 40 of 1882).

In 1882, the jurisdiction of the Supreme and Eastern Districts Courts was extended to the **Transkeian** territories and **Griqualand East**.

In **1900**, crimes arising out of the South African War created pressure on the system. A special court was set up to hear these matters and the quorum of the Supreme Court and district courts was reduced to a single judge. These courts themselves created further pressure and meant that the judges could no longer cope with the work if still required to sit in

[5] The Court of Appeal was composed of the Chief Justice, the two puisne judges sitting at Cape Town, and the Judge-President. It heard civil appeals from circuit courts and from the E.D.C. and the H.C.G. but, as before, not from the Supreme Court sitting at Cape Town. Appeal lay to the Privy Council as in the past. In criminal cases, the court considered special entries of irregularity and illegality of proceedings and reservations of points of law, from the Supreme Court at Cape Town as well as the other courts. Full criminal appeal on fact from a superior court was still far distant. The Appeal Court was eliminated in 1886 and its powers vested in the Supreme Court, sitting with the Chief Justice, the two members at Cape Town and any other judge specially assigned. Still no civil appeal lay to it from a judgement of the Supreme Court at Cape Town.

pairs in civil trials. Thus, in 1904, such a single member court, termed a divisional court, was empowered to sit at all times.

By 1907, when the diamond rush had ended, the High Court of Griqualand was again reduced to a single judge court.

THE TRANSVAAL PROVINCIAL DIVISION

In **1838**, in terms of the Natal Instructions for Magistrates, three bodies made up the hierarchy of criminal courts in the Transvaal:

- the magistrate,
- a magistrate with four to six heemraden (four to concur with the landdrost for a verdict), and
- a magistrate, heemraden and twelve jurors whose decision had to be unanimous (in respect of offences carrying punishment of death or banishment).

The Volksraad had to confirm all sentences, and could reduce them or set them aside.

Under the **Thirty-three Articles** of **April, 1844**, by which the Potchefstroom-Winburg districts declared their independence on the annexation of Natal, the Burgerraad was the court of justice.

In terms of the **1858 Grondwet**, the judicial power became vested in popularly elected landdrosten and in jurors. Every district was to have a landdrost's court, with civil jurisdiction up to 500 ryksdaalders and criminal jurisdiction up to three months' imprisonment and a fine of £7 10s.. A higher district court of landdrost and four to six heemraden had full original civil jurisdiction, tried criminal cases with jurisdiction up to three years' imprisonment and a fine of £37 10s., and acted as an intermediate appeal court. The High Court, composed of three landdrosten and twelve jurors, was the final court of appeal from the court of landdrost and heemraden; sat in criminal trials beyond the competency of that court; and heard and pronounced on charges against the executive of unworthiness.

In **March 1877**, President Burgers developed a plan for a fundamental

change in the **structure of the courts**. In terms of the proposed plan, the administration of justice would now be entrusted to (1) a Supreme Court consisting of a Chief Justice and two puisne Judges (all holding office for life); (2) a Circuit Court (of a single judge) for the different districts of the State; and (3) a Court of Landdrost as already existing.

Before it could be put into operation, however, the Executive Council suspended the new law and, five days later, on 12th April, Shepstone proclaimed the annexation of the Transvaal by the British[1].

Shepstone's proclamation provided that all courts were to remain in existence and either English or Dutch could be used in courts of law, at the option of suitors. The laws in force would be retained until altered by a competent legislative authority.

One month later, a **High Court of Justice**, for the Transvaal, was established, with a **single judge**[2] holding office for life subject to good behaviour. The court was to sit at **Pretoria** and such other places as were appointed by the Government. Criminal trials were to be before a judge and jury of nine, who had to bring in a unanimous verdict. In civil cases, the judge sat alone. Appeal lay to the Privy Council in civil disputes of £500 or more. The death sentence required confirmation of the Governor or Administrator.

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[1] Burgers had offered the Chief Justiceship to J.G.Kotzé, an advocate who was at that time in practice in the Eastern Districts. Kotzé indicated his acceptance of the position but failed to reach the Transvaal in time, however, and was therefore only offered the single puisne judge position then available under the British rule. It was only later, when Burgers' plan was finally put into operation during the retrocession, that he was eventually granted his originally promised status, that of Chief Justice.

[2] In terms of the Annexation Proclamation, all contracts made by the Government of the Republic with companies or individuals were guaranteed and recognized, but there arose a practical difficulty in at once carrying out President Burgers' scheme for the establishment of a Supreme Court consisting of three Judges. On assuming the government of the Transvaal, Sir Theophilus Shepstone found only 2s. 6d. in the Treasury. There was a total lack of funds to provide the necessary salaries for three Judges. It was consequently decided by the Administrator to postpone for a time the completing of President Burgers' scheme as approved by the Volksraad. Consequently, a Proclamation was issued by Sir Theophilus Shepstone on 18th May 1877, creating a High Court for the Province, as the annexed Republic was now called, consisting of one Judge (J.G.Kotzé) only. *Vide* The Administration of Justice in the South African Republic (Transvaal), 36 SALJ, 1919 p128

New rules of court were framed, based on the **Cape** provisions.

Kotzé was appointed to the Bench, where he sat alone until 1880.

A court of one judge created inevitable problems, however, such as the fact that, when he was on circuit, no one was available at the capital to hear matters. While he was on leave, an acting appointment had to be made.

In March, 1880, therefore, the High Court was enlarged[3] – now, it was to have a maximum of **three members**, one to be Chief Justice. A single judge was to have full original jurisdiction, appeal lying to the full court in which, until a third member was appointed, the judgement of the Chief Justice was to prevail.

Upon Retrocession, in 1881, Burgers' plan for the High Court was immediately put into operation. The court was to have full civil and criminal jurisdiction and to act as a general court of appeal. Criminal trials as before were to be before judge and jury of nine, to return a unanimous verdict. Civil cases were before a judge alone. A death sentence had to be confirmed by the President. Finally, Kotzé was appointed Chief Justice.

The **High Court**, initially three-judge strong, sat in **Pretoria**, the seat of government. It was a court of first instance and of appeal for the whole Republic, its decisions being final. Johannesburg had a circuit court which sat for most of the year, but had no appellate jurisdiction and was virtually debarred from entertaining applications. The quorum for the full court was two members; if they were not in agreement, the case was to be postponed to allow the third judge to be present. In vacations, a single

[3] By Order in Council of 27th November, 1878: *Locale Wetten*, p. 741.

judge, in the absence of his brethren, was competent to sit in Pretoria, appeal lying from his decision to the full court.

In civil cases, a jury of nine would be summoned if one of the parties so desired. Rules regarding the required majority, the summoning of the jury and similar matters could be made by the judges with the consent of the President. Criminal trials at the seat of the court came before a judge and a jury of nine, whose decision, as before, had to be unanimous. The judge could reserve a point of law for the consideration of the whole court.

A **circuit court** of one judge to hear both criminal and civil matters had initially to be held twice a year, from 1888 on as often as required. Appeal lay to the High Court in civil cases and in criminal cases where the presiding judge reserved a point of law.

An amending enactment of 1885 vested jurisdiction in all civil matters in a single judge sitting in Pretoria (with an appeal to the High Court, that is, the full bench), unless the parties in writing agreed to bring their suit at first instance before the High Court, whose decision would be final. This provision, however, was repealed in 1888 and replaced by the old rule that in term time, two judges were to make a quorum. This law also allowed for the appointment of **two additional puisne judges** by the State President on the advice of the Executive Council. Not more than three judges were to sit in a matter, two still being a quorum. In vacations and on circuit a single judge sat.

Rules of court were framed in 1881, to be successively by new rules in 1887 and 1899. Court officials from 1888 were enjoined to use only the Dutch language.

In 1890 a **fourth puisne Judge** was appointed to the Bench, largely necessitated by the discovery of the Gold Fields on the Witwatersrand[4] and the greatly increased legal business of the country. In 1896, the President, with the advice of the Executive Council, was empowered to appoint a **fifth puisne judge**.

The following table[5] shows the state of High Court business *in lustra* from 1877:

	1877	**1882**	**1887**	**1892**	**1897**
Applications	86	271	289	823	753
Illiquid cases	10	46	95	292	389
Liquid cases	5	51	17	109	94
Civil and criminal appeals	17	29	25	89	185
Criminal trials	19	15	57	247	387
Reviews of stock theft cases	-	-	-	-	101
TOTAL	137	412	483	1 560	1 909

From the **second British Annexation**, in **1900**, the whole administration of justice was reconstructed.

New superior courts were established. A **High Court of the Transvaal**, with its seat at Pretoria, was set up, composed of a judge-President and at least three puisne judges. In the Witwatersrand sat a single-judge

[4] The *Staats-Almanak*, 1899, p.143, gives a picture of High Court business for the year 1897, the following summary of which shows the importance of the Rand and the inconvenience that must have been caused by the limited jurisdiction of the circuit court:

	Before High Court or in Chambers in Pretoria	Before the Circuit Court, Johannesburg	Before other circuit courts
Applications	732	21	-
Illiquid cases	212	174	3
Liquid cases	73	20	1
Civil and criminal appeals	183	-	2
Criminal trials	33	224	130
Reviews of stock theft cases	101	-	-

[5] Condensed from the table in the *Staats-Almanak*, 1899, p. 142.

tribunal, the **Witwatersrand District Court**. Within a few months, the names were changed to the **Supreme Court of the Transvaal** (the Judge-President becoming Chief Justice) and the **Witwatersrand High Court**.

The High Court had **concurrent jurisdiction** with the Supreme Court in its area. No special judges were appointed to the High Court; it drew on the Supreme Court Bench to constitute one or more single-member divisions. Witwatersrand became a permanent court of first instance, instead of a circuit court as in the old Republic, but with the same absence of appellate and review jurisdiction and limitation on original jurisdiction as with the old circuit court.

Applications and civil trials in default were to be heard by a single judge of the Supreme Court; otherwise, the quorum in civil matters was two judges (save in vacations when it was reduced to one). The High Court was a single-member court. Appeal lay from all civil judgements of a single member in chambers to the Supreme Court, which also entertained all reviews of proceedings of an appeals from inferior courts and appeals from the High Court. From the Supreme Court a further appeal lay to the Privy Council as in the Cape, but as of right only where the matter in issue was of the value of £2,000 or more.

From 1904 onwards, the Supreme Court, in cases where its normal quorum was two judges, was enabled to sit as a divisional court of **one judge** on consent of the parties or of its own volition. Appeals would lie from it and from a single judge sitting in vacation to the Supreme Court as though from a decision of the High Court. Provision was made in 1903 for circuit courts of a single judge of the Supreme Court with original civil as well as criminal jurisdiction, but unlike the circuit courts of the other colonies, they could not entertain appeals from inferior courts.

With crime, the Supreme Court was vested with jurisdiction over the whole colony, the High Court and circuit courts over their particular areas. Trial was before a judge and jury of nine males, originally required to reach a unanimous verdict, from 1909 to reach a verdict by a majority of at least seven to two. Appeals lay to a Supreme Court bench of three judges on the customary restricted basis of a special entry of irregularity or illegality of proceedings or reservation of a question of law. There was no appeal on fact.

The Orange Free State:

In terms of the **1854 Grondwet**, there were two layers of courts of inferior jurisdiction: the court of landdrost, with civil jurisdiction to £37 10s. and criminal jurisdiction to three months' imprisonment; and the court of landdrost and two of the heemraden of the district[6] with double the civil jurisdiction and criminal jurisdiction to four months' imprisonment.

The superior court under the Grondwet was a circuit high court of three landdrosten (popularly known as the court of combined landdrosten). In criminal trials it was to sit with a jury. The jurors in criminal trials were to number six or more, and they alone would return the verdict.

In 1875, a qualified **superior court** was established[7] and this new court sat both at first instance and on appeal.

There was now a circuit court and a High Court with its seat at Bloemfontein, comprising a Chief Justice and to puisne judges.

[6] Appointed by the Volksraad for a term up to two years, but eligible for reappointment.
[7] Law No. 2 of 1875.

The circuit court of a single judge sat at least once a year in each district trying criminal and civil cases and hearing appeals from the inferior courts. From its decisions, appeal and review lay to the High Court.

The **High Court**, composed of all judges, had no original criminal jurisdiction but enjoyed original jurisdiction in all applications and, with consent of the parties, in all matters that could be entertained by the circuit court, as well as appellate capacity. In 1878, it took the place of the circuit court in civil matters in Bloemfontein.

During the years 1900 to 1910, a series of early enactments saw the reconstruction of the courts.

A new High Court, also with its seat at Bloemfontein, was established, consisting initially of two judges, from 1904 of a Chief Justice and no fewer than two puisne judges appointed by the Lieutenant-Governor. Circuit courts of a single judge could be established, having the full jurisdiction of the High Court.

