

# South African CRIME QUARTERLY

No. 66 | December 2018



- > The reinforcement of legal hegemony in South Africa
- > The insistence on verification of address in bail hearings
- > The need for effective bail affordability inquiries
- > Applying theory to the practice of human rights violations
- > On the record with Judge Jody Kollapen

The Institute for Security Studies (ISS) partners to build knowledge and skills that secure Africa's future. The ISS is an African non-profit with offices in South Africa, Kenya, Ethiopia and Senegal. Using its networks and influence, the ISS provides timely and credible policy research, practical training and technical assistance to governments and civil society.

The Centre for Law and Society (CLS) is an innovative multi-disciplinary centre in the Faculty of Law where scholars, students and activists engage critically with, and work together on, the challenges facing contemporary South Africa at the intersection of law and society. Through engaged research, critical teaching and robust exchange, CLS aims to shape a new generation of scholars, practitioners and activists, and to build the field of relevant legal theory, scholarship and practice, that is responsive to our context in South Africa and Africa.

## © 2018, Institute for Security Studies and University of Cape Town



All material in this edition of SACQ, with the exception of the front cover image, is subject to a *Creative Commons Attribution-ShareAlike 4.0 International License*. Licensing conditions are available from <https://creativecommons.org/licenses/>

ISSN 1991-3877

First published by:

The Institute for Security Studies,  
PO Box 1787, Brooklyn Square 0075  
Pretoria, South Africa

Centre for Law and Society  
University of Cape Town, Private Bag X3,  
Rondebosch, 7701 Cape Town, South Africa

[www.issafrica.org](http://www.issafrica.org)

[www.cls.uct.ac.za](http://www.cls.uct.ac.za)

### SACQ can be freely accessed on-line at

<http://www.issafrica.org/publications/south-african-crime-quarterly>

### Editor

Kelley Moulton    **e-mail** [kelley.moulton@uct.ac.za](mailto:kelley.moulton@uct.ac.za)

### Editorial board

Judge Jody Kollapen, High Court of South Africa

Professor Ann Skelton, Director: Centre for Child Law, University of Pretoria

Professor Eirena van der Spuy, Institute for Safety Governance and Criminology, Department of Public Law, University of Cape Town

Professor Bill Dixon, Professor of Criminology, School of Sociology and Social Policy, University of Nottingham, UK

Professor Rudolph Zinn, Department of Police Practice, University of South Africa

Professor Jonny Steinberg, Professor of African Studies, African Studies Centre, University of Oxford

Professor Jamil Mujuzi, Faculty of Law, University of the Western Cape

Professor Catherine Ward, Department of Psychology, University of Cape Town

Professor Dee Smythe, Department of Public Law, University of Cape Town

Associate Professor Lukas Muntingh, Project Head, Civil Society Prison Reform Initiative, Dullah Omar Institute, University of the Western Cape

Dr Hema Hargovan, School of Built Environment and Development Studies, University of KwaZulu-Natal

Dr Chandré Gould, Senior Research Fellow, Crime and Justice Programme, Institute for Security Studies

Ms Nwabisa Jama-Shai, Senior Researcher, Gender and Health Research Unit, Medical Research Council

Ms Nomfundo Mogapi, Executive Director: Centre for the Study of Violence and Reconciliation, Centre for the Study of Violence and Reconciliation

**Cover** Allan Swart / Stock Photo

**Production** Image Deziign [www.imagedezign.co.za](http://www.imagedezign.co.za)

**Printing** Remata

# Contents

---

SA Crime Quarterly

No. 66 | December 2018

## Editorial

Decolonising the South African prison ..... 3

*Nontsasa Nako*

## Research articles

Rationalising injustice ..... 7

The reinforcement of legal hegemony in South Africa

*Thato Masiangoako*

Possibly unconstitutional? ..... 19

The insistence on verification of address in bail hearings

*Palesa Rose Madi and Lubabalo Mabhenxa*

Decolonising prisons in South Africa ..... 31

The need for effective bail affordability inquiries

*Untalimile Crystal Mokoena and Emma Charlene Lubaale*

The Lindela Repatriation Centre, 1996–2014 ..... 41

Applying theory to the practice of human rights violations

*Anthony Kaziboni*

On the record with Judge Jody Kollapen

Nontsasa Nako ..... 53

### **Editorial policy**

*South African Crime Quarterly* (SACQ) is an inter-disciplinary peer-reviewed journal that promotes professional discourse and the publication of research on the subjects of crime, criminal justice, crime prevention and related matters, including state and non-state responses to crime and violence. South Africa is the primary focus of the journal but articles on the above-mentioned subjects that reflect research and analysis from other African countries are considered for publication, if they are of relevance to South Africa.

SACQ is an applied policy journal. Its audience includes policymakers, criminal justice practitioners and civil society researchers and analysts, including academics. The purpose of the journal is to inform and influence policymaking on violence prevention, crime reduction and criminal justice. All articles submitted to SACQ are double-blind peer-reviewed before publication.

### **Policy on the use of racial classifications in articles published in *South African Crime Quarterly***

Racial classifications have continued to be widely used in South Africa post-apartheid. Justifications for the use of racial descriptors usually relate to the need to ensure and monitor societal transformation. However, in the research and policy community racial descriptors are often used because they are believed to enable readers and peers to understand the phenomenon they are considering. We seem unable to make sense of our society, and discussions about our society, without reference to race.

*South African Crime Quarterly* seeks to challenge the use of race to make meaning, because this reinforces a racialised understanding of our society. We also seek to resist the lazy use of racial categories and descriptors that lock us into categories of identity that we have rejected and yet continue to use without critical engagement post-apartheid.

Through adopting this policy SACQ seeks to signal its commitment to challenging the racialisation of our society, and racism in all its forms.

We are aware that in some instances using racial categories is necessary, appropriate and relevant; for example, in an article that assesses and addresses racial transformation policies, such as affirmative action. In this case, the subject of the article is directly related to race. However, when race or racial inequality or injustice is not the subject of the article, SACQ will not allow the use of racial categories. We are aware that some readers might find this confusing at first and may request information about the race of research subjects or participants. However, we deliberately seek to foster such a response in order to disrupt racialised thinking and meaning-making.

## Decolonising the South African prison

**Nontsasa Nako**

nnako@uj.ac.za

<http://dx.doi.org/10.17159/2413-3108/2018/v0n66a5649>

Prisons have been in the news in South Africa in the past two years: from the stripper scandal,<sup>1</sup> where saucily dressed women were snuck into Johannesburg Correctional Centre to entertain the inmates, to frequent reports of stabbings in prisons across the country, and of course, the unrest at the St Albans Maximum Security Prison in Port Elizabeth, where three inmates lost their lives at the end of 2016.<sup>2</sup> More recently, prisons made headlines with the revelations at the Commission of Enquiry into State Capture about massive corruption involving high-ranking government and ANC officials, and a security company called Bosasa (now African Global Operations), which manages detention facilities in South Africa. Ranging from lurid to frightening, tragic and disturbing, these frequent media reports have kept the public's gaze squarely on prisons, exposing the greed and abuse that undergird our system of crime and punishment in the country. But these reports have only addressed the prison as a *place* and not as an *institution*. That is, while these reports may raise debates about the role of the prison in the criminal justice system, they have not questioned incarceration as an institution, and its role in a constitutional democracy.

This special edition attempts to do both – to think of the day-to-day function of the prison and also to confront the wider impact of imprisonment on various communities through the lens of decolonisation. The prison, as a place of exclusion and legitimate expression of state power, has a critical role to play in South Africa's decolonisation project. Decolonisation is itself a struggle against domination, particularly domination that stems from colonialism and its enduring institutions. Gatsheni urges us to consider 'how the current modern global coloniality and capitalist structure re-emerged, was organized, configured and articulated according to the imperatives of global imperial designs'<sup>3</sup> in understanding the global designs of colonialism. Given the prison's centrality in constructing colonial modernity's domination, it is an appropriate target for decolonisation. We should not lose sight of its oppressive presence in our society.

Whether decolonisation will mean the complete destruction of colonial institutions, or rather require tweaking them to better accommodate the formerly colonised and oppressed, is a much larger debate. This special edition is concerned with describing the status quo in terms of prisons and imprisonment, and understanding how the marginalised fare in the current systems. We may start by asking how those who expend their resources and energies exposing the perfidies of legal systems, for example activists and criminalised communities, continue to appeal to these self-same systems in pursuit of justice and equity. This is the question with which Thato Masiangoako's 'Rationalising injustice: the reinforcement of legal hegemony in South Africa' engages. Her

article explains the frames of rationalisation employed by migrants and student and community activists, who were victims of police violence due to their perceived activist or migrant status. By explicating the discursive frames that legitimise legal hegemony, Masiangoako's article helps us understand how enduring cultural, social and institutional histories shape popular perceptions and may account for 'the enduring nature of prison', despite Masiangoako's experiences of unfair detention among these migrants and student and community activists.

In South Africa, where nearly a third of those incarcerated are awaiting trial, the deleterious impact of crime and punishment on the poor and marginalised is clear. Palesa Madi and Lubabalo Mabhenxa's article, 'Possibly unconstitutional?: The insistence on verification of address in bail hearings', analyses the bureaucracy of detention and finds that the requirement to verify addresses makes it difficult for the poor and marginalised to be released on bail. The criterion of fixed address as a bail condition for awaiting trial inmates places an undue burden on itinerant and displaced persons in a country where it is not uncommon for people to lack fixed homes. Further, because there is no uniformity in how this criterion is applied, different courts apply different standards. The authors conclude that with the remand detainee population so high in South African prisons, the existing instruments that protect the rights of detainees, including the right to liberty, the right to be presumed innocent, the right to equality and the right to be detained only as a measure of last resort, should be utilised in order to bring South Africa in line with international human rights law.

However, as Untalimile Crystal Mokoena and Emma Charlene Lubaale argue in 'The need for effective bail affordability inquiries', whether through bail, or verification of address as a condition for granting bail, remand conditions, as they stand, create unequal access to justice. These authors argue that bail affordability is a paramount consideration if we want to ensure that there is equality before the law and that the dignity of the indigent accused is protected. Both articles place emphasis on international laws and appeal to universal human rights discourses, and as such, both rely on colonial modernity to make the case for equitable dispensation of justice. We may well ask whether this goes far enough toward decolonising prisons, or whether there are other ways in which we can be more responsive to local colonial realities.

Global capital flows have retarded the progress of social justice, and there are contextual and historical conditions in South Africa that give these flows a distinctive local colour. For instance, while the prison industrial complex is a global phenomenon, it finds its grossest manifestation yet in the recent revelations about the corrupt entanglements of Bosasa and high-ranking government and ANC officials. If Angelo Agrizzi's explosive testimony at the Commission of Enquiry into State Capture is to be believed, those tasked with the administration of justice manipulated social problems to enrich themselves, at the expense of the poor and marginalised. Anthony Kaziboni's piece on the Lindela Reparation Centre is timely and relevant as it uncovers the crude manipulation of social problems for the benefit of a security company. Drawing on Giorgio Agamben's concept of 'bare life' described in *Homo sacer: sovereign power and bare life*, Kaziboni follows media reports on Lindela over a period of 18 years to identify what he terms 'xenophobic biopower', wherein immigrants detained at the centre are presented as negatives in South Africa. Perhaps, Agamben's 'bare life' usefully aligns with Mbembe's categories of colonial violence,<sup>4</sup> particularly the legitimisation of violence through institutions such as prisons. Kaziboni shows that in Agamben's state of exception, there is no distinction between violence and the law, and, as such, violence is intrinsic to the juridical.<sup>5</sup> He argues that when the detained immigrants are constituted

as exceptional, and when their rights are suspended due to 'illegality', all manner of violence against them is permissible. The article forces us to ask ourselves what we make of this 'rightless condition', where 'the normal order is de facto suspended'.<sup>6</sup> The reader is left questioning whether decolonisation of our prisons requires envisioning new spaces, or whether we can improve the existing juridical order.

The outsourcing of important state functions like security, crime and punishment risks eroding public trust in the state's ability to dispense justice. Of course, while we focus on the South African prison, this special edition emerged out of a 2017 conference hosted by the University of Johannesburg's Centre for Social Change entitled 'The Global Prison', during which the state of prisons and incarceration globally was discussed by scholars, practitioners and activists. Presentations at that conference explored the many facets of crime and punishment globally, especially the way in which neoliberal globalisation retards social justice advancement towards real prison reform or even decarceration. Instead, progress is marked by advances in incarceration technologies which do nothing to advance social justice, and in fact entrench state power. Our system remains caught up in what Loïc Wacquant describes as a paradox of neoliberal penalty where 'the state stridently reasserts its responsibility, potency, and efficiency in the narrow register of crime management at the very moment when it proclaims and organizes its own impotence on the economic front, thereby revitalizing the twin historical-cum-scholarly myths of the efficient police and the free market.'<sup>7</sup> Clearly, advancements in policing and prison technologies owe their genesis to colonial global designs. So, decolonisation must attend to the definition of modernity which feeds the drive for the most technologically advanced institutions, even when they displace the marginalised and poor – think housing developments, airports and shopping malls – or legitimise violence, like the prison. In a marked departure from the conference themes, though, we focus on what decolonisation would mean for the South African prison, given the country's history and national aspirations.

Decolonising prison, or any other institution, will have to centre on defining, identifying and describing our realities in our terms. It is not enough to speak of colonisation as if there have been no intervening social orders. The South African Truth and Reconciliation Commission (TRC), for instance, sought to mitigate the effects of apartheid, which was a spawn of colonialism and produced particularly harsh realities for the majority of South Africans. But, from these contributions, it is clear that not enough has been done to extend the gains of the TRC (such as they were). Clearly, apartheid forged various categories of racial and gendered identities from colonial taxonomies, but their persistence in post-apartheid South Africa is puzzling and calls for closer scrutiny. When it comes to decolonisation of prison therefore we have to look at the history of detention and imprisonment to see how it shapes the present. As Judge Jody Kollapen suggests in 'On the Record', decolonisation is a broad concept, and the high rate of crime places undue focus on crime and punishment rather than on the various factors that produce social malaise, therefore contributions such as the essays in this volume help in expanding our knowledge and might ultimately guide us towards the decolonisation of institutions such as prisons.

## Notes

This issue of *South African Crime Quarterly* was made possible by funding from the National Institute for the Humanities and Social Sciences (NIHSS) Working Group Fund.

1 T Khubeka, Full investigation underway into prison stripper incident – commissioner, *EWN*, 27 June 2017, <https://ewn.co.za/2017/06/27/officials-linked-to-prison-strip-show-to-face-consequences>

- 2 D Spies, 'Worst of the worst' inmates behind attack on St Albans prison guards, *news24*, 27 December 2016, <https://www.news24.com/SouthAfrica/News/worst-of-the-worst-inmates-behind-attack-on-st-albans-prison-guards-20161227>
- 3 J Sabelo and G Ndlovu, *Empire, global coloniality and African subjectivity*, New York and Oxford: Berghahn Books, 2013, 53.
- 4 Achile Mbembe, cited in *ibid.*, 51.
- 5 G Agamben, *State of exception*, Chicago: University of Chicago Press, 1998, 6.
- 6 *Ibid.*, 174.
- 7 L Wacquant, *Punishing the poor: the neoliberal government of social insecurity*, Durham: Duke University Press, 2009, xviii.



# Rationalising injustice

## The reinforcement of legal hegemony in South Africa

**Thato Masiangoako\***

thatomasiangoako@gmail.com

<http://dx.doi.org/10.17159/2413-3108/2018/v0n66a5633>

*The legal system in South Africa holds a legitimate and authoritative position in the country's constitutional democracy and political order, despite the commonplace experiences of injustice that take place at the hands of the criminal justice system. This article looks at how the legal consciousness of community activists, student activists and migrants is shaped by experiences of arrest and detention, and focuses particularly on how their perceptions of the law reinforce the legitimacy and hegemonic status enjoyed by the criminal justice system and broader legal system in South Africa. The article draws on original interviews with community activists, student activists and migrants, who recounted their experiences of arrest and detention. Using a socio-legal framework of legal consciousness, the article unpacks how these groups reinforce legal hegemony through the ways in which they understand and rationalise their experiences of punishment. Despite the reasonable expectation that those who have experienced a miscarriage of justice would be most sceptical and pessimistic about the law's legitimacy, this article finds that they continue to maintain their faith in the law. The article presents an analysis of interviews conducted with members of these groups, and shares evidence that begins to explore some of the ways in which South Africa's criminal justice system is able to sustain its legitimacy, despite the gaps between what the law ought to be and what the law actually is.*

Scholars and practitioners who have studied South Africa's criminal justice system have focused on crime, policy, and institutional perspectives in their efforts to understand its nature, effects and place in society.<sup>1</sup> These accounts have tended to overlook how members of society view and understand the criminal justice system. By providing a top-

down understanding of the system, these scholars have missed the various bottom-up processes that entrench, but also resist, the character of criminal justice in South Africa today. In particular, these accounts do not help us understand how the criminal justice and broader legal systems are influenced from below through the actions and perspectives of ordinary members of society.

This article attempts to address this oversight by using the socio-legal framework of legal consciousness to explore the ways in which

---

\* Thato Masiangoako is a researcher at the Socio-Economic Rights Institute (SERI), and recently completed her MA (Politics) at the University of the Witwatersrand. This article draws from the research conducted for her MA.

particular groups of people encounter and understand the criminal justice system. As a theoretical framework and tool, legal consciousness seeks to investigate how the law is able to maintain its legitimacy and hegemonic status, despite its shortcomings. It investigates the apparent gap between ‘the law on the books’ and ‘the law in action’<sup>2</sup> by examining the legal system’s role in maintaining South Africa’s political order, despite commonplace experiences and examples of injustice and the failures of the criminal justice system.

The article presents findings from a larger study that asked two questions: how do migrants and community and student activists encounter and understand the law in South Africa in the context of getting arrested and detained; and how is their legal consciousness shaped as a result of such encounters? The article focuses particularly on the second question, namely how the participants’ perceptions of the law reinforce the legitimacy and dominant status of the criminal justice and broader legal systems in South Africa.

As groups that organise and protest around socio-economic and socio-political issues, community and student activists are typically quite aware of the law as it pertains to their protest activity. They deliberately assert their rights, and often organise on the basis of the state’s failure to meet its legal obligations. However, migrants<sup>3</sup> in South Africa do not have the same history of political mobilisation and collective organising.<sup>4</sup> Instead, their experiences of the law are often concentrated around their encounters with the Department of Home Affairs.<sup>5</sup> As such, migrant encounters with the law are obligatory, and less confrontational or purposeful than those of activists, who typically intentionally mobilise the law through collective organisation. Migrants are generally more suspicious of the law because of the dominant and pervasive role that it plays in their lives.

The article finds that although migrants and activists experienced varying degrees of violence, protracted legal proceedings, harassment and clear injustice, most maintain their reverence for the law, sometimes inadvertently. Most of these individuals unintentionally reinforce legal hegemony through the ways in which they understand and rationalise their experiences of punishment. This reinforcement is part of the reason that the penal system is entrenched in our way of thinking of and dealing with social challenges, and underscores the fact that we remain restricted by a crime and punishment framework.

### **Legal consciousness and the criminal justice system in South Africa**

South Africa’s political order is based on a normative conception of the law as the legitimate and arguably unrivalled authority in South Africa’s constitutional democracy. It is thought of as the guarantor of freedoms and the neutral mediator of conflict. The legitimacy of the law can be attributed to the Constitution and the history that necessitated its birth. Another source of its legitimacy has been the law’s long history of fighting injustice, even under colonial rule and apartheid.<sup>6</sup> But how does the law in South Africa continue to enjoy its authoritative status, given the gap between the standards of the law (guided by the principles enshrined in the Constitution) on the one hand, and the day-to-day lived experiences and actual encounters with the law, on the other?

The concept of legal hegemony provides a useful framework for dealing with this question. It emerges out of law and society scholarship and forms part of a long tradition within socio-legal studies concerned with the relationship between law and its place in society. A large number of these studies focused on civil cases, predominantly set in North America. While subsequent works have taken up legal consciousness in other social contexts around

the world,<sup>7</sup> no such study has been applied to South Africa, and none has focused on criminal cases.

There is, however, a body of South African literature that engages with some of the issues raised by legal consciousness scholarship. Joel Modiri, Jackie Dugard, Grace Khunou and Brandon Bodenstien are among the scholars who have grappled with experiences of the law since the end of apartheid, looking critically at how the law is implemented and what the consequences are for society. Modiri<sup>8</sup> and Dugard's<sup>9</sup> work provides critical legal analysis, focusing on the law, the courts, and actual judgements, while Khunou<sup>10</sup> and Bodenstien's<sup>11</sup> work turns to the ordinary courtroom encounters and lived experiences of regular people passing through the legal system. These studies provide indispensable knowledge of first-hand encounters with the law and give a credible depiction of how the law works in South Africa.

Much of the work on South Africa's criminal justice system focuses on prisons, particularly on sentenced incarceration. Minimal attention is given to short-term incarceration in jails, holding cells and deportation centres, and while awaiting trial.<sup>12</sup> We know, however, that the legal system is not designed to have every case reach trial.<sup>13</sup> Many of these brief encounters with the criminal justice system consequently remain unaccounted for. More than half of those in remand detention will be released because they are acquitted, or because their charges are withdrawn or struck off the roll.<sup>14</sup>

As long as these perspectives are absent, our knowledge of how ordinary people experience the law through their encounters with the criminal justice system will be limited. If we do not shift this focus, our understanding of South Africa's criminal justice system will remain incomplete. In expanding the application of legal consciousness and introducing it to the South

African context, we are provided with a new and perhaps decolonial approach to how we study our criminal justice system, as well as to the broader perceptions of law in South Africa.

