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- > The SAPS crime statistics
- > Restorative justice, criminal justice and access to justice
- > Paralegals and the provision of legal services
- > Assessing the experience of pre-trial detainees in Maputo
- > Homophobic hate crimes, the state and civil society
- > Book review: Police reform from the bottom up



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Minister of Police Nathi Mthethwa & National Commissioner Riah Phiyega release the countries' crime stats at a media briefing in Parliament, 20 September 2012.

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EDITORIAL

Each year there is a brief, but intense period during which South Africans very publicly assess the state of crime in the country. This period of reflection is brought about by the annual release of the police crime statistics. In 2012 the SAPS and the Minister of Police faced intense criticism. There were allegations (as there have been in the past) that the statistics are an inaccurate reflection of the state of crime; but, more importantly, the Minister was criticised for the infrequency of the availability of police crime data. By the time the statistics for the financial year are announced in September of the following year, the figures are, at best, six months out of date. This means that it is not possible to rely on the police statistics for accurate, up-to-date information about crime. As political pressure mounts in South Africa in the face of rising prices, dissatisfaction with local government service and public service corruption, it will be important for civil society to be able monitor levels of public violence. For this, and a range of other reasons, the Minister of Police should reconsider the existing policy and make the statistics available on a more frequent basis. The first article in this edition makes the case for changes in the reporting practices of the crime statistics.

While SACQ focuses predominantly on crime and criminal justice-related matters in South Africa we have carried articles from other parts of the continent in the recent past, and hope to increase our regional content in future. In this edition we feature an assessment of prison reform in Mozambique. The author, Tina Lorizzo, conducted her MSc research in two prisons in Maputo and assessed the legal framework for prison reform in that country. Her article reflects the limits of law reform as a means to effect real, positive change for inmates. On a slightly more positive note, Martin Schönteich provides an assessment of the positive effect that paralegals are having in accessing justice for pre-trial detainees in a number of countries in Africa.

Hema Hargovan's article brings us back to the enormous challenges of implementing sustainable alternatives to court-based justice. She shares the findings of an evaluation of a restorative justice programme in KwaZulu-Natal and how prosecutors have found restorative justice practices a handy tool to reduce pressure on court rolls.

Also in this edition of SACQ we continue the 'hate debate' started in December 2011 (SACQ 38) by Juan Nel and Duncan Breen. Nel and Breen made the case for new legislation to increase the penalty for crimes motivated by prejudice. They argued that not only do crimes of prejudice have a more severe emotional effect on the victims; but that it is necessary for the state to demonstrate its objection to these types of crimes through the imposition of harsh sentences for offenders. In response, Bill Dixon and David Gadd (SACQ 40, June 2012) drew on international experience to argue that the law is a blunt instrument for countering prejudice; and that laws of this kind have been shown to have negative unintended consequences. In this edition, Kerry Williams, a partner at the law firm Webber Wentzel, draws on her experience in representing a non-governmental organisation that acted as a 'friend of the court' during the sentencing phase of a criminal case against a group of young men convicted of seriously assaulting a gay man. This article is written from the perspective of a practitioner in the criminal justice system and seeks to draw out some of the key issues for consideration in relation to the role of civil society and the state in countering prejudice.

We end this final edition of 2012 with a review by Elrena van der Spuy of Monique Marks and David Sklansky's edited volume: *Police reform from the bottom up*.

Chandré Gould (Editor)

THE SAPS CRIME STATISTICS

What they tell us – and what they don't

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Every year, the South African Minister of Police releases the crime statistics in September and the SAPS Annual Report shortly thereafter. In this article we draw on an earlier analysis by David Bruce (SACQ 31) that questioned the veracity of the SAPS statistics for inter-personal violence. We show that there remains reason to question the veracity of the assault statistics, and point to other weaknesses in the way in which the statistics are reported. We argue that greater value would be obtained from the crime statistics if reported more frequently than once a year, and if they were disaggregated to a greater degree. The SAPS has a sophisticated and up-to-date system for recording and analysing crime data. This could prove an invaluable source of information for those who seek to better understand and respond to crime in South Africa. However, a long-overdue policy change is needed to ensure that South Africa can make better use of its crime statistics.

The annual press conference at which the Minister of Police and the National Commissioner of the South African Police Service (SAPS) present the previous financial year's crime statistics reflects the government's attitude towards dealing with crime since the late 1990s; which is to place the responsibility for reducing crime squarely on the shoulders of the SAPS. For a number of years now, reducing crime has been one of the government's top five priorities.¹ An inter-ministerial structure called the Justice Crime Prevention and Security Cluster (JCPS) was established to achieve this objective. While the inclusion of the Department of Social Development in the JCPS may suggest a recognition that addressing social risk factors could contribute to a reduction in crime, this is not reflected in statements by political figures, who remain focused on presenting policing as the primary response to crime.^{2,3}

Interestingly, the top police leadership appears willing to accept the responsibility of reducing all crime, despite acknowledging that 'crimes such as assault are not responsive to policing crime prevention strategies'.^{4,5} Given that most crime categories have been decreasing since crime peaked in 2002/03, it may indeed serve the interests of police leadership to have their performance assessed in this way. Yet, the long-term negative consequences of this policy approach far outweigh any short-term political benefit that may be derived by pretending that the police are solely responsible for declining crime rates.

David Bruce has argued that the 2004 policy to set the target of reducing crime by seven to ten percent per annum as a key performance indicator of the SAPS resulted in a 'perverse incentive' to under record violent crime, particularly the various forms of assault.⁶ In effect this has rendered the SAPS statistics for inter-personal

* Gould and Burger are senior researchers in the Crime and Justice Programme of the ISS and Newham is head of the Programme.

violent crime useless for the purposes of monitoring and understanding these crime trends. In this article we reflect on whether this assessment holds for the latest statistics released by the SAPS.

