

South African CRIME QUARTERLY

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- › Why victims of domestic violence retract from the criminal justice process
- › (In)security, crime and gangs in Nairobi informal settlements
- › The legal case for rehabilitation
- › Defining criminal justice social work
- › Interview with Peter Tinsley, Institute for Justice Sector Development, Canada



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EDITORIAL

In September the Minister of Police and Commissioner of Police released the annual crime figures (2010/11) for South Africa. As we have come to expect, the announcement was followed by a week-long media focus on crime. Since the high rate of crime still is a major concern for South Africans it is not surprising that this occasion attracts enormous media attention. And in many ways the media focus creates the space for researchers, academics and activists to raise awareness about the complexity of the risk factors for crime perpetration, challenge misperceptions and misunderstandings and offer their views on the solutions. Unfortunately few actually take this space and use it effectively.

Two days before the crime statistics were released the World Health Organisation and Ministry of Health hosted an international conference on violence prevention in Cape Town. The conference brought together researchers, academics, government officials and NGOs to share evidence about local and global initiatives that show promise in reducing violence. That conference was followed by another, organised by the UCT-based Safety and Violence Initiative, which again brought together an impressive array of local and global experts on violence prevention. Yet, the voices of these experts were largely missing from the very public discourse that played itself out in the days following the release of the crime statistics.

One reason for this is that those who work in the areas of safety and violence prevention feel frustrated by the release of the crime statistics by the police. They argue (correctly, I believe) that the perception created by the very public release of the crime figures by the police each year is that policing and the criminal justice system offer the solution to high crime rates. This reinforces the oppositional notion that criminals are 'other' and that more police, more prosecutions and harsher sentences are the way to deal with crime. This is the very antithesis of the discourse of safety and violence prevention. However, by not engaging in the media storm the public was denied insight into the very practical and important work that is being done in relation to violence prevention.

It is true that television, radio and print media do not offer a forum for public engagement that allows much space for nuance and the presentation of complex data. However, I believe that the research and academic community would gain much by using the space created by the release of the crime statistics to advocate for the kind of social interventions and attitudinal change that will improve safety in the long run.

The crime statistics offered a very mixed picture. The much-publicised good news was that most categories of violent crime went down in the past year. Murder in particular continued its downward trend with a 5,3% reduction since 2009/10. The bad news is that while the overall murder rate decreased, the murders of women in fact increased by 5,6%. Since it can be assumed that at least a portion of those murders are the consequence of intimate partner violence, the findings of the study presented in this edition of SACQ by Lillian Artz about why women do not complete the process of obtaining a protection order against their abusive partners is of particular relevance. Most importantly it shows the enormous limitations of any criminal justice response to domestic violence.

Also in this edition, Leon Holtzhausen argues for a clearer definition of criminal justice-related social work so that social workers in this field can receive the necessary specialised skills and knowledge; Jameelah Omar claims that prisoners have a realisable right to rehabilitation in South African prisons; and Patrick Mutahi presents an innovative view of the role of criminal gangs in Kenya. We conclude this edition with an interview by Chris Botha with Peter Tinsley, who offers an international perspective on police oversight.

Chandré Gould (Editor)

FEAR OR FAILURE?

Why victims of domestic violence retract from the criminal justice process

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In 2008/9 MOSAIC,¹ with the assistance of the Gender, Health & Justice Research Unit (UCT), embarked on research that sought to identify the factors that contribute to domestic violence victims withdrawing from the legal process before they finalise protection orders (POs) applied for under the Domestic Violence Act (DVA).² This study was based on the 2008 work of this author who, in partnership with MOSAIC, interviewed 365 domestic violence victims in the Western Cape about their engagement with and retraction from the criminal justice process.³ The second tier of this project – reported on here – emerged with more focused interview schedules and the addition of eight jurisdictions from which the sample was drawn. The findings from this study were extensive and pointed to a range of personal, systemic and structural reasons why Domestic Violence Act [DVA] applicants disengage from the criminal justice process. This article will limit its focus on three areas that are relevant to the decision by survivors to withdraw their applications for protection orders: the history and severity of violence, deadly threats, and key findings relating specifically to experiences of DVA applicants with the courts.

The Domestic Violence Act (DVA) (No. 116 of 1998) was promulgated in 1999 with the aim of creating a civil remedy that was accessible, affordable and ensured that ‘victims of domestic violence received the maximum protection from domestic abuse that the law could provide.’⁴ Under the DVA, victims of domestic violence may apply for a Protection Order (PO), which aims at preventing future acts of violence.⁵ It involves a two step process. The victim of domestic violence applies for an interim protection order (IPO)⁶ which is granted if the court is satisfied that there is *prima facie* evidence that the ‘respondent’ (the alleged abuser) has committed an act of domestic violence and that the applicant (the victim) would suffer undue hardship if a protection order was

not issued immediately. Where urgency can be shown, an IPO is issued.⁷ The second part of the process involves finalising the order. Once the IPO is served on the respondent, the applicant and the respondent are required to return to court on a certain date – referred to as the ‘return date’ – for a hearing during which the respondent is afforded the opportunity to present to the court reasons why the protection order should not be finalised. If the court is satisfied, on a balance of probabilities, that the respondent has committed or is committing an act of domestic violence, the protection order can be finalised (or varied in some way).⁸ It is in the period between the application for an IPO and the finalisation of the protection order that cases fall out of the system.

DOMESTIC VIOLENCE ATTRITION RESEARCH

This study of domestic violence attrition was sparked by MOSAIC, an organisation that provides

* Associate Professor, Gender, Health & Justice Research Unit, University of Cape Town. This article is based on the findings from L Artz, D Jefthas & Z Majeit, *Reluctance, Retaliation and Repudiation: The Attrition of Domestic Violence Cases in Eight Magisterial Districts*, GHJRU, University of Cape Town: South Africa, 2011.

court support services to victims of domestic violence who apply for protection orders. MOSAIC estimated that almost half of their clients were not returning to court to finalise their protection orders, and embarked on research to establish the reasons why victims of domestic violence who apply for POs do not return to finalise them.

Attrition research shows us the different points in the criminal justice system *where* cases fall out, and, hopefully, the *reasons* for cases falling out. Without this kind of research, we can only speculate about the decrease in the number of cases from the time they are reported to the police, to when they go to court. We can use attrition research to establish whether the reasons for cases dropping out relate to the complainant (personal reasons) or relate to the performance or decisions of the criminal justice system (systemic reasons).

Studies that have reported on the rates of attrition in domestic violence cases consistently find that out of the ‘thousands of women’ who initiate the process of obtaining protection orders in the US, less than half return to court to obtain final orders.⁹ It is critical to establish whether the fallout or ‘attrition’ of cases is a result of the failure of criminal justice to implement domestic violence legislation, or of a seemingly unrelenting cycle of violence.¹⁰ This research has shown that it is a combination of both. Despite progressive legislation such as the Domestic Violence Act, the inconsistent and faulty application of the law by the police and other criminal justice agents results in limiting the effect of the legislation, and discourages protection order applicants from continuing the legal process. On the other hand, victims of domestic violence are often caught in intractable personal situations that make it almost impossible to take effective legal action.

METHODOLOGY

Between 2008 and 2009, 503 DVA applicants¹¹ were interviewed about why they applied for protection orders, but did not return to court to have these orders finalised.¹² Their application forms for protection orders were also reviewed. They were interviewed at the following research sites:

Table 1: Research sites

Research sites/courts	Number of interviews	% of total interviews
Bellville	42	8,3%
Bishop Lavis	20	4,0%
Cape Town	78	15,5%
Khayelitsha	87	17,3%
Paarl	56	11,1%
Philippi	88	17,5%
Wellington	13	2,6%
Wynberg	119	23,7%
TOTAL	503	100%

The sampling was purposive, specifically targeting complainants who did not return to court to finalise their protection orders. The research took place over a six-month period. The only requirements for participation in the study were that DVA applicants (a) consented to being in the study at their first appearance (application) at the court; (b) were on the court roll on the return date; and (c) did not appear in court on the return date during the period of the research. DVA applicants were asked to participate at their first court appearance, which is at the date of application for a protection order. It was only after applicants had been assisted with applying for a protection order that the prospect of participating in the study was introduced and explained in detail.¹³

On any given day there may be between 20 and 50 applications for protection orders and hearings for domestic violence cases at each court, and up to half of the hearings may involve ‘non-returns’.¹⁴ Sometimes, although not exactly procedurally correct, these cases are struck off the court roll. The researchers involved in the project noted who was struck off the roll and checked these names against the list of applicants who consented to participate in the study when they came to court to apply for protection orders. These applicants were then phoned for an interview. Afrikaans and Xhosa interviews were conducted by MOSAIC’s auxiliary social workers, who were extensively trained on how to conduct the interviews, including how to manage situations where the alleged perpetrator was in the vicinity when the researchers phoned for the interview.

The non-return interview schedule was a semi-structured interview schedule specifically designed to interview research respondents telephonically. The interview schedule was divided into eight sections:

1. Introduction to the project
2. Re-establishing consent
3. Nature of application for protection
4. Reactions by abusers when interim protection order was served
5. Experiences with police and the reporting process
6. Experiences with the courts
7. Why applicants did not return to court on the return date to finalise protection orders, and
8. Additional narratives specifying reasons for non-returns.

The findings were analysed through a post-coding process as well as a process of thematic content analysis of the narratives from the interviews.

The findings were analysed based on the gender of the applicants and the nature of the relationship between the applicants and their abusers, and specifically whether the PO was sought for protection from an intimate partner or a family member.¹⁵ The four key categories for analysis were:

- *Female intimate partner* [FIP] – female applicants who applied for a PO against their intimate partners
- *Male intimate partner* [MIP] – male applicants who applied for a PO against their intimate partners
- *Female family member* [FFAM] – female applicants who applied for a PO against a family member, and
- *Male family member* [MFAM] – male applicants who applied for a PO against a family member.

This approach was adopted on the basis of overwhelming empirical evidence from both local and international research showing that women tend to be the victims of domestic violence, and the strong association between femicide and a history of domestic violence.¹⁶

RESEARCH FINDINGS

Demographic profile of the research respondents

Demographic information on the research respondents was primarily captured in, and extracted from, the intake forms. Where information on the intake form was absent or unclear, the relevant information was taken from the interview schedules and/or affidavits attached to the consent forms. As Table 2 sets out, the majority of applicants in the study were female (84,5%; n=425), with a significantly smaller number of male applicants (15,5%; n=78) completing the sample. Approximately three-quarters (74,7%; n=376) of the applications included in the study were brought against intimate partners, with the remaining 127 applications (25,3%) being brought against family members. Women applying for POs against an intimate partner made up 64,4% (n=324) of the applications, with the next biggest percentage, 20,1%, comprising women wanting protection from family members (n=101). Applications by men against intimate partners totalled 10,3% (n=52) of all research respondents, with men seeking protection from family members in only around five per cent of the cases (n=26).¹⁷

The majority of applicants in the study, 65% (n=327), were between the ages of 20-39. Of all

Table 2: Gender of applicants and nature of relationships

Applicants – sex category	Number	%
Female intimate partner applicants	324	64,4%
Female family member applicants	101	20,1%
Total female applicants	425	84,5%
Male intimate partner applicants	52	10,3%
Male family member applicants	26	5,2%
Total male applicants	78	15,5%
TOTAL	503	100%

the female applicants (n=425), 67,5% (n=287) were in this 20-39 age group, with a further 26,6% of women (n=113) between the ages of 40-59. Of all the male applicants, just over half (51%; n=40) were between the ages of 20-39 and 38% (n=30) between the ages of 40-59 years old.

Nature of abuse

... I have told him on numerous occasions that it is not working and he doesn't want to let go. He has been threatening my ... life and because I know what he's capable of, I take his threats serious [sic]... [BL22-FIP]

The study included an examination of the nature and extent of abuse reported by applicants. In doing so, the research interrogated both the patterns of domestic abuse over a period of time as well as the specific incident(s) that led to the victim's decision to engage with the criminal justice process at that particular point in time. The analysis of these experiences provides some indication of the personal, social and systemic contexts that may contribute to the reasons why victims of domestic violence find themselves unable to continue with the criminal justice process. To some extent it allows inferences to be made about the extent to which certain types of abuse patterns contribute to the decision of women to withdraw from proceeding with formal interventions.