## Methodology

This article draws on data collected in a study (undertaken in 2016 and 2017) on how short-term incarceration shapes legal consciousness among community activists, student activists and migrants. It delves into accounts of arrest and detention among these groups in order to develop an in-depth understanding of the ways in which legal consciousness is shaped by particular experiences of the law, and how members of these groups understand the criminal justice system as a result.

Based on the experiences of a small cohort of 24 individuals – eight African migrants, eight student activists, and eight community activists – the study is not representative and cannot be reflective of South Africa's wider population. What we learn from these interviews, however, can shed light on the experiences of similar social groups. The study used purposive and snowball sampling methods to identify and access potential participants until the target sample size was reached. The data was captured through semi-structured, in-depth interviews and was analysed using thematic analysis. The interviews were conducted in a language preferred by the participants and were all conducted in and around Johannesburg.<sup>15</sup> To protect their identities, the participants were identified by a code pseudonym that consists of a letter ('C', 'S' or 'M'), followed by a number (between 1 and 24).<sup>16</sup>

Each interview was structured in three parts: the first looking at basic information and the background of the participant, the second focusing on an incident of arrest and detention, and the third reflecting on that experience. The

second part of the interview focused on how the participants actually recalled a particular experience of arrest and detention by asking how they were treated, how they interacted with the police, how they recalled the legal process, and how much of it they understood. The third part shifted towards an exploration of their perceptions and understandings of the law more broadly, in light of their experience of arrest and detention. Some of the questions asked in this section of the interview included what they thought of their experience(s) looking back, and how they now felt about the law and its agents in South Africa. For some, the experiences took place years ago, while for others, mainly the student activists, the experiences were much more recent.<sup>17</sup>

This article focuses on data gleaned during the third part of the interview in particular. It draws out some of the meanings that participants now attached to their experiences of arrest and detention. In this part of the interview, participants shared their perceptions of the law in general by making reference to their experiences of the criminal justice system. The responses they shared reveal how their encounters with the criminal justice system, largely characterised by violence and ill treatment, shape their broader perceptions of the law in South Africa – in other words, their legal consciousness. The responses reveal how participants came to rationalise their experiences in a way that unintentionally reinforces legal hegemony, and how their experiences do not necessarily alter their confidence in the law in South Africa and the value they attach to it. Those who were expressively critical of the criminal justice system, I argue, also unintentionally entrench legal hegemony, despite their staunch refusals to acknowledge the law's legitimacy.

## Research findings and analysis

The participants' socio-political identities, namely community activist, student activist, and

migrant, are significant because those identities shaped their encounters with the law. From the interviews, it is clear that each participant believed that the treatment they received was in some way related to these respective identities, and that their arrest and detention was based on how the police perceived them.<sup>18</sup> The migrants whom I interviewed were not activists, and the reasons behind their arrest and detention were therefore related to their perceived criminal activity or illegal migrant status. The community and student activists were detained for their alleged involvement in protest-related activity.

The community activists I spoke to came from, or were affiliated with, the Thembelihle Crisis Committee (TCC). Two of the participants viewed their arrests as the result of their perceived involvement in the protest activity that brought them in contact with the law. All of these interviewees had legal representation and each was later released without conviction. The student activists were arrested for their involvement (or perceived involvement) in the #FeesMustFall protest activity in 2015 and 2016. Two of these participants also saw their arrests as the result of their perceived involvement in the protests. Both these interviewees were legally represented and also later released without conviction. Among the migrants interviewed, only one of the participants was convicted of a drug-related offence, while the other seven participants were all released from immigration detention or remand detention. Most of these interviewees also had some form of legal representation.

Of the 24 participants, four were women (two community activists and two student activists). The time spent in custody ranged from three days to six weeks for community activists, while the students were detained between a few hours to one week. Of the three groups, the migrants spent the longest time in custody,

ranging from eight to 16 weeks.<sup>19</sup> Compared to the community and student activists, it is clear that migrants experienced significantly longer periods of detention and were the most vulnerable of the three groups in terms of violations and abuses.

### **Encountering the ‘gap’: expectations of the law and the shaping of legal consciousness**

Legal consciousness attempts to understand the law’s ability to maintain its authority in spite of the gap that exists between what the law is and what the law should be. This study develops a model of how encounters with the law and our perceptions of the law are informed by a combination of normative and predictive expectations of the law. Normative expectations are drawn from morally or ethically based idealised conceptions of the law.<sup>20</sup>

Normative expectations are based on the image that the law projects of itself, such as being objective and just. Predictive expectations are informed by depictions, shared perceptions, and experiences of the law that can be both personal and vicarious. These expectations are highly influential and extremely pervasive and because of this, they actively shape legal consciousness. These expectations make up what Ewick and Silbey refer to as ‘schemas’ that are the ‘publicly exchanged understandings [and perceptions]’ of the law.<sup>21</sup>

Persons with stronger normative expectations are likely to be disposed to a general acceptance of the law or a resignation to the law. For someone who has not experienced a hostile and contentious event like getting arrested, reliance on normative expectations would translate to routine obedience to the law. A stronger emphasis on predictive expectations (including depictions, perceptions and experiences) is likely to impel some to manoeuvre and negotiate with(in) the law, and others to defy or resist the law. The experiences

and perceptions of the law described in the interviews were typically at odds with how participants expressed their normative expectations of the law. This illustrated the gap between what people believe the law is and what the law ought to be or, put differently, the ‘empirical gap’ that exists between the ‘law on the books’ and the ‘law in action’ that has been identified in socio-legal scholarship.<sup>22</sup>

The rights enshrined in the Constitution, particularly its foundational values of human dignity, equality and freedom, are perceived by many people to be idealistic. On the one hand, we hold on to these principles and freedoms because they are what we aspire to in South Africa. On the other hand, these values remain distant, elusive and unattainable, particularly for community activists, student activists and migrants. The experiences of the criminal justice system recounted in this study are illustrative of the gap between the constitutional standards of arrest and detention, and the lived experiences of the individuals who experience these events. Their narratives reveal the various ways in which processes of arrest and detention are either intentionally used to administer punishment, or how they result in undue punishment because of the various deficiencies of the criminal justice system.<sup>23</sup>

When I asked the participants to share thoughts about their experiences and how they now perceived the law, its institutions and personnel, the community activists and student activists held overwhelmingly negative perceptions of the law in South Africa. In fact, only one of the community activists and one of the student activists presented a mixed view of the law. These negative views characterised the law in South Africa as partial, oppressive, overwhelmingly corrupt, and benefitting the powerful, wealthy and privileged. C12’s description of the law was that: ‘It serves the

few ... It's for the rich ... It's not for us as poor people. It doesn't serve us.' At various points in the interview, he referenced the struggles with which he identified to substantiate his belief in the law's partiality. He cited examples like the striking miners of Marikana and the protesting students of #FeesMustFall:

Because the state, the system ... it does oppress especially – you know, they will have a lenient hand on criminals and use a very oppressive system on activists. You check your #FeesMustFall, ja. The brutality on those students, it was a matter of saying we are going to clamp down on those activists ...<sup>24</sup>

Some of the students also believe that the criminal justice system is partial as a result of their experiences of arrests and detention. A student activist [S6] shared how he believes the law works, based on identity and how it differed from the ideal standard:

[M]y experience ... didn't match what I expect the law to be because ... the way they applied [the law] depends on who you are and ... where you come from, you know, your race, you know. I'm black and I'm anti- you know, the ruling party, so the law takes a different turn when you're in that position, I think.<sup>25</sup>

The migrants' responses were predominantly neutral in that they were a mixture of positive and negative opinions that acknowledged both the successes and failures of the law in South Africa. They viewed the law as pragmatic, imperfect, corruptible, but largely well-functioning. Of the eight migrants I spoke to, one had a negative view of the law and two had very positive and optimistic views of the law as being fair, just, and impartial. Given the complex and fluid nature of legal consciousness, I view perceptions of the law as existing on a continuum, with the most idealistic perceptions on one end and the most

pessimistic perceptions on the other. However, encounters with the law and exchanges about the law can shift those perceptions. As Merry argues, legal consciousness is interactively derived as people encounter the law but also as they share their experiences.<sup>26</sup>

The interviewees described forms of legal consciousness drawn from reflections on their experiences of the law. These forms of legal consciousness therefore present a general idea of what is believed to be true about the law in South Africa, derived from encounters with the criminal justice system as either a community activist, student activist, or migrant. These perceptions and strands of legal consciousness are based on a particular experience of the law, and while they might not present a complete account of the interviewees' legal consciousness, we are still able to learn from them. Indeed, these narratives hold implications for the ways in which legal hegemony is sustained.

### **Overcoming the 'gap': the rationalising frames of punishment and the (re)entrenchment of legal hegemony**

The multiple perceptions of the law emerging from the interviews reflect the complexity and multiplicity of experiences of the law. As highlighted by Ewick and Silbey, no one image of the law prevails.<sup>27</sup> It is precisely this complexity that allows the law to sustain its hegemonic status within South Africa's political order. The interviews reveal how people deal with their feelings of shame, humiliation, and regret that result from their experiences of arrest and detention, but also show how negative recollections are often accompanied by feelings of pride and even gratitude.

All of the interviewees felt, justifiably, that they were treated completely unjustly. However, some of the interviewees viewed their experiences as more than simply miscarriages of justice in that their testimonies would go

further to grapple with why they experienced what they did or what they believe has come of that experience. These rationalising frameworks form part of 'the time I went to jail' stories that the interviewees share with others, and are woven into their broader archive of life experiences.

From the interviewees' responses, I identified four rationalising frameworks: (1) injustices that highlight the 'gap'; (2) the personal value derived from the experience; (3) tangible outcomes derived from the experience; and (4) injustices attributed to individual actors. These frameworks are important because firstly, they show that people do not all experience and rationalise punishment or injustice in the same way. Secondly, their significance for legal consciousness is that they serve as a bridge between experiences of the law and our broader perceptions of the law. Thirdly, and perhaps most importantly, these rationalising frameworks inadvertently reconcile the gap between how the law was experienced and what was normatively expected of the law.

The first rationalising framework differs from the other three frameworks because those interviewees explicitly refused to acknowledge that the law as it exists in South Africa today holds any value. Their experience not only reflected the injustices of the law but also highlighted the gap between the law of the books and the law in action. The interviewees attributed their experience to a failure of the legal system in South Africa that cannot be 'explained away' or 'excused'. They scoffed at the very idea of the existence of a functioning legal system in South Africa, and pointed out the various ways in which the law had failed them.

Two students, S7 and S8, expressed awareness of some of the normative expectations of the law, but insisted that their expectations of the law in South Africa were grounded in their

predictive expectations; in other words, what they had heard, seen and believed to be true about the law in South Africa. When I asked S8 about his expectations of the law, he argued that he had no expectations of the law in South Africa because for him the law was nothing but 'an oppressive system' and 'money-laundering scheme' that exploited both victims and perpetrators.<sup>28</sup> In S8's view, black and poor people suffered the most under South Africa's legal system, and his experience of the criminal justice system confirmed his equally negative perceptions of the law.

Similarly, when I asked S7 what he expected of the law, he replied quite simply: 'Nothing. In South Africa? I expect absolutely nothing!'<sup>29</sup> These perceptions, which were echoed to varying degrees by some of the other participants, present criticisms of the law that challenge the idea that there is a functioning legal system in South Africa. S7 and S8 do not conform to any rationalising framework, as they reject any attempt to make sense out of what they describe as 'nonsense'.

These overly cynical accounts, however, get away with more than they are willing to acknowledge: they overlook their own implicit commitment and subscription to some kind of legitimate legal system in South Africa by virtue of their socio-political identities as student and community activists. Activist work assumes a belief in rights and entitlements. Political organisation, advancing particular objectives and demands, implicitly imagines the possibility of achieving some form of relief through legal means. And in fact, South Africa has a long and rich history of victories that have been won through the legal system. Also, a commitment to the right to freely organise and protest is best expressed by actually taking part in the activity, no matter how heavy-handed government's response might be. Therefore, through their very activism, the supremacy of the law as the

final arbiter and protector is sustained. Legal hegemony is reinforced, even when its power is deliberately resisted.

Conversely, the other three rationalising frameworks reveal that although the participants recognised and understood that the criminal justice system had failed them, and that there had been an abuse of power, they (re)interpreted their experiences, and in so doing helped reconcile the gap between the injustices that they experienced and their normative expectations of the law. Legal hegemony is thus reinforced through framing the experience as a failure that is not entirely attributable to the legal system. Some participants viewed it as an imperfect and flawed framework, while others continued to hold a negative view of the law.

All three frameworks reveal an attempt to reconcile the gap, while also, unintentionally, reasserting the law's power. These rationalising frameworks represent what Crenshaw, quoting Gordon, describes as 'the many thoughts and beliefs that people have adopted which [may] limit their ability "even to imagine that life could be different and better"'.<sup>30</sup> These three frameworks ultimately reassert the law's dominant and hegemonic status within society.

The participants who rationalised their experiences of arrest and detention on the basis of perceived personal value, expressed surprisingly positive views about the experience, often referencing religion and divine intervention, lessons learned, and the benefits of the experience. M24, who was wrongfully arrested and eventually convicted because of a drug-related matter that took place within three months of his arrival in South Africa, described his experience as follows:

When I think of my time in jail, you see, it's like God, he want to save my life inside there, you understand. Because, even some people who I know outside before I go, before I come back,

some of them is dead, you understand? You understand?<sup>31</sup>

M4 shared similar sentiments that also included a religious outlook on his time in detention:

[W]hen I think about those things, I say, 'Thank God. God, You opened my eyes and showed me something I didn't know.' Because even though I was wrongly arrested, I learned a lot, which I wouldn't have learned ...<sup>32</sup>

The role of religion as a rationalising framework featured quite strongly, particularly in the testimonies of migrants. Faith becomes a text according to which one's life experiences can be interpreted and understood. For M4 and to some extent M24, their experiences formed part of a divine plan for them to learn how the law in South Africa works. This notion of lessons learned, supported either by faith or by past experiences of jail, is a very intriguing way of rationalising unwarranted punishment.

The community activists rationalised their experiences of arrest and detention in terms of the tangible outcomes. These came in the form of their community, Thembelihle, now receiving various socio-economic services from government. Thembelihle's continued existence and how it resisted removal was presented as a victory in and of itself. The activists made sense of their arrests and detention by attributing tangible outcomes to these experiences, as they see it as part of their struggle for Thembelihle as a community. When I asked what they made of their arrests and time in detention, some of the responses reflected these sentiments:

When I look back we usually make a joke out of it when we are together because it is through those kinds of actions that makes Thembelihle today to be as it is today because the aim of the authorities was to take Thembelihle out of here ...<sup>33</sup>



Well today [my arrest is] a badge of honour [laughs], you know ...<sup>34</sup>

The quotes highlight the meaning attached to experiences of being arrested and detained. These outcomes are also associated with the very long history of protest and struggle. For the activists of Thembelihle, the harassment that they described, the grievous wounds that some had suffered, and the experiences of arrest and detention, all took on greater significance and ultimately contributed to the successes and victories of the movement. Such an account does little to challenge legal hegemony because, although their experiences epitomise the ways in which the law failed them, their victories are often secured through legal means. The various services they receive and their ability to resist government efforts to relocate the community have partly been the result of winning arduous and protracted legal battles. Even their eventual release following their arrests was because they had legal representatives such as the Socio-Economic Rights Institute (SERI), Centre for Applied Legal Studies (CALS), and other pro-bono legal support. This would not have been possible without a functioning and somewhat legitimate legal system. As such, the law can be both predator and saviour. Through these victories, the law is vindicated and its power is sustained.

Some of the interviewees rationalised their experiences by attributing the injustices that they experienced to individual actors. They blamed the police, immigration officers, and poor legal representatives. M1 and M13, both of whom were arrested and taken to the Lindela Repatriation Centre, experienced xenophobic treatment at the hands of Home Affairs and Immigration officials.

[T]here's some people working in South Africa, they don't know the law. Like immigration officers... they treating you like a foreigner, 'You are foreigner, you are

*makwerekwere, makwerekwere.*' ... The law is not talking like this but you can go somewhere, other people, they are talking like this.<sup>35</sup>

*La loi est bonne mais sauf que ceux dont on a mis pour pratiquer cette loi en faveur des étrangers, ils ne le font pas. Ils ont souvent des sentiments. Des sentiments xénophobiques, des sentiments autochtones et des originaux de ce pays...*

[The law is good but those put in place to implement the law in favour of foreigners, they don't do it. They harbour feelings, xenophobic feelings, feelings for natives and the originals of this country...]<sup>36</sup>

These interviewees attribute their negative experiences to professionals within the criminal justice system who lack expertise and harbour deep xenophobic and prejudicial attitudes. Immigration officers were seen as the gatekeepers between them and a legal stay in South Africa. In his interview, M1 argued that migrants in South Africa are forced into a precarious existence where they have to live in the shadows of the law.

Others attributed much of the criminal justice system's failure and their unfortunate experiences of arrest and detention to police conduct. M20 and M21 recognised the legitimacy of the law but felt that police corruption and incompetence resulted in their prolonged stay in remand detention. S2 argued that 'the law and people that work for the law are different'.<sup>37</sup> When accounting for the way that he and his comrades were treated, S5 described the police and their attitude towards their work as follows:

[T]he police officers, they do what they do only to serve their own purposes, not because they like the job, like most of them ... joined the police force not because they wanted to be police officers but because they just wanted a job ... So hence, most

of them they don't do what's right, they just do what they're required to do, not because they, themselves they believe in the law.<sup>38</sup>

This rationalising framework reinforces the legal hegemony by refusing to see the misconduct of officials and legal personnel as part of a systemic problem. The law maintains its legitimacy because individuals are responsible for the arrestees' unjust experiences. These participants may have believed that their experience of the law would have been different, were it not for these particular individuals, and possibly much closer aligned to their normative expectations.

## Conclusion

This article is based on the shared experiences of 24 migrants, student activists and community activists. Therefore the article cannot claim to be reflective of the broader population whose encounters with the criminal justice system present different complexities and involve different population groups. However, the article's engagement with the development of legal consciousness and the impact that has on sustaining legal hegemony begins to shed light on some the intricacies behind how the law upholds its authority, despite its shortcomings.

The legal consciousness of individuals has been shaped by their experiences of arrest and detention, either by trying to make sense of their experiences of injustice, or simply refusing to. For those who made an effort to rationalise their experience of arrest and detention, those frameworks of rationalisation helped bridge the gap between their experiences of the law and the ideal and normative expectations of the law. Participants' efforts to attach meaning to their experiences contributed to sustaining legal hegemony in South Africa. For those who refused to attach any particular meaning

to, or refused to rationalise, their experiences, the gap between what the law is and what the law ought to be remained just that – a gap. These same participants, however, unknowingly also contributed to sustaining legal hegemony because of their everyday interactions with the law, which lie beyond their exceptional experiences of arrest and detention.

This article has shown how negative experiences of the criminal justice system were not enough to shift interviewees' commitment to their normative expectations of the law as impartial and just. Through rationalising frameworks that they employed to make sense of their experiences, they actively bridged the gap between their experiences of what the law is and their commitment to their normative expectations of what the law ought to be.



To comment on this article visit

<http://www.issafrica.org/sacq.php>

## Notes

- 1 See A Dissel and S Ellis, *Reform and stasis: transformation in South African prisons*, Cape Town: Centre for the Study of Violence and Reconciliation, 2002; L Muntingh, Punishment and deterrence: don't expect prisons to reduce crime, *South African Crime Quarterly*, 26, 2008, 3-9; K Gillespie, Moralizing security: 'corrections' and the post-apartheid prison, *Race/Ethnicity: Multidisciplinary Global Contexts*, 2:1, 2008, 69-87; F Buntman, Prison and democracy: lessons learned and not learned, from 1989 to 2009, *International Journal of Politics, Culture, and Society IJPS*, 22:3, 2009, 401-18; J Chaskalson and Y de Jong, Bail, in C Gould (ed.), *Criminal (in)justice in South Africa: a civil society perspective*, Pretoria: Institute for Security Studies (ISS), 2009; D Gordon, *Transformation and trouble: crime, justice, and participation in democratic South Africa*, Ann Arbor: University of Michigan Press, 2009; G Super, Twenty years of punishment (and democracy) in South Africa: the pitfalls of governing crime through the community, *South African Crime Quarterly*, 48, 2014, 7-15.
- 2 S Silbey, After legal consciousness, *Annual Review of Law and Social Science*, 1:1, 2005, 323-68.
- 3 In this study, the term 'migrant' will be used to refer to broadly to migrants who are black and brown and typically live in the poorer urban areas in South Africa. The migrants included in this study are all from African countries.
- 4 J Klaaren, Citizenship, xenophobic violence and law's dark side, in L Landau, *Exorcising the demons within: xenophobia, violence and statecraft in contemporary South Africa*, Johannesburg: Wits University Press, 2011, 135-49; T Polzer and A Segatti, From defending migrant rights to new political subjectivities: Gauteng migrants' organisations after May 2008, in *ibid.*, 200-225.
- 5 Klaaren, Citizenship, xenophobic violence and law's dark side, 144.