The article begins by briefly describing the 2011/12 murder statistics and then offers a discussion about why the reliability of the statistics for all categories of assault remains in question. We argue that there appears to be a link between the way in which police performance is measured and the disproportionate reduction in all categories of assault. The article then considers shortcomings in current and past reporting practices in relation to gender-based violence and sexual offences, including inconsistency in what is reported and the inadequacy of the level of disaggregation. The article also considers SAPS reporting and recording of public violence. It argues that clarity on the categories of public violence is needed, along with more detailed and frequent statistics.

We conclude by arguing for the crime statistics to be released more than once a year; for consistency in SAPS reporting formats; for further disaggregation of the statistics in various crime categories, particularly with regard to gender; and for a change in the way in which police performance is measured.

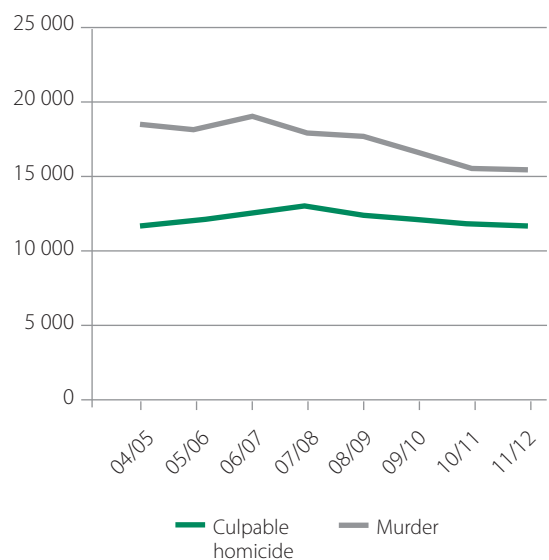
VIOLENT CRIME

In general there was little change in overall crime trends over the past two financial years. Total crime increased slightly by 0,7% from 2 071 487 cases in 2010/11 to 2 085 757 in the 2011/12 financial year. Total property-related crime increased by 0,3%, while total violent crime decreased by 2,3%. The murder rate remains high with 30,9 South Africans in every 100 000 the victims of homicide, despite a 54% decrease in the number of murders since 1994. This means that the murder rate in South Africa is four and a half times higher than the world average of 6,9 murders per 100 000 people.⁷ In the 2011/12 financial year the police recorded a total of 15 609 murders (a daily average of almost 43 murders), representing a decline of 3,1% from the previous financial year.

According to the SAPS Annual Report 2011/12, 65% of murders result from assaults.⁸

How sure can we be that the murder rate is reliable? This question is pertinent because there have been cases where the police have been found to record murders as inquests or culpable homicide so as to be able to present lower crime statistics.⁹ While Figure 1 (below) shows the gap between murder and culpable homicide rates narrowing between 2004/5 and 2011/12, and the increase in culpable homicides between 2004/05 and 2007/08 may be an indication of statistical manipulation, there is no marked shift in the trends after 2004/5, as is evident for other categories of violent interpersonal crime.

Figure 1: Culpable homicide vs murder rates 2004/5 – 2011/12



The Medical Research Council (MRC) recently released the results of a study of female homicides (femicide) which provides a basis for assessing the veracity of the trends in murder. This study undertook an analysis of a representative sample of cases at mortuaries in 2009 and offered a comparison with the number of femicides in 1999. The study showed that over ten years, the female homicide rate declined from 24,7 per 100 000 in 1999 to 12,9 per 100 000 in 2009 (a reduction of 47,7%). Since the police statistics are reported for financial years rather than calendar years it is not

possible to accurately compare the national murder rates to the femicide rates for this time period. However, during a similar period the SAPS recorded a 35% decrease in the total murder rate (from 52,5 to 34,1 per 100 000). This suggests that there has likely not been a manipulation of the murder statistics to show a lower rate than is in fact the case. The MRC study supports the SAPS statistics as a reasonably reliable indicator of the overall trend in murder.

While the SAPS statistics for murder may accurately reflect the reality, there is ample reason to question the veracity of police data for other forms of inter-personal violence, as reflected in the various categories of assault.

Figure 2 compares the rate of murder and attempted murder between 1994/5 and 2011/12. What is immediately striking is that while the murder rate showed a consistent decrease, there was a significant increase in attempted murder from 2000/01. The attempted murder rate increased substantially until 2002/03 and then inexplicably dropped sharply in 2003/04 until 2005/06, when it closely followed the murder rate trend. While it is more difficult to manipulate or incorrectly record murder statistics, it is relatively easy to do so for attempted murder. Thus the spike

in attempted murder between 2000/01 and 2002/3 was very likely the consequence of a change in recording practices rather than an accurate reflection of attempted murder trends. The sudden decline in the attempted murder rate after 2002/3, without similar changes in other inter-personal violence categories, suggests that there was again a change in recording practices. Bruce has argued that the introduction in 2004 of police performance targets for reducing crime provided an incentive for the police to reduce the numbers of cases they recorded.¹⁰

High rates of inter-personal violence (including domestic and youth violence) have been identified as having a significant negative impact on a country's development.¹¹ It is therefore crucially important that there is accurate recording of these types of violence if we are to better understand and respond to this phenomenon. Only once we clearly understand the social risk factors for violence and aggression will we be in a position to implement interventions that will effectively reduce inter-personal violence.¹²

Figure 3 presents the rates of assault with the intention to commit grievous bodily harm (assault GBH), and common assault between

