

New-look court systems ‘undermine judicial process’

by [Amanda Visser](#), 27 December 2012, 08:27



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A GROWING number of state institutions have their own "court systems", which is undermining traditional judicial systems, says University of the Witwatersrand professor of finance and insurance Robert Vivian.

These institutions seem to have taken the role of the traditional judicial systems, and an example of this is the competition regime in South Africa.

Prof Vivian said in a recent talk at the Free Market Foundation in Johannesburg that the Competition Tribunal, through the Competition Act, was used "to garner billions of rands for the government" without meeting the constitutional requirements of due process.

The burden of proof in the proceedings before the tribunal did not follow due process because the evidence produced was not tested in a court of law, he said.

The Competition Commission and tribunal were undermining the role of the judicial system and, in the process, several historical constitutional principles were forgotten, Prof Vivian said. There should be a distinction between the administrative and criminal roles taken by institutions such as the competition authorities.

He said that the competition authorities should be allowed to decide on administrative issues such as mergers and acquisitions. However, matters relating to contraventions of the Competition Act should be dealt with by the criminal justice system.

"Since the Competition Act, a system operating as a state within the state combines and confuses the executive (administrative), judicial, legislative functions ; it is not clear where to draw the line between these functions in the legislation," he said in an article published earlier.

The Competition Act has been amended to allow for criminal sanctions in terms of prohibited practices such as price-fixing, collusion and market division, which are considered serious contraventions.

This often resulted in companies paying millions in fines. The amendments to the act provide for directors, managers or senior officials to be sent to jail if they knew about prohibited practices but did nothing to stop it.

Prof Vivian said if South Africa had decided on these amendments earlier on when the act was introduced, half of the problems relating to the unconstitutional nature of the competition regime would have been solved. "The reason we did not go that route (initially) is because it allowed the state to collect billions of rand."

The Competition Amendment Act has been signed by the president, but the implementation date has not been promulgated.