In civil suits, the quorum of the High Court was two judges, save in vacation when it became a single judge.

Criminal trials before the High or circuit Court were heard by a judge and jury of nine, required to return a unanimous verdict.

Until 1904, civil appeals from the superior courts were heard by the Transvaal Supreme Court. Thereafter from the High Court appeals went direct to the Privy Council, the lower limit being £500 as in the Cape, the High Court itself becoming an intermediate court of civil appeal from a circuit court and a judge in chambers.

The Transvaal Supreme Court was also the court of criminal appeal from cases tried by the Orange River Colony superior courts until 1904. Thereafter its place was taken by the Orange River Colony High Court. The basis of appeal was on the same restricted footing as in the Transvaal. The execution of the death sentence required approval of the Governor after consideration of a report by the presiding judge.

The High Court and a circuit court had full review and appeal jurisdiction in respect of civil and criminal cases in magistrates' courts.

ANNEXURE C_a

AUDIT OF TRIALS IN HIGH COURT JULY TO DECEMBER 2002

DIVISION	Year	Ave Hours	No. Finalised	% of the TOTAL finalised	Crime to 1st DC appearance	1st appearance to receipt by DPP	% referred back for further investigation	Receipt by DPP to indictment	1st DC appearance to 1st HC appearance	Indictment to 1st HC appearance	% Cases postponed	Crime to trial	1st DC appearance to trial	1st HC appearance to start of trial	Trail to verdict	Crime to sentence	1st DC appearance to sentence	Receipt by DPP to sentence	1st HC appearance to sentence	Trial to sentence	Conviction to sentence
BOP	2000	3.38	112	7.6	108	248	73%	247	548	52	31%	721	613	66	6	727	619	371	72	6	0
	2001	3.19	88	7.5	108	211	76%	220	490	59	45%	653	545	55	1	640	553	340	57	1	0
Jan-Jun	2002				43	147	100%	272	475	57	53%	551	508	33	3	514	472	331	33	0	0
Jul-Dec	2002		47	6.7%	139	184	95%	213	452	55	30%	619	477	27	1	622	467	290	28	1	1
Average	**2002**	**03:14**	**87**	**6%**	**91**	**166**	**98%**	**243**	**464**	**56**	**42%**	**585**	**493**	**30**	**2**	**568**	**470**	**311**	**31**	**1**	**1**
CIS	2000	3.39	73	5.0	182	134	49%	101	337	101	33%	548	366	30	34	586	404	269	67	37	3
	2001	3.43	60	5.1	212	108	55%	108	297	81	28%	522	307	10	44	569	354	246	57	47	3
Jan-Jun	2002				215	174	26%	99	346	78	29%	548	359	13	30	575	386	213	45	31	1
Jul-Dec	2002		50	7.1%	328	150	24%	94	351	106	48%	728	372	21	30	787	436	277	65	41	6
Average	**2002**	**03:59**	**78**	**5%**	**272**	**162**	**25%**	**97**	**349**	**92**	**39%**	**638**	**366**	**17**	**30**	**681**	**411**	**245**	**55**	**36**	**4**
CPD	2000	3.04	148	10.1	104	240	38%	132	551	179	36%	692	587	38	33	727	622	384	72	35	2
	2001	3.03	78	6.6	69	233	85%	136	591	222	36%	699	629	36	37	741	671	437	78	42	5
Jan-Jun	2002				144	237	83%	131	591	224	39%	775	631	40	59	837	693	456	102	62	3
Jul-Dec	2002		31	4.4%	345	232	72%	159	678	287	45%	1085	739	61	95	1185	840	608	162	101	5
Average	**2002**	**03:04**	**84**	**6%**	**245**	**235**	**78%**	**145**	**635**	**256**	**42%**	**930**	**685**	**51**	**77**	**1011**	**767**	**532**	**132**	**82**	**4**
ECD GHT	2000	3.35	67	4.6	46	106	48%	100	342	136	16%	413	367	25	33	450	404	298	62	37	4
	2001	3.25	89	7.6	52	162	39%	86	412	163	8%	520	421	12	47	577	476	321	72	60	13
Jan-Jun	2002				38	132	35%	97	358	124	53%	426	367	10	27	461	403	271	45	35	9
Jul-Dec	2002		46	6.5%	22	113	65%	148	400	117	2%	403	381	3	19	429	407	294	146	26	6
Average	**2002**				**30**	**123**	**50%**	**123**	**379**	**121**	**28%**	**415**	**374**	**7**	**23**	**445**	**405**	**283**	**96**	**31**	**8**
ECD PE	2000		43	2.9	55	149	30%	71	363	144	14%	441	386	22	33	489	433	285	70	48	15
	2001		46	3.9	159	143	61%	66	430	182	20%	536	445	10	39	605	514	298	51	42	5
Jan-Jun	2002		15	2.5	4	214	0%	30	396	152	7%	403	400	4	46	405	402	245	63	60	14
Jul-Dec	2002		38	5.4%	49	203	34%	70	404	132	26%	466	418	13	30	489	447	257	48	37	4
Average	**2002**				**27**	**209**	**17%**	**50**	**400**	**142**	**17%**	**435**	**409**	**9**	**38**	**447**	**425**	**251**	**56**	**49**	**9**
ECD Tota	**2002**	**03:26**	**131**	**9%**	**28**	**166**	**34%**	**86**	**390**	**131**	**22%**	**425**	**392**	**8**	**31**	**446**	**415**	**267**	**76**	**40**	**8**

ANNEXURE C_a

AUDIT OF TRIALS IN HIGH COURT JULY TO DECEMBER 2002

DIVISION	Year	Ave Hours	No. Finalised	% of the TOTAL finalised	Crime to 1st DC appearance	1st appearance to receipt by DPP	% referred back for further investigation	Receipt by DPP to indictment	1st DC appearance to 1st HC appearance	Indictment to 1st HC appearance	% Cases postponed	Crime to trial	1st DC appearance to trial	1st HC appearance to start of trial	Trail to verdict	Crime to sentence	1st DC appearance to sentence	Receipt by DPP to sentence	1st HC appearance to sentence	Trial to sentence	Conviction to sentence
FSD	2000	3.21	92	6.3	104	268	41%	89	474	116	11%	610	506	32	13	626	522	253	49	16	3
	2001	3.39	70	5.9	107	195	77%	106	499	198	11%	621	514	14	41	676	569	370	64	48	6
Jan-Jun	2002			0.0	48	145	65%	95	433	193	9%	477	442	9	8	483	435	293	15	6	1
Jul-Dec	2002		40	5.7%	65	195	68%	81	471	196	15%	559	494	22	23	579	511	323	50	32	8
Average	**2002**	***03:58***	***113***	***8%***	**57**	**170**	**67%**	**88**	**452**	**195**	**12%**	**518**	**468**	**16**	**16**	**531**	**473**	**308**	**33**	**19**	**5**
NCD	2000	3.43	69	4.7	39	170	26%	68	358	91	25%	400	361	33	6	408	369	201	41	9	3
	2001	3.54	55	4.7	29	148	36%	73	335	113	38%	388	360	25	6	385	354	212	30	10	3
Jan-Jun	2002				158	125	41%	68	259	94	37%	519	289	45	18	367	274	160	45	17	3
Jul-Dec	2002		34	4.8%	136	157	91%	109	360	99	26%	477	392	27	12	437	422	270	44	20	8
Average	**2002**	***03:31***	***62***	***4%***	**147**	**141**	**66%**	**89**	**310**	**97**	**32%**	**498**	**341**	**36**	**15**	**402**	**348**	**215**	**45**	**19**	**6**
KZN DRB	2000	3.16	133	9.0	167	221	82%	145	605	238	35%	855	688	83	35	891	725	503	120	37	2
	2001	3.35	116	9.8	186	127	98%	196	584	265	47%	880	682	95	90	972	779	660	188	93	2
Jan-Jun	2002				155	208	47%	162	567	197	55%	766	619	52	25	791	644	436	77	25	1
Jul-Dec	2002		28	4.0%	107	257	25%	164	578	157	50%	776	669	91	38	814	715	456	129	40	4
Average	**2002**				**131**	**233**	**36%**	**163**	**573**	**177**	**53%**	**771**	**644**	**72**	**32**	**803**	**680**	**446**	**103**	**33**	**3**
KZN PMB	2000		142	9.7	97	231	35%	54	423	139	51%	597	201	77	36	637	540	310	117	40	4
	2001		122	10.4	61	161	42%	88	402	153	54%	499	438	36	71	572	503	346	106	72	1
Jan-Jun	2002		69	11.5	73	137		112	332	104	75%	508	391	67	22	461	346	273	73	14	0
Jul-Dec	2002		67	9.5%	156	129	22%	97	324	98	31%	510	354	30	30	523	388	250	62	32	1
Average	**2002**				**115**	**133**		**105**	**328**	**101**	**53%**	**509**	**373**	**49**	**26**	**492**	**367**	**262**	**68**	**23**	**1**
KZNTotal	**2002**	***03:38***	***248***	***17%***	123	183	31%	134	450	139	53%	640	508	60	29	647	523	354	85	28	2
TPD	2000	3.53	221	15.0	79	140	85%	202	531	189	36%	698	620	89	9	709	631	491	100	11	2
	2001	4.03	139	11.8	84	155	89%	192	587	196	64%	776	742	137	21	799	766	559	163	23	3
Jan-Jun	2002			0.0	38	192	90%	176	589	206	93%	797	758	169	14	617	580	410	105	17	3
Jul-Dec	2002		124	17.6%	76	163	56%	151	480	172	48%	694	618	138	32	738	662	505	182	44	12
Average	**2002**	***03:51***	***253***	***17%***	**57**	**178**	**73%**	**164**	**535**	**189**	**71%**	**746**	**688**	**154**	**23**	**678**	**621**	**458**	**144**	**31**	**8**

ANNEXURE C_a

AUDIT OF TRIALS IN HIGH COURT JULY TO DECEMBER 2002

DIVISION	Year	Ave Hours	No. Finalised	% of the TOTAL finalised	Crime to 1st DC appearance	1st appearance to receipt by DPP	% referred back for further investigation	Receipt by DPP to indictment	1st DC appearance to 1st HC appearance	Indictment to 1st HC appearance	% Cases postponed	Crime to trial	1st DC appearance to trial	1st HC appearance to start of trial	Trail to verdict	Crime to sentence	1st DC appearance to sentence	Receipt by DPP to sentence	1st HC appearance to sentence	Trial to sentence	Conviction to sentence
TRA	2000	3.13	111	7.6	295	302	35%	426	1070	348	72%	1438	1269	164	27	1468	1279	969	195	31	3
	2001	3.29	144	12.2	76	366	38%	239	927	352	66%	1130	1053	126	90	1192	1120	767	196	84	3
Jan-Jun	2002				201	175	38%	136	516	222	100%	835	601	91	153	720	500	456	202	153	17
Jul-Dec	2002		79	11.2%	75	221	43%	133	545	187	58%	725	649	103	179	880	802	584	287	191	15
Average	2002	03:32	151	10%	138	198	41%	135	531	205	79%	780	625	97	166	800	651	520	245	172	16
VEN	2000	3.33	47	3.2	55	200	89%	86	448	162	49%	521	467	19	34	559	504	305	57	38	4
	2001	3.21	55	4.7	33	208	51%	63	373	103	42%	477	412	29	31	512	443	238	63	32	1
Jan-Jun	2002			0.0	108	296	28%	418	820	106	100%	960	852	33	13	974	866	570	43	14	1
Jul-Dec	2002		40	5.7%	177	142	13%	183	415	89	77%	626	449	35	21	657	465	332	66	28	1
Average	2002	03:51	91	6%	143	219	21%	301	618	98	89%	793	651	34	17	816	666	451	55	21	1
WLD	2000	3.07	212	14.4	123	195	17%	59	434	180	76%	644	521	87	92	752	629	434	194	108	16
	2001	3.17	116	9.8	127	127	39%	46	453	244	76%	667	543	90	39	732	607	431	151	60	22
Jan-Jun	2002			0.0	100	154	0%	34	454	262	38%	724	629	186	42	665	586	466	209	64	24
Jul-Dec	2002		79	11.2%	203	157	1%	50	550	343	53%	926	723	173	53	971	807	652	259	76	18
Average	2002	03:02	171	12%	152	156	1%	42	502	303	45%	825	676	180	48	818	697	559	234	70	21
NPA	2000	03:08	1470	100%	104	191	50%	145	470	170	42%	698	484	69	33	736	568	422	108	38	5
	2001	03:29	1178	100%	91	176	61%	136	489	193	46%	685	554	65	47	683	562	417	108	49	5
Jan-Jun	2002			100%	103	178	61%	142	486	168	72%	673	560	78	38	630	526	378	98	41	7
Jul-Dec	2002		703	100%	155	183	49%	125	285	160	39%	683	530	62	46	724	580	400	115	54	7
AverageT	2002	03:28	1469	100%	129	181	55%	134	385	164	56%	678	545	70	42	677	553	389	107	48	7