Figure 2: Murder and attempted murder rates, trends 1994/95–2011/12

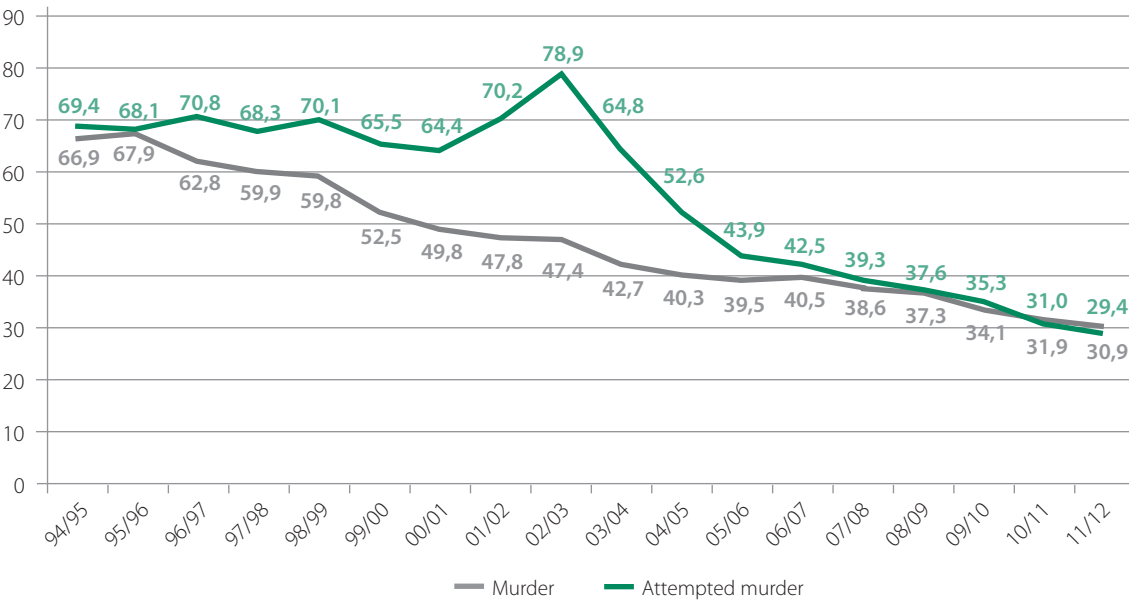
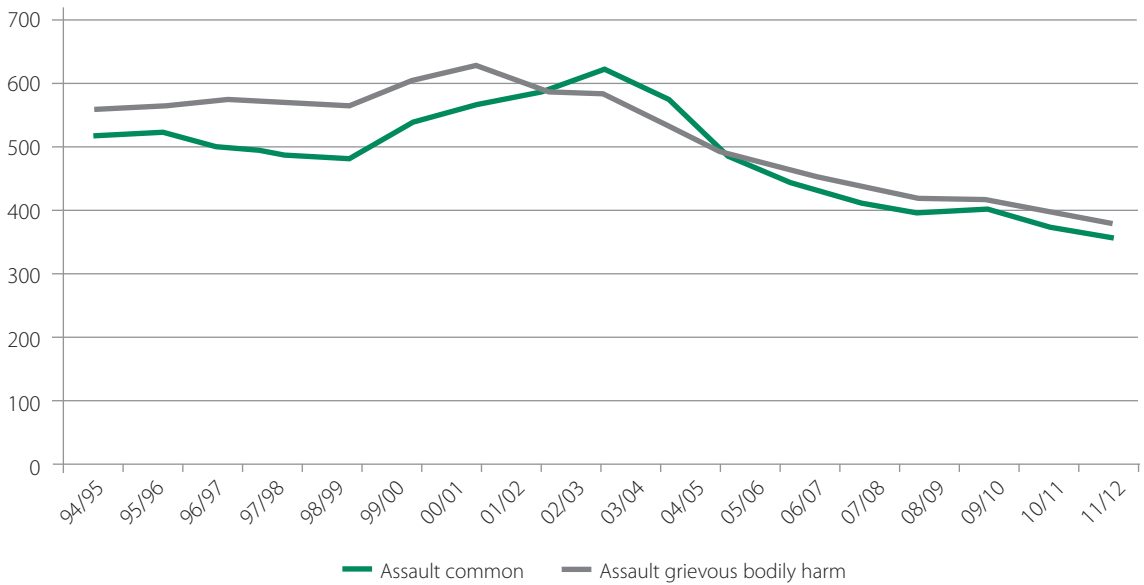


Figure 3: Assault GBH and common assault trends 1994/95–2011/12



1994/5 and 2011/12. There was a marked decrease in the rates of these types of crime since 2003/04, following the adoption of the crime rate as a measure of police performance. While there may be other reasons for the sudden and consistent declines in these crime categories, particular attention must be given to their veracity, especially since they coincide with the adoption of the policy of using these data to measure police performance.¹³

Consideration of the assault statistics disaggregated by gender and measured against other indicators provides additional reason to question the veracity of the SAPS assault statistics since 2004/5. In 2011/12 the SAPS recorded a total of 144 536 cases of assault against women (including both assault GBH and common assault).¹⁴ Within a similar timeframe the Department of Justice and Constitutional Development recorded the lodging of 217 989 protection orders, mostly by women (against their partners).¹⁵

While not all protection orders will have been sought by women who have been assaulted, we do know that the police are usually the first point of contact for women who experience abuse,

particularly intimate partner abuse; and that women who apply for protection orders have, on average, been in an abusive relationship for four years.¹⁶ Thus, if the police assault statistics really reflected the actual number of cases of assault reported to them, we would see a much higher figure, likely higher than the number of protection orders issued.

Research conducted by Tshwaranang Legal and Advocacy Centre in Acornhoek (Mpumalanga) found that of the 942 cases of domestic violence collated from police, court and hospital records, only 6,7% 'will ever have made their way into officials statistics, as only 63 women pressed charges.'¹⁷ It was for this very reason that the Domestic Violence Act requires police to complete an incident report for every case of domestic violence reported to them. Yet these data are not made available. In short, the police assault figures are inaccurate indicators of actual levels of interpersonal violence in South Africa. This points both to the problems that may result from measuring police performance through reductions or increases in crime, and to the need for the disaggregation of domestic violence from general assault figures.