- 6 Gordon, *Transformation and trouble*; Klaaren, Citizenship, xenophobic violence and law's dark side; T Ngcukaitobi, *The land is ours: South Africa's first black lawyers and the birth of constitutionalism*, Johannesburg: Penguin Random House, 2018.
- 7 LB Nielsen, Situating legal consciousness: experiences and attitudes of ordinary citizens about law and street harassment, *Law & Society Review*, 34, 2000, 1055–90; D Cowan, Legal consciousness: some observations, *The Modern Law Review*, 67:6, 2004, 928–958; M Hertogh, A 'European' conception of legal consciousness: rediscovering Eugen Ehrlich, *Journal of Law and Society*, 31:4, 2004, 457–481; K Hull, Legal consciousness in marginalized groups: the case of LGBT people, *Law & Social Inquiry*, 2016; D Engel and J Engel, *Tort, custom, and karma: globalization and legal consciousness in Thailand*, Palo Alto: Stanford University Press, 2010; LJ Abrego, Legal consciousness of undocumented Latinos: fear and stigma as barriers to claims-making for first- and 1.5-generation immigrants, *Law & Society Review*, 45:2, 2011, 337–70; A Kubal, Migrants' relationship with law in the host country: exploring the role of legal culture, *Journal of Intercultural Studies*, 34:1, 2013, 55–72.
- 8 See JM Modiri, The colour of law, power and knowledge: introducing critical race theory in (post-) apartheid South Africa, *South African Journal on Human Rights*, 28, 2012, 405–436; JM Modiri, Race as/and the trace of the ghost: jurisprudential escapism, horizontal anxiety and the right to be racist in BoE Trust Limited, *PER: Potchefstroomse Elektroniese Regsblad*, 16:5, 2013, 583–616.
- 9 J Dugard, Court of first instance? Towards a pro-poor jurisdiction for the South African Constitutional Court, *South African Journal on Human Rights*, 24:2, 2006, 214–38; J Dugard, 'Judging the judges': towards an appropriate role for the judiciary in South Africa's transformation, *Leiden Journal of International Law*, 20:4, 2007, 965–981; J Dugard, Courts and the poor in South Africa: a critique of systemic judicial failures to advance transformative justice, *South African Journal on Human Rights*, 24:2, 2008, 214–38.
- 10 G Khunou, Fathers don't stand a chance: experiences of custody, access and maintenance, in L Richter and R Morrell (eds), *Baba: Men and fatherhood in South Africa*, Cape Town: Human Sciences Research Council, 2006; G Khunou, Maintenance and changing masculinities as sources of gender conflict in contemporary (sic) Johannesburg, University of the Witwatersrand, 2008, <http://wiredspace.wits.ac.za/handle/10539/4651>.
- 11 B Bodenstein, In search of advice: (re)defining meaningful access to justice in the district courts of Johannesburg, University of the Witwatersrand, 2017, <http://wiredspace.wits.ac.za/handle/10539/26556>.
- 12 See Gillespie, Moralizing security; Muntingh, Punishment and deterrence; L Muntingh, The prison system, in Gould, *Criminal (in)justice in South Africa*, 201–13; Dissel and Ellis, *Reform and stasis*; Gould, *Criminal (in)justice in South Africa*.
- 13 M Feeley, *The process is the punishment: handling cases in a lower criminal court*, New York: Russell Sage Foundation, 1992; P Ewick and S Silbey, Conformity, contestation, and resistance: an account of legal consciousness, *New England Law Review* 26, 1998, 731.
- 14 C Ballard, Research report on remand detention in South Africa: an overview of the current law and proposals for reform, Cape Town: Civil Society Prison Reform Initiative (CSPRI), 2011, 5.
- 15 The interviews were kindly translated and transcribed by Lebo Thabong, Sanelisive Sithole and Sibongile Shope
- 16 The letters 'C', 'S' and 'M' stand for community activist, student activist and migrant, respectively. The numbers range from 1 to 24 and indicate when the interview was conducted within the series, ranging from the first interview conducted to the last interview conducted. The logic here is that each interview conducted impacted on the one that followed.
- 17 It is unclear how the differences in how recent the experiences were may have had an impact on how they remembered and reflected on their experiences. Therefore, when analysing the interviews, this was something that I had to be aware of.
- 18 Some of the interviewees were arrested because of their *perceived* activity and, by extension, their *perceived* sociopolitical identities of being community activists, student activists or migrants. In such cases, these interviewees made it clear that at the time of the arrest and detention, their arrests were wrongful in that they were not involved in the activities for which they were arrested, e.g. protest activity or drug dealing. In this study, I categorised them according to these perceived identities.
- 19 Three migrants spent eight weeks in detention, another three spent 12 weeks, while another two spent 16 weeks.
- 20 Normative and predictive expectations are concepts drawn from JB Barbeau, Predictive and normative expectations in consumer satisfaction: a utilization of adaptation and comparison levels in a unified framework, in K Hunt and RL Day (eds), *Conceptual and empirical contributions to consumer satisfaction and complaining behavior*, Bloomington: Indiana University School of Business, 1985, 27–32. The concepts have been adapted and applied to a legal consciousness framework.
- 21 Ewick and Silbey, Conformity, contestation, and resistance, 46.
- 22 Silbey, After legal consciousness; Hertogh, A 'European' conception of legal consciousness; S Halliday and B Morgan, I fought the law and the law won? Legal consciousness and the critical imagination, *Current Legal Problems*, 66:1, 2013, 1–32.
- 23 See, for example, R Hopkins, Broken beyond imagination: South Africa's justice system, *Daily Maverick*, 15 April 2014; Ballard, Research report on remand detention in South Africa; A Karrim, To grant bail or not to grant bail, Wits Justice Project, 2017, <http://www.witsjusticeproject.co.za/investigative-journalism/to-grant-bail-or-not-to-grant-bail/>; J Gordin and I Cloete, Imprisoned before being found guilty: remand detainees in South Africa, *U. Cin. L. Rev.*, 80, 2011, 1167–77.
- 24 C12, interview, 2017.
- 25 S6, interview, 2017.
- 26 SE Merry, *Getting justice and getting even: legal consciousness among working-class Americans*, Chicago: University of Chicago Press, 1992, 211–13.
- 27 Ewick and Silbey, Conformity, contestation, and resistance, 51.
- 28 S8, interview, 2017.
- 29 S7, interview, 2017.
- 30 K Crenshaw, Race, reform, and retrenchment: transformation and legitimation in anti-discrimination law, in K Crenshaw et al. (eds), *Critical race theory: the key writings that formed the movement*, New York: The New Press, 1995, 103–26, 108.
- 31 M24, interview, 2017.
- 32 M4, interview, 2017.
- 33 C16, interview, 2017.
- 34 C10, interview, 2017.
- 35 M1, interview, 2017.
- 36 M13, interview, 2017.
- 37 S2, interview, 2017.
- 38 S5, interview, 2017.



# Possibly unconstitutional?

## The insistence on verification of address in bail hearings

**Palesa Rose Madi and Lubabalo Mabhenxa\***

Palesa.Madi@wits.ac.za

Lubabalo.Mabhenxa@wits.ac.za

<http://dx.doi.org/10.17159/2413-3108/2018/v0n66a5710>

*Arrestees have the right to apply for bail and to be released pending their trial, where circumstances require it. There is a practice of requiring people to verify their addresses prior to bail being granted, and this is implemented in various ways by different magistrates' courts; from a magistrate refusing to hear a bail application until there is a verified address, to a magistrate hearing the application but holding the decision over until a verifiable address is supplied. This practice is widespread, and unfairly prejudices the homeless and poor, whose addresses are difficult to verify. It also means that their pre-trial incarceration might be lengthier than their sentences. This article will argue that this practice should be subject to the interests of justice criteria, and that its current form does not meet this standard. We will also investigate what this practice might look like if carried out in compliance with the interests of justice criteria. Lastly, this article will argue that this practice in its current form fails to meet rule of law standards. These arguments will be made in the context of the right to equality, and discrimination against those living in poverty. It will be concluded that, in its current form, the practice is unconstitutional.*

Courts of law are frequently criticised for denying bail to accused persons. Critics argue that the courts place too much weight on some factors, and completely disregard others.<sup>1</sup> These include denying an accused bail because s/he does not own satisfactory assets, and is therefore considered a flight risk in the view of the presiding officer.<sup>2</sup> In addition, the lack of a verifiable and/or fixed address affects the judge's assessment of whether such an accused is

likely to evade trial.<sup>3</sup> Accused persons who can provide information about community and family ties, or who are permanently employed, or who can prove ownership of assets, are much less likely to be deemed a flight risk than those who cannot.<sup>4</sup> A fixed residential address and the ownership of assets, while different, are both indicators of an accused's economic status, and adjudicating bail applications on this basis discriminates against accused persons and runs counter to international human rights provisions and constitutional rights.<sup>5</sup>

South Africa already has a very high number of people in remand detention. Approximately

\* Palesa Madi is an attorney and the Acting Deputy Director at the Centre for Applied Legal Studies, Wits University. She completed her LLB at Wits University. Lubabalo Mabhenxa is an admitted attorney of the High Court and completed his LLB at the University of Fort Hare.

one third of persons detained in correctional facilities are on remand detention, and this number has grown more than 100% since 1995.<sup>6</sup> These growing numbers of remand detainees result from the lack of correctional centres, unnecessary detention (in instances of petty crimes), prohibitively high bail, incorrect application of the two-pronged bail inquiry, and lack of access to legal representation.<sup>7</sup> Depending on how harsh the prison conditions are, remand detainees are exposed to many life-threatening diseases, suffer loss of employment, lose contact with family members, and have a number of their constitutional rights violated daily.<sup>8</sup>

Denying bail exacerbates the already unacceptable levels of overcrowding in prisons by detaining high numbers of people who have not yet been found guilty of the crimes for which they stand accused.<sup>9</sup> Research has shown that setting a high bail essentially amounts to a denial of bail – it discriminates against people living in poverty and means that large numbers of people remain in detention merely because they cannot afford to pay the set bail amount.<sup>10</sup> This has prompted interventions such as ensuring reasonable bail calculations in order to prevent pre-trial punishment.<sup>11</sup> Research (discussed later in this article) has also shown that judicial officers more often consider the nature of the crime rather than the personal circumstances of the accused during the bail inquiry. Little attention has been paid to the way in which presiding officers rely heavily on a lack of assets ownership and lack of a verified address to justify denying or postponing bail, and how this not only discriminates against accused people living in poverty but also contributes to the growth of the remand detention population.

This article argues that placing too much emphasis on these factors when determining arrestees' flight risk (and setting bail amounts)

violates South African law, international human rights law and regional instruments. The article sets out how the courts assess flight risk by considering an accused's fixed address and/or ownership of assets in the determination of bail, and the important role that presiding officers' attitudes play in this regard. We then discuss what is required under an interests of justice criterion, how the courts should treat arrestees, given either an absence of assets or the failure of the prosecution to verify the physical address of an accused, and how the courts should assess whether an arrestee poses a flight risk. The article proposes some recommendations and suggests alternative strategies to enable bail for arrested persons without violating their human rights.

### **The requirement of a fixed address and/or ownership of assets for bail**

Before a court considers a bail application, the accused's physical address must be verified through documentary evidence or by the investigating officer, who physically has to go to the address in question to confirm whether the accused does in fact live there. The investigating officer will monitor the accused person while s/he is out on bail, and will check the given address in the event that the accused does not attend court on a day that s/he was required to do so.<sup>12</sup> If this address is not yet established in time for the accused's first appearance in court (which is usually when bail applications are heard), the presiding officer may postpone the matter for up to seven days under section 50(6)(d)(i) of the Criminal Procedure Act.<sup>13</sup> (We return to a discussion of the bail provisions in the Criminal Procedure Act, below).

A 2016 study, which observed bail applications at the Cape Town and Wynberg magistrates' courts, showed that 16 out of 37 cases were postponed in accordance with section 50(6)(d)(i), pending the verification of the accused's permanent residential address.<sup>14</sup>

Bail was not granted in five cases because police officers were not able to find and verify the accused's residential address.<sup>15</sup> Bail hearings had been postponed at least once prior to the hearings observed in all of these cases.<sup>16</sup> A 2013 study into how bail hearings affected the remand detention population in Gauteng similarly showed that a large number of bail hearings were postponed in order for the accused's address to be verified prior to the granting of bail.<sup>17</sup> When an accused does not have a fixed or readily verifiable address, the court is unlikely to believe that the accused will appear once the trial commences, or that the correctional officers will be able to locate and monitor the accused person if they do not return to court as required.<sup>18</sup> Presiding officers have acknowledged that the concept of a fixed address is problematic in the South African context, where many people live in informal settlements.<sup>19</sup>

Existing research has also shown that courts often view accused persons who own few or no assets as a possible flight risk.<sup>20</sup> Presiding officers in seven hearings observed and analysed by Omar took the view that a lack of ownership of assets meant that the accused would be a flight risk.<sup>21</sup> In three of these seven cases, the courts characterised the accused as 'likely to abscond',<sup>22</sup> despite the fact that they were employed.<sup>23</sup> The problem with this type of approach by the courts is that, as held in *S v Letaoana*,<sup>24</sup> 'to take into account the minimal assets possessed by an accused as a factor for refusing bail is tantamount to imposing a penalty for poverty'.<sup>25</sup>

The practice of requiring fixed addresses in order to grant bail disproportionately affects black South Africans living in poverty. Accused persons of higher economic standing, who likely live in a residential area, can easily and quickly verify their address by producing a copy of their rates and taxes bill, an account statement or similar document. This is taken as full and adequate

verification of their address. South Africa has many people who reside in informal housing (sometimes unlawfully occupying pieces of land close to prospective places of employment), and who consequently are not able to meet these requirements.

A related concern are the variable ways that courts implement the requirement for a fixed address and/or ownership of assets. From our own observations in magistrates' courts around Johannesburg (which we conducted in order to better understand the requirement in practice), we have seen presiding officers who insist that only an affidavit by an investigating officer is suitable for verification of an address, while others accept testimony by the accused's relatives and family members for the same purpose. Strictly speaking, there is no specific provision in South African law that sets out that a fixed address and ownership of assets is a prerequisite for granting bail (as cases like *Letaoana* have questioned). Instead, there is limited law to guide presiding officers in respect of how addresses must be verified, which creates uncertainty and a lack of uniformity in how the law is applied.

## Legal framework

For an international treaty to be binding in South Africa it must be enacted into law by the legislature, even if South Africa is a signatory to the treaty.<sup>26</sup> However, treaties can act as interpretative tools for understanding rights even before they are enacted into law.<sup>27</sup> International law is therefore important, as it creates obligations for South Africa to develop and enact laws that are in line with international human rights standards.

## International instruments

### *Universal Declaration of Human Rights*

The Universal Declaration of Human Rights (UDHR) is considered the foundation of international human rights law.<sup>28</sup> The UDHR

was adopted in 1948, and precedes a number of international human rights treaties, which are legally binding instruments to signatory states.<sup>29</sup> The UDHR recognises that all human beings have basic rights and fundamental freedoms, and that such freedoms and rights are applicable to everyone.<sup>30</sup> Further, through the UDHR the international community made a commitment to uphold dignity and justice for all, regardless of people's 'nationality, place of residence, gender, national or ethnic origin, colour, religion, language, or any other status'.<sup>31</sup> Detained persons as a vulnerable group have human rights that are protected under the UDHR, and, like all other human beings, are entitled to their fundamental freedoms.<sup>32</sup>

Article 3 of the UDHR guarantees the right 'to life, liberty and security of the person'.<sup>33</sup> Article 11 provides the right of accused persons to be presumed innocent until proven guilty in accordance with the law,<sup>34</sup> and Article 9 protects against being subjected to arbitrary arrest and/or arbitrary detention.<sup>35</sup>

### ***International Covenant on Civil and Political Rights***

Article 9 (1) of the International Covenant on Civil and Political Rights (ICCPR), to which South Africa is a party,<sup>36</sup> guarantees the right to liberty and freedom of security, and outlaws arbitrary arrest and detention.<sup>37</sup> To comply with article 9 of the ICCPR, states may not deprive people's liberty in a manner that is not authorised by the law, and where they do deprive a person of liberty this 'must not be manifestly unproportional, unjust or unpredictable'.<sup>38</sup> Omar argues that the courts' practice of placing too much weight on the unavailability of a fixed address or ownership of property, which proportionally impacts on the lives of people living in poverty, means that the practice is unjust.<sup>39</sup> Further, because the practice is not strictly found in any specific legislation, it is unpredictable.

The United Nations (UN) Human Rights Committee holds that the definition of arbitrariness is not limited to conduct that is contrary to the law but rather, arbitrariness is inclusive of inappropriate, unjust actions or omissions, which are unpredictable.<sup>40</sup> People must therefore only be arrested for lawful reasons, and must also be detained only under circumstances that are reasonable, otherwise the detention is unlawful.<sup>41</sup>

Article 9(3) of the ICCPR provides that detention 'shall not be the "general rule"' and advocates for remand detainees to be released from prisons, subject to conditions, which may include bail money or other types of guarantees.<sup>42</sup> Although the Human Rights Committee has consistently said that the general rule is subject to the exception where there is a possibility that the accused would abscond,<sup>43</sup> an inability to show ownership of assets and/or to provide a fixed address does not automatically mean the accused will evade trial.<sup>44</sup> Accused persons who do not own property or have a fixed address should still be released from prison during the pre-trial period, subject to bail conditions and/or other guarantees.

This position is further amplified by the UN Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules),<sup>45</sup> which require that pre-trial detention should only be used as a measure of last resort and should not be longer than necessary.<sup>46</sup> Presiding officers should as a matter of principle always consider non-custodial measures, which may include conditions such as periodically visiting the local police station. Of course, these conditions may pose an additional burden to accused persons who cannot afford regular transport to the police station.

Detained persons also have the right to be treated equally, equality being characterised as 'the most important principle imbuing and inspiring the concept of human rights'.<sup>47</sup> Article



26 of the ICCPR provides that everyone is equal before the law and that everyone is equally entitled to the protection of the law.<sup>48</sup> Article 2(1) of the ICCPR disallows discrimination in the context of all rights and freedoms listed under the ICCPR, including the right to liberty.<sup>49</sup> Accused persons without any fixed address or ownership of assets should therefore not be treated any differently than any other accused just because of their financial circumstances. The law, for them too, requires that detention be a measure of last resort.

## Regional instruments

The African Charter on Human and Peoples' Rights<sup>50</sup> (the African Charter), to which South Africa is a party,<sup>51</sup> does not have a specific bail provision, which, it has been argued, weakens its ability to adequately protect the rights of people seeking bail.<sup>52</sup> Article 6 of the African Charter provides that 'every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.'<sup>53</sup> Although the African Charter does not explicitly set out the right to be presumed innocent, it does provide that people must be protected from arbitrary detention.<sup>54</sup> The African Commission on Human and Peoples' Rights, in a case where accused persons were detained for over three years, held that detaining people without the possibility of bail amounts to arbitrary deprivation of liberty under article 6 of the African Charter.<sup>55</sup>

In addition to article 6 of the African Charter, the African Commission on Human and Peoples' Rights has established a number of standards that protect the right to be presumed innocent.<sup>56</sup> Section M(1)(e) of the Principles on the Right to a Fair Trial<sup>57</sup> provides that states must not keep accused persons in detention pending the finalisation of their trial, unless it is absolutely necessary to do so to

prevent an accused person from fleeing (subject to sufficient evidence).<sup>58</sup> Instead, states should release accused persons on particular conditions and/or guarantees.<sup>59</sup>

The Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa<sup>60</sup> seeks to further encourage alternative strategies to imprisonment.<sup>61</sup> The Plan of Action sets out that remand detention should be a measure of last resort and should be for as short a period as possible. The plan mandates that police officers should have and exercise their wider bail powers, including the use of police bail (a process where a police officer can grant bail without a presiding officer), and that presiding officers should involve community members for bail hearings in order to gather more evidence about accused's assets and/or their place of abode.<sup>62</sup>

The African Commission has stated that detention carried out by states based on discrimination amounts to the arbitrary deprivation of an accused's right to liberty and, consequently, is a violation of article 6 of the African Charter.<sup>63</sup> This raises interesting questions in South Africa, where the majority of people living in poverty are black, and where adjudicating bail based on the absence of a fixed address and/or ownership of assets may be considered discriminatory.

## Domestic law

### The Constitution

Section 12(1)(a) of the Constitution provides that everyone has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause.<sup>64</sup> Section 12 guarantees both substantive and procedural protection of the right to freedom and security of the person. In *S v Coetzee*, Justice O'Regan described the two components of section 12 as follows:

The first is concerned particularly with reasons for which the state may deprive

someone of freedom; and the second is concerned with the manner whereby a person is deprived of freedom ... our Constitution recognises that both aspects are important in a democracy: the state may not deprive its citizens of liberty for reasons that are not acceptable, nor when it deprives its citizens of freedom for acceptable reasons, may it do so in a manner that is procedurally unfair.<sup>65</sup>

Where presiding officers place too much weight on whether an accused person owns assets and/or has a verified address in determining whether to grant bail or not, they unfairly deprive the accused of his or her liberty, for the reasons set out above.<sup>66</sup> Consequently, this practice is inconsistent with section 12(1) of the Constitution.

Section 35(1)(f) of the Constitution provides that 'everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit, subject to reasonable conditions'.<sup>67</sup> Given prison conditions in South Africa, it should be in the interests of justice to release accused persons who have been denied bail merely because they do not own assets or have a fixed residential address. Failing to do so penalises their poverty (as *Letoana* points out).

Section 1(c) of the Constitution provides 'that the Republic of South Africa is one, sovereign, democratic state founded on the value of supremacy of the Constitution and the rule of law'.<sup>68</sup> The rule of law demands uniformity in the legal system. In *Gcaba v Minister for Safety and Security*,<sup>69</sup> the Constitutional Court, in reference to the binding effect of judgments, held that 'precedents must be respected in order to ensure legal certainty and equality before the law'.<sup>70</sup> It is not uniform for presiding officers to hear testimonies of family members to ascertain flight risk in some bail hearings, while insisting on a police officer's affidavits in others. The

manner in which flight risk is assessed should be flexible and yet uniform to ensure that it does not discriminate against certain groups of people. Discretion allowed to police and judicial officers should therefore be guided to ensure a level of fairness and consistency.<sup>71</sup>

Further, section 9(3) of the Constitution provides that 'the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race ... or social origin'.<sup>72</sup> In *President of the Republic of South Africa v Hugo*, the court held the following regarding substantive equality:

We need ... to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.

The Constitution therefore protects a number of rights of persons who have been arrested and detained: the right to freedom and security of the person (which includes the right not to be deprived of freedom arbitrarily or without just cause), the right to be released from detention if the interests of justice permit, and the right to not be unfairly discriminated against directly or indirectly, based on one or more grounds, including race and social origin. In addition, the Constitution reminds us that one of the values our state is founded on is the rule of law. It is in

this constitutional framework that we need to protect and interpret the rights of persons who have been arrested and detained.

### ***The Criminal Procedure Act***

The Criminal Procedure Act<sup>73</sup> (CPA) makes provision for criminal matters and their procedures.<sup>74</sup> Chapter 9 of the CPA sets out provisions that relate to bail hearings.<sup>75</sup>

Section 60(1)(a) of the CPA, which emanates from section 35 of the Constitution, provides that ‘an accused who is in custody in respect of an offence shall, subject to the provisions of section 50(6), be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that the interests of justice so permit’.<sup>76</sup> Section 60(4)(b) provides that ‘the interests of justice do not permit the release from detention of an accused where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial’.<sup>77</sup>

Section 60(6) further provides that

[i]n considering whether the ground in subsection (4)(b) has been established, the court may, where applicable, take into account the following factors, namely –

- (a) the emotional, family, community or occupational ties of the accused to the place at which he or she is to be tried;
- (b) the assets held by the accused and where such assets are situated;
- (c) the means, and travel documents held by the accused, which may enable him or her to leave the country;
- (d) the extent, if any, to which the accused can afford to forfeit the amount of bail which may be set;
- (e) the question whether the extradition of the accused could readily be effected should he or she flee across the

borders of the Republic in an attempt to evade his or her trial;

- (f) the nature and the gravity of the charge on which the accused is to be tried;
- (g) the strength of the case against the accused and the incentive that he or she may in consequence have to attempt to evade his or her trial;
- (h) the nature and gravity of the punishment which is likely to be imposed should the accused be convicted of the charges against him or her;
- (i) the binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached; or
- (j) any other factor which in the opinion of the court should be taken into account.<sup>78</sup>

None of the detailed set of factors set out in section 60(6) to guide a judicial officer when adjudicating bail specifically states that the accused must have a fixed address or ownership of assets. However, section 60(6)(a) and section 60(6)(b) may be interpreted to mean a fixed address and/or ownership of assets, although such an interpretation must still be in line with the constitutional rights (liberty, equality, the presumption of innocence etc.). Further, as provided for by the Constitution, such an assessment has to be uniform and predictable and done in a manner that does not violate international human rights law.

### ***Other domestic instruments***

The Protocol on the Procedure to be followed in applying Section 63A of the Criminal Procedure Act (the Bail Protocol) contains no information, process or procedure regarding the requirement of a fixed address and/or ownership of assets. It also does not set out the mechanisms through

which the addresses of accused persons in detention ought to be verified when the head of a correctional centre applies for bail on behalf of the accused.<sup>79</sup>

The *National Instruction 3 of 2016: Bail and the Release of Persons (NI3)*<sup>80</sup> acknowledges that detention is a serious infringement of the detained person's rights to liberty and freedom and security of the person. The instruction makes reference to police officers having to complete a SAPS 3M(k) form when verifying addresses of accused persons.<sup>81</sup> The instruction requires the investigating officer to verify the correctness of the name, address and personal details of the accused by visiting the address that they have provided, contacting the accused's family members or other contact persons they have nominated, and conducting enquiries on available state electronic systems (such as the fingerprint database or the traffic system, and by contacting the Department of Home Affairs).<sup>82</sup>

The instruction does not provide guidance on what to do if the accused person does not have a fixed address or an address that is formal and verifiable, and who does not have family, friends or neighbours who are able or willing to confirm any such address. In the absence of clarity on what to do in such cases, accused persons can remain in detention indefinitely, pending the finalisation of their trial. This is unconstitutional and a violation of international human rights law.

Section 10 of NI3 explains that in terms of section 50(6)(d) of the CPA, the investigating officer may request the prosecutor to ask the court to postpone any bail proceedings or bail applications where the investigating officer has not managed to get the required information (for example, not having completed the SAPS 3M(k) form). These cases may be postponed for seven days at a time. The instruction does not provide any insight into what constitutes legitimate reasons to justify why the investigating officer failed to procure the required information.

It also does not set out what process should be followed to ensure protection of the accused's constitutional and human rights in cases of repeated postponements or indefinite detention. The lacunas in the bail protocol and the National Instruction therefore have the effect of violating the equality of accused persons living in poverty.

## **Bail and the interests of justice**

In *S v Dlamini*, the courts grappled with questions of the constitutional validity of the provisions relating to bail and the interests of justice.<sup>83</sup> The decision in this case established that all bail laws must be measured against section 35(1)(f) of the Constitution, which provides for the release of arrestees where the interests of justice permit, subject to setting reasonable conditions that aim to facilitate the person's arrest and not curtail it, where the interests of justice so require.<sup>84</sup> The court clarified that this should apply to all instances where there is a deprivation of liberty, including postponements of bail proceedings.

The *Dlamini* case underlines three important principles. The first is that it accepts that people can be arrested even before it has been proven that they committed a crime and they are convicted. The second is that arrested persons have a right to be released on bail, subject to reasonable conditions, and third, that such release is assessed in terms of the interests of justice in each case.<sup>85</sup> Bail is intended to maximise liberty through a weighing up of factors by the court.<sup>86</sup> Arrests are meant to be a way to ensure that the accused attends trial,<sup>87</sup> and a court must decide whether continued detention is necessary to achieve that end.<sup>88</sup>

The interests of justice criterion found both in section 35(1)(f) of the Constitution and section 60 of the Criminal Procedure Act seeks to balance what is fair and just for the interested parties.<sup>89</sup> Section 60(4) of the Criminal Procedure Act establishes a guideline for how

this ought to be determined and it is settled law that none of these factors should be given undue weight so as to deny bail even when it should be granted.<sup>90</sup> There is also no reason to presuppose that an accused must be denied bail purely because there was a failure to verify his or her address, or because s/he possesses very few assets (given that this fact alone does not make the accused a flight risk).<sup>91</sup> Pre-trial detention can severely limit the rights of accused persons before their guilt has been determined. Adequately weighing and balancing the interest of justice is therefore critically important.

We are also particularly concerned about the use of section 50(d)(i) of the Criminal Procedure Act in order to postpone bail hearings. Although this section provides that a court can postpone a matter for up to seven days where there is insufficient information for considering bail (like failure to verify an address), the overburdened court rolls in the magistrates' courts mean that remands are often longer than seven days in practice. Such delays are in violation of the accused's right to a speedy decision.<sup>92</sup>

Section 50(d)(i) also introduces wide discretion and sees prosecutors' requests for postponement accepted without further inquiry. In *Majali v S*,<sup>93</sup> the state sought a postponement in terms of section 50(d)(i), as there were parts of the investigation into the accused's past convictions that were incomplete for the purposes of bail. The court held that the prosecution ought to provide cogent reasons why they had not sought a postponement before the day of the bail hearing,<sup>94</sup> and held that the court should balance the reasons put forward in support of the request for a postponement against considerations of the liberty of the accused.<sup>95</sup> In addition, where the prosecution has not shown good cause for postponement, the court must rely on the information provided by

the applicant for bail, where this has not been disputed.<sup>96</sup>

We have seen from our own observations in practice that bail applications are either not heard or are postponed for verification when, on the basis of the information provided by the applicant, bail should in fact be granted. Where applicants have been denied bail because of the absence of a fixed address, the investigating officer has stated that the informal settlement was too convoluted to navigate, or that they were unable to find the house, or that no police cars were available. Often, as we have seen from our own observations, these reasons were not even interrogated by the magistrate. In our experience, the postponements in these cases are missed opportunities: the court would have sight of the applicant/accused's evidence, and in the absence of good reasons for not having verified this information, or doubting its veracity, it should be considered by the court. Balancing the need to limit the deprivation of liberty of the accused against ensuring that s/he attends trial requires that the accused is released where the other factors under section 60(6) call for it. There are any number of interventions less extreme than imprisonment that can, and should, be considered.

## Recommendations

The South African state should consider rolling out an electronic monitoring system, a system that is used to track and record an accused person's movements and location while s/he is out on bail.<sup>97</sup> Although this kind of electronic system will require sufficient state resources to ensure that it is efficient and effective, its advantages may include increased public confidence in the criminal justice system, reduced harm associated with detention for arrestees, and a decrease in the numbers of remand detainees.<sup>98</sup>

Judges, magistrates, attorneys, advocates and other officers of the court need further training or learning exchanges on the intersection of poverty, race and the criminal justice system. Increased emphasis should be placed on the use of the conditions under which an accused can be released (pending trial, instead of detention), and matters should be stood down rather than postponed while the investigating officer goes to look for the address, or gets assistance from the accused's family. Further research ought to be done on the prevalence of the practice of placing more weight on certain bail factors than others. Such research should be done in collaboration with legal aid attorneys, who are already in courts across the country on a daily basis.

It is important that we explore less extreme measures than remand, where appropriate. Cases where the only reason for postponing or denying bail is that the address verification is missing should ordinarily use less restrictive means. Finally, there should also be widespread education campaigns for the general public on the importance of the concept of innocence until proven guilty, and the protections in law around bail.

## Conclusion

Our limited research in South African magistrates' courts suggests that presiding officers place too much weight on whether an accused owns assets and/or has a fixed address when determining flight risk during bail hearings. This practice exacerbates conditions in South African prisons, where the remand detainee population is still unacceptably high. This article has considered this practice in light of international and domestic human rights law instruments: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples' Rights, the Constitution, the Correctional Services Act and the Criminal

Procedure Act. These instruments all protect the rights of detainees, including the right to liberty, the right to be presumed innocent, the right to equality and the right to be detained only as a measure of last resort. We argue that relying too heavily on asset ownership and fixed address to determine an accused's flight risk during bail hearings is a violation of all the rights discussed above, and is not in line with international human rights law.



To comment on this article visit

<http://www.issafrica.org/sacq.php>

## Notes

- 1 J Omar, Penalised for poverty: the unfair assessment of 'flight risk' in bail hearings, *South African Crime Quarterly*, 57, September 2016, 1.
- 2 Ibid.
- 3 Ibid.
- 4 Ibid.
- 5 Ibid.
- 6 Ibid., 16.
- 7 Ibid.
- 8 Ibid., 10.
- 9 Department of Correctional Services, *White Paper on Remand Detention Management in South Africa*, March 2014, 53, [https://www.gov.za/sites/default/files/gcis\\_document/201607/white-paper-remand-detention-management-south-africaa.pdf](https://www.gov.za/sites/default/files/gcis_document/201607/white-paper-remand-detention-management-south-africaa.pdf)
- 10 M Stevenson and SG Mayson, Pretrial detention and bail, in E Luna (ed.), *Academy for justice: a report on scholarship and criminal justice reform*, Public Law Research Paper 17-18, Philadelphia: University of Pennsylvania, 2017, 26–27, 28.
- 11 Ibid.; American Bar Association (ABA), *ABA standards for criminal justice: pretrial release*, 3<sup>rd</sup> edition, Washington DC: ABA, 2007.
- 12 A Serrao, Show proof of address and you get bail, *IOL News*, 24 July 2013, <http://www.iol.co.za/news/crime-courts/show-proof-of-address-and-you-get-bail-1551803>
- 13 Criminal Procedure Act 1977 (Act 51 of 1977), section 50(6)(d) (i).
- 14 Omar, Penalised for poverty, 30.
- 15 Ibid.
- 16 Ibid.
- 17 N de Ruiter and K Hardy, Study on the use of bail in South Africa, African Policing Civilian Oversight Forum (APCOF), Research Paper 23, May 2018, 23, <http://apcof.org/wp-content/uploads/023-apcof-research-study-on-the-use-of-bail-in-south-africa-nicola-de-ruiter-and-kathleen-hardy-.pdf>
- 18 *S v Diale and Another* 2013 (2) SACR 85 (GNP), 18; Omar, Penalised for poverty, 30.
- 19 R Leslie, Bail and remand detention: entry points into evaluation of Gauteng stakeholders, Centre for Applied Legal Studies, November 2012, 12, <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/rule-of-law/resources/A%20measure%20of%20last%20>

- resort%20Research%20report%20on%20remand%20detention%20in%20South%20Africa.pdf
- 20 Omar, Penalised for poverty, 30.
- 21 Ibid.
- 22 Ibid.
- 23 Ibid., 30–31.
- 24 *S v Letaoana* 1997 (11) BCLR 1581 (W), 1594.
- 25 Omar, Penalised for poverty, 30–31.
- 26 Constitution of the Republic of South Africa, 1996, section 231; *Glenister v President of the Republic of South Africa and Others* (CCT48/10) [2011] ZACC 6, para 92.
- 27 *Glenister*, para 96.
- 28 United Nations (UN), The foundation of international human rights law, <http://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html>
- 29 Ibid.
- 30 Ibid.
- 31 Ibid.
- 32 UN, Universal Declaration of Human Rights (UDHR), Article 3, <https://www.un.org/en/universal-declaration-human-rights/>
- 33 Ibid.
- 34 Ibid., article 11.
- 35 Ibid., article 9.
- 36 South Africa ratified the International Covenant on Civil and Political Rights (ICCPR) on 10 December 1998.
- 37 ICCPR, article 9(1), <https://treaties.un.org/doc/publication/units/volume%20999/volume-999-i-14668-english.pdf>
- 38 Ibid., article 9; M Nowak, *UN Covenant on Civil and Political Rights: CCPR commentary*, Kehl am Rhein: Engel, 1993, 173.
- 39 Omar, Penalised for poverty, 32–33; *S v Letaoana* (11) BCLR 1581 (W).
- 40 *Van Alphen v the Netherlands*, Human Rights Committee, Communication No. 305/1988, UN Doc. CCPR/C/39/D/305/1988 (1990), para 5.8.
- 41 Ibid.
- 42 ICCPR, article 9(3).
- 43 Communication No. 526/1993, *M and B Hill v Spain* (views adopted on 2 April 1997), in UN doc. GAOR, A/52/40 (vol. II), 17, para 12.3.
- 44 *S v Masoanganye* 2012 SACR 292 (SCA).
- 45 UN, United Nations standard minimum rules for non-custodial measures (The Tokyo Rules), adopted by General Assembly Resolution 45/110 of 14 December 1990, <https://www.ohchr.org/Documents/ProfessionalInterest/tokyorules.pdf>
- 46 See *ibid.*, clause 6; De Ruiter and Hardy, Study on the use of bail in South Africa, 6.
- 47 Nowak, *UN Covenant on Civil and Political Rights*, 458.
- 48 ICCPR, article 26.
- 49 ICCPR, article 2(1) states: 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'
- 50 Adopted by the Organization of African Unity (OAU) at the 18<sup>th</sup> Assembly of Heads of State and Government on 27 June 1981, Nairobi, Kenya.
- 51 South Africa ratified the charter in 1996.
- 52 MC Nicol-Wilson, The realisation of the right to bail in the Special Court for Sierra Leone: problems and prospects, *AHRLJ*, 2, 2007, 496–521.
- 53 African Commission on Human and Peoples' Rights (ACHPR), African Charter on Human and Peoples' Rights, article 6, <http://www.achpr.org/instruments/achpr/>
- 54 Ibid.
- 55 Ibid.
- 56 Ibid. Also see ACHPR, Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, para 1 (b), 7, 10–11, 31, 32 (a), [http://www.achpr.org/instruments/guidelines\\_arrest\\_detention/](http://www.achpr.org/instruments/guidelines_arrest_detention/)
- 57 ACHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, <http://www.achpr.org/instruments/principles-guidelines-right-fair-trial/>
- 58 Ibid.
- 59 Ibid.
- 60 ACHPR, Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa, <http://www.achpr.org/instruments/ouagadougou-planofaction/>
- 61 De Ruiter and Hardy, Study on the use of bail in South Africa, 6.
- 62 Ibid., 7.
- 63 ACHPR, *Organisation Contre la Torture and Others v Rwanda, Communications* 27/89, 46/91, 49/91, and 99/93, decision adopted during the 20<sup>th</sup> Ordinary Session, October 1996, para 28.
- 64 Constitution.
- 65 *S v Coetzee* 1997 (3) SA 527 (CC), para 159, quoted in *De Lange v Smuts* NO 1998 (3) SA 785 (CC), para 18.
- 66 Omar, Penalised for poverty, 32–33.
- 67 Constitution, section 35 (1) (f).
- 68 Ibid., section 1 (c).
- 69 *Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC), para 62.
- 70 Ibid.
- 71 *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* (CCT35/99) [2000] ZACC 8.
- 72 Constitution, section 9(3).
- 73 Criminal Procedure Act.
- 74 Ibid.
- 75 Ibid., chapter 9.
- 76 Ibid., section 60 (1) (a).
- 77 Ibid., section 60(4)(b).
- 78 Ibid., section 60 (6).
- 79 The Protocol on the Procedure to be followed in Applying Section 63A of the Criminal Procedure Act; De Ruiter and Hardy, Study on the use of bail in South Africa, 24.
- 80 South African Police Service (SAPS), National Instruction 3 of 2016: Bail and the release of persons.
- 81 Ibid.
- 82 Ibid.
- 83 *S v Dlamini; S v Dladla and Others, S v Joubert, S v Schieteket* 1992 (2) SACR 51 (CC).
- 84 Ibid., para 5.
- 85 Ibid., para 6.
- 86 Ibid.
- 87 Ibid., para 10.
- 88 Ibid.

89 Ibid., para 46.

90 Omar, Penalised for poverty.

91 Ibid.

92 *Magistrate Stutterheim vs Mashiya* 2003 2 SACR 106 SCA.

93 *Majali v S* [2011] ZAGPJHC 74.

94 Ibid., para 24.

95 Ibid., para 26.

96 Ibid., para 36.

97 De Ruiter and Hardy, Study on the use of bail in South Africa,  
10.

98 Ibid.



# Decolonising prisons in South Africa

## The need for effective bail affordability inquiries

Untalimile Crystal Mokoena and Emma Charlene Lubaale\*

crystal.mokoena@univen.ac.za

charlene.lubaale@univen.ac.za

<http://dx.doi.org/10.17159/2413-3108/2018/v0n66a5634>

*Prisons have been a major player in all countries with a history of tyrannical regimes, as people who attempted to resist repression frequently found themselves detained in prisons. Many countries have adopted democratic government, underscored by equality of all people before the law. Many states – South Africa among them – continue to make reforms to address these past injustices, and, as part of this shift, prisons across continents are attempting to decolonise. This article questions whether South Africa can decolonise its prisons, given that the country's poor are at a higher risk of detention because they are not able to afford bail. The article focuses on the concept of cashless bail and argues that, given South Africa's history of marginalisation and income inequality, this model can be one mechanism through which to address past injustices with a view to decolonising the country's prisons. The article makes a strong case for the effective implementation of provisions on inquiry on affordability of cash bail as one of the means to achieve this end.*

Since an accused is innocent until proven guilty, s/he may be released on bail when certain conditions, set out in law, are met. In South Africa, bail is a constitutional right afforded in terms of section 35(1)(f) of the Constitution. Courts exercise profound discretion where bail applications are concerned.<sup>1</sup> This discretion

notwithstanding, the process demands of courts to engage in a balancing act: in arriving at decisions on whether or not to grant bail, the court has to balance the interests of society, the accused and the victim(s) to ensure that the interests of justice are served.<sup>2</sup>

Since bail is a constitutional right, it may be reasonable to expect, at least on the face of it, that accused individuals would be able to access bail relatively easily. However, the challenge of bail affordability introduces enormous complexity. The law requires that judicial officers must inquire into the affordability of bail for the accused.<sup>3</sup> Ideally, judicial officers are mandated to conduct this affordability inquiry, based, among others, on the accused's

\* Untalimile Crystal Mokoena is a lecturer in the Department of Public Law at the University of Venda. She holds an LLB and LLM from the University of Venda, and is currently pursuing a post-graduate diploma in Higher Education at the University of Kwazulu-Natal. Her research interests lie at the interface between social security and international human rights law. Emma Charlene Lubaale is a senior lecturer in the Department of Jurisprudence at the University of Venda School of Law. She holds a doctorate in law from the University of Pretoria, and is currently pursuing a post-graduate diploma in Higher Education at the University of Kwazulu-Natal. Her current areas of interest are international human rights law, criminal law and constitutional law.

access to the money necessary to pay bail. These provisions may lead one to reasonably conclude that, even for the poor in society, there are no apparent anomalies in accessing this right.