ANNEXURE D_a

AUDIT OF TRIALS IN HIGH COURT JULY TO DECEMBER 2002

DIVISION	Year	Ave Hours	No. Finalised	% of the TOTAL finalised	Crime to 1st DC appearance	1st appearance to receipt by DPP	% referred back for further investigation	Receipt by DPP to indictment	1st DC appearance to 1st HC appearance	Indictment to 1st HC appearance	% Cases postponed	Crime to trial	1st DC appearance to trial	1st HC appearance to start of trial	Trail to verdict	Crime to sentence	1st DC appearance to sentence	Receipt by DPP to sentence	1st HC appearance to sentence	Trial to sentence	Conviction to sentence
BOP	2000	3.38	112	7.6	108	248	73%	247	548	52	31%	721	613	66	6	727	619	371	72	6	0
	2001	3.19	88	7.5	108	211	76%	220	490	59	45%	653	545	55	1	640	553	340	57	1	0
Jan-Jun	2002				43	147	100%	272	475	57	53%	551	508	33	3	514	472	331	33	0	0
Jul-Dec	2002		47	6.7%	139	184	95%	213	452	55	30%	619	477	27	1	622	467	290	28	1	1
Average	2002	03:14	87	6%	91	166	98%	243	464	56	42%	585	493	30	2	568	470	311	31	1	1
CIS	2000	3.39	73	5.0	182	134	49%	101	337	101	33%	548	366	30	34	586	404	269	67	37	3
	2001	3.43	60	5.1	212	108	55%	108	297	81	28%	522	307	10	44	569	354	246	57	47	3
Jan-Jun	2002				215	174	26%	99	346	78	29%	548	359	13	30	575	386	213	45	31	1
Jul-Dec	2002		50	7.1%	328	150	24%	94	351	106	48%	728	372	21	30	787	436	277	65	41	6
Average	2002	03:59	78	5%	272	162	25%	97	349	92	39%	638	366	17	30	681	411	245	55	36	4
CPD	2000	3.04	148	10.1	104	240	38%	132	551	179	36%	692	587	38	33	727	622	384	72	35	2
	2001	3.03	78	6.6	69	233	85%	136	591	222	36%	699	629	36	37	741	671	437	78	42	5
Jan-Jun	2002				144	237	83%	131	591	224	39%	775	631	40	59	837	693	456	102	62	3
Jul-Dec	2002		31	4.4%	345	232	72%	159	678	287	45%	1085	739	61	95	1185	840	608	162	101	5
Average	2002	03:04	84	6%	245	235	78%	145	635	256	42%	930	685	51	77	1011	767	532	132	82	4
ECD GHT	2000	3.35	67	4.6	46	106	48%	100	342	136	16%	413	367	25	33	450	404	298	62	37	4
	2001	3.25	89	7.6	52	162	39%	86	412	163	8%	520	421	12	47	577	476	321	72	60	13
Jan-Jun	2002				38	132	35%	97	358	124	53%	426	367	10	27	461	403	271	45	35	9
Jul-Dec	2002		46	6.5%	22	113	65%	148	400	117	2%	403	381	3	19	429	407	294	146	26	6
Average	2002				30	123	50%	123	379	121	28%	415	374	7	23	445	405	283	96	31	8
ECD PE	2000		43	2.9	55	149	30%	71	363	144	14%	441	386	22	33	489	433	285	70	48	15
	2001		46	3.9	159	143	61%	66	430	182	20%	536	445	10	39	605	514	298	51	42	5
Jan-Jun	2002		15	2.5	4	214	0%	30	396	152	7%	403	400	4	46	405	402	245	63	60	14
Jul-Dec	2002		38	5.4%	49	203	34%	70	404	132	26%	466	418	13	30	489	447	257	48	37	4
Average	2002				27	209	17%	50	400	142	17%	435	409	9	38	447	425	251	56	49	9
ECD Tota	2002	03:26	131	9%	28	166	34%	86	390	131	22%	425	392	8	31	446	415	267	76	40	8

ANNEXURE D_a

AUDIT OF TRIALS IN HIGH COURT JULY TO DECEMBER 2002

DIVISION	Year	Ave Hours	No. Finalised	% of the TOTAL finalised	Crime to 1st DC appearance	1st appearance to receipt by DPP	% referred back for further investigation	Receipt by DPP to indictment	1st DC appearance to 1st HC appearance	Indictment to 1st HC appearance	% Cases postponed	Crime to trial	1st DC appearance to trial	1st HC appearance to start of trial	Trail to verdict	Crime to sentence	1st DC appearance to sentence	Receipt by DPP to sentence	1st HC appearance to sentence	Trial to sentence	Conviction to sentence
FSD	2000	3.21	92	*6.3*	104	268	*41%*	89	*474*	116	*11%*	610	506	32	13	626	522	253	49	16	3
	2001	3.39	70	*5.9*	107	195	*77%*	106	499	198	*11%*	621	514	14	41	676	569	370	64	48	6
Jan-Jun	2002			*0.0*	48	145	*65%*	95	433	193	*9%*	477	442	9	8	483	435	293	15	6	1
Jul-Dec	2002		40	*5.7%*	65	195	*68%*	81	471	196	*15%*	559	494	22	23	579	511	323	50	32	8
Average	**2002**	***03:58***	***113***	***8%***	**57**	**170**	**67%**	**88**	**452**	**195**	**12%**	**518**	**468**	**16**	**16**	**531**	**473**	**308**	**33**	**19**	**5**
NCD	2000	3.43	69	*4.7*	39	170	*26%*	68	358	91	*25%*	400	361	33	6	408	369	201	41	9	3
	2001	3.54	55	*4.7*	29	148	*36%*	73	335	113	*38%*	388	360	25	6	385	354	212	30	10	3
Jan-Jun	2002				158	125	*41%*	68	259	94	*37%*	519	289	45	18	367	274	160	45	17	3
Jul-Dec	2002		34	*4.8%*	136	157	*91%*	109	360	99	*26%*	477	392	27	12	437	422	270	44	20	8
Average	**2002**	***03:31***	***62***	***4%***	**147**	**141**	**66%**	**89**	**310**	**97**	**32%**	**498**	**341**	**36**	**15**	**402**	**348**	**215**	**45**	**19**	**6**
KZN DRB	2000	3.16	133	*9.0*	167	221	*82%*	145	605	238	*35%*	855	688	83	35	891	725	503	120	37	2
	2001	3.35	116	*9.8*	186	127	*98%*	196	584	265	*47%*	880	682	95	90	972	779	660	188	93	2
Jan-Jun	2002				155	208	*47%*	162	567	197	*55%*	766	619	52	25	791	644	436	77	25	1
Jul-Dec	2002		28	*4.0%*	107	257	*25%*	164	578	157	*50%*	776	669	91	38	814	715	456	129	40	4
Average	**2002**				**131**	**233**	**36%**	**163**	**573**	**177**	**53%**	**771**	**644**	**72**	**32**	**803**	**680**	**446**	**103**	**33**	**3**
KZN PMB	2000		142	*9.7*	97	231	*35%*	54	423	139	*51%*	597	201	77	36	637	540	310	117	40	4
	2001		122	*10.4*	61	161	*42%*	88	402	153	*54%*	499	438	36	71	572	503	346	106	72	1
Jan-Jun	2002		69	*11.5*	73	137		112	332	104	*75%*	508	391	67	22	461	346	273	73	14	0
Jul-Dec	2002		67	*9.5%*	156	129	*22%*	97	324	98	*31%*	510	354	30	30	523	388	250	62	32	1
Average	**2002**				**115**	**133**		**105**	**328**	**101**	**53%**	**509**	**373**	**49**	**26**	**492**	**367**	**262**	**68**	**23**	**1**
KZNTotal	**2002**	***03:38***	***248***	***17%***	123	183	31%	134	450	139	53%	640	508	60	29	647	523	354	85	28	2
TPD	2000	3.53	221	*15.0*	79	140	*85%*	202	531	189	*36%*	698	620	89	9	709	631	491	100	11	2
	2001	4.03	139	*11.8*	84	155	*89%*	192	587	196	*64%*	776	742	137	21	799	766	559	163	23	3
Jan-Jun	2002			*0.0*	38	192	*90%*	176	589	206	*93%*	797	758	169	14	617	580	410	105	17	3
Jul-Dec	2002		124	*17.6%*	76	163	*56%*	151	480	172	*48%*	694	618	138	32	738	662	505	182	44	12
Average	**2002**	***03:51***	***253***	***17%***	**57**	**178**	**73%**	**164**	**535**	**189**	**71%**	**746**	**688**	**154**	**23**	**678**	**621**	**458**	**144**	**31**	**8**

ANNEXURE D_a

AUDIT OF TRIALS IN HIGH COURT JULY TO DECEMBER 2002

DIVISION	Year	Ave Hours	No. Finalised	% of the TOTAL finalised	Crime to 1st DC appearance	1st appearance to receipt by DPP	% referred back for further investigation	Receipt by DPP to indictment	1st DC appearance to 1st HC appearance	Indictment to 1st HC appearance	% Cases postponed	Crime to trial	1st DC appearance to trial	1st HC appearance to start of trial	Trail to verdict	Crime to sentence	1st DC appearance to sentence	Receipt by DPP to sentence	1st HC appearance to sentence	Trial to sentence	Conviction to sentence
TRA	2000	3.13	111	7.6	295	302	35%	426	1070	348	72%	1438	1269	164	27	1468	1279	969	195	31	3
	2001	3.29	144	12.2	76	366	38%	239	927	352	66%	1130	1053	126	90	1192	1120	767	196	84	3
Jan-Jun	2002				201	175	38%	136	516	222	100%	835	601	91	153	720	500	456	202	153	17
Jul-Dec	2002		79	11.2%	75	221	43%	133	545	187	58%	725	649	103	179	880	802	584	287	191	15
Average	2002	03:32	151	10%	138	198	41%	135	531	205	79%	780	625	97	166	800	651	520	245	172	16
VEN	2000	3.33	47	3.2	55	200	89%	86	448	162	49%	521	467	19	34	559	504	305	57	38	4
	2001	3.21	55	4.7	33	208	51%	63	373	103	42%	477	412	29	31	512	443	238	63	32	1
Jan-Jun	2002			0.0	108	296	28%	418	820	106	100%	960	852	33	13	974	866	570	43	14	1
Jul-Dec	2002		40	5.7%	177	142	13%	183	415	89	77%	626	449	35	21	657	465	332	66	28	1
Average	2002	03:51	91	6%	143	219	21%	301	618	98	89%	793	651	34	17	816	666	451	55	21	1
WLD	2000	3.07	212	14.4	123	195	17%	59	434	180	76%	644	521	87	92	752	629	434	194	108	16
	2001	3.17	116	9.8	127	127	39%	46	453	244	76%	667	543	90	39	732	607	431	151	60	22
Jan-Jun	2002			0.0	100	154	0%	34	454	262	38%	724	629	186	42	665	586	466	209	64	24
Jul-Dec	2002		79	11.2%	203	157	1%	50	550	343	53%	926	723	173	53	971	807	652	259	76	18
Average	2002	03:02	171	12%	152	156	1%	42	502	303	45%	825	676	180	48	818	697	559	234	70	21
NPA	2000	03:08	1470	100%	104	191	50%	145	470	170	42%	698	484	69	33	736	568	422	108	38	5
	2001	03:29	1178	100%	91	176	61%	136	489	193	46%	685	554	65	47	683	562	417	108	49	5
Jan-Jun	2002			100%	103	178	61%	142	486	168	72%	673	560	78	38	630	526	378	98	41	7
Jul-Dec	2002		703	100%	155	183	49%	125	285	160	39%	683	530	62	46	724	580	400	115	54	7
AverageT	2002	03:28	1469	100%	129	181	55%	134	385	164	56%	678	545	70	42	677	553	389	107	48	7

APPENDIX E

THE UNITED KINGDOM

There is an **adversarial** system and **jury** system in the United Kingdom.

The Supreme Court consists of the Court of Appeal, the High Court and the Crown Court. A person convicted at a magistrates' court may appeal to the Crown Court, while a person convicted at the Crown Court may appeal to the Court of Appeal and finally to the House of Lords.

Appeals on points of law and proceedings arising in the magistrates' courts are dealt with by the Queen's Bench, Divisional Court of the High Court. It has very limited jurisdiction in such matters arising in the Crown Court.

The highest court in the land is the House of Lords. This court is composed of the Lords of Appeal, who are lawyers of eminence generally appointed from amongst the judges of the Court of Appeal. They deal with points of law of general public importance brought before them on appeal from the Supreme Court.