Another anomaly in the assault figures is evident in the provincial reporting trends. In this case we consider the reporting of the different categories of assault in Gauteng and the Eastern Cape. The rate of serious assault (assault GBH) is similar both in the Eastern Cape and in Gauteng. However, the rate of assault GBH is significantly higher than the rate of common assault in the Eastern Cape, while the opposite is true in Gauteng. Does this mean that there are almost a third more common assaults in Gauteng as compared to the Eastern Cape? Or are victims of common assault less likely to report the incident in the Eastern Cape than in Gauteng? Or, are the police in the Eastern Cape less likely to record cases of common assault than serious assault? Similarly, in the Western Cape the rate of common assault is much higher than serious assault, whereas the opposite is true in the Northern Cape. Explaining these peculiarities would require a greater level of insight into the recording and reporting practices of the police and victims. These anomalies support the contention that the police statistics for attempted murder, assault GBH and common assault may not be reliable measures of inter-personal violence in South Africa.

Since assaults often occur in private settings, the police have little influence over whether or when

Figure 4: Eastern Cape assault rate trends 2004/5–2011/12

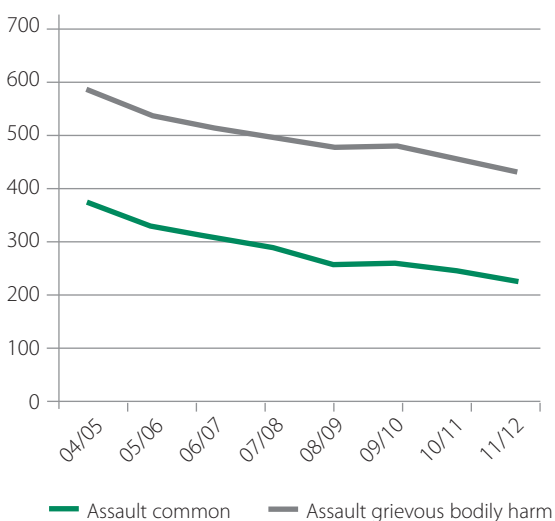


Figure 5: Gauteng assault rate trends 2004/5–2011/12



such assaults occur. It is thus not only counter-productive to measure police performance by reductions in crime types over which they have little control, but also creates the perverse incentive to under-record these types of crime. This is because such crimes don't involve insurance claims and many of the victims have a low social or economic status.

Rather, the police should be encouraged to record these types of crimes so that police crime records can provide a more accurate indicator of inter-personal violence. The consequence of encouraging police recording is likely to result in an apparent increase in inter-personal violent crime in the short term, but would allow for more appropriate and effective responses to this problem. Better indicators of police performance could include the length of time it takes for the police to respond to reported instances of assault, and the detection rates of these crimes.¹⁸ This should also enable us to develop a better understanding of the problem, the types of interventions required and who, in addition to the police, should be held accountable for addressing the social drivers of violence.

SEXUAL AND GENDER-BASED VIOLENCE

The preceding discussion raised questions about the recording practices of inter-personal violent crime and thus the veracity of the available data. It touched on the gendered dimension of crime by referring to domestic violence. In this section of the article we consider the shortcomings of current police reporting practices (i.e. what information is made available to the public each year by the police).

The 2011 State of the Nation address by the President 'stipulated that government would continue to prioritise crimes against women and children.'¹⁹ Yet, in their assessment of the extent to which advances were made with regard to priorities set in 2009, the Women's Legal Centre states that

We found the lack of gender-disaggregated data a severe obstacle in measuring government performance. This persistent unavailability of gender-disaggregated information makes a mockery of government's declared commitment to gender equality, as it is impossible for government programmes to target the multiple challenges women face if no data are available to inform those programmes.²⁰

Research conducted by the MRC points to extremely high rates of rape perpetration in South Africa, with between 28% and 37% of men having raped once, and between 7% and 9% having committed multiple perpetrator rape.²¹ It is thus important that the SAPS make every effort to accurately record every rape reported to them so that we are able to monitor trends over time. While rape reported to the police will only ever reflect a small proportion of the actual rape being perpetrated (estimated to be one out of nine cases that are reported),²² police data are essential for monitoring the extent to which any rape prevention initiatives are effective or not.

Indeed, the failure of the SAPS to consistently provide gender disaggregated data for rape and violent sexual offences has been a significant obstacle to the effective assessment of efforts to

reduce sexual violence. The most serious shortcoming is the inaccessibility of consistent (year-on-year) data about sexual violence disaggregated by gender. In this regard, consider the data presented in the SAPS annual reports over the past three years.

In 2009/10 the annual report offered no statistics for the numbers of rapes committed during that financial year; however, the total number of rapes and indecent assaults for that period was provided.²³ In 2010/11 the SAPS annual report provided data on sexual offences disaggregated into 'contact sexual offences' and 'sexual offences detected by police action'. Also provided were the combined numbers of rapes and sexual assaults for 2008/9-2010/11.²⁴ No provincial breakdown of the statistics was offered, nor a gender disaggregation for rape and sexual assault. The SAPS annual report of 2011/12 goes further than either of the two preceding years by providing rape statistics disaggregated by province for 2010/11 and 2011/12, and by separating rape from sexual assault and 'other contact sexual offences'. However, it is still not possible to determine the gender of the victims of rape and sexual assault. Thus, while more information has been provided each year, the inconsistency in what is reported and what not, and inconsistencies in how data are reported means that it is difficult to predict what information will be made available in future; and thus whether it will be possible to ultimately monitor trends over time.

In each of those three years a gendered breakdown for five categories of crime is offered for adult victims, that is, for murder, attempted murder, assault GBH, common assault and the broad category of sexual offences. However, in 2009/10 and 2010/11 only the number of cases in which the victims were women over the age of 18 was provided, offering no comparison between the number of cases where men were victims. In 2011/12 this was addressed, and the number of cases of men and women in each of these categories of crime have been provided. However, the broad SAPS category of 'sexual offences' includes numerous different types of crimes, and thus offers little in the way of useful information

about the gendered nature of rape and other forms of sexual assault. Another shortcoming is that to date no gender breakdown of crimes against children has been provided in the successive annual reports of the police.