The boomerang effect

Domestic violence cases reported to the criminal justice system may be triggered by seemingly trivial events, but can quickly degenerate into violent episodes. Sometimes, the very act of seeking a protection order results in a 'boomerang effect', whereby seeking help only amplifies threatening behaviours and escalates violence by the respondent (perpetrator). Finn argues that 'unlike most other types of crime, the offender is *motivated*¹⁸ to retaliate against a specific victim.'¹⁹ In other cases, the incident of violence that instigates legal action may be a seemingly minor incident (i.e. a non-physical but controlling behaviour), but the victim's cumulative experience

of violence within the relationship results in a 'reporting incident'. This incident may not be reflective of the historical expressions of violence within the domestic relationship, but is experienced by the victim as something which has historically led to more serious violence.

Victims of domestic violence often suffer a range of abuses, compounding in severity or frequency over time and as the relationship begins to disintegrate. We found that, on average, DVA applicants have known their partners for nine years, experiencing abuse for at least half that time (4,3 years) before approaching the police or courts for assistance. One out of ten women (12%) experienced domestic violence for 10-20 years of their lives. From the intake forms, physical abuse, as opposed to sexual abuse, was cited as the most common form of physical victimisation reported by DVA applicants. Of the female applicants wanting protection from their intimate partners [FIPs], 83% (n=269) reported being physically abused. In about two-thirds of cases (67%, n=321) applicants cited physical abuse among the reasons they sought a protection order.

Of all the applicants (n=503), sexual abuse or rape was reported in 16,5% of cases (n=83), with all of these cases reported by females applying for POs against an intimate partner. This means that of the female intimate partner applications almost one in five women had experienced sexual abuse or rape by their intimate partner. The findings showed that of those who reported being sexually abused, the majority, 82% (n=68), reported being forced to have sex or being raped. The majority of these women (90%) had been raped by their current partners, while the remaining 10% had been raped by an ex-partner. In addition to threats of further physical abuse, threats of rape or having the applicant raped were identified by women as reasons why they feared proceeding with the criminal justice process.

Deadly decisions

Victims of domestic violence are often threatened with death or more violence if they initiate or

proceed with criminal justice interventions. The interviews revealed that 44% (n=222) of all DVA applicants stated that their abusers had threatened to kill them. Threats to kill were present in 46% of cases (n=152) among women in the intimate partner category. There are also instances when the abuser threatens to send a third party to kill or harm the applicant. The following excerpt provides a glimpse into the contexts in which such threats are made and why returning to continue with the criminal justice process is, in some instances, more dangerous than protective:

... My ex boyfriend [name] came to my house and demanded that I must go with him. As I refuse to do so he started banging on the door and then proceeded in punching me with his fist. I had to phone my mother to come ... as we got near to the police office we notice that [he] was waiting opposite the police office with a sharp stone in his hand – he then walked next to us and started swearing at me [and] saying [you are sleeping with the policeman], you are a whore... He then threatened to get somebody to kill me if he don't get bail and if he gets a bail he will come and kill me himself ... [W11-FIP]

Other studies, such as that by Belknap and Graham, have found a positive relationship between lethal threats to victims of domestic violence and their (dis)continuance with the criminal justice process.²⁰ Belknap *et al* found that lethal threats by defendants featured in one fifth of cases they examined,²¹ while Anderson *et al* found that two thirds of domestic violence victims feared for their lives.²² In 15% of these cases victims reported that their abusive partners actually *tried* to kill them at some point in their relationship. Our interviews with DVA applicants revealed that fear of the perpetrator and coercion to withdraw – through explicit or implied threats – were significant factors affecting DVA applicants' decisions to return to court. When combined with the fact that in 28% (n=134) of all cases in this study DVA applicants reported that their abuser used a weapon during an incident of

abuse, it is clear that there are high risks associated with continuing the process.

In the work by Zoellner *et al*, prior threats to kill and threats to children were also positively related to whether victims obtained a final order or not.²³ The range of abuses that directly or indirectly involve children are also prominent in the experiences of women in our study, varying from threats to 'kidnap' children to actual physical (and in some instances sexual) abuse of children. Threats to kill children were not uncommon in situations where the victim has threatened to, or has actually left, the abusive relationship. In 50% (n=251) of the interviews, applicants reported having at least one child affected by the abuse. From these 251 applicants a total of 469 children were listed as being affected by the domestic violence, with an overwhelming majority of these applicants stating that their children had been, and continued to be, psychologically damaged by the abusive environments they were exposed to. The desire to protect and care for children is a formative factor with respect to how women 'manage' domestic violence and the decisions they make, particularly whether continuing to finalise a protection order is worth the risk.

Systemic issues

Although domestic violence victims' experiences with violence and their reasons for applying for protection orders defines the context in which the attrition of domestic violence cases takes place, it is what women say about not returning to court to finalise protection orders that is essential to this analysis. A critical finding from the interviews is that there are a number of systemic reasons why applicants do not finalise their POs. The difficulties faced in navigating the application process becomes particularly glaring when considering the cases where applicants returned to court to finalise the orders, but due to a systemic reason were unable to finalise their orders. The findings presented in Table 3 highlight these key reasons. Note that the respondents could have reported *more than one reason* for not returning.

Table 3: Systemic reasons for not finalising the protection order

Reasons for not finalising IPO	Number	%
Didn't get a copy of the PO from the court	43	9%
Didn't get any paper saying when I must come back to court	38	8%
The respondent didn't sign the papers/fled	65	13%
Didn't realise I had to come back to court	27	5%
Still with him, but I didn't realise I had to come back to court	25	5%
Applicant returned to court but no return of service at court	25	5%
Struck off the court roll	24	5%
Case postponed by the court on the return date	10	2%
IPO not served	113	23%
Lost confidence in the system	86	17%
Other	38	8%
Total responses	494	–

In 23% of the cases, the interim protection order was never served. In an additional 13% of cases, the respondent did not sign for the service or fled from the police. Seventeen per cent simply lost confidence in the system. Nine per cent of applicants reported that they had not returned to finalise their orders because the court had not provided them with a copy of the PO. These applicants were therefore unlikely to know their return dates. In eight per cent of cases, DVA applicants explicitly stated that the court had failed to provide them with information about their return dates and in an additional five per cent of cases the applicants were not aware that they had to come back to court to finalise their orders. And yet another group (five per cent) reported that they *had* returned to court to finalise the order, but upon arrival learned that their cases had been struck from the court roll.

These findings show that many DVA applicants do not return to court as a result of *systemic* problems, such as the courts not issuing

protection orders timeously or at all – even after multiple attempts by applicants to secure them from the courts – or cases being struck off the roll when applicants are late or at the wrong venue. Understandably, numerous attempts to get a copy of the protection order, endless phone calls to the courts and continued difficulties with serving protection orders are resulting in a critical and unnatural attrition of cases from the system.

There are three studies from the United States that were published in the 1990s and two more contemporary studies that have directly investigated why women do not proceed with the process of finalising protection orders.²⁴ These studies similarly found that poor criminal justice responses (multiple visits to court and the subsequent impact on work and childcare); difficulty with the service of protection orders; the lack of knowledge about the criminal justice system and other individual factors, such as the fear of perpetrators, were positively associated with the retraction of protection orders. Our study also found other ‘personal reasons’ for non-returns that have not been highlighted in this article – for instance, permission to leave work, childcare and financial dependency – which indicate critical structural barriers for not returning to finalise protection orders. These challenges to women’s continued participation in a system that is meant to alleviate the additional burdens of violent domestic contexts, lie at the heart of the ‘attrition problem’.

DISCUSSION

It is widely accepted that intensity and brutality of domestic violence increases over time. Psychological and mental abuse escalates to physical violence. The use of weapons, and threats to harm or kill children and other family members intensify as victims attempt to seek outside help. Restrictions on victims’ movements, association with others and daily routines increase. Regardless of how ‘serious’ the reporting incident may or may not be, it is the victims of domestic violence who are the best assessors of their own risk to further violence. One of the applicants in this study illustrates this point:

... He has a serious history of abusing women who needed to be hospitalised. He keeps telling me he is going to kill all three of us if I don't want to be with him. He is very aggressive and doesn't care how he swears and performs in front of [my daughter]. He knows where I work and where [my daughter] goes to school. I fear for my safety and the safety of my daughter. He told me last night he would rather go to jail, then he knows why he's alone, and that if I feel I want to go to the police and get an interdict, he doesn't care. Nothing will stop him from being with me or [my daughter], and if he can't be with us he will kill all of us ... [BL22-FIP]

It is reasonable to suggest that when victims fear for their safety they are extremely vulnerable; vulnerable to further violence as well as other factors that may have profound personal, social and economic consequences. Baker argues that women make a range of 'reasoned choices' in domestic violence relationships: staying with the abuser, lifting restraining orders and refusing to call the police are just some of these.²⁵ The act of requesting formal legal intervention through the court system – despite the risks and barriers presented by the use of that system – indicates that South African women seeking protection orders are using the system to actively interrupt the cycle of violence. Victims use the system to arrange security – and a woman may have negotiated terms with her abuser under which she would not proceed if he left her alone. It is thus a conscious, protective strategy, where the decision to continue the process to its finalisation is tangential to the decision to utilise external measures in the first place.

CONCLUSION

The primary question in this research was: Why do victims of domestic violence who apply for a PO against their abusers, not return to court to finalise those orders? The findings from this research have, in some instances, mirrored findings revealed in previous studies on domestic violence. Most notably they have highlighted again that victims of domestic violence suffer a wide range of abuses, that the intensity and

brutality of the abuse is likely to increase over time, and, most importantly, that seeking help can increase risk – whether actual or perceived. In reflecting on the types and severity of abuse suffered by domestic violence victims who apply for POs but who fail to finalise them, it is hard not to question why these victims would remain in their abusive situations, and why, with a legal remedy available to them under the DVA, they would not follow through and finalise the order. This research suggests that fear is a significant and common denominator in many cases of domestic violence. These 'fears' range from aggravating already violent situations and fear of reprisal from their abusers, to the fear of navigating what is perceived as a less than reliable criminal justice system.

From the findings presented it is clear that the issue of attrition in domestic violence cases is a complex one, with a number of often interconnected factors impacting on an applicant's decision-making with regard to finalising the PO. Only a few of these factors were presented here. These factors – both personal and systemic – may work together in a way that makes continuing the process simply impossible. They also, as Belknap and Sutherland argue, highlight the extraordinary risks that DVA applicants will take to actually proceed with the criminal justice process.²⁶



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NOTES

1. MOSAIC is a non-profit organisation that supports youth and adults who experience domestic violence and abuse. MOSAIC works in partnership with government and other service providers in communities, delivering a range of violence prevention and support services.
2. See L Artz, D Jeffthas & Z Majeit, *Reluctance, Retaliation and Repudiation: The Attrition of Domestic Violence Cases in Eight Magisterial Districts*. GHJRU, University of Cape Town: South Africa, 2011.
3. See L Artz, *An Examination of the Attrition of Domestic Violence Cases in the Criminal Justice System in Post-Apartheid South Africa*, Queen's University Belfast, 2008, 1-425.
4. Preamble, Domestic Violence Act (116 of 1998).
5. Internationally, protection orders are variously described as restraining orders, protective orders, no-contact orders or peace orders.