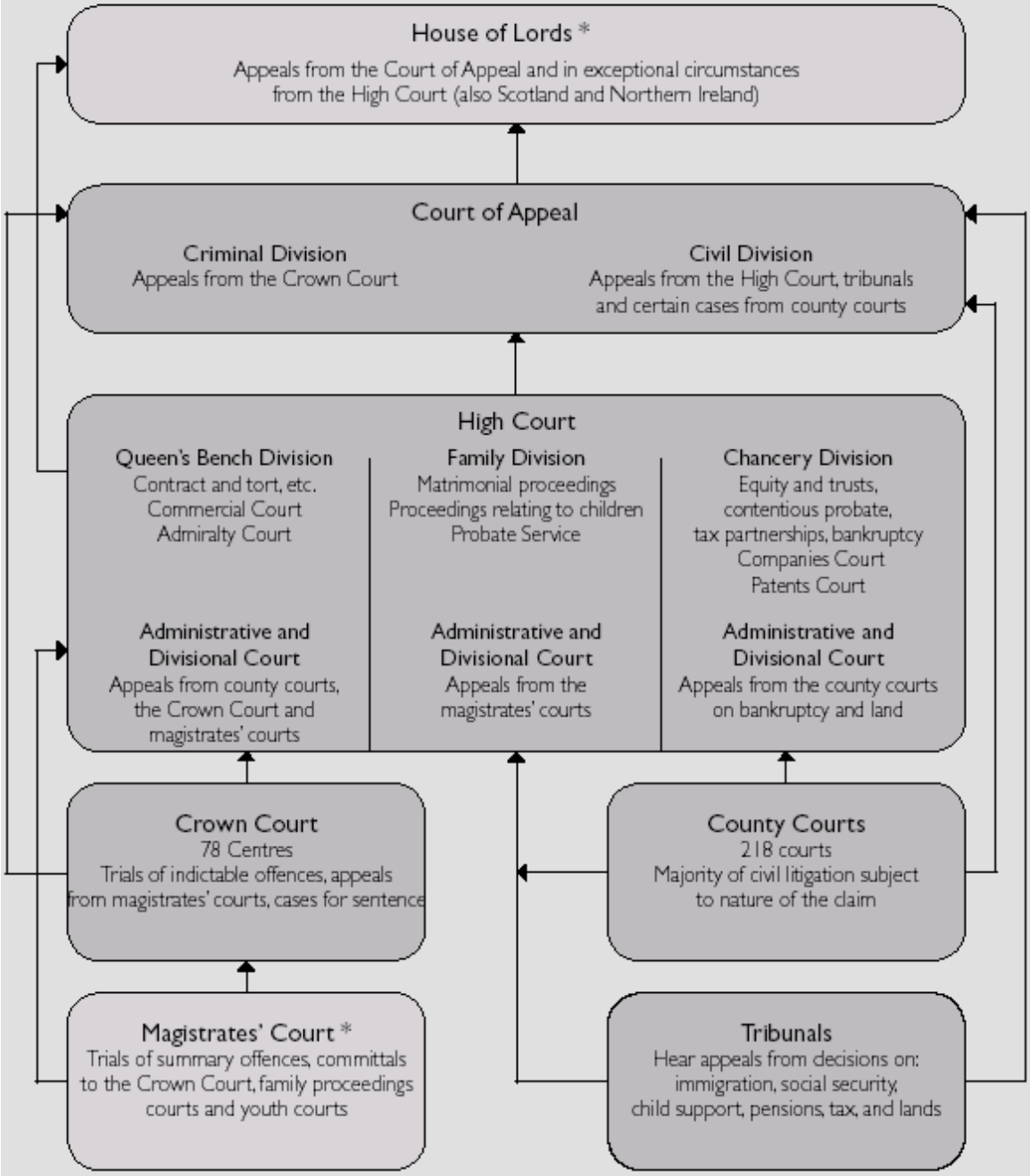
As can be seen from the table below, civil and criminal jurisdictions are separated. Whereas the traditional civil vacations have been left largely unaltered, in criminal trial courts the policy of the government has been to attempt to keep these courts open throughout the year subject to weekends and public holidays. [1]

[1] From a telephonic interview with Mr Budger, of the Lord Chancellor's Division, United Kingdom.

APPENDIX E

The Court Structure in England and Wales

The Court Service carries out the administrative and support tasks for: the Court of Appeal; the High Court; the Crown Court; the county courts; the Probate Service; and certain tribunals. The structure of the courts in England and Wales is set out below.



* Although the House of Lords and the Magistrates' Courts, form part of the structure within England and Wales, the Court Service does not administer them. This diagram is, of necessity, much simplified and should not be taken as a comprehensive statement on the jurisdiction of any specific court.

The **Crown Court**, which hears all the serious criminal trials, was created by the Courts Act of 1971. This latter Act abolished the previous criminal system of Assizes and the courts of Quarter Session.

The Courts Act, 1971 provided that:

> "*The places at which the Crown Court sits and the days and times at which the Crown Court sits at any place shall be determined in accordance with directions given by or on behalf of the Lord Chancellor."*[2]

The Crown Courts[3] are manned by circuit judges and, from time to time, by High Court Judges, and sit throughout the year.

The Circuit Court Judges, who do the majority of the work, are required to sit for a minimum of **210 days** of the year, and their leave period is staggered.

The High Court Judges also sit in Crown Courts, where circumstances demand it.[4] These (High Court) Judges have a commitment of only **189 days** per year, and are entitled to certain formal vacations[5].

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[2] This provision is now repealed; however, s.78(3) of the Supreme Court Act, 1981 preserves it, in exactly the same terms. Neither Act makes reference to vacation times.

[3] The creation of the Crown Court was first mooted by the Royal Commission on Assizes and Quarter Sessions, 1966 – 1969, chaired by Lord Beeching as a result of the difficulties created, *inter alia,* by the system of Assizes and the limited time the judges were available to hear cases. See Beeching Report, 1969 on next page.

[4] For purposes of trial in the Crown Court, offences are divided into four classes of seriousness, according to directions given by the Lord Chief Justice, with the concurrence of the Lord Chancellor: ***Class 1*** offences are the most serious offences and are **generally** to be tried by a High Court judge, unless a particular case is released on the authority of a Presiding judge to a circuit judge. These offences include treason and murder. ***Class 2*** offences are **generally** also to be tried by a High Court judge unless a particular a case is released on the authority of a Presiding judge to a circuit judge or other judge. These offences include manslaughter and rape. ***Class 3*** offences **may** be listed for trial by a High Court judge, but may be tried by a circuit judge or recorder if the listing officer, acting under the directions of a judge, so decides. Class 3 offences include all offences triable only on indictment other than those specifically assigned to classes 1, 2 and 4, for example, aggravated burglary, kidnapping and causing death by dangerous driving. ***Class 4*** offences are normally tried by a circuit judge, recorder or assistant recorder, although they may be tried by a High Court judge. They include grievous bodily harm, robbery and conspiracy, and all 'either way' offences – those which may be tried whether on indictment at the Crown Court or summarily, i.e. at magistrates' courts. The offences include treason and murder.

Prior to the Courts Act, 1971, the (now abolished) Assizes Courts were presided over by High Court Judges only and, consequently, the traditional High Court vacation times applied to the Assizes Courts.

By creating a new tier of '**hybrid**' criminal court, comprised of both High Court Judges, with their traditional High Court vacation time, and Circuit Court Judges with no such traditional vacation time, Parliament attempted to ensure the **continuous session** of the Crown Court.

In addition, the so-called '**ticketing**' system was introduced. 'Ticketing' entails authorization to hear the more serious cases[6], which is given by the Presiding judge to Circuit judges whom he feels have the aptitude and experience necessary to deal with these particular cases, which were hitherto the prerogative of High Court judges only[7].

The High Court vacation times still technically apply to High Court Judges when sitting in the Crown Court, although it is widely noted that even this appears to be coming to an end, with High Court Judges now sitting through the summer where required in serious criminal cases.

The Beeching Report, 1969.

The Royal Commission on Assizes and Quarter Sessions, 1966 – 1969, chaired by Lord Beeching, was the Parliamentary body which first mooted

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[5] 3 weeks at Christmas, 2 weeks at Easter, 1 week at Whitsun and the two summer months of July and August.
[6] See footnote 4 *supra.*
[7] Lord Justice Auld, in his Review on the Criminal Courts of England and Wales remarked that "at present, authorizations are given primarily, not as a badge of recognition or advancement, but to relieve High Court judges from having to try certain cases of a particular class or category, where there are too many for them to try." He recommended that "most of the rigidities of the present 'ticketing' system should be removed and replaced by the conferment on the Resident Judges wide responsibility, subject to general oversight of the Presiding Judges, for allocation of judicial work at their court centres, but coupled with, [firstly,] regular and systematic appraisal enabling Resident Judges and Presiding Judges to determine the experience and interests of the judges; and [secondly], the undertaking by judges of such training by the JSB as may be required as a pre-condition for the trial of particular categories of work." Chapter 6, para 20 – 25.

the idea of the restructuring of the court system, and the creation of the Crown Court. Their report considers the difficulties created, *inter alia*, by the system of Assizes, and the limited time the judges were available to hear cases. As shown above, their recommendations in this regard were largely accepted.

It is interesting to note that, in addition to the above measures, the Commission also had certain recommendations in respect of the fixed two month summer vacation, which were not dealt with by Parliament in the Act establishing the Crown Courts[8].

Beeching made the wry comment that "*proposals for any reduction in the length of vacations are understandably likely to arouse strong feelings, and arguments for leaving the holiday period undisturbed, therefore, need to be examined dispassionately."*[9]

In the event, as has been seen, the matter of vacation times was left open by the Legislature.

The Beeching Commission was opposed to the 2 month summer vacations enjoyed by High Court judges (when sitting in the proposed Crown Courts) on grounds that these vacations -

> *"i [caused] an inevitable increase in the delay time of some cases by 2 months – 2 months of real time to those who are not lawyers; and*
> *ii the peak in court loading which is bound to follow a shut down of 2 month' duration, with consequent disturbances to listing for months thereafter, and a recurrent danger that*

[8] See footnote 2.
[9] The Royal Commission on Assizes and Quarter Sessions, 1966 – 1969 para 422, p. 133.

> *each peak in turn may cause a permanent extension of average delay time."* [10]

Lord Beeching recommended that:

- consideration be given to reducing the formal legal vacation periods for High Court Judges sitting in the Crown Court; in particular, to confining the summer vacation to the month of August, and,
- that this should be achieved by greater staggering of the existing sitting commitments of the High Court Bench, not by increasing them.

Beeching that was of the view that, if implemented, his recommendations would be beneficial to judges and not make any real difference to the lives of the legal practitioners.

The Beeching Commission also considered an argument by a joint Committee of the Bar Council and the Council of Law Society for retaining the long vacation.

Their case was that the general public might find their holidays interfered with, and that most of the other courts in the country did not close for such a lengthy period. The point is made in the report that the second argument rather tends to defeat the first – that is, presumably, if all of the other courts in the country are closed for a shorter period of time, they must interfere with the holidays of a larger number of persons.

The Commission stated thus:

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[10] *op. cit.* para 422 – 425, pp.133 – 134.

> *"We recognize …. that national habits are changing. Holidays abroad are becoming relatively cheap and common, so that climatic restriction of holiday months is diminishing.* ***Staggering of holidays is being fostered****, and in many places the 'Wakes week' approach to industrial holidays has disappeared. It will, therefore, become progressively more difficult to sustain the argument that closure for 'the holiday period' will eliminate most of the problems arising from holiday absence. Therefore, although we think it justifiable for the courts to close for a month, we recommend that the closure of the High Court for a summer vacation should be* ***made progressively shorter and less complete*** *than it is at present. By* ***staggering*** *this, we are not proposing that High Court judges should have their total vacation period cut, and certainly not without recompense, but, moved by the same influences as others, many judges may welcome a wider choice in the timing of holidays, and staggering of their leave should be quite possible.*
>
> *It is also relevant that, with the reduced reliance on part-time judges which we are proposing, it will no longer be necessary for members of the Bar to sit judicially in the Long Vacation to avoid interference with their practices.*
>
> *We firmly believe that, if the Long Vacation is reduced, most of the difficulties foreseen by the legal profession will prove to be unreal, and certainly no more difficult than those which other professional men take in their stride."*[11]

In the period subsequent to the Courts Act, 1971, the Lord Chancellor set no vacation times in respect of **Circuit Judges** in the Crown Court. However, in the earliest stages of the new criminal system, lists tended to be kept light of business throughout August and September reflecting the position as it had been with the Assize Courts.

Over time, the pressure of work at the criminal courts, and the increased numbers at the Bar contributed to more and more listings being arranged

[11] *Op. cit.* para 424, p.134.

in those months, and the ebbing away of the traditional lighter load at those times. Simply, the number of cases the Crown Court was required to adjudicate upon grew, as did the number of barristers able to perform that work. It became impossible to meet the demand for court time and to retain the vacation time in any real form.[12]

The general increase in workload is clearly reflected by examining the statistics on the following table.

[12] During 2001, 80,551 cases were received for trial at the Crown Court, an increase of over 13% on the 2000 total. Committals for trial disposed of during 2001 totalled 75,565, an increase of nearly 4%. As receipts exceeded disposals the number of cases outstanding increased by nearly 38% to 31,612 compared with 22,946 at the end of 2000. Lord Chancellors Department Report "Judicial Statistics" [Volumes 1986 – 2001].

APPENDIX E

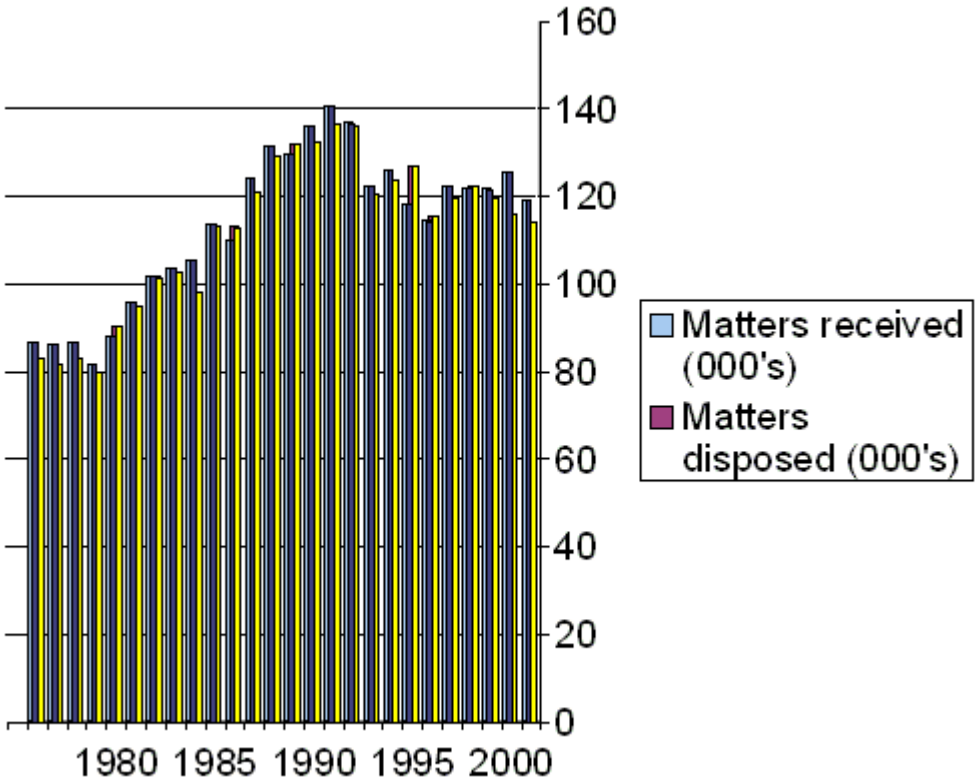
Table of matters dealt with by Crown Court

Year	Trials received	Trials disposed	Committals for sentence received	Committals for sentence disposed	Appeals received	Appeals disposed	**Total received**	**Total disposed**
1974	App. 44000	App. 44500	XXX	XXX	XXX	XXX	**No figures**	**No figures**
1975	App. 50000	App. 48000	XXX	XXX	XXX	XXX	**No figures**	**No figures**
1976	54576	51705	16628	16419	15304	14990	**86508**	**83114**
1977	57407	53118	13138	12846	15857	15497	**86402**	**81461**
1978	57091	53927	13223	13050	16372	16195	**86686**	**83172**
1979	50798	49464	13983	13961	16699	16274	**81480**	**79699**
1980	55594	57271	14935	14973	17531	17859	**88060**	**90103**
1981	60750	61929	15421	15223	19710	17573	**95881**	**94725**
1982	67869	66184	14845	14544	19025	20775	**101739**	**101503**
1983	73524	72567	11222	11521	18861	18775	**103607**	**102863**
1984	75283	74777	9250	9141	20622	20350	**105155**	**98268**
1985	83898	82788	9299	9427	20596	21059	**113793**	**113274**
1986	84244	86426	7504	7581	18386	18925	**110134**	**112932**
1987	98873	96197	7947	7867	17276	17053	**124096**	**121117**
1988	106524	104773	8577	8485	16315	15849	**131416**	**129107**
1989	98668	101232	13718	13689	17223	16860	**129609**	**131781**
1990	103011	100005	15270	14988	17801	17557	**135838**	**132550**
1991	104754	101999	16554	15995	19150	18433	**140458**	**136427**
1992	100994	100742	14883	15546	20783	19765	**136660**	**136053**
1993	86849	85566	11088	10956	24531	23722	**122468**	**120244**
1994	89301	86980	11485	11226	25262	25644	**126048**	**123850**
1995	81186	88985	11718	11726	25240	26062	**118144**	**126773**
1996	83328	83274	12002	11762	18981	20304	**114311**	**115340**
1997	91110	90096	14871	13378	16269	16196	**122250**	**119610**
1998	75815	77794	29774	28224	16278	16473	**121867**	**122491**
1999	74232	73539	31928	30641	15413	15381	**121573**	**119561**
2000	71022	72762	27591	28713	13902	14359	**112515**	**115834**
2001	80551	75565	25960	25717	12596	12679	**119107**	**113961**

NB Note a drop in Crown court trials received in 1978 – a result of the Criminal Law Act 1977 which reclassified offences and enabled more matters to be dealt with by the Magistrates' Courts and similarly a drop in 1989 as a result of reclassifying offences under the Criminal Justice Act 1988.

**Figures taken from the Lord Chancellor's Department Report "Judicial Statistics" (volumes 1986-2001)

APPENDIX E


160
140
120
100
80
60
40
20
0
1980 1985 1990 1995 2000
Matters received (000's)
Matters disposed (000's)

In September 2001, **Lord Justice Auld**[13] recommended that the Beeching Commission's recommendation in respect of the '**staggering**' of the respective Judges' vacations be revisited as, in practice, almost all the High Court judges were in fact working throughout the formal vacations. In fact, in August, the Crown Courts dealt with about 70% of its usual monthly workload.

Lord Justice Auld based his recommendation also on the reasoning that a shorter summer vacation would be -

> "*a useful discipline in maintaining the momentum of case preparation and management. It would be more in line with the working patterns of most public and private sector organizations. And, it would help to correct a popular misconception about the present work pattern and load of the higher judiciary*."[14]

No statute of Practice Direction brought a sudden halt to the summer vacation within the Crown Court, although it is plain that the restructuring of the criminal court system and the creation of a new rank of judge were largely responsible for the changes.

Ultimately, it was the **pressure** placed on the courts by the number of cases before it, and the commitment of the judiciary to efficient and speedy justice, which forced an abandonment of even a lighter summer schedule.

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[13] Review of the Criminal Courts of England and Wales op. cit. Chapter 6, para. 38.
[14] *op. cit.* Chapter 6, para 39.

IRELAND

The **adversarial** system operates in the Irish judicial system. Ireland has a **jury** system, except for 'terrorist'-type offences.

In criminal cases, the **District Court** deals with minor offences and sits without a jury. The **Circuit Court** deals with more serious offences and sits with judge and jury. It also has appellate jurisdiction from the District Court summary cases, while the **Central Criminal Court** deals with more serious crimes like rape and murder, and sits with judge and jury.

The **Special Criminal Court** deals with terrorism and offences against the State. The **Court of Criminal Appeal** hears appeals from the Criminal Court. The **Supreme Court** is the court of final appeal for both criminal and civil cases.

There is, at present, a serious backlog in the Central Criminal Court, with cases taking up to three years to be heard. To date, the Central Criminal Court has never sat outside term time except for urgent sessions.

There are **four law terms**: Michaelmas begins on the first Monday in October and is followed by a **Christmas vacation** of approximately three weeks in duration. This is followed by a further three law terms, which conclude at the end of July. There is a **vacation of about two weeks at Easter** and of **another ten days at Whitsun**, and the **long vacation** occupies the whole of August and September.

This year, exceptionally, the Central Criminal Court was in session during the month of September in an attempt to clear some of the **backlog**.[1]

[1] Director of Public Prosecutions, Dublin.

AUSTRALIA

Australia has a **federal** system of government and there are federal and State courts.

The State courts deal with virtually all criminal cases, even those involving offences created by Acts of the Commonwealth Parliament. They also deal with most civil claims.

The **structure** of the Australian Court system can be outlined as follows[1]:

High Court of Australia

Federal Courts	*State Courts*
Full Court of Federal Court Appellate Division, Family Court	Court of Appeal Court of Criminal Appeal
Federal Court (Single Judge) Family Court (Single Judge)	Supreme Court
	District (County) Court
Federal Magistrates Service	Local Court

The **High Court of Australia** is the ultimate court of appeal from all the Australian courts. Except for the High Court of Australia, the decision of each State court is, in theory, subject to appeal or some kind of review by a higher court in the system.

New South Wales is the most appropriate State to compare with the South African situation, due to the complexity of its serious cases, the volume of the work and the problems experienced by court delays.

[1] This diagram does not include specialist courts and tribunals. There are minor variations within the States.

The law in Australia operates as an **adversarial system** and there is a **jury** system in respect of the more serious criminal and civil trials.

NEW SOUTH WALES

There are 3 levels in the general court hierarchy in New South Wales[2]:

- Supreme Courts
- District Courts
- Local Courts

The Supreme Court of New South Wales serves as the superior court of general jurisdiction in the State and hears criminal trials of the most serious nature and has unlimited jurisdiction in civil disputes. In addition, this court has appellate jurisdiction in criminal and civil matters.

The Court of Appeal and the Court of Criminal Appeal and the administration of these courts are centralized within the Supreme Court.

The Supreme Court has two divisions – the Common Law Division and the Equity Division.

Judges are assigned to the divisions by the Chief Justice. The Judges of the Common Law Division hear the Supreme Courts criminal trials as well as civil trials. The Court of Appeal hears civil appeals and the Court of Criminal Appeals hears criminal appeals. Acting Judges do not normally sit for an entire year and the courts' policy is that only either former

[2] The other courts, namely the Land and Environment Court, the Industrial Relations Commission, the Compensation Court, the Dust Diseases Tribunal and the Administrative Tribunal are not relevant for our present purposes.

Judges or those running a current commission in another jurisdiction will be appointed as Acting Judges of the Supreme Court of New South Wales.

The permanent judicial resource is composed of 47 judges, including the Chief Justice, the President and 4 Masters. At any one stage, there are 12 acting judges.

The District Court serves as the largest trial court in Australia and the intermediate court in the State court system. The court also deals with all indictable criminal offences (except murder, treason and piracy) in its criminal jurisdiction, and has unlimited civil jurisdiction in relation to motor vehicle accidents and has $750 000 limit on general actions. The court also hears appeals from the local court and also presides over a range of administrative and disciplinary tribunals.

There are 160 **Local Courts** in New South Wales which deal with criminal matters which can be decided without a jury, and committal hearings and civil actions to recover amounts up to $40 000.

Appeals from the Court of Appeal or Criminal Appeal go to the **High Court of Australia**. Thus, the Court of Appeal and Court of Criminal Appeal hear appeals from decisions made by most of the courts of New South Wales and from decisions made by a single judge of the Supreme Court.

Delays in the criminal justice system have been a matter of concern to the New South Wales Government since the **middle of the 90's**. The Director of the New South Wales Bureau of Crime Statistics and Research

stated in 1998 that the delays in criminal matters had far-reaching social effects that had to be addressed quickly:[3]

> *"Firstly, many innocent people who are not guilty are being kept in prison for more than a year and, plainly, that is neither fair nor desirable, he said.*
>
> *Secondly, the length of time before the matter comes to trial when somebody is guilty means they have a greater chance of getting off because it is harder for people to remember what they saw and evidence becomes less reliable."*

One option then under consideration was to *"eliminate the long summer vacation."*

Although comparisons between the States must be treated with caution due to the widely differing complexity of cases, workload and resources, the 1999 Report by the Council of Australian Governments, covering the 1997 – 1998 financial year, indicated that New South Wales had the longest finalization time nationally for processing matters before both the Supreme Court and the District court in the criminal jurisdiction.

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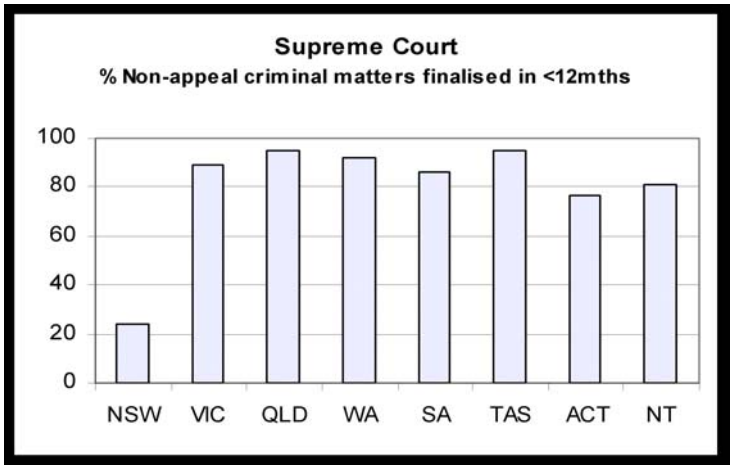
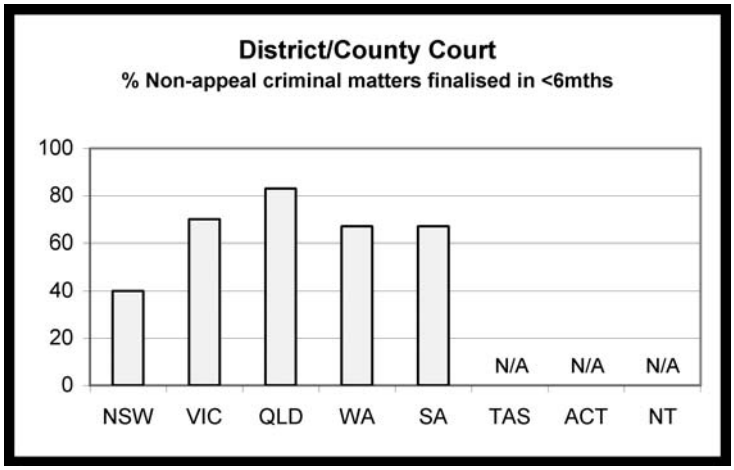
[3] Statistics released by the Australian Bureau of Statistics [ABS] show that, in 1996, the mean time for matters going to trial before the New South Wales [NSW] district Court stood at 62,7 weeks for a guilty verdict and 55,8 weeks for an acquittal. Guilty verdicts in Victoria took 55,2 weeks, in Western Australia [WA] 42,4 weeks, in Queensland 38,3 weeks and in Tasmania 18.5 weeks. The 29.7 weeks' median duration it took until NSW defences and prosecutions prepared their cases, and courts listed, and heard, the cases, was also the longest in the country, the ABS figures showed. Victoria came next with 23,2 weeks; Tasmania and WA had the shortest median duration of just over 12 weeks. The ABS figures show NSW took longer to put cases through the District Court in 1996, even though the number of defendants dropped by 14 percent to 3,835 from 4,458 the previous year.
NSW also failed to register much of an impact in reducing the waiting time for defended cases. At the start of 1996, NSW defendants were waiting 24,4 weeks for a verdict after their case had been initiated, but by the end of that year the pending time had blown out to 28,9 weeks.
Sydney Morning Herald, 28 August '98
50% of the awaiting trial prisoners in the NSW district court have been waiting for 6 months in custody and close to 30% spend between 6 and 12 months in custody.
The NSW Bureau of Crime Statistics and Research, *Higher Courts Quarterly Report Series*, December Quarter, 1998

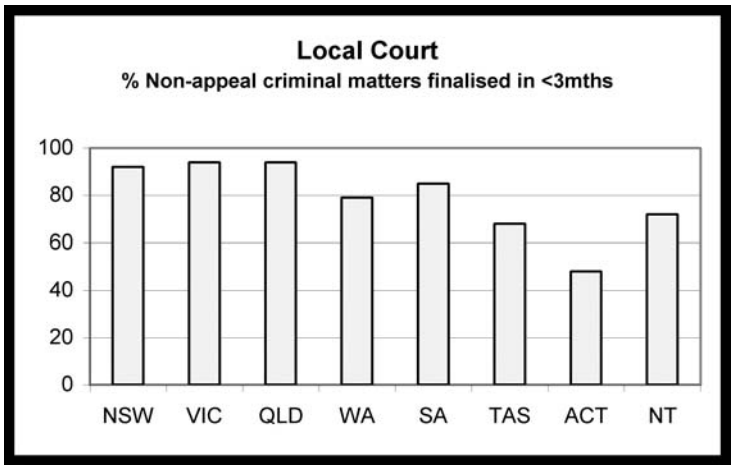
The comparative tables are set out hereunder:

The following figures show the comparison, based on the percentage of non-appeal criminal matters finalised[4].





[4]Source: Report on Government Services 1999, vol 1 Table 7A.9



Supreme Court Cases Finalised 1997-1998[5]

	Civil	**Criminal**	**Civil Appeal**	**Criminal Appeal**
NSW	8,436[6]	92	926	538
VIC	3,085	103	315	374

During the late 1990's, there was a major move to deal with the backlogs that had accumulated in the higher courts.

- In the **Supreme Court**, several **acting judges** were appointed for varying periods to assist in the hearing of the backlog of cases.

- Following legislative changes in July 1997, many Supreme Court

[5] Source: Report on Government Services 1999. Tables 7A.8 7A.10
[6] After deducting 2,174 cases transferred to the District Court

Common Law Division cases became appropriate for hearing in the District Court (which was given increased jurisdiction), where waiting times were generally shorter. The entire Supreme Court Common Law Division caseload was screened for suitability for transfer to the District Court and a total of **3 199** cases were **transferred** to the District Court. This reduced estimated waiting times, from completing case management to hearing, by 6 – 13 months for remaining Common Law Division cases.

- The Supreme Court in 1998/99 **increased its rostered sittings** in the Criminal jurisdiction by about 64%, to 315 sitting weeks.

- In the **District court**, the Government provided special funding for the implementation of an **Acting Judge Scheme**. The scheme was run in conjunction with the initiative of **abandoning** the **fixed term judicial vacations**, so that the court could sit for more weeks of the year. In 1996/97, the court's judicial sitting capacity was increased by **310 weeks** and, in 1997/98, by about **490 weeks**. This was equivalent to the workload of around 12 extra judges.

- The District court in 1998/99 increased its rostered sittings in the criminal jurisdiction by 12%, most markedly in country areas where an additional 61 weeks were scheduled (being an increase of 22% over 1997).

Although New South Wales implemented other measures to combat the delays in the criminal justice system, **appointing more acting judges** and s**taggering judicial vacations** was regarded as fundamental for

this exercise.[7]

THE POSITION AT PRESENT:

The **local courts** sit from around 15 January to 15 December each year and do not close at any other time during the year.

The **District Court** has a variable timetable for both civil and criminal courts and both civil and criminal courts sit from 30 June to 25 June each year. Vacations are thus staggered. Country and region courts have different sittings according to the local needs.

Supreme Court:

The rules concerning vacations in the Supreme Court are set out in Part 1A, Rule 2(2) of the Supreme Court Rules:

> *"**2** **Vacations***
> *(1) There shall be a fixed vacation and a variable vacation in each year.*
> *(2) The fixed vacation shall be a period of six weeks from the beginning of the Monday before the 24th of December.*
> *(3) The variable vacation shall be a period not exceeding four weeks regulated by the Chief Justice.*
> (4) *A hearing or trial shall not be held in the fixed vacation, unless the Court otherwise orders."*

The Court's judges each have an entitlement to, in total, **10 weeks** of leave per year.

Six of those weeks should fall within the period of the **fixed vacation**

[7] The NSW Government Audit Report 1999/2000 Chapter 3 Point 3.2 and 3.3 - http://www.audit.nsw.gov.au/perfaud-rep/Year-1999-2000/courtswait99/3measuresadopt.html; NSW Court Services: Annual Report 1997/98 Supporting the Administration of Justice – http://www.lawlink.nsw.gov.au/lawlink.nsf/pages/ar_court

unless the judge was rostered to sit during the fixed vacation as either a Vacation Judge or a Bail Judge, or unless the judge has been required to sit for some other reason during the fixed vacation. That time lost from the fixed vacation is given as compensatory leave later in the year.

The balance of **4 weeks** is the **variable vacation** and is taken outside the fixed vacation period.

Judicial officers also have an entitlement to **extended leave**.

Fixed vacation[8]

During the fixed vacation there are Vacation Judges rostered who are available to deal with urgent applications. Generally, at most times during the fixed vacation there are at least three Vacation Judges: one each from each of the Common Law Division, the Equity Division and the Court of Appeal.

Any Vacation Judge may be designated by the Chief Justice to handle any of the work concerning the Court of Criminal Appeal that arises during the fixed vacation. Criminal work can be handled by the Common Law Division Vacation Judge.

Generally, a judge rostered as a Vacation Judge will be rostered for a two-week period. A judge who has been rostered as a Vacation Judge will have that rostered time "reimbursed" as compensatory leave during the following year.

Bail applications lists continue as normal throughout the entire year, regardless of the fixed vacation period. The exception to the routine is usually confined to public holidays that fall during the fixed vacation, such

[8] Subrules 2 and 4 describe the fixed vacation.

as Christmas Day, Boxing Day and New Year's Day. Bail applications are heard from a judge of the Common Law Division. Any judge who is rostered during the fixed vacation as the Bails Judge would also be "reimbursed" with compensatory leave during the following year.

Also note that the Court has a policy that once started, a trial should run to conclusion.[9] In accordance with subrule 4, unless otherwise ordered, trials will generally not be listed at a time that might reasonably cause that trial to proceed during the fixed vacation period. However, if for example a trial listed in ordinary circumstances is not concluded by the start of the fixed vacation, the trial will proceed during the fixed vacation period until the accused is acquitted or found guilty.

Variable vacation[10]

The variable vacation is a separate vacation to the fixed vacation. It totals four weeks and can be taken at any time in the year, subject to the approval of the Chief Justice. It need not be taken as one block. The Chief Justice regulates the timing of this leave.

The variable vacation of the judges is staggered so that, as much as possible, a sufficient number of judges will be available during the law term for:

- one, or sometimes two, benches in the Court of Criminal Appeal each week
- two, or sometimes three, benches in Court of Appeal each week, criminal trials and civil hearings
- a Bail Judge

[9] Judges from the Common Law Division are rostered to hear criminal trial work during nominated periods of the year. They do not hear any other case during the hearing of a criminal trial until the accused is acquitted or found guilty, even if the trial exceeds its estimated hearing time. After this the judge may be assigned to hear other cases until such time as the sentence can be prepared. The criminal trial work of the Supreme Court generally means that, for an accused found guilty, several weeks will elapse before pre-sentence reports and other necessary sentencing materials are available.

[10] Subrule 3 refers to variable vacation.

- a Common Law Duty Judge
- an Equity Division duty Judge
- hearing listed criminal trials
- hearing listed civil cases

If sufficient permanent judges will not be available to meet these needs, the Chief Justice will consider assigning one or more Acting Judges. This situation can arise when, for example, cases over-run their estimated hearing time, there are fewer settlements than expected, or when permanent judges require judgment writing time or are ill.

One of the advantages of the New South Wales Supreme Court system is its flexibility which makes it beneficial for Judges, practitioners and the public alike.[11]

Extended leave

Six months of extended leave is available to judges after 5 years of service. Thereafter, extended leave accrues at a rate of 1 month and 6 days for every completed year of service. For the purpose of calculating leave, periods of leave already taken are regarded as periods of service.

If part or all of the fixed vacation falls during a period of extended leave, this time will not be "reimbursed" at a later time but will be counted as part of that period of extended leave. Public holidays that fall within a period of extended leave are similarly not "reimbursed".

[11] During September 1999, the Chief Justice of the NSW Supreme Court announced that 3 weeks of the variable vacation for the year 2000 were to be fixed for the period commencing Monday 11 September 2000 and concluding on Friday 29 September 2000. This vacation was fixed pursuant to Part 1A Rule 2(3) of the Supreme Court Rules 1970 in order to coincide with the Olympic Games. The arrangement also took into account the availability of police for court work during the period, the impact of transport congestion on prisoner transport, court personnel, witnesses, jurors, the legal profession and court reporters and accommodation difficulties for witnesses and litigants. During the vacation, duty judges and registrars were available to deal with urgent applications and registry services were maintained. Arrangements were made to ensure that there was no reduction in the courts' sitting time.

Judgment-writing time

The Common Law Division judges are each allocated one week during the year that is designated as judgment-writing time. Judgments are written throughout the year, as time out of court arises, and also after hours and on weekends. Judgments are expected to be completed within six months after the conclusion of the hearing. Judgment-writing therefore cannot be routinely deferred until the allocated judgment-writing week although that week does offer some catch-up time. A judge may negotiate with the Chief Judge at Common Law to be relived of his or her rostered duties for some additional judgment-writing time during the year, if this is necessary.

If a matter that arises during a trial must be dealt with before the trial can continue, the judge might need to take a short time off the bench to research or consider that matter. The judge will give his or her decision so that the trial may proceed but often the reasons for the decision will be reserved and given after the conclusion of the trial.

VICTORIA, QUEENSLAND AND WEST AUSTRALIA

The court structures in **Victoria, Queensland** and **Western Australia** are similar to that of New South Wales except that the district court in Victoria is referred to as a county court and a local court is referred to as a magistrates court in Queensland and Victoria.[12]

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[12] The **Supreme Court** is the superior court of Victoria, Queensland and Western Australia divided into the Court of Appeal and the Trial Division. The types of criminal cases heard and determined by the trial division include:

- all cases of treason, murder, attempted murder and other major criminal matters such as armed robbery and serious drug cases
- some appeals and reviews of inferior courts and tribunals
- various other cases such as applications for bail

The **County Court** of Victoria has jurisdiction to hear all indictable offences except treason, murder and certain other murder related offences [s. 36A *County Country Court Act 1958]*. Subject to the power of the Supreme Court to order a transfer of a matter from the Supreme Court to the County court the director of Public Prosecutions does the initial decision where to present a person for trial in a county or supreme court [Section 353 Crimes Act]. In practice the majority of offences are heard in the county court. The South Australia

The **Victoria Supreme Court** has 3 fixed vacations: 6 weeks in summer (starting the week before Christmas), 2 weeks in winter and 4 days at Easter (following Easter Monday).[13]

Queensland has a population of 3.6 million, and growing rapidly. It is overwhelming English-speaking and hence is relatively homogenous. The State is roughly triangular in shape, about 2 500 kms long X 1 300 kms at its widest, with the capital Brisbane illogically placed within 100 kms of the southern border, which greatly increases the problem and cost of servicing non-metropolitan areas. However, some evidence and some appeal hearings are now being taken electronically.

The **Queensland Supreme Court** has 24 Judges [including 5 Court of Appeal Judges]; about 35 District Court Judges and 75 magistrates. The latter have civil jurisdiction up to $50 000 and a criminal jurisdiction extending up to 2 years imprisonment. District Court civil jurisdiction is presently from $50 001 to $250 000. District Courts try all indictable crimes except murder, manslaughter, kidnapping and drug dealing. Both District and Supreme Court judges sit with juries in criminal matters but rarely in civil matters.

The original scheme of the court calendar was that Supreme and District Court judges sat **throughout the year** except for six weeks, from before Christmas to the end of January, and two weeks at mid-year[14], with four

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district court was established in 1969 to take some of the pressure off the supreme court and it was not constituted by its own Act of Parliament until 1991.

[13] Victoria Legal Almanac for 2003:

First Term	Monday 3 February to Wednesday 16 April
Second Term	Wednesday 23 April to Friday 4 July
Court Vacation	Monday 7 July to Friday 18 July
Third Term	Monday 21 July to Friday 3 October
Fourth Term	Monday 6 October to Friday 19 December

During the terms, judges will sit on circuit which may last for a full four weeks and in the Practice Court. Outside the terms, a number of Judges will sit in order to dispatch business. A Judge will sit daily in the Practice Court from Thursday 2 January 2003.

[14] Supreme Court Trial Division Roster: July 2003 – January 2004

Winter break 30 June 2003 – 11 July 2003

weeks scattered across the year for judgment writing.

Except for about a **fortnight** at Christmas/New Year, most District Court judges now sit throughout the year taking their annual leave at times that suit them personally and the Court calendar. The Supreme Court is moving in the same direction. There is always at least one judge sitting in civil and one judge in crime in Brisbane during the January vacation. For some reason (probably flexibility in holiday-taking time) there is no difficulty in finding Supreme Court judges to sit during what were formerly the vacation times.

The Hon Mr Justice B H McPherson CBE[15] says:

> *"The secret of success lies in calendaring. The system aims at having a minimum number of judges sitting at all times in criminal, civil, chambers, circuits and on appeals, as well as allowing for judgment writing and vacations at staggered times throughout the year. The old practice by which all judges sat in fixed term times, and none sat in vacations has now almost disappeared except for the month of January. The legal profession has shown some resistance to having that month off, and in that respect can always get their way by applying a form of passive resistance to working when they do not want to.*
>
> *The ultimate limiting factor on sitting constantly through the year is the annual summer holiday period. All schools, universities and many businesses [including the building industry] close during January when most people go away to other places. In consequence, it is impracticable to try to assemble witnesses, parties, members of the legal profession and jurors for trials in that month of the year.*
>
> *I can see no reason why courts in South Africa should not sit continuously and make use of court facilities during the whole year, provided there are sufficient numbers of judges and court staff, as well as prosecutors and defence counsel, to serve the system at all times. Trials by jury are probably more time-consuming than trials by judges and assessors, but with juries there is no delay in waiting for reserved judgments in criminal*

Summer break 22 December 2003 – 30 January 2004

[15] Court of Appeal, Supreme Court Brisbane, Australia

matters, as I find there sometimes is in Solomon Islands, where I also sit periodically as an appeal judge, and where trial judges sit without juries or assessors.

In terms of use of facilities, you might derive some assistance from Singapore, which has a reputation for making the most of its buildings, etc. For example, school children there attend school either in the morning or in the afternoon session, so that schools are used twice over in the same day."

The **Supreme Court of Western Australia** has 2 fixed vacations namely 4 weeks in the summer and 2 weeks in the winter.[16]

The **Australian Capital Territory, the Northern Territory** and **Tasmania** have no intermediary structures between the local/magistrates courts and their supreme courts[17].

Conclusion

In Australia, and especially in the state of New South Wales, it is evident that the courts are becoming increasingly mindful that judicial independence does not remove the need to manage public resources appropriately and to account for their performance.[18]

Largely through need, New South Wales has adopted a very progressive and even handed approach in respect of the reduction of court recesses or vacations in order to promote higher productivity.

Such an approach, where possible, should be replicated elsewhere.

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[16] Almanac for 2003:
Winter break 30 June – 13 July
Summer break 20 December – 13 January

[17] An analysis of the court structure of these areas would be irrelevant. By way of example, the 2003 Criminal Annual Almanac for the Tasmanian Supreme Court reads as follows:

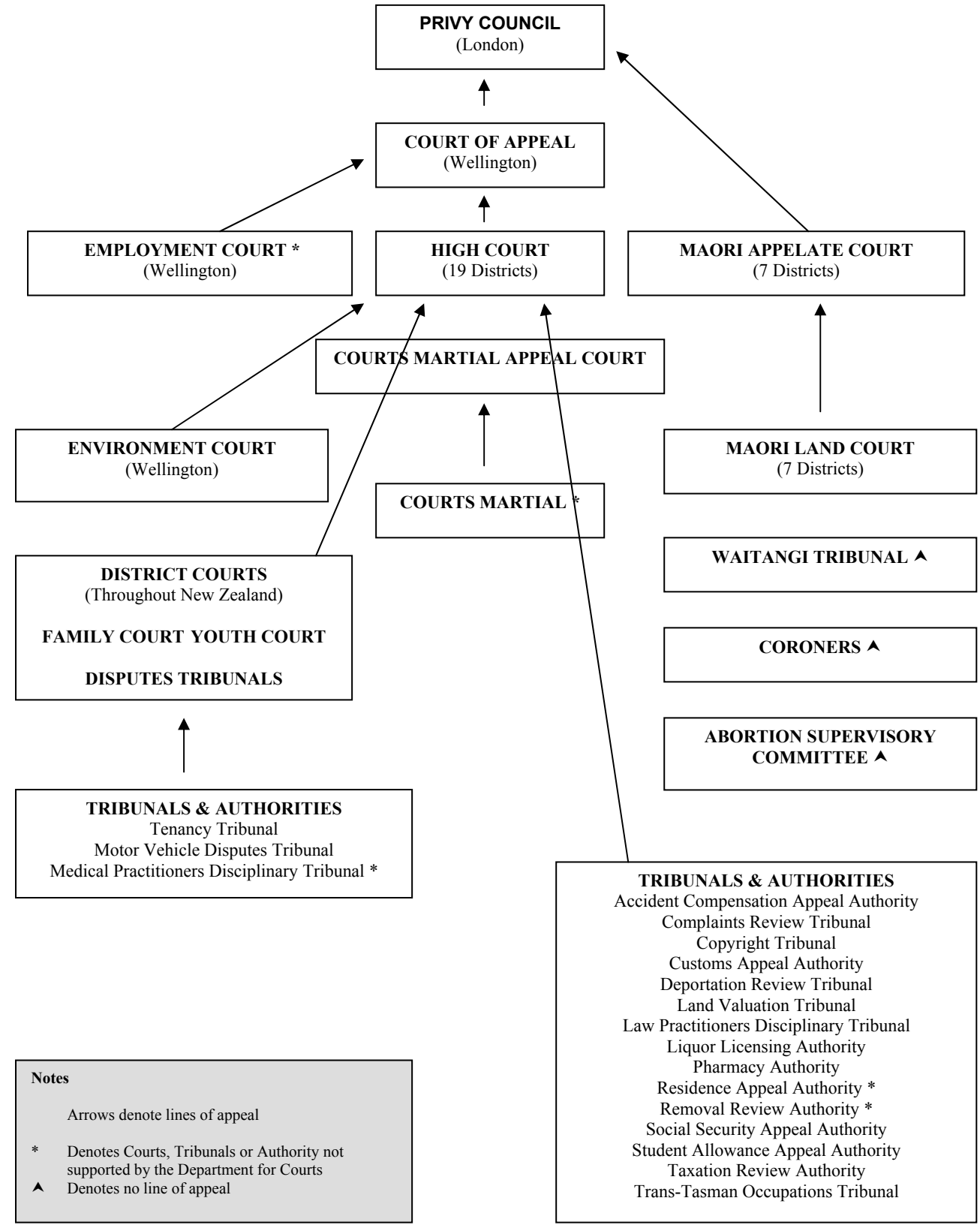
First Term	3 March 2003 – 20 March 2003
Second Term	26 May 2003 – 5 June 2003
Third Term	18 August 2003 – 28 August 2003
Fourth Term	27 October 2003 – 6 November 2003

[18] *Vide* strategic plan of the district court of NSW.

APPENDIX H

NEW ZEALAND

New Zealand Court Hierarchy



The **High Court** has jurisdiction over major crimes and civil claims. It deals with judicial reviews of administrative action and admiralty proceedings and frequently hears appeals from the **Tribunal** and Lower Courts including the **District Court**.

The Chief Justice is head of the New Zealand judiciary and sits in both the High Court and **Court of Appeal**.

It is an interesting feature that he also represents the judiciary in dealing with the Department for Courts and other government agencies and is ultimately responsible for the management of the work of the High Court judges.

Vacation and holiday periods for the High Court in New Zealand are fixed by the High Court Rules, thus Rule 18 states that there shall be:

- a long vacation beginning on 20 the day of December and ending at the close of the 31st day of January; and
- an Easter vacation beginning on the day before Good Friday and ending with the close of the Saturday following Easter.[1]

Rule 21 deals with sittings in vacations and states that the court may lawfully sit in any vacation or on any court holiday if any judge considers it desirable to do so **for the dispatch of business.**

An exception to this rule is to be found in Subsection 2, in that the court may sit on a Sunday or on Christmas Day, New Year's day or Good Friday **only** if, in the opinion of the judge, the business to be dispatched is extremely urgent.

New Zealand has an **adversarial** justice system and a **jury** system.

[1] Cf1908, No 89, Second Schedule r. 601(1), (2); SR 1957/30, r 7(1); SR 1973/39, r3(1)

HONG KONG

The Hong Kong Special Administrative Region of the People's Republic of China

The major criminal trial courts in this region are the Court of First Instance (High Court), which has a maximum sentencing jurisdiction of life imprisonment, and the District court, which has a maximum sentencing jurisdiction of seven years.

There are **recess** periods; however, the legislation relating to vacation does **not** apply to **criminal** proceedings. Criminal trials are conducted in court vacations and the number of criminal trials in court vacations are generally the same as the non court vacation period. The trial courts obviously do not sit on public holidays.[1]

The sittings of the Court of Appeal and of the Court of First Instance -

> *"shall be three in every year, that is to say:*
>
> - *The Winter sittings which shall begin on 4 January and end on the Thursday before Easter Sunday;*
> - *The Spring sittings which shall being on the second Monday after Easter Sunday and end on 31 July; and*
> - *The Autumn sittings which shall begin on 1 September and end on 23 December."*[2]

The Rules, however, provide that both the Court of Appeal and the Court of First Instance can sit in the vacation on appeals. In practice, appeals are generally also heard in the vacation.

The law in Hong Kong operates as an **adversarial** system and there is a **jury** system in respect of the most serious criminal offences, such as murder, manslaughter, rape, armed robbery and certain drug offences.