The 2011/12 data show that while 80,3% of murder victims are men and 64,7% of serious assault victims are also men, 48% of common assaults are committed against women. Yet, the data are not disaggregated by gender and province, nor is it possible to determine how many of the assault cases against men and women are domestic disputes. This level of disaggregation would be a valuable addition to the 2012/13 report.

PUBLIC VIOLENCE

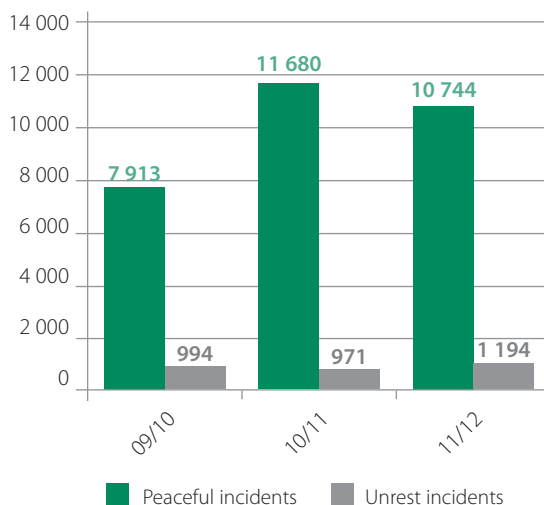
Public violence manifests in a number of ways, including demonstrations, protest actions, strikes, vigilantism and xenophobic attacks. While there are indications that public violence is on the increase, accurate information about the types and causes of public violence are not available. In addition, the way in which the police report on public violence is somewhat confusing and does not allow for the development of an accurate picture of the nature and extent of the phenomenon.

The SAPS Annual Report 2011/12 provides a short summary of what are referred to as 'crowd-related incidents'. The report distinguishes between 'peaceful incidents' and 'unrest-related incidents'.²⁵ According to the report, 'peaceful incidents' are non-violent public assemblies, gatherings and meetings where the police had a presence. On the other hand, 'unrest-related incidents' refer to 'incidents such as labour disputes and dissatisfaction with service delivery in which violence erupted and SAPS action was required to restore peace and order'.²⁶

It is apparent from both the SAPS statistics and those provided by the Municipal IQ Hotspots Monitor, that public protests and gatherings are becoming increasingly violent. Figure 6 shows that peaceful public gatherings increased by 47,6%

from 7,913 in 2009/10 to 11 680 in 2010/11, and then decreased slightly by 8% to 10 744 in 2011/12. Unrest incidents, however, increased substantially by 23% to 1 194 in 2011/12 compared to the previous year.

Figure 6: SAPS data about public protest incidents

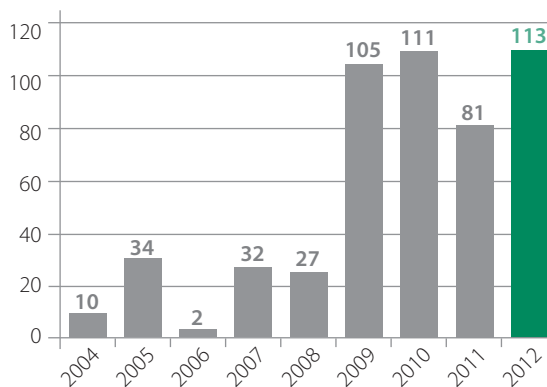


Source: SAPS Annual Report 2011/12, 85.

Figure 7 provides a breakdown of the number of 'service delivery' protests aimed at local government, as recorded by Municipal IQ between January 2004 and July 2012.²⁷ The Municipal IQ figures are based on an analysis of press reports.

According to Municipal IQ the first seven months of 2012 accounted for 22% of all protests recorded

Figure 7: Service delivery protests as recorded by Municipal IQ



since January 2004.²⁸ A vast majority (88%) of the 113 incidents in 2012 turned violent. A little under half (46%) of these happened in informal settlements, likely reflecting the level of desperation and frustration in these communities.²⁸

There are indications that the situation has worsened since the release of the SAPS statistics for the 2011/12 reporting period. Gang violence, vigilantism and farm worker violence flared up in the Western Cape, and striking truck drivers set fire to over 70 vehicles. The widespread mining strikes following the Marikana killings, during which 44 people died, are further examples of incidents that will only be reported in the 2012/13 financial year figures.

In the SAPS Annual Report 2011/12 expressed concern that the increasing number of public violence incidents resulted in a diversion of police resources away from crime combating activities to public order policing. The SAPS stated that they expect government and business to 'invest more in the investigation of the causes of public unrest-related incidences and to consider softer solutions that could be implemented to reduce public unrest and to build greater responsibility, social and economic resilience in communities'.³⁰ Indeed, the police are expected to 'manage' an increasing number of violent situations, which they did not create and cannot resolve. As a consequence they become the visible face of an absent or failing government at which frustrated groups can direct their anger. When the police react with force in an attempt to 'manage' these incidents, the danger of police brutality appears to increase.

This confrontational relationship has serious implications. It threatens to further undermine police legitimacy, and could lead to increasing levels of polarisation between communities and the police, which in turn could lead to more public violence. Indeed, two of the nine 'objectives of democratic policing' in the OSCE (Organization for Security and Cooperation in Europe) Guidebook on Democratic Policing relate to police legitimacy:³¹

- Public trust and confidence in the police are prerequisites for effective policing. Without this trust the public will not be willing to report crimes and provide the police with the information needed to work successfully.
- Furthermore, democratic policing requires that the police simultaneously stand outside of politics and protect democratic political activities and processes (e.g. freedom of speech, public gatherings, and demonstrations).

Violent public protest action also has the effect of creating an impression of instability. It reflects the frustrations and anger of citizens whose expectations are not met. While the crime statistics are by no means the only source of information that informs perceptions of safety and political instability, it is important for accurate information to be made available on a regular basis so that citizens can make an informed assessment about the scale and nature of these protests. In addition, public violence, if not addressed, may have the effect of increasing risk factors for crime.