6. The application process is contained in Section 4 of the Domestic Violence Act (116 of 1998).
7. In instances where urgency cannot be shown an applicant is required to wait for the court hearing to see whether the order will be granted.
8. Section 6(4) of the DVA (116 of 1998).
9. L Zoellner, N Feeny, J Alvarez, C Watlington, M O'Neill, R Zager & EB Foa, Factors associated with completion of the restraining order process in female victims of partner violence, *Journal of Interpersonal Violence*, 15(10), 2000, 1081-1099.
10. By identifying the specific individual and systemic factors that contribute to attrition, we can begin to separate the broader structural challenges victims of violence face from the more immediately remediable systemic ones; the latter being a starting point from which to alleviate certain factors that discourage victims from proceeding with the criminal justice process.
11. Of the 533 DVA applicants contacted for interviews, only 6% (n=30) did not want to proceed with interviews or were not contactable. Many applicants mentioned that they were appreciative that MOSAIC had contacted them to ask about the reasons for not returning to court. For some of these applicants, the very act of a follow up call was seen as a 'support service'.
12. For a full description of the methodology see Artz et al, *Reluctance, Retaliation and Repudiation*.
13. Informed consent was established. The applicants were asked to sign a consent form that explained the purpose of the study. It also explained that should the applicant not return to court on the return date, the researcher would have permission to contact the applicant to discuss the reasons why s/he did not appear. To ensure that women were aware of their rights in this regard, it was also explained that the applicant had the right not to proceed with the application process.
14. Applicants who do not return to court on the return date to finalise their protection orders. P Parenzee, L Artz & K Moul, Monitoring the Implementation of the Domestic Violence Act: First Report 2000-2001, South Africa: University of Cape Town, 2001.
15. The definition for what constitutes an 'intimate partner' and what constitutes a 'family member' application is taken directly from the DVA [Section 1 (vii)]. An intimate partner is a male or female partner or ex-partner of the protection order applicant; and any of the following are thus placed in the family member category: father, mother, brother, sister, son, daughter, in-laws, as well as any other relationship as defined by this section.
16. See for example JC Campbell, D Webster, J Koziol-McLain, C Block, D Campbell, MA Curry, F Gary, N Glass, J McFarlane, J Sachs, P Sharps, Y Ulrich, SA Wilt, J Manganello, X Xu, J Schollenberger, V Frye & K Laughon, Risk factors for femicide in abusive relationships: Results from a multisite case control study, *American Journal of Public Health*, 93(7), 2003, 1089-1097.
17. Close scrutiny of these applications by men reveals that there are a notable number of counter-applications, meaning these male applicants are attempting to get a PO against someone – in a majority of cases female intimate partners – primarily because that person already has an order against them.
18. Own emphasis added. Finn, Statutory authority in the use and enforcement of civil protection orders against domestic abuse, *Family Law Quarterly*, 23(1), 1989, 43-73.
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BETWEEN ILLEGALITY AND LEGALITY

(In)security, crime and gangs in Nairobi informal settlements

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This article analyses the informal security market in the Nairobi slums of Kibera and Mathare. It assesses how gangs manoeuvre between legality and illegality in the provision of security. This article argues that there is a need to move away from a traditional interpretation of crime and criminal groups so as to understand the deeper reasons for their existence, why they continue to exist, and how they operate as they tactically shift their nature to survive. This article thus advocates for a multilayered approach to security in order to identify how best Kenyans can meet their human security needs.

The development of a human security framework by the United Nations Development Programme (UNDP) was a pioneering step. It shifted the focus of security from the protection of the state and its borders by military means, to the protection of individuals against a wider range of threats to their well-being. The UNDP defined human security as including ‘...safety from such chronic threats as hunger, disease and repression, and protection from sudden and hurtful disruptions in the patterns of daily lives, whether in homes, jobs or communities.’¹

However, this broad definition of security has revealed the limitations of the state in providing security, especially in African countries. While most governments guarantee protection from external aggression, they cannot provide adequate internal security. The void has been taken over by non-state actors like criminal gangs, especially in urban slums. This is the situation that the Kenyan

government finds itself in today as it grapples with the growth of gangs in slums.

In the opinion of many residents in informal settlements, the police are generally slow, inept, corrupt and unlikely to properly investigate criminal cases for successful prosecution. According to the 2010 Global Corruption Barometer Report, at least 92% of Kenyans perceive the police force as the most corrupt institution of the state. Fifty-nine percent of the respondents said that either they or a member of their household had paid a bribe to the police.² Indeed, the police force has constantly been listed as among the top three most corrupt institutions in Kenyan urban bribery surveys.³ Further, an encounter with a police officer in a slum will almost always end up with harassment, or paying of a bribe to avoid arrest and incarceration.⁴ People complain of police failures in assisting them: ‘If you go to the police, they ask you to buy fuel for them to travel to the crime scene, or they ask you for airtime to call their seniors. Other times they tell you they will come to investigate but they don’t come. Most of the times, nothing is

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done or the criminals are set free for lack of evidence.⁵ Consequently, people have resorted to gangs to provide security and other social services in the slums.

The majority of poor people in urban slums live on the margins of 'illegality', which is characterised by unlawful acquisition of housing, non-payment of taxes, and the illegal tapping of water and electricity, among others. The government has been unable to adequately provide these services to slum residents, who are consequently forced to rely on gangs for service provision, at a fee. They turn to the same gangs to resolve matters of justice, law and order. Gangs have therefore emerged as key players in the provision of security, less as contributors to the disorder in slums and more as actors that mitigate the absence of government.

Most of the research and analysis on gangs in Kenya has focused on the political and cultural elements of these groups.⁶ Little research has been undertaken to study the economy of informal security in urban slums. This paper seeks to fill this gap by analysing how gangs operating in Kibera and Mathare slums manoeuvre between formality and informality, legitimacy and illegitimacy in their operations. Only by understanding how these gangs exist and operate can we avoid viewing them through the narrow, simplistic and sensational lenses through which they are often seen.

At the onset, it is important to note that the provision of security in informal areas is more complicated than simple supply and demand. Apart from use of force by the gangs, the social context and the relationship between local residents and the groups influence the operations of the security industry. A discussion of these relationships forms the heart of analysis of this paper.

In collecting primary data, roughly 15 people, including different gang members, were interviewed, using one-on-one semi-structured interviews. Further, six focus group discussions (FGD) of ten people each were held from

December to February 2011 in Kibera and Mathare urban slums (three FGDs in each area). Purposive sampling was used to select the FGD participants and the overriding factor was that they had to be residents of Kibera and Mathare slums.⁷ The study has also benefitted from several security-related seminars and roundtable meetings that the researcher has attended.

Secondary data that have helped enrich the study were retrieved from books, newspapers, journals, non-governmental organisation (NGO) reports, and any other relevant published and unpublished information on informal security provision in Africa.

In the first section of this article, I explore the theoretical framework of the study. In the second part, I give a short history of the proliferation of gangs in Kenya and lastly analyse the complicated nature of relations between residents of Kibera and Mathare, local gangs and the police.

UNDERSTANDING GANGS

Kenya can be termed a 'hybrid state'⁸ where state and non-state actors share the public goods of security. Boege *et al* argue that in a 'hybrid state', diverse and competing claims to power and logics of order co-exist, overlap and intertwine. 'In such an environment, the "state" does not have a privileged position as the political framework that provides security, welfare and representation; it has to share authority, legitimacy and capacity with other structures.'⁹ As such, violence has been 'democratised',¹⁰ ceasing to be the resource of the powerful or the police. It has, on the contrary, been utilised by a variety of actors to achieve their goals.

However, policing in a 'hybrid state' involves a complex pattern of overlapping agencies providing security, depending on the time of day, social status of the person involved and the economic activity they are engaged in. Those who work in offices are most likely to encounter private guards or state police securing office buildings. Commuters encounter gangs who control bus terminals and public service vehicles.

People who live in middle and upper class estates have private guards to secure their homes while dwellers in the informal settlements rely on gangs for security. In a day, a citizen can therefore encounter both formal and informal 'policing'.

In Kenya, formal policing is carried out by the Kenya Police Force and the Administration Police, who are guided by the Constitution and their operational acts of parliament. Informal policing however takes place mostly outside the regulatory framework of the state. Its actors include gangs and private security companies that bring the otherwise absent public good of security to situations where state organs are largely not present.

Informal policing has its share of critics and supporters alike. Some have associated informal policing with 'gangsterism', 'commodification', 'warlordism', terrorism, radicalisation, ignorance and abuse of basic human rights.¹² Other scholars have argued that informal policing is not only popular in the absence of formal police but it has been proven to actually work.¹³ In some areas, it has been anchored in the local traditional systems of governance.¹⁴

Informal security networks, especially in slums, are a complex web of linkages of different groups that include gangs, youth groups and vigilantes. There is little in the way of a theoretical consensus in classifying them. This paper adopts the perspective that the youth providing informal security in Kibera and Mathare operate as gangs. Despite not having an agreement on the definition of a gang, scholars have widely accepted several characteristics of gangs.¹⁵ It is generally agreed that gangs can be defined by their ability to organise as a group with clear names and symbols, and by having a clear territory in which they exert their power. They mostly have a shared ethnic, race or age group identity. Members view themselves as a gang, and they are recognised by others as such. Gangs are also said to be involved in an elevated level of criminal activity.

Most people view gangs as a group of young people with negative attributes, operating illegally,

and engaged in predatory practices like extortion, violence and human rights abuses. Some scholars have even suggested that what sets gangs apart from other youth groups is their routine association with violence, which the wider society sees as inherent to gangs.¹⁶ This however ignores the fact that gangs are the product of particular social and political settings. The physical deterioration of poor neighbourhoods has a spiralling effect on the social control within these areas, and provides a fertile environment not only for crime and other deviant behaviours but also for the rise of gangs.¹⁷ In addition, gangs can also play positive roles, for example by reducing crime levels and campaigning against drug abuse, prostitution and other negative social phenomena.¹⁸

Thus, in attempting to understand the operation of gangs in Kibera and Mathare, one needs to look at the complex relationship between the individual members of the gangs, their behaviour, and their influence over economic and social change in the areas where they operate. Violence is not the only defining characteristic of gangs. We need to recognise the other factors over which gangs hold influence in order to develop a complete picture of why they are able to operate between legality and illegality, legitimacy and illegitimacy.

SNAPSHOT OF GANGS IN KENYA

In March 2000, the Kenyan Police Commissioner outlawed nearly two dozen gangs active across the country. This did not stop them from operating, however. In August 2010, the Kenyan government enacted the Prevention of Organised Crimes Act 2010,¹⁹ which outlines strategies to address organised crime. A month later, 33 gangs that were operating in various parts of Kenya were outlawed. Ironically, these included some of the groups that were banned in 2000. However, banning or outlawing the gangs did not stop them from operating, as they are very informally organised and hence hard to disband. Moreover, the instrumentalisation of violence and impunity within Kenyan society has also contributed to the continued existence of these groups. Some of

their leaders and sponsors, though publicly known, have never been prosecuted, giving them a sense of comfort. More fundamental is that the Kenyan government has not taken measures to address reasons why gangs exist, which is largely due to a lack of economic and job opportunities. The gangs play different roles in Kenyan society. When respondents were asked what activities the gangs engage in during a November 2010 national survey, 48% said they collect illegal taxes, while 42% cited violence. Another 14% said they provide services and 22% said they offer security for payment.²⁰ Further, when asked who they would rely on to protect them between the police and gangs, 75% of respondents preferred the police while 19% said it is important for both the gangs and police to protect them.²¹ In another 2010 survey by the World Bank, residents of Korogocho slum in Nairobi were asked to name three groups that are doing the best job in reducing crime and violence. Fifty-six per cent named vigilante groups. The Kenyan police were ranked fifth with only 5% of responses.²²

Thus, whereas the majority of respondents would rather have the police providing security, there are those who would opt to have them share this duty with the gangs. It therefore emerges that police are not the only recognised security providers. Although citizens would prefer to rely on a trustworthy police force for protection, they sometimes have to rely on gangs, due to the inefficiency and lack of legitimacy of the force.

Recognising the centrality of organised gangs, the 2010 Kenya Police Crime Report²³ notes that threats to national security are primarily posed by organised criminal gangs. The Ministry of State for Provincial Administration and Internal Security also notes that the emergence of gangs poses a significant threat to peace for most Kenyans.²⁴ Regrettably, police responses to gangs and gang-related violence has sometimes led to extrajudicial killings of youth suspected to be members of the outlawed groups. According to the UN Special Rapporteur on extrajudicial executions, 'killings by police in Kenya are systematic, widespread and carefully planned. They are committed at will and with utter

impunity'.²⁵ However, many Kenyans support heavy police tactics and argue that it is the only way to handle crime and the proliferation of gangs. A lack of trust and faith in the criminal justice system has led to these high approval ratings for the extrajudicial executions of suspects. Nevertheless, the killings have not translated into lower levels of crime or the demise of gangs.

The Kenya Police Force acknowledges that it has inadequate resources and personnel to effectively tackle crime and organised gangs.²⁶ The police citizen ratio is at 1:850, which falls below the recommended United Nations ratio of 1:450. The force is inadequately resourced in terms of, for instance, police vehicles and the relevant technologies to solve crime. Officers are overwhelmed by the wide range of policing duties, which further compromises the quality of investigations.²⁷

The factors outlined above have thus contributed to the state's inability to adequately offer security, especially to the urban poor, forcing them to rely on gangs.

INFORMAL SECURITY IN KIBERA AND MATHARE

Like other informal settlements in Nairobi, Kibera and Mathare slums are characterised by high population density, unplanned and crowded housing, and a lack of infrastructure.²⁸ Most roads are inaccessible to vehicles, drainage channels are often blocked, and heaps of uncollected garbage are scattered everywhere. In addition, insecurity is a big problem, and has forced residents to resort to the informal security offered by gangs.

Gangs operating in Kibera include Siafu, 12 Disciples, Kamukunji Pressure Group, Military, Yes We Can, Mungiki, J-10 and Debunchers. All of these operate in Laini Saba and Katwekera areas within the slum. Each has its own territory within these areas. In Mathare 3C and Kosovo areas, the most prominent groups are the Taliban and Mungiki. Despite the gangs having different names, their mode of operation is similar and

they have cross-cutting features. For example, most gang members interviewed said the groups are made up of young people.²⁹ In addition, one has to pay a registration fee, which varies from group to group, to become a member. Ethnicity is not necessarily a criterion for enrolment in the gangs and their members are from different ethnic groups.

All the gangs have leaders who are usually the founders. Whenever there are unresolved disagreements, the aggrieved parties often break away and start their own group in a different area, where they continue carrying out the same roles.³⁰ Two gangs rarely operate in the same area, as each jealously protects its turf.³¹ Though banned by the state, all of them still organise people to attend political rallies in their areas of operation and provide security at the meeting venue. They also regularly take part in crime, solve disputes in the slums, provide social services like illegal water and electricity connections, and extort money from slum dwellers.

Most shelters in the slums do not have piped water or electricity. However, the gangs install illegal connections without meters to tap into the main water and power supply lines.³² A minimum of KES3 (30 cents USD) is charged for a 20-litre gallon of water, but this price increases in the event of a water shortage. To connect electricity, the gangs charge between KES300 to KES1000 (3-11 USD), depending on the size of the house, paid once after connection. Water and electricity companies disconnect the illegal supplies whenever they discover them. This sometimes leads to violence in the slums with the gangs coming together to chase away officials carrying out the disconnections.

Gangs in both Kibera and Mathare charge a security fee of KES100-200 (about 1-2 USD) per month depending on whether residents occupy a permanent or semi-permanent house. Businesses pay KES300-500 (about 3-5 USD) per month depending on the size of the business. For tourists and filmmakers there is a flat security fee of KES5000 (55 USD) that is only paid once. These

fees are set by the gangs, and are non-negotiable and paid on demand. Failure to pay results in harassment and makes it impossible to live in the area or operate a business.

It is thus arguable that by providing and charging for security, these gangs have altered the nature of state power at the local level. They have renegotiated and blurred the boundaries between state operations and those of the gangs.³³ The gangs are the 'government' and charge 'taxes' through extortion or protection fees. The state no longer commands the monopoly of force it once had. The gangs have evolved new normative structures and modes of operation and organisation with far-reaching consequences for economic and social welfare.³⁴

Nevertheless, the relationship between the community and the gangs is complicated. According to one of the gang members, they have a 'love-hate relationship' with the community, which is also symbiotic.³⁵ The gangs benefit from the community by being given a safe haven when the police are pursuing them. They are also tolerated and given space to conduct their activities since 'they are not outsiders; they are the children of the community, born and raised there and are products of the environment they have grown in.'³⁶ Unemployment, idleness, poverty and lack of opportunities have led to crime and violence in the informal settlements. This has sometimes led people in the slums to empathise with the gangs and to blame the government for not doing enough to create jobs. The youth are left with little or no choice but to turn to organised crime to eke out a living.

In turn, the community benefits by getting security and other social services that the government fails to provide. 'The people support them because of providing such things like water, toilets and electricity which the government does not supply.'³⁷ However, the gangs are also supported because of the fear they instil among the people, compelling them to pay for services rendered. According to a resident of Mathare, 'the groups take advantage of this fear to unreasonably extort money from us.'³⁸

An ambiguous relationship exists between the gangs, the police and provincial administration as they operate along a continuum of legality and illegality. At times the police kill gang members, which serves as a daily reminder that the state is not entirely absent in the informal settlements, and that it is also powerful. Gang members have been used as police informers, in the long run establishing a system of mutual tolerance, co-existence and co-operation in solving crimes.³⁹ However, police also have been known to protect the gangs when they commit crimes, since they may receive proceeds of extortion.⁴⁰

Residents of Kibera and Mathare report crime to both the police and the gangs, depending on its seriousness. Murder and rape are considered serious crimes and are reported directly to the police.⁴¹ Petty crimes, including muggings, theft, housebreaking, fights, brewing of illicit alcohol and domestic violence are reported to the gangs. According to one Kibera resident, they do not like reporting petty crimes to police 'since they will not solve the crime or recover stolen goods'.⁴² If a suspected criminal is apprehended, the gangs may choose to hand him over to the police or not, or may subject him to mob justice to 'teach him and others a lesson'. Other forms of punishment include banishing the suspect if he or she comes from within the community. By doing this, the social relations between the gang and the community are enhanced.

Part of the reason Mathare and Kibera residents prefer handing the suspects to gangs is to make it difficult for the suspected criminals to take revenge against them. Secondly, the gangs are trusted to protect the identity of witnesses, unlike the police who sometimes name them while conducting investigations. The other reason citizens will hand crime suspects over to gangs is because of the generally high level of mistrust the public have of the police, which is reinforced by high levels of police corruption (police sometimes takes bribes in exchange for not apprehending criminals).⁴³ This results in a loss of public trust in the police and a blurring of the line between the police and the gangs.

Since citizens refer to gangs to solve problems, this might suggest a good social relationship between gangs and the community. However, the relationship is more complicated than this. On the one hand, the gangs are violent and will most likely resort to using violence to solve problems. Hence, they are a source of violence and criminal actions. On the other hand, they have a reputation of solving problems more quickly and efficiently than the police. Since the members of gangs are also inhabitants of the slums they are not generally considered to be 'bad people' but rather victims of circumstances they grew up in.

Nevertheless, it is clear that the community seeks the services of gangs because there is no other effective institution to turn to. If the police were effective, and inspired trust, there would be less need to involve gangs in problem solving. While the state is not completely absent in Kibera and Mathare, its ineffectiveness makes residents turn to gangs for their security needs.

Considering the role that the gangs play in the informal settlements like Kibera and Mathare, it can be argued that they are an invisible state and represent the real state of polity.⁴⁴ This invisible state receives praise when it is working well, ensuring norms and sanctions that resonate with local needs, but is criticised when it engages in human rights violations. The gangs are thus sub-political institutions exercising political authority, despite not being part of the formal state. They influence social order in response to the limitations of formal politics.⁴⁵

The linkages between the informal and formal state, however, are complex. Importantly, therefore, Kenya must adopt a model for addressing human security needs that suits its local conditions, while at the same time undertaking security sector reforms. The Organisation for Economic Cooperation and Development (OECD) has recognised that the reform of the justice and security sectors requires a multilayered approach that provides assistance to a wide range of legitimate state and non-state actors. Undertaking a multilayered approach will give people a chance to build on their local

resources and knowledge in security provision. It will offer an opportunity to untangle the complex linkages between the invisible and visible state, leading to the formation of a strong state that is able to provide both national and human security. In addition, forming linkages with non-state actors will strengthen the state's legitimacy in ensuring people are safe, since all providers would be seen as an integral cog in the government security machinery.

However, this needs to be done hand in hand with police reforms, which need to build on a framework based on principles of accountability. Clear standards should be established, and appropriate sanctions put in place for those who transgress. Already, the Kenyan government has started implementing provisions on security sector reforms as outlined by Chapter 14 of the Constitution promulgated on 27 August 2010. Parliament has approved the National Police Service Bill. The new legislation will set the stage for the replacement of the entire police leadership, in line with the new Constitution. The remaining bills that are in draft form include the Independent Policing Oversight Authority Bill, which is intended to establish a police oversight body, and the Private Security Industry Regulation Bill, which will create synergy between the government and private security providers.

However, no major reform has been undertaken in the police force. Attitudinal change among the police and political commitment are required for comprehensive police reforms. Furthermore, reform must be comprehensive in order to encompass all sectors and actors within the justice system.

CONCLUSION

This article has attempted to demonstrate that the existence and operation of gangs in Kibera and Mathare is a result of complex factors. There are interesting and symbiotic linkages between citizens and informal law enforcement groups. If properly utilised, these linkages could provide opportunities for a multilayered approach to policing and the provision of other services in the

slums. In order to do this, the government should adopt an enabling approach that supports and regulates the local security governance mechanisms.

Considering the roles that gangs play in slums like Kibera and Mathare, it is necessary that security reforms take note of the operations of informal policing. This might mean incorporating their good elements and utilising the already existing network to strengthen formal security structures. Disbanding the gangs without providing adequate measures to fill the security gap will not solve crime in slums.



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A PRISONER'S RIGHT?

The legal case for rehabilitation

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This article examines the rights of South African prisoners to rehabilitation in light of the entitlement to rehabilitation contained in the Correctional Services Act 111 of 1998 and the White Paper on Corrections, and thus enshrined in statute. The author contends that prison conditions play a significant role in the failure of the South African government to implement successful rehabilitative programmes. The article considers the potential recourse available to South African prisoners to judicially enforce the South African government's obligation with regard to effective rehabilitation programmes.

This article will argue that while there is no clear, identified right to rehabilitation for a prisoner contained in either the Bill of Rights or statute, the right does exist in some form and can be enforced by individual prisoners in a court.

In order to make this argument it is necessary to investigate what the meaning and nature of a 'right' is and what consequences accrue thereto. Thereafter, the article will seek to show that in light of the purpose of imprisonment in South Africa and the language used in the relevant legislation, there is a duty on the state to provide rehabilitation to prisoners, and hence, prisoners have a right to force the state to comply with such a duty.

The article will also argue that rehabilitation ought to be recognised as a right in order to give full and proper effect to other fundamental rights enshrined in the Constitution of South Africa, such as the right to freedom and security of the person and the right not to be treated or punished in a cruel, inhuman or degrading way.

The article concludes that in light of the purpose and importance of rehabilitation in the correctional system, as well as for furthering other rights, a right to rehabilitation for prisoners does exist in South Africa, and can be enforceable in a court of law.

THE MEANING OF A 'RIGHT'

A right can be defined as something that is due to a person by just claim, legal guarantee or moral principle; a power, privilege, or immunity secured to a person by law; or as a recognised and protected interest, the violation of which is wrong.¹

Rights can also be explained as correlative to duties. Thus, where there is no duty, there can be no right.² However, the converse is not true, as duties may exist without corresponding rights.³

When judging whether someone has an enforceable entitlement, the important question is *where* such entitlement originates. Denise Meyersen defines legal rights as 'those rights enforceable through the courts, which are granted to us by statute, common law and constitutional provisions'.⁴

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A vital characteristic of a right is therefore that it can be enforced through the courts. This is in keeping with the maxim *ubi ius ubi remedium* – where there is a right, there is a remedy. This maxim implies the existence of an authority with the power to grant a remedy if that rule is infringed.⁵

Considering the above discussion, it appears therefore that we can extract the essential characteristics of the nature of a right. It is an *entitlement* with a *corresponding duty* that finds its *authority in a source of law* and can be *judicially enforced*.

REHABILITATION⁶ IN A SOUTH AFRICAN CONTEXT

A primary purpose of the correctional system in South Africa, as articulated by the Correctional Services Act, is to promote ‘*the social responsibility and human development of all prisoners and persons subject to community corrections*’.⁷ Further, the purpose of imprisonment itself declared by the Act is to enable the prisoner to lead a socially responsible and crime-free life in the future.⁸

However, while the Correctional Services Act claims that rehabilitation is one of its primary aims, it makes no attempt to define the concept. It has been astutely pointed out that the concept of rehabilitation is easier to describe than to define.⁹ For this reason this article focuses on the description provided by the Department of Correctional Services itself. In the 2005 White Paper on Corrections in South Africa,¹⁰ rehabilitation is described as the result of a process that combines the correction of offending behaviour with human development and the promotion of social responsibility and values.¹¹ Further, it states that rehabilitation should not only be viewed as a crime prevention strategy but as a holistic phenomenon¹² achieved through interventions to change attitudes, behaviour and social circumstances.¹³ Indeed, the mission statement of the department involves placing rehabilitation at the centre of all departmental activities.¹⁴

While the term ‘rehabilitation’ is used in South Africa and many other jurisdictions, Germany prefers the term ‘resocialisation,’ which acknowledges that the aim of rehabilitation is not to *cure* the offender, but to endeavour to restore an offender’s relationship with society so as to prevent future crimes being committed.¹⁵ The focus is therefore on the reintegration of the offender into society as a socially responsible citizen. Given the explanation of rehabilitation and the kinds of programmes identified by the White Paper, which focuses on education and the acquiring of skills,¹⁶ it appears as though South Africa’s conception of rehabilitation is similar to that of the German resocialisation ideal.¹⁷

In a South African context, the socio-economic circumstances of offenders entering the prison system cannot be ignored, as some prisoners will not necessarily have had access to opportunities for skills development (whether social or educational).¹⁸ Hoffman proposes that divergent socio-political sentiments, originating from a pre-1994 context, underlie the high crime and recidivist rates in South Africa.¹⁹ One of the aims of rehabilitation is to reintegrate a prisoner back into society, with the hope that crime will be avoided in the future. But the kind of society into which a prisoner will be ‘reintegrated’ is often the environment from which crime takes life.²⁰

Rehabilitative programmes thus ought to equip offenders with hard skills, life skills and opportunities that they might never have been able to access on their own. Offenders ought to be able to return to their families and communities, not merely with new resolve to avoid crime, but also with the necessary tools and expertise to begin afresh.