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[1] Aylmer Yan for Judiciary Administrator dated 11 July 2003
[2] Order 64 of the Rules of the High Court

REPUBLIC OF SINGAPORE

The Singapore court system consists of

- The Supreme Court consisting of the Court of Appeal and the High Court
- The District Courts
- The Magistrates Courts

The District Courts and the Magistrates Courts hear both civil and criminal cases and there is a right of appeal to the High Court against any decision of a district judge or magistrate. From the High Court, there is a further appeal to the Court of Appeal on questions of law. In criminal cases which start in the High Court, an appeal will be heard by the Court of Appeal.

Whether a criminal case is heard in one of the lower courts or the High Court depends on the seriousness of the offence. By way of example, cases punishable by death or life imprisonment are dealt with by the High Court.

There are **two vacations** in the Supreme Court of Singapore, namely the midyear court vacation which, for the year 2003, ran from 26 May to 20 June, and the end of the year vacation, which will run from 1 December 2003 to 2 January 2004.[1]

The law in Singapore operates as an **adversarial** system and there is **no jury** system in respect of the more serious criminal and civil trials.

[1] Republic of Singapore Supreme Court Calendar 2003/04

INDIA

The **Supreme Court** is the apex court in the country and the **High Courts** stand at the head of the State's judicial administration. India has an **adversarial** and **jury system**.

Each State is divided into judicial districts presided over by a **district** and **sessions judge** who is the highest judicial authority in the district. Below the district level, there is a hierarchy of **magistrates** functioning under the supervisory authority of a district magistrate.

At the village level, disputes are frequently resolved by *panchayats* or *lokadalats (***people's courts**).

The **Supreme Court** has original, appellate and advisory jurisdiction. The Constitution gives an extensive original jurisdiction to the Supreme Court to enforce fundamental rights.

There are 18 **High Courts** in the country, 3 having jurisdiction over more than one State. Among the Union Territories, Delhi alone has a High Court of its own whilst the other 6 Union Territories come under jurisdiction of different State High Courts.

Each High court in India is a court of record exercising origin and appellate jurisdiction within its respective State or territory. They try original criminal cases by a jury, but not civil cases.

The Supreme Court was reported to have more than 150,000 cases pending in 1990, the High courts had some 2 million cases pending, and the lower courts had a substantially greater backlog. Research findings in the early 1990's show that the backlogs at levels below the Supreme Court are the result of delays in the litigation process and the large

number of decisions that are appealed and not the result of an increase in the number of new cases filed.

Court Vacations

The **Supreme Court** of India has 45 vacation days a year excluding weekends (spread throughout the year).[1]

Some of the High Courts have summer and winter vacations and others have other vacations in addition. A feature in the High Courts is that some Saturdays are used as working days to set off the plethora of public holidays in the country.[2] Some of these public holidays are subject to change depending on the visibility of the moon.

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[1] **Supreme Court of India:**
The court vacations run from:

- 1 to 3 January 2003
- 17 to 23 March 2003
- 11 May to 6 July 2003
- 1 to 5 October 2003
- 20 to 26 October 2003
- 22 to 31 December 2003

[2] **By way of example:**
High Court of Delhi:
Although there are some 23 public holidays this is offset to a degree by 6 working Saturdays per year.
Summer vacations: 2 June to 5 July 2003 inclusive
Winter vacations: 25 December 2003 to 1 January 2004 inclusive
High Court of Chhattisgarh:
Although there are some 28 public holidays this is offset to a degree by 12 working Saturdays per year.
Summer vacations: 12 May to 13 June 2003 inclusive
Winter vacations: 22 December 2003 to 1 January 2004 inclusive
High Court Himachal Pradesh:
Although there are some 22 public holidays this is offset to a degree by 28 working Saturdays per year.
Summer vacations: 16 June to 21 June 2003 inclusive; and
2 to 31 July 2003 inclusive
Winter vacations: 13 January to 22 February 2003 inclusive
High Court of Bombay:
Although there are some 25 public holidays this is offset to a degree by 5 working Saturdays per year.
Summer vacation: 5 May to 1 June 2003 both days inclusive
October vacation: 20 October to 2 November 2003 both days inclusive
Winter vacation: 22 December 2003 to 4 January 2004 both days inclusive

ISRAEL

In Israel, there are basically three levels of courts in respect of criminal matters.

The **Magistrates' Court** deals with petty offences. In addition to the Magistrates Courts there are several specialized courts including Traffic Courts, Juvenile Courts, Labour Tribunals, Family Courts and the Religious Courts.

The **District Court** deals with serious criminal offences involving the death penalty or imprisonment for a period of more than 7 years. The District Court also hears appeal from Magistrate Courts.

Judgments of the District Court are appealable to the **Supreme Court**. If the judgment has been given at first instance, the appeal is as of right; if the judgment has been given by the district Court as an Appellate Court, then the appeal is by leave of appeal.

The court sits from 08:30 to approximately 13:00 from Sunday to Thursday, and on Friday there is a duty roster for emergency hearings only.

The court sits for 10 and a half months per year, the **recess period** being from 15 July to 1 September, during which time there is a judge available if required.

Backlogs of cases are not a problem.

The law in Israel operates as an **adversarial system** and there is **no jury** system.

THE NETHERLANDS AND DENMARK

The Netherlands operates in an **inquisitorial** justice system without a jury. **Denmark** has, however, introduced aspects of the trial system found in common law countries and has a **jury** system.

The Netherlands:

Civil and criminal justice is administered in 61 **Sub-district Courts**, 19 **District Courts** [Rechtbanken], 5 **Courts of Appeal** [Gerechtshowen] and a **Supreme Court of the Netherlands** [Hoge Raad].

Petty cases are heard first in the Sub-district Court, while more complicated (and **all criminal**) cases go straight to the District Court.

There is a right of **appeal** from the Sub-district Courts to the District Court, and from the District Courts to the Court of Appeal. Each Court of Appeal serves a number of District Courts which, in turn, each serve several Sub-district Courts.

The Supreme Court of the Netherlands decides on questions of law and its main duty is to ensure the uniform application of the law.

All courts sit throughout the **whole year**. In the Gerechtshof at Amsterdam, for instance, there are 11 criminal law chambers (consisting of 3 judges) and each sit an average of 2 sessions a week. This means for each day in which the court sits, there is one day for preparation and time to write the judgment, and the last day is for general purposes (meetings, study, etc.).

All judges and public prosecutors are required to work a 36 hours week and, for an extra 4 hours' work per week, they are entitled to one extra day' leave.

They have an **annual holiday** of **180 hours** which is normally taken during the summer holiday period, that is, 15 June to the end of August. The winter holidays apply at the end of December and the beginning of January. During these periods, there will be half the amount of court sessions as compared to other months.

In the Netherlands, the courts also make use of so-called "Rechtersplaatsvervanger" to assist the court if in need of extra judges. These are normally barristers, university professors or recently retired prosecutors or judges.[1]

Denmark:

The Danish courts comprise of 82 County Courts (first level courts), 2 High Courts (The High Courts of Appeal) and the Supreme Court.

All the courts sit **throughout the year** except for a short recess during the summer holiday, usually 3 weeks in duration. Only **urgent** cases are dealt with during the summer recess.

The judges are granted **5 weeks'** vacation per year, provided that such vacation does not interfere with the daily work of the court.

[1] Hoofadvocaat-Generaal, Openbare Ministerie, Amsterdam - 28 July 2003

URUGUAY

The **Supreme Court of Justice** heads the judiciary and lower courts include **6 appellate courts** (for civil matters, criminal matters and labor matters), courts of first instance (sometimes referred to as lawyer courts – "juzgados lerados") and the **justice of peace** courts.

The Supreme Court of Justice has the power to modify any decision made by the Appellate courts and is the only court allowed to declare the unconstitutionality of laws passed by the General Assembly.

In addition, it decides on conflict effecting diplomats and international treaties, the execution of rulings of foreign courts and relations among the agency of government.

The Supreme Court also manages the entire judicial system. It prepared budgets for the judiciary and submits them to the general assembly for approval, proposes all legislation regarding the functioning of courts, appoints judges to the appellate courts and nominates all judges and judicial officials.

The appellate courts hear appeals from the courts of first instance which, in turn, hear appeals from the lower courts. The courts of first instance also hear the most serious criminal felony cases.

The criminal courts have a midyear recess from 1 July to 20 July and an end of the year recess from 25 December to 31 January; only urgent matters are heard during the recesses.

The judicial system is based on the Napoleonic Code of 1804 and the Constitution makes provision for a **jury** system.

SCHEDULE FOR COURT YEAR AND JUDGES' VACATION, NEW JERSEY, USA

Directive #1-82 October 22, 1982
(Amended by Directive #1-98)
Issued by: Chief Justice Robert N. Wilentz

It is the policy of the Supreme Court that the trial courts of New Jersey shall operate on a yearly schedule that affords the greatest possible efficiency of operation and provides the public with maximum access to the courts.

A study of the schedule of judicial work conducted in 1982 has led to the conclusion that greater court efficiency and accessibility to the public could be attained through maintaining court operations throughout the year to the fullest extent practicable. Therefore, to implement the policy of the Supreme Court, the Judiciary will undertake a court schedule by which trial judges will hold court each business day of the year except for official national and state holidays and the period between Christmas and New Year's Day when only emergency judges will be on duty.

In addition, judges, while maintaining the present court day from 9:00 a.m. to 4:00 p.m., will keep their chambers open and staffed from 8:30 a.m. to 4:30 p.m.

The success of this policy relies on its careful implementation by Assignment Judges and on the cooperation of the Judiciary with affected groups. Because the personnel of offices associated with the courts, attorneys, jurors and the public at large will be affected by the change in schedules resulting from this directive, Assignment Judges are requested to consult with interested groups in implementing this policy.

JUDICIAL VACATIONS

Judicial vacations will be scheduled by Assignment Judges in accordance with the following guidelines:

a) Judicial vacations may be taken during any month in periods of no less than five consecutive days, provided that vacation schedules do not interfere with court operations. Assignment Judges may require vacation periods of no less than two weeks in their discretion. Holidays or court recess occurring during a vacation week shall be counted as vacation days.

b) In all months, save July and August, Assignment Judges may authorize vacations for up to 20% of the vicinage judges, at any one time. This percentage may be varied in future years, based upon experience. The Assignment Judge in his or her discretion may authorize more than 20% of judges to schedule vacations in the five-day period following Easter.

c) The requests of trial judges for particular vacation periods shall be accommodated whenever possible, provided, of course, that they do not unduly interfere with court operations.

The Assignment Judge in granting vacation requests shall consider that vacations should be spread as evenly as possible over the course of the year, with the exception of July and August.

d) During July and August, Assignment Judges may authorize vacations for more than 20% of vicinage judges; provided, however, that at all times an adequate number of judges are available to conduct sessions, including criminal jury trials.

Vicinages which experience heavy influx of court business during the summer should adjust vacation schedules in accordance with demand.

e) Reasonable adjournments should be granted to accommodate the vacation schedules of all prosecutors, public defenders, private defense counsel and attorneys handling civil matters. Attention should be given to the need to coordinate the vacation schedules of the offices of the institutional litigants, the prosecutor and the public defender with those of the judges. This can be accomplished through discussions with the county prosecutor and regional public defenders before final vacation schedules are fixed so necessary adjustments on all sides can be made.

f) Vacations may not be scheduled during the New Jersey Judicial College.

COURT RECESSES

a) Court will be recessed only for state and national holidays, and during the week between Christmas and New Year's Day.

b) Judges who wish to attend the annual meeting of the New Jersey State Bar Association presently held during the month of May, may do so with approval of the Assignment Judge.

In order to keep the AOC informed as to when judges are on vacation, Assignment Judges should file vicinage vacation schedules with the Administrative Director on a date prescribed.

This directive is effective immediately.

EDITOR'S NOTE

The original directive restricted civil jury trials during the month of August. This restriction does not conform to practice and it therefore has been deleted from this directive.

That portion of the directive dealing with judicial vacations has been used as a set of guidelines, subject to relaxation or modification by the Assignment Judge.

At the meeting of the Chief Justice and Assignment Judges on March 24, 1988, the vacation policies were discussed and it was concluded that the practices in the several vicinages were relatively uniform and that the existing vacation policy should continue. Two minor changes were approved. It was determined that judges who take a vacation for a week containing a legal holiday should not receive an extra vacation day. Requests to take vacations in blocks of less than one full week are to be left to the discretion of individual Assignment Judges.

The first section dealing with the schedule for the court year has been modified by deleting the reference to the implementation of this policy "on an experimental basis." The date of the study leading to the change in schedule has been changed from "over the past year" to "in 1982."

In 1998, the requirement that Assignment Judges notify the Administrative Director of vacation schedules was eliminated by Directive #1-98.