Given the apparent increase in citizen frustration and willingness to resort to violence, it is essential that accurate, disaggregated data are made available. It is not sufficient to rely only on press reports in order to develop a complete picture of the extent of public violence. Not only are more up-to-date data necessary, but it is important that the data be disaggregated to allow for a better understanding of the nature of public protests. It would be useful, for example, to be able to distinguish between public protests aimed at local government and other forms of public violence such as vigilantism; which is not possible from the information currently available.

Other categories of crimes that are important to monitor on a consistent and regular basis include politically motivated killings, taxi violence, xenophobic attacks, gangsterism and vigilantism. Currently the only reference to some of these forms of public violence is to be found in the Addendum to the Annual Report 2011/2012: *An Analysis of the National Crime Statistics*. In the

section of this report a discussion of murder is presented, as well as a breakdown of the different causes of murder in South Africa. From this it can be gleaned that 4,8% of murders result from vigilante activity; 1,2% from gangsterism; and 0,9% from taxi violence.³² Since there were 15 609 murders in 2001/12, it means that the police recorded 749 murders as a result of vigilantism, 187 murders as a result of gangsterism and 140 murders stemming from taxi violence. However, these data are not disaggregated by province and have not consistently been made available over the past few years. In other words, it is not possible, on the basis of this information, for civil society researchers or institutions to know whether we will be able to track and monitor changes over time.

CONCLUSION

This article has drawn attention to several shortcomings of the police crime statistics. In relation to inter-personal violent crime, the article has argued that the police performance measures have likely had a negative impact on the veracity of the statistics for the various forms of assault. It also argues that consistent disaggregation of the figures by both province and gender would assist researchers to monitor trends and identify the relative effectiveness of efforts to reduce gender violence. The article also argues that the time lag between the recording of crimes and the annual reporting by the SAPS negatively influences our ability to monitor public violence. There seems to be no clear and cogent reason why these data should not be made available more regularly and disaggregated to a greater degree.

In summary the article argues for (i) the crime statistics to be made available more frequently than is currently the practice; (ii) consistency in reporting formats; (iii) additional disaggregation of the statistics by gender and province; (iv) more detailed reporting on public violence, and (v) for a change in the measures of police performance.



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NOTES

1. Minister Jeff Radebe: Justice, Crime Prevention and Security (JCPS) cluster media briefing, available at <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=28579&tid=73815> (accessed 10 October 2012).
2. For example, in 2009 in response to a parliamentary question about whether the government would add crime to its list of obstacles to economic growth, Deputy President Kgalema Motlanthe responded saying that:
 The fight against crime is receiving intense and sustained attention. Apart from the fact that we have increased our real spending to fight crime and that we are increasing the number of police officers, we are also seeking ways to improve the effectiveness of our crime fighting efforts. We have made it quite clear that fighting crime is a top priority of this government. The Minister of Police and the Commissioner have addressed this, and will continue to update Parliament regarding our strategy and its outcomes...
 thus demonstrating that policing was considered synonymous with dealing with crime. Deputy President Kgalema Motlanthe's answers to parliamentary questions, <http://www.the-presidency.gov.za/pebble.asp?relid=1321> (accessed 10 October 2012)
3. In June this year (2012) in reporting on the performance of the Justice Crime Prevention and Security Cluster, the comments of Minister of Justice and Constitutional Development, Jeff Radebe, in relation to performance output 1, which is to 'reduce overall levels of serious crimes and in particular contact crime', exclusively referred to the criminal justice system, the police and the National Prosecuting Authority in particular, while making no reference to the need to address the social factors driving crime and violence. Minister Jeff Radebe: Justice, Crime Prevention and Security (JCPS) cluster media briefing, 25 June 2012. Available at <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=28579&tid=73815> (accessed 26 November 2012)
4. David Bruce, 'The ones in the pile were the ones going down': The reliability of violent crime statistics, *South African Crime Quarterly* 31, Pretoria: Institute for Security Studies, 2010, 11.
5. Addendum to the SAPS Annual Report 2011/12, South African Police Service, 5.
6. Bruce, 'The ones in the pile were the ones going down', 9-17.
7. UNODC, 2011 Global study on homicide: trends, contexts and data, Vienna: United Nations Office on Drugs and Crime, 2011, 9.
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A BALANCING ACT FOR THE PROSECUTOR

Restorative justice, criminal justice and access to justice

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An international appraisal of prosecutors' perceptions depicts a uniform tendency for prosecutors to see their role as one of 'presenting evidence in court to get convictions, rather than promoting problem solving'.¹ Many young law graduates dream of a courtroom battle similar to those in popular television series, which tend to glorify the role of the prosecutor in a dramatic depiction of good versus bad. However, reality soon sets in regarding the numerous challenges faced in the criminal justice system. Court backlogs, high case loads, delays in processing huge numbers of remand offenders, and overcrowded correctional facilities plague the system. It is probably within this context that restorative approaches to justice in the pre-trial phase became attractive for the South African prosecutor. This article examines prosecutorial engagement with restorative approaches to justice, and more specifically the KwaZulu-Natal Justice and Restoration Programme.

In South Africa, the term access to justice is used fairly widely and loosely; intertwined with the notion of seeking justice for the injustices and inequalities of the past and present. Hence 'access to justice' has come to mean the right to exercise a wide range of human rights that are enshrined in the Constitution, including access to economic, social, political, and legal rights. Providing access to justice to all of South Africa's citizens remains one of the country's major challenges. Together with the promotion of the rule of law, access to justice is one of the strategic goals of the Department of Justice and Constitutional Development (DoJCD). The Services Charter for Victims of Crime outlines a number of rights

falling within the ambit of access to justice: being treated fairly, with dignity, and with respect for privacy; the right to protection; the right to offer and receive information; the right to compensation and restitution; and the right to assistance with respect to social, medical, legal and counselling services.² A restorative approach to justice in the criminal justice system is viewed as just one mechanism through which victims (and offenders) may be able to access justice.