The White Paper describes rehabilitation as the true essence of deterrence, as it is rehabilitation and not punishment that breaks the cycle of crime.²¹ Thus, as deterrence and rehabilitation are both stated aims of imprisonment, by rehabilitating offenders, the department would give effect to both these ideals. Indeed, it has also been argued that rehabilitation is the only justification of criminal sanctioning that obligates

the state to care for an offender's long-term welfare.²²

It can be argued that very few rehabilitative programmes can be shown to reduce re-offending. It is also acknowledged that only limited information about rehabilitation and its successes exists, particularly in an African context.²³ The White Paper itself acknowledges that there are no reliable data in South Africa on recidivism.²⁴ Until there are constructive and properly resourced programmes that are available to all prisoners, we cannot know the true value that rehabilitation can play in our prisons.

The article will now turn to whether prisoners are endowed with the *right* to be rehabilitated and to demand that the state discharge the duty to rehabilitate.

REHABILITATION AS A FREE-STANDING RIGHT

It is evident that rehabilitation is viewed as one of the principal aims and functions of the correctional system in South Africa, and as one of the aims of imprisonment. The right to rehabilitation is consistent with the drive towards the full restoration of the civil and political rights of citizenship after release.²⁵ In this regard, the Department of Correctional Services (DCS) has the responsibility to ensure that offenders gain market-related skills,²⁶ so as to enable offenders to take their place in society, to be gainfully employed and become economically successful citizens.

The literal meaning of the words used in the White Paper appears to entrench rehabilitative aims as an obligation of the Department of Correctional Services.²⁷ In the language of rights, such obligation creates a duty on the state to provide for rehabilitation of prisoners in its care. The department must make a systematic effort to ensure the rehabilitation of offenders,²⁸ and to provide programmes for offenders to address offending behaviour and to promote social responsibility, lifestyle choices and ensure the future employability of the offender.²⁹

It is the view of this author that the significance and importance placed on rehabilitation as an ideal would be undone if it were not considered that prisoners have a right to be rehabilitated. Not only would individual prisoners be left without recourse to rehabilitation if they had no opportunity to participate in an already established programme at their particular detention centre,³⁰ but one of the most appropriate ways of holding the state accountable to its obligation to rehabilitate offenders in its care, that is, by way of enforcement of a right, would not be possible.

The remaining question then, is whether this right is enforceable and justiciable in a court of law.

There are numerous rights that are considered non-justiciable across many jurisdictions, most particularly socio-economic rights. However, uniquely in South Africa, the Constitutional Court has held on more than one occasion that socio-economic rights are justiciable and has been willing to fashion creative remedies to force the state to comply with its obligation to provide adequate housing and health care.³¹ There is therefore no reason why a court in South Africa should be unwilling to allow a prisoner to claim that his or her right to rehabilitative programmes is not being upheld, and to grant an appropriate remedy, forcing the Department of Correctional Services to comply with its obligation.³²

Germany has recognised prisoners' rights to resocialisation,³³ which provides courts with a substantive basis upon which to explore the nature of the prison regime and the power to force the state to implement policies within prisons.³⁴ If, as argued in this article, there is a recognised right to rehabilitation in South Africa, then individual prisoners ought to be able to have this right enforced in court, as it is the most appropriate and successful means by which prisoners can demand that the right is upheld.

This article therefore argues that the essential characteristics of a right are fulfilled: there is a duty on the state to rehabilitate all prisoners,

which gives rise to an entitlement to be rehabilitated; this duty is enshrined in legislation and is the cornerstone of the Correctional Services framework; and the state can be held accountable to this duty in a court of law. Thus, it is argued that in South Africa prisoners enjoy a recognisable, free-standing, enforceable right to rehabilitation.

THE RIGHT TO REHABILITATION AS A NECESSITY FOR OTHER RIGHTS

Whether the right to rehabilitation exists can also be argued for via the line of reasoning that it is necessary to recognise a right to rehabilitation in order to give full and proper effect to other entrenched, constitutional rights. There are various rights that are relevant in such an inquiry.³⁵ This article considers the rights to freedom and security of the person as provided for in section 12 of the South African Constitution, and the right to human conditions of detention provided for in section 35 of the Constitution.

The right to freedom and security of the person

Under section 12(1)(e) of the Constitution, all citizens have the right not to be treated or punished in a cruel, inhuman or degrading way.³⁶ Since incarceration involves state control over prisoners in its care, and rehabilitation relates to the conditions under which an offender is incarcerated rather than the actual sentence of a term of imprisonment, the discussion of a right to rehabilitation arises in the realm of the manner of the 'treatment'.

The right to dignity is at the heart of the right not to be treated or punished in a cruel inhuman or degrading way.³⁷ Human dignity is a foundational value of the South African Constitution, and the right to dignity is also entrenched in section 10 as a recognised, free-standing right in the Bill of Rights.³⁸ Section 12(1)(e) recognises that certain forms of treatment can diminish the dignity or humanity of the person subjected to such treatment.³⁹

In *S v Dodo*,⁴⁰ the Constitutional Court held that in deciding whether treatment or punishment is cruel, inhuman or degrading, the impairment of human dignity must be involved in such determination.⁴¹ However, each of the terms *cruel*, *inhuman* or *degrading* means something very different, and only one of them need be fulfilled for section 12(1)(e) to be infringed. The concept that is best suited for the purposes of this discussion is *degrading* treatment.⁴² Treatment is considered degrading if it causes 'feelings of fear, anguish and inferiority capable of humiliating and debasing [the victims] and possibly breaking their physical or moral resistance.'⁴³ A finding of degradation could turn on the manner and method of punishment, or its physical and mental effects.⁴⁴

A sentence of imprisonment necessarily involves various infringements of a prisoner's dignity and freedom. The reality of prison life by nature entails constrained freedom of movement, communal same-sex living, strict time-frames, reduced ability to work and socialise and restricted opportunities to exercise, to mention a few. In a South African context, prison life also involves fear of gang violence and overcrowded cells.⁴⁵ A term of imprisonment without the opportunity for a prisoner to access rehabilitative programmes is likely to be a demoralising and dehumanising experience, which may result in treatment that is degrading.

The failure to give effect to the duty on the state to rehabilitate prisoners denies a prisoner the right to freedom from degrading treatment and therefore also the right to dignity.⁴⁶ It is, therefore, necessary to recognise a right to rehabilitation in order for section 12(1)(e) to be given full and proper effect.

The right to humane conditions of detention

In terms of section 35(2)(e) of the Constitution, every detained person is granted the constitutional right to conditions of detention that are consistent with human dignity.⁴⁷

Courts have rejected the argument by the state that it owed no higher duty to provide medical care to

prisoners than that available at state expense to the general public.⁴⁸ The Constitutional Court in *Van Biljon*⁴⁹ held that section 35(2)(e) provided more extensive positive rights for detainees than for the general population.⁵⁰ This is due to the higher duty of care that the state owes to persons in its custody because of the uniquely close relationship that prisoners share with the state,⁵¹ and, unlike free citizens, prisoners have no access to other resources to gain access to medical treatment.⁵²

In the case of *Rossouw v Sachs*,⁵³ the Appellate Division held that since the purpose of detention in that particular case was interrogation, by allowing the detainee reading material he would be less inclined to cooperate, as the tedium of imprisonment would be lessened. However, it has been argued that the reasons for detention should not be used to create discomfort on the part of detainees.⁵⁴ The argument is even stronger in the context at hand, since a major rationale for imprisonment is to rehabilitate prisoners. Reading and writing materials are important means of securing the successful rehabilitation of offenders. Thus, in acknowledging the recognition of a right to rehabilitation, prisoners would have access to reading and writing materials, which would go some way towards ensuring humane conditions of detention.⁵⁵

In the case of *Strydom v Minister of Correctional Services*,⁵⁶ the High Court (Witwatersrand Local Division), in deliberating whether the right to access to electricity was required in order for the conditions of detention to be humane and consistent with human dignity, held that the denial of access to electricity could materially affect prisoners' prospects of rehabilitation and result in prisoners being 'treated and punished in a cruel or degrading manner'.⁵⁷

This argument leads into the murky area of general conditions of imprisonment that are not consistent with human dignity,⁵⁸ and not conducive to rehabilitation. It has been shown that overcrowding and hygiene conditions in South African prisons are far below the international standards, and prisons are under-

staffed and lack the capacity of officials such as social workers and educational specialists, who can effectively implement rehabilitative programmes.⁵⁹ Rehabilitation cannot take place in such a context without first providing prisoners with conditions that are consistent with human dignity.⁶⁰ This argument recognises the link between the right to humane conditions of imprisonment, which is a constitutionally enshrined right, and rehabilitation, which, it is argued, is elevated to a *right* status. Thus the right to rehabilitation cannot be denied because general conditions of detention leave much to be desired. In fact, a right to rehabilitation ought to be recognised because it is a means of creating and ensuring the conditions of detention that can be called 'humane'. The corollary is also true: that in order for rehabilitative programmes to be effected successfully, prisons need to provide an enabling environment for rehabilitative interventions.⁶¹

The right to conditions consistent with human dignity must therefore be interpreted generously in light of the special duty of care owed by the state to prisoners. Furthermore, as argued earlier in this article, the state has created the particular duty on itself to provide rehabilitative programmes for prisoners in its custody. By recognising a right to rehabilitation, many other conditions of detention will be catered for, such as access to reading and writing materials, access to education and access to electricity. It could also be argued that when courts have emphasised the importance of these benefits in light of their role in rehabilitation, the right to rehabilitation is implicitly recognised as essential to ensure humane conditions of detention.

It is likely that the main criticism that would be levelled at recognising rehabilitation as a right is related, but not restricted, to a separation of powers issue. The primary critic would in all probability be the state, and the core issue raised would be that the state does not have the resources or the capacity to be able to treat rehabilitation as a right that can be enforced by individual prisoners.

In the case of *B v Minister of Correctional Services*,⁶² the Constitutional Court held that although the resources of the state were important

to consider, the state could not use a defence of non-affordability to deny the applicant's assertion of the 'right to adequate medical treatment' once the content of that right had been established.⁶³ Similarly, I would argue, it is up to the state to raise a lack of resource argument before a court, but the possibility of a lack of resources in a particular case cannot outweigh the necessity of affording prisoners the general opportunity to demand that the state discharge its self-appointed duty to rehabilitate.

CONCLUSION

This article has shown that access to rehabilitation, through educational and skills development programmes, is necessary to improve a prisoner's chances of a successful future out of prison. It is clear that rehabilitation is acknowledged as a vital aim for the correctional system and a stated obligation on the state. The Correctional Services Act and the White Paper place a heavy duty on the Department of Correctional Services, because they regard rehabilitation as a right of prisoners and not as a luxury dependent on resources.⁶⁴ An unenforceable duty is no real duty at all. Without recognising that prisoners must be given the opportunity to hold the state accountable to its duty, prisoners are not afforded right of recourse.⁶⁵ It has been said that imprisonment without the opportunity of rehabilitation is inhumane and retrograde.⁶⁶ Prisoners should thus not be denied the right to demand rehabilitation.



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NOTES

1. Bryan A Garner et al., *Black's Law Dictionary*, 9th ed., USA: West Publishing Co., Thomson Business, 2004, 1436.
2. John Chipman Gray, *The Nature and Sources of the Law*, 2nd ed., Columbia University Press, 1921, 8.
3. Ibid.
4. Denise Meyersen, *Essential Jurisprudence*, New York: Routledge, Cavendish, 2006, 117.
5. Iain Currie and Johan de Waal, *The Bill of Rights Handbook*, 5th ed., Juta & Co Ltd, 2005, 23.
6. Amanda Dissel, Rehabilitation and reintegration in African prisons, <http://www.hsrcpress.ac.za> (accessed 15 August 2011), 156. Rehabilitation is a term broadly

accepted to refer to a planned intervention that aims to bring about change in the offender's attitude, personality and cognitive processes. Sandy Hoffman, Rehabilitation of Prisoners in a Transforming South Africa, Consolidating Transformation Conference 7-8 February 2005, <http://www.csvr.org.za/wits/confpaps/hoffman.htm> (accessed 15 August 2011), 7. A broad description of the kind of interventions envisioned include social relations, education and vocational skills and employment. Effective rehabilitation is a lifelong process that relies on individual commitment and socio-political and institutional recognition and support.

7. Section 2(c) of the Correctional Services Act 111 of 1998.
8. Section 36 of the Correctional Services Act 111 of 1998.
9. JD Mujuzi, The Prospect of Rehabilitation as a "Substantial and Compelling" Circumstance to Avoiding Life Imprisonment in South Africa: a Comment on *S v Nkomo*, South African Journal of Criminal Justice 21(1) (2008), 12.
10. Department of Correctional Services White Paper on Corrections in South Africa, 2005.
11. Ibid., paragraph 4.2.1.
12. Ibid, paragraph 4.2.2.
13. Ibid., paragraph 4.2.3.
14. Ibid., paragraph 4.3.2.
15. Liora Lazarus, *Contrasting Prisoners' Rights: A Comparative Examination of England and Germany*, Oxford University Press, 2004, 61.
16. White Paper on Corrections in South Africa 2005, paragraph 4.4.8.
17. Lazarus, *Contrasting Prisoners' Rights*, 193. The German 'constitutional resocialisation principle' determines the nature and purpose of the prison system and permissible limitations on a prisoner's negative rights.
18. Sandy Hoffman, Rehabilitation of Prisoners in a Transforming South Africa, 5. It is inconceivable that centuries of alienation expressed through the politico-legal devaluation of human life would be confined to political struggle without an impact on social violence.
19. Hoffman, Rehabilitation of Prisoners, 1.
20. Lukas Muntingh, Offender rehabilitation and reintegration: taking the White Paper on Corrections forward, Civil Society Prison Reform Initiative Research Paper No. 10, 2005, 26. It is essential to understand the type of community from which a prisoner is imprisoned and what the impact of their return might be, both on the prisoner and the community.
21. White Paper on Corrections in South Africa, 2005, paragraph 4.4.2.
22. Francis T Cullen and Karen E Gilbert, *Reaffirming Rehabilitation*, Anderson Publishing Co., 1982, 247.
23. Dissel, Rehabilitation and re-integration in African prisons, 155.
24. Muntingh, Offender rehabilitation and reintegration, 28.
25. Edgardo Rotman, Do Criminal Offenders have a right to Rehabilitation? *Journal of Criminal Law and Criminology* 77(4), 1986, 1027.

26. White Paper on Corrections in South Africa 2005, paragraph 4.4.8.
27. Section 2(c) of the Correctional Services Act 111 of 1998.
28. White Paper on Corrections in South Africa 2005, paragraph 4.2.5.
29. *Ibid.*, paragraph 4.4.6.
30. This paper does not assume that every prisoner who undergoes rehabilitative programmes will be rehabilitated. The decision not to re-offend lies solely with each individual prisoner. However, that fact does not detract from the entitlement of prisoners to at least have access to programmes geared towards rehabilitation.
31. *The Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC); and *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC).
32. I would argue further that the nature of a socio-economic right is somewhat different to the right to rehabilitation that I am proposing. The main criticism levelled at the justiciability of socio-economic rights is that it is an infringement of the Separation of Powers doctrine for a court to dictate to the state how its budget ought to be spent. In South Africa, it is accepted that there is no clear separation of powers, rather, the doctrine is aimed at providing a framework of checks and balances between the different branches of state. Further, since the duty on the state to rehabilitate is already contained in legislation and is said to be the cornerstone of the Correctional Service, it is clear that rehabilitation ought already to have a budgetary allocation by the department. Furthermore, in both the *Grootboom* and *TAC* case, the court did not allow the argument by the state that socio-economic rights ought not to be adjudicated upon by courts because of the impact it would have on policy and budget issues. The courts held that there are numerous other contexts which also have an impact on policy and budget but which are generally considered justiciable. Forcing the state to act in accordance with an obligation it has set out for itself in legislation and policy, is not an infringement of separation of powers, but is the safeguard that checks whether the duty is being properly discharged. If a court were to adjudicate on an issue pertaining to the right to rehabilitation, it would not bring into question a separation of powers problem, because the court will not be creating policy, only interpreting policy that has already been created by the executive. Adjudication in this regard does not exceed the role of the judiciary.
33. Lazarus, *Contrasting Prisoners' Rights*, 193. Prisoners are said to hold an economic and social right to have state resources aimed at the realisation of their resocialisation.
34. *Ibid.*
35. The right to dignity (section 10); the right to freedom and security of the person (section 12); the right to education (section 29); the right to humane conditions of detention (section 35).
36. S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M. Bishop (eds), *Constitutional Law of South Africa*, 2nd ed., Juta & Co Ltd, 2009, Chapter 51, 64-65. While punishment refers to the form of treatment by an authority because of the transgression of some rule, treatment refers to the conditions associated with the implementation of a sentence. There must be some active state process involving an exercise of state control over the individual to constitute 'treatment'.
37. *S v Makwanyane* 1995 (3) SA 391 (CC) paragraph 111.
38. Currie and de Waal, *The Bill of Rights Handbook*, 275. This double entrenchment of dignity in the Constitution means that human dignity is not only an enforceable and justiciable right in South Africa, but it also informs the interpretation of other fundamental rights.
39. Woolman et al, *Constitutional Law of South Africa*, Chapter 51, 67.
40. *S v Dodo* 2001 (3) SA 382 (CC).
41. *Ibid.*, paragraph 35.
42. Woolman et al, *Constitutional Law of South Africa*, Chapter 51, 68. Cruel treatment refers to intentional conduct on the part of the perpetrator with disregard for the suffering of the victim. Inhuman treatment refers to treatment of others as if they were not human.
43. *Ireland v The United Kingdom* (1978) 2 EHRR 25 at paragraph 167.
44. Woolman et al, *Constitutional Law of South Africa*, Chapter 51, 69.
45. Department of Correctional Services Annual Report for the 2009/2010 Financial Year, 93-95.
46. Woolman et al, *Constitutional Law of South Africa*, Chapter 51, 67. It is a violation of a specific right that indicates a violation of dignity, and not the other way around.
47. Section 35(2)(e) of the Constitution of the Republic of South Africa, 1996.
48. *B v Minister of Correctional Services* 1997 (6) BCLR 789 (C); and *Van Biljon & Others v Minister of Correctional Services and Others* 1997 (4) SA 441 (C).
49. *Van Biljon & Others v Minister of Correctional Services and Others* 1997 (4) SA 441 (C).
50. *B v Minister of Correctional Services* 1997 (6) BCLR 789 (C), para 65.
51. *Ibid.*, paragraph 53.
52. *Ibid.*, paragraph 53 and *Van Biljon & Others v Minister of Correctional Services and Others* 1997 (4) SA 441 (C), paragraph 65.
53. *Rossouw v Sachs* 1964 (2) SA 551 (A).
54. Woolman et al, *Constitutional Law of South Africa*, Chapter 40, 50.
55. There is an overlap between this argument put forth for the right to humane conditions of detention and the right to education. Under section 29 of the Constitution, the state is obliged to provide basic education, and to provide access to further education where reasonably practicable. Many of the rehabilitative programmes outlined by the White Paper envisage educational programmes aimed at skills gain, further education and life skills. If these rehabilitative aims are not given proper effect, and are not considered a recognised and enforceable right, then the full and proper effect of section 29 will not be fulfilled.
56. *Strydom v Minister of Correctional Services* 1999 (3) BCLR 342 (W).
57. *Ibid.*, paragraph 141H-142A.

58. This is a controversial area because it involves issues of state resources and its failure to create humane conditions of incarceration.
59. C Cilliers and J Smit, Offender Rehabilitation in the South African Correctional System: Myth or Reality? *Acta Criminologica* (20), 2007, 84.
60. Ibid., 86.
61. N Fine, Transforming Institutional Thinking: Through the Walls, Community Law Centre (UWC) Bellville, 1996, 6.
62. *B v Minister of Correctional Services* 1997 (6) BCLR 789 (C).
63. Ibid., paragraph 49.
64. Muntingh, Offender rehabilitation and reintegration, 5.
65. Besides relying on internal prison mechanisms, the media and civil society are to hold the state accountable.
66. Lazarus, *Contrasting Prisoners' Rights*, 61.

WILL THE REAL SOCIAL WORKER PLEASE STAND UP?

Defining criminal justice social work

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The fundamental objective of this article is to urge a change in the conventional paradigms used to define the practice of social work in the field of criminal justice, and to set in motion a conversion to a unified paradigm of criminal justice social work. A unified paradigm is used here to refer to the multidimensional and multidisciplinary practice of social work in working with both those who offend and those who are victims of crime, in order to restore harm done and prevent further offending. This text is essentially nomenclatorial in nature, meaning, it deals with the naming and defining the specialisation of criminal justice social work as distinctly different from social work in general.

The last few years have seen a maelstrom of change and transformation of policy and programmes at all levels within the South African criminal justice sector. These include, among others, working with offenders and victims of crime through the use of restorative justice programmes, Victim-Offender-Mediation protocols, and a stronger focus on diversion of child and youth offenders out of criminal justice. Yet, despite the role that social workers play in these interventions, a widely accepted definition of social work in the field of criminal justice does not exist. This is notwithstanding the fact that historically, social workers have provided services to incarcerated individuals since the inception of the profession in 1904.¹

The lack of a clear definition of criminal justice social work may be exacerbated by the short time given to social workers to prepare for, comprehend and deal with crime and delinquency. Research has shown that professionals are seldom prepared for social work practice in specialised settings like prisons and secure care facilities.² To make matters worse, there is very little useful exchange of information between those who teach and those who employ social workers in criminal justice. Researchers and academics have not engaged sufficiently with the development and application of nomenclature for this field, leading to an underlying crisis of identity that needs resolution.³

FRAGMENTED POLICY AND LEGISLATIVE FRAMEWORKS

One reason for the crisis of identity is the polymorphous fragmenting of social work in the field of criminal justice into ever-smaller-sub-specialities with overlapping policy and legislative

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responsibilities. For example, present statutory provisions for probation services in South Africa are contained in the Probation Services Act (No 116 of 1994), the Probation Services Amendment Act of 2002, the Child Care Act (No 74 of 1983), Criminal Procedure Act (No 51 of 1997) and the Child Justice Act (No 75 of 2008). The role of probation officers as investigators, supervisors, crime ‘preventers’, planners and implementers of programmes, and convenors and mediators in restorative justice initiatives, are described accordingly in each piece of legislation.⁴

Furthermore, forensic social workers function in Family Violence, Child Protection and Sexual Offences (FCS) units across South Africa. The FCS units, which exist in 176 policing areas countrywide, were established to conduct specialised investigations in all cases of sexual offences, domestic violence and child abuse. These perplexing sub-specialities spawn a multitude of disjointed professionals practicing social work in the same field, making use of self-limiting paradigms that impact adversely on service delivery to both offenders and victims of crime. A unified practice framework and understanding of criminal justice social work could change the way professionals engage with each other and those they serve, leading to integrated ‘one stop’ service delivery, as envisaged by the various policy and legislative frameworks that govern this sector.

FRAGMENTED SERVICE DELIVERY

The chaotic fragmentation of social work in the field of criminal justice is reminiscent of the 1956 American television game show *To Tell the Truth*. The show features a panel of four celebrities attempting to correctly identify a described contestant who has an unusual occupation. Towards the end of the show, the host would ask: ‘Would the real.....please stand up?’

Finding the same professional working with the same client system, but in different settings at different times, claiming to be someone else, leads to doubtful validity of a scientific discipline. Depending on the time of day or place of

meeting, offenders could be seeing a social worker for an assessment regarding their mental competency to understand their behaviour, their level of moral development, criminal capacity and ability to stand trial. Later the same day they could be meeting another social worker who makes recommendations concerning child custody and divorce proceedings and the placement of their emotionally disturbed child in a secure care facility, pending court proceedings. At some stage they might have an appointment with yet another social worker to discuss sentencing options and the possibility of being diverted to a community supervision sentence. Along the way they’ll likely meet a social worker who will talk to them about the impact of their crime on the victim and engage in some form of restorative justice to try and minimise the harm of their offending behaviour and help them make amends. When they finally walk into court, a social worker may be there as an expert witness in their case, offering evidence of possible future risk and harm and making recommendations in relation to sentencing options. Will the real social worker please stand up?

These small artificially boundaried areas of social work in criminal justice are of questionable utility. Kirst-Ashman, by way of example, defines forensic social work as social work involving the law – both criminal and civil, and the legal system.⁵ Included in the tasks of the forensic social worker are the conduct of assessments regarding suspects’ mental competency to understand their behaviour and stand trial; making recommendations concerning child custody, divorce, and the placement of emotionally disturbed or delinquent juveniles; preparing for court presentations as expert witnesses; and advocating for welfare rights. For Kirst-Ashman, forensic social work focuses predominantly on service delivery when offenders enter the criminal justice system, and adjudication (the process of legal sentencing and passing of judgement). Others, like Barker, recognise forensic social work as a ‘specialised field of social work practice that is characterised by the social worker’s primary function of providing expert testimony in courts of law’.⁶

Then there is the vicarious use of the term probation officer. Some, like Morris, optimistically describe the goal of probation officers as involving people who receive a sentence of probation in community service, and steering them away from criminal behaviour.⁷ In contrast, others, like Annison *et al*, write about a 'new breed' of probation officer, more versed in control than care.⁸ This echoes Whitehead and Braswell's lamentation of the supposedly 'dark side' of contemporary probation officers:

Probation officers have gone from social casework to urine testing, from brokerage activities to curfew monitoring, from acting as mentors to arresting for technical violations... probation officers have changed their ideal role model from John Augustus, acting as avuncular advisor, to Dirty Harry Callahan, waiting for a violation to 'make their day'.⁹

In some countries, South Africa among them, the term correctional social work describes services delivered to offenders in prisons and community corrections settings. According to the Department of Correctional Services the core function of social work services in corrections is 'to assess the offender and provide needs-based programmes and services in order to enhance the adjustment, social functioning and reintegration of offenders back into the community'.¹⁰ Duties include obtaining information from clients and their families to identify social, economic, emotional, health or physical problems and to determine eligibility for casework or other services.

Domestic violence social work is another example of a sub-speciality that has emerged with scant regard for overlapping concerns or the skills and needs found in the field of criminal justice social work. This despite the fact that social workers are the professionals most frequently contacted by survivors of domestic or intimate partner violence for emotional and physical problems, and sexual abuse, among others. Domestic violence services and shelters for survivors (women and children) have taken root in many places in South Africa – often initiated and run by social workers. The role of domestic violence social work is generally described as developing interventions designed to

deter abuse and rehabilitate abusers so they will not abuse again – clearly a criminal justice-related response.

Victim assistance counselling and support include various interventions intended to assist victims and witnesses of crime with the stressful and often traumatic process of testifying in court against offenders. Services include crisis counselling, assistance with making a legal complaint, support groups for survivors of violence and abuse, and temporary financial help.

WHAT IS CRIMINAL JUSTICE SOCIAL WORK?

Criminal justice social work (CJSW) is recognised as a specialised practice approach with three important functions unique to the field of criminal justice:

1. identifying and addressing offending behaviour
2. reducing the risk of re-offending
3. restoring those that have been injured and affected by crime.

Identifying and addressing offending behaviour

This entails the comprehensive assessment and detailed description of criminal behaviour in relation to crime causation and the factors that underlie offending, as well as delivering offence-specific programming, interventions and services to address this behaviour. Central to addressing offending behaviour is the belief that there are certain risk factors for crime situated in the life of the individual, the community and society that generate maladaptive behaviour.¹¹ Raynor and Robinson believe that it is possible to isolate or identify the causes of an individual's offending – whether they are related to his or her character, morality, personality, psychological makeup or choices – and intervene in ways that will remove those causes or otherwise effect positive changes in that individual.¹² Accordingly, given the right interventions, programmes or 'treatments', it is assumed that offenders can be brought into line with a law-abiding 'norm'.¹³

Research literature is sufficiently robust to offer general suggestions about what should constitute good correctional assessment. For example, it is suggested that with offender assessments and pre-parole assessments, risk should be a major consideration.¹⁴ In risk assessments, therapists and correctional administrators assume that offenders have an invariant propensity to reoffend, which ranges from low risk (penny ante offending) to high risk (serious offending). High-risk offenders should therefore be the main focus of intervention strategies.¹⁵ The goal of assessment is to assist in the treatment of offenders, and effective intervention depends on an accurate assessment.¹⁶ Offender assessment relates to the collection of detailed information about the offender's crime, as well as contributing factors of crime, offending behaviour, emotional and physical health, social roles and other factors bearing upon the offender's situation.¹⁷

Reducing the risk of re-offending

Ogloff and Davis observed that 'there is an ever-expanding corpus of firm empirical support to show that offender rehabilitation can help reduce the risk of re-offending'.¹⁸ Underpinning offender rehabilitation is the Risk-Need-Responsivity (RNR) model of Canadian researchers James Bonta, Don Andrews, and Paul Gendreau.¹⁹ The RNR model is perhaps the most influential model for the assessment and treatment of offenders.²⁰

RNR is based on three principles:

- 1) the *risk principle* asserts that criminal behaviour can be reliably predicted and that treatment should focus on the higher risk offenders
- 2) the *need principle* highlights the importance of criminogenic needs in the design and delivery of treatment
- 3) the *responsivity principle* describes how the treatment should be provided.

According to Andrews, custodial treatment services should target multimodal criminogenic needs to develop offender-relevant treatment programmes. The factors placing the offender at future risk, often described as 'criminogenic', may

be social or personal and have a causal or contributory role in offending acts, and should thus be the target of intervention. Adherence to the principles of risk and criminogenic needs depends upon the reliable and valid assessment of offender risks and needs.

Criminogenic needs are those aspects of an individual's functioning that give rise to his or her antisocial and criminal behaviour. A criminogenic factor may be located in any area where the offender has needs or deficits, where a reduction in the need or deficit would lead to a reduction in the risk of reconviction.

In other words, criminal justice social work focuses on those factors that place the offender at future risk for reoffending. All offenders display criminogenic and non-criminogenic needs. Criminogenic needs are divided into dynamic (changeable) and static (unchangeable) risk factors which, when reduced, are followed by reduced reoffending. Important dynamic risk factors include anger, prior treatment compliance, personality style, impulsiveness, psychopathy, cognitive impairment, violent fantasies, unemployment and substance abuse.²¹ If changed, these dynamic risk factors reduce the likelihood of criminal conduct.²² Research demonstrates that dynamic risk factors are reliable predictors of reoffending behaviour. Static risk factors (also known as 'historical factors'), which comprise factors such as criminal history, age and gender, are also reliable in predicting long-term recidivism risk for both general and sex offenders.²³

Restoring those that have been injured and affected by crime

The role of criminal justice social work is transformed by shifting the focus from crime being a violation of the state, to crime being a violation of the person. From a restorative justice perspective, 'crime first of all is harm done to people and communities', says Zehr. Harm done must be repaired, and as a result victim support and healing become key priorities of social work intervention in the field of criminal justice. Implied within this restorative perspective in

criminal justice social work is the need for offender accountability and responsibility.²⁴ If crime is essentially about harm, then, according to Zehr, 'accountability must encourage offenders to understand the consequences of their actions.'²⁵ This in turn means that they have a responsibility to make things right as far as is possible, both concretely and symbolically.

In restoring the offender's capacity to function acceptably in society, offenders should understand and experience the consequences of their crimes, an experience that, according to Skelton, should lead to a change in their behaviour. This is both an ongoing process and an overarching aim of criminal justice social work. It entails providing both offenders and victims with appropriate assistance, through planned programming and intervention, to help them address the cost of crime. Also, as Marshall convincingly argues, 'restorative justice is a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future.'²⁶

Often offenders need to be socially re-integrated into the community and their social connections reconstructed. Braithwaite and Mugford call this 'reforming the deviant through reconstructing his or her social ties'.²⁷ 'The social ties described here include those with family members and friends, but also potentially include a wider network of community ties and support', according to Raynor and Robinson.²⁸ Reparative work – whether to a direct victim or the wider community – can also foster social reintegration.²⁹ Many victims also need re-integration into the community, as they often feel alienated and isolated as a result of crime. They need victim support, and the criminal justice social worker needs to provide this service.

CONCLUSION

Gain in any profession or scientific discipline can only be achieved by discarding some previously standard beliefs or procedures and, simultaneously, replacing those components of the previous paradigm with others.³⁰ This article argued that there is a significant difference

between the practices of social work and criminal justice social work, warranting a paradigm shift. The fundamental objective was to urge a change in the conventional paradigms used to practice social work in the field of criminal justice, and prompt a conversion to a unified paradigm of criminal justice social work. A new and more rigid definition of criminal justice social work was offered and explicated in an effort to create a unified practice framework for service delivery to those who offend, and those who are harmed.



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ON THE RECORD...

Interview with Peter Tinsley, Executive Director of the Institute for Justice Sector Development, Canada

As reported by Andrew Faull in the previous edition of SA Crime Quarterly (36), the Independent Police Investigative Directorate (IPID) Bill is expected to be promulgated into South African law towards the end of the year. Once adopted, the new law will significantly change the functions of the Independent Complaints Directorate (ICD), which is currently South Africa's primary independent agency responsible for investigating complaints against the police.

Chris Botha met up with Peter Tinsley, recognised as an expert on the rule of law and the oversight of security forces, at a recent United Nations Development Programme (UNDP) conference on policing reform in Dhaka, Bangladesh, and discussed Canadian developments on issues of police oversight.

Chris Botha (CB): Tell us about yourself and your involvement in police oversight in the world.

Peter Tinsley (PT): I served in the Canadian military for 28 years, first as a military police officer and then as a military lawyer. In 1999 I was appointed as Director of the Special Investigations Unit of Ontario, an agency tasked with the investigation of police incidents involving death or injury. This appointment allowed me to assist in reforming and rebuilding community trust in the police. During the years 2003-2005 I served as a war crimes prosecutor in Kosovo as well as in Bosnia and Herzegovina after which I was appointed as Chairperson of the Military Police Complaints Division. I have participated in oversight and rule-of-law issues in Afghanistan, Somalia, Nicaragua, Guatemala, El Salvador, Cuba, Romania, Northern Ireland, Portugal, Iraq and Brazil. I am a past member and president of the Canadian Association for Civilian Oversight for Law Enforcement and presently I am the executive director of the Institute for Justice Sector Development, a non-government organisation

created to assist nations whose justice systems are in transition.

CB: Why oversight at all?

PT: The answer to your question is perhaps best tied up in the Latin maxim, often associated with Plato, of *quis custodiet ipsos custodios* – who guards the guardian or, more particularly, who will watch the watchman? The police typically have the legal authority to carry out their duties, holding extraordinary powers over other citizens, including the use of lethal force. In a constitutional democracy one should recognise that those with special powers – especially those with powers impinging directly on individual liberty, like the police – will require special accountability for the use of those powers. Therefore one cannot have the police policing themselves only. One should have alternative models of oversight additional to any internal models that the police may have, such as professional standards units or units tasked with internal affairs. To this end, it must be clear that I refer to independent, civilian oversight

external to the police when I speak about oversight in policing.

CB: Are the police not capable of policing themselves?

PT: One should not necessarily assume that the police are *not* capable of policing themselves, or that the police are not to be trusted. Human nature, however, necessitates oversight over the police. The police are typically tightly-knit, highly insular organisations often accused of ‘covering up’ abuses of power by their colleagues – a phenomenon in many places referred to as ‘the blue wall’. This aspect of human behaviour obviously needs to be checked constantly. However, I suggest to you that the major reason for independent oversight is a function of perception and the need of communities to be assured that there is accountability, that the rule of law is being applied. Further, there is a need on the part of the police to maintain the confidence of the community.

CB: Allow me to pick up on something you have just said: how important is the power of perception?

PT: A perception is formed quickly. The more the community notes issues of police abuse or bad behaviour, which can be through vicarious means, the more the police run the risk of being perceived abusive or behaviourally unacceptable. This cannot be fixed with some spin-doctoring. Instead, the police will have to address the perception in a transparent way. If not, the perception turns into a stereotype, labelling the police as bad. This stereotype is very difficult to turn around. This is where oversight structures come in: I have a firm view that the overarching purpose of independent oversight is the promotion and maintenance of community confidence in policing, police services and individual officers.

CB: Community confidence in the police through oversight?

PT: Indeed. You see, we often look at the complaint only; the allegation by an individual

citizen that the police have offended his or her rights or that he or she was abused by the actions of the police. Of course, that is part of the oversight role and should be addressed effectively. However, we must look at the underlying issues as well. What caused the police to act in the way that they did? Often, we will find deficiencies in supervision, training and equipment as underlying factors. During a recent inquiry into the conduct of Canadian law enforcement officials a judge in my country made us aware of this. Judge O'Connor was of the opinion that the full value of oversight can only be achieved if we look to more than the actions of an individual police official; oversight must of necessity also be a review mechanism for systemic causative factors. In a case brought before the Military Police Complaints Commission, the Commission found that the officers involved acted entirely in accordance with their protocols and their training. However, the Commission found that the training and protocols were substantially flawed and in fact provided for the abuse of the rights of people so handled. Therefore, the Military Police changed the practices of the police in instances such as the one brought before the Commission. So, whereas it is certainly important for the offended citizen to see his or her complaint dealt with, oversight has even greater value when the community as a whole sees a just system at work. Oversight actions may thus maintain, or in other cases restore, community confidence in the police.

CB: In South Africa, given our history, we developed and introduced a multiple accountability model of oversight on many levels, from parliamentary structures through (the then) National and Provincial Secretariats for Safety and Security (now Police), Community Police Forums and the ICD, to name but some of them. We were interested in civilian oversight because we needed to prevent unjust and abusive behaviour as it presented itself in our past. How did civilian oversight become part of the Canadian landscape?

PT: It is by no means a new concept. 1829 may be a long time ago, but I believe that the principles of policing offered by Sir Robert Peel in the United Kingdom then, still have relevance today. One of

those principles states clearly that the ability of the police to perform their duties is dependent upon public approval and that the police are required to secure and maintain the respect of the public. The concept of oversight originated in Australia in the early '70s and it spread, also to Canada. Most nations have done what you have done – they have advanced the concept of oversight in response to the demands of their people, probably since we have no binding international obligations regarding oversight. However, by implication and interpretation, we do have international instruments in existence that are relevant to the exercise of police powers. The 1948 Universal Declaration of Human Rights and the 1966 International Covenant on Civil and Political Rights are examples of these instruments. Beyond these, international human rights law is generally satisfied by the legal (and preferably constitutional) recognition of certain rights of persons suspected or accused of crimes, particularly upon arrest or detention, along with access to judicial remedies for breaching these rights. There are others, such as the 1989 United Nations Guidelines for the Effective Implementation of the Code of Conduct for Law Enforcement Officials and the 1993 'Paris Principles', which specified minimum standards for national human rights oversight bodies. All of these played a role in the determination of the Canadian models for oversight.

CB: Before exploring the Canadian model, would you care to explain the policing landscape in which this model is executed?

PT: Canada is a federation comprised of ten provinces and three territories. We have about 70 000 police officers employed at federal, provincial and municipal levels. Historically, control of the police was exercised by police commissions or boards. However, these structures came to be viewed as corporate boards of directors administering police services and really as part of the police. They were not positioned to fulfil the objective oversight role that communities were demanding. Today we have at least one fully developed civilian oversight agency in each of the ten provincial jurisdictions and at

the federal level. Every officer holding law enforcement powers is subject to some form of independent oversight. In the last four years alone three new more robust agencies have been established, while two other existing agencies have been scheduled for revitalisation and greater empowerment by their respective governments.

CB: Was this change in role and number, from the commissions/boards to a more widely spread and robust structure of civilian oversight, the result of community demands?

PT: The change was actually affected by both community demands as well as progress in the discourse of oversight, where a relatively theoretical concept was actually structured in our society. An example of the former may be found in the establishment of Ontario's Special Investigation Unit in 1990. The event that triggered this establishment was the shootings of two young men from a minority community within a two-week period. The event caused government to react with the purpose of assuring the community that the deaths would be properly investigated. The changes were not only limited to the number of oversight agencies, but also took place because of a developing trend to expand the role performed by, and the processes available to, oversight agencies. One now finds that the traditional Canadian model of oversight, which focused on review, appeal or audit following internal police reaction to a complaint, is shifting towards a 'first instance' jurisdiction where conduct complaints are made to the oversight bodies directly. In fact, in two provinces the jurisdiction for criminal investigations involving police officers and the performance of their duties has passed to independent civilian bodies. This same change in regime in the criminal context will soon be implemented in a third province and is being called for elsewhere.

CB: What is the attitude of the police towards civilian oversight?

PT: Historically, the attitude of the police towards civilian oversight was one of resentment and even active resistance by both police leaders and

frontline officers. In my experience, the reaction of the police was mostly one of ‘people outside the police do not understand what a police officer faces on a daily basis nor are they qualified to conduct investigations’. Of course, this view has been proven to be categorically incorrect in Canada and elsewhere. With some police leaders and officers a resistance mode continues to be the case, but overall it is fair to say that oversight is now generally accepted with a far higher degree of cooperation. It is recognised as a necessary part of police professionalism and the maintenance of community confidence.

CB: Why the change in attitude?

PT: The police, both leaders and frontline officers, have come to understand and accept that credible independent oversight bodies can serve to validate their performance in a way that they cannot do themselves. But, to achieve this attitude in the police it is critical that the oversight agencies are highly professional in every sense of the word and that they are seen as credible, not just by the community but by the police themselves. It takes a constant demonstration of standards and professionalism by the oversight body to achieve and maintain credibility.

CB: Canada, in my understanding, enjoys a high standard of policing. The police services are generally well funded, efficient and effective. In fact, many of us in South Africa have always seen your federal police service, the Royal Canadian Mounted Police, or ‘Mounties’, as some sort of icon in policing, a police service to be respected for how they do the job. Why then the increase in the number of oversight agencies and the discourse on the role of oversight in society?

PT: Indeed, we have excellent police services and polls suggest that the majority of Canadians generally hold the police in high regard. The ‘Mounties’ that you refer to are in fact a much revered historic national symbol of Canada. However, flawed or deficient police services are clearly not the motivation for the changes. It is the very importance that Canadians attribute to the police and their role in society, our quality of life,

and our unwillingness to allow inevitable instances of poor performance or misconduct of any degree to go unchallenged, that has been the primary impetus of change. This, I would suggest, is informed by the significance attributed to the rule of law and the belief that all must be equal, and seen to be equal, under the law. Also, we are experiencing a general lessening of tolerance for breaches of individual rights by the government or any agent thereof.

CB: Eventually, I’m getting to the Canadian model of oversight. Please tell me about it.

PT: Yes, there’s so much to talk about... In Canada, we do not claim to have identified the best or perfect oversight model. In fact, experience has taught us that no one specific model of oversight agency fits the needs of all communities, which may vary widely in terms of size, demographic make-up and other environmental factors and customs. One is able to identify four general groupings of models in Canada, as identified by their various processes or powers. Some agencies may initiate a complaint, may direct who will investigate the complaint, may refer the complaint to an independent adjudicator and may have binding disposition power. Others may adjudicate the complaint itself, or may investigate, while still others may only recommend disposition. Be that as it may, we have certain immutable, fundamental characteristics in our system spanning, as it were, all four general groupings. These are:

- Independence (both real and perceived). Oversight agencies must be free of government direction in terms of the performance of their mandate
- Appropriate empowerment by law, not by some lesser instrument of policy or governmental directive
- Sufficient resources to properly and professionally perform their mandate
- Transparency of process and fairness to all, including the police
- Sufficient and credible expertise and experience of all involved in the oversight process

- Communication with both the broader community and the police, since rights do not exist if they are not known.

CB: How many complaints are received by Canadian oversight agencies?

PT: Some years ago, the Canadian Association of Civilian Oversight of Law Enforcement adopted a statistical analysis system. We found that a police service should reasonably expect to receive complaints amounting to between five and ten per cent of the number of police officers employed. So, for every 100 police officials employed, we could expect between five and ten complaints. Of course, these are complaints received, not necessarily upheld.

CB: In your case then, with 70 000 police officials over all jurisdictions, you should expect between 3 500 and 7 000 complaints to investigate. What does this cost, what are the budgetary implications for the state, and how many people do you need to deal with the complaints effectively?

PT: I don't have available national figures but I could provide an example based on Ontario – Canada's second largest province at approximately 900 000 square kilometres (a significant factor in terms of the cost of service delivery), a population of approximately 12 million and approximately 27 000 police officers, both municipal and provincial. Ontario is one of the provinces with two oversight agencies, one dealing with complaints in an administrative/disciplinary context and the other with criminal investigations of police involved in incidents resulting in death or serious injury, including sexual assault. The former employs approximately 40 personnel and the latter 87, 39 of whom are regionally based 'as needed' investigators. The combined budgets of these two agencies are approximately 16,5 million dollars.

CB: Can you elaborate on the training provided to investigative members of oversight agencies in Canada? Are investigators sourced from the general public, or from policing agencies?

PT: The sourcing of staff, particularly investigators, has long been a contentious issue, with the police and broader community having very contrary views. While the notion of police secondments has been pretty much rejected, it is quite common to find mixed investigative staff members from both police and non-police backgrounds. With appropriate safeguards in place to avoid the perception of a conflict of interest for retired police officers, and a heavier training quotient for those without prior police experience, this compromise works effectively. Appropriate training for all staff is critical. In most oversight agencies it is a significant budget item with training obtained from academic institutions, specialised providers and even police colleges.

CB: Lastly, what advice would you give to South Africa on civilian oversight?

PT: I would not presume to advise the government of South Africa without having a much better grasp of the state of police community relations. However, when asked that question, I cannot help but think of the significant message in the title of the Commonwealth Human Rights Initiative's 2005 Report – 'Police Accountability: Too Important to Neglect, Too Urgent to Delay'. Independent civilian oversight is a concept that has spread exponentially over the last several decades. It has certain core requirements, as stated earlier, that when adapted to the circumstances of a community in a suitable model has proven to not just be of benefit to the community, but also as a multiplier of police service effectiveness. So, I would say that it is a worthy consideration everywhere.



NATIONAL AND INTERNATIONAL PERSPECTIVES ON CRIME REDUCTION AND CRIMINAL JUSTICE

2nd INTERNATIONAL CONFERENCE

2011

Join us for the second annual international conference of the Crime and Justice Programme of the Institute for Security Studies.

In the seventeen years that have passed since South Africa's first democratic elections the country has experienced high levels of violent crime and mixed results in efforts to transform and improve the functioning of the criminal justice system. The problems faced by South Africa are not unique, and it is unlikely that effective solutions will be specific to South Africa.

This conference provides a forum for academics, researchers and practitioners to share research findings from South Africa, the African continent and the rest of the world about crime, the functioning of the criminal justice system and innovative approaches to reduce crime.

The conference will explore the following themes:

- Innovative approaches to improving criminal justice
- Crime and crime trends
- Social crime prevention

Register to attend

If you wish to attend this event please register on-line at www.issafrica.org and follow the link to 'events'.

There are a limited number of places so please make sure you register before 15 November 2011.

Direct any queries to:

Chandre Gould (cgould@issafrica.org) or
Millicent Mlaba (mmlaba@issafrica.co.za)

**The conference will take place at the Sandton Sun Hotel in Johannesburg
on 1 and 2 December 2011.**



PREVIOUS ISSUES



In SACQ 36 David Bruce presents evidence that ordinary police members have, over the last few years, resorted to an ever more brutal style of policing. Johan Burger considers the effect that media coverage of police brutality and corruption has had on public faith in the institution, and calls for an urgent remedy. In addition, Andrew Faull interviews Francois Beukman, a lawyer and politician who has made his way to the head of the police oversight body responsible, at least in the minds of the public, 'for cleaning up' behind the police. Also in this edition, Sonja Loots and Dap Louw present the findings of research to establish the extent of anti-social psychological disorders amongst adult male offenders in South African prisons; and Clifford Shearing and Julie Berg ponder the on-going challenge of preventing crime.



Any discussion about crime and criminal justice in South Africa is incomplete without reference to the place of customary justice and the chiefs who administer it, particularly in rural areas. Yet, precisely because this issue almost exclusively affects rural dwellers whose voices are seldom heard, it fails to attract much attention. This edition of SACQ considers the flawed processes that led to the Traditional Courts Bill (TCB), and its controversial take on how customary justice should be dispensed.

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