Unfortunately, these inquiries are often not conducted. In addition to the courts' mandate to make inquiries, they can also grant bail subject to 'special conditions', for example, requiring the accused to report to a specified authority or person at a specified place and time.<sup>4</sup> However, these options are seldom explored. Thus, although the application for bail itself is often successful, challenges arise when the accused cannot afford to pay the bail amount. Lines are therefore clearly demarcated between rich and poor, and bail applications often disproportionately affect poor and disadvantaged communities and fail to advance the broader goal of equality. This challenge is exacerbated by South Africa's high levels of inequality, which are rooted in the history of subjugation, marginalisation, racism and discrimination against black South Africans.<sup>5</sup>

Failure to raise the required funds to secure bail affects not only the accused but also the Department of Correctional Services, among others, because accused persons who cannot pay bail must be detained in a correctional facility. De Ruiter and Hardy<sup>6</sup> show that the inability to pay bail money contributes to the congestion of correctional facilities, with the poor constituting the highest percentage of those detained because of an inability to pay cash bail. Dissel and Ellis<sup>7</sup> argue that the large number of people without the assets or income necessary to secure their freedom from detention further exacerbates the problem of overcrowding in prisons.

Significant strides have been made in reforming South Africa's correctional services in the post-apartheid era.<sup>8</sup> During apartheid, prisons (as they were referred to at the time) mainly

housed black inmates, the majority of whom were detained under apartheid legislation for breaking the laws that upheld the apartheid regime and discriminated against black South Africans.<sup>9</sup> The end of apartheid and South Africa's transition to democracy signalled the dawn of a new era anchored in equality, and encompassing, among other things, the redress of past injustices. Laws that formed the basis for detaining black citizens were repealed in favour of a constitutional dispensation founded on values such as equality and dignity.

Other, more practical reforms have also been implemented. For example, the criminal justice system now uses modern technology to effectively manage day-to-day operations, reduce costs, eliminate waste, and automate paper-intensive systems.<sup>10</sup> These reforms are praiseworthy, and the criminal justice system's orientation has certainly shifted since apartheid. But the question remains as to whether it has sufficiently decolonised, given the rampant inequality in South African society. Have we properly considered the question of affordability of bail, and taken account of the ways in which cash bail is a criminalisation of poverty for the majority of South Africans? What are the implications of this for the rights guaranteed under our Constitution?

This article considers these questions, and argues for a thorough inquiry into the affordability of bail as a mechanism through which to reform prisons in South Africa. To this end, the article begins with an examination of decolonisation and bail from both a national and international perspective. The article then shows how bail without proper inquiry disadvantages the poor, and ultimately undermines the decolonisation goal. The article concludes by making a case for a deliberate and systematic inquiry into the affordability of bail, to ensure that the poor are not prejudiced.

## Decolonisation, bail and the law

Despite being the subject of considerable scholarly attention, there is little consensus on what decolonisation means. Given this contestation, it is particularly critical to map out the parameters of its meaning in so far as this article is concerned.

Himonga and Diallo define decolonisation as 'a move from a hegemonic or Eurocentric conception of law connected to legal cultures historically rooted in colonialism (and apartheid) in Africa to more inclusive legal cultures'.<sup>11</sup> In conceptualising decolonisation, commentators also draw insight from the history of colonisation and apartheid, and emphasise the subjugation of black people during both eras.<sup>12</sup> Decolonisation therefore demands that this history of subjugation and past injustice not only be acknowledged, but also addressed.<sup>13</sup> The process of redress may entail, among others, a dismantling of existing structures that continue to advance the subjugation and injustice experienced by the marginalised during the colonial and apartheid eras.<sup>14</sup> However, in deconstructing and ultimately reconstructing structures and systems, some scholars insist that a complete overthrow of all existing structures and systems would be unrealistic.<sup>15</sup> This is because (despite the need to address past injustices and dismantle Eurocentric machinery), recourse to structures remains critical to responding to the problems and people that these very structures aim to address.

From the perspective of prisons, decolonisation requires approaches that seek to address past injustices in correctional facilities and the criminal justice system at large. The goal of decolonisation in corrections, therefore, is to ensure that the injustices suffered by marginalised groups during the colonial and apartheid eras are effectively addressed. Bail affordability becomes a key site for decolonising

the criminal justice system, because it holds the promise that accused persons can be given due regard in every decision pertaining to the application of bail.

## Understanding bail: international and national perspectives

Bail is explicitly provided for under South African law. Although international law does not explicitly make provision for the concept of bail, various international treaties contain provisions which, if progressively interpreted, could give due regard to accused persons who cannot afford to be released on bail due to poverty. Fortunately, South Africa's Constitution contains provisions which demand that appropriate weight is accorded to international law. For example, in terms of section 39 of the Constitution, courts are mandated to consider international law in interpreting the Bill of Rights. Sections 231 and 232 also elaborate on the role and place of international treaties and customary international law in South Africa's legal framework.

From an international law perspective, there are standards that lend impetus to the cause of release of those accused of crime, pending their trial, despite not being an internationally accepted default practice.<sup>16</sup> South Africa ratified the International Covenant on Civil and Political Rights (ICCPR) in 1998 and this convention envisages the right to bail based on the fact that it guarantees the right to liberty and outlaws arbitrary arrest and detention.<sup>17</sup> Article 9(3) of the ICCPR provides that it is not a general rule that persons awaiting trial should be detained; however, release may be subject to guarantees to appear for trial. According to the United Nations Human Rights Committee,<sup>18</sup> this provision may suggest that detention should be a measure of last resort, save for exceptional circumstances such as a likelihood that the accused would abscond or destroy evidence, influence witnesses, or flee from the jurisdiction of the trial court.

The African Charter on Human and Peoples' Rights, to which South Africa is a party, also stands against arbitrary arrests.<sup>19</sup> In 2014, the African Commission on Human and Peoples' Rights adopted Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (the Luanda Guidelines), which address a number of issues, including unnecessary and arbitrary arrest, and pre-trial detention. The guidelines are alive to the fact that pre-trial detentions contribute profoundly to the overcrowding of prisons in Africa. Prison overcrowding is exacerbated by the fact that sufficient inquiry is not always held into the affordability of bail for the poor, who often cannot afford bail money and end up in detention. Moreover, in terms of the Luanda Guidelines, pre-trial detention is conceptualised as a measure of last resort to be used in the absence of other alternatives.<sup>20</sup> Given that international law is inclined towards release of those accused pending trial, it is arguably also against any acts or omissions leading to unnecessary pre-trial detention. The inability to afford to pay bail is one such consideration.

### **Detention and the granting of bail in South Africa**

Section 38 of the Criminal Procedure Act<sup>21</sup> provides for arrest as one of the ways of securing attendance of an accused in court for purposes of trial. However, one has a right to apply for release from custody pending trial. In terms of section 35(1)(f) of the Constitution, every person who is arrested for allegedly committing an offence has a right to be released from detention if the interests of justice permit, subject to reasonable conditions.<sup>22</sup> *Black's law dictionary* defines bail as the release of a prisoner after a deposit of security.<sup>23</sup> The Criminal Procedure Act provides that an accused may be released from custody upon payment of, or guaranteeing to pay, the sum of money determined for his bail.<sup>24</sup> This provision already

sets the tone that bail must be paid in monetary form, although it suggests that alternatively, a valuable asset might be dispensed with by the accused. In reality, however, release on bail is impossible without access to money – in other words, for most detained people in South Africa, where over half of the population is poor, and where poverty is on the rise.<sup>25</sup>

With these figures in mind, it is crucial that inquiries into accused persons' ability to pay are consistently conducted to ensure the effective decolonisation of prisons. Failure or omission to inquire would arguably be akin to punishment, even though the requirements of bail were never intended to constitute punishment or discrimination against the accused. It is precisely for this reason that the overarching issue in assessing whether or not bail is granted is the extent to which it serves the interests of justice, in addition to considerations such as whether the accused constitutes a flight risk.<sup>26</sup> The Criminal Procedure Act further stipulates that accused persons may be released on warning in lieu of bail when they are in custody in connection with an offence that is not contained in Part II or Part III of Schedule 2, and which qualifies for bail.<sup>27</sup> However, this list of offences in Schedule 2 is broad, and includes crimes such as treason, murder, rape, sexual offences against children or the mentally disabled, robbery, kidnapping and housebreaking with intent to commit an offence. This means that bail is the sole option for most accused persons. Where an inquiry into affordability is not conducted, correctional facilities end up crowded with the indigent while those who can afford bail (the wealthy) remain at large, regardless of the gravity of their offence(s).

### **The prerequisites for securing bail in South Africa**

Upon application, the presiding officer should grant bail, if the interests of justice permit.<sup>28</sup> The

question of what constitutes the 'interests of justice' must be determined by the courts,<sup>29</sup> but release of the accused will not be permitted in the following situations:<sup>30</sup>

- (a) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or will commit a schedule 1 offence; or
- (b) Where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or
- (c) Where there is the likelihood that the accused, if he or she were released on bail will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or
- (d) Where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system; or
- (e) Where in exceptional circumstance there is the likelihood that the release of the accused will disturb the public order, or undermine the public peace or security.

The implication of these requirements is that bail should be granted where an accused makes an application, and none of the grounds listed above is present. A bail application is, however, frequently described as a two-stage inquiry.<sup>31</sup> The first inquiry determines whether it is in the interests of justice to grant bail. This was emphasised in the cases of *S v Dlamini*, *S v Dladla*, *S v Joubert* and *S v Schietekat*,<sup>32</sup> which held that pre-trial arrestees are entitled to be released on reasonable conditions if the interests of justice permit. The second stage of the inquiry is to establish the amount of money to be paid by the accused. Here the presiding officer has to consider the amount that the applicant can afford. In terms of section 60 of

the Criminal Procedure Act, the mandate of determining the bail amount rests with the court. The Act, however, does not provide specific criteria for determining the bail amount. As such, this is mostly omitted by the courts, thereby jeopardising the rights of accused persons who are too poor to be able to pay monetary bail.

There is divergence in commentaries regarding the factors which ought to be taken into account in determining the bail amount. Karth,<sup>33</sup> for instance, contends that the amount is not determined by the severity of the crime. Rather, the court is to assess whether the likelihood of forfeiting the amount of money is sufficiently severe to guarantee the accused's return to court.<sup>34</sup> Bates,<sup>35</sup> drawing on some of South Africa's high-profile cases that address the issue of bail, argues on the other hand that the presiding officer must consider the seriousness of the charge and the interests of justice in the granting of bail. Among the cases he analysed to reinforce his point are those against high-profile murder accused Shrien Dewani and Oscar Pistorius.<sup>36</sup> He used these cases to conclude that although release on bail has a lot to do with financial means, the seriousness of the offence also plays a critical role. Bates's view is supported by Ulrich, who is of the opinion that bail can be set at hundreds of rands, depending on the offence, and that the amount is subject to the presiding officer's discretion.<sup>37</sup> Considered together, what exactly should count for purposes of determining the bail amount remains controversial. However, what is clear is the fact that when bail money is set too high, the indigent in society are affected the most.

### **Omission of inquiry: a hindrance to indigents' rights and decolonisation of prisons**

Section 60(2B) of the Criminal Procedure Act mandates the judiciary to conduct a separate inquiry into the ability of the accused to pay bail. If the accused cannot afford bail, the court is to

consider non-financial bail options or set bail at a price cognisant of the circumstances of the accused. Non-compliance with this mandatory probe has impeded the administration of bail in South Africa, and has consequently become a stumbling block in the realisation of the right to bail. Failure to inquire about the affordability of bail often undermines the findings of the first-stage bail application inquiry into whether the interests of justice permit release. This is because the accused gets detained without any effort on the court's part to inquire about the accused's financial ability. The Judicial Inspectorate of Prisons Annual Report<sup>38</sup> has highlighted this problem, arguing that non-affordability of bail is a major cause of overcrowding in prisons. This is exacerbated by the tendency of courts to set unrealistically high bail amounts. The report recommended a re-examination of this practice, based on the fact that bail should not be confused with a fine for an offence. High bail amounts pose challenges to the poor and disadvantaged, and consequently undermine the interests of justice. This resonates with Van der Berg's argument that bail in South Africa operates as 'privilege prejudicial to the poor'.<sup>39</sup> This state of affairs underscores the need for the criminal justice system to make a concerted effort to inquire into accused persons' ability to pay bail money, short of which, the inequality inherited from the apartheid and colonial eras will continue to thrive.

A 2014 study by the Centre for Applied Legal Studies (CALs) into adherence with the legal framework for bail found that courts mainly do not inquire about the accused's ability to pay bail.<sup>40</sup> Leslie adds that judicial officers are usually reluctant to conduct these inquiries, due to the difficulties in assessing and verifying the accused's financial standing, and the lack of clearly defined procedures guiding the inquiry.<sup>41</sup> The Criminal Procedure Act stipulates that appropriate conditions, that do not include

money, must be considered for release of those accused who cannot afford bail.<sup>42</sup> Indeed, some accused who are given non-financial bail<sup>43</sup> do not appear in court for trial,<sup>44</sup> which may prejudice the court against a mechanism that is effectively designed to help the indigent. Because of this, some judicial officers prefer to err on the side of caution, and thus ensure that accused persons appear in court, rather than risk them jumping bail.<sup>45</sup> However, presupposing that all accused have the same dishonourable intentions impacts negatively on those indigent accused who are committed to appear for trial.

Section 63A of the Criminal Procedure Act adds another layer of redress for accused persons who cannot afford bail money. In terms of this section, an accused person who has been granted bail, but is unable to pay, can be released by the head of prison on warning. This, however, is on condition that the prison population is reaching such proportions that it constitutes a material and imminent threat to the human dignity, physical health or safety of an accused. It could be argued that section 63A affords relief to accused persons who cannot afford bail. The limitation is that the discretion of the head of a prison can only be invoked when prisons are overcrowded, so when they are not, there is no reprieve for the accused.

Section 63A(1) was never intended to advance the interests of the indigent accused. If anything, it serves the interests of the prison facilities, since it is only invoked to relieve the burden on correctional facilities. Even with section 63A(1) in place, accused persons routinely remain in custody when they cannot afford the stipulated bail amount, despite findings that releasing them would serve the interests of justice. Given that the largest proportion of people in pre-trial detention are from poor backgrounds, many of whom belong to groups that are socially, economically and politically discriminated against,<sup>46</sup> this finding

should hardly be surprising. Can we therefore speak of decolonisation when the poor and the marginalised continue to suffer the brunt of pre-trial detention, while the wealthy tend to enjoy their liberty? Even taking into account the impact that the nature of the crime has on the outcome of bail application, the odds remain stacked against the accused at the second stage of the inquiry, where one's financial status determines whether or not one will be detained. Failure to conduct an affordability inquiry has become a default filtering tool that determines who is released pending trial, and unfairly disadvantages and discriminates against the indigent accused.<sup>47</sup>

Thus, with the glaring structural inequalities in South Africa, it is apparent that bail has become punitive to the poor. Leslie remarks that:

[W]e have a system whereby an indigent shoplifter will be remanded for being unable to afford a small amount of bail money, whereas a businessman who stole millions can afford his huge bail and will not be remanded. There is, therefore, an inconsistency in the way bail is applied. Bail serves as a mistress to those with money.<sup>48</sup>

Hopkins further notes that 'when an indigent South African is arrested, however, the cogs of the court system turn incredibly slow, and seemingly not much heed is paid to the principles of a fair trial'.<sup>49</sup> On the face of it, it does then appear that money is being used as a tool to discriminate against the poor.

The indigent accused is disadvantaged not only in terms of the amount of bail set by the court but also by the factors that are taken into account in assessing whether or not the accused is a flight risk. Notably, among the factors that the courts consider is whether the accused has permanent employment or owns valuable assets (see, for example, Madi and Mabhenxa in this edition). Accused

persons who meet these requirements are less likely to be deemed a potential flight risk than their indigent counterparts.<sup>50</sup> It is, therefore, apparent that accused persons who are poor tend to be disproportionately prejudiced by the implementation of the bail system. This is itself discriminatory to the indigent accused. The fact that the possession of valuable assets and money remains a major consideration in arriving at an assessment of flight risk not only disadvantages the indigent but also has adverse effects on the dignity and other rights of accused persons who are poor.<sup>51</sup>

Three cases make this point. In *S v Masoanganye*,<sup>52</sup> three accused were charged with, among others, the offence of theft. One of the three accused was tried separately after being granted bail, and the other two co-accused were refused bail because the trial judge was not satisfied that the appellants were not a flight risk, as they did not have sufficient assets registered under their names. The accused who was granted bail was considered not to be a flight risk, merely because he possessed valuable assets.<sup>53</sup> The matter was ultimately appealed in the Supreme Court of Appeal (SCA), which adopted a more progressive approach in overturning the High Court decision:

[T]he trial court apparently failed to consider that the personal circumstances of an accused – much more than assets – determine whether the accused is a flight risk. Had the court considered the personal circumstances of the appellants, the SCA held, it would have been satisfied that they were not a flight risk.<sup>54</sup>

The point, however, is that similar rulings remain pervasive, clearly denoting how one's means are used to determine whether or not one is a flight risk. *S v Letaoana* addressed a similar issue.<sup>55</sup> In this case, the accused was a scholar who resided with his parents and owned no real

assets of value except a bed and his clothing. The investigating officer in the case testified that if the accused did not return to court, he would not know where to find him. The stance of the investigating officer is highly problematic. Making asset possession a requirement for bail for a 20-year-old schoolboy who, like most of his peers, does not own property or any valuable assets in his own name, is not only discriminatory and unreasonable, it also strikes at the core of South African constitutional values of equality and dignity. Not coincidentally, the court in *Letaoana* ruled that 'to take into account the minimal assets possessed by an accused as a factor for refusing bail is tantamount to imposing a penalty for poverty'.<sup>56</sup>

The *Letaoana* case, though decided in the democratic era, underscores the ignorance and unwillingness of criminal justice professionals, including investigating officers, to take cognisance of the practical realities that ordinary and disadvantaged South Africans have to contend with. This is an indication that the criminal justice system still harbours discriminatory views, many of which directly impact the prison system and undermine the decolonisation of our prisons. This is tantamount to the criminalisation of poverty, and it appears that it is offensive to be poor in so far as bail applications are concerned. Omar affirms this conclusion, contending that such a trend remains problematic and ignores the need for justice and fairness in what remains a very unequal society.<sup>57</sup> It is submitted that unless there are reasons to believe that the accused will evade trial, a lack of ownership of assets is a discriminatory basis for denying bail.<sup>58</sup> It undermines the equality clause, and can hardly be justified in South Africa's free and democratic society.<sup>59</sup>

### Looking forward: cashless bail?

Alternative ways should be considered to resolve the issue of whether or not an accused

person is a flight risk. The decision in the case of *S v Pineiro*,<sup>60</sup> though not focused on indigent accused, addresses the viability of alternative means to ensure that accused attend trial once released on bail. In the *Pineiro* case, the applicants, who were citizens of Spain, were denied bail because their risk of absconding from trial was high. Despite this risk, the appeals judge considered other ways to deal with the issue, without resorting to keeping the accused in detention. Bail was granted to the applicants subject to certain conditions, notable among which were that the accused had to report to a specified police station once a day, had to hand over their passports to the police, and also could not leave specified areas without reporting to the police. This decision shows that pre-trial detention can remain a matter of last resort if courts creatively consider alternative means to securing the attendance of the accused. This stance resonates with, and would be a furtherance of, section 35(1)(f) of the Constitution, which underscores that '[e]veryone who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit, subject to reasonable conditions'. Here, reference is made to the phrase 'reasonable conditions'. Arguably, conditions that result in discrimination of accused persons on account of their indigence is a far cry from reasonableness as envisaged in section 35(1)(f). This is because, rich or poor, accused persons should be released on bail if the interests of justice permit.

This article set out to demonstrate the need for the criminal justice system to be serious about inquiries into affordability of bail, with a view to decolonising the system. The article has demonstrated that both national and international law lend impetus to the argument that a price should not necessarily be attached to bail, particularly where such a price makes it hard, or close to impossible, for the vulnerable



to be released. With such a high percentage of individuals in South Africa living under the poverty line, failure to conduct the necessary inquiry on bail affordability not only undermines the notion of equality but also constitutes an affront to the values of dignity, both being pillars of South Africa's constitutionally-based free and democratic society. It is highly unlikely that the indirect penalisation of poverty through this practice is justifiable in terms of South Africa's constitutional limitation clause under section 36. The fact that the marginalised constitute a substantial percentage of those in pre-trial detention ought to send a signal to stakeholders about the implications of the failure to conduct an inquiry and follow the necessary procedure thereafter. Where, in the past, the marginalised in South Africa suffered the brunt of detention and imprisonment, it now seems history is repeating itself – this time clothed in the failure of the criminal justice system to follow the legal requirement to make inquiries into the affordability of bail for those accused of crime. Seemingly, this is resulting in the penalisation of the poor.



To comment on this article visit

<http://www.issafrica.org/sacq.php>

## Notes

- 1 This can be gleaned from Criminal Procedure Act 1977 (Act 51 of 1977), sections 60–63.
- 2 This view was captured in the joint cases of *S v Dlamini*, *S v Dladla and Others*; *S v Joubert*; *S v Schietekat* (CCT21/98, CCT22/98, CCT2/99, CCT4/99) [1999] ZACC 8; 1999 (4) SA 623; 1999 (7) BCLR 771 (3 June 1999); *S v Rudolph* 2010 SACR 262 (SCA) (paragraph 9 thereof indicates that, S60(11)(a) of the Criminal Procedure Act places an onus on the applicant to produce proof, on a balance of probabilities, that 'exceptional circumstances exist which in the interests of justice permits his release); V Karth (compiler), *Between a rock and a hard place: bail decisions in three South African courts*, Open Society Foundation for South Africa, 2008, [https://acjr.org.za/resource-centre/OSF\\_Bail\\_text\\_web.pdf](https://acjr.org.za/resource-centre/OSF_Bail_text_web.pdf)
- 3 On the provision on alternatives to monetary bail and inquiry into the financial means of the accused, see e.g. Criminal Procedure Act, sections 62 and 60(2B)(a). In particular, section 60(2B) (a) provides that '[i]f the court is satisfied that the interests of justice permit the release of an accused on bail as provided for in subsection (1), and if the payment of a sum of money is to be considered as a condition of bail, the court must hold a separate inquiry into the ability of the accused to pay the sum of money being considered or any other appropriate sum'.
- 4 *Ibid.*, Section 62.
- 5 E Bezuidenhout, *The past is unpredictable: race, redress and remembrance in the South African Constitution*, Inaugural lecture of Pierre de Vos, University of Cape Town, 4 September 2011, 1, [https://www.uct.ac.za/downloads/uct.ac.za/news/lectures/inaugurals/De\\_Vos\\_inaugural.pdf](https://www.uct.ac.za/downloads/uct.ac.za/news/lectures/inaugurals/De_Vos_inaugural.pdf); EMK Mathole, *The Christian witness in the context of poverty*, PhD thesis, University of Pretoria, 2005.
- 6 N de Ruiter and K Hardy, *Study on the use of bail in South Africa*, African Policing Civilian Oversight Forum (APCOF), Research Paper, <http://apcof.org/wp-content/uploads/023-apcof-research-study-on-the-use-of-bail-in-south-africa-nicola-de-ruiter-and-kathleen-hardy-.pdf>
- 7 A Dissel and S Ellis, *Reform and stasis: transformation in South African prisons*, *Critique Internationale*, 2002, <https://csvr.org.za/docs/correctional/reform.pdf>
- 8 L Muntingh, *Ten years after the Jali Commission: assessing the state of South Africa's prisons*, *South Africa Crime Quarterly*, 58, 2016.
- 9 A Dissel and J Kollapen, *Racism and discrimination in the South African penal system*, Centre for the Study of Violence and Reconciliation, 2002, <http://www.csvr.org.za/docs/correctional/racism.pdf>; G Makou, I Skosana and R Hopkins, *Fact sheet: the state of South Africa's prisons*, *Daily Maverick*, 18 July 2017, <https://www.dailymaverick.co.za/article/2017-07-18-fact-sheet-the-state-of-south-africas-prisons/>
- 10 Brand South Africa, *The criminal justice system review (CJSR)*, January 2015, [https://www.brandsouthafrica.com/wp-content/uploads/brandsa/2015/01/Criminal\\_Justice\\_System\\_Review.pdf](https://www.brandsouthafrica.com/wp-content/uploads/brandsa/2015/01/Criminal_Justice_System_Review.pdf)
- 11 C Himonga and F Diallo, *Decolonisation and teaching law in Africa with special reference to living customary law*, *Potchefstroom Electronic Law Journal*, 5, 2017.
- 12 KG Fomunyam and D Teferra, *Curriculum responsiveness within the context of decolonisation in South African higher education*, *Perspectives in Education*, 201, 2017; T Letsekha, *Revisiting the debate on the Africanisation of higher education: an appeal for a conceptual shift*, *The Independent Journal of Teaching and Learning*, 1-13, 2013.
- 13 *Ibid.*
- 14 CA Hoppers, *Indigenous knowledge systems and academic institutions in South Africa*, *Perspectives in Education*, 74, 2001.
- 15 See, for example, B Wingfield, *What 'decolonised education' should and shouldn't mean*, *The Conversation*, 14 February 2017, <https://theconversation.com/what-decolonised-education-should-and-shouldnt-mean-72597>.
- 16 R Leslie, *Bail & remand detention: entry points into evaluating Gauteng's court stakeholders*, Wits Justice Project, November 2012, [www.canoncollins.org.uk/file/225/download?token=WixOLi51](http://www.canoncollins.org.uk/file/225/download?token=WixOLi51), accessed 8 December 2018.
- 17 International Covenant on Civil and Political Rights, 1966, article 9.
- 18 Office of the High Commissioner for Human Rights in Cooperation with the International Bar Association, *Human Rights in the Administration of Justice, A manual on human rights for judges, prosecutors and lawyers*, Professional

- Training Series 9, 2003, <https://www.ibanet.org/Document/Default.aspx?DocumentUid=D7CC7605-4340...>
- 19 African Commission on Human and People's Rights (ACHPR), African Charter on Human and Peoples' Rights, 1986, articles 6 and 7.
  - 20 ACHPR, Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (Luanda Guidelines), clause 10.
  - 21 Criminal Procedure Act.
  - 22 The Constitution of the Republic of South Africa 1996 (Act 108 of 1996).
  - 23 *Black's law dictionary*, What is bail?, <https://thelawdictionary.org/bail/>
  - 24 Criminal Procedure Act, section 58.
  - 25 Statistics South Africa, Poverty on the rise in South Africa, 22 August 2017, <http://www.statssa.gov.za/?p=10334>
  - 26 V Karth (compiler), *Between a rock and a hard place: bail decisions in three South African courts*, Open Society Foundation for South Africa, 2008, [https://acjr.org.za/resource-centre/OSF\\_Bail\\_text\\_web.pdf](https://acjr.org.za/resource-centre/OSF_Bail_text_web.pdf)
  - 27 Criminal Procedure Act, section 72(1).
  - 28 Constitution, section 35 (1)(f).
  - 29 Criminal Procedure Act, section 60(1).
  - 30 *Ibid.*, section 60 (4).
  - 31 De Ruiter and K Hardy, Study on the use of bail in South Africa, 9.
  - 32 *S v Dlamini*, *S v Dladla and Others*; *S v Joubert*; *S v Schietekat* (CCT21/98, CCT22/98, CCT2/99, CCT4/99) [1999] ZACC 8; 1999 (4) SA 623; 1999 (7) BCLR 771 (3 June 1999).
  - 33 Karth, *Between a rock and a hard place*.
  - 34 Although Karth's report suggested that there was no (geographic) nexus between high amounts of bail money and prison overcrowding, the report did reveal that a high rate of cases of non-affordability of bail existed in one of the Durban regional courts, with one in four accused being unable to pay the amount determined by the court.
  - 35 E Bates, Bail's sliding scale: out of jail for a fee, *eNCA*, 5 June 2015, <https://www.enca.com/south-africa/sliding-bail-scale-out-jail-fee>
  - 36 *S v Dewani* (CC15/2014) [2014] ZAWCHC 188; *S v Pistorius* (CC113/2013). The cases against Dewani and Pistorius respectively pertained to their alleged murder of their partners. Both Dewani and Pistorius managed to secure bail after paying the bail money. Dewani has since been acquitted while Pistorius has been convicted and is currently serving his sentence.
  - 37 In an interview between eNCA.com and lawyer Ulrich Roux. See Bates, Bail's sliding scale.
  - 38 Correctional Services Portfolio Committee, Judicial Inspectorate of Prisons annual report 2005/2006: briefing, 24 May 2006, <https://pmg.org.za/committee-meeting/6916/>
  - 39 J van der Berg, *Bail: a practitioner's guide*, Lansdowne: Juta Law, 2001.
  - 40 *Ibid.*
  - 41 Leslie, Bail & remand detention.
  - 42 Criminal Procedure Act, section 60 (2B) (b)(i).
  - 43 Non-financial bail is a mechanism used when an accused is unable to afford bail and usually includes conditions such as prohibiting the accused from visiting certain geographical locations; prohibiting the accused from communicating with certain people; regular reporting at police stations.
  - 44 Leslie, Bail & remand detention.
  - 45 *Ibid.*
  - 46 Harvard Law School, Criminal Justice Policy Program, *Moving beyond money: a primer on bail reform*, October 2016, <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf>
  - 47 *Ibid.*
  - 48 *Ibid.*
  - 49 R Hopkins, Broken beyond imagination: South Africa's justice system, *Daily Maverick*, 15 April 2014, <https://www.dailymaverick.co.za/article/2014-04-15-broken-beyond-imagination-south-africas-justice-system/>
  - 50 J Omar, Penalised for poverty: the unfair assessment of 'flight risk' in bail hearings, *South Africa Crime Quarterly*, 57, 2016.
  - 51 *Ibid.*
  - 52 *S v Masoanganye and Another* 2012 (1) SACR 292 (SCA).
  - 53 Omar, Penalised for poverty.
  - 54 *Masoanganye v The State* (252/11) [2011] ZASCA 119, para 19.
  - 55 *S v Letoana* 1997 (11) BCLR 1581 (W), 1594.
  - 56 *Ibid.*
  - 57 Omar, Penalised for poverty.
  - 58 *Ibid.*
  - 59 Constitution, section 9.
  - 60 *S v Pineiro* 1992 (1) SACR 577 (NM).

# The Lindela Repatriation Centre, 1996–2014

## Applying theory to the practice of human rights violations

**Anthony Kaziboni\***

anthonyk@uj.ac.za

<http://dx.doi.org/10.17159/2413-3108/2018/v0n66a5623>

*This article is based on media content analysis of more than 230 newspaper articles written on the Lindela Repatriation Centre from its establishment in 1996 to 2014. This centre is South Africa's only holding facility for undocumented migrants<sup>1</sup> awaiting repatriation, and the data revealed that it is a hub of human rights violations. The article juxtaposes the South African Bill of Rights, which supposedly underpinned the establishment of the centre, with the grotesque human rights violations that have occurred there since its inception. In light of this, the article draws on the theorising of Giorgio Agamben (1998), and particularly his theoretical contribution of the 'homo sacer' as one who has been left behind or excluded from the territorial boundaries that confer the rights of citizenship. I found that the detainees at the centre are largely living in what Agamben describes as a 'state of exception' and that undocumented migrants are often treated as 'bare life', as individuals who are subject to the suspension of the law within the context of the centre. Since they are non-citizens of the recipient state, these actions amount to xenophobia, which manifests in a gross violation of human rights.*

Undocumented migrants awaiting deportation are initially detained in what have been termed repatriation centres, deportation centres, and detention centres. While there is no clear distinction between the three facilities, they seem to serve the same purpose: to house undocumented migrants who are awaiting deportation. In South Africa, the Lindela

Repatriation Centre is one such holding facility. The South African Immigration Act (Act 13 of 2002) authorises the Department of Home Affairs (DHA) to detain undocumented migrants at Lindela for the purposes of deportation. The Act also sets out a series of procedural guarantees to ensure that the process is administratively fair and that none of the detainees' constitutional rights are violated.

The advent of democracy in South Africa in 1994 brought with it the promise that the Bill of Rights, contained in section 2 of the Constitution,<sup>2</sup> would be equally upheld for everyone in the

---

\* Anthony Kaziboni is a political and critical sociologist, broadly interested in how power is conceptualised and theorised, its role in society, and the culminating patterns of social change. He is a social justice activist who is interested in race and racism, gender discrimination and ethnicity in the era of globalisation, and their implications on social policy.

country. The Bill of Rights is the ‘cornerstone of [South African] democracy’ that ‘enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom’.<sup>3</sup> These protections extend to people in detention or prisons, as the Bill of Rights mandates that ‘[e]veryone has inherent dignity and the right to have their dignity respected and protected’.<sup>4</sup> This is echoed in section 35(2)(e) of the Constitution, which provides for the right to conditions of detention that are consistent with human dignity:<sup>5</sup>

Everyone who is detained, including every sentenced prisoner, has the right ... to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.<sup>6</sup>

There is a large body of research that has been conducted on immigrants in detention in South Africa.<sup>7</sup> In this article, I add to this body of knowledge by investigating the experiences of detainees awaiting deportation. Research on Lindela has largely been done by think tanks and human rights organisations such as the South African Human Rights Commission (SAHRC) and Lawyers for Human Rights (LHR), findings which have been referred to in different newspaper articles.<sup>8</sup> Academic researchers generally have an increasingly difficult time to access repatriation [detention] centres.<sup>9</sup> I sought to analyse newspaper articles as a way to understand how the events at Lindela were reported in the media, and to analyse the public discourse around the centre. Using the articles that were written on the Lindela Repatriation Centre from 1996–2014, I argue that the detainees’ experiences amount to violations of the South African Constitution.

Theoretically, I draw from the writings of Giorgio Agamben, an Italian philosopher, who describes

the notion of ‘bare life’<sup>10</sup> to refer to a state in which the sustenance of biological life is given priority over the way in which that life is lived. Agamben merges sovereignty and biopower in *homo sacer*, an archaic Roman figure of law who is excluded from human life to live a bare life of mere existence. This theoretical concept has been utilised in describing deportation and detention in the global North<sup>11</sup> and the global South.<sup>12</sup> In this article, I argue that detained undocumented migrants are often treated as ‘bare life’ – as individuals who are subject to the suspension of the law in all spheres of life due to their ‘illegality’.

## The origins of the Lindela Repatriation Centre

The Lindela Repatriation Centre is the only holding facility in South Africa for undocumented migrants who are awaiting repatriation. The centre is located approximately 40 km away from Johannesburg,<sup>13</sup> and holds up to 4 000 detainees of both sexes. Lindela was set up by the Department of Home Affairs (DHA) and the Dyambu Trust<sup>14</sup> as a so-called experimental centre aimed at relieving overcrowding in nearby Gauteng prisons.<sup>15</sup> News reports show that Lindela was viewed by this coalition as a ‘way of contributing to the normalisation of South Africa’. At the same time, they admitted that while they ‘are not against foreigners coming into South Africa, [they] must assist our government in curbing the influx [of foreigners into South Africa]’.<sup>16</sup> The centre was initially run by the private company Bosasa, which has been implicated in a number of state capture scandals and has recently rebranded itself as African Global Operations ‘in an attempt to erase their dirty footprint’.<sup>17</sup> Although the centre was initially conceived as a partnership, DHA is legally and administratively responsible for all matters pertaining to the apprehension, holding, processing, repatriation and release of undocumented immigrants at the centre.

## Research methodology

Repatriation centres pose a myriad of methodological complexities for researchers, the most crucial being gaining research access, as governments generally refuse permission to allow academic studies of such institutions, or of those who stay or work in them.<sup>18</sup>

Consequently, there have been relatively few studies of the Lindela Centre. The Forced Migration Studies Programme (FMSP), based in Johannesburg, conducted a survey in which over 700 participants were interviewed to document detainees' experiences around 'their arrest, documentation, detention prior to arriving at Lindela, procedural processes at Lindela, prolonged detentions and conditions of detention, including medical care and basic needs, as well as experiences of corruption and violence'.<sup>19</sup> Amit and Zelada-Aprili's 2012 study reviewed 90 detention cases from February 2009 to December 2010 in order to investigate both the DHA's disregard for the law and the wastage of corresponding government resources.<sup>20</sup> Only one other study, by Vigneswaran,<sup>21</sup> drew its data from newspaper articles on detention and migration to research the media's representation of undocumented migrants in South Africa.

To document detainees' experiences at Lindela from its establishment in 1996 to 2014, this study used a qualitative research

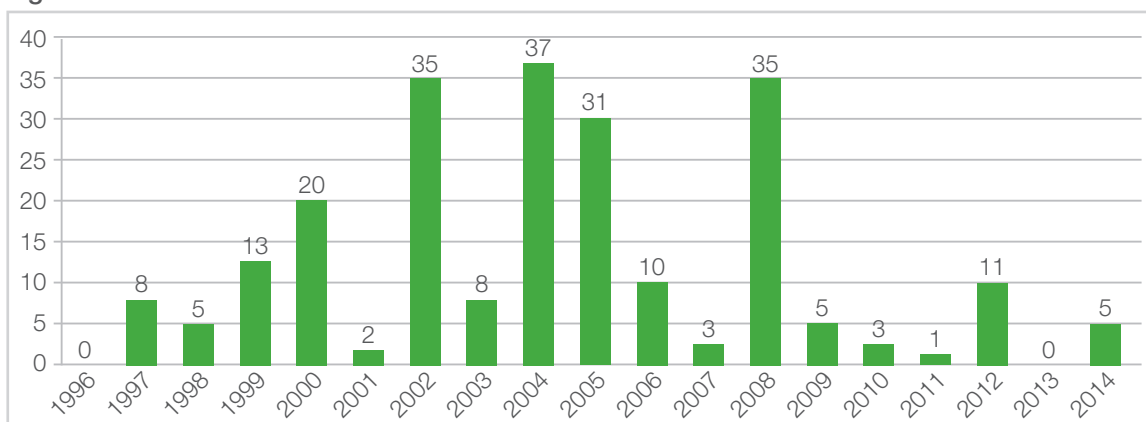
methodology to reduce, make sense of and 'identify core consistencies and meanings' in a volume of material.<sup>22</sup> This was carried out through qualitative content analysis, which refers to the analysis of documents and texts, including a variety of different media (in this case newspaper articles).<sup>23</sup> Media content analysis is a non-intrusive research method through which a wide range of data, covering an extensive period of time, can be analysed to identify popular discourses and their meanings.<sup>24</sup> I was also able to draw from a wide range of articles from different media houses, although it was not possible to tabulate the number of articles written by each journalist in the identified time period.

### Selection of newspaper articles

The analysis covered articles published in South African newspapers over the period 1 January 1996 to 31 December 2014. The articles were accessed through the SA Media platform, one of the most comprehensive press cutting services in the country, offering access to a database of more than 3 million newspaper reports and periodical articles that have been indexed on computer since 1978.

A single key search word ('Lindela') was used to identify 232 articles in 23 newspapers. Figure 1 below illustrates the number of articles written on Lindela between 1996 and 2014 that were returned, based on these search criteria.

Figure 1: Number of articles on Lindela from 1996–2014



Most of these articles were published from 2000–2008. The year 2008 signifies the height of xenophobic violence in South Africa, when over 60 people were killed and the media reported that ‘thousands’ scattered, seeking refuge.<sup>25</sup> From 2009, articles on Lindela declined significantly. Figure 2 below illustrates the number of articles published on Lindela in each of the 23 newspapers identified through the search criteria.

The top five publishers were *The Star* with 65 articles; the *Sowetan* with 34 articles; closely followed by the *Citizen* with 31 articles; and *City Press* and *Pretoria News*, with 18 and 14, respectively. Nine newspapers had one article each within the time period.

**Data analysis and limitations**

Using procedures common in content analysis, I defined the themes to be used in the research,<sup>26</sup> and then coded the data by taking notes from the newspaper articles. This was an iterative process, as I read the articles several times, and then collated the various themes. In order to be consistent when doing the analysis, I used the same procedures in examining the content of each newspaper article. I also compared articles

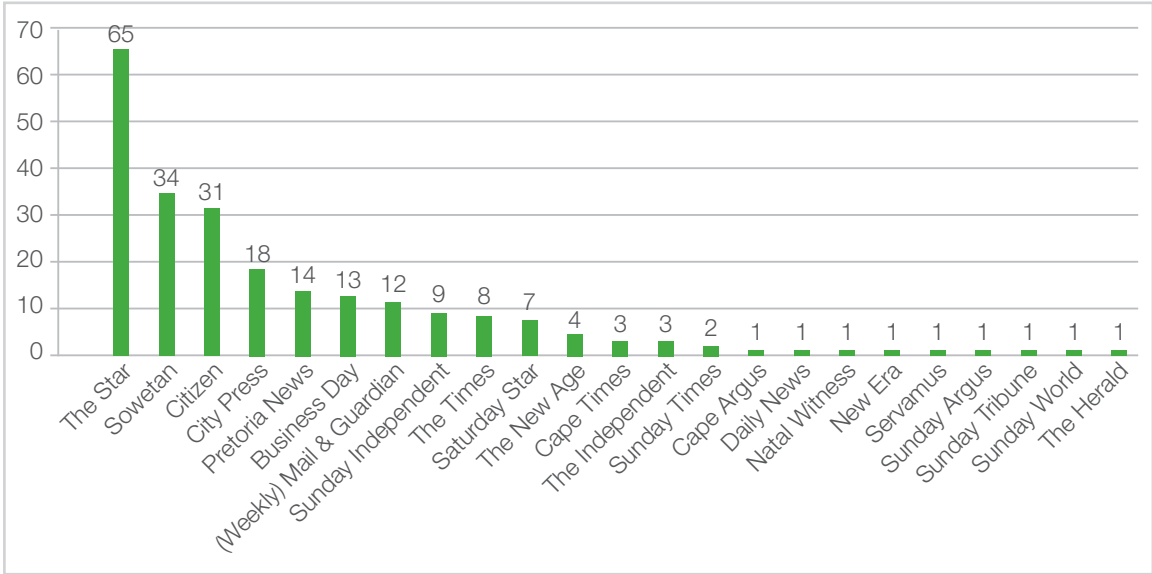
written on the same incident across platforms so as to verify the trustworthiness of the story.<sup>27</sup>

A major limitation in this process was that some articles were poorly copied, which made them difficult to read. Others had been (physically) cut out of the hard-copy newspaper, and had – in some cases – text missing, which rendered them only partly useful. Secondly, at the time of data collection I could only gather articles on ‘Lindela’ until 2014, which meant that nothing could be accessed beyond that time. There is, however, little to suggest that much has changed since then: the company responsible for managing the facility may have changed (from Dyambu to Bosasa, and then renamed African Global), but the way in which Lindela is being run is still the same.

**Findings**

The analysis of the data collected from the newspaper articles revealed a clear and consistent theme: gross violations of human rights. The South African Human Rights Commission and Lawyers for Human Rights have consistently highlighted the abuses and human rights violations taking place at Lindela since its inception. These organisations have

**Figure 2: Number of articles on Lindela by publisher from 1996–2014**



not only raised these issues through the media but have also taken the responsible parties to court. The articles examined for this study documented a diverse range of violations and abuses, from physical violence (beatings, sexual abuses, physical torture), to the denial of adequate food, inadequate healthcare, and lack of hygiene.

### **Lindela – a place for animals**

The data shows that Lindela has been constructed to be a place unfit for human habitation – where human beings are treated like ‘animals’, beaten, and generally not cared for. Kumbulani Sibanda, a Zimbabwean national who was once detained at Lindela, said that ‘it’s not a place meant for human survival’. Another Zimbabwean detainee, Andy Duffy, similarly said that ‘[t]he problem is that we are not treated like human beings ... Yesterday guys were beaten severely. One guy was 13 years old. He was severely beaten with a baton stick.’<sup>28</sup> Detainees described how people would be beaten ‘for such simple things as queuing for food, smoking or even speaking in your own native tongue’.<sup>29</sup>

The newspaper articles show that the personnel at Lindela even describe detainees as animals. Evans Owusu, a Ghanaian teacher, spent four weeks at Lindela and reported: ‘I was hit by a security guard yesterday. He called me “an animal”.’<sup>30</sup> Dube, a Zimbabwean who had been living in South Africa for 12 years, alleged that detainees were being tortured at Lindela, saying that ‘our people [detainees] face harassment. They are treated like animals and murderers.’<sup>31</sup> According to him, ‘in 2012, there were reported incidents of inmate abuse at the centre. Somalians, Congolese and Ethiopians were very dissatisfied and frustrated at being at Lindela and accused the DHA of failing them.’ Another inmate similarly commented that the ‘guards treat us like animals and assault us as they wish and they [Home Affairs officials] do not care what happens to us. They do not even want to

listen to our complaint.’<sup>32</sup> Frederick Ngubane, who was detained for almost two months at Lindela in 2010, said that ‘they treat you like you are worse than an animal. If you complain about anything, they beat you.’<sup>33</sup>

In some instances, the detainees were scared of reporting the perpetrators because they feared more beatings.<sup>34</sup> These beatings would be done in full view of the other detainees, but the inmates alleged that they were carried out when the cameras were off. In the event that an inmate died, the guards claimed that s/he had been beaten by other inmates.<sup>35</sup> Suzyo Kamanga, a Malawian national with South African permanent residency, was quoted as saying, ‘the people there do not respect us ... they beat them [detainees] like criminals’.<sup>36</sup> Patience Ekutshu, a Congolese asylum-seeker who went on a hunger strike with another inmate, was severely assaulted by Lindela security officers and cleaners with batons and brooms. ‘The way they were beating me, I thank God I am alive,’ he remarked. He claimed that he was beaten so badly that he had to spend a week in Leratong Hospital.<sup>37</sup>

In another incident, Hamid Mnesi, a detained Malawian national, died on his way to hospital after being assaulted with baton sticks, sjamboks and a gun by Lindela personnel. Another unnamed detainee died after being in a critical condition after a similar assault.<sup>38</sup> The deceased had sustained severe head, back and chest injuries, as well as lacerations that could have been caused by barbed wire.<sup>39</sup> The authorities alleged that he and four other inmates had attempted to escape.

Jonathan Ancer recounted the story of a whistle-blower guard at the repatriation centre who gave a heinous account of what happened there.<sup>40</sup> Admitting that ‘we beat them; we take bribes – but it’s not our fault’, the whistle-blower said that the guards sold marijuana, an illegal substance at the time, to the inmates,

to supplement their own personal income. Isaac<sup>41</sup> also recounted how the guards resorted to violence because of insufficient training to deal with inmates: 'We beat the immigrants [undocumented migrants in detention] and we're encouraged to beat them.'<sup>42</sup> He also told of an incident where the guards beat a mentally ill patient until he passed out. Solly, a former Lindela guard, said that he and other guards routinely walked around with hosepipes with which to hit the inmates, but were told to hide them when journalists and human rights groups visited the centre.<sup>43</sup>

It is quite evident that from the data that the beatings and assaults, combined with being treated as 'non-humans', was a lived experience of the detainees. This contravenes section 10(1) of the Bill of Rights, which states that 'everyone has inherent dignity and the right to have their dignity respected and protected'. This kind of treatment also violates the right to freedom and security of the person protected in section 12 of the Bill of Rights, and, in particular, the right to be free from all forms of violence from either public or private sources;<sup>44</sup> not to be tortured in any way;<sup>45</sup> and not to be treated or punished in a cruel, inhuman or degrading way.<sup>46</sup>

### **Sexual abuses**

Sexual abuse of women detainees by staff was also rife at Lindela. In exchange for sex, female inmates were promised freedom, which never materialised.<sup>47</sup> Mendi Mnyathi, a female Zimbabwean detainee, was quoted as saying, 'I have endured unbridled insults and have had food thrown in my face because I refuse to have sex with him [a male Lindela staff member].' Sinikiwe Msimang, another Zimbabwean woman, told how '[t]he guard asked me for sex in return for my early release, an offer which I steadfastly refused. Afterwards, his general conduct towards me was, to put it mildly, appalling.'<sup>48</sup> Gina Snyman,

an attorney at the Detainee Monitoring Project at Lawyers for Human Rights, confirmed these reports, saying that Lindela was not only a haven for corrupt officials but that she had 'even heard about female foreigners who are booked out at night to perform sex work. It's a very dysfunctional place.'<sup>49</sup>

Again, this kind of abuse violates the protections under sections 10 and 12 of the Constitution. Moreover, section 12(2) sets out that '[e]veryone has the right to bodily and psychological integrity', which includes the right to make decisions concerning reproduction<sup>50</sup> and to security in and control over their body.<sup>51</sup> Since the detainees were not in a safe or secure space, their rights were again violated.

### **Appalling living conditions and hygiene**

The data showed that the living conditions in Lindela were horrendous. A former detainee, Yokojama, described how inmates stayed in appalling conditions:

I got ill within three days of arriving at Lindela because the place is overcrowded. In a cell which was supposed to accommodate only 15 people, we were packed up to 70 – made to sleep two on a bed, with some sleeping on the floor where water from a leaking toilet would wet mattresses.<sup>52</sup>

She went on to say that 'no soap and towels were provided to detainees, although they were available at a shop [at a price] on the premises'.<sup>53</sup> According to another source, the inmates were spread across two sections; A and B blocks. The rooms had running water, but neither toilet paper nor soap. One inmate describes the cell:

The cell was roughly 10 m by 9 m. Inside the cell was a shower with a toilet next to it and a silver basin where those who had toothbrushes and toothpaste brushed their teeth. The walls around the toilet



were 2 m high. Dozens of men formed a queue to the toilet after we had supper. Because the partitioning wall does not go right to the roof, the stench emanating from the toilet flooded the cell. Man, I've never appreciated cigarette smoke like that. It served as an air freshener!<sup>54</sup>

The beds were flea infested, and most inmates preferred to sleep on the floor. This was the same issue that was raised in 2000 when it was noted that there were lice.<sup>55</sup> Another inmate claimed that she was bitten by fleas at Lindela.<sup>56</sup>

The detainees received two meals a day at Lindela, but these made them ill.<sup>57</sup> According to Lindiwe,<sup>58</sup> '[d]etainees were hopelessly underfed. We were fed a cup of soup which was like filthy dishwater and given a stale piece of bread. In the afternoon, we received a bowl of mealie meal and another cup of the disgusting liquid.'<sup>59</sup>

During her detention, Yokojama suffered from a number of ailments, including flu, tonsillitis and sinus pains, but she was not given medical attention. She would be intimidated if she complained.<sup>60</sup> In 2005, then Minister of Home Affairs Nosiviwe Mapisa-Nqakula ordered an investigation into the deaths of two Zimbabweans at Lindela – pregnant 18-year-old Alice Chumba [Tshumba] and 22-year-old Mcabangeli Mlambo.<sup>61</sup> Alice died at Leratong Hospital near Krugersdorp when she was seven and a half months pregnant.<sup>62</sup> Her post-mortem revealed that she died from gastro-enteritis pulmonary oedema (fluid in the lungs), while Mcabangeli had suffered from flu and conjunctivitis, vomited blood and bled to death. In another case, a 23-month-old infant in the custody of a Congolese woman died from pneumonia, which had progressed to septicaemia and shock. An article dated 30 October 2005 reported that a total of 52 detainees had died since the beginning of the year; nine at Lindela and 43 upon referral to Leratong Hospital. Another article reported that

70 detainees had died between January and August 2005.<sup>63</sup> The diseases that these inmates succumbed to were preventable and curable.

The data shows that detainees were staying in horrendous living conditions, where they were refused adequate healthcare and food. Conditions at Lindela clearly violated sections 10 (the right to human dignity) and 27 (the right to healthcare, food, water and social security) of the Bill of Rights.

### **Bribes and corruption**

Shoddy record-keeping by the DHA has made it increasingly difficult to verify the immigration status of a migrant in the event that their permit is lost or damaged. For example, the data shows reported incidents where documented migrants were detained at Lindela due to errors on the part of the DHA. These errors have been described as 'bureaucratic failures, incompetence, and corruption' of the DHA and its officials.<sup>64</sup> In 1998, Danny Mansell, the Director of Dyambu Operations, confirmed that Lindela was plagued with corruption, and that both Lindela staff and Home Affairs officials had been caught taking bribes.<sup>65</sup>

Nathan Mwale's brother, Jones, recounted how 'Bobo', the facility's second-in-charge, had taken his brother's documents and came back 30 minutes later and told Jones, '[m]ake a plan', going on to say that '[m]y brother, *nix khokha* (without paying), I can't help you ...'<sup>66</sup> In 2003, Ephraim Sukazi,<sup>67</sup> a South African citizen, only found freedom after his cousin Petros Hlatswayo called Lindela, and was advised to bring with him R700 for Ephraim's release, or else he would be 'repatriated'.

If you have money, freedom is imminent. The *Saturday Star* was able to contact three people who were believed to have paid R450 each to leave the repatriation centre,<sup>68</sup> although other reports allege that, depending on the officer, one could be released for as little as R10.<sup>69</sup>

Suzyo Kamanga, a Malawian national with valid documents, paid R800 to be released, confirming that ‘if you can pay, you can leave’.<sup>70</sup> Brian Nkululeko, a Zimbabwean, described how a Home Affairs official secured his freedom after he had been arrested and sent to Lindela: ‘After I gave the guy R800, he wrote a letter for me to be released. It happens all the time ... It’s not the police, it’s Home Affairs. There is always someone there who wants money.’<sup>71</sup> Lindiwe, a former detainee, elaborates:

Unless you happen to have a few hundred rands on you when you are arrested you will not survive Lindela. The guards demand cold drinks and cigarettes from male detainees. If they don’t have money to buy these items, the guards beat them unmercifully. The continuous beatings of males at Lindela is one of the most upsetting things about being at Lindela.<sup>72</sup>

The data therefore reveals that Lindela was so broken that you could literally ‘buy freedom’, as ‘bribery remains a viable option for avoiding detention’.<sup>73</sup>

### **Living in limbo**

Alleged undocumented migrants can only be kept in custody for a maximum of 30 days, after which their cases must be reviewed and they must be deported, charged or released.<sup>74</sup> Detaining someone longer than this is deemed to be an illegal deprivation of a person’s liberty and an unconstitutional violation of their rights to freedom and security.

Yet, these protections do not appear to exist at Lindela. One article argues: ‘Under apartheid you could be detained for 90 days without trial, under democracy you can be detained for up to 120 days without trial – if you are an undocumented migrant.’<sup>75</sup> Cases have been raised in the press of undocumented migrants who had been at Lindela for ‘too long’.<sup>76</sup> The SAHRC has filed a case on behalf of 40

undocumented migrants at Lindela – some of whom have been detained for between 60 and 150 days. These migrants are also frequently exposed to abuse by the authorities. Some detainees have been held in excess of 120 days and in contravention of detention laws. For example, in 2012 an inmate reported:

In the past two weeks to three weeks, most of us who had spent more than the maximum 120 days in this place were given release letters. We were told that we were free to go. Instead of the promised freedom, we found immigration officials waiting for us outside, saying they were taking us to Home Affairs in Pretoria to have our documents fixed ... Instead they took us to different police stations, including Mamelodi East and Atteridgeville, where we spent two weeks and others a week ... From the police station we were driven back to Lindela, where we have been provided with new cards with new dates of arrest, because we refused to be repatriated to our countries for fear of being killed or incarcerated.<sup>77</sup>

In terms of section 34 of the Immigration Act 19 of 2002, an undocumented migrant may not be held in detention for longer than 30 calendar days without a court warrant, which on good and reasonable grounds may extend such detention for an adequate period not exceeding 90 calendar days. The above evidence demonstrates that there were clear violations of rights at Lindela, as some of the detainees simply remained in limbo at the centre.

### **Discussion**

The data presented above shows that life in Lindela was layered with violations of human rights, including the right to human dignity, to freedom and security of the person, and to healthcare, food, water and social security.

Foucault uses the concept of 'biopower' to describe a mechanism, or mechanisms, through which the state exercises power and control over its citizens by regulating or controlling life. I argue that Lindela is an example where – through the systematic elimination of outsiders, in this case migrants, and through the disregard of human rights – the South African state has created a class of political 'others'. These others are exposed to what Agamben terms 'bare life' as a result of the intersection of disciplinary power and biopower at the hands of the state. This kind of xenophobia is deployed by the state to ensure that its ultimate sovereign power, the right to kill, is maintained. Foucault argues that killing is not a facet of biopower but one of sovereign power. Agamben, on the other hand, sees the Foucauldian opposition between biopower (the right to let live) and sovereign power (the right of death) as superfluous, instead arguing that they essentially intersect in a previously obscured manner. Agamben calls this hidden point of intersection between biopower and sovereign power 'bare life' – where *homo sacer* is exposed to an unconditional threat of death. As a type of xenophobic biopower, migrants, whether they are documented or not, are represented in negative terms in South Africa as job stealers, criminals, disease carriers and, therefore, a physical threat to the country.<sup>78</sup> In this process, the foreigner is represented as a physical disease that threatens the body politic with contamination. The immigrant, documented or not, therefore also represents a symbolic threat to the South African nation.

In criticising Foucault's notion of biopower, Agamben (borrowing from Schmitt) proposes the 'state of exception', in which juridical order is suspended. When the 'state of exception' becomes the rule, the legal order remains in force only by suspending itself.<sup>79</sup> Modern states have used the 'state of exception' to justify bypassing the requirement for due process

with regard to respecting the recognised rights of citizens, and the separation of powers in cases of dire necessity, like a threat of civil war, revolution, foreign invasion, and now terrorism.<sup>80</sup> The 'state of exception' is therefore not the chaos that precedes order; instead it is the situation that arises from the suspension of the rule of law.<sup>81</sup>

The plight of undocumented migrants is made worse by the South African Police Service (SAPS) and the DHA. These departments form part of the machinery that has left migrants in this 'state of exception',<sup>82</sup> and have (along with other institutions) created an environment that is conducive to xenophobic violence and in which xenophobia has been legitimised by the state. Agamben's 'state of exception' is a direct response to the dualistic contradictions in modern liberal politics, in which liberties and rights mark not a domain free from sovereign political authority but precisely the opposite.<sup>83</sup> By entering the South African territorial space, the undocumented migrant is relieved of citizenship and, as a consequence, of the very rights that people should hold simply on account of being human. The undocumented migrant can only realise rights through the help or protection of sovereign states. Bosworth argues that, '[c]itizenship, unlike a criminal sentence or conviction, is (meant to be) an absolute: you either have it and its attendant rights and obligations or you do not'.<sup>84</sup>

The loss of rights is exacerbated when the idea of the 'other' is successfully politicised. Papastergiadis argues that 'they are excluded from the field of human values, civic rights and moral obligations ... [thus] maintaining the boundary that divides "us" from "them"'.<sup>85</sup> Undocumented migrants are perceived as strange and dangerous, and violence against them is seen as a justified response to this threat. As the logic of the 'state of exception' becomes more generalised in society, and

'bare life' results, the undocumented migrant becomes the political 'other', the *homo sacer* who has been left behind or excluded from the territorial boundaries that confer the rights of citizenship. In South Africa, the flow of undocumented migrants into the country exemplifies 'bare life', as migrants are stripped of the mask of nationality, and of rights.

The notion of 'bare life' is also exemplified in the way that the state as an institution treats undocumented migrants. Lindela creates health risks for detainees<sup>86</sup> as the overcrowding and lack of adequate ventilation put detainees at risk of contracting diseases like tuberculosis (TB). Regular access to healthcare for chronic conditions such as HIV and TB is scarce. The food is poor and the living conditions are filthy.<sup>87</sup> Migrants report physical abuse and intimidation by wardens, security guards and government officials. Inmates are denied a free phone call as required by law, are not informed of their rights, and are regularly detained for periods longer than the statutory maximum of 30 days.<sup>88</sup> The DHA and African Global Operations (formerly Bosasa) have an obligation to ensure that conditions at the centre meet standards that uphold basic human rights, but they negate this responsibility.<sup>89</sup> The employees at the repatriation centre extort money from detainees for fingerprinting, the use of public telephones, and access for visits by family and friends.<sup>90</sup>

It is apparent that the environment at Lindela does not just illustrate what happens when 'others' fall into a politically vague category, but the living conditions of many of these undocumented migrants also characterise them as trapped in Agamben's notion of 'bare life'. Arendt argues that because (undocumented) migrants are not considered citizens, statelessness not only means the lack of citizenship but also the loss of (human) rights, which leaves them in a 'rightless condition'.<sup>91</sup>

## Conclusion: human rights for all

Media reports of the Lindela Repatriation Centre between 1996 and 2014 are overwhelmingly negative, and detail gross violations of human rights protected under the Bill of Rights. These violations are tantamount to institutionalised xenophobia, given that they are perpetrated by SAPS, DHA officials and personnel at the centre. Using Agamben's concept of a 'state of exception' I have argued that undocumented migrants in South Africa survive in conditions of 'bare life' as they have their rights suspended due to their so-called 'illegality'.

There have been policy interventions to address these violations, but they have not curbed the incidence of xenophobia. State intervention has mainly been centred on security-driven solutions, and has tended to involve the police, the military and other punitive measures when dealing with undocumented migrants. However, xenophobia is rooted in the minds of ordinary citizens, and therefore needs to be addressed on those terms. A strategy that has been successful elsewhere in responding to fearism and othering, is to provide forms of recognition for undocumented migrants that work against the view that they are figures of hate. These liberal discourses of citizenship combine humanitarian and liberal values – asking the public and schools in particular to see undocumented migrants, and migrants in general, as people with humanity, assuring 'us' (the hosts) that 'they' are just like us.<sup>92</sup> The strategy of re-humanisation of the 'other' is pervasive, particularly in social studies, conflict resolution, peace education, and in the literature of non-profit and humanitarian organisations. This can offer a solution towards redressing the xenophobia not only in Lindela but also in South Africa as a whole.



To comment on this article visit

<http://www.issafrica.org/sacq.php>

## Notes

- 1 An undocumented migrant refers to a foreign national, or non-South African, residing in the Republic of South Africa without legal or valid immigration status.
- 2 Constitution of the Republic of South Africa 1996 (Act 106 of 1996).
- 3 Ibid.
- 4 Ibid.
- 5 Ibid.
- 6 Ibid.
- 7 D Vigneswaran, Free movement and the movement's forgotten freedoms: South African representation of undocumented migrants, Paper presented at the 'Representation and Displacement: Refugees, IDPs and Stateless Persons in State and Nation' workshop, Oxford, 9–10 February 2007; M Bosworth, Subjectivity and identity in detention: punishment and society in a global age, *Theoretical Criminology*, 16:2, 2012, 123–140; R Amit and R Zelada-Aprili, *Breaking the law, breaking the bank: the cost of Home Affairs' illegal detention practices*, Johannesburg: African Centre for Migration Society, 2012; R Amit, *Lost in the vortex: irregularities in the detention and deportation of non-nationals in South Africa*, Johannesburg: African Centre for Migration & Society, 2010; R Sutton and D Vigneswaran, A Kafkaesque state: deportation and detention in South Africa. *Citizenship Studies*, 15:5, 2011, 627–642.
- 8 J Ancer and M Sadodien, Lindela – is this the disturbing face of a xenophobic SA?, *The Star*, 15 November 2004, 28; J Ancer and S Smillie, Litany of abuse at Lindela, *The Star*, 3 November 2004, 1; N Tshisela, Out of jail, into Lindela, *Sowetan*, 7 August 2008, 4.
- 9 M Bosworth, Subjectivity and identity in detention, 123.
- 10 G Agamben, *Homo sacer: sovereign power and bare life*, Stanford: Stanford University Press, 1998.
- 11 N Dines, N Montagna and V Ruggiero, Thinking Lampedusa: border construction, the spectacle of bare life and the productivity of migrants, *Ethnic and Racial Studies*, 2015; NP De Genova, Migrant 'illegality' and deportability in everyday life, *Annual Review of Anthropology*, 2002; RL Doty, Bare life: border-crossing deaths and spaces of moral alibi, *Environment and Planning D: Society and Space*, 2011; A Downey, Zones of indistinction: Giorgio Agamben's 'bare life' and the politics of aesthetics, *Third Text*, 2009; J Darling, Becoming bare life: asylum, hospitality, and the politics of encampment, *Environment and Planning D: Society and Space*, 2009.
- 12 PK Rajaram and C Grundy-Warr, The irregular migrant as homo sacer: migration and detention in Australia, Malaysia, and Thailand, *International Migration*, 2004; HJ Shewly, Abandoned spaces and bare life in the enclaves of the India–Bangladesh border, *Political Geography*, 2013.
- 13 K Jaynes, Factsheet: Detention and deportation of undocumented migrants in South Africa at the Lindela Repatriation Centre, Africa Check, 17 August 2016, <https://africacheck.org/factsheets/lindela-repatriation-centre-migrants/>
- 14 The Dyambu Trust was created by a group of 'high-profile ANC women', including Baleka Kgositsile, Lindi Sisulu, Adelaide Tambo, Lindiwe Zulu and Hilda Ndude. Only Nomvula Mokonyane and Lindiwe Maseko were formally registered as its trustees. Dyambu's operations had 'nothing to do with the ANC [n]or the women's league', but the group were 'women with vision, women who fought the struggle, women who are trying to bring change'. *Mail & Guardian*, Deporting for cash, 7 February 1997, <https://mg.co.za/article/1997-02-07-deporting-for-cash>
- 15 J Berg, Private prisons: international experiences and South African prospects, Dissertation, University of Cape Town, 2000; LB Landau, Immigration and the state of exception: security and sovereignty in East and Southern Africa, *Millennium: Journal of International Studies*, 34:2, 2005, 30.
- 16 *Mail & Guardian*, Deporting for cash.
- 17 A Basson, State capture is much bigger than the Guptas, *News 24*, 11 September 2018, <https://www.news24.com/Columnists/AdriaanBasson/state-capture-is-much-bigger-than-the-guptas-20180911>
- 18 Bosworth, Subjectivity and identity in detention.
- 19 Amit, Lost in the vortex.
- 20 Amit and Zelada-Aprili, Breaking the law, breaking the bank.
- 21 Vigneswaran, Free movement and the movement's forgotten freedoms.
- 22 MQ Patton, *Qualitative research and evaluation methods: integrating theory and practice*, Thousand Oaks: Sage, 2015.
- 23 A Bryman, *Social research methods*, 3<sup>rd</sup> edition, New York: Oxford University Press, 2008.
- 24 J Macnamara, Media content analysis: its uses, benefits and best practice methodology, *Asia Pacific Public Relations Journal*, 6, 2005, 1–34.
- 25 *News 24*, Xenophobic violence echoes deadly 2008 precedent, 19 April 2015, <https://www.news24.com/SouthAfrica/News/Xenophobic-violence-echoes-deadly-2008-precedent-20150419>
- 26 Y Zhang and BM Wildemuth, Qualitative analysis of content, in BM Wildemuth (ed.), *Applications of social research methods to questions in information and library science*, Westport: Libraries Unlimited, 2009.
- 27 The research process, including the names of newspaper sources, article titles and authors, is included in the database, to enable replication.
- 28 A Duffy, Riot on eve of detention-camp probe, *Weekly Mail & Guardian*, 12[18] December 1997, 10.
- 29 G Gifford, Accusations of corruption, cruelty at Lindela camp, *The Star*, 15 October 1997, 5.
- 30 M Isaacson, Illegal immigrants fume at their treatment in Lindela, *Sunday Independent*, 3 September 2006, 9.
- 31 Ancer and Smillie, Litany of abuse at Lindela.
- 32 C Prince, Lindela 'hell' ignored, *The Times*, 8 June 2012, 1.
- 33 U Ho, Stateless and stuck in limbo, *Saturday Star*, 1 March 2014, 3.
- 34 Gifford, Accusations of corruption.
- 35 *The Star*, 'This country could soon be despised across Africa', 15 November 2004, 28.
- 36 Y Groenewald, Paying their way back into SA, *Weekly Mail & Guardian*, 26 February 2004, 6.
- 37 L Donnelly and H Bangerezako, Living in limbo, *Mail & Guardian*, 31 August 2006, 30.
- 38 S Mkhwanazi and D Matsena, Arrests after death recaptured immigrant, *The Star*, 11 March 2002, 2.
- 39 Ibid.; L Venter, Nigerian dies in detention, *Citizen*, 11 March 2002, 1.

- 40 J Ancer, 'We beat them with batons and hosepipes', *The Star*, 15 December 2004, 8.
- 41 Pseudonym.
- 42 Ancer, 'We beat them with batons and hosepipes'.
- 43 Ibid.
- 44 South African Bill of Rights, section 1(c).
- 45 Ibid., section 1(d).
- 46 Ibid., section 1(e).
- 47 *The Star*, 'This country could soon be despised across Africa'.
- 48 S Ngomane, Illegal abused at camp – claim, *City Press*, 22 November 1998, 28.
- 49 J Pauw, Detention centre where money is key, *City Press*, 25 October 2008, 6.
- 50 Bill of Rights, section 12(2)(a).
- 51 Ibid., section 12(2)(b).
- 52 *The Star*, 'This country could soon be despised across Africa'.
- 53 Gifford, Accusations of corruption, cruelty at Lindela camp.
- 54 *The Star*, Stench of toilet in cell number 3 is masked by cigarette smoke, 19 July 2002, 6.
- 55 G Gifford, The pain of Lindela, *The Star*, 10 April 2000, 17.
- 56 P Krost, Abuses go on and on at Lindela, *Saturday Star*, 30 October 1999, 2.
- 57 B Jordan, Three months in the hell of a repatriation cell, *Sunday Times*, 2 September 2012, 10.
- 58 Pseudonym.
- 59 M Marx, Horror tale of detention – and escape by bribery, *City Press*, 29 November 1998, 12.
- 60 *The Star*, 'This country could soon be despised across Africa'.
- 61 P Sukhraj, Lindela scandal, *The Star*, 24 August 2005, 1; C van Grass, Minister orders probe into Lindela deaths, *Business Day*, 25 August 2005, 5; P Zvomuya, From terror to misery, *Weekly Mail & Guardian*, 25 August 2005, 12; *The Star*, Hapless illegals, 25 August 2005, 20; P Mgwamba, Asylum seekers are people too, *Pretoria News*, 25 August 2005, 21.
- 62 B Peta, Lindela deaths could have been avoided, says report, *Sunday Independent*, 30 October 2005, 2.
- 63 D Mahlangu, Illegal immigrants' bodies to be dug up and tested, *Sunday Times*, 30 October 2005, 11.
- 64 Amit and Zelada-Aprili, Breaking the law, breaking the bank.
- 65 M Marx, The place where unwanted people wait, *City Press*, 22 November 1998, 28.
- 66 E Maluleke, Life may get better for illegals holed up in Honeydew cells, *City Press*, 8 August 1999, 2.
- 67 T Mabasa, SA man maybe deported – from SA, *Citizen*, 16 January 2003, 1.
- 68 Krost, Abuses go on and on at Lindela.
- 69 Marx, Horror tale of detention.
- 70 Groenewald, Paying their way back into SA.
- 71 Ibid.
- 72 Marx, Horror tale of detention.
- 73 R Amit, Security rhetoric and detention in South Africa: detention, alternatives to detention, and deportation, *Forced Migration Review*, 44, 2013, 32.
- 74 Immigration Act 2002 (Act 13 of 2002), section 34.
- 75 Ho, Stateless and stuck in limbo.
- 76 K Chikanga, Home Affairs denies abuse of illegals, *The Citizen*, 5 November 1999, 8; K Chikanga, SA deporting 180 000 a year, *The Citizen*, 5 November 1999, 1; C Keeton, Move frees 40 detained aliens, *Sowetan*, 12 November 1999, 2; *The Citizen*, Aliens 'too long at Lindela: set free', 13 November 1999, 6.
- 77 Prince, Lindela 'hell' ignored.
- 78 R Danso and D McDonald, Writing xenophobia: immigration and the print media in post-apartheid South Africa, *Africa Today*, 48:3, 2001, 114–37.
- 79 M Ojakangas, Impossible dialogue on bio-power Agamben and Foucault, *Foucault Studies*, 2, 2005, 5–28.
- 80 W Kisner, Agamben, Hegel, and the state of exception, *Cosmos and History: The Journal of Natural and Social Philosophy*, 3, 2007, 2–3.
- 81 K Genel, The question of biopower: Foucault and Agamben, *Rethinking Marxism*, 18:1, 2006, 43–62.
- 82 C Johnson, Failed asylum seekers in South Africa: policy and practice, *African Human Mobility Review*, 1:2, 2015, 1–16; Landau, Immigration and the state of exception; C Musuva, Immigration, the state of exception and African migrants in South Africa, Paper presented at 'IPSA Challenges of Contemporary Governance Conference', Montreal, 24 July 2014.
- 83 A Neal, *Giorgio Agamben and the politics of the exception*, Paper presented at the Sixth Pan-European International Relations Conference of the SGIIR, Turin, 12–15 September 2007.
- 84 Bosworth, Subjectivity and identity in detention.
- 85 B Harris, Xenophobia: A new pathology for a new South Africa?, in D Hook and G Eagle (eds.), *Psychopathology and social prejudice*, Cape Town: University of Cape Town Press, 2002.
- 86 J Gorton and N Geffen (eds), *Equal Treatment: Special Report on the Systematic Abuse of Immigrants*, 25, June 2008.
- 87 Marx, Horror tale of detention.
- 88 M Neocosmos, The politics of fear and the fear of politics, Abahlali baseMjondolo, 5 June 2008, <http://www.abahlali.org/node/3616>.
- 89 J Gorton and N Geffen (eds), *Equal Treatment: Special Report on the Systematic Abuse of Immigrants*, 25, June 2008.
- 90 Neocosmos, The politics of fear and the fear of politics.
- 91 H Arendt, *The origins of totalitarianism*, New York: Harcourt, Brace, 1951.
- 92 M Zembylas, Agamben's theory of biopower and immigrants/refugees/asylum seekers: discourses of citizenship and the implications for curriculum theorizing, *Journal of Curriculum Theorizing*, 26:2, 2010, 31–45.

# On the record

## Judge Jody Kollapen

<http://dx.doi.org/10.17159/2413-3108/2018/n0v66a6242>

*With the revelations by Bosasa officials at the State Capture Enquiry, held in early 2019, laying bare the corrupt links between prisons, detention centres and border control, and high-ranking political and government officials, the time is ripe to excavate the capitalist interests that fuel incarceration in this country. How did the prison industrial complex overtake the lofty principles that ushered in the South African democratic era? Judge Jody Kollapen is well-placed to speak to the evolution of the South African prison from a colonial institute that served to criminalise and dominate 'natives', to its utility as instrument of state repression under apartheid, to its present manifestation in the democratic era. He has laboured at the coalface of apartheid crime and punishment through his work as an attorney in the Delmas Treason Trial and for the Sharpeville Six, and also worked as a member of Lawyers for Human Rights, where he coordinated the 'Release Political Prisoners' programme. Importantly, Judge Kollapen had a ringside seat at the theatre of our transition from apartheid to democracy as he was part of the selection panel that chose the commissioners for the Truth and Reconciliation Commission (TRC). Many questions can be asked of the South African TRC, including whether it was the best mechanism to deal with the past and whether it achieved reconciliation. What concerns us here is its impact on crime and punishment in the democratic era. If our transition was premised on restorative justice, then should that not be the guiding principle for the emerging democratic state? In line with this special edition's focus on the impact of incarceration on the marginalised and vulnerable, Judge Kollapen shares some insights on how the prison has fared in democratic South Africa, and how imprisonment affects communities across the country. As an Acting Judge in the Constitutional Court, a practitioner with a long history of civic engagement, and someone who has thought and written about criminalisation, human rights and prisons, Judge Kollapen helps us to think about what decolonisation entails for prisons in South Africa.*

**Nontsasa Nako (NN):** My first question is what you think decolonisation would mean when it comes to penal systems, detention centres, prisons and the criminal justice system?

**Judge Jody Kollapen (JK):** Maybe I would need to first understand what is meant by the term decolonisation.

**NN:** That's the crux of my question; what do we mean by decolonisation? What would it imply when it comes to jurisprudence and legal systems?

**JK:** I think when we look at the whole system of crime and punishment and the building of prisons and the use of the penal system, it's difficult to divorce it from the pillars of colonial and apartheid rule. It was an essential feature. And so, from that perspective, the decolonisation project must interrogate why we had prisons initially. It was a source of

\* Nontsasa Nako is a postdoctoral fellow at the University of Johannesburg's Centre for Social Change. She obtained her PhD from Binghamton University in Philosophy, Interpretation and Culture.

cheap labour for many farmers. It was a form of criminalisation of a large percentage of black people. Those realities seem to have seamlessly moved into the present, without a sufficient interrogation of their very rationale. The social and economic structure, for example, lent itself to criminalising people: if people had to steal a loaf of bread out of poverty the intervention was the criminal justice system rather than social security system. I don't think that any of those pillars have been sufficiently interrogated.

And I think in our anger about crime and punishment we continue to seize upon the penal system as the most effective system. So, decolonisation really means revisiting why we should have prisons and why we should have punishment: what is the purpose? And locate it also within the context of the African value systems that we are quite glib about. In many African societies offenders were dealt with in a restorative way. Exclusion was really a means of last resort.

**NN:** You say that we are glib about the African value systems, which the Truth and Reconciliation Commission (TRC) said it was relying on. And in that sense, it seemed to be a way of rethinking crime and punishment and seemed instead a way of engaging victims and offenders in a way that would be better. My question is whether you think we have made use of that system at all?

**JK:** Well I don't think so, but I also don't think that system was advanced and engaged with honestly as a means to constructing a better future. And, if I may explain, for me what the truth and reconciliation system did – and even though it was founded on some wonderful principles – it allowed South Africans to look back into the past and see how horrible it was, and to be quite romantic about it. To say, 'Right, we've seen that and now can we get back to the present?' But we didn't take the lessons from the past.

**NN:** So we did not input that into our criminal system in any way?

**JK:** What it would have meant was, firstly, a commitment that the process of the TRC would continue after the TRC completed. Government, civil society, business, the prisons, the police, for example, would have had to have a commitment to dealing with whatever emerged during the process. And it would then have to be incorporated into policy, into law, if need be. But because it was such a painful process, it was almost that everybody wanted to breathe a sigh of relief and say, 'Thank God that's over, and now can we get back to our life in present South Africa?' So, if you look, for example, at what emerged in the TRC regarding police misconduct, violence in the police, excessive use of force, I haven't seen any real evidence of how those lessons have been used in policing, in saying how do we avoid doing that again. We all condemn it and we are all ashamed about it, but then that's it, we just want to cut a clear line through it. And I think for many white people it was also convenient that we cut that clear line because they were able to then say that 'this whole thing about transformation, why do we have to talk about it? We have dealt with it, the TRC dealt with it, it's over.' It was a nice way to insulate it and then to leave it there.

**NN:** So, particularly in respect of prisons, would decolonisation mean completely rethinking prison or would it mean making prison less inhospitable, if I can use that word?

**JK:** I think you need to completely rethink it because if you work on the basis of simply reforming the institutions then you don't deal with the question of who is entering those institutions. You don't then interrogate the questions about what the purpose of these institutions should be, of who most deserves to go to prison and what kind of society do we wish to create by building so many prisons and incarcerating so many people. Recognising,



on the one hand, that there are those who society needs to be protected from, and that we shouldn't be scared to say that there are some people who need to be put in prison for the rest of their lives. There are those who will simply not stop offending, and therefore society needs protection against those people. But then, on the other side of the pendulum, there are many who will find themselves in prison simply because of a number of factors that are quite variable, for example, the amount of money they have. It's also clear that the quality of legal representation has a large influence on whether you go to prison or not. And therefore, those who can afford the best legal representation increase their chances of not being in prison, while those who have to make do with poor quality legal representation face a greater risk of imprisonment. That can't be a rational basis for deciding who goes to prison or not and yet it is largely still a significant factor in that determination.

**NN:** We received submissions for this edition dealing with cashless bail, detention centres for holding foreign nationals awaiting deportation, and whether there is a clear public understanding of justice and human rights. I am wondering whether any of these themes tap into what you would think of as decolonisation? Are we tinkering with a broken machine, as it were? Or putting a Band-Aid on a broken leg with thinking about whether we can make detention centres more hospitable, whether we should think about cashless bail? Should we think about abandoning some of the bureaucracy because it harms the poor?

**JK:** Look, I think we're tinkering with the system because fundamentally we're being held hostage by crime and violence. In a sense, the public anger and outrage is so strong because the criminal justice system is not seen to be working effectively, and therefore tinkering with the last part of the system in

terms of incarceration and conditions within the penal system is a no-win situation. Because, what happens is that we have such low levels of arrests, prosecution and convictions, that there is almost a kind of a subconscious thing that says, 'Those people we do catch, we will deal with them!' Almost to compensate for those that we didn't catch. When you enter the debate at the tail end, you're on the losing wicket from the beginning. You're up against both public sentiment and real perceptions of a system that's not working well. But the solution is not an easy one; how do you get the public to understand these things? How do you get people more involved in corrections? I think for example, a large percentage of South Africans haven't been inside a prison. I try to visit prisons regularly. There is a perception out there that you get three meals a day, it's a wonderful life in there, but that's far from the truth. It's a terrible place to be in for any human being, and it is questionable whether people can be rehabilitated in those conditions, if somebody goes there for three or six months. So, I think public knowledge is important, in order to have a meaningful public debate. At this stage, public knowledge is quite limited with regard to the system.

**NN:** There is a theory that prisons hide in plain sight, that they are there and we think we know what is going on there, but we don't. So how do we breach that curtain? How does the public get to know about the prison in a way that's not romanticised or fictionalised or portrayed through the snippets of prison riots? How does prison come into the public consciousness?

**JK:** Well I think the role of the media, the role of academics, the role of NGOs [non-governmental organisations] and the role of the judiciary are important. For example, when I visit a prison I should be in a position to say something about the conditions that I saw there. I think that might go a long way to

at least changing public perceptions of what happens in prison. And the public may rightfully be concerned about whether we should send someone there for three months if there's a real risk that this person may be further damaged. There's a prevailing sense that we send someone there for three months and we're likely to improve them.

**NN:** Because we're only likely to be familiar with prison if we're personally touched.

**JK:** Exactly.

**NN:** Thank you so much.



## Previous issues

In Issue 65 David Bruce analyses statements from the injured and arrested strikers taken by the Independent Police Investigative Directorate in the five days immediately after the Scene 2 massacre at Marikana. Robert Doya Nanima looks at whether the latest version of the proposed Traditional Courts Bill provides a satisfactory mechanism to evaluate evidence in criminal cases before it is admitted. Mahlongonolo Thobane and Johan Prinsloo discuss ‘bank associated robberies’ – robberies (or attempted robberies) of cash that are committed against a bank client while en route to or from a bank or ATM. Nicole van Zyl considers whether evidence of sexual grooming influences the decisions of South African courts when passing sentence on offenders who have been found guilty of sexual assault or rape of children. Elna van der Spuy reviews Anneliese Burgess’s book, *Heist! South Africa’s cash-in-transit epidemic uncovered*, published in 2018 by Penguin Random House. ‘On the Record’ presents a conversation between Nicolette Naylor (Director, Ford Foundation for Southern Africa) and Sibongile Ndashe (Executive Director: The Initiative for Strategic Litigation in Africa) on sexual harassment and the law.



Articles in Issue 64 confront questions about what proper governance and accountability mean in the criminal justice environment, and how research, law and policy reform may engendering change. Gareth Newham and Brian Rappert reflect on the ways that operations-focused research collaborations between police and external bodies can shape policing in practice. Lukas Muntingh looks into police oversight, in particular the powers and performance of the office of the Western Cape Police Ombudsman. Shifting focus to the public’s pushback against inadequate governance, Lizette Lancaster presents data from the Institute for Security Studies’ Protest and Public Violence Monitor that shows how wide-ranging and geographically dispersed protest grievances are. Fatima Osman looks at the latest version of the Traditional Courts Bill and asks whether it sufficiently addresses the fundamental objections to previous versions. Bill Dixon reviews two books: Andrew Faull’s *Police work and identity: a South African ethnography*; and Sindiso Mnisi Weeks’s *Access to justice and human security: cultural contradictions in rural South Africa*. In ‘On the Record’ Guy Lamb and Ncedo Mngqibisa discuss the in-the-field realities of doing a randomised household survey in South Africa.