Restorative Justice (RJ) has emerged in the midst of the 'culture of control';³ espousing the principle that all participants in the justice process – victims and offenders – 'should be treated in a humane way that values their worth as human beings and respects their right to justice and dignity'.⁴ While its strongest foothold is to be found in the youth justice system, there is increasing interest in its application to adult offenders.

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There is similarity between RJ and justice as practised by African people through community and customary courts, which in turn has found expression in urban areas through forums such as community courts and street committees.⁵ Policy makers and politicians may be attracted to RJ for various other reasons, such as its claims to reduce reoffending, to meet the needs of victims, and its 'communitarian solutions for improving social integration and cohesion in an era of radical and unpredictable transformation'.⁶ Models of practice include victim-offender mediation/conferencing, family group conferencing, victim intervention programmes, sentencing circles, and peace-making circles.

One of the findings in an earlier study on prosecutorial engagement with restorative approaches at the pre-trial phase⁷ was that the criminal justice system (CJS) faces many challenges because of its relative inexperience in actually adopting RJ approaches and providing RJ services, particularly in the context of adult criminal justice. The development, application, and implementation of RJ have been haphazard, inconsistent, lacking consensus, and characterised not only by uncertain engagement by CJS role-players, but also by the hesitant support of victims and community members.⁸

THE KZN JUSTICE AND RESTORATION PROGRAMME

The DoJCD has six demarcated justice clusters in KwaZulu-Natal: Northern KZN, Southern KZN, Durban, Pinetown, Pietermaritzburg and Empangeni. Khulisa's⁹ KZN Justice and Restoration Programme (JARP) began in 2007 with a pilot programme at Phoenix; a township with a predominantly Indian population located about 30km north of Durban. This community-based programme provided alternative methods for dealing with crime, wrongdoing and conflict in the community, and appropriate cases were referred for RJ at the pre-trial phase. A collaborative partnership approach between various stakeholders and government departments such as DoJCD, the National Prosecuting Authority (NPA), South African

Police Service, Departments of Correctional Services, Social Development and Education, and voluntary sector organisations, was integral to the RJ project in KZN, forming the 'backbone' of RJ initiatives in the province.¹⁰

Through funding from the European Union, Khulisa was able to expand and replicate Phoenix JARP to establish 'specialised RJ programmes' at six sites in KZN: Phoenix, Wentworth, Umlazi, Empangeni, Newcastle and Ixopo. The choice of site location was motivated by JARP's ability to reach rural, urban and peri-urban communities in the province and the presence of a court in the close vicinity of the site. Also, communities around the sites were generally those where the scars of apartheid – inequality and discrimination, high levels of unemployment, lack of skills, substance abuse, disjointed and broken families, and high levels of petty crime – were still evident. Apart from the Pietermaritzburg and Pinetown clusters, JARP was able to provide RJ services within the other four justice clusters. Each site was staffed by a site manager, an administrator, an appropriately qualified and trained coordinator, and suitable mediators drawn from the community and trained by Khulisa. The coordinator managed the mediation process by paying attention to the preparation, screening and follow-up of cases, victim support services, referrals from courts or schools, and referral of offenders and victims to appropriate support programmes. While the Phoenix site was already operational as a pilot programme and had processed a total of 3 930 cases during the three year period (2007-2010); Wentworth only began providing services in July 2010; Umlazi in August/September 2010; Newcastle in August 2010; and Ixopo and Empangeni in November 2010.

The main beneficiaries of the programme include not only those directly affected by the crime, but also secondary victims (family and community members of both victims and offenders); vulnerable and marginalised groups (women, children, elderly, disabled, urban and rural poor communities); civil society organisations (non-governmental, community based and faith based

organisations); and government departments. JARP was further supported by the DoJCD through the KZN restorative justice subcommittee which oversaw and guided the implementation of RJ initiatives across all relevant government departments.

A policy framework has since emerged.¹¹ A host of strategic goals for the RJ sector are outlined in the policy; such as the promotion of community based alternative dispute resolution mechanisms to resolve civil disputes in communities; facilitating a protocol for engagement between the Justice, Crime Prevention and Security Cluster and civil society organisations working in the sector; education and training programmes on RJ for communities and civil society; and programmes that will assist with building the capacity of civil society organisations. The 2011 Restorative Justice National Policy Framework¹² sets out the roles and responsibilities of the individual government departments and civil society organisations for the implementation of RJ. The department has recently revised the framework to include the roles and responsibilities of traditional leaders that had been omitted from the original framework.¹³

RJ AND THE PROSECUTOR

Internationally, prosecutors tend to see their role as one of presenting evidence in court to get convictions, rather than promoting problem solving. There is often a reluctance to wholeheartedly engage with RJ.

South Africa does not follow a principle of compulsory prosecution, but if there is a *prima facie* case against the accused and there are no other compelling reasons not to prosecute, the prosecutor has a duty to institute criminal action. A number of possibilities for diversion exist within this discretionary system and the decision to divert is largely dependent on the individual nature of the case or the circumstances of the accused. The terms diversion and RJ are not synonymous or interchangeable, even though many diversion programmes may draw on RJ principles. RJ processes may include diversion,

but diversion on its own, with no participation by the victim, is not necessarily restorative in nature. Victims benefit from restorative processes, especially where the principles of RJ are properly applied; but this is often not possible through the traditional CJS.¹⁴

In line with the NPA's notion of prosecutors 'being lawyers for the people', the prosecutor is expected to become an active participant in decisions on whether cases should be referred for RJ processes at the pre-trial phase or not. While victim centrality is key, this approach seeks to bring offenders back into the 'loop' by also paying attention to their experiences and needs. Typically less serious offences, such as common assault, theft, malicious damage to property and *crimen injuria*, will be referred in this way.¹⁵ However, in certain instances even serious cases have been referred for RJ processes as part of diversion conditions, especially if it involves a youthful first offender, and/or if the parties are known to each other.¹⁶ If after initial assessment the matter is deemed suitable for a RJ process, preparation and facilitation takes place. Such matters require an 'acknowledgement of responsibility' on the part of the offender, but no formal plea is entered: the charge is withdrawn and there is no criminal record. It implies the provisional withdrawal of the charges against the accused, on condition that the accused participates in an appropriate programme and/or makes reparation to the complainant. Diversion is preferable to merely withdrawing a case, as the offender is charged with taking responsibility for his or her actions.

Restorative approaches can also be applied where the offender tenders a guilty plea and the prosecutor decides that the matter will not be withdrawn. In this instance, the prosecutor is obliged to consult with the victim of the crime, and the payment of restitution to the victim may specifically be listed as a possible condition. If the victim is amenable to the idea, a RJ process can be held prior to the plea and sentence agreement.

Prosecutors clearly exert a huge influence over the administration of justice and exercise

considerable discretion in determining which cases are suitable for a particular RJ process. The adoption of restorative approaches at the pre-trial phase depends largely on the innovation and creativity of prosecutors themselves. 'Once the prosecutor accepts his role as gatekeeper, it is a short jump to the paradigm shift from the "trail 'em, nail 'em, jail em" mentality that pervades the traditional CJS, to the RJ mindset that considers every case in light of what outcome best addresses the needs of the victim, community and offender.'¹⁷

METHODOLOGY

The research that this article is based on was motivated by a perusal of Khulisa's evaluation report¹⁸ on the six sites over the two year period. Prosecutorial referrals to RJ for the period March 2010 to April 2012 made up an average of 89,35% across all the sites, followed by referrals from schools (3,49%) and from walk-ins (5,16%).

During May and June 2012, 18 prosecutors – nine male and nine female – at courts located in the close vicinity of the sites, completed a questionnaire that probed their knowledge of and training in RJ, referral patterns, and their interaction with the KZN JARP. The questionnaire comprised a self-report instrument and included open-ended and close-ended items.

Eleven prosecutors at a site not serviced by JARP were interviewed to determine whether and how restorative approaches were being applied in the absence of a dedicated RJ service provider. Semi structured interviews with key informants such as site managers provided valuable information on the content, delivery and challenges experienced by the programme.

The sampling was purposive; targeting only those prosecutors that worked at courts in the vicinity of the JARP sites at Phoenix, Wentworth, Umlazi, Ixopo, Newcastle and Empangeni. Similarly, interviews were held with prosecutors at only one court that was not serviced by JARP.

RESEARCH FINDINGS AND DISCUSSION

Case loads and referral patterns

Data from questionnaires showed that prosecutors generally carried very high caseloads, with the majority (eight) dealing with at least 100-200 cases per month, six dealing with 50-100 cases, and three with 200-300 cases. One prosecutor dealt with over 300 cases per month.

While prosecutors mainly referred cases to the Department of Social Development, Khulisa and NICRO, seven prosecutors indicated that they referred only 'some cases' and 'mediated the rest themselves'. One prosecutor conducted all the restorative mediations himself and did not refer.

In determining which cases were suitable for referral the following criteria were cited: willing candidates; petty matters where parties are known to each other; if the probability of resolving the case through mediation is high; where victims are no longer interested in pursuing the matter, for example in domestic violence cases; in less serious offences; and where parties are amenable to resolving the case outside of the formal court process. According to prosecutors, participants (victims and offenders) were in the main happy for the matter to be resolved through restorative processes; showing a willingness to go ahead with the process once it was explained to them.

Types of crime and reoffending

The most common types of crimes referred for restorative justice were for assault, theft, malicious damage to property, shoplifting, crimen injuria, and vandalism. Referrals were mostly for crimes such as common assault and assault GBH (59,54% cumulatively across all sites). The highest number of referrals for these crimes was at Wentworth and Umlazi, areas plagued by high rates of substance abuse, violence, and petty crimes. Only one prosecutor referred domestic violence matters. While the majority (nine) indicated that they did not know of any cases where the offender had reoffended, three indicated reoffending had occurred.

While the draft prosecutorial guidelines specifically excluded domestic violence cases for RJ processes, in terms of the new 'informal mediation directives',¹⁹ domestic violence cases may be dealt with through restorative justice processes on the authority of the Director of Public Prosecutions. Only a senior public prosecutor or person delegated by the DPP may mediate these cases.²⁰ From interviews with site managers and prosecutors it became apparent that many cases of common assault and assault GBH are in fact 'disguised' domestic violence cases, and that the parties involved are close family members.²¹ However, international practice²² indicates that there are opposing views on whether domestic violence issues belong within a RJ paradigm.²³ The main reason for this is that victims of domestic violence may be unable to negotiate for themselves in the way that RJ meetings expect. The power imbalances and dynamics of control that characterise many domestic violence relationships suggest that, in most instances, the victims of violence do not have the capacity to negotiate freely and fairly with the abusers.²⁴ Clearly, the situation in South Africa is quite different, where prosecutors are not averse to either referring these cases to service providers for RJ, or even facilitating mediation themselves.²⁵

RJ processes

Mediations were facilitated at the JARP premises in a separate room or at the court in a separate room. According to site managers, mediations were attended by the offender, the victim, their support person such as a family member, and two mediators. The mediation typically lasted for about an hour.

Prosecutors revealed an eagerness to embrace RJ at the pre-trial phase; with some seeing a particular role for themselves in the screening phase of the RJ process. However, there was a dire shortage of service providers and training. Prosecutors are also willing to make greater use of alternative dispute resolution mechanisms, and participate in crime prevention initiatives to enhance quality of life, through partnerships with

local communities, media, businesses, and schools.²⁶

There are many factors that affect their willingness to do this. They may be motivated by the constant departmental pressure to reduce high caseloads and relieve court backlogs; and if RJ services are not available, might end up facilitating large numbers of cases themselves. It could also be a convenient and 'easy' way for prosecutors to avoid court processes. In the present study, prosecutors were extremely positive about the programme's impact on the functioning of the court, with nearly all citing the 'reduction of court rolls' and 'clