Previous issues

Stacy Moreland analyses judgements in rape cases in the Western Cape, finding that patriarchal notions of gender still inform judgements in rape cases. Heidt Baines writes a case note on the Constitutional Court case F v Minister of Safety and Security. Alexander Higopoulos and Jeremy Porter demonstrate how Geographic Information Systems can be used, along with crime pattern theory, to analyse police crime data. Geoff Harris, Crispin Horsman & Sylvia Kaye report on a conference held in Durban in mid-2013 about measures to reduce violence in schools; and Homa Harmovan reviews the latest edition of Victimology in South Africa by Robert Peacock (ed).

Andrew Faul responds to Herrick and Charman (SACO-48), delving into the daily liquor policing in the Western Cape. He looks beyond policing for solutions to alcohol-related harms. Claudia Foresto-Towne considers how race and gender influence police reservists’ views about their work. Elenora Van der Spuy assesses the contribution of ethnographers and autobiographies to our understanding of policing in South Africa. Megan Gwinder looks at how crime statistics and the national victims of crime surveys are used to support opposing views of public perception about the levels of crime. The edition concludes with a discussion between Olivia Owen (Nigeria) and Andrew Faul (South Africa) about the differences in how police performance in the two countries.

ISS Pretoria
Block C, Brooklyn Court
361 Veale Street
New Muckleneuk
Pretoria, South Africa
Tel +27 12 346 0920
Fax +27 12 460 0908
pretoria@issafrica.org

ISS Addis Ababa
5th Floor, Get-House Building
Africa Avenue
Addis Ababa, Ethiopia
Tel: +251 11 515 6520
Fax: +251 11 515 8449
addisababa@issafrica.org

ISS Dakar
4th Floor, Immaible Atiyum
Route de Ouakam
Dakar, Senegal
Tel: +221 33 860 3304/42
Fax: +221 33 860 3343
dakar@issafrica.org

ISS Nairobi
Braeside Gardens
off Multhinari Road
Lavington, Nairobi, Kenya
Tel: +254 20 266 7208
Fax: +254 20 266 7198
nairobi@issafrica.org

www.issafrica.org

South African CRIME QUARTERLY
No. 48 | June 2014

Twenty years of punishment (and democracy) in South Africa
Political policing then and now
Criminal justice policy and remand detention since 1994
Insider views on the Judicial Inspectorate for Correctional Services
Addressing corruption in South Africa
Responses to organised crime in a democratic South Africa
Upholding children’s rights in the criminal justice system
The Institute for Security Studies is an African organisation which aims to enhance human security on the continent. It does independent and authoritative research, provides expert policy analysis and advice, and delivers practical training and technical assistance.

© 2014, Institute for Security Studies

Copyright in the volume as a whole is vested in the Institute for Security Studies, and no part may be reproduced in whole or in part without the express permission, in writing, of both the authors and the publishers.

The opinions expressed do not reflect those of the Institute, its trustees, members of the Advisory Council or donors. Authors contribute to ISS publications in their personal capacity.

ISBN 1991-3877

First published by the Institute for Security Studies,
P O Box 1787, Brooklyn Square 0075
Pretoria, South Africa

www.issafrica.org
SACQ can be freely accessed on-line at http://www.issafrica.org/publications/south-african-crime-quarterly

Editor
Chandré Gould  e-mail cgould@issafrica.org

Editorial board
Professor Ann Skelton, Director: Centre for Child Law, University of Pretoria
Judge Jody Kollapen, High Court of South Africa
Dr Jonny Steinberg, Research Associate, Centre for Criminology, Oxford University
Dr Jamil Mujuzi, Faculty of Law, University of the Western Cape
Associate Professor Catherine Ward, Department of Psychology, University of Cape Town
Associate Professor Dee Smythe, Director of the Centre for
Law and Society, University of Cape Town
Professor William Dixon, Head of School, School of Sociology
and Criminology, Keele University, UK
Professor Rudolph Zinn, Department of Police Practice, University of South Africa
Associate Professor Lukas Muntingh, Project Coordinator, Civil Society Prison Reform Initiative,
Community Law Centre, University of the Western Cape

Sub-editors who worked on this edition
Andrew Faull, PhD candidate, Oxford University
Khalil Goga, PhD candidate, Stellenbosch University
Camilla Pickles, PhD candidate, University of Pretoria
Elona Toska, PhD candidate, Oxford University

Cover
An artist’s impression of criminal justice over the past 20 years
© Lize-Marie Dreyer

Production Image Design 071 883 9359
Printing Remata
## Contents

**SA Crime Quarterly**  
No. 48 | June 2014

### Editorial
Memory and forgetting: how meta-narratives about the past overshadow the future  ................................................. 3

### Twenty years of punishment (and democracy) in South Africa
The pitfalls of governing crime through the community

Gail Super

### We need a complicit police!
Political policing then and now

Julia Hornberger

### Unsustainable and unjust
Criminal justice policy and remand detention since 1994

Jean Redpath

### Looking back
Insider views on the Judicial Inspectorate for Correctional Services

Chloë McGrath & Elrena van der Spuy

### Control, discipline and punish?
Addressing corruption in South Africa

David Bruce

### Taking stock of the last 20 years
Responses to organised crime in a democratic South Africa

Khalil Goga

### Court support workers speak out
Upholding children’s rights in the criminal justice system

Lorraine Townsend, Samantha Waterhouse & Christina Nomdo
Editorial

Memory and forgetting: how meta-narratives about the past overshadow the future

Two decades on from 1994 seems an appropriate time to take stock of what has been achieved and where we have fallen short of our own expectations, and identify what remains to be done in South Africa. But perhaps it is also an appropriate moment to take stock of how we remember and represent our past and how the meta-narratives, particularly about apartheid and opposition to apartheid, inform and overshadow our present and future.

Memory is a curious thing, at both a social and individual level. While we are inclined to think of our memory as a static entity, scientists such as Charles Fernyhough describe it as a constantly changing set of impressions, informed as much by the needs of the present as by the experiences of the past.¹ When the memories we have are of traumatic events, the process of remembering is even more fraught, especially when those who are doing the remembering do not share the same perspectives, experiences or social status.

For South Africans the construction of a collective memory about the experience of apartheid is thus fraught. While remembering the details of the past was regarded as an essential requirement for moving forward, we as a society did our remembering within a formal process guided by the Truth and Reconciliation Commission (TRC), and within a very narrow time period. After the TRC, arguably, we moved forward very quickly to forget – enabled by the construction of comfortable meta-narratives that do not disturb. This is consistent with trauma psychologist Judith Herman’s theory that ‘the knowledge of horrible events periodically intrudes into public awareness but … is rarely retained for long’. Indeed, she argues that ‘[d]enial, repression, and dissociation operate on a social as well as an individual level’. But, ‘like traumatised people, we need to understand the past in order to reclaim the present and the future’.²

The meta-narratives we have constructed draw very clear lines between ‘perpetrator’ and ‘victim’, ‘hero’ and ‘villain’, establishing these as distinct categories, despite the very real murkiness and fluidity between them, identified even by the TRC.³ I believe it is the untroubled acceptance of these categories of ‘othering’, applied post-apartheid, that creates the basis for justifying state violence.

Over the past 18 months the Nelson Mandela Foundation and the Global Leadership Academy of the German Development Agency (GIZ) have held a series of international dialogues about transitional justice and ‘memory work’. The driving motivation of these dialogues has been to overcome what practitioners, theorists and activists in the fields of peace-building and transitional justice have come to express as a stagnancy in thinking about, and approaches to dealing with, past injustices and conflict.

The dialogues have identified as a crucial element in any transition to democracy ‘respect for, and the provision of space for, the interrelated dynamics of remembering and storytelling’. At the same time they have recognised that globally our experiences have shown that ‘in the context of post-oppression or post-conflict, archives and memory regimes tend to alienate voices that are potentially important for a resilient and sustainable society; whether the reckoning takes place immediately or many years after the rights violations’. The concern underlying these views is that what is regarded as important to remember, and what is left unsaid or silenced, are shaped by today’s interests and powerful groups within societies.⁴
Why is this relevant now, and why in the context of a 20-year review?

The Presidency’s 20-year review of safety and security between 1994 and 2014 reveals an interesting, albeit contentious, analysis of the progress made in the field of criminal justice in the past 20 years. It adopts selective narratives as fact, but in reality they are open to enormous contestation. Arguably these narratives – and the language we use to tell them – trouble our ability to address persistently high levels of violence and to understand the root of the inability of the police service to establish a mutually respectful relationship with citizens.

The language that should trouble us is the language of war and othering that has persistently characterised official statements about crime and violence since crime rates peaked in 2001. The fifth volume of the TRC’s final report reminds us that the excuse that ‘we were at war’ was used to justify atrocities by state security forces, the African National Congress (ANC) and the Inkatha Freedom Party. The context of war allowed the protagonists to undertake violent actions ‘with pride rather than distress or embarrassment’. Yet, while being at war implies the application of military discipline and hierarchy to those involved, the TRC found that ‘all parties fell short, in some respects, in imposing restraints and disciplines on their own members, followers and supporters’. The report also refers to leaders’ denial of responsibility for the actions of their supporters when things went wrong. This was as true of the ANC, United Democratic Front (UDF) and IFP as it was of the leaders of state security structures.

In relation to the police and policing a particular meta-narrative has been adopted, and is reflected in the Presidency’s 20-year review. The story we tell ourselves is that before 1994 the police existed only to uphold apartheid, and dealing with crime was given little attention, with the latter focused on the needs of the white population. We also tell ourselves, as reflected in the 20-year review, that community structures to oversee security under apartheid were both effective and progressive, thus informing attempts to recreate such structures in the form of community policing forums and community safety forums. We have chosen to forget the violence meted out by self-defence units (SDUs) in Gauteng and the Western and Eastern Cape. We have also chosen to forget the many differences, ideological and aspirational, that existed in black communities, choosing rather to represent these communities as homogenous. And we have forgotten policemen like Wilson Magadla who served in the South African Police, and later on the TRC, who worked tirelessly and with integrity to respond to crime in all communities during apartheid.

The concluding fiction presented in the Presidency’s 20-year review of safety and security is that a loss of morality is to blame for the high levels of violence in South Africa. The report holds that it is ‘moral decay’, a lack of respect, a failure to teach children the difference between right and wrong, that is at the root of violence, including violent public protests. My experience in speaking to perpetrators of violence over the past year has led me to understand that to speak of morality (and a loss of morality) in the context of structural violence, and in a country where violence is regarded as necessary to solve disputes, discipline children and partners, and invoke respect, is absurd. I would implore us rather, like James Gilligan proposes, to regard such violence as tragedy, acknowledge the trauma it gives rise to, and seek to intervene with humility and compassion.

Several of the articles in this edition serve to trouble our existing narratives. Gail Super’s article raises important considerations about the consequence of locating crime combatting as a ‘community’ function. While the intention behind the policy push towards ‘community policing’ may be to democratise policing, Super argues that it has had unintended consequences: ‘Because violent punishment is one of the consequences of the state’s turn towards democratic localism, we should question the way in which the “community” is deployed as a tool of crime prevention, and subject it to rigorous scrutiny.’

Julia Hornberger also tackles policing issues, arguing that to overcome the problem of violent public protests becoming more violent when the police intervene, would require the police to ‘become more explicitly partisan towards the citizens they serve, and help deliver the message inherent in each protest’.
David Bruce offers an overview of state responses to corruption, showing that there is a robust legal and institutional infrastructure for addressing corruption that flounders because of unfair practices that favour those that hold power.

The articles by Khalil Goga, Jean Redpath, Elrena van der Spuy and Chloé McGrath, and Loraine Townsend, Sam Waterhouse and Christina Nomdu offer a more traditional review of the past 20 years. Goga provides an overview of state responses to organised crime while Townsend and her colleagues offer a sobering assessment of court services to support child witnesses.

In her article, Redpath shows that punitive bail and sentencing practices underlie the persistent problem of prison overcrowding. She argues that while ‘durations of remand detention have increased, convictions have decreased’, which results in an increasing proportion of people in remand detention who will not be convicted, while sentences are less likely than ever to contain a custodial component. Her conclusion: ‘the “tough on crime” approach has in practice turned into “justice delayed and freedom denied”’.

Staying with prisons, Van der Spuy and McGrath draw on interviews with ‘insiders’ in the Judicial Inspectorate of Correctional Services, offering an insightful and important assessment of the efficiency of the oversight body.

Finally, the image on the front cover of this edition is an artist’s impression of criminal justice over the past 20 years. The illustration is by Lize-Marie Dreyer, an honours student in visual arts at Stellenbosch University.

This edition would not have been possible without the assistance I received from the sub-editors: Andrew Faull, Camilla Pickles, Khalil Goga and Elona Tosca. Thanks are also due to Bea Roberts, Janice Kuhler and Iolandi Pool, who are the production team and who willingly took on the extra work involved in producing a longer edition; and to Kathryn Smith from Stellenbosch University who encouraged her art students to contribute to this edition.

This publication was made possible with funding from the Hanns Seidel Foundation and the Ford Foundation. The ISS is also grateful for support from the following members of the ISS Partnership Forum: the governments of Australia, Canada, Denmark, Finland, Japan, Netherlands, Norway, Sweden and the US.

Chandré Gould (Editor)

Notes
2 Judith Herman, Trauma and recovery: the aftermath of violence – from domestic abuse to political terror, New York: Basic Books, 1997, 2.
7 Ibid.

Editorial policy

South African Crime Quarterly 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 for 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 policy makers, criminal justice practitioners and civil society researchers and analysts, including the academy. The purpose of the journal is to inform and influence policy making on violence prevention, crime reduction and criminal justice. All articles submitted to SACQ are double-blind peer-reviewed before publication.
This article examines how the ideology of ‘community’ is deployed to govern crime in South Africa, both by marginalised black communities and by the government. Although the turn to ‘community’ started under the National Party government in the late 1970s, there is no doubt that as a site, technology, discourse, ideology and form of governance, ‘community’ has become entrenched in the post-1994 era. Utilising empirical data drawn from ethnographic research on vigilantism in Khayelitsha, as well as archival materials in respect of ANC policies and practices before it became the governing party, I argue that rallying ‘communities’ around crime combatting has the potential to unleash violent technologies in the quest for ‘ethics’ and ‘morality’. When community members unite against an outsider they are bonded for an intense moment in a way that masks the very real problems that tear the community apart. Because violent punishment is one of the consequences of the state’s turn towards democratic localism, we should question the way in which the ‘community’ is deployed as a tool of crime prevention, and subject it to rigorous scrutiny.

With the advent of formal democracy in South Africa in April 1994 one might have been justified in expecting that the criminal justice system would become less punitive and that this would entail less reliance on imprisonment as a punishment par excellence. However, although the numbers in custody have been reduced since an all-time high in 2004, South Africa has the highest incarceration rate in Africa and one of the highest in the world.2 In 2013, the number of people serving life imprisonment stood at 11 000, as opposed to 400 in 1994.3 Democratisation has thus brought with it a dramatic increase in long-term prison sentences, ranging from seven years to life. One of the consequences has been an escalation in the number of maximum security risk category prisoners. Prison overcrowding is rife (albeit unequally distributed) and social workers, psychologists and other professionals who are key for rehabilitation are in woefully short supply.4 Indeed, in overcrowded prisons, prisoners only have 1.2 m² in which to eat, sleep and spend 23 hours of the day.5 The conditions are, to say the least, appalling.6
Yet, in 2002, precisely when the South African rate of imprisonment had almost peaked, the Department of Correctional Services introduced a restorative justice approach ‘aimed at facilitating the mediation and healing process between offenders, victims, family members and the community’. This article discusses the apparent contradictions in, and consequences of, the state embracing ‘community’ based criminal justice initiatives in tandem with long-term imprisonment. Although the turn to community started in the late 1970s, under the National Party government, there is no doubt that as a site, technology, discourse, ideology and form of governance, the ‘community’ has become entrenched in the post-1994 era. It is, of course, one of those terms that is so vague and amorphous as to be capable of many different meanings. As such, it appeals to all parts of the political spectrum.

The paper focuses on the punitive underside of community, which, at its most extreme, manifests in the form of vigilante killings. Drawing on ethnographic and documentary research into non-state crime prevention and punishment practices in Khayelitsha, conducted between 2012 and 2014, I argue that vigilantism is in fact part of a continuum of violent technologies that are both connected with, and imbricated in, this shift to governing through the community. Not only is the term ‘community’ a discursive construct but, as I argue, because of its distinctively punitive iterations, both in the present and historically, it manifests as a peculiar mix of socialist-based grassroots activism, coupled with violently exclusionary attitudes towards those accused of criminality. I show how violent punishment is one of the consequences of this turn towards democratic localism. As such we should question the way in which the ‘community’ is deployed as a tool of crime prevention, and subject it to rigorous scrutiny.

I start by discussing the argument that community/democratic policing is opposed to the principles of liberal minimalism enshrined in the South African Constitution. I then discuss the consequences of the ANC's version of ‘mass political culture’; how the ‘cultural patterns’ inherited from the struggle against apartheid combine with the way in which the problem of crime, and what to do about it, is framed by political rhetoric, resulting in an approach that significantly stigmatises deviance. Deploying Zimring’s concept of ‘symbolic transformation’ I argue that the distrust that poor communities have of the police translates into a call for more (and not less) punitive treatment of criminals. Finally, I make some recommendations for future research.

Contradiction or coherence?

One explanation for the apparent contradiction in embracing the benign-sounding ‘community’, together with ‘the prison’, is that in fact these are not simultaneous, but consequential, penal developments. Thus, although the state embraced community policing and restorative justice in the early days of the heyday of rainbow nation democracy, in fact it soon thereafter shifted into a more punitive gear due to the panic about crime, and pressure to do something about it. The argument, brought to its logical conclusion, is that community/democratic policing is somehow opposed to the punitive style of policing recently adopted by the South African state. In a challenging and provocative article Hornberger counters this analysis, arguing that the ‘current [punitive] changes’ should be interpreted as ‘popular rather than elite or autocratic’. This helps to make sense of what might otherwise appear to be ‘contradictory, incoherent trends’.

According to Hornberger, community policing, which she refers to as ‘a policing of proximity’, seeks legitimacy from the community. This involves a ‘penetration of policing by forms of local justice’. These forms of justice, which include the call for ‘illegal violence’, are removed from what Hornberger refers to as ‘the civility of the law’. I argue that this ‘illegal violence’ is in fact part of a continuum of community-based crime prevention and punishment practices, where the legal and illegal are blurred, and where the state is complicit in the construction of vengeful ‘communities’. In a context of great scarcity and rampant social and economic inequality, ‘mob’ justice serves as an occasion for victims, and the communities with which they are linked, to proclaim the extent of their suffering and seek punitive redress. It is structured by the state insofar as victims (and their communities) have, in the past 20 years, discursively at least if not always in practice, come to assume a central role in the criminal justice system.
Instead of seeing vigilantism as a form of ‘mob justice’, as a scourge, as inimical to ‘civil’ society and as being somehow outside of and opposed to it, I argue that we should acknowledge how vigilantes, or at least their supporters, are in fact part of ‘civil society’.

‘Mass political culture’ and the community

Rooted as it is in 1980s notions of people’s power and the left-wing notion of grassroots democracy, the term ‘community’ has great rhetorical purchase in South Africa today. It encapsulates the communitarian emphasis of the ‘people shall govern’ clause of the Freedom Charter, echoes the global embracing of informalism, is presented as an effective means of combatting crime, and of course dovetails with the neoliberal shift towards greater responsibilisation – across all fields of government – by shunting responsibility from the state to the ‘people’ (a.k.a. ‘the community’).

This form of governance, one that operates in terms of a ‘liberation paradigm’, valorises local level initiatives by constantly seeking to mobilise communities on the ground. Thus, in 1992, the ANC stated that it was ‘the community who are largely responsible for prosecutions [and] ... not the police alone who combat crime’. One of the objectives of Community Policing Forums (CPFs) is to ‘enhance the ability of the police to combat and prevent crime, disorder and fear, in partnership with the community’, and parole boards are meant to give the ‘community’ a special say in release decisions.

Not only has democratisation ushered in a growing discursive emphasis on giving crime victims a role to play in sentencing, bail and parole decisions, but the South African Police Service (SAPS) measures the success of its ‘social crime prevention strategy’ in terms of the number of crime awareness programmes, neighbourhood watches, business forums and street committees that are established to deal with crime. In some instances the notion of partnership policing even includes ‘mobilising the community to oppose bail’ via collaboration with the CPF. Indeed, the community is so fundamental to policing in democratic South Africa that police will, in future, be subjected to a ‘stringent new recruitment process’ that includes ‘being paraded in front of community members’, via a ‘community parade’.

A 1997 amendment to the Criminal Procedure Act 51 of 1977 provides for crime victims and/or the community in which the crime occurred to play a role in bail decisions. In particular, a court may refuse bail where the release ‘will disturb the public order or undermine the public sense of peace or security’. The criteria that it may take into account relate entirely to how the community will react to the release. Thus bail may be refused where:

- The nature of the offence is likely to induce a sense of shock or outrage in the community where the offence was committed
- The shock or outrage of the community might lead to public disorder
- The release might jeopardise the safety of the accused
- The release will undermine or jeopardise the sense of peace and security among members of the public
- The release may undermine or jeopardise public confidence in the criminal justice system

In this way then, the door is opened for an ambiguous and vengeful ‘community’ to play a central role in the supposedly neutral criminal justice system. Pratt refers to this as a ‘decivilising process’ in terms of which the ‘liberal notions of unemotive sentencing and bail decisions’ are undermined.

History of the present

Marginalised communities in South Africa have a history of self-policing. Moreover, political violence has always played a prominent role in local politics. Both the National Party government and the ANC liberation movement used the death penalty against their enemies, and the radical traditions of people’s power and ungovernability sometimes resulted in violent punishment. As such, punishment in South Africa has historically been relatively unconstrained by the minimalistic considerations associated with liberalism.

In the turbulent 1980s the apartheid state depicted township activists as violent criminals and terrorists,
stripping their acts of any political dimension. At the same time the ‘comrades’ committed violent acts in the name of politics while accusing South African government officials and their lackeys of being the real criminals. At times, when criminal gangs looted trucks driving into the townships, some political activists claimed that this was part of the struggle. Similarly, certain acts – such as ‘necklacing’ – that might otherwise be regarded as gratuitous violence, assumed some kind of political salience, due to the fact that the targets of these acts were accused of being spies or apartheid collaborators, and thus on the wrong side of the ‘just war’. In fact, there was some substance to the claims of both the state and political movements. Among and alongside the ‘comrades’, activities and people emerged to take advantage of these township struggles to wreak violence for their personal gain – hence the appearance of the label ‘comtsotsis’, meaning criminals masquerading as ‘comrades’.

With the transition from a white minority government to a black majority government in 1994, the ANC had to transition from a liberation organisation calling for ungovernability in the black townships, to a governing party. As such it had to govern and demonstrate control over a crime situation about which citizens were becoming increasingly vocal, and which it had hitherto ignored. Tensions arose between its previous pronouncements on how it would deal with crime, the punitive practices that it now adopted, and its attempts to legitimate the police via community or ‘democratic’ policing. As crime became increasingly politicised – the subject of many parliamentary debates and a general consensus on the need to treat criminals harshly – so too did the new ANC government seek to simultaneously legitimate the previously vilified police and prove that it was not soft on crime. It did so via a two-pronged strategy of implementing community policing and uncoupling criminals from a political and social context, presenting them as a threat to the country’s young democracy. Thus, at the opening of Parliament in 1995, then President Nelson Mandela blamed crime and violence for ‘eroding the foundation of our democracy’, necessitating a ‘harsher approach’. A decade later, political leaders have called on police to ‘kill the bastards’, to ‘teach them a lesson’ by means of the use of lethal force and to show ‘no mercy’. This is a far cry from the 1992 ANC discussion document ‘Crime and crime control’ which, to give one example, ascribed gang formation to ‘structural and political reasons’ and presented gang members as having ‘legitimate economic needs’.

As such, there is no doubt that crime and punishment have assumed an ideological importance in the ‘new’ South Africa that is markedly different from the situation during apartheid. This ‘hyper-politicisation of penal policy’ frames the field of punishment (and other ‘self-help’ initiatives) in Khayelitsha and other marginalised South African townships.

### The legitimacy conundrum

Community solutions to crime and policing are attractive, not because they actually reduce the incidence of offences but because, like punitive punishments, they reassure people that something is being done to collectively prevent crime. De Klerk argues that the ideology of collectivism encourages vigilantism because the raised expectations generated by institutions of partnership policing, such as CPFs, are inevitably not met.

During evidence given at the Commission of Inquiry into Policing in Khayelitsha (hereafter referred to as the Khayelitsha Commission), a senior police officer stated that he knew about ‘formal meetings’ that had resulted in a decision to evict people from their homes due to a crime. A resident testified that when the ‘community’ had called her to a meeting, demanding that her nephew leave the area due to his alleged ‘criminality’, she did not argue, and did not think of other options: ‘Our main concern was that he should leave the house so he wouldn’t be harmed. We could see the mood of the residents and it appeared that they would do something.’ Another witness stated that the boys who had allegedly stolen his niece’s money, leather jacket and cellphone climbed into his car voluntarily because ‘they were asking us not to assault them, saying that their parents were going to pay back the money’. Similarly, a teenager living in a tin shack in Enkanini told me that when her blankets and hair-iron were stolen during a break-in she did nothing, because
she did not see the thieves – but that if she had seen them she would have alerted the ‘community’ to assist her in retrieving her goods. In this sense then, there is a desire for criminals to be banished and for the victims to get their goods back.

Banishment in informal settlements sometimes takes the form of demolition of the dwellings of suspected criminals. In some instances a decision taken at street committee level to banish an ‘offender’ by demolishing his/her shack is taken too far when the enforcers not only destroy the dwelling but also assault (or kill) the resident, sometimes destroying other homes in the purging process. One of my interviewees was a member of three different committees, all with varying relationships with the state: the local neighbourhood watch, a less formalised community patrol group, and the Khayelitsha CPF. He had also been a participant in the demolition of three shacks in an informal settlement after a decision to this effect was taken at a ‘general council’ gathering of the street committees in his area. Thus, members of neighbourhood watches and street committees may be, or may have been, the same people who become part of a ‘mob’ – the point being that there is fluidity between structures. As such it becomes difficult to distinguish the mob from the community, the unlawful from the lawful.

Where the police encourage the public to engage in partnership policing, join neighbourhood watches, establish community patrols, and observe and report crimes, they create the expectation that they will be available to assist in instances when crime is detected. However, given a scarcity of resources, particularly in poorer communities, this promise cannot be fulfilled. There are widespread allegations of police complicity and police have themselves admitted that they tacitly permit violent community-based ordering processes. Surprisingly, some members of the Social Justice Coalition (SJC) also expressed support for the beating of ‘criminals’ by ‘community members’ as a technique to retrieve stolen goods, even though they stated that they themselves did not participate in violent activities.

Dominant public discourse in South Africa is replete with allegations that criminals are released on bail when they should not be, that prisons are like five-star hotels, that the criminal justice system is too slow, that the police do not do their jobs properly, that there are too many acquittals, that there are too many early releases; the list is endless. One only has to peruse the record of the evidence given at the Khayelitsha Commission to find overwhelming evidence in this regard. The point of this article is not to prove/disprove the veracity of these claims but to note their prominent presence and, at the same time, to observe how, in the quest for harsh treatment of criminals, the negative consequences of imprisonment are almost entirely excised from the debate.

Despite this lack of trust in the criminal justice system, in what Zimring refers to as a process of ‘symbolic transformation’, the consistent call from residents in marginalised communities is for a more intimate relationship with a punitive state. This translates into a call for more arrests, punitive punishments, including long prison sentences, and the reinstatement of capital punishment. Even though the state is largely absent/failing/distant, however one describes it, citizens of ‘frontier societies’, lacking the resources that the well-off have to deploy private security, translate an exercise of police power (in other words a punitive criminal justice system) into a service for victims.

Conclusion

As Garland points out, ‘liberal institutions’ such as the rule of law and Bill of Rights are not the same as democratic institutions. Whereas the former tend to constrain state punishment, the latter are not concerned with restraint but with punishing in accordance with what the majority wants. In South Africa the history of the liberation struggle, combined with apartheid-sanctioned self-help township initiatives, people’s courts, notions of community empowerment and grassroots localism, have given popular democracy an exceptional flavour. Looking back from the vantage point of 2014, it is clear that the South African version of mass democracy exists uneasily, side by side, with the liberal minimalism of its Constitution.
While the idea of community sounds progressive and inclusive, important questions should be asked about the power relations between different communities, within communities, and between communities and state agents. The danger of rallying communities around crime combatting is that it can, and does, unleash violent practices in the quest for a ‘moral community’.\textsuperscript{54} The ironic twist is that ‘mob justice’ is in part a mass technology to protect private property in a context of endemic inequality.\textsuperscript{55} When community members unite against an outsider they are bonded for an intense moment in a way that masks the very real problems that tear the community apart and/or separate it from other less or more socially connected and empowered communities.\textsuperscript{56}

I have argued in this article that violent community-based punishments are constitutive of, and constituted by, violent state punishments and crime prevention practices (both lawful and unlawful). For this reason South African researchers and policymakers would do well to heed Johnson’s exhortation to ‘examine the conditions that determine whether and to what extent participants in community-based crime prevention initiatives are prepared to act outside the law in given circumstances.’\textsuperscript{57}

In particular, a research agenda in marginalised communities should include the phenomenon of punitive populism by mapping the field of crime prevention and punishment practices – asking how penalty is constituted within specific localities. Instead of presenting ‘communities’ and ‘mobs’ as self-evident binaries we should interrogate the power relationships, local politics, societal networks, social capital and other dynamics that constitute these transient and non-homogenous groupings.

**Acknowledgements**

Some of the research for this paper was conducted while the author was an NRF sponsored post-doctoral researcher at the Centre for Criminology, University of Cape Town. The author would like to thank the Social Justice Coalition, in particular Joel Bregman and Welcome Makele, for having assisted in arranging many of the interviews with residents in Khayelitsha. Thanks are also due to the anonymous reviewers for their helpful comments and, of course, to Chandré Gould, the editor of this journal.

Notes

1 In 1992 the ANC stated that ‘our crime problems are NOT being solved by large-scale imprisonment’ and that ‘however much one condemns those deeds the state response should show compassion for the perpetrator [emphasis as in the original]. See African National Congress (ANC), Discussion document: crime and crime control. What role should the police play?’, Centre for Applied Legal Studies, File AK 2195, P2 Police, South African history archives, University of the Witwatersrand, 1992, 7.


6 The conditions, as is the case with overcrowding, vary from prison to prison.

7 Department of Correctional Services, Annual report 1 January 2000 – 21 March 2001, Foreword.

8 My research methodology included selective in-depth interviews with residents of Khayelitsha; a member of Mayytshe (a community patrol group), the Chairperson of the ‘Father’s Committee’ in Enkanini (an informal settlement), members of the Social Justice Coalition (SJC), community journalists who were following vigilante incidents, five street committee members, four residents who openly identified themselves as ‘vigilantes’, and three mothers of victims of vigilantism. I also conducted participant observation in the SJC ‘Campaign for Safe Communities’ meetings, attended the first ten days of the proceedings of the Commission of Inquiry into Policing in Khayelitsha (hereafter referred to as the Khayelitsha Commission) and the proceedings in The State vs Mziwabantu Mncwengi, Moinasi Mncwengi, Buyelwa Mncwengi, Lumnkho Babalaza, Xolani Makapela, Mawende Siborna, case number SS03/2013, Western Cape High Court, South Africa (part-heard), where the accused were charged with the kidnapping and murder of four youths who were alleged to have stolen the plasma television set of one of the accused. This was supplemented by documentary research (including the official records of the Khayelitsha
Commission, the judgements in court cases that dealt with vigilante incidents, and documents that the Western Cape Department of Community Safety made available for my perusal).

9 I use the term ‘liberal minimalism’ to refer to those Chapter Two rights that constitute the essence of liberal democracies, namely life, equality, freedom and security of the person, access to courts and the rights of arrested and detained persons. However, it should be noted, as one of the anonymous reviewers pointed out, that because the South African Constitution protects civil, political, economic and cultural rights there is debate as to whether it is minimalist or not.


11 According to Zimring the ‘symbolic transformation of capital punishment’ entails its transformation from being a symbol of a powerful state into a form of victims’ redress. This is crucial in constructing popular support for the death penalty in the American South where distrust of government is the norm. Zimring argues that “vigilante” cultural traditions sustain the idea of harsh punishment as a communal ritual on the victim’s behalf and counteract the inhibiting effect of distrust of government on support for the death penalty’. See Steven Messner, Eric Baumer and Richard Rosenfeld, Distrust of government, the vigilante tradition, and support for capital punishment, Law & Society Review 40(3) (2006), 559–590, 560.


14 Ibid.

15 Ibid., 12. See also Fouchard, who argues that community policing does not have a uniform definition but may be used as a ‘euphemism for a particular concept of police–civil society relations which include different local structures such as Community Police Forums, ad hoc anti-crime campaigns and neighbourhood watch schemes’. Laurent Fouchard, The politics of mobilization for security in South African townships, African Affairs 110 (441) (2011), 608–609.

16 Ibid.


18 Darracq, The African National Congress (ANC) organization at the grassroots, 595.

19 ANC, Discussion document: crime and crime control, 8–9.


23 Michelle Jones, New breed of police recruits on parade soon, Cape Times, 28 March 2014, 7.

24 Criminal Procedure 2nd Amendment Act 1997 (Act 85 of 1997), Section 4(d).

25 Section 4 (e) inserts Section 8A into the original Act, i.e. into Criminal Procedure Act 1977 (Act 51 of 1977), Section 60 (a).

26 Section 4(d).


29 Lars Buur and Steffen Jensen, Introduction: Vigilantism and the policing of everyday life in South Africa, African Studies 63(2) (December 2004), 139–152; Gary Kynoch, Of compounds and cellblocks: the foundations of violence

30 See David Garland, Penalty and the penal state, Criminology 51 (3) (2013), 475–517, where he discusses this in an American context.


34 ‘Kill the bastards’ – Minister’s astonishing order to police, The Star, 10 April 2008.


37 ANC, Discussion document: crime and crime control, 8–9.

38 The phrase ‘hyper-politicization of penal policy’ comes from Marie Gottschalk, The carceral state and the politics of punishment, in Simon and Sparks (eds), The Sage handbook of punishment and society, 217.


40 De Klerk, Community Policing Forums – inducing vigilantism.


42 Personal notes taken during Nomakuma Bontshi’s testimony, 24 January 2014.

43 Personal notes taken during Mr Simelele’s testimony, 27 January 2014.

44 Interview, 16 October 2013.


46 It should be noted that, although interviewees consistently referred to street committees as making the banishing decisions, this does not necessarily mean that these bodies are affiliated to SANCO, since the term is a code for many types of gatherings. See Bongani Tshehla, Non-state justice in the post-apartheid South Africa – a scan of Khayelitsha, Johannesburg: Ravan, 1992, 186–200; Gail Super, The spectacle of crime at the ‘new’ South Africa: a historical perspective (1976–2004), British Journal of Criminology 50(2) (March 2010).

47 De Klerk, Community Policing Forums – inducing vigilantism, 51.

48 See Major General CP de Kock, Serious crime in Khayelitsha and surrounding areas, Crime Research and Statistics, Crime Intelligence (AL 30), 3 August 2012, iv. In this report De Kock, after referring to taxi associations as being ‘in control of vigilante actions’, states: ‘They [the taxi associations] even went as far as imposing a curfew after 21:00 in the evening. Everyone (including the police) was very happy with the decrease in crime at the time …’ Although this was admitted in the context of what happened six or seven years ago, police complicity is still evident. See in this regard the testimony of school principal Mr Mjonondwana, Khayelitsha Commission, 28 January 2014. This was also the sense I got from chatting to police officers during court adjournments at the Western Cape High Court in August 2013.

49 This was communicated to me during interviews with four SJС members on 4 February 2013, during informal conversations I had, and during a group meeting facilitated by the Centre for the Study of Violence and Reconciliation on 13 March 2013. Given the SJС’s left-wing, human rights-based credentials and the fact that it is sensitive to the social, economic and structural circumstances that might lead some people to committing offences, one might have expected SJС members to be less supportive of the harsh treatment of criminals.

50 Messner, Baumer and Rosenfeld, Disturb of government, 561–562.

51 Ironically, even Advocate Masuku, acting for the SAPS in the Khayelitsha Commission, referred to the desirability of the death penalty when, while cross-examining a witness, he stated: ‘So if for example a person was arrested and evidence was properly collected and the prosecution was properly done and there was a conviction and the person went to jail and in certain instances there was the death penalty … if that were to be done people would feel a little
more confident, confidence in the whole system.’ Khayelitsha
Commission of Inquiry, Record, 31 January 2014, 958,
http://www.khayelitshacommission.org.za/2013-11-10-19-
36-33/hearing-transcriptions/public-sitting.html (accessed 15
April 2014).

52 The term ‘frontier society’ comes from Craig Little and
Christopher Sheffield, Frontiers and criminal justice: English
private prosecution societies and American vigilantism in the
eighteenth and nineteenth centuries, American Sociological

53 Garland, Penalty and the penal state, 506.

54 The term ‘moral community’ comes from Buur and Jensen,
Introduction: Vigilantism and the policing of everyday life in
South Africa, 139–152, 144.

55 Violent retrieval of goods is clearly one of the goals of ‘mob
justice’. This is clear from a perusal of the evidence given
at the Khayelitsha Commission, where numerous people
testified to ‘mobs’ having beaten alleged thieves to death
in the quest to retrieve their property. It is also borne out by
all of the interviews that I conducted. According to a police
report, between April and June 2012 there were 78 recorded
‘vigilante incidents’ in Khayelitsha. Most of the victims were
young men, between the ages of 18 and 30, with at least
half having either been caught in the act of stealing/robbing/
housebreaking and/or suspected of the same. See South
African Police Service, Bundu courts, 01 April to June 2012,
Khayelitsha Cluster, unpublished report.

56 See George Herbert Mead’s classic piece on the psychology
of punitive justice where he states: ‘The criminal does not
seriously endanger the structure of society by his destructive
activities, and on the other hand he is responsible for a sense
of solidarity, aroused among those whose attention would be
otherwise centered upon interests quite divergent from those
of each other.’ George Mead, The psychology of punitive
justice, American Journal of Sociology 23 (1918), 577–602,
591.

57 Les Johnston, What is vigilantism?, British Journal of
Criminology 36(2) (Spring 1996), 232–233.
We need a complicit police!

Political policing then and now

Julia Hornberger*

julia.hornberger@wits.ac.za

http://dx.doi.org/10.4314/sacq.v48i1.2

South Africa is witnessing a build-up of cases of public order policing gone wrong, in fact deadly wrong. Even the police are willing to admit that something is amiss. Yet the police response is a short-sighted one, which places the responsibility for the eruption of violence squarely with the people protesting, and underestimates its own role in aggravating the situation. I argue here that if the police wish to break the patterns of their long history of protecting a government and its partisan interests, and do not want to be misunderstood in their intention to serve the people, then simply increasing the capacity of public order policing will not help. On the contrary, we might end up (again) with a permanent occupying army. Instead the police have to become more explicitly partisan towards the citizens they serve, and help deliver the message inherent in each protest.¹

The demise of public order policing

On 13 April 2011 Andries Tatane, a teacher and local activist, was killed by officers of the South African Police Service (SAPS) during a protest in Ficksburg, a small town in the Free State, South Africa. Although the killing was captured live on video, all seven police officers involved in the incident were acquitted of the killing, as the state failed to prove beyond reasonable doubt who exactly had fired the deadly rubber bullets, and that there was ‘common purpose’ among the police officers involved in killing Tatane. This tragic and brutal killing is seen by many as a watershed moment, marking the definite return of police violence (repressive violence), well known from apartheid times.² It brought broad public awareness – not least because the event had been captured on video – to a chain of similar incidences of police brutality during protests both prior to and after that of Tatane.³ This includes the Marikana shootings, where the police, armed with live ammunition, killed 34 striking miners who refused to disperse. Together these present a frightening picture of police failure to deal with public protests in a democratically acceptable manner.

In this article, I do not discuss what is behind such policing, or whether the police are political instruments to suppress dissent, or even whether these incidences reveal police incapacity. While these are important questions that should inform our research agenda, I consider the issue from a different perspective: refracting the response by government to this crisis of protest policing firstly in the light of a long history of (public order) policing going back to the inception of policing in the 19th century, and secondly by comparing it to other more intimate forms of policing, such as the policing of domestic violence.

The government’s public response to incidents such as those described in the introduction to this article has been to announce a steep increase in the capacity of public order policing. Through the
refraction I show that such a policy decision not only risks repeating history in the short term but also places the SAPS at risk of falling back into the same purpose and patterns of policing as those that informed its inception in the 19th century. From the very beginning, South African policing has been over-invested in public order policing to protect a partisan government and specific societal interests.

Secondly, I show that a policy focused on increasing the capacity of public order policing is likely to further disappoint citizens’ wish for an effective police. I end this article with an aspirational call – that if the SAPS wishes to break these patterns of its long history and does not want to be misunderstood in its intention to serve the people, the service cannot hide behind the rule of law, neutrality or questions of capacity, but has to be more explicitly partisan towards the citizens it serves.

This article is intended to stimulate thinking and debate about political policing. Drawing on Brodeur, and how Steinberg has recently applied Brodeur's idea of 'high policing', political policing can be explained as the explicit protection of government through the use of intelligence and extralegal force against people challenging government from outside or from within. Political policing, however, is also the biased enforcement of laws, or the enforcement of laws that are biased against a certain group or interest. In contrast to the idea of high policing, such notions of political policing diffuse the questions of agency, conspiracy and intentionality in favour of a more structural perspective. While in tension with each other, I would like to keep both notions in sight.

Aside from the insights offered into the policing of domestic violence, this article is not based on original research but relies on secondary sources. While ethnographic research into the policing of protest would probably complicate the notion of political policing, I use it here in a normative way to stress the contrast with a form of policing that is relatively free from direct political instrumentalism and that accepts a constitutional democratic law as its primary source of authority.

On a different route

I would like to start by highlighting an irony. While many have condemned the brutality of current public order policing, and in so doing have tended to evoke the spectre of all-encompassing police repression, the SAPS has in fact been disinvesting itself substantially from public order policing in the past 15 years. This has mainly been done in order to deal with the pressure to reduce crime. In an effort to increase its legitimacy with the people of South Africa as well as its administrative accountability, it has allocated the bulk of its resources – both budgetary and personnel – to ‘ordinary’ crime fighting.

In 2000, under the Thabo Mbeki government, which was often accused of not taking crime seriously, the police released the National Crime Combating Strategy (NCCS). This self-assertive reaction of the police to shift towards a results-driven crime combating strategy was a way to show that they were serious about crime. Soon after, in 2002, the dismantling of the Public Order Policing (POP) units began. First the POP units were turned into a ‘reaction force’ of sorts, to be called on to respond to major crime operations such as bank robberies. But the dismantling did not stop there. By 2007 the POP personnel were reduced by nearly two-thirds. Officers were transferred to bolster daily police work at station level. Those who remained in the renamed Crime Combating Units, while nominally still responsible for public order, were also in practice re-deployed, more or less full time, to major crime-fighting operations.

This left the public order police understaffed and undertrained, and unable to deal with the public dissatisfaction with a government failing to live up to expectations. In the light of history this change could be considered an unprecedented and even a progressive move, since policing in South Africa before the end of apartheid was generally characterised as being overused for crowd control purposes and underused for crime-fighting purposes. In that era, even where the police concentrated on responding to crime, the criminal offences often served as yet another way to keep black South Africans in a subjected state (e.g. pass laws). This bias was accentuated by the fact that police were
thinly spread, forcing difficult choices as to where to deploy their resources.\textsuperscript{11}

**Political policing in the past**

From their inception in the 19th century, one of the primary roles of the police in South Africa, mounted and in paramilitary attire, was not to keep peace among people but to police territory and suppress internal resistance to colonial rule.\textsuperscript{12} These colonial regiments of mounted riflemen – at least in the British territories of Natal and the Cape – followed the model of the Royal Irish Constabulary, which had a long history and proven record of suppressing civil unrest and political agitation.\textsuperscript{13} Prior to Union in 1910, there was also no single police force. Mounted regiments were complemented with a potpourri of other police forces, such as special police for key infrastructure: railway police, private police for the mines, native administration police and town police. Each of the colonies had one such set of multiple police forces. But even where there were ‘town’ police, accountable to and paid by the respective town councils, like the one set up in Johannesburg at the turn of the previous century and which supposedly subscribed to a more civilian outlook, police officers were placed in service of the mining industries to forcefully manage their workforce.\textsuperscript{14} Three laws deserve particular mention here: the liquor laws, gold laws and pass laws. Together, their enforcement led to the mass incarceration of an otherwise innocent black population.\textsuperscript{15}

With the forging of Union, the plan was to have a highly centralised, single police force. At least, that was the fantasy of newly appointed Police Commissioner Theodorus Truter and people close to him who had the modernisation of the police at heart.\textsuperscript{16} Truter succeeded in centralising the force with control located firmly in Pretoria.\textsuperscript{17} However, the second aspect of the plan, to have only a single police force, was thwarted by the government (particularly the Ministry of Justice), which insisted on keeping a dual system: the South African Police (SAP) for the burgeoning cities, and the South African Mounted Riflemen (SAMR) for the countryside and to control ‘tribal rivalry’ and resistance to white rule. To leave no doubt about the role and methods of the SAMR, it was promulgated under the Defence Act of 1912 instead of the Police Act of 1913. The SAMR was finally absorbed into the SAP after World War II. By then, however, unrest had in any event become a phenomenon of urban areas rather than rural areas, and the SAP had already taken over many internal security tasks, such as the quelling of protests and strikes.\textsuperscript{18} In fact, from its inception in 1913 the SAP was fully absorbed by such tasks.

Consider a year such as 1914, in which the SAP first helped to suppress a railway strike, which turned into a general strike by white workers and was swiftly crushed by the police and military, acting with powers under martial law. In the same year the police were involved in suppressing the De la Rey rebellion, and, finally, the police helped with the conquest and occupation of German South West Africa. On the side of the police this drove a process of militarisation, with a bias towards drill and weapons training and the introduction of military ranks in 1919.\textsuperscript{19} By 1922 it had even become thinkable to use the police in combination with air force bombings to end a strike by white workers.\textsuperscript{20} Still, the number of people killed in those interventions pales by comparison with how the police dealt with black resistance. In 1920 the SAP, led by the Commissioner himself, killed 200 black people in an uprising in Bulhoek.\textsuperscript{21}

Meanwhile, where the police were trying to deal with so-called ordinary crimes that threatened white people’s lives and property in the growing and industrialising cities at the beginning of the 20th century, and which were rife, especially on the Witwatersrand, they were deeply caught up in inefficiency. This was shaped especially by corrupt entanglements with the various gangs and gangsters who – attracted by the unruly, male-dominated capitalist precious metal business of early Johannesburg – populated the Reef.\textsuperscript{22} Also, the main efforts of the Criminal Investigation Department (CID) of the SAP were still focused on disciplining a mining workforce and the enforcement of the gold, liquor and pass laws.\textsuperscript{23} In fact, the ongoing raids on mining compounds and black living quarters in the city by the specialised Liquor and Gold branches could be considered an everyday version of crowd control.
Implausible as it might seem, police management tried to maintain a language of modernisation and an aspiration towards professionalism and independence by trying to secure better-educated recruits, by insisting on a civil police spirit, through technological advances in the field of forensics, and by maintaining the principle of the use of minimum force. However, these efforts only appeared in pure form in the wishful language of commemorative albums and the recommendations of various Commissions of Inquiry (e.g. the 1913 Commission of Inquiry into the Witwatersrand Riots and the 1926 Water Commission). And while these might explain why a purely instrumental understanding of the police as the agent of dominant interests falls short, the police force itself often failed to concede its highly compromised character and its fundamental role in political policing. This is evident in budgetary priorities. Brewer shows that ‘[t]he proportion of the police budget spent on detective services, a measure of expenditure on civil police work, had fallen by a third in the 1926/7 financial year compared to the 1914/15 financial year, while overall the police budget had doubled’. And even where white middle-class citizens, who might have had some influence on what kind of police they wanted, expressed their unease about armed police officers patrolling their area, such liberal concerns were quickly overruled – with the consensus of these very citizens – when confronted with a growing urban under- and working class. This structural constellation of bias toward crowd control – in its exceptional form mainly directed at white industrial strike action and Afrikaner rebellion, and in its mundane form mainly directed at a black working force – was at the root of the SAP from its inception. It reproduced itself over the years in different variations, strengths and proportions.

To mention one more important event in this long history: the 1976 Soweto student protest. Like today, riot policing as it was called then had been in a kind of slumber. Political resistance had been quelled in the early 1960s (after Sharpeville), and the previous years had been relatively quiet in terms of public protest. When the protest happened, police intervened brutally. This was partly the effect of its ongoing political policing mission. But it was also a consequence of sheer incompetence and unpreparedness. The reaction of the police in the following months and years was to deal with this unpreparedness by increasing its riot police manpower, and strengthening its chains of command and protective measures for police officers. This culminated in the highly militarised police of the 1980s, with very little capacity and will to respond to ordinary crime.

The desire for a strong state

It is necessary to remember that the political bias in policing largely left black areas to their own devices in creating a means of safe living. This gap was filled at different times with different formations of informal justice. It was a form of self-rule that was sometimes politically (locally) legitimate, but at other times highly divisive in inter-generational and class conflicts. It often got out of hand and turned from sanctioned force to menace; sometimes it was initiated and even paid (or rather, underpaid) for by the state. Sometimes it was reined in by the state. Mostly, though, it was just ignored as a necessary if not useful evil in a divide and rule policy. This normalised the experience of a lack of security as public good, and of highly authoritarian and rather immediate forms of punishment.

Together with post-apartheid’s democratic promises of inclusion and new infrastructure, such as community policing, to bring the police closer to the people, this has produced a highly ambiguous yearning for the force of the state, which can be otherwise read as a yearning for a private relationship with the state. The expectation is that policing intervenes forcefully (not particularly constrained by human rights) in one’s own favour and for one’s own protection.

This is apparent, for example, in the policing of domestic violence, where a call for the police is often an expression of the desire for a protective but authoritative figure, who can at least match a husband’s violence and rein him in on behalf of the wife or partner. But it also comes through in the policing of public protest. In fact, I would propose, to put matters starkly, that public order policing
is not very different from, and just as protracted, as the policing of domestic violence. The violence itself is the result of a failure of communication and symptomatic of conditions of (gender) inequalities and economic disempowerment. Most importantly, it is the epiphenomenon of a structural situation, which the police alone cannot change. In many domestic violence cases, most women do not want to get rid of their husbands, but simply want them to behave differently. We could say the same about municipalities. It is mostly not the legitimacy of the government as such that is at stake, but rather how things work, or not, that leads to protest and the involvement of the police. In the case of domestic violence, police intervention is often desired in the hope that it will change the behaviour of the husband, at least in the moment, as the fight is happening.

When it comes to public protests, calls are sometimes made directly to the police to deal with a particular case creating insecurity within a community. Even when the call goes to other divisions of the local council, the police remain the most tangible visible manifestation of the state, and become the frontline recipients of the message (of anger). Policing thus serves as a rallying point to hold government accountable and make people’s suffering heard. This is important, as it marks a difference between policing now and in the late apartheid era: there is a demand for actual policing. While this demand might be misplaced at times in its wish for violence against others, it remains a hope for an effective police service. I posit that this offers an opportunity for the police to win over and build legitimacy among a populace calling for more security and a functioning state.

Yet the manner in which this demand is responded to leads to constant disappointment, and instead produces antagonism towards the police. As with domestic violence, when the police intervene in public protest they often appear to be intervening on behalf of someone else. This may be a real or imagined other. There is a spectrum of possibility between a police force instrumentalised to crush a protest with well-known apartheid policing methods, and a police service ‘merely’ acting biased towards its own occupational rationale of self-defence and the preservation of its authority, but with such incompetence that it translates into policing-against-the-people.

Either way, the intervention of the police mostly disappoints and in fact aggravates the situation. It is not only that the police cannot solve the situation, but that the very act of policing provokes retaliation. Protesters may feel violated and silenced, and the sense of violence suffered is recast as a form of political sacrifice, leading people into subsequent protests with the expectation that further sacrifice might be necessary. If nothing else is solved, police intervention will certainly only produce an increased need for intervention.

Making things worse

The ability of the police to aggravate the situation is often highly underestimated and misunderstood by those who order the police to intervene, and even more so by the police themselves. There might be some theoretical awareness that the police can choose between a calming or escalatory approach, between a minimum of force and a maximum of force approach. And to be fair, the police have been retrained in public order policing and this has been seen as one of the successes of transformation, at least before the public order police unit was dismantled. But the police are still used as if they are outside of the conflict, and as if they are a surgical instrument that can repair the situation by removing the trouble or quelling the spilling of blood. They are not sufficiently seen as an integral element of the conflict itself.

A recent ethnographic description of protest against the hosting of the World Cup in Brazil remarks how quickly protesters’ sentiments regarding the police can turn. When the protest started, people mixed their anti-FIFA messages with the message of ‘sem violencia’ (without violence), hoping for a pact of solidarity with the police. But the police did not respond to the call and instead used a pre-emptive display of might and violence, occasionally throwing stun grenades and preventing the demonstrators from moving to the centre of town to deliver their message. While the demonstration did not turn violent, the author powerfully describes a sense of disenchantment about what is politically possible:
'While the chant “without violence” didn’t lose its poetry, it didn’t move me the way it did before the interruption. The pact seemed to have been broken'.47

So-called crowd psychology has provided substantial insights into these sometimes very subtle, but potentially highly consequential dynamics, described here from an ethnographic perspective. It shows how police intervention is absolutely crucial to what happens at a gathering; how police have the possibility of either giving people the sense that movement is possible or that a horizon is closed; and how police themselves are mainly responsible for escalating hostility. An important point is that crowds are hardly ever homogeneous. There is always a broad spectrum of people in a crowd, from those who are willing to police themselves, to people who are prepared to use violence.48 It is police action, which confuses the acts of a few with the acts of a whole crowd, and which imagines the crowd as a homogeneous (and violent) entity, that leads a crowd to unite and halt communication. This was certainly the case in Marikana, where the criminal acts of some tainted the whole group of demonstrators as criminal.49 To avoid an escalation of violence – in the moment as much as over a long period of time – the police need to always assume that the crowd is there to deliver a message and that the primary role of the police is to facilitate the deliverance of that message.

Delivering the message is not simply a question of sticking to the rule of law. As many people writing about the police have shown, the police work according to a set of informal organisational rules, while the law is often only evoked in retrospect.51 It is here in this informal operational realm that bias creeps in, often leading to disappointment because demonstrators are being vilified. In the case of domestic violence, to pick up the analogy again, the police lose patience with women who do not follow through with the law and the charges they laid against their husbands or partners. But this is where the police have to anchor the bias to make their intentions to serve the people explicit. It is in this informal realm, where neutrality doesn’t exist anyway, that the police have to make their choice.

The police cannot change inequality and unemployment, but in the case of domestic violence they can arrest a perpetrator, whose release the wife or partner may well demand the next day, without retaliating against her and not ignoring her call the next time she seeks help. In the case of public protest it means explicitly – if not complicitly – choosing the side of the protestors and helping to deliver the message.

An example of how this might work is taken from Waddington, who observed the negotiations between representatives of a far-left anarchist group and Metropolitan Police officers in Britain during the early 1990s. The declared aspiration of the protestors was to ‘tear down the fabric of capitalism’, to which the Superintendent conducting the meeting replied, ‘And how can we help you?’51

Quo vadis, political policing?

There appears to be little chance of such a radical mind shift in the current approach to police intervention. Instead, like after 1976, the primary reaction to police failure to deal with public protest has been the promise to bring back and build even more public order capacity than ever before. Admittedly this will be done under a paradigm of the rule of law,52 but soon there are supposed to be 9 000 police officers ready to deal with public protests all over the country.53 It is clear that since nothing is likely to change in terms of people’s demands, the role of the police is pretty much set to become that of an ongoing occupying army – unless, perhaps, they stay on their difficult course, seeking to get their response to ordinary crime right, and making sure that protest does not increase because of their interventions. In this way they might learn to do the impossible: making protest effective, even if they have to insist that they can only do their job if they put themselves behind the demand of the protesters, for example by having the councillor receive a memorandum. What we need is a complicit police, complicit not in the inertia, but complicit in bringing about change.

To comment on this article visit http://www.issafrica.org/sacq.php
Notes

1 An earlier version of this paper was commissioned and presented at the ‘Public positions in history and policy’ series at the University of the Witwatersrand, http://wiser.wits.ac.za/publicpositions. The author would like to thank the organisers of the event, Shireen Hassim, Keith Breckenridge and Jonathan Klaaren, for encouraging her to take up this topic.


5 Jonny Steinberg, Policing state power and the transition from apartheid to democracy: a new perspective, African Affairs (2014).


10 Sean Tait and Monique Marks, You strike a gathering, you strike a rock, SA Crime Quarterly 38 (December 2012), 15–22.


13 David Killingray, The maintenance of law and order in British Colonial Africa.


15 Ibid.


17 This is a rather unusual development in comparison with police forces globally, and not without consequences: it means that police stations and all other units are primarily accountable to police headquarters rather than municipalities (Breckenridge, Biometric state). It is very different, for example, from what happened in other colonies such as India, where local elites collaborated with the police to define what constituted criminal activity (Radhika Singha, Punished by surveillance: policing “dangerousness” in colonial India, 1872–1918, paper presented at the Centre for Historical Studies, Jawaharlal Nehru University, New Delhi, 2013). Although decentralisation could exacerbate local despotism, it could also mean that police were much more accountable to the locality in which they were operating.

18 Brewer, Black and blue.

19 Ibid.

20 Killingray, ‘A swift agent of government’.

21 Brewer, Black and blue, 100.


23 Breckenridge, Biometric state.

24 Brewer, Black and blue.


26 Brewer, Black and blue, 67.

27 Ibid., 91.

28 Due to space limitations I tried to highlight the less-known early beginnings of political policing in South Africa. There are, of course, many other important moments that could be discussed here, showing the kind of decisions the police made in terms of choosing to protect a government and its partisan interests versus building up the capacity for ordinary crime fighting. Keith Shear discusses conflicts over political loyalties within the police in the following articles: Keith Shear, Colonel Coetzee’s war: loyalty, subversion and the South African Police, 1939–1945, South African Historical Journal 65(2) (2013), 222–248; and Keith Shear, Tested loyalties: police and politics in South Africa, 1939–63, Journal of African History 53(2) (2012), 173–93. Other important moments are the militarisation of the police through its participation in South Africa’s counter-insurgency border wars. For more detail on these developments see, for example, Gavin Cawthra, Brutal force: the apartheid war machine, International Defence and Aid Fund, 1986; and Kenneth Grundy, The militarization of South African politics, Oxford: Oxford University Press, 1994.


30 Brewer, Black and blue.

31 The same analysis does not apply to the apartheid rule of coloured areas, where police played a much more crime control-oriented role, but in the process subjected coloured families, especially coloured men, to a carceral/reformatory regime, See Steffen Jensen, Gangs, politics and dignity in Cape Town, Oxford, Johannesburg and Chicago: James Currey, Wits Press and University of Chicago Press, 2009.


Also see Gail Super’s article in this edition of SACQ.


Unsustainable and unjust

Criminal justice policy and remand detention since 1994

Jean Redpath*

redpath@iafrica.com

http://dx.doi.org/10.4314/sacq.v48i1.3

The ‘tough on crime’ approach embodied in bail and sentencing law has had a profound impact on the trends around remand detention, including prison overcrowding of such an extent that it is estimated to have contributed to an additional 8 500 natural deaths in custody. Ultimately the policies have led, in practice, to an ‘Alice in Wonderland’ effect: fewer people are being tried and sentenced, while more than ever are denied their freedom without ever being tried in a court of law.

Over the period 1995–1998 South Africa embarked upon an unprecedented legislative programme. In 1998 alone, more than 120 laws were passed by the new democratic parliament. In the arena of criminal procedure and criminal law these laws were not in the direction of the reforms suggested by South Africa’s Constitution and Bill of Rights, enacted in 1996; instead, they were intended to convey a ‘tough on crime’ approach. In a short space of time a number of protections for accused persons, many of which had been developed by the courts during apartheid to ameliorate the effects of unjust security detention laws, were simply swept away by legislative fiat, encompassed in amendments to the Criminal Procedure Act (CPA). This article seeks to describe and analyse the ‘tough on crime’ policy approach, and to assess its impact.

The ‘tough on crime’ policy approach

During the apartheid years it was accepted that a bail application was a matter of urgency: after all, a person’s freedom was at stake. But in 1997 the CPA was amended so that it explicitly provides in s50(6)(b) that an arrested person is not entitled to be brought to court after hours. Bringing bail applications after hours was a common practice in magistrate’s courts before 1998, and prior to 1994 the courts on a number of occasions confirmed the right of an accused to bring a bail application within the 48 hours envisaged by the then section 50; some went so far as to say there was a duty on the part of the state to co-operate and make it possible for a bail application to take place. Commentators at the time voiced their dissatisfaction at the change, noting: ‘The irony inherent in this reactionary measure is, of course, striking: a procedural human right deemed under the old order through creative and enlightened judicial interpretation has been summarily taken away by decree of the new order.’

Protective limits on the length of time for which bail applications may be postponed for further investigation were undone in 1995. Section 50(7), which contained a time limit of a day on delaying bail applications for the purpose of further investigations, was deleted and replaced, and subsequently tweaked by the Amendment Act 62 of 2000, which...
provides for the postponement of a bail application for seven days at a time if the court, inter alia, thinks it has insufficient information to make a decision on bail, if the accused is going to be charged with a serious offence, or the court simply thinks it is in the interests of justice to do so.\textsuperscript{8}

In addition to these procedural changes relating to when bail applications may be heard, a greater onus has been placed on the accused. The court hearing the bail application must be satisfied that the interests of justice are served by release, whereas previously the court had to be satisfied that the interests of justice are served by continued detention.\textsuperscript{9} In relation to accused persons charged with serious offences listed in Schedule 6,\textsuperscript{10} such as premeditated murder and gang rape, bail has all but been ruled out. Section 60(11) places the onus on an accused charged with such an offence to adduce evidence to satisfy the court that exceptional circumstances exist, which, in the interests of justice, permit release.\textsuperscript{11} This is called a ‘reverse onus’ and implies that if an accused charged with a Schedule 6 offence at the bail application provides no evidence, or provides unexceptional evidence in support of the contention that the interests of justice will be served by his release, he will not be released on bail.

In relation to Schedule 5\textsuperscript{12} offences, which are serious offences such as murder and rape that have not been aggravated by additional factors (such as premeditation in the case of murder), the amendments require that ‘the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release’. This formulation is slightly less onerous than that applicable to Schedule 6 offences.

The Constitutional Court found that the limitation inherent in s60(11) (exceptional circumstances for Schedule 6 offences) on section 35(1)(f) of the Constitution, which 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’, was reasonable and justifiable in our current circumstances of widespread violent crime.\textsuperscript{13} The Court noted that ‘the subsection does not say they must be circumstances above and beyond, and generally different from those enumerated ... an accused ... could establish the requirement by proving there are exceptional circumstances relating to his or her emotional condition that render it in the interests of justice that release on bail be ordered notwithstanding the gravity of the case’.\textsuperscript{14}

It was also noted that ‘the amendment was intended to make the obtaining of bail of accused persons who are charged with serious offences more difficult. It was not meant to make the obtaining of bail by these persons impossible’.\textsuperscript{15} Unfortunately, the provisions seem to have ensured that the possibility of bail in relation to Schedule 6 offences is likelier among those with expensive legal representation;\textsuperscript{16} for the vast majority accused of serious crimes, release is highly unlikely.\textsuperscript{17} A 2008 study predicted that the combined impact of these changes is ‘likely to be a significant delay in the hearing of bail applications, an increase in postponements for further investigation, and a reduction in the number who are granted bail at first appearance’.\textsuperscript{18} The study did in fact find evidence of these trends in three courts investigated.\textsuperscript{19} However, many crime-weary South Africans appeared to welcome these amendments to bail law, as many believed at the time that ‘criminals have too many rights’.\textsuperscript{20}

In response to public perceptions of leniency in sentencing,\textsuperscript{21} tough sentences were also introduced in 1997.\textsuperscript{22} Counter-intuitively termed ‘minimum sentencing’, the legislation prescribing tough sentences for serious crime was a response to an earlier Constitutional Court judgement that had found the death penalty to be unconstitutional.\textsuperscript{23} At the time of this judgement, the public believed crime in South Africa had escalated\textsuperscript{24} and public sympathy was against the abolition of the death penalty.\textsuperscript{25} Consequently there was a need to demonstrate that government was ‘tough on crime’, and thus ‘minimum’ sentences of life imprisonment were legislated for crimes that previously might have
incurred the death penalty. Other ‘minimums’ were also provided for. Minimums are applicable even in relation to first offenders, unlike the ‘three strikes’ law applicable in some US and Australian states. The minimum sentencing provisions commenced on 1 May 1998,26 and the initial period of their validity was only two years.27 After two years the provisions were explicitly renewed by the President with the agreement of the legislature.28 These minimum sentencing provisions were renewed on a number of occasions, and almost ten years later the renewal requirements were deleted, making minimum sentencing permanent.29 A summary of the minimum sentencing provisions and their applicable sentences appears in the tables below. Their introduction occasioned further amendments to the sentencing jurisdiction of the lower courts.

**Table 1.1: Summary of minimum sentencing offences (Schedule 2)**

<table>
<thead>
<tr>
<th>Part I</th>
<th>Part II</th>
<th>Part III</th>
<th>Part IV</th>
</tr>
</thead>
<tbody>
<tr>
<td>Life</td>
<td>Fifteen years</td>
<td>Ten years</td>
<td>Five years</td>
</tr>
<tr>
<td>Some aggravated murders, such as pre-meditated murder</td>
<td>Murders not covered in Part I</td>
<td>Rapes not covered in Part I</td>
<td>All offences in Schedule 1 of the Criminal Procedure Act, where committed with firearm</td>
</tr>
<tr>
<td>Some aggravated rapes, such as gang rape</td>
<td>Some aggravated robbery (including hijacking)</td>
<td>Some indecent assault</td>
<td></td>
</tr>
<tr>
<td>Some aggravated terrorism offences</td>
<td>Some drug dealing</td>
<td>Some assault GBH</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Some firearms offences</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Some white collar crime (including corruption)</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Terrorism offences not in Part I</td>
<td></td>
</tr>
</tbody>
</table>

Table 1.2: Prescribed sentences (section 51)

<table>
<thead>
<tr>
<th>Penalty on:</th>
<th>PART I</th>
<th>PART II</th>
<th>PART III</th>
<th>PART IV</th>
</tr>
</thead>
<tbody>
<tr>
<td>1st offence</td>
<td>life</td>
<td>15 years</td>
<td>10 years</td>
<td>5 years</td>
</tr>
<tr>
<td>2nd offence</td>
<td>life</td>
<td>20 years</td>
<td>15 years</td>
<td>7 years</td>
</tr>
<tr>
<td>-3rd or subsequent offence</td>
<td>life</td>
<td>25 years</td>
<td>20 years</td>
<td>10 years</td>
</tr>
</tbody>
</table>

At the time of the introduction of minimum sentences, only the high courts, which generally hear fewer than 1% of criminal cases, had the sentencing jurisdiction to impose many of these sentences. Consequently, soon after the minimum sentencing provisions came into effect, the sentencing jurisdiction of the regional courts was extended to 15 years’ (from 10 years’) imprisonment, and the district courts’ jurisdiction was extended to three years’ (from 12 months’) imprisonment.32

A messy period of almost a decade (1998–2007) followed, during which regional courts were empowered to hear life imprisonment matters, but had to refer them to the high courts for sentencing. Incidentally, a parliamentary study found that in one in ten such cases the high court ended up acquitting the accused, who had been found guilty in the regional court.33 Ultimately the regional courts were empowered in December 2007 to hand down sentences of life imprisonment in these matters.34 The automatic right of appeal that went with these sentences was legislatively removed – possibly unintentionally – in April 2010.35

Some analysts predicted that this jurisdictional change would sharply increase the number of people convicted and sentenced to prison, simply because the regional courts have the capacity to hear many more cases than the high courts. The next section reveals that the number of people handed down long sentences has indeed increased – but not the total number convicted and sentenced year-on-year.

**The impact of ‘tough on crime’ policy changes**

The practical impact of the changed bail and sentencing framework was borne most obviously by the Department of Correctional Services (DCS).
This is immediately apparent in the figures for the total remand population by month. Between 1995 and 1996, after the first amendments, the number of people held pre-trial at month end increased by 50%, from around 20 000 to 30 000 people. By the end of April 1998 almost 43 000 people were held, compared to the almost 18 000 held in May 1995 – a staggering 138% increase in only three years. After the 1998 amendments came into effect, there was a further steep increase until April 2000, when a peak of almost 60 000 people held pre-trial was reached. In only five years the pre-trial population in prisons had tripled.

Figure 1: Remand population in prisons as at month end, 1995–2012

Since that peak, the pre-trial population has hovered around the 50 000 mark, with some seasonal dips to the 40 000 mark.

During the remand peak from 2000 to 2004, prisons were bursting at the seams, holding 170 000 to 190 000 people, a large proportion of whom were untried, in facilities designed for just over 100 000 people. Overcrowding leads to less than ideal conditions of detention, including the spread of communicable diseases. Unsurprisingly, these conditions of overcrowding led to a steep increase in the number of deaths from natural (i.e. not violent or accidental) causes.

Plotting the inmate population since 1995 in prisons against the rate of natural deaths per 100 000 inmates shows that not only does the number of deaths increase as the inmate population grows, but also the rate of death. At around a total population of 140 000, there is on average one death a year for every 250 inmates. Where total inmate populations are closer to 190 000 (largely because of the massive increase in remand inmates) there is closer to one death for every 110 inmates. In other words, a 35% increase in total population has more than doubled the rate of natural death. Using this relationship, it can be calculated that, had inmate populations remained at around 140 000, some 8 500 natural deaths would probably not have occurred in the period 1998 to 2011.

Figure 2: Number of deaths due to natural causes in prisons, 1998–2011

The trend in natural deaths is likely to have been influenced by a high prevalence of HIV and tuberculosis. Anti-retroviral roll-out in prisons only began in 2006 at three sites just after the peak in inmate population numbers over the 2003–2005 period. Official prison capacity by the end of February 2011 was only 118 154 – yet at one point during this period the number incarcerated tipped 190 000.

Figure 3: Relationship between rate of natural deaths per year and inmate population from 31 March 1998–2011
In response to excessive inmate numbers – see the graph above – the DCS motivated for presidential ‘special remissions of sentences’, leading to the early release of 33 972 sentenced prisoners during 2005. In addition, consideration of parole at the earliest possible parole date has now become the norm. This is increasingly essential as prisoners with longer sentences (in excess of ten years) continue to replace those with shorter sentences. By 2011 the number of prisoners with sentences of more than ten years had almost quadrupled, to more than 50 000.

**Figure 5: Composition of the total prison population by sentence status, 1995, 2000, 2005 and 2011**

Since 1994, imprisonment capacity has increased by approximately 20 000, which is still not nearly enough. However, the DCS has limited control over one of the key drivers of the size of the total inmate population – a high remand population, which is around twice the size it was in 1995.

**The drivers of the remand population**

What causes high remand populations? The number of remand detainees on any particular day is influenced by two trends – how many people are admitted to remand, and how long each of them remains in detention. What do the data say about how many people were admitted to remand detention?

The legislative changes discussed above were likely to have increased the number of people denied bail and admitted to remand. If arrests had remained constant or had increased, then the number admitted to remand should have increased, and analysis of the data shows that admissions rose considerably during the initial period of the new laws. In 1995/1996 just over 230 000 people were admitted on remand. This increased to almost 299 000 by the year 1999/2000 – in other words, four years later, 67 000 or 29% more people were admitted on remand than in 1995/1996. Another two years later 311 013 were admitted on remand. Subsequently, however, remand admissions dropped to the point where in 2010/11 there were fewer such admissions than there had been in 1995/6. What accounts for this trend?

**Figure 6: Number of people admitted on remand (un-sentenced admissions) to prisons, 1995/6–2010/11**

The question arises whether the drop in remand admissions down to 1995/6 levels is due to a drop in the number of arrests, particularly priority crime arrests, which are more likely to result in a denial of bail. This is not the case. Comparing 2002/3 – the peak of remand admissions – to 2010/11 shows a 55% increase in priority crime arrests (which are more likely to result in denial of bail), from 444 738...
to 688 937. Consequently the drop in remand admissions cannot be attributed to a drop in arrests.

**Figure 7:** Number of priority crime arrests, 2001/2–2012/13

What has reduced is the extent to which such arrests translate into remand admission into prisons. In 2002/3 the remand admissions figure was 70% of the priority crime arrests figure (in the previous year there were more remand admissions than priority crime arrests). By 2008/9 the ratio of remand arrests had dropped to 53%; in 2010/11 it was only 33%. How can this be explained, given that the legislative framework in relation to bail remains strict?

**Figure 8:** Remand admissions expressed as percentage of priority crime arrests

A possible explanation is that an increasing proportion of people are being held for extended periods in police cells, rather than in prisons – often because prisons refuse to take any more: a number of oversight visits by national and provincial Members of Parliament over the last decade mention police cells being used for prolonged remand detention because “prisons are full”. Indeed, some prisons are holding more than double their approved capacity. The 2013 White Paper on Corrections and the White Paper on Remand Detention, however, seek to affirm that after 5 March 2012 the holding of remand detainees in police cells after first appearance is not legal.

Using the 70% figure for 2002/3 (of priority arrests converted to remand admission) as a benchmark would suggest that a potential 250 000 people were probably admitted to police cells rather than to prison remand after first appearance in 2010/11. This is of great concern, given that police cells do not have facilities for the adequate care of detainees held for prolonged periods. Arrests continue to rise: in 2012/13 the SAPS reported 806 298 priority crime arrests and a further 876 476 ‘other’ arrests.

The fact that the remand population in prisons remains high, despite the drop in admissions to prison on remand, must then relate to the duration of remand detention. One of the theorised effects of minimum sentencing for the pre-trial phase was that persons accused of such offences would be loath to plead guilty, given that the bar is now set so high on their potential punishment. This could lead to backlogs and general slowing of the system. Given that such persons would highly likely be denied bail under the bail amendments, they would also highly likely be incarcerated awaiting trial for an extended length of time. Their continued incarceration before the commencement of trial could, it was theorised, lull the state into taking its time in preparing a case against the accused.

In 1995, there were remand admissions of 230 000 and a remand population of around 20 000, suggesting that the average duration of detention in 1995 must have been around one month. By 2000, admissions of almost 300 000 and a remand population of 60 000 suggests that the average duration of detention must have doubled to around 2,4 months. In 2010/2011 there were 227 664 admissions but a population of around 46 500 – suggesting the average duration of detention has remained at around 2,4 months.
The back-of-the-envelope ‘average duration’ calculations above provide a putative average of the duration of detention. Averages are not the best measures of the ‘central tendency’ of a population that is asymmetrically distributed – in other words, populations where there is a fixed minimum for the measure at hand (in this case duration of detention cannot be less than zero) and a maximum that can increase in size indefinitely. The department has therefore provided ‘snapshot’ figures of the time spent in remand at a particular date over the period 2009–2012.

**Figure 9: Number of people held for various durations on remand, 2009–2012**

The number of people in custody on remand for more than three months comprised more than half of remand detainees as at March 2012. (Recall that the putative average in 1995 was one month.) The number in custody for more than a year comprised almost 18% in 2012 (or one in six remand inmates), whereas in 2009 this percentage was only 13% (one in eight). Indeed, by March 2012 some 5% (or one in 20) had spent more than two years in custody. In other words, all the longer time categories have experienced growth over the period 2009 to 2012, while all the shorter time categories have reduced in size, suggesting a general and continued lengthening of the duration of remand detention over this time period.

**Is the remand trend justified by court outcomes?**

In short then, the data show that fewer people are being admitted on remand to prisons, but for much longer time periods. Can it be assumed that such long pre-trial incarcerations on remand are ultimately justified by eventual convictions? Over the initial time period after the legislative changes the number of people sentenced to imprisonment and admitted to prisons did indeed rise 24% from 1995/6 to 2001/2 (see Figure 7). This coincided with the peak in the size of the total prison population over the period thereafter until the special remissions that occurred in 2005.

**Figure 10: Number of people held for more than one year on remand, 2009–2012**

After the peak in 2001/2 there was a steady decrease in the number of sentenced admissions. Yearly
remand admissions, by contrast, dropped below their 1995/6 levels only in 2010/11, while sentenced admissions did so in 2002/3 and decreased further thereafter. Yet, despite the drop in remand admissions, the remand population remains more than double the size it was in 1995.

**Figure 12: Number of sentenced and remand admissions, 1995–2011**

In 1995/6 the 230 000 remand admissions were matched by 200 000 sentenced admissions; in other words, there was an approximately 85% conversion of remand to sentenced imprisonment in 1995/6. Put differently, just over one person was sent to remand for every person convicted and imprisoned in the same year. By 2007/8 this had worsened to 31%; in 2010 the ratio was 35%. Almost three times as many people were sent to remand as were convicted in the last years for which data are available. In 2010/11, some 150 000 people were sent to prison on remand who were not subsequently imprisoned as a result of a conviction in the same year. The ‘conversion rate’ is likely to be far worse if remand detention in police cells is taken into account.

**Figure 13: Percentage of remand admissions matched by sentenced admission**

What has been driving the drop in sentenced admissions? Sentenced admissions are admissions of people who are convicted, and then sentenced to a term of imprisonment, rather than with a non-custodial sentence. Has the number of convictions dropped, or is it the extent to which sentences that include a term of imprisonment have dropped?

The National Prosecuting Authority Act, which created the National Prosecuting Authority (NPA), was promulgated in October 1998. Initially the newly formed NPA reported data on the finalisation of cases in the reporting period January to December; prior to that the individual provincial Attorneys-General did not report on their work in a uniform manner. The 2001/2 NPA Annual Report included data for 1999, 2000 and 2001 on the number of finalisations and the conviction rate.58

According to these data, convictions increased sharply over this time period, by 55%. From 2002/3 the reporting period changed to run from March to February each year.59 The further jump in convictions, comparing January to December 2001 with March 2002 to February 2003, of another 41% in a single year suggests there may have been a further change in reporting practices that occurred at the same time, that influenced the number of convictions recorded. Assuming there was no such change in reporting practices, the increase in convictions, comparing the year January to December 1999 to the year March 2002 to February 2003, was a staggering 117%.

**Figure 14: Number of convictions, 1999–2001,60 2002/3 to 2012/1361**

From 2002/3, however, the trend changes dramatically towards an overall decrease in the number of convictions. Consequently it appears that
the reduction in the number of sentenced admissions is partly a result of the trend towards a reduction in the number of convictions apparent from 2002/3.

Figure 15: Number of convictions, 2002/3–2012/13

At the same time, however, there has been a commensurate reduction in the extent to which sentences of imprisonment accompany a guilty conviction. Over the period 1999 to 2001 there appear to have been more sentenced admissions than there were convictions. This may, as indicated above, also be the result of how convictions are recorded. Looking at data from 2002/3 onward, there is a steady downward trend in the extent to which convictions are matched by sentenced admissions, from almost 60% to less than 30%.

Figure 16: Sentenced admissions as percentage of total convictions

This suggests that convictions are increasingly accompanied by non-custodial sentences – or alternatively that convicted people are being sentenced to time already served on remand – the ‘Alice in Wonderland’ scenario: ‘sentence first, verdict after’.

What is clear is that the number of people held on remand in prisons is decreasing, the time for which they are held on remand in prisons is increasing, and the likelihood that they will ever be sentenced to a term of imprisonment is decreasing.

Conclusion

The ‘tough on crime’ policy approach embodied in the tightening of bail laws and lengthy minimum sentences has had, over the long term, an unanticipated impact. After an initial period in which the DCS bore the brunt of predicted and massive increases in the total prison population, there was a subsequent stabilisation.

Prior to stabilisation, the twin unsustainable bail and sentencing policies led to conditions of detention resulting in more deaths from natural causes due to overcrowding in just over a decade, than the number of death penalty deaths during the apartheid era.

As a result the criminal justice system developed methods to ameliorate the impact of these unsustainable policies. Some prisons refused to accept any more remand detainees, and detainees were then held at police stations. The full extent to which this occurred and continues to occur, is unclear.

The criminal justice trends suggest that, in addition, the system has generally slowed down and cut back on the number of people it chooses to prosecute, the number it convicts, and the speed with which it does so, leading to a reduction in the number of people sentenced year-on-year.

The sentenced prison population is increasingly composed of those with longer sentences, but most will be released on parole at the earliest possible parole date.

In short, durations of remand detention have increased, convictions have decreased, an increasingly greater proportion of people are held on remand than will ever be convicted, and sentences are less likely than ever to contain a custodial component.

The ‘tough on crime’ approach has in practice turned into ‘justice delayed and freedom denied’.
Notes


2 See cases cited in note 4 below.

3 Criminal Procedure Act, as amended by the Criminal Procedure Second Amendment Act 1997, Section 50(6)(b).

4 See Tswayi v Minister van Justisie 1986 (2) SA 101 (C); S v Du Preez 1991 (2) SACR 372 (Ck); Novick v Minister of Law and Order 1993 (1) SACR 194 (W). 197.


7 Section 50(7) (now deleted): ‘If a person is arrested on suspicion of having committed an offence but a charge has not been brought against him or her because further investigation is needed to determine whether a charge may be brought against him or her, the investigation in question shall be completed as soon as it is reasonably possible and the person in question shall as soon as it is reasonably possible thereafter, and in any event not later than the day after his or her arrest contemplated in subsections (1) and (2), be brought before an ordinary court of law to be charged and enabled to institute bail proceedings in accordance with subsection (6) or be informed of the reason for his or her further detention, failing which he or she shall be released.’

8 The full text of Section 50(6)(d): ‘The lower court before which a person is brought in terms of this subsection, may postpone any bail proceedings or bail application to any date or court, for a period not exceeding seven days at a time, on the terms which the court may deem proper and which are not inconsistent with any provision of this Act, if— (i) the court is of the opinion that it has insufficient information or evidence at its disposal to reach a decision on the bail application; (ii) the prosecutor informs the court that the matter has been or is going to be referred to an attorney-general for the issuing of a written confirmation referred to in section 60 (11A); (iii) the prosecutor informs the court that the person is going to be charged with an offence referred to in Schedule 6 and that the bail application is to be heard by a regional court; (iv) it appears to the court that it is necessary to provide the State with a reasonable opportunity to (aa) procure material evidence that may be lost if bail is granted; or (bb) perform the functions referred to in section 37; or (v) it appears to the court that it is necessary in the interests of justice to do so.’

9 Prior to amendment, Section 60(1) (a) read as follows: ‘An accused who is in custody in respect of an offence shall, subject to the provisions of section 50 (6) and (7), be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, unless the court finds that it is in the interests of justice that he or she be detained in custody. After amendment, section 60(1) (a) reads: 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.’ [Own emphasis]

10 The offences listed in Schedule 6 are: ‘Murder, when—(a) it was planned or premeditated; (b) the victim was—(i) a law enforcement officer performing his or her functions as such, whether on duty or not, or a law enforcement officer who was killed by virtue of his or her holding such a position; or (ii) a person who has given or was likely to give material evidence with reference to any offence referred to in Schedule 1; (c) the death of the victim was caused by the accused in committing or attempting to commit or after having committed or having attempted to commit one of the following offences: (i) Rape; or (ii) robbery with aggravating circumstances; or (d) the offence was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy. Rape—(a) when committed—(i) in circumstances where the victim was raped more than once, whether by the accused or by any co-perpetrator or accomplice, (b) more than once; (ii) a person, where such persons acted in the execution or furtherance of a common purpose or conspiracy; (iii) by a person who is charged with having committed two or more offences of rape; or (iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus; (b) where the victim—(i) is a girl under the age of 16 years; (ii) is a physically disabled woman who, due to her physical disability, is rendered particularly vulnerable; or (iii) is a mentally ill woman as contemplated in section 1 of the Mental Health Act 1973 (Act 18 of 1973); (c) involving the infliction of grievous bodily harm. Robbery, involving—(a) the use by the accused or any co-perpetrators or participants of a firearm; (b) the infliction of grievous bodily harm by the accused or any of the co-perpetrators or participants; or (c) the taking of a motor vehicle. Indecent assault on a child under the age of 16 years, involving the infliction of grievous bodily harm. An offence referred to in Schedule 5—(a) and the accused has previously been convicted of an offence referred to in Schedule 5 or this Schedule; or (b) which was allegedly committed whilst he or she was released on bail in respect of an offence referred to in Schedule 5 or this Schedule.’


12 Treason. Murder. Attempted murder involving the infliction of grievous bodily harm. Rape. Any offence referred to in Section 13 (f) of the Drugs and Drug Trafficking Act 1992 (Act 140 of 1992), if it is alleged that—(a) the value of the dependence-producing substance in question is more than R50 000,00; or (b) the value of the dependence-producing substance in question is more than R10 000,00 and that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or (c) the offence was committed by any law enforcement officer. Any offence relating to the dealing in or smuggling of ammunition, firearms, explosives or armament, or the possession of
an automatic or semi-automatic firearm, explosives or armament. Any offence in contravention of Section 36 of the Arms and Ammunition Act 1969 (Act 75 of 1969), on account of being in possession of more than 1 000 rounds of ammunition intended for firing in an arm contemplated in Section 39 (2) (a) (i) of that Act. Any offence relating to exchange control, extortion, fraud, forgery, uttering, theft, or any offence referred to in Part 1 to 4, or Section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act 2004—(a) involving amounts of more than R500 000.00; or (b) involving amounts of more than R100 000.00, if it is alleged that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or (c) if it is alleged that the offence was committed by any law enforcement officer—(i) involving amounts of more than R10 000.00; or (ii) as a member of a group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy. Indecent assault on a child under the age of 16 years. An offence referred to in Schedule 1—(a) and the accused has previously been convicted of an offence referred to in Schedule 1; or (b) which was allegedly committed whilst he or she was released on bail in respect of an offence referred to in Schedule 1.

13 Dlamini v S; Dladla and others v S; S v Joubert; S v Schietekat [1999] JOL 4944 (CC), para. 67–77: [67] There can be no quibble with Mr D’Oliveira’s submission that over the last few years our society has experienced a deplorable level of violent crime, particularly murder, armed robbery, assault and rape, including sexual assault on children. Nor can there be any doubt that the effect of widespread violent crime is deeply destructive of the fabric of our society and that accordingly all steps that can reasonably be taken to curb violent crime must be taken. Mr D’Oliveira was correct when he argued that it is against this background that we should assess the provisions of s 60(1)(a). [68] Although the level of criminal activity is clearly a relevant and important factor in the limitations exercise undertaken in respect of s 36, it is not the only factor relevant to that exercise. One must be careful to ensure that the alarming level of crime is not used to justify extensive and inappropriate invasions of individual rights. It is well established that s 36 requires a court to counterpoise the purpose, effects and importance of the infringing legislation on the one hand against the nature and importance of the right limited on the other. Parliament enacted s 60(1)(a) with the clear purpose of deterring and controlling serious crime, an indubitably important goal. Its effect is to limit, to an appreciable extent, the right of an arrested person to bail if the interests of justice permit. The question we need to answer is whether the extent of that limitation is justifiable. [69] In order to determine whether the limitation is permissible in terms of s 36, it is necessary to consider whether the limitation would be considered reasonable and justifiable in democratic societies based on freedom equality and dignity. [...][77] In conclusion, therefore, I am of the view that although the inclusion of the requirement of “exceptional circumstances” in s 60(1)(a) limits the right enshrined in s 35(1)(f), it is a limitation which is reasonable and justifiable in terms of s 36 of the Constitution in our current circumstances.”

14 Dlamini v S; Dladla and others v S; S v Joubert; S v Schietekat [1999] JOL 4944 (CC) para. 75–76.


16 Such as the bail application of Oscar Pistorious, in which a lengthy affidavit spoke to exceptional circumstances.

17 A 2008 study in three large urban courts found that in excess of 80% of murder accused and 90% of rape accused were denied bail. See V Karkh et al., Between a rock and a hard place: bail decisions in three South African courts, Open Society Foundation for South Africa, 2008.

18 Ibid.

19 Ibid.

20 In a national representative survey conducted face to face with 3 000 South Africans in November and December 1998, about 70% of South African respondents either agreed or strongly agreed with the statement that ‘criminals have too many rights’. Reality Check, South Africans’ views of the new South Africa: a report on a national survey of the South African people, 1999, 1999.

21 See M Schönteich, Sentencing in South Africa: public perception and judicial process Paper 43, ISS, November 1999. The ISS and the Institute for Human Rights and Criminal Justice Studies at Technikon South Africa (TSA) conducted a survey among Eastern Cape residents in 1999 to ascertain their attitudes to sentencing in South Africa. The survey found almost 60% said that the courts are ‘much too lenient’.


23 S v Makwanyana & another 1995 (3) SA 391 (CC).

24 Although serious crime had been increasing since the 1980s, the public perception of a ‘crime wave’ over the period 1994–1997 is not supported by SAPS data: See M Schönteich & A Louw, Crime trends in South Africa 1985–1998, Centre for the Study of Violence and Reconciliation (CSVR), June 1999.

25 A survey conducted by the Human Sciences Research Council (HSRC) in July 1996 found that 71% of the public were in favour of retention of the death penalty, while 69% felt that criminals were treated too leniently by the courts. See HSRC media release, The death penalty debate, 4 September 1996, http://www.hsric.ac.za/ media/1996/9/19960904.html (accessed 3 June 2005).


27 Section 53(1) of the Act.

28 Section 53(2) of the Act.

29 The Criminal Law (Sentencing) Amendment Act 2007 (Act 38 of 2007), Section 3; Criminal Law Amendment Act 1997 (Act 105 of 1997), deleted sections 53(1) and 53(2).


31 Ibid., Section 51.


33 Over the period April 2005 to March 2007 some 2 418 minimum sentencing matters were referred to the High Court for sentencing. The High Court acquitted 234 of these accused who had already been convicted in the


36 This chart was compiled by combining a spreadsheet covering the period 1995 to 2005 that incorporated monthly data, originally made available to the author by the Office of the Inspecting Judge for the preparation of a report on a minimum sentencing in 1997, with various MIS (Management Information System) reports provided to the Civil Society Prison Reform Initiative (CSPRI) by the Department of Correctional Services (DCS) since 2003. The last such report was dated 28 February 2011. A data point for 2012 was obtained from the DCS Annual Report.


38 See note 22 above.

39 Some 7 280 deaths in 13 years would have been likely over 1998–2011, if the prison population had remained at 140 000. Instead 15 778 deaths occurred.

40 This chart was compiled using data from the Judicial Inspectorate of Correction Services, Annual report 2011–2012, figure 22, on the number of natural deaths over the period 1998–2011, as well as total inmate population data, usually reported at the end of February or March of the year concerned.


42 See note to Figure 2 above.


44 Parole is a manner of placement whereby an offender, subject to completion of a minimum period of sentence inside the correctional centre, and subject to certain criteria being met, may be allowed to serve a part of his/her sentence in the community. A person placed out on parole will be placed under strict conditions and under the supervision of a parole/probation officer and will remain under supervision in the community until the sentence is completed in full. If he/she transgresses any of these conditions, he/she may be arrested and returned to a correctional centre to serve the remainder of the sentence.

45 For most sentenced offenders (those serving between two years and life imprisonment), the earliest parole date occurs when half the sentence has been served, in terms of Section 73(6)(a) of the Correctional Services Act 1998 (Act 111 of 1998). For a life sentence, 25 years must be served, and sentences in terms of minimum sentencing require four-fifths.

46 The percentage of eligible cases considered by parole boards from April 2011 to end of December 2011 is 76.30%. See Department of Correctional Services, Status report on case management committees, parole boards and correctional supervision, 13 March 2012, http://www.pmg.org.za/report/20120313-correctional-supervision-parole-
February 2012 to the following police stations in Limpopo Province, http://www.pmg.org.za/files/doc/2013/com reports/130515pcpolicereport2.htm (accessed 5 March 2014): ‘All the detainees were supposed to be in Polokwane prison and not in the station cells. The one who had been there the longest, had been there from January 2010. The reason given was that the prison was full.’

For example, Johannesburg Medium B on 28 February 2011 held 249% of approved capacity; Mount Frere 245%; King William's Town 254%.

Correctional Services Act 1998 (Act 111 of 1998), Section 5(2)(b) prohibits the detention after first appearance of detainees in police cells. According to the White Paper on Remand Detention, para. 4.3.2.5, ‘Prior to the implementation of section 5(2) (b) of the CSA, the SAPS kept a number of RDs in their police cells in terms of a bilateral agreement between the SAPS and the DCS regional offices. The above-mentioned section makes provision for the detention of inmates in a police cell for a period not exceeding seven (7) days if there is no correctional centre or RDF nearby. All the bilateral agreements for detention of RDs in police cells for longer than seven (7) days ceased to operate on 01 March 2012 as this was the official date set for the implementation of section 5(2)(b). The purpose of 5(2) (b) was to ensure that RDs are not kept for longer periods than necessary by the entity responsible for investigating their alleged offences which may lead to torture or inhumane treatment in the pursuit of an investigation.’

Source: Department of Correctional Services.

Source: Department of Correctional Services.


NPA, Annual report 2001–2002, annexures B and D, 15, 17. The number for 1999 and 2000 excludes High Court convictions. The number for 2001 includes High Court convictions. The convictions are derived by multiplying the percentage guilty by the total finalised.

The red line shows data reported by the Department of Performance Monitoring and Evaluation, Twenty-year review, 143. The blue shows data sourced from individual annual reports of the NPA.

Lewis Carroll, Alice’s Adventures in Wonderland, London: Macmillan,1865, Chapter 12: ‘“Let the jury consider their verdict,” the King said, for about the twentieth time that day. “No, no!” said the Queen. “Sentence first – verdict afterwards.”’

The number executed during the apartheid era is estimated at approximately 4 000. Approximately 8 500 additional deaths (i.e. 8 500 more than would have been the case had usual occupancy levels prevailed) are calculated to have occurred during the worst period of overcrowding.

Looking back

Insider views on the Judicial Inspectorate for Correctional Services

Chloë McGrath and Elrena van der Spuy*
chloemcgrath@gmail.com
Elrena.VanDerSpuy@uct.ac.za
http://dx.doi.org/10.4314/sacq.v48i1.4

The establishment of a constitutional democracy in South Africa necessitated widespread institutional reforms across state sectors. A key feature of such reforms was the emphasis on oversight and accountability as illustrated in reform endeavours pursued in the South African Police Service, courts and prisons. One such oversight mechanism – the Judicial Inspectorate for Correctional Services (JICS) – is the subject of this article. Drawing on qualitative interviews with people closely involved with the JICS since 1998, this article presents ‘insider views’ regarding the JICS. We conclude with incumbents’ views on the effectiveness of the JICS.1

In brief: South African prisons

Under apartheid, South African prisons bore the imprint of racialised and repressive rule. The opportunity for a fundamental re-think of the policy framework had to await the establishment of a constitutional democracy. Bold efforts at redesigning the system of incarceration were put forward, but uneven implementation has diluted many of the visions set out on paper. Twenty years into the new dispensation, South African prisons continue to confront a mix of structural fault lines, bureaucratic intransigence, resource constraints and a measure of political indifference to the plight of prisoners.2

In 2001 the Parliamentary Portfolio Committee for Correctional Services called for an independent inquiry in the Department of Correctional Services (DCS) on issues of corruption. In 2006, after five years of collecting evidence, the Commission of Inquiry into Alleged Incidents of Violence or Intimidation in the Department of Correctional Services (the Jali Commission) declared that the department was ‘arguably no longer governable’.3 The report highlighted a wide range of ailments: widespread patterns of corruption in the procurement of goods and services and in appointments, administrative ineptitude, a routinisation of abuse of inmates, widespread sexual violence among inmates, gangsterism,4 endemic overcrowding,5 and departmental capture by the Police and Prisons Civil Rights Union (POPCRU).

At present the DCS has the capacity to house 118 441 inmates across 242 correctional facilities.6 The inmate population has long exceeded capacity. The current inmate population of 150 608 shows an overcrowding rate of 127%.7 Overcrowding has significantly contributed to poor prison conditions and human rights standards are frequently infringed as a result of the burgeoning numbers of inmates.8 In 2013, pre-trial persons constituted 32% of the total incarcerated population.9

* Elrena van der Spuy is attached to the Centre of Criminology, Faculty of Law at the University of Cape Town. Chloë McGrath was a researcher attached to the Centre of Criminology in 2013 and has been awarded a Fulbright scholarship for post-graduate studies from August 2014 onwards.
In brief: the Judicial Inspectorate for Correctional Services

The Judicial Inspectorate for Correctional Services (JICS) was established in 1998 and became a fully functioning office in 2000. The office is headed up by an Inspecting Judge (IJ), who is assisted by a Chief Executive Officer (CEO), under whom are three units: the support services directorate, the legal services directorate, and the management regions directorate. The CEO must appoint an Independent Correctional Centre Visitor (ICCV) for each correctional facility. The role of the ICCV is to regularly visit correctional centres, interview inmates and record complaints, and attempt to resolve complaints with the DCS where possible, submitting unresolved complaints to the IJ and writing monthly reports to be submitted to the IJ’s office. Visitors Committees (VC) are then established to deal with unresolved complaints, schedule visits to correctional facilities, and engage with community leaders. The total expenditure of the JICS for the 2012/3 year was R31 321 506.67. In the 2012/13 year, the ICCVs dealt with 530 183 complaints across 242 correctional centres.

Four key pieces of research have evaluated both the necessity for and the efficacy of the JICS. While in agreement that an independent watchdog to provide oversight in South Africa’s correctional centres is absolutely necessary, the research has raised serious concerns about its functional independence and its lack of power to enforce recommendations. While the JICS publishes the number of complaints, it does not indicate whether these complaints are resolved. Furthermore, although the JICS has been highly critical of the DCS, its recommendations and findings have been largely disregarded by the DCS.

How do those situated at the upper echelons of the JICS reflect on the mandate, role, achievements and challenges of this oversight mechanism?

Research methods

This study combined elements of oral history methodology with in-depth interviews. The group of 15 respondents included two drafters of the legislation in terms of which the JICS was established; six Inspecting Judges, a former Inspector, a former Director and a current CEO, the Head of the Parliamentary Portfolio Committee for the Department of Correctional Services, and three research experts. The choice of participants proceeded via purposive sampling so as to include all six Inspecting Judges who served terms between 1999 and 2013, and five others who fulfilled key roles in the design and operation of the JICS. Three researchers of prisons provided informed comment on prison reform. The face-to-face interviews of approximately two-hour duration each were audio recorded and transcribed during the second half of 2013. All interviewees consented to having their interviews archived in an open access resource.

In the analysis of the interview material we made use of a thematic checklist based on the themes explored in the interviews. The themes included: individual pathways to the Judicial Inspectorate; key features of South African prisons past and present; core components of the JICS; key moments in the evolution of the JICS; challenges relating to the management of relations and establishing networks; and views on the contribution of the JICS to the democratic administration of prisons.

Key features of prisons past and present

We asked JICS incumbents to reflect on key features of prisons inherited from the past at the point that reconstruction got underway. The responses served as a reminder of a deeply racialised system, managed along para-military lines, beset by overcrowding and overseen by extremely limited forms of oversight.

Prior to the 1990s, racial segregation in prisons was prescribed in legislation and enforced throughout the country. One of our interviewees, a former political detainee, described it as follows:

Prior to 1994 of course the first thing was that there was apartheid in prisons. It was very strictly applied. Even the police was more kind of integrated. In the prison apparatus itself, they were very strict. My memory was that all white warders outranked all black warders, no matter what levels they were at. There were no black warders in my white prison. White prisons had beds. At least they had mattresses and they had blankets. Black prisoners had … well … not much.
The prison service itself was an extremely hierarchical, indeed quasi-military institution. The rank structure was modelled on that of an army, and a coercive top-down spirit pervaded the nation’s prisons. Judge Nathan Erasmus observed that this legacy of militarism ‘was a force to be reckoned with’ as prison reform got underway.23

Judge John Trengove, the first Inspecting Judge, commented on the horrendous conditions of inmates when he took up office as follows: ‘I was shocked when I became the Inspecting Judge, with the conditions in which people were being held. You had cells which were built and had the facilities to take about, say, 18 prisoners … where they were crammed and had about 60.’24

Judge Deon van Zyl commented on his own earlier experience: ‘In the old dispensation the conditions were really not good. Already in those early days, on circuit courts I visited prisons. It was quite obvious that the cells were hopelessly overcrowded. That’s not something of the modern times, that’s something that goes back as far as prisons are concerned.’25

Prior to the introduction of the Bill of Rights and a democratic South Africa, some informal oversight mechanisms for the treatment of incarcerated persons were in place. In 1964, for example, the International Red Cross (ICRC) was invited to visit South African prisons, and conducted inspections across the country, but the report, as is the practice of the ICRC, was not made public.26 Furthermore, the Prison Regulations of the Republic of South Africa extended prison visiting rights to all members of parliament regardless of political persuasion, and provided access to judges of the Supreme Court to any correctional facility in the country. Magistrates were given access to prisons within their jurisdiction. Judge Hannes Fagan took this duty seriously: ‘Whenever you went on circuit, you always went to the prisons … it was the duty of the judge to go and visit prisons … detainees felt that they had nobody to talk to and they couldn’t report to anybody.’27 In contrast, Judge Vuka Tshabalala reported that in his experience judges on the Natal Bench were effectively dissuaded from undertaking such visits due to concerns for their safety.28

Several of the respondents recalled human rights abuses inflicted on political detainees from the 1960s onwards. These personal experiences during incarceration shaped a deep commitment to oversight and accountability among them. As Albert Fritz put it:

We always had the theory that the reason why the Mandela regime was so serious about this piece of legislation and specially the part that deals with the Judicial Inspectorate was because they experienced prison life. They know exactly what it was and what conditions were on Robben Island and they really wanted to get some mechanism that was going to be effective.29

The birth of the Judicial Inspectorate for Correctional Services

From 1993 onwards, the courts and politicians, with a cohort of progressive advisers, began to propose sweeping changes regarding incarceration. A ground-breaking court case, Minister of Justice v Hofmeyr,30 was the prelude to a human rights regime that included the idea that ‘persons incarcerated in prison retain all their personal rights save those abridged or proscribed by law’.31

The Interim Constitution explicitly recognised a prisoner’s positive rights.32 These rights were later entrenched in the Constitution of the Republic of South Africa of 1996. The idea of an independent oversight mechanism for the correctional services arose when the Penal Reform Lobby Group (PRLG), a conglomeration of civil society lobby groups involved in prison reform, spoke out strongly on the inadequacy of a 1994 White Paper issued by the prisons department.33 The PRLG argued for an oversight mechanism and pointed out that, without it, the government would be in breach not only of the principles set out in the Constitution but also of Principle 29(1) of the Principles for the Protection of all Persons under any form of Detention or Imprisonment, and Rules 55 and 35(2) of the UN Standard Minimum Rules For the Treatment of Prisoners.34

Dirk Van Zyl Smit, an academic who had published prolifically on prison law and practice in South Africa since 1982, was invited by the Commissioner...
of Correctional Services to advise on the new Act. Alongside Van Zyl Smit, drafters Judge Mark Kumleben and Advocate Neil Roussouw considered the models of independent oversight mechanisms in the prison systems of England and Western Australia.35

Van Zyl Smit recounted that the advisers considered that the English model was most appropriate for the South African context, but proposed two changes. They argued that a judge should be the head of the institution, based solely on the ‘independence and integrity that judges are recognised to have in South Africa’.36 In the British system there is both a Prison Ombudsman and an Inspector of Prisons. It was decided that in the light of resource constraints, these should be combined in the single role of the judge within the Inspectorate. The inclusion of ‘corrupt and dishonest practices’ in the mandate was due to the drafters’ conviction that the two were inextricably linked.

The JICS was established under section 25 of the Amendment Act 102 of 1997 of the Correctional Services Act 111 of 1959. The Inspectorate was formally established on 1 June 1998, with Judge John Trengove as the first Inspecting Judge. The Judicial Inspectorate is governed by the provisions in Sections 84 to 94 of the Amendment Act. These sections were promulgated on 8 February 1999, according to the proclamation issued by the President as provided for in section 138 of the Act.37

The original mandate of the Inspectorate stated:

The Judicial Inspectorate of prisons is an independent office under the control of the Inspecting Judge … The object of the Judicial Inspectorate is to facilitate the inspection of prisons in order that the Inspecting Judge may report on the treatment of prisoners in prisons and on conditions and any corrupt or dishonest practices in prisons.38

**Critical components of the Judicial Inspectorate**

Interviewees were asked about the importance of various components of the JICS relating to the effectiveness of the oversight body. They agreed that the critical components of the JICS were the Inspecting Judge, the CEO, ICCV and VC, and its electronic systems of recording and analysing data.

**The Inspecting Judge**

The Judicial Inspectorate is headed by a judge, who must be either a Judge of the High Court in active service, or a retired judge. In practice the Minister of Correctional Services nominates the Inspecting Judge to the president, who then makes the final appointment.39 Due to the recent creation of the position of CEO to replace the former role of the director, most participants did not comment at length about the impact of the CEO. However, it is clear from the data that the administrative function of the director and CEO within the JICS has played a critical role in operationalising the statutory design of the Judicial Inspectorate.

Not all participants agreed that it was necessary for a judge to head up the Judicial Inspectorate, but there was consensus that the status afforded to judges in South Africa was useful in securing the statutory endorsed independence (albeit of a limited kind) of the Inspectorate. As a former Inspector Adam Carelse put it, the Inspecting Judge brought ‘independence’ and the notion that ‘one must account for one’s actions’. Other interviewees commented that in the early phase of the Inspectorate’s establishment, the position of the judge carried political clout and social prestige. For Judge Nathan Erasmus the immunity of his position as a judge and the security of a lifetime appointment meant that an adversarial approach could be taken when necessary. Judge James Yekiso questioned the reliance on retired judges and suggested that the JICS had to become attractive to judges in active service. Others again insisted that the Inspecting Judge was only as good as his or her commitment to prison reform and the protection of the human rights of inmates.

**Independent Correctional Centre Visitors**

There was broad consensus among those interviewed that the Independent Correctional Centre Visitor unit is a critical component of the Judicial Inspectorate. The role of the ICCV, as set out in the Act (S. 93), is to deal with prisoners’ complaints by conducting regular visits to the prison, interviewing
prisoners in private, recording complaints in an official diary and monitoring their progression through the reporting system, and discussing complaints with the Head of Prison or another internal official with the intent of resolving complaints internally where possible. Thus, the ICCV is a critical cog in the system designed according to the principle of procedural justice. It functions via Visitors Committees (VC), consisting of independent persons from particular areas, which are established by the Inspecting Judge. The committees consist of visitors from the relevant area. The purpose of the VC is to address unresolved complaints that have been reported to the ICCVs with the intention of bringing resolution, and to submit reports with complaints that the committee has been unable to resolve to the Inspecting Judge.

The effectiveness of the lay visitor scheme, designed with the notion of community involvement in mind, is dependent on a range of factors. Viewed collectively, interviewees emphasised the importance of selection, the speedy appointment of ‘suitable’ lay persons, proper training, adequate resourcing, and ongoing monitoring of visitors at local and regional levels. On these issues respondents concurred with the research findings of external assessments of the ICCV scheme. There was general agreement that there was much room for improvement to all of these aspects. Chronic problems existed around vacancies, further exacerbated by staff turnover. Above all, it was emphasised that the effectiveness of an individual visitor is largely determined by his or her commitment to the human rights of prisoners. As one interviewee put it: ‘If the applicant is a mere job seeker, and someone who sees this as an opportunity, as a stepping stone to something else, then you’re not going to get that commitment.’

Did ICCVs make a difference to the lives of inmates? Here the views differed. Some preferred to acknowledge the potential embedded within the system of bottom-up oversight, provided that issues bedevilling selection through to training and monitoring are addressed. Others again had a more pragmatic approach – the ‘mere presence’ of ICCVs had a ‘restraining’ influence, creating an awareness that ‘big brother’ is watching, which in itself may act as a deterrent to perpetrators of human rights abuses. For another interviewee, the small contribution that individual ICCVs could make to secure, for example, an extra blanket for an inmate, should not be scoffed at. As CEO Adam Carelse put it: ‘Now, blankets may sound very petty, but if you were with me last week in the Free State and it’s three degrees, and you sleep under one grey blanket, it changes who you are … and in a centre, there’s no one to go to beside the ICCV to ensure that you get that blanket.’

Electronic systems

Over the past 20 years of criminal justice system reform there has been a considerable investment in the modernisation of information systems. In 2001 the Judicial Inspectorate piloted an electronic reporting system. The system was designed to be the main portal through which ICCVs and Heads of Prisons submitted reports to the Inspecting Judge. The system was linked to cell phones carried by the ICCVs and other JICS staff to enable more efficient communication. Furthermore, the system was programmed to alert members of staff when reports were submitted to the JICS concerning deaths of inmates, as well as other mandatory reporting incidents such as segregation and the use of mechanical restraints. In addition to creating an electronic reporting portal, the new IT system also included an automated system for appointing ICCVs, which would, according to Gideon Morris, ‘ensure that the system will run independent of the personalities’ and thus ‘eliminate the incidences of corruption and nepotism’.

However, ten years later the system has not been updated. The website that was launched in 2002 remains the same, and the efficiency of the system has been significantly diminished. More tellingly, both the website and the domain of the JICS are still hosted by the DCS.

Changes in the mandate and role of the JICS

The mandate of the Judicial Inspectorate as set out in the Act was changed almost immediately after the Inspectorate was officially established. At the request of Judge Fagan, the Act was amended in 2001, and the clause concerning ‘corruption and
dishonest practices in prisons’ was removed. The reasons for removing the corruption clause, set out in the Annual Report, were that the JICS lacked the capacity to track corruption and that the investigation of corruption would compromise relations between correctional officials and JICS staff. It was argued that, given these concerns, corruption should be left to an internal unit of the DCS itself.

Views on the removal of the corruption clause

The removal of the corruption clause has been controversial, not only in scholarly assessments but also within the JICS. The decision to adopt a ‘narrow interpretation’ of its mandate has been criticised as disregarding the intimate ‘link between corruption (i.e. governance) and the treatment of prisoners (i.e. human rights)’. The original drafters of the Act who were interviewed insisted that the inclusion of the corruption clause was not an afterthought but a calculated measure to remedy what they perceived to be an omission in the British system of oversight.

Interviewees had divergent views on whether corruption should have been retained within the mandate. There was, however, agreement that the Judicial Inspectorate lacked the capacity to deal with corruption. Judge John Trengove, for example, acknowledged that while he was acutely aware of corruption being rife throughout the ranks of the DCS, limited capacity left him with ‘tied hands’. Others again emphasised that the very idea of investigating corruption was also an ‘uncomfortable’ one as it was bound to strain the relationship between the JICS and DCS. As another interviewee argued:

In Correctional Services the allegations of corruption went to all the way to the top ... how do you investigate and maintain a working relationship? It’s very difficult. When you deal with lower cases of soft corruption, it’s easy. But when it goes up the hierarchy ... and then tomorrow you have to ask the same people to get your budget. It’s not practical.

As it turned out, various scandals relating to corruption made public headlines and then culminated in the establishment in 2001 of the Jali Commission. Gideon Morris recalls that the JICS was given ‘the first bite at the apple’ to investigate allegations but that Judge Fagan said, ‘We’ve got so much work to do, we don’t have the capacity. I don’t want to get involved in that.’

The elusive search for independence

A second issue of importance in the evolution of the Judicial Inspectorate relates to its independence. This matter has been at the centre of the civil society debate. Respondents in this study agreed that the JICS is not functionally independent of the DCS. Financial dependence on the DCS constituted a particular hurdle. According to Judge Trengove, ‘as far as the prison department was concerned we were dependent on them for our finance ... we had to get our money from them.’

Bureaucratisation of systems and processes

Lastly, a third issue relates to the inevitable but insidious process of bureaucratisation. The routine activities of the foot soldiers (in this instance the ICCVs recording and reporting complaints) can so easily come down to a ticking of boxes on standardised templates, which are then fed into the administrative machinery of the complaints system. More importantly, as interviewees pointed out, lay visitors find it immensely difficult to maintain working relationships with correctional officials and at the same time remain independent in any real sense. It is the problem of ‘capture’ that is at stake here. As Fritz put it, ‘too quickly the independent visitors also become institutionalised like the warders’.

Managing relationships – external and internal

The legal mandate of the JICS tells us very little about its actual operation. Key social actors (the Inspecting Judge, the Minister, the Commissioner and senior personnel of the DCS together with heads of prisons, the Parliamentary Portfolio Committee and civil society) need to create working relationships conducive to the realisation of institutional objectives. From the interviews it became apparent that along the way different styles of engagement (more or less adversarial, more or less cooperative) emerged in
response to situational dynamics and the individual personalities involved.

Three sets of relationships were mentioned by interviewees. The explicit political relationships involve the JICS and the Minister, the JICS and the upper echelons of the DCS, and the JICS and the Portfolio Committee. The bureaucratic/administrative relationships are primarily between the JICS and prison management at regional and local levels, and within the JICS between the Inspecting Judge, the CEO and the ICCVs on the ground. Thirdly, there are the social relationships between the JICS and the wider public, which respondents also commented on as they reflected on the need for establishing legitimacy.

Respondents stated that in the early phase of state reconstruction the JICS could count on the political support of the new government more broadly, and the Ministry of Correctional Services more particularly. At the time, widespread support for the ethos of human rights provided a collective sense of purpose. The ‘Robben Island’ experience, shared among many a cadre of new political figures, brought with it a political commitment to the notion of oversight, and thus to the objectives of the JICS. Cordial working relationships between particular individuals (notably Judge Fagan and Deputy Minister Cheryl Gillwald) created further conducive circumstances for cooperation during the first phase of the JICS, but before long the relationships became strained. An adversarial relationship between Judge Erasmus and Minister Ngconde Balfour was brought to a head when Erasmus called in the police to attend to corruption in Pollsmoor. The consequent breakdown in the relationship between the JICS and the Ministry required the new incumbent (Judge Yekiso) to meet the Minister, who outlined the judge’s responsibilities as set out in the legal mandate and conveyed that he would ‘not appreciate any interference in the performance of my [Yekiso’s] duties’.57

The reception at prisons of JICS personnel, recalled interviewees, varied from hostile to lukewarm, depending on the area. At times, pro-reform elements within the ranks of the DCS unexpectedly opened up opportunities for engagement. It is in this context of ambiguous support that the office and status associated with the Inspecting Judge was considered a critical factor. Making inroads necessitated cooperative strategies, but in other instances the need for keeping a respectable distance between the JICS and the DCS required something different. Early on, recalled one interviewee, a cadre of new leaders within the DCS wanted too close a relationship with the JICS. They were eager for the JICS to assist with the development of departmental policy, training and developing ‘appropriate’ budgets. But involvement in operational matters had to be resisted so as to protect the perceived independence of the JICS.

Making unannounced prison visits was a moot point among those interviewed. Some thought it was merely a matter of courtesy to announce visits beforehand. As one Inspecting Judge put it: ‘I just regarded it as a courtesy. For instance I mean I know that they want to take a little trouble, to make sure that there is some tea and cookies and samosas or whatever the case may be.’58 Others again felt that announcing visits beforehand was required in order to minimise the disruption of routine processes. For Adam Carelse, announcing a visit or not was of lesser importance. The real issue was to report on what you found without fear or favour, and not to feel that you had to apologise, as Carelse put it, for saying ‘your prison stinks. Just say it as it is. Call them to book. But obviously then you need … character. You need to be very strong.’59

Our interviews also explored relationships between the JICS and the Parliamentary Portfolio Committee. Portfolio committees have the potential to fulfil an important oversight function. Under the recent chairmanship of Vincent Smith, both the DCS and JICS were expected to provide quarterly reports to the Portfolio Committee. Some of the respondents commented in particular about the safety of the political space for debate provided by the Portfolio Committee as a multi-party structure. The sophistication of debate and interaction depends very much on the personalities and the commitment of key actors, as remarked on by the chair of the Portfolio Committee.60

The quest for managing relationships has lost none of its importance. At a meeting of the Portfolio Committee in August 2013, the working relationship
between the DCS and the Judicial Inspectorate featured prominently. The concern related to the DCS’s claim of not receiving JICS Reports, and the JICS again feeling that its recommendations fell on deaf ears. The chairperson, Vincent Smith, injected a measure of realism into the discussions. There was bound to be tension, he argued, but ‘that need not necessarily be destructive. The main issue was to ensure that the tension did not bring work to a grinding halt.’

The contribution of the JICS in the greater scheme of things

At the end of our interviews we asked respondents for their views on the overall contribution of the Judicial Inspectorate to prison administration. Roughly speaking, the responses fell into three categories. One was a kind of qualified optimism about the protection embedded within the constitution and the oversight role of the JICS. A second was deep pessimism about prison conditions and the lack of political commitment to the protection of prisoners’ rights. Finally, some respondents attempted to balance the positive achievements of the JCIS with an admission of the difficulties facing the reform of institutions of state.

Judge Fagan’s response to the question regarding the overall contribution of the JICS served as a useful reminder that the very concept of prison oversight itself constituted a radical departure from the previous closed system. He also emphasised the rich potential for oversight embedded within the institution at that early period of operationalisation.

A second category of responses consisted of less qualified and more damning responses. Here the responses focused on continuities in the system of incarceration. For Fritz the traumatic memory of his own experience of police detention was evident in his response that prisons remain inhospitable spaces with cruel power inequalities:

I mean from a substantive point nothing … I think very little changed in prisons. Prison is still about the things that happen all over: the shouts, screams that I heard, that was a police cell, and I can imagine what happens in the truck from the police cell to the prison and what happened at the prison.

For Judge Erasmus the continuity between then and now lies at a deep-seated cultural level where inmates continue to be treated as bandiete. In his view, although many structural changes have taken place, the mindset of prison wardens remains unchanged. Fritz too pointed out that although the demographic and political affiliation of Correctional Services staff has changed dramatically with the democratisation of South Africa, the attitude towards inmates remains hostile and degrading: ‘(There is still this attitude that) … a bandiet is a bandiet. He has no rights, he’s a criminal.’

A last category of responses we typify as pragmatic realism. These responses see some progress, but underline the complexities in criminal justice reform. Gideon Morris’s response emphasised the multifaceted nature of departmental change pursued after 1994.

[Currently the Department of Correctional Services] operates not because of management but despite of management … I think there are some serious challenges. But that’s not uncommon in government as a whole for now.

Many interviewees stressed the enormity of prison reform, and emphasised that issues of overcrowding, health, corruption, coercion and sexual violence are systemically rooted.

Conclusion

In search of a retrospective account of the design, establishment and operationalisation of the JICS, we relied on the stories and recollections of key incumbents. Through such stories we hoped to breathe additional life into our understanding of the way in which structure and agency interact in processes of social re-engineering. Insiders spoke of both continuities and shifts in the contextual challenges they had to negotiate along the way. But the stories also served as a critical reminder of the force of individual personalities in engaging such challenges.

We were struck by the seriousness and sense of purpose exhibited by almost all of the respondents
who have helped shape the identity and trajectory of the Judicial Inspectorate over the past decade and a half. Creating an institution from scratch is rarely easy, less so when the institution is charged with powers to inspect internal affairs. Closed institutions – such as prisons – yield particular challenges to bodies of oversight, as the international literature concurs. Such challenges multiply where crisis defines the state of departmental affairs.

Our own small study leads us to concur with much of the recent research literature. Although the JICS is widely acknowledged to be an essential institution in a democratic South Africa, the role of this mechanism of oversight has failed to live up to initial expectations. With varying degrees of emphasis, these ‘insiders’ appeared aware of the shortcomings of the Inspectorate. For those currently involved, it is a matter of making the best of a difficult situation whose remedy lies quite beyond their powers and responsibilities.

To comment on this article visit http://www.issafrica.org/sacq.php

Notes
1 This research has been funded by the Open Society Foundation. We hereby also acknowledge the comments on earlier drafts that we received from Lukas Muntingh, Gideon Morris, Jeffrey Lever and two anonymous reviewers.
5 As of 31 March 2011 there were 18 correctional centres in South Africa critically overcrowded at 200% capacity (Keehn, Nyembe and Sukhija, An evaluation of South Africa’s Judicial Inspectorate For Correctional Services, 8).
13 Judge Mark Kumleben and Professor Dirk van Zyl Smit.
15 Albert Fritz.
16 Gideon Morris, a former Director and Adam Carelse, the current CEO.
17 Vincent Smith.
18 Amanda Dissel, Lukas Muntingh, Chris Giffard.
19 The interviews with key incumbents started on a personal note. We asked respondents about their social and professional backgrounds and how they became involved with the Judicial Inspectorate of Correctional Services (JICS). The life stories were characterised by considerable diversity in terms of background, political experience and worldview. An interesting mix of personal fortune, fate and chance seemed to have combined to either push or pull individuals into the orbit of the JICS.
20 This paper draws on some of the research findings of C McGrath and E van der Spuy, ‘Hier kom die Judge se manne’: the Judicial Inspectorate of Correctional Services: a view from the inside, Centre of Criminology, University of Cape Town, October 2013.
21 The Prison and Reformatories Act 1911 (Act 13 of 1911).
22 Interview with Chris Giffard, Cape Town, 19 August 2013.
23 Interview with Judge Nathan Erasmus, former Inspecting Judge, Cape Town, 4 July 2013.
24 Interview with Judge John Trengove, former Inspecting Judge, Somerset West, 13 June 2013.
25 Interview with Judge Deon van Zyl, former Inspecting Judge, Somerset West, 12 June 2013.
26 Department of International Affairs, Prison administration in South Africa, 1969, 30.
27 Interview with Judge Johannes Fagan, former Inspecting Judge, Cape Town, 11 June 2013.
28 Interview with Judge Vuka Tshabalala, current Inspecting Judge, Cape Town, 20 August 2013.
Interview with Albert Fritz, Minister of Social Development, Western Cape Provincial Government, former Inspector in JICS, Cape Town, 8 August 2013

Minister of Justice v Hofmeyr (3) SA 131 (A) 1993.


Dirk van Zyl Smit, Imagining the South African prison, lecture delivered at the University of Cape Town, 2006.


Jagwanth, A review of the Judicial Inspectorate of Prisons in South Africa.


Thabani Jali, Commission of Inquiry into alleged incidents of corruption, maladministration, violence or intimidation in the Department of Correctional Services: full report, 2006, 566.


Correctional Services Act (Act 8 of 1998), S. 85 as amended.


Gallinetti, Report on the evaluation of the independent prison visitors system, 14.

Interview with Adam Carelse, past CEO of the JICS, Cape Town, 17 July 2013.

Chris Giffard.

Adam Carelse.


Interview with Gideon Morris, former director of JICS, Cape Town, 14 June 2103.


Telephonic interview with Dirk van Zyl Smit, 22 July 2013.

Adam Carelse.

Gideon Morris.

Judge John Trengove.


Albert Fritz.

A shorthand term that refers to political prisoners’ experience of incarceration on Robben Island.

Interview with Judge James Yekiso, former Inspecting Judge, Cape Town, 8 August 2013.

Judge Deon van Zyl.

Adam Carelse.

Interview with Vincent Smith, Chairman of the Portfolio Committee on Correctional Services, Johannesburg, 16 July 2013.


Literally, bandits.
Control, discipline and punish?

Addressing corruption in South Africa

David Bruce*

davidbjhb@gmail.com

http://dx.doi.org/10.4314/sacq.v48i1.5

This article provides a ‘high level’ view of current debates about the causes of and remedies for corruption in South Africa, with a view to reflecting on how to address corruption. The article starts by providing an overview of the current integrity framework and initiatives to strengthen it within the domains of public administration and criminal justice. Alongside this, the article briefly reviews historical and sociological accounts of corruption in South Africa. This provides the basis for a discussion of the moral economy of corruption. Instead of focusing on questions of surveillance or deterrence, this strand of analysis implies that addressing corruption is not simply about addressing ‘moral deficits’ but engaging with questions about how to advance justice and fairness in South African society.

The manifestos of many of the political parties that contested South Africa’s recent general election illustrate the fact that corruption is regarded as a major problem in the country. For instance, the African National Congress (ANC) 2014 election manifesto commits the ANC to ‘intensify the fight against corruption’, stating that the ANC ‘is committed to a corruption-free society, ethical behaviour across society and a government that is accountable to the people’.1 For many people in South Africa declarations such as these, by the ANC and its representatives, are highly incongruous. Though he is not the only ANC member to have been implicated, this is above all because Jacob Zuma, ANC president and President of South Africa, has repeatedly been linked to allegations of corruption.

As this article will discuss, the fact that Zuma, as President of South Africa, is himself allegedly implicated in corruption, is an obstacle to addressing corruption in South Africa. Of equal significance, in terms of the focus of this article, is that the allegations against him have not ultimately served as an obstacle to his achieving and retaining the status of ANC leader or dramatically affected the popularity of the ANC. Indeed, overall support for the ANC, and for Zuma as leader of the ANC, declined slightly in the May 2014 national election. The ANC received 62.15% of the vote, compared to the 65.9% of the vote it received in 2009, with declines being most pronounced in metropolitan areas such as Johannesburg, Tshwane and Ekurhuleni. Nevertheless, other than in the Western Cape, the ANC remained the dominant party in all provinces and in all metropolitan areas other than Cape Town.

That Zuma and other ANC leaders linked to corruption have continued to enjoy widespread

* Bruce is an independent researcher specialising in crime and policing. This article was the result of research conducted with and funded by the School of Law at the University of the Witwatersrand, Johannesburg.
support raises questions about attitudes to corruption in South Africa. It is of course likely that some of those who support the ANC are themselves firmly opposed to corruption. They might support the ANC on the basis of its role in South Africa’s liberation from apartheid, or on the basis of its programmes and social policies. Nevertheless, the ANC’s and Zuma’s continued popularity points to an obvious conclusion: that rather than being ‘united against corruption’, many South Africans are willing to excuse or overlook acts of corruption. That attitudes of this kind exist is of course reflected in the fact that corruption is a substantial social problem. However, corruption, unlike violent crime, is not associated with an outsider or underclass, but extends into the upper reaches of the state and political elite, implying that these attitudes are to be found within ‘mainstream’ South African society.

I do not intend to argue that declarations by senior politicians of their resolve to address corruption may be dismissed as mere rhetoric. As this article will illustrate, South Africa has an elaborate framework of policies, laws and mechanisms intended to ensure the ‘integrity’ of public servants and politicians. Furthermore, it would appear that there is an investment by some government officials in strengthening the detection, deterrence and punishment of corruption. Tolerance for corruption needs to be understood alongside this reality.

This article is concerned with developing an integrated understanding of these issues. It provides an overview of the current government integrity framework and reform initiatives intended to strengthen anti-corruption efforts. Debates about this framework and how to strengthen it imply certain approaches to addressing corruption. In addition, the article highlights work on the history and ‘social psychology’ of corruption. This in turn provides the basis for an understanding of the ‘moral economy’ of corruption.

The South African government integrity framework

Corruption as a social problem began to receive attention from policy makers relatively soon after South Africa’s transition to democracy. During 1997 and 1998, for instance, government took several steps to address corruption, including the introduction of a code of conduct for public servants and the establishment of an inter-ministerial committee on corruption. The extensive regulatory framework that now exists, intended to ensure that public servants and politicians adhere to standards of integrity, has taken shape over several years and includes, for instance, codes of conduct binding on all employees of the public service and on municipal staff members. There is also an executive ethics code binding on members of the Cabinet, deputy ministers and members of Provincial Executive Councils (required in terms of the Executive Members Ethics Act 82 of 1998), and a code of conduct that is binding on parliamentarians. Some provincial legislatures as well as a number of government departments and other official institutions have also introduced codes of conduct.

There are also provisions for financial disclosure, and a prohibition against members of the public service doing remunerative work outside of the public service without express authorisation from the executive authority. Provisions also exist to ensure accountability for the management of finances in government departments as well as a legislative and regulatory framework governing public procurement (supply chain management) and protecting whistleblowers. The Prevention and Combating of Corrupt Activities Act 121 of 1998 provide, inter alia, for civil forfeiture of illegally obtained assets. Laws also provide for the surveillance of high value financial transactions by a state-run financial intelligence centre. Legislation also exists to promote government transparency in the conduct of its affairs.

In 2002 Cabinet approved a public service anti-corruption strategy, and in September 2003 issued an instruction that all departments should have a minimum anti-corruption capacity (MACC). In 2006 the Department for Cooperative Governance and Traditional Affairs complemented these initiatives with the introduction of a local government anti-corruption strategy.
and Administration (DPSA) introduced a Public Sector Integrity Management Framework. The DPSA and Public Service Commission (PSC) have also published various resource materials for managers and employees of government departments.

Management of integrity

In line with the obligations imposed by the Public Finance Management Act as well as the MACC requirements, departments and other governmental entities have internal systems ostensibly intended to ensure compliance with financial reporting requirements and promote integrity. For instance, a Public Service Commission assessment in North West Province in 2010/11 found that six out of the 12 provincial government departments had dedicated anti-corruption units, while in two other departments anti-corruption personnel were said to be located within Risk Management or other units. Within all but one of the departments with dedicated units the assessment suggests that staffing is inadequate. In the Department of Education, 13 of the 21 staff are said to be highly competent. In the remaining five departments one staff member is described as ‘highly competent’, nine are described as ‘adequate’ and nine are described as ‘newly appointed: still gaining experience’. Yet even where these structures exist it does not necessarily mean that effective action is taken to investigate and respond to alleged acts of corruption. For instance, of 289 cases reported to the National Anti-Corruption Hotline that were referred to North West government departments since September 2004, feedback had been provided on 76 cases (26%) and 49 cases (17%) had been closed. No feedback had been received on any of the cases reported during the preceding financial year.

Anti-corruption units are only one component of a substantial range of structures and procedures that departments are supposed to establish. Of these, arguably the most important are the core financial management functions. As illustrated repeatedly by the reports of the Auditor-General, the latter are frequently ineffective, particularly at local government level.

Law enforcement and accountability mechanisms

Alongside this intricate framework of ethical codes, regulations, laws and internal mechanisms for the management of integrity, South Africa also has an extensive range of organisations with mandates that include investigation of allegations of corruption. These agencies, referred to by the National Development Plan as ‘the multi-agency anti-corruption system’, include:

- The South African Police Service (SAPS) and Directorate for Priority Crimes Investigation (DPCI)
- The Special Investigations Unit (SIU)
- The Public Protector
- The Asset Forfeiture Unit (AFU)
- The National Prosecuting Authority (NPA) also needs to be understood as part of the anti-corruption architecture. The NPA houses not only the National Prosecuting Service but also the AFU, and other units such as the Specialised Commercial Crime Unit and Office of Witness Protection that may also play a role in corruption cases
- The courts can also be seen as part of this enforcement machinery
- The Independent Police Investigative Directorate (IPID)
- The South African Revenue Service (SARS)
- Other agencies that might be regarded as part of an integrity and anti-corruption system include the National Intelligence Agency and the office of the State Attorney

In his 2013 State of the Nation address Zuma referred to ‘the Anti-Corruption Task Team’, which he said comprises the Hawks, the SIU and the NPA. The AFU may be assumed to be part of the task team by virtue of being located within the NPA. In addition, several ‘hotlines’ have been established by government to facilitate reporting of alleged corruption or other problems.
Governance and oversight

As distinct from the ‘law enforcement’ role that is performed by many of the agencies referred to above, there are also a number of government agencies that provide oversight, which includes monitoring state agencies and promoting their compliance with the regulatory and ethics framework. These include:

- The DPSA
- The PSC
- The Auditor-General (AG)

In addition to ensuring compliance with financial laws and regulations the National Treasury maintains a database of ‘restricted suppliers’ and another database of ‘tender defaulters’

New public service reforms

On 15 August 2012 the National Development Plan (NDP) was launched. The plan, a product of the National Planning Commission, is intended as a strategy to address poverty and inequality in South Africa through, inter alia, promoting faster and more inclusive growth, higher public and private investment, and improved education and skills.35 In his State of the Nation address in February 2013 Zuma said that the NDP had been adopted by government and that the activities of all departments must be aligned with it.36

Central to the NDP’s objectives being realised is the need for what it calls a ‘capable and developmental state’. The potential for developing such a state, and the potential to achieve many of the other NDP objectives, is clearly directly linked to the effectiveness of efforts to address corruption, the subject of Chapter 14 of the Plan. Since early 2013 a number of steps have been taken both in pursuit of the ‘capable state’ proposed by the NDP and with a view to strengthening the state’s response to corruption. The most important of these would appear to be the introduction of a new Public Administration Management Bill37 that was passed by Parliament in March 2014 and awaits the signature of Zuma. Described as an ‘anti-corruption bill’,38 it, among other things, provides that:

- An Ethics, Integrity and Disciplinary Technical Assistance Unit will be established within the DPSA to ‘provide technical assistance and support to … all spheres of government regarding the management of ethics, integrity and disciplinary matters relating to misconduct in the public administration’, among others.39 In an address in February 2014 the previous Minister of Public Service and Administration said that the unit was being established ‘to deal with a whole variety of disciplinary and ethical conduct cases, because we have found that departments and spheres of government do not have the expertise to deal with most of these cases and we are unable to apply corrective measures immediately while officials are on paid suspensions for years at taxpayers’ expense’.40

- An ‘Office of Standards and Compliance’ will be established inter alia to ‘promote and monitor compliance with minimum norms and standards’ in public administration.41 In an earlier address by Minister Lindiwe Sisulu she indicated that this was in part motivated by the fact that ‘a vacuum exists with respect to ensuring the implementation of recommendations from constitutional oversight bodies like the PSC, AG and Public Protector’s Office’.42

- All public servants will be prohibited from doing business with the state.43 The extension of provisions in this regard was motivated by the realisation that those doing business with the state were not necessarily only those at the most senior levels.

- Obligations regarding financial disclosure will be extended to all government employees at national, provincial and municipal level.44 ‘According to the Public Service Commission and the Auditor General reports, the majority of public servants with business interests are officials on salary levels 4 to 8 who were previously not included in the financial disclosure framework.’45

- The Minister of Public Service and Administration may specify minimum educational or other standards for positions within the public service.46 In 2013 the Minister indicated that
positions where minimum qualifications would be a priority would include national directors-general, heads of provincial departments and municipal managers as well as chief financial officers.47

• A National School of Government will be established to ‘promote the progressive realisation of the values and principles governing public administration and enhance the … development of human resource capacity’.48

The introduction of the Public Service Management Bill was preceded in August 2013 by the introduction of a new Public Service Charter. The Charter calls on public servants to serve the public in an unbiased and impartial manner, not to engage in transactions that are in conflict with their official duties, and to act on fraud and corruption, nepotism, maladministration or other acts that are prejudicial to the public interest.49

During 2013 a Chief Procurement Officer (CPO) was also appointed within the National Treasury. The CPO's functions include the review of ‘high value and strategic contracts to ensure that value for money is derived and that all contracts adhere to the relevant prescripts’.50 Motivation for the establishment of the office of the CPO is to be found in the Minister of Finance’s 2013 budget speech, which says that ‘in the present system, procurement transactions take place at too many localities … There is very little visibility of all these transactions’.51 However, one commentator has suggested that these measures may just turn ‘decentralised corruption and mismanagement’ into ‘much higher level dodgy dealing’.52

Obstacles to the effectiveness of integrity framework

Despite this extensive integrity framework, corruption continues to be a significant problem for South Africa. What then are the obstacles to addressing corruption? Are the key shortcomings failures of the design or the implementation of the integrity framework? The new public service reforms, and other recent analyses, reflect a range of different views about the answers to these questions.

Some assessments focus on apparent gaps in the legislative regulatory and ethical framework. For instance:

• Whilst concerns have been expressed about whether law reform can indeed benefit whistleblowers,53 the National Planning Commission and others have motivated for amendments to the Protected Disclosures Act to improve the protection provided to whistleblowers, and the range of whistleblowers protected.54

• The Public Service Management Bill identifies as a key problem the number of public servants doing business with the state. It seeks to forbid this as well as to discourage public servants from engaging in illicit transactions by broadening provisions relating to financial disclosure. Along similar lines, another proposal is for South Africa to introduce a public register of the beneficiaries of trusts and other legal structures.55 The idea has recently become the focus of anti-corruption efforts in Europe, where trusts and other ‘shell companies’ are used to disguise the proceeds of corruption.

• Recent events have also highlighted shortcomings in the Executive Members Ethics Act.56 The Act does not take account of the possibility that the Public Protector may make a finding against the President. The President is supposed to inform Parliament about action to be taken against members of the executive who are implicated in a report by the Public Protector. In effect the President decides on action to be taken against him or herself.57

On the other hand, many of the proposed reforms identify the key problem as being compliance with the established framework. It is widely agreed that factors contributing to the vulnerability of the public service to corruption have included the widespread appointments of inexperienced managers and personnel, and high staff turnover. As a result there has been a weakening and sometimes breakdown of the management and control systems in public sector organisations.58 This kind of analysis seems to have informed many of the reforms, including the Ethics, Integrity and Disciplinary Technical Assistance Unit
and Office of Standards and Compliance provided for in the new Public Service Management Bill, as well as the appointment in the Treasury of the Chief Procurement Officer. Public Service Management Bill provisions for the Minister to set minimum standards for the recruitment of personnel are also implicitly guided by the understanding that improvements in skills will help to ensure compliance by public servants with the various regulatory frameworks.

One of the major vehicles through which black middle-class formation has been advanced has been through a focus on ‘representation’ in the public sector. The problems of compliance do not merely reflect a shortage of skills. As argued by Von Holdt, the legacy of apartheid has been that skill became tied to white ‘racial power’. Within the public service, contesting white domination has been associated with the marginalisation of skill in employment practices, contributing to an ‘ambivalence about skill’ that, with other factors, ‘tended to work against the potential for development of a meritocratic and effective state bureaucracy’. In this context, the Public Service Management Bill’s focus on ‘minimum standards’ may not necessarily be well received throughout the public service.

Shortcomings in the bureaucracy have also been linked to policies associated with the ‘New Public Management’ (NPM) that became the orthodoxy in the public administration field in the late 1990s. Chipkin and others have argued that these policies have contributed to the neglect of systems of ‘basic administration’ and the fragmentation and corporatisation of public administration in South Africa. Though there is a need to strengthen systems of ‘basic administration’, the nature of the social challenges in South Africa requires that public administration continues to maintain a capacity for innovation and responsiveness, suggesting that not all practices associated with the NPM should be rejected.

The absence of coordination of the overall anti-corruption effort has also been identified as a problem. In the words of a senior public service official, ‘[t]here isn’t an institution designated as the leader or coordinator of efforts and there is no-one clearly responsible for the development of a distinct, articulated strategic approach’. This echoes a 2002 critique by the DPSA, which argued that ‘none of the existing mandates promotes a holistic approach to fighting corruption’. Not only is there no effective lead agency, but none of the agencies has an explicit corruption prevention mandate. There is no agency responsible for promoting anti-corruption education, for instance.

The NDP nevertheless rejects the argument that ‘fragmentation’ of anti-corruption efforts represents a key problem. In line with this, it rejects the ‘single anti-corruption agency model’ of which the Independent Commission Against Corruption (ICAC) in Hong Kong is often regarded as the premier example. According to the NDP, South Africa ‘does not have the institutional foundation to make the ICAC a viable option’. In addition, while ‘[i]ndependence entails insulating institutions from political pressure and interference [a] single agency approach is less resilient in this respect because if the lone anti-corruption body faces political capture, the independence of the entire system is compromised’. Instead of a stronger centralised anti-corruption body, the NDP recommends a range of other measures to strengthen the multi-agency system, including ‘a review of the mandates and functions of all agencies with a view to some rationalisation’ and more funding to enable agencies to ‘employ skilled personnel and sophisticated investigative techniques’.

**Political interference**

The NDP therefore defends the multi-agency system. However, it strongly emphasises the need to insulate agencies that are part of the system ‘from political pressures’. Of the agencies in the system, the office of the Public Protector, under Thuli Madonsela, is perhaps the only one that is currently regarded as operating relatively autonomously and willing to resist such pressure. The Public Protector has limited power to enforce remedial action. For example, ANC leaders and others used the findings of an inter-ministerial task team to nullify findings against Zuma in Madonsela’s report on the construction of his homestead at Nkandla. In addition, not all of the previous incumbents of the office have acted with the same degree of fearlessness, indicating that the
nature of the role played by the Public Protector’s office is strongly affected by the character of its leadership.

The SIU is the only agency solely dedicated to investigating corruption. But it can only initiate investigations on the basis of presidential proclamations, is orientated towards ‘civil’ rather than criminal resolution of cases, and its head is appointed by the President.71 Related to the limited powers of agencies such as the Public Protector and SIU, current analyses of the integrity framework tend to identify the question of the independence of the key criminal justice agencies – the SAPS, including the DPCI in complex or high-level cases, and the NPA – as being the primary challenge.

A central factor giving rise to the need for the current political leaders to maintain control over criminal justice agencies, is Zuma’s need to avoid legal liability for the allegations of corruption against him. It is, however, not only the President who fears prosecution, but various individuals within the political elite. Allowing the criminal justice agencies to investigate corruption ‘without fear or favour’ would potentially endanger not only the President but also some of the political alliances that have helped to secure power for the current elite.

Above all else, political control over the key criminal justice agencies is currently exercised through control over the key leadership positions within these agencies. Since the appointment of the heads of all of these agencies is effectively controlled either by the President or the Minister of Police,72 senior politicians and public servants who are alleged to be involved in corruption enjoy a high level of impunity.73 Where their control over key appointments has not been sufficient to protect them against action, officials who have attempted to pursue corruption cases against allies of the President have been the targets of direct victimisation.74 The downfall of the Directorate of Special Operations (Scorpions) has also been linked to efforts to secure Zuma’s ascension to the Presidency.75

It has therefore been argued in the media that Zuma’s supporters are willing to execute ‘a scorched earth strategy on public institutions’ to preserve Zuma’s power.76 If this is the case, the implication is that there are significant constraints on the possibility that the autonomy of the criminal justice system will be reinforced. This is notwithstanding the fact that this is motivated for in the NDP77 which, in addition to a general call for the autonomy of agencies in the multi-agency system to be reinforced, also motivates for the senior leadership of the SAPS to be appointed by means of a competitive process presided over by a panel.78 In the light of the risks involved there is unlikely to be much enthusiasm for these recommendations among South Africa’s current political leadership.

In order to resolve this impasse some observers have proposed that there should be a blanket amnesty for acts of corruption.79 This, it is argued, would mean that members of the political elite no longer have the incentive to undermine the criminal justice system. In return for the amnesty it is proposed that one would be able to secure the ‘removal of the entire Criminal Justice cluster from any possible political interference or influence’, thereby allowing the components of the criminal justice system to function independently.80 Implicit in the proposal appears to be the idea that the institutionalisation of corruption in post-apartheid South Africa was in some ways associated with the transitional period and that those who are implicated in corruption are not, on a continuing basis, invested in the need to use political power to enrich themselves.81 On current evidence this seems to be an optimistic reading. The more realistic approach at this point appears to be the strategy that has been adopted by some opposition parties and non-governmental organisations. This has involved turning to the courts to force government to uphold the provisions of the Constitution and other laws in ensuring that obviously inappropriate personnel are not retained in key positions,82 that charges are not inappropriately withdrawn against favoured individuals,83 and in contesting legislation that facilitates political interference.84

The history and social psychology of public sector corruption

A somewhat different analysis of corruption in South Africa focuses on the history of, and
relationship between, past and present-day corruption. Corruption in South Africa predates apartheid. Apartheid itself may be depicted as a system of institutionalised structural corruption, with power being abused to ensure that the country’s resources were primarily used to benefit the white minority. As argued by Van Vuuren, ‘A near monopoly on money, power and influence were in the hands of a minority and they used this to either violently suppress the majority or, at best, transfer resources in order to stave off the inevitable revolution.’ During apartheid, corruption manifested in a multiplicity of ways, facilitated by strict official secrecy provisions.

One place in which continuities between past and present corruption can be identified is in the provinces, where provincial governments have incorporated homeland civil servants into the current administrations. Corruption was rife in many of the Bantustans. Many apartheid-era administrations, for example, especially in the former bantustans, had weak administrative and technical capacity and were deeply implicated in patrimonial relations. As the apartheid state progressively ceded power to the homelands so the bantu authority system provided more opportunities to traditional elites, senior bureaucrats and South African companies for the accumulation of wealth.

In the post-apartheid era the ‘arms deal’ of the late 1990s has been said to have played a crucial role in institutionalising corruption. Through the deal, senior politicians effectively endorsed the use of public office for self-enrichment, giving the green light to corruption more generally. Though there were many individuals who benefited, Holden has argued that some role players may have supported the deal in order to secure funding for the ANC. Even if this is true, it seems that the boundaries between the interests of the political party and those of individuals were already blurred before the deal took place and that the arms deal rapidly became a vehicle for well-positioned individuals within the political elite to enrich themselves.

Corruption in post-apartheid South Africa cannot, however, purely be understood in terms of continuities with apartheid and the legacy of the arms deal. Another stream of analysis focuses on the ‘socio-psychological pressures on the new political elite’. Post-apartheid South Africa is a country in which the ideas of racial justice and equality enjoy prominence in a global context of the triumph of consumer capitalism and the retreat (if not defeat) of the idea of social solidarity. A large proportion of the white population continue to enjoy a standard of living – characterised by the ownership of suburban property and consumption of high-end consumer goods – comparable to that in the global ‘metropole’. But high levels of racialised inequality persist.

In so far as the members of the new elite and middle class define equality in relation to the lifestyles enjoyed by white South Africans, many still find themselves to be disadvantaged in relation to other people of an equivalent professional position. This is reinforced by the fact that, as Netshitenze has argued, unlike their ‘white counterparts’, members of the black middle class often lack historical assets. Related to this, their changing class location also often involves acquiring substantial levels of debt. At the same time members of the black middle class often have obligations not only to extended families, many of whom remain in poverty, but other responsibilities that they are seen to carry relative to their newly established social status and advancement. Improvements in social status therefore may seem to carry obligations that are greater than the privileges that they confer. In the words of Njabulo Ndebele, even among the black elite the context is therefore often one where ‘genuine personal material needs …, shaped by historic deprivation, brutally compete with social commitment that once gave meaning to the struggle for liberation’. Generalised white affluence alongside black poverty, and economic insecurity even among much of the black elite, clearly raise profound questions about the meaning of equality and the terms on which this is to be achieved.

The vagueness and ambiguity of the term ‘transformation’ has itself fed into a blurring of the distinction between the objective of black middle and upper class advancement and that of more egalitarian social development. They have been presented ‘as if they were one and the same thing’ while in practice they are ‘competing imperatives’. 
Along with the emphasis on representation in public service and other employment, ‘deracialising the class of capitalists’, thereby ensuring that black South Africans are appropriately represented among those South Africans who are most affluent, has ended up being prioritised over a broader project of social change. In practice therefore, the South African state’s project of transformation has come to be dominated by black middle and upper class interests. This in turn has fed into the ‘canonisation’ of policies of Black Economic Empowerment (BEE), creating an environment that is rich with opportunities for individuals and groups in close ‘proximity to power’ to use this to ‘corruptly secure government work’.98

**The moral economy of corruption**

What is beginning to emerge from these reflections on the history and social psychology of corruption is a framework for analysing ‘the moral economy’ of corruption in South Africa. In terms of one strand of this analysis corruption has many of the characteristics of a ‘neo-patrimonialism’ in which ‘modern democratic procedures as well as rational legality’ are built ‘on a foundation of traditional and highly personalised reciprocities and loyalties’. In terms of this type of view, corruption is a manifestation of a ‘premodern conception … that refuses to distinguish between a public leader and public resources’ and is tied to interpersonal connections that are rooted in friendship, familial and broader ethnic ties.

A second possibility is that ‘corrupt solidarities’ are contemporary manifestations of political and other solidarities, in part animated by ideas of justice and associated with opposition to apartheid and the apartheid period more generally. This possibility is alluded to by Gilder who asks, inter alia, whether ‘notions of nepotism and cronyism adequately take into account … the solidarity amongst those who gave so much of themselves in the struggle for democracy’. Much apartheid opposition activity was criminalised by the apartheid state. Linked to this, those within the ranks of the liberation movement tended to give precedence to values of internal solidarity over those of adherence to the law. A contemporary political morality may be a third strand in this moral economy. Pointing out that, due to practices such as fronting, policy instruments such as BEE have not necessarily achieved the objective of the creation of a black capitalist class, Chipkin suggests that ‘misuse or deviation from public sector processes’ might be seen as ‘a condition of realising political and economic objectives’. In terms of this perspective, corruption may then be rationalised in relation to the disadvantages that black South Africans still suffer relative to white South Africans, and be tacitly accepted by many within the elite as a means to ‘reverse historic racist inequities’. Indeed, many individuals may not see the pursuit of self-interest through corruption and of broader developmental goals as mutually exclusive, but simply part of the broad pursuit of racial redress.

In a manner that is perhaps comparable to the late 19th century French society that Emile Durkheim observed, current day South Africa remains in uncertain and ‘uneasy transition from one state of solidarity or integration to another’. As part of its triumphalism the ANC is often inclined to emphasise its role in ‘liberating’ South Africa. Yet it must be remembered that democratic South Africa and its constitution are products of a negotiated settlement. The persistence of corruption serves to highlight the reality that many, even within the ANC itself, do not necessarily unambiguously endorse the prescripts of the Constitution and that it may serve as merely one of a number of moral and intellectual points of reference.

Engaging with corruption as moral behaviour appears dangerous, as it carries the risk of giving credibility to and legitimising corruption. However, it may be a necessity if there is to be a fuller engagement with the problem of corruption in South Africa, and to
ensure that efforts to address corruption have greater traction. Critical reflection on these issues should pay attention to the fact that apparently moral claims may reflect deeply held understandings and beliefs, but may also be superficial ‘rationalisations’ used to excuse behaviour motivated by greed. As Sykes and Matza highlight, criminal behaviour is associated with ‘techniques of neutralisation … which enable people methodically to counter the guilt and offset the censure they might experience when offending’.  

Furthermore, though they may be linked to apparently ‘pro-social’ historical loyalties or solidarities of one kind or another, the alliances that have emerged are not benign in their implications. Rather the ‘corruptive collusions … become the new foundation for group solidarity … and will be hostile towards any regulatory measures, whatever their merits, which emanate from outside the group’. In due course they run the risk of creating ‘a parallel system of power that turns our democracy into an empty shell’.  

Implications for addressing integrity  

The current mobilisation against corruption cannot be assumed to represent a general rejection of corruption by the elite. Though there are anti-corruption reformist elements within government, corruption could not exist at the current scale without some consensus among significant sections of the elite about its necessity and justifiability. Rather, government’s mobilisation against corruption is likely to reflect a realisation that, while some forms of corruption may have been tolerated, it has lost control of corruption and that corruption has ‘run away with itself’. As a result, corruption threatens the elite’s ability to credibly put itself forward as acting in the national interest, resulting in a loss of legitimacy and ultimately the loss of power.  

Ambivalent attitudes to corruption among the elite are also reflected more broadly in South African society. The absence of a broad anti-corruption consensus needs to be taken into account in understanding how to deepen anti-corruption initiatives. In many countries public pressure has been crucial in creating a political environment where investigations against high-level officials are possible. There has as yet not been any instance where it has been possible to mobilise broad popular opinion against corruption, with corruption providing the main motivation for only a relatively small number of community protests. Instead, over recent years, the biggest popular mobilisation in relation to matters of corruption was in support of the efforts to protect Zuma against having to face trial for corruption. In many other instances where alleged corruption is exposed, it appears to be motivated by the desire to settle political scores rather than by an intolerance of corruption.  

Though there is an elaborate integrity framework already in place, and steps are being taken to strengthen it, the impression is that anti-corruption efforts suffer from a lack of traction. It is possible that this reflects deficiencies in the development of ‘ethical values’ among perpetrators. But, as this article suggests, this may also reflect the presence of an alternative ‘moral economy’ that serves to legitimise corruption. If this is true it may imply that addressing corruption is not necessarily about addressing a lack of moral rectitude, but partly involves understanding and interrogating the moral claims that are made in order to rationalise it.  

Conclusion  

This article began by providing an overview of the current integrity framework and initiatives to strengthen it within the domains of public administration and criminal justice. Initiatives and debates about strengthening this framework largely speak to questions about the effectiveness of the framework as a mechanism for surveillance and increasing deterrence by addressing the problem of impunity. Alongside this, the article briefly reviews historical and sociological accounts of corruption in South Africa. This provides the basis for a discussion of the moral economy of corruption. Instead of focusing on questions of surveillance or deterrence this analysis implies that efforts to address corruption should engage with questions about how to advance justice and fairness in South African society. These two strands are not mutually exclusive. 

Work on procedural justice suggests that people’s willingness to obey laws, rules and procedures is strongly influenced by the manner in which officials associated with institutions of the law...
conduct themselves. For instance, “if courts and other tribunals are conducted in a fair and neutral manner then obedience to the law in future is reinforced”. Thus the credibility of current public service initiatives to strengthen disciplinary processes may be enhanced if they are focused on improving both their fairness and efficiency. A public service that emphasises not only more efficient, but fairer promotion, discipline and human resource practices may be more likely to win support, not only for the reforms themselves but for the legal framework that it seeks to operate within and the social goals that it aims to advance. Likewise, the policing of corruption more broadly might be more widely supported if clearly linked to efforts to advance justice and fairness as core principles of South African society.

Notes
3 S’thembiso Msomi, Predictions of Zuma’s demise prove premature – yet again, Sunday Times, 6 April 2014.
14 Public Service Act 1994 (103 of 1994), Section 30.
17 Protected Disclosures Act 2000 (26 of 2000).
21 Department of Public Service and Administration, Public Service anti-corruption strategy, 2002.
22 Local government anti-corruption strategy introduced by the Department for Cooperative Governance and Traditional Affairs in 2006.

Public Finance Management Act 1999 (1 of 1999). See, for instance, Section 38(a)(i).


Public Service Commission, An assessment of professional ethics, 27.

Ibid., 13.


Department of Public Service and Administration, Public Service anti-corruption strategy, 13.

Department of Public Service and Administration, Anti-corruption capacity requirements, 80–81.


Zuma, State of the Nation Address, 2013.


Public Administration Management Bill, Section 15.


Public Administration Management Bill, Section 17.


Public Administration Management Bill, Section 8.

Ibid., Section 9.


Public Administration Management Bill, Section 13.

Sisulu, Remarks by the Minister for Public Service and Administration at the media breakfast.

Public Administration Management Bill, Section 11.


Lewis, The rot of corruption.


Gavin Woods, Public sector corruption: behavioural origins and counter-behavioural responses, inaugural lecture, Stellenbosch University, 26 October 2010.


Department of Public Service and Administration, Public Service anti-corruption strategy, 14.

A National Anti-Corruption Forum (see http://www.nacf.org.za) was established in 2001, but this body has been largely non-functional.

NPA, Our future, make it work, 448.

Ibid.

Ibid.


Chris Barron, So many questions (Jackson Mthembu), Sunday Times, 6 April 2014.


Susan Booyisen, Nkandla – the ANC’s house of cards, Sunday Independent, 6 April 2014, 13.

NPA, Our future, make it work, 448.

Ibid., 354. Note, however, that the panel is supposed to be appointed by the President.


Breytenbach, The politicisation of the criminal justice system, 54.

Ibid., 53.


Cronin, We’ve been structured to be looted.

Joel Netshitenze, Competing identities of a national liberation movement versus electoral party politics: challenges of

93 Netshitenze, Competing identities of a national liberation movement.


95 The quotes are from Cronin, We’ve been structured to be looted, 2, although he talks about competing imperatives of ‘individual redress’ and “substantial social development”.

96 Ibid.

97 Ibid.


100 Lewis, The rot of corruption.

101 Comments by reviewer.


103 Chipkin, The politics of corruption, 12.

104 Lodge, Neo-patrimonial politics in the ANC, 18.

105 Chipkin, The politics of corruption, 18.


107 Ibid., 241.

108 Ndebele, A meditation on corruption.

109 Oriani-Ambrosini, Amnesty is our best hope of beating corruption.

110 Booysen, Is ANC getting to grips with corruption?

111 Chipkin, The politics of corruption, 12.


Taking stock of the last 20 years

Responses to organised crime in a democratic South Africa

Khalil Goga*

kgoga@issafrica.org

http://dx.doi.org/10.4314/sacq.v48i1.6

Following the end of apartheid, the South African state has faced a number of challenges. One of these has been the growing spectre of organised crime, which has weighed heavily on the public consciousness. The narrative has been one of organised crime, which is becoming increasingly sophisticated and dangerous, pitted against a weakening and ill-equipped state.

This article seeks to give insight into the legal and institutional measures taken by the South African state over the last 20 years. It focuses on direct state responses to organised crime, primarily changes to legislation and enforcement structures. It finds that although the state has been active in changing legislation to combat organised crime, it has often been its own worst enemy where enforcement is concerned, and has consequently lost some important tools in the fight against organised crime.

Like many other countries, South Africa has struggled with the growth of organised crime, and the mainstream narrative has often been one of corruptible, underequipped, under-informed law enforcement, unable to deal with a rising tide of dangerous, sophisticated, organised criminals.¹ In the mainstream media, South Africa has been described as a ‘haven for organised crime’ with veteran investigative journalist Sam Sole describing Czech fugitive Radovan Krejčíř’s choice of South Africa as a refuge ‘symptomatic of the country’s deepening moral malaise’,² arguing that ‘unless we start to exercise discipline as a society, there is a wave of people like him coming, attracted by our sophisticated banking and legal system – and our diminishing capacity to enforce its rules.’³

Criminologists and crime researchers have differed in their assessments of the problem. Early post-apartheid literature appears to accept that South Africa suffered from increases in transnational organised crime and the growing sophistication of local organised crime groups.⁴ However, whether the state has been overwhelmed by organised crime since 1994, is disputed. South Africa is far from being a criminalised state⁵ and it will be argued that over the last 20 years the state has taken strong legislative, regulatory and enforcement measures to combat organised crime, with mixed levels of success.⁶ This article assesses the state’s response to organised crime, and is limited to important direct state responses.

The research for this article consisted of an analysis and review of secondary sources, including

* Khalil Goga is a researcher in the Transnational Threats and International Crime Division (TTIC) at the Institute for Security Studies. He received both undergraduate and Master’s degrees from the University of KwaZulu-Natal.
Understanding and defining organised crime

The conceptualisation and definition of organised crime is contentious. Researchers, policy makers, law enforcement bodies and the judiciary have all used a variety of terms to describe a myriad of criminal activities and criminal groups that could be considered ‘organised’ crime. In part, this is based on historical and contextual understandings of organised crime, related to crime control efforts in the United States and primarily rooted in conceptions of the American ‘mafia’. Organised crime has come to refer to both continued criminal activity and various types of criminal groups. Andre Standing argued over ten years ago that, ‘on a technical level there is no definitive reason why organised crime is not a catch-all term that could be applied to all businesses that break the law or government departments that commit ongoing crimes’, and that ‘the distinction between organised crime and other types of crime was incoherent and was based on popular stereotypes rather than persuasive arguments as to why conventional organised crime is qualitatively different from white-collar crime, government crimes and terrorist activities’.

Within South Africa, there are a variety of definitions of organised crime. The Prevention of Organised Crime Act of 1998 (POCA) is noticeably devoid of a clear definition. POCA does, however, list criminal activities that would be covered by the law, as well as offering fairly broad traits of membership to a criminal group. Importantly, there must be a group committing the crimes, and there are stipulations over the types of the crimes to be considered organised crime. The South African Police Service (SAPS) has relied on a variety of terms and definitions and often uses the South African Police Service Act 67 of 1995 as reference. The Act defines organised crime as ‘a person, group of persons or syndicate acting in an organised fashion or in a manner which could result in substantial financial gain for the person, group or persons or syndicate involved’ and ‘the circumstances amounting to criminal conduct or an endeavour thereto which requires national prevention or investigation or crime which requires specialised skills in the prevention and investigation thereof’.

For purposes of this study organised crime has been taken to refer to a broad range of serious economic and organised crimes that could be punishable under POCA, including criminal activities that would traditionally be seen as ‘white collar crime’ as well as crimes perpetrated by large ‘street gangs’. I will use the term organised crime to describe the activities of organised criminals rather than referring to groups or networks.

Using the abovementioned conceptualisation of organised crime allows for a greater understanding of contemporary organised crime, and can incorporate new crimes such as cyber crime, which do not fit the typical form of organised crime.

Historical background

Organised crime has existed in South Africa in various forms since the colonial period. The structural factors influencing the rise of organised crime can be traced back to this period and include the British system of indirect rule and cross-border trade. More formalised organised crime groups were also recorded in the late 1800s, for example the ‘Irish raiders’ in early mining towns and Umkosi Wezintaba, which established the ideological roots of some of the country’s prison gangs.

More recently, organised youth and defence gangs emerged in the 1950s, although at that time ‘opportunities remained relatively limited and the criminal markets small’. The roots of organised crime as we see it today can be traced back to the apartheid system that criminalised and marginalised the majority of the population. For example, shebeens, which were the progenitors of more sophisticated crimes and criminal empires, had their roots in the apartheid policy of alcohol control. With the majority of state funds being used for the developmental needs of a white minority, suburbs with black populations had limited funding for infrastructure and for policing. People often turned away from the state to informal sources of security, including criminal gangs.
The apartheid government promoted organised crime in townships by supporting gangsters to limit the activities of the anti-apartheid movement and to promote drug use.22 Outside the townships the apartheid state was involved in a variety of organised criminal activities including, but not limited to, corruption,23 money laundering, smuggling and wildlife crime.24 Similarly, apartheid resistance also turned to organised crime and informal channels, both to fund their activities and to overcome procurement problems. The liberation movement was able to develop and exploit routes for procuring weapons and to gain much-needed funds through smuggling activities.25 After the transition to democracy many of these apartheid-era social and business links remained, and security personnel on both sides of the conflict were known to have made inroads in the private security business and in organised crime, using the same routes and markets that they had used in the past.26

The market also had an important effect on organised crime. It is argued that growing demand for narcotics across the globe, at the same time as many African states were gaining independence in the 1960s and 1970s, dramatically changed the modus operandi of criminal groups.27 During these years, smuggling and illicit trade routes were established across Southern African borders but also as far afield as India.28 The late 1980s and 1990s saw an increase in foreign criminal groups within the country.29 These transnational groups included Asian syndicates that were prominent in wildlife-related crimes,30 West African criminals, who left their home countries due to political instability,31 and other groups, including Middle Eastern, Eastern European, Italian and Indian/Pakistani criminals.32 Local crime groups also became increasingly sophisticated and were able to network across the globe. In the Western Cape in particular, functioning cartels were formed.33 Towards the end of apartheid there was an identifiable surge in crime within the country, both organised and inter-personal. By the early 2000s crime reached unprecedented highs, though it has decreased significantly over the last 15 years. Figure 1 illustrates the trends in serious crime since 1994.34

Organised crime in contemporary South Africa

It is difficult to accurately determine the levels of organised crime anywhere, and South Africa is no exception.35 Statistics and research on organised crime offer contradictory accounts. For example, while vehicle theft, which often has an organised crime component,36 dropped from 88 144 incidences in 2004 to 58 312 in 2013,37 incidences of rhino poaching jumped from 22 to 1 004 in the same period.38 Similarly, while there was an increase in drug arrests,39 social research on drug use and gang influence seems to suggest that there has not been a significant change in drug use.40 The increase in drug arrests could indicate better enforcement rather than an increase in drug trafficking. Or this could be due to factors such as a loosening of power monopolies and

Figure 1: Serious crimes 1994/5 – 2012/13
a decentralisation of the drug supply as new drugs such as tik have become popular, and that there are more street-level dealers41 who are easier to arrest.

In much the same way that it is difficult to determine whether there has been an increase in the drug trade, it is also difficult to determine whether there has been an increase in transnational organised crime. RT Naylor argues that,

while it is doubtless true that there is more economic crime across borders today, there is also much more legal business, and no proof that the proportion of illegality is increasing faster. Indeed, to the extent that exchanges are becoming liberalised, flows more transparent, taxes cut and regulations relaxed, illicit traffic across borders is more likely to be shrinking relative to total economic transactions.42

While one cannot argue that transnational organised crime in South Africa has not increased over the last 20 years, considering the growth in the South Africa economy and the increase in international trade, the common narrative over foreign threats seems unnecessarily sensationalist.43

Economically and socially, those involved with crime have continued to experience support through criminal philanthropy and a community reliance on the ‘criminal economy’, as described by Standing and Irish-Qobosheane.44 In many areas relationships between the police and the community are fraught, while organised criminals fulfil a governance role.45

The economic power that comes through organised crime is not limited to urban areas. In many rural areas, the trade in cannabis effectively supports thousands of people in the production and supply chain.46

Of particular concern within the country have been the apparent links between organised crime, political figures and law enforcement. A prominent example of this was the case of former police commissioner Jackie Selebi who was sentenced to 15 years in prison for his corrupt relationship with convicted drug trafficker Glenn Agliotti. Similarly, Radovan Krejcir, the notorious Czech fugitive, was known to have a relationship with Joey Mabasa while he was head of Gauteng Crime Intelligence. Furthermore, entire police departments are alleged to be corrupt, providing a variety of services to criminals, such as ‘losing’ dockets, and selling firearms and drugs.47

State response since the end of apartheid

The South African state has taken a number of steps to limit organised crime since the end of apartheid. These can broadly be broken down into changes in specialised policing and in new approaches to combating organised crime, primarily by ‘following the money’ and ‘taking the profit out of crime’.48

Enforcement: the SAPS and specialised units

The SAPS is the largest of the law enforcement bodies in South Africa. Its budget increased from R6 billion in 1994 to R63 billion in 2013, while the correctional services budget increased from R1 billion in 1994 to R17 billion in 2013.49 ‘Victims of crime’ surveys and police statistics show a decrease in crime over the past 20 years, yet the state readily admits a number of failings. Both the 15 and 20 year reviews of state performance have highlighted organised crime, ineffective operation and integration, and corruption as serious persistent issues.50

Although the state was arguably in a weakened position after the end of apartheid as a result of the loosening of border controls and the transition from a police force to a police service,51 the legislature and law enforcement began taking steps against sophisticated organised crime soon after it was identified as a problem.52 In 1991 the Crime Combating and Investigation division (CCI) of the SAPS was established to combat organised crime. By 1992 various organised crime groups had been identified and the police began building cases against them using new investigative techniques highly reliant on crime intelligence.53

After 1994 the SAPS comprised around 500 specialised units, including units such as the South African Narcotics and Alcohol Board (SANAB) and vehicle crime units. In 2001 the SAPS announced that the specialised units would be dissolved and amalgamated into the broader police service and that this was in accordance with government’s strategy
to have an ‘integrated and coordinated approach to fighting crime, including organised crime’. The SAPS restructuring sought to limit and streamline the number of units, and units were disbanded or amalgamated into other larger units.

Those arguing in favour of the disbandment of specialised units held that the new structure would be more efficient and that local police stations needed to be empowered by locating expert skills at local level. The transfer of skilled officers was intended to allow for a more equitable allocation of skills to areas that were under-resourced as a legacy of apartheid. It was also argued that ‘a key motivation underlying the restructuring is that it provided an opportunity for removing detectives who were underperforming, from the specialised units’. Another motivation was that there was confusion over the use and responsibilities associated with the large number of units, and often units would avoid taking on investigations for fear of overlap in responsibilities and accountability.

However, as has been reported during testimony at the Khayelitsha Commission of Inquiry, the shifting of personnel did not have the desired effect. High-income areas maintained higher numbers of police, while poorer areas often remained understaffed and underequipped to deal with high levels of violent crime. Poorly performing staff were ‘dumped’ in poorer areas while better performing staff were ‘poached’. Moreover, similar to Khayelitsha, many areas often have infrastructural, social and economic challenges that make policing more difficult than it would be in suburban areas. This has contributed to a breakdown in police-community relations.

An illustration of the advantages and disadvantages of specialised units can be drawn from SANAB, which was a controversial unit until its closure in 2004. On the one hand it has been argued that ‘SANAB ...[was] regarded by foreign governments as the most effective drug policing institution in the region’. SANAB officers had close links with the Drug Enforcement Agency (DEA) and other foreign bodies that provided them with training and skills, and the closure of SANAB was seen as a major setback. Its disbandment resulted in a loss of networks, data collection techniques, contacts, crime threat analysis and street-level intelligence. Street-level intelligence subsequently was often inept, and an interviewee for this article cited the key loss of intelligence on West African criminal networks as an example. On the other hand, it has been argued that, ‘under apartheid, SANAB was already considered to be completely corrupt’ and that the high levels of corruption in SANAB were linked to the ‘Boere mafia’ and relationships between ethnicity and crime. Furthermore, there were suggestions that units such as SANAB were not as efficient as they should have been. However, while the reasons for the amalgamation might have been valid, skills were lost. For example, the incorporation of SANAB into the organised crime division in 2004 meant that many of those redeployed were not using their skills at a local level.

In the meantime, new institutions were established outside the SAPS to deal with corruption and organised crime. This included the Specialised Commercial Crimes Unit (SCCU), located within the SAPS but with a high level of interaction with other institutions, such as the specialised courts, established in 1999 with a team of dedicated prosecutors. To put the importance of such a unit into context, only 15 commercial crimes were prosecuted in Johannesburg in 1997, but by 2007 there were over 700 such prosecutions in Pretoria and Johannesburg. Other units, such as the Special Investigating Unit (SIU), were also developed through the Special Investigating Units and Special Tribunals Act 74 of 1996, to investigate public administration corruption.

One of the most visible specialised units established after 1994 was the Directorate of Special Operations (DSO), commonly known as the Scorpions. The Scorpions came into operation in January 2001 to investigate and prosecute serious organised crime and corruption in cooperation with other units. Under the National Prosecuting Authority (NPA), the DSO employees selected the cases they investigated. Despite complaints over the manner in which the DSO operated, they were seen to be effective, with a high conviction rate. The successes of the Scorpions included limiting the terror activities of People Against Gangsterism and Drugs (PAGAD), taking down high-level platinum smugglers, high-
profile drug dealers and Chinese abalone smugglers. The DSO was a significant player in chasing down sophisticated commercial crimes, including investigating Brett Kebble and Johannesburg Consolidated Investment (JCI). The DSO also went after political cases, and was drawn into the allegations of corruption around the arms deal, leading to the arrest and conviction of Shabir Shaik.71 Yet the DSO also came under criticism for its tactics, cherry picking cases and perceived political agenda. Despite the recommendations of the Khampepe Commission (2006)72 to retain the Scorpions, the DSO was disbanded in 2008 and incorporated into the SAPS. It was replaced by the Directorate for Priority Crimes Investigation (DPCI), known by the moniker ‘the Hawks’.73

While the removal of specialised units can arguably be justified in context, the loss of skills impacted on efforts to combat serious organised crime.74 Furthermore, the failure of the executive to appoint police commissioners (who arguably should be career policemen) worthy of the position has impacted on leadership within the police. The last two commissioners were dismissed on corruption charges, and the leadership of the current police commissioner has come under criticism, not least for the Marikana massacre. Divisions within the police have become politicised, and this has taken its toll on the reputation of the SAPS.75 Crime Intelligence, an important unit in relation to the investigation of organised crime, has been used on multiple occasions to further political ends, resulting in a virtual collapse of the division.76

Changes in enforcement may have had some success in increasing police capacity. However, the demise of specialist bodies such as the Scorpions has had serious ramifications for the police’s ability to complete sophisticated organised crime investigations and to root out corruption in enforcement bodies, which is imperative in limiting organised crime. Despite the limitations described here, legislative reforms provide a strong basis for the state to combat organised crime, as described in the next section of the article.

### Legislative changes

In 1999, economics professor RT Naylor wrote, 

> [O]ver the last 15 years there has been a quiet revolution in the theory and practice of law enforcement. Instead of simply closing rackets that generate illegal income, the central objective has become to attack the flow of criminal profits after they have been earned.77

South Africa eagerly embraced the approach of attacking criminal profits, or the proceeds of crime. In 1992 the Drugs and Drug Trafficking Act was promulgated. De Koker argues that this law supplemented common law, and broadened the criminalisation of money laundering to include those who did not report suspicious transactions related to drug trafficking.78 The Proceeds of Crime Act 76 of 1996 broadened the scope of the statutory laundering provisions to all types of offences, and followed international conventions that sought to combat organised crime by following financial flows.

In 1998, the Prevention of Organised Crime Act (POCA) was passed. Strongly influenced by the Racketeer Influenced and Corrupt Organizations Act (RICO), in the United States, POCA was a dedicated piece of legislation to limit organised crime and was touted as integral to fighting both organised and commercial crime.79 It is possible to use POCA across a broad range of criminal activities, and according to Mujuzi POCA is aimed ‘at dealing with a wide range of criminal activities, some of which are quite commercial in nature’. He further states that the Constitutional Court held that ‘the wording of POCA as a whole makes it clear that its ambit is not in fact limited to so-called “organised crime offences”’ and that ‘the primary object of POCA is to remove the incentive for criminal activity’.80

Using ‘follow the money’ and/or ‘proceeds of crime’ approaches and financial penalties to prosecute criminals is a common law enforcement tactic,81 and POCA follows this tradition to ‘take the profit out of crime’. It is argued that these approaches, along with more global cooperation, have made it increasingly difficult to move money across borders and to launder illicit financial flows.82 POCA has been successfully used in a number of commercial crimes
as well as in more traditional gang activities. Its strong forfeiture laws have enabled the state to confiscate anything from cars and houses to multimillion rand businesses.

Following proceeds of crime as an investigative strategy has become popular with crime investigators, partly because it changes the standard of proof required. Moreover, asset forfeiture also provides finances to continue to investigate cases, as a portion of the confiscated assets is used to fund the investigation. In order to strengthen the ability of the state to follow illicit money flows, the Asset Forfeiture Unit (AFU) was established in May 1999 in the Office of the National Director of Public Prosecutions.

In line with POCA, a number of laws and by-laws were passed to set stronger regulations against money laundering and the proceeds of crime. These included the Financial Intelligence Centre Act 38 of 2001 and the Financial Intelligence Centre Amendment Act 11 of 2008 (FICA). The origins of FICA can be traced back to 1996, when the South African Law Commission published a Money Laundering Control Bill as part of a report entitled Money laundering and related matters. An analysis of money laundering laws by Goredema reveals that, after the flurry of activity in the early 2000s as the South African state set up legislation, regulations and sector-specific guidelines, by 2004 criminalising money laundering was substantially complete and institutions, primarily in the banking sector, had to comply with a number of prescriptions.

South Africa has also ratified international conventions and joined the Financial Action Task Force (FATF), and has strong local laws that govern banks and financial institutions. The South African Revenue Service (SARS) is a well-run institution and its regulatory and enforcement arm is highly regarded. South Africa also has a strict exchange control system that determines compliance with exchange control regulations; De Koker argues that ‘[t]his system has certainly made South Africa a less attractive destination for foreign criminals’. Furthermore, post-9/11 concerns over terrorism have increased the strength of governments to follow money, and in South Africa this is legislated through the Protection of Constitutional Democracy against Terrorist and Related Activities Act of 2004.

While globalisation is touted as a cause of organised crime and transnational organised crime, one of South Africa’s success stories over the last 20 years lies in the use of ‘follow the money’ approaches, global cooperation and the harsh line taken on forfeiture laws. If one analyses the implementation of money laundering laws and the work of the Financial Intelligence Centre (FIC), it is possible to see the quantitative effectiveness of measures taken by the South African government. According to the FIC annual report, ‘[i]nvestment in the FIC’s work also yields tangible gains for public finances’. During 2012/13, the FIC had available funds of R245.3 million, but recovered R1,171 billion for the fiscus as a result of its efforts. This represents a value adding growth on investment of 377% for the South African taxpayer. The steady increase in the FIC’s ability to detect illicit financial flows is illustrated by Figure 2.

Figure 2: Suspicious transaction reports, 2002/3–2012/13

The FIC has also been able to work in tandem with other bodies to provide financial intelligence, and has been integral to a number of convictions and arrests. In general, South Africa’s anti-money laundering (AML) framework compares favourably with models in place in the European Union and United Kingdom. Furthermore, both the SAPS and prosecuting bodies are increasingly adept at using legislation such as POCA to combat crime.

Despite this, analysts such as Naylor remain critical of these approaches, citing ineffectiveness and a
concern over civil liberties. In many proceeds of crime cases the onus is on the state to prove a balance of probability rather than beyond reasonable doubt. This in turn has made it easier for law enforcement officials to pursue cases where there is little evidence. Furthermore, in South Africa ‘follow the money’ approaches have been unable to pick up on bartering of goods through informal channels such as drugs for abalone or cattle for cannabis, which has long been a mainstay of the industry. It was argued by Gastrow that the cannabis trade underpinned the drug trade, as cannabis was used as a bartering system. This could explain how foreign drugs were purchased in South Africa at such a low price, despite the exchange rate.91

**Conclusion**

The response by the South African government to organised crime has been mixed. After 1994 the state was faced with an increase in organised crime that mirrored the experience of many post-transition societies.92 At the same time, the new government that mirrored the experience of many post-transition state was faced with an increase in organised crime. After 1994 the response by the South African government to organised crime has been mixed. After 1994 the state has implemented strong measures against organised crime, including following many of the Financial Action Task Force (FATF) recommendations93 with regard to money laundering.

However, a number of serious challenges remain. Research suggests that communities are increasingly turning to informal sources of authority, including organised criminals, suggesting a breakdown in relations between the police and community.94 Failure to stem this tide is likely to result in the growth of organised crime in these communities and the development of youth gangs into more organised structures. Similarly, corruption in the police force remains high and the state has been unable to find an effective means to limit it. Police have been accused, and convicted, of a variety of organised crime activities.95 Without police corruption, organised crime is unlikely to succeed and it is argued that ‘the SAPS actively undermined its corruption control mechanisms’96 through, inter alia, disbanding the Scorpions and the former anti-corruption agency of the SAPS.97

Over the past 20 years the South African state has put in place measures that could significantly limit organised crime. The legislation remains strong and it is continually updated. Although popular narrative of South Africa as a state being overrun by organised criminals seems exaggerated, the failings of the state include the removal of successful operations, institutions and systems, and failures at the upper echelons of police management. The inability to systematically address these failings will lead to the continued existence of, and increases in, organised crime in South Africa.

To comment on this article visit

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

**Notes**


4 Using the definition of a criminalised state by Phil Williams, who argues that ‘the state itself becomes a continuing criminal enterprise’, it is evident that South Africa has not reached this level of criminality. See Phil Williams, Transnational Criminal Networks, RAND Corporation, 83, http://www.rand.org/content/dam/rand/pubs/monograph_reports/MR1382/MR1382.ch3.pdf (accessed 3 June 2014).
Internationally, the most common global definition of organised crime is that used in the United Nations Convention against Transnational Organized Crime, which describes organised crime groups as ‘[a] structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention’. See UN International Convention Against Transnational Organized Crime, Palermo, 2000.

For more information of the definitional disputes of organised crime, see Andre Standing, Rival views of organised crime, Monograph 77, ISS, 2003.

Ibid., 64.

The use of the description ‘gang’ has also increased confusion in organised crime debates, according to Standing, Rival views of organised crime. More noticeably, gangs have become entrenched in the Western Cape. The SAPS estimates that there are three serious prison gangs and 12 serious street gangs in the Western Cape, where gang-related violence is the most serious and ‘organised’. These gangs differ substantially from many other small gangs, although they often interact with them. See South African Police Service, Western Cape annual report 2012–2013 (2013), 10.

Hagan differentiates between people using the term to describe activities and groups. While Hagan chose to capitalise the group, I will use a collective noun at the end, i.e. ‘Organised crime networks’. See F Hagan, ‘Organised crime’ and ‘organized crime’: indeterminate problems of definition, Trends in Organized Crime 9(4) (2006).


Among the problems was an exodus of senior SAPS personnel and an increase in poorly trained new recruits. William R Pruitt, The progress of democratic policing in post-apartheid South Africa, African Journal of Criminology and Justice Studies 4(1) (2010), 116. Also see Shaw, Organised crime in post-apartheid South Africa.


Johan Burger quotes former commissioner Jackie Selebi in 2006 as saying that ‘the restructuring of the police will lead to a redeployment [that] would see a substantial increase in staff at police stations’. The idea was that specialised units that were based at the SAPS area offices, serving around 20 police stations each, would have their staff and resources ‘decentralised’ to station level – thereby bolstering local policing resources. See Johan Burger, The South African Police Service must renew its focus on specialised units, ISS Today, 31 March 2014, http://www.issafrica.org/iss-today/the-south-african-police-service-must-renew-its-focus-on-specialised-units (accessed 2 June 2014).


Ibid.


For example, the majority opposition party in South Africa, the Democratic Alliance, has repeatedly called for the reinstatement of SANAB on the basis that drug crime has increased. However, the increases in arrests could also be attributed to better policing.

Shaw, Organised crime in post-apartheid South Africa.


Interview with senior investigator formerly with the SAPS, 2013.

Interview with an independent consultant formerly with the SAPS and SADF. Also see Burger, The South African Police Service must renew its focus on specialised units.


Ibid. ‘Boere mafia’ in this sense means those who had political and economic power. Towards the late 1980s, tightly organised and ethnically based organised crime emerged in the form of the Boere mafia (literally ‘farmers mafia’). Involved in a range of criminal activities, these groups were soon infiltrated and broken by the police. Significantly, however, the Boere mafia appeared to recruit former members of the security forces and had right-wing political connections. See Shaw, Organised crime in post-apartheid South Africa.

Redpath, Leaner and meaner.


Ibid.

73 Ibid.

74 Burger, The South African Police Service must renew its focus on specialised units.


77 Naylor, Follow-the-money methods in crime control policy.


79 POCA has, however, come under extreme criticism: for example, former deputy commissioner of the SAPS and advocate Godfrey Lebeya, in his PhD thesis on organised crime definitions, states: ‘The POCA is not a model of legislative coherence; it is a legislation that may be described as half-baked, which requires immediate return to the legislative oven.’ See Godfrey Lebeya, Defining organised crime: a comparative analysis, PhD thesis, UNISA, 2012, 119.


81 Naylor, Follow-the-money methods in crime control policy.


84 Notably, the Department of Forestry and Fisheries has come under attack for being reliant on confiscated abalone. See, A scaley solution to a slimey problem, Noseweek, 1 January 2012.


88 It should be noted that this differs significantly from IL van Jaarsveld, who in her thesis argues: ‘This study portrays a grim picture of money laundering control in South Africa. Not only has FICA failed to keep abreast with international AML trends, but key AML obligations, namely customer identification and suspicious transaction reporting, have been exposing banks to unnecessary civil liability.’ IL van Jaarsveld, Aspects of money laundering in South African law, LD thesis, UNISA, 2011, 686.


90 Ibid., 9.


92 Standing, Organised crime.

93 Financial Intelligence Centre, Annual report 2012/2013.


95 See Julian Radermeyer and Kate Wilkinson, South Africa’s criminal cops: is the rot far worse than we have been told?, AfricaCheck, 27 August 2013, http://africacheck.org/reports/south-africas-criminal-cops-is-the-rot-far-worse-than-we-have-been-told/ (accessed 10 June 2014).

96 Irvin Kinnes and Gareth Newham, Freeing the Hawks: why an anti-corruption agency should not be in the SAPS, South African Crime Quarterly 39 (March 2012), 36.

Court support workers speak out

Upholding children’s rights in the criminal justice system

Lorraine Townsend, Samantha Waterhouse & Christina Nomdo*

lorainejoytownsend@gmail.com
swaterhouse@uwc.ac.za
christina@rapcan.org.za

http://dx.doi.org/10.4314/sacq.v48i1.7

The prevalence of sexual offences against children in South Africa continues to be among the highest in the world. The quality and accuracy of a child’s testimony is often pivotal to whether cases are prosecuted, and whether justice is done. Child witness programmes assist child victims of sexual abuse to prepare to give consistent, coherent and accurate testimony, and also attempt to ensure that the rights of the child are upheld as enshrined in the various laws, legislative frameworks, directives and instructions that have been introduced since 1994. We draw on information from two studies that sought the perspectives of court support workers to explore whether a child rights-based approach is followed in the criminal justice system (CJS) for child victims of sexual abuse. Findings suggest varying degrees of protection, assistance and support for child victims of sexual abuse during participation in the CJS. The findings revealed that the rights of children to equality, dignity and not to be treated or punished in a cruel, inhuman or degrading way were undermined in many instances. Finally, recommendations are given on ways to mitigate the harsh effects that adversarial court systems have on children’s rights.

Child victims of sexual abuse

Sexual abuse of children has devastating adverse social and mental health effects on victims. Sexual abuse during childhood has long been associated with a range of short- and long-term psychological and behavioural problems such as fear, post-traumatic stress disorders, poor self-esteem and anxiety disorders; and the risk of later sexual and physical abuse and domestic violence, higher rates of substance abuse, binge eating, somatisation, suicidal behaviours, and poor social and interpersonal functioning in adult life. While some child victims of sexual abuse are resilient and able to lead relatively normal lives following the event/s, most often they experience lasting physical, mental and emotional harm. Not only must they cope with these harmful consequences, but should the case be reported and referred to the criminal justice system (CJS), they are forced to deal with the trauma of having to repeatedly relive the violence by retelling their stories of abuse, and through in-court testimony.

* Loraine Townsend is a research consultant based at the South African Medical Research Council, Cape Town. Samantha Waterhouse heads the Parliamentary Programme at the Community Law Centre, University of the Western Cape. Christina Nomdo is the Executive Director of RAPCAN (Resources Aimed at the Prevention of Child Abuse and Neglect).
**Extent of sexual offences against children**

The prevalence of sexual offences against children in South Africa continues to be among the highest in the world. According to the South African Police Service (SAPS) Annual report, 63 067 sexual offences were recorded in 2012/13; 25 446 of these against children (40.3%). It must be noted that the report indicates that the total number of sexual offence cases reported was 63 067 for that period; however, elsewhere in the report the total number of sexual offences against children and adults is given as 55 374, thus indicating that 46% of offences reported are committed against children. In 2008/09 – the last known detailed, age-disaggregated data – 39.5% of sexual offences committed against children affected those in the age group of 15 to 17 years, 60.5% were committed against children below the age of 15 years, and 29.4% of these sexual offences involved children aged 0 to 10 years. Set against the knowledge that sexual offences against children are grossly under-reported and that reported cases of sexual offences against children are thus considered the tip of the iceberg, these statistics are harrowing, and demand not only concerted prevention efforts but also justice for the child victims.

**Sexual offences data**

The problem of the lack of disaggregated data on sexual offences cases from the SAPS, specifically those involving children, has been compounded by changes in reporting by the Department of Justice and Constitutional Development (DoJCD) and the National Prosecuting Authority (NPA) that do not disaggregate conviction data for the various sexual offences. The changes have negatively affected our ability to assess the performance of the criminal justice system when responding to sexual offences in general, and sexual offences against children in particular.

Subsequent to the promulgation of the Criminal Law [Sexual Offences and Related Matters] Amendment Act 32 of 2007 (the Act), the NPA’s annual reports provide one single figure for conviction rates regarding the 59 sexual offences contained in the Act. It consolidates information regarding rape and sexual assault, specific offences against children (such as the exposure or display of pornography to a child), and specific offences committed against persons with mental disabilities, amongst others, into a single number of ‘sexual offences’. Previously, the NPA reported separately on the number of indecent assault cases and on the number of rape cases, according to the common law definitions.

Interestingly, the NPA Strategic Plan 2013–2018 does disaggregate rape from other sexual offences when referring to SAPS reports between 2008 and 2012, but fails to do so in reference to its own performance.

Furthermore, recent NPA reports (2011/12 and 2012/13) only contain information on the number of sexual offences cases finalised, and the conviction rates. It is unclear from the reports how many cases are referred to the NPA by the SAPS. In the 2012/13 reporting period, the NPA indicates that it finalised a total of 7 092 sexual offences with a conviction rate of 65.8%; this indicates convictions in 4 669 cases. This should be considered against the annual reporting rates provided by the SAPS of approximately 65 000 per year. Although we cannot track actual convictions against cases reported with the data available, there is an indication that the finalisation rate is in the region of 11% of the cases reported to the SAPS, bringing the conviction rate closer to 7.1% of reported cases.

Vetten et al.’s 2008 study shows that the conviction rate for rape tends to be lower than that for other sexual offences. A study on conviction rates published in 2000 that tracked cases through the system indicated that the conviction rate for rape overall was 7% at that stage, with a 9% conviction rate in rape cases involving children. The fact that there is no difference in the conviction rates over the past 14 years raises the serious question of the actual value of the law reforms and programme developments relating to the prosecution of sexual offences over the past two decades.

The only matters in which one can glean a better sense of the percentage of cases that are prosecuted, are those relating to the prosecution and conviction rates for sexual offences reported to Thuthuzela Care Centres (TCCs). The annual reports...
include the category ‘% of cases reported at a TCC that are referred to court for prosecution’. While not contained in the 2011/12 report, the 2012/13 report includes the actual reporting figures to TCCs for both of these years. In those years 28 557 and 33 112 cases were reported at TCCs. The conviction rate for the 2012/13 period in relation to the number of cases reported in the same period is thus 4,13%.

In the NPA 2011/12 Annual report the conviction rate given for matters reported to TCCs is slightly lower than the overall conviction rate for sexual offences in that period. This trend continues in the 2012/13 report, which shows a conviction rate of 65,8% for all sexual offences and 61% for sexual offences referred from TCCs. Since the purpose of the TCCs is to improve the management and prosecution of sexual offences matters, including conviction rates, the fact that the conviction rates are lower for cases going through the TCCs is worrying and suggests that they are failing in their primary aim.

The failure to provide disaggregated data across sexual offences obscures an accurate assessment of the performance of the DoJCD and the NPA. It also prevents a proper assessment of the blockages in the system, in terms of both investigations and decisions not to prosecute, and thus hampers the ability to plan and establish effective strategies to address this poor performance.

Developments in law and policy since 1994

The children’s rights framework in South Africa

The United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child recognise a wide range of children’s rights. They require member states to ensure that legislative, administrative, social and educational measures are taken to protect children from a range of forms of violence, abuse, neglect, maltreatment and exploitation, and to put in place measures to ensure their realisation. They also specifically provide that in judicial and administrative proceedings that affect the child, the child must be provided with the opportunity to be heard, either directly or through an impartial representative.

These two instruments were ratified by South Africa in 1995 and 2000 respectively, leading to a priority for law reform in the country. Various laws, legislative and policy frameworks, directives and instructions came into being from early 2000 with the intention of upholding the rights of all children in South Africa, and ensuring their protection from further psychological distress and harm resulting from testifying in open court, in the presence of the accused.

The Bill of Rights in the Constitution of the Republic of South Africa is thus complemented by international law and given effect by legislation and policy. Section 28 of the Constitution specifically addresses the rights of children. It provides the right of children to freedom from maltreatment, neglect, abuse or degradation; to be treated fairly and equitably; and to be protected from unfair discrimination on any grounds. Importantly, section 28(2) of the Constitution states that: ‘A child’s best interests are of paramount importance in every matter concerning the child.’ This is a higher standard than that set in international law.

Legislative and policy frameworks

The past 20 years have seen significant changes in the legislative and policy frameworks relevant to child rights. These include the Children’s Act 38 of 2005, the Criminal Law [Sexual Offences and Related Matters] Amendment Act 32 of 2007 (SOA), and the Criminal Procedure Act 51 of 1977.

Most significant among these in terms of sexual offences was the promulgation of the SOA at the end of 2007, following a lengthy reform process. The SOA includes as one of its objectives to ‘afford complainants of sexual offences the maximum and least traumatising protection that the law can provide.’ This Act introduces or strengthens various protective measures to uphold children’s rights and to ensure their protection from further psychological distress and harm resulting from engaging as complainants in sexual offences matters. It specifically includes provisions to improve the protection of the child testifying in open court in the presence of the accused. For example, these provisions allow for children below the age of 18 years to testify outside of the court environment.
with the assistance of a person who acts as an intermediary; or to give evidence in a separate room linked to the court room via closed-circuit television; or to have court proceedings conducted in camera.

In addition, regulations and directives have been developed for police officers and prosecutors when investigating and prosecuting sexual offences cases. Within these regulations and directives are measures intended to ensure the safety and protect the rights of child victims of sexual offences throughout the criminal justice process. The National Instruction for police officers when dealing with cases of sexual abuse highlights the issue of the particular vulnerability of victims of sexual abuse. Other portions of this document attempt to ensure that victims’ rights are protected at all times; for example, taking steps to protect the privacy and dignity of the victim (section 7 (4)), respecting how victims describe the event and writing down everything that is said (section 5 (3)f and g), interacting with victims in a non-judgemental way (section 5 (5)), making a thorough and professional investigation of the case (section 9 (1)), and ensuring the safety of the child (section 9 (2)b).

The directives issued in terms of section 66 (2) (a) and (c) of the Sexual Offences Act are also constructed with the particular vulnerability of victims of sexual abuse in mind. For example, the directives recommend the selection of dedicated prosecutors who are experienced, skilled and sensitised, and that prosecutors ‘should endeavour to reduce the trauma caused by the complainant’s contact with the CJS by following a sensitive, victim-centred approach’. At trial, prosecutors should ensure that sexual offence cases receive priority and proceedings are expedited, especially in cases where the complainant is a child. Furthermore, ‘efforts should be made to ensure that the complainant and other witnesses wait in a comfortable and private victim-friendly environment where contact with the accused can be avoided’.

In September 2013, five years later than it was due, the National Policy Framework on Management of Sexual Offences (NPF) was published in the Government Gazette. The NPF is based on the principles of ensuring a ‘victim centred approach to sexual offences’; adopting multidisciplinary and inter-sector responses; providing specialised services in these matters; and ensuring ‘equal and equitable access to quality services’. The NPF provides a number of new measures that may improve the implementation of existing laws and policy. Firstly, it recognises a range of factors that increase the vulnerability of victims ‘due to gender power imbalances, age, disability, sexuality and cultural dynamics’. Secondly, it requires that budget allocations and expenditure on sexual offences must be separately tracked to monitor this and ensure sufficient resources are made available. It also requires the development of SAQA-accredited training, allowing for improved standards in training.

Perhaps most importantly, the NPF provides that ‘psycho-social services and practical assistance must be provided as an integrated part of support services at all stages’. Other key developments in the past 20 years include the establishment of specialist Sexual Offences Courts (SOCs) in 1993 and the introduction of TCCs in 2000.

Sexual Offences Courts

Although officially established in 1993, there was only one SOC based in Wynberg, Cape Town until 1999. At that stage the DoJCD made a decision to roll these courts out across the country by 2003. The implementation of this was delayed and the national strategy to roll out SOCs was only agreed on in 2003.

These courts were intended to deal exclusively with sexual offences cases. They included the requirement to appoint victim assistants, case managers, court preparation officials and magistrates dedicated to hear matters in these courts. Each court was also to be staffed by two prosecutors to improve preparation in these matters. In 2005 a blueprint for the management of these courts was developed, setting out the various requirements for infrastructure to minimise distress associated with the court environment and exposure to the accused in the court building and the court room.

At the same time that the blueprint was finalised in 2005, a moratorium was called on the establishment of SOCs. Subsequently many of the infrastructural and staffing gains made with the establishment of the courts were lost.
In 2012, a Ministerial Advisory Task Team on the Adjudication of Sexual Offence Matters (MATTSO) was established. This task team released its report in August 2013. The report strongly recommended the re-establishment of SOCs. In addition, the MATTSO recommendations are consistent with many of the recommendations made in a submission to parliament in April 2013 by a group of civil society organisations working with sexual offence survivors and the CJS.46

In response to the report, the Judicial Matters Second Amendment Act of 2013 was passed. This provides a legal framework for the establishment of SOCs.47 At a minimum, this new law safeguards the future existence of these courts. However, the Act does not provide adequate direction to the DoJCD regarding the pace of implementation of the courts and resourcing, nor standards for infrastructure, staffing or functioning of these courts. Without this, there is no assurance that what will be established as an SOC is anything more than a name on the door of the court. Given the history of inconsistencies in standards in these courts, this is concerning.

**Thuthuzela Care Centres**

After the first TCC was established in 2000, the DoJCD has continued to roll out TCCs. By 2012 the DoJCD reported that 30 TCCs had been established.48 The NPA plans to increase that number to 60 by the 2017/18 financial year.49 These centres are set up as one-stop facilities, housing police, health and psycho-social support services to assist victims at the point of entry into the system. However, very few TCCs do in fact provide psycho-social services.50

**Child witness and advocacy programmes**

The quality and accuracy of a child’s testimony is often pivotal in whether cases are prosecuted, and whether the court reaches a finding. Yet, research and anecdotal evidence from across the world relate how child testimony is often complicated by a number of factors. Most often the nature of child sexual abuse means that there is little supporting evidence, and the court proceedings are based on the word of the child against that of the (usually) adult perpetrator. Children often have difficulty in recalling and verbalising events and sometimes have difficulty telling adults about their abuse.51, 52 They may be plagued by shame, guilt, fear and/or embarrassment.53 particularly if the perpetrator is known to them, which is most often the case.54 Finally, young children may be developmentally unable to disclose abuse or have difficulty in understanding that what has occurred is in fact abuse.55 The abuse itself may have hindered their normal cognitive and emotional development, affecting their ability to recall and/or relate the event/s.

Child witness and child advocacy programmes assist child victims of sexual abuse in preparing for consistent, coherent and accurate testimony, which in turn has the potential to affect the outcome of the court process. Central to these services is informing witnesses about court processes and role players, reducing secondary victimisation, strengthening victims’ coping strategies, and providing psycho-social support and referral to counselling services.56 In South Africa, court preparation services for children are largely delivered by non-profit organisations (NPOs), either on site at the courts, or as part of broader psycho-social services provided off-site.57 There is no available information on the number of court preparation personnel employed by NPOs in South Africa. The NPA Annual report for 2012/13 indicates in respect of its Ka Bona Lesedi Court Preparation Programme that there are ‘140 Court Preparation Official (CPO) posts’ in operation in 76 lower courts and two high courts.58 However, the report does not comment on how many posts are filled, and it must be noted that these CPOs do not specialise in sexual offences and undertake preparation of all witnesses. The report goes further to note that these NPA CPOs conducted 91 050 witness sessions in the period under review. It does not indicate the actual number of witnesses they worked with, just the sessions. Nor does it indicate how many witnesses were children in sexual offences matters.

**Child Witness Project**

In this article, we focus on one child witness support programme: the Child Witness Project (CWP), initiated by Resources Aimed at the Prevention of
Child Abuse and Neglect (RAPCAN), which has been providing services to child victims of sexual abuse and their families in five SOCs in Atlantis, Cape Town, Khayelitsha, Paarl and Wynberg since 1999. The CWP is delivered in cooperation with the National Prosecuting Authority, the Department of Justice and Constitutional Development and the Western Cape Department of Social Development. An average of 500 children access the programme on a monthly basis. The CWP service is provided primarily by lay court support workers, who are supported and supervised by specialised social workers. Each child and his/her caregiver and other family members may have several interactions with court support workers. The CWP court support workers prepare children for court proceedings, debrief children and families after testimony in court, and follow up with children after the completion of the case. The CWP also works hard to ensure that the environment in court is conducive to children’s comfort and safety by providing child-friendly physical spaces such as separate waiting rooms and playrooms at each court. All CWP court support workers have the necessary aptitude as well as previous experience working with children, and have completed a three-week training course provided by RAPCAN.

Research methodology

This article draws on two studies that sought the perspectives of the CWP’s court support workers to examine whether a child rights-based approach is followed in the CJS for child victims of sexual abuse. Both studies were cross-sectional and employed a qualitative approach for data collection. This method was deemed appropriate because the CWP court support workers interact not only with child victims and caregivers but with all role players in the CJS with whom child victims and caregivers come into contact. Their experiences and insights position them to understand the processes to which child witnesses and their caregivers are subjected while interacting with the CJS.

In the first study, conducted in mid-2011, the perspectives of the CWP court support workers were sought through their own written reports of cases that had particular salience for them. In the second study, in mid-2012, face-to-face interviews were conducted with the CWP court support workers. These interviews used a storytelling, oral history format rather than a structured interview format. Interviewers asked questions that accessed narrative detail that could not be answered with a simple ‘yes/no’ response. Such questions were designed to elicit cognitive, behavioural and emotional content (often simultaneously), and to give rise to autobiographical accounts of experiences, good and bad, rather than bland generalisations.

In the first study referred to above, 16 court support workers attended a two-day getaway where they were asked to record their most significant case while working in the CWP. These reports were written and shared among participants. Information was shared voluntarily, and the court support workers gave their permission to use extracts from the written reports. As this was an internal team building exercise, ethics approval was not sought.

In the second study referred to above, researchers randomly and independently selected one court support worker from each of the five courts out of the approximately 20 who worked in the CWP. All of the five court support workers approached were willing to be interviewed. After written, informed consent was obtained, court support workers were interviewed by an experienced researcher. Interview guides were used to lead the conversations, with questions designed to encourage participants to think about their behaviours and emotions in relation to their experiences of the CJS, as well as how they related to the people they encountered and the physical spaces in which the interactions occurred. All interviews were conducted in participants’ own language and were audio-recorded, transcribed and translated where applicable. Original recordings were checked against the transcripts to ensure the accuracy of the data capture. This study was approved by the research ethics committee in the Department of Psychology at the University of Cape Town.

A thematic content analysis was used for the written case reports and the interviews. The case reports and transcripts were read repeatedly by both team members independently, and initial broad themes
were identified. The team members discussed and decided upon the themes in consultation and by mutual agreement.

Findings

Support workers

There are many role players children engage with from the moment of disclosure to their engagement in court, as described in this interview:

... report first time to the police ... tell the story to the doctor ... tell it to somebody that's maybe a counsellor ... they have told it to their parents or whoever they told first ... So that's already four people ... come to court ... telling the prosecutor, so they get tired ... girls are not comfortable telling their story to somebody that is a male ... (Interview: CSW 5)

Court support workers provide a safety net for the children during (and sometimes after) their engagement with the CJS. They work with child victims as young as five and up to 18 years of age. Their strong commitment to their charges and their work was seen consistently across the interviews and in the written reports.

Court support workers ensure that children are well-prepared for court appearances. The CWP court support workers are trained, guided and supervised to only fulfil this specific role. They are trained not to elicit the story of the incident, as it may affect the merits of the case; nor give advice outside the scope of their knowledge of the court process; nor should they impose any religiosity or make contact with the family outside of the court spaces. Despite this training, court support workers reported that they overstepped these roles in some cases, for example providing advice to children and visiting the family of abuse victims.

In many cases it was clear that court support workers felt a great deal of empathy for the children. There were also accounts of having bonded closely with the children, and internalising the trauma experienced by the children. While these behaviours would be considered as crossing professional boundaries and could be the result of insufficient training, supervision and debriefing, they could also signify a compassionate and empathetic response by the court support workers to a system they consider to be dispassionate. Some court support workers expressed anger, despair and helplessness (at the perpetrator, the court system, the children’s caregivers), suggesting that they were experiencing vicarious trauma.62

Confronting the perpetrator

Ideally, victims (especially children) should not need to fear contact or confrontation with perpetrators, thereby deepening the trauma inflicted by the initial sexual offence. However, due to a failure of personnel diligence or, in certain instances, a lack of resources, children are sometimes obliged to confront their perpetrators.63

Court support workers talked about their particular frustrations with investigating officers who seem to have no awareness of how being in close proximity to the perpetrator would affect a child, and who even transport victims to court with the alleged perpetrators:

Say they come from the farms, that long distance from [place name] or wherever they come from, sitting with the perpetrator in the car. I can imagine myself, sitting with somebody in a car that wanted to murder me, or did rape me or whatever. So when the child comes here, you don’t know what to say. You don’t know where to start, what to talk or where to begin with the child, because the child is so traumatised sitting with that person for an hour or hour-and-a-half in the car. (Interview: CSW 4)

Even though transporting children and perpetrators together may seem efficient or justifiable due to limited resources, such practices are in direct opposition to the principle of the best interests of the child, and are completely unacceptable.

Children may also come into contact with alleged perpetrators in the court building. As described earlier, the Criminal Procedures Act does provide for children below the age of 18 to testify in a separate room linked to the court via closed-circuit television and/or with the assistance of an intermediary. These measures are intended to protect child witnesses from psychological stress caused by testifying.
in open court, and to alleviate some of the harm associated with cross-examination. These measures do not, however, take into account the exposure of children to perpetrators outside the courtroom. Court support workers described how, in some cases, children met the perpetrator (or their family) in the passages, the public toilets or even in the court. These experiences make children anxious, while they need to be calm and confident if they are to testify against the perpetrator. Contact with the perpetrator negatively affects the quality of many children’s testimony, unnecessarily traumatises the child, and also has the potential to impact adversely on the outcome of a case. One court support worker wrote about this exact experience for a 10-year-old rape victim:

Die kind was deur die familie van die beskuldige voorgekeer en daarna wou sy nie verder praat in die hof nie. Met die gevolg dat die man vrygespreek is en da die saak van die rol is. (The child was accosted by the family of the accused and after that she did not want to speak in the court. With the result that the man was acquitted and the case was taken off the court roll.)

In many instances the layout of court buildings makes it impossible for the two parties to avoid each other. This is exacerbated by the failure of court staff to recognise the negative impact of this contact and take the necessary measures to prevent it.

The cold reality of court

Court buildings have not been designed to accommodate children who enter as victims or witnesses. The starkness of the court buildings and rooms intimidate first-time visitors, and often invoke fear and uncertainty for the children and their caregivers.

The minute they have stepped into that door, there is that fear. They are on their nerves. It’s like some of them withdraw into themselves. (Interview: CSW 2)

To soften the negative impact of the stark court environment on children, a number of courts have established ‘child-friendly’ waiting rooms and interview rooms to prevent a situation where the child waiting for the trial to start has to be in the same waiting area as the accused. According to the experience of the court support workers interviewed in this study, measures to create separate waiting areas and testifying rooms for children are not sufficient protection for traumatised children.

I don’t think the court can be child friendly! It’s too cold there ... it’s just those benches there ... (Interview: CSW 4)

With repeated delays and postponements of the trial date, it is a reality that children experience the cold court environment, and risk the potential to confront their perpetrators, on multiple occasions.

Delays and postponements

Court proceedings are often protracted. Many of the court support workers spoke about how these processes were difficult for children to endure. One court support worker wrote that ‘over the next 18 months the case [got] postponed six times’; another spoke about how ‘the children get tired sitting in one place’. Support workers interviewed in our study expressed their frustrations about postponements and delays, and the inability of the court to provide timeous information to victims that would shorten their stay at court:

Sometimes they come here three times, and they just sit here the whole morning. ... (the) prosecutor doesn’t come up and say, listen here, this is what is happening, the case is going to be postponed. (Interview: CSW 4)

The main role players in the court process should ensure that victims are protected from secondary traumatisation, but their insensitivity or carelessness can turn the court process into a painful experience, filled with anxiety and fear. The opportunity for children to connect meaningfully with adults who care can be tainted by their engagement with insensitive defence lawyers, prosecutors and even magistrates.

Going the extra mile – or inefficiency

The investigating officers are important role players in the CJS and are instrumental in ensuring the child’s case is built. The docket with all the statements and evidence that supports the child’s case becomes the sole representation of the child’s experience of being abused. It is important that this be as complete
a record of the crime as possible. When there are gaps in this record of the crime, the child’s case is weakened, as these support workers noted:

It [pertinent evidence] had to be in the docket, but was not there, and that is why the perpetrator was being released. (Interview: CSW 4)

Sometimes it is not even the child’s fault that the evidence is incomplete or sometimes the docket gets lost. (Interview: CSW 3)

The investigating officers are also required to ensure that the child is advised of court dates and when he or she must appear in court. Court support workers in our study spoke of cases in which a child was required in court, but the investigating officer had forgotten to collect them. However, one support worker’s experience with the police and their handling of cases was positive:

There’s great assistance [from the detectives] because there is support: the police will come to them and the police will assist them. The police will take them here and take them there, so I don’t want to put the police down. (Interview: CSW 1)

**Sensitivity – or jaded callowness**

Court support workers work with prosecutors, and jointly they act as the advocates in the court process for children who have witnessed or experienced sexual offences. For the children, these ‘friendly’ adults will be symbolic of the humanity of the CJS and assist in rebuilding trust after the violation associated with the sexual offence, which is often committed by a trusted adult. They will remember if these adults talked to them respectfully, gave credence to their experiences, and did the best they could to see that those responsible would be held to account.

The court support workers’ written reports made reference to how prosecutors and magistrates operate. For instance, one court support worker felt that a certain prosecutor did not do enough to bring a case to justice. A certain magistrate was seen as insensitive to the difficulties a child witness had with testifying, while the child support worker recognised that this had more to do with the child’s mental state as a consequence of long-term abuse than with any fault in her actual testimony.

In some cases prosecutors were perceived as intimidating, reportedly acting in a very harsh manner towards the children whose rights they were supposed to uphold and protect. Child support workers felt that prosecutors were re-traumatising children by questioning them in a manner that made them emotional and undermined their ability to reliably testify in court. One of the support workers had this to say:

The prosecutor, she is very helpful to the kids, but sometimes she can also be unhelpful. They speak to kids, and sometimes they push them and say, no, you are not telling the truth ... because of the treatment they [the children] get, they end up getting emotional so that they can’t handle it any further. (Interview: CSW 2)

Support workers believed that empathy with child victims was a missing ingredient in the system:

Maybe the lawyers or even the magistrate can feel for the child ... If we feel what the child is feeling, we will change our mindsets. (Interview: CSW 2)

Court support workers in our study appreciated the role of sensitive prosecutors:

The court is a very cold place ... it depends on the prosecutor, the one defending that child ... that prosecutor will tell the child, okay, you don’t need to worry. Don’t worry; everything is going to be fine. You don’t have to fear. Don’t even look at the perpetrator ... you look at me. (Interview: CSW 2)

**Discussion**

**Lack of uniformity in services to children**

Findings from this study suggest varying degrees of protection, assistance and support for child victims of sexual abuse during participation in the CJS. There were mixed reports from participants on the support received from investigating officers: some were clearly supportive, providing assistance that likely arose from sensitivity to the children and their ongoing ordeal/s, while others seemed to have little regard for them, or lacked sensitivity. Similarly, while some prosecutors did understand the needs of children, others were
demeaning and insensitive to the children. There could be various reasons for this: not knowing the extent of the impact testifying has on a child, a poor understanding of the ‘best interests of the child’ principle, and the low value placed on children in the CJS. These findings certainly denote unevenness in the standards applied across state stakeholders in the criminal justice system.

Gaps in the policy framework that should be setting these standards, and failures in management practices to enforce the standards that are set, exacerbate this inconsistency. The on-again, off-again approach to specialised policing units and SOCs has further undermined the standardisation of measures to better protect the rights of children in the system.

Protecting the rights of the child

The findings revealed that the rights of children who attend court to equality, dignity and not to be treated or punished in a cruel, inhuman or degrading way, are regularly undermined. Assistance and support for these children most consistently come from court support workers. Yet, in the view of the child support workers, there is a systematic failure to protect children from the trauma of having to face the perpetrators and their families and the real or imagined threats directed at them in these encounters.

Defence lawyers’ strategies and efforts to represent the constitutional rights of accused persons are necessary for the pursuit of justice. However, while there are provisions in law (such as the use of an intermediary to relate the questions posed in court to the child) to mitigate the negative impact of this on children, these provisions are not uniformly applied. The Constitutional Court found that the discretion of the court to apply these provisions is constitutional, but that their application by courts in many cases was unconstitutional, due to a failure to apply the best interests standard.64 The Constitutional Court also underlined the importance of giving effect to the constitutional values of human dignity, equality and freedom in these matters. The failure of prosecutors and presiding officers to intervene when the cross-examination by defence lawyers becomes unnecessarily badgering, or undermines the child’s dignity, is concerning and represents a failure to promote the best interests standard. In addition, some prosecutors appear to have a poor understanding of how a child’s testimony is affected when testifying in the presence of the accused, and when exposed to direct cross-examination.

Repeatedly having children and their caregivers wait endlessly at the courts, only to be told to return on another day, shows great disregard and a certain callousness to the victims of abuse. The findings from this study suggest that the legal and administrative proceedings involving children were not kept to a minimum. The participants spoke about delays in court proceedings, and continual postponements. All spoke about disregard for victims and their families, and having to wait many hours before being advised of a postponement.

Measuring performance in the management of sexual offences

The findings of this study suggest that there are some instances in which the approach of staff in the criminal justice system, and the application of protective measures during the trial, may lessen the secondary trauma experienced by children. However, the absence of baseline or current research on this question means that it is not possible to assess if the rates of secondary trauma experienced by child victims have dropped in South Africa in response to developments over the past 20 years.

In spite of the difficulty posed by the reporting and performance statistics currently available, the available information on the performance of the CJS in terms of prosecution and conviction rates clearly shows that there has been little change in the case outcomes. The data available indicate that prosecution and conviction rates remain as alarmingly poor as was the case when they were studied 14 years ago.65

The failure to disaggregate police and prosecution data into age categories and types of offences obfuscates the ability to assess the actual performance of the CJS. Further, the unavailability of information on the attrition of cases from the reporting and prosecution stages means that strategies to address problems in this regard cannot be devised.
Information regarding how the relationship between the accused and the victim is linked to the case outcomes (i.e., is there a correlation between the relationship between the accused and the child and detection, prosecution and conviction rates?) may also assist in the planning of prevention strategies and responses, such as training interventions to improve the management of cases at all stages. At this stage, no such information is routinely collected.

Budget allocation to sexual offences

It is currently not possible to assess how resources in the SAPS, the NPA or the DoJCD are allocated with the intent to improve the investigation and prosecution of sexual offences. An assessment of the information available in the NPA performance plans shows that the intention to improve SOCs is not likely to be realised, given the budgets available. For example, SOCs should be staffed by two prosecutors, however, the NPA reports that it does not have sufficient funds to pay the current number of prosecutor posts and that the compensation budget is under “severe stress”. In addition, while the MATTSO report calls for the establishment of SOCs, it goes on to suggest that the SOCs that will be developed are all already resourced to the standards set and there is no indication of a plan to increase resources for the further establishment of these courts. The failure to commit funds to the further roll-out of SOCs will perpetuate the unevenness of services to child victims in different parts of the country.

Conclusion

The law reform and policy developments undertaken to date clearly have not had the desired impact on case outcomes, and too many children continue to experience avoidable secondary victimisation when traversing the CJS. The impact of the NPF and the extent to which recommendations in the MATTSO report are implemented may be critical factors in changing the experiences that children have in what has remained to date a stubbornly negative environment for child victims.

The participants in our study reported children’s discomfort, fear and trauma when confronting the perpetrator either in court, in the court buildings and/or outside of court. The court support workers spoke about children becoming confused, recanting testimony and/or appearing untrustworthy when harangued by defence attorneys. While the justice system is adversarial, ways to mitigate the harsh effects that adversarial court systems have on children’s rights to dignity, privacy and freedom from harm must be given serious consideration. We offer the following recommendations:

- SAPS statistics should include age-disaggregated data to allow for year-on-year monitoring of reported sexual offences against children. In addition, the different types of sexual offences, and in particular rape and sexual assault, should be reported separately.

- NPA performance data must include information on the numbers of cases referred for prosecution against the numbers of cases prosecuted. Similar to the above recommendation, these figures should be age-disaggregated and various sexual offences should be separately reported.

- The allocation of budget to sexual offences matters by the SAPS, the NPA and the DoJCD must be delineated in annual performance plans. Spending must be reported in the annual reports.

- To promote uniformity in protecting children’s rights, and to guard against regression where good standards are developed, standards for infrastructure and staffing in SOCs, in line with the recommendations of the MATTSO report, must be incorporated into a formal policy framework or law. This can be achieved by including these standards in regulations to the Judicial Matters Second Amendment Act of 2013. Although this Act makes the development of regulations discretionary and consequently sets no time frames for their development, the DoJCD must be urged to finalise these urgently.

- Court support workers should have ongoing, expert professional psycho-social training and supervision. This would provide them with the skills necessary to avoid crossing professional boundaries, vicarious trauma and ‘compassion fatigue’.
• A greater investment should be made to improve the quality of investigations and forensic evidence collection.

• The robust implementation of existing instructions for police officials when dealing with sexual offences is needed. This includes systematic monitoring of their implementation. The National Instructions for police officers when dealing with child victims of sexual abuse should be extended to include measures to ensure the child’s rights to privacy, dignity, and safety once s/he enters the court system. Specifically, rules regarding transporting child witnesses and perpetrators to court need to be clearly spelled out.

• Police officers should have training in the particular psychological vulnerability of child victims of sexual abuse and their caregivers, and in how to question and take statements from children in a sensitive manner.

• The quality of prosecution of sexual offences against children should be strengthened. This could be done through improving the skills and knowledge of prosecutors in the technical as well as the emotional aspects of prosecution and working with child victims of trauma. Not only training, but improved recruitment and selection processes for prosecutors would go a long way to strengthen the quality of prosecution of sexual offences against children. To this end the recommendation contained in the Directives for Prosecutors – that dedicated prosecutors who are experienced, skilled and sensitised – are selected, should be adhered to, without exception.

• The CJS is essentially ‘adversarial’ in nature; this means that the victim’s needs and rights carry the least weight in relation to those of the accused and the state. To undertake reforms that would increase the ‘inquisitorial’ nature of the system would allow for an increased focus on the victim’s needs. At its simplest level, this means that the magistrate can play a greater role in protecting the rights of the victim, within the constitutional framework, yet sometimes at the expense of entrenched rules of procedure, for the purpose of uncovering the truth. Even without reform to the nature of the system, there is sufficient precedent for presiding officers to play a stronger role to promote the rights of child victims. Careful selection and quality training of presiding officers prior to their hearing sexual offences matters can improve the level of protection provided to children within the current constitutional framework.

• The use of video testimony of child victims, either within evidence-based prosecutions or within the current system, should be further investigated or considered. The child’s entire testimony could be video recorded and replayed during trial without necessitating the child’s presence in court.

• The NPF and the recommendations made in the MATTSO report must be implemented as a matter of urgency.

This study has alerted us to the sometimes callous attitudes of adult role players towards child victims. The training of court role players needs to be placed within a psycho-social context to promote increased levels of sensitivity. This would go a long way to ensuring consistently good and empathetic service delivery, including regular supervision of adherence to the objective of limiting the secondary traumatisation of child victims.

Acknowledgements

We would like to thank the court support workers for sharing their insights with us, and Blanche Rezant for the interviews in the second part of the study.

Notes


8 This statistic was accessed from the South African Police Service (SAPS), Annual report 2012–2013, 114, 117, www.saps.gov.za. A search of various websites did not reveal any age-disaggregated data for this reporting period.

9 Ibid., 116.


11 P Proudlock (ed), South Africa’s progress in realising children’s rights: a law review, Cape Town: Children’s Institute, University of Cape Town and Save the Children South Africa, 2014.


15 NPA, Annual report 2012–2013, pages 32 and 30 respectively for total number and percentage.

16 These are estimates. In order to track the actual conviction rate it is necessary to track and monitor outcomes in actual cases over a period of a number of years.

17 L Vetten, R Jewkes, R Sigsworth et al., Tracking justice: the attrition of rape cases through the criminal justice system in Gauteng, Johannesburg: Tshwaranang Legal Advocacy Centre, South African Medical Research Council and Centre for the Study of Violence and Reconciliation, 2008.

18 R Paschke and H Sherwin, Quantitative research report on sentencing, Institute of Criminology, University of Cape Town, 2000.


20 A total of 60.7% in 2011/12 of TCC matters vs 65.1% overall. NPA, Annual report 2011–2012, 40.


32 Ibid.

33 Ibid.


36 National Instruction on Sexual Offences 2008, 7 (31).

37 Section 62(2)(a) and (b) required that it be tabled within one year of the Act coming into effect.


39 Ibid., 21.

40 Ibid., 26.

41 Ibid., 61.

42 Ibid., 27.

43 Shukumisa Campaign, Submission to the Portfolio Committee on Justice and Constitutional Development on the strategic plans and budget of the Department of Justice and Constitutional Development and the National Prosecuting Authority, 2013, 5–6.

44 Ibid.

45 Ibid.

46 Ibid.


50 Shukumisa Campaign, Submission to the Portfolio Committee on Justice and Constitutional Development, 7.


52 E R DeVoe and K C Faller, The characteristics of disclosure among children who may have been sexually abused, Child Maltreatment 4 (1999), 217–227.


56 F Nagia-Luiddy & S Waterhouse, Oiling the wheels of justice? The RAPCAN child witness project, *SA Crime Quarterly* 29 (September 2009), 35–43.

57 Ibid., 56. These services are delivered by the Teddy Bear Clinic for Abused Children, Childline South Africa, Rape Crisis Cape Town, the Institute for Child Witness Research and Training, Resources Aimed at Prevention of Child Abuse and Neglect (RAPCAN), and a few smaller projects nationally. The NPA introduced a national court preparation service in 2006.


59 See F Nagia-Luiddy & S Waterhouse, Oiling the wheels of justice?, 56, for a comprehensive description of the RAPCAN Child Witness Project.

60 The studies were funded by the Open Society Foundation of South Africa. The Western Cape Department of Social Development provided funding for supplementary research.


64 Summary of the Constitutional Court judgement in *Director of Public Prosecutions v Minister for Justice and Constitutional Development and Others ([2009] ZACC 8)*, Centre for Child Law, University of Pretoria, referring to para. 83 of the judgement.


69 Rape Crisis, *Don’t hide speak out*, 61.


71 This recommendation is also made by Proudlock, *South Africa’s progress in realising children’s rights*, 11.

72 As contained in the Sexual Offences Act 2007, 26.
Twenty years of punishment (and democracy) in South Africa
Political policing then and now
Criminal justice policy and remand detention since 1994
Insider views on the Judicial Inspectorate for Correctional Services
Addressing corruption in South Africa
Responses to organised crime in a democratic South Africa
Upholding children's rights in the criminal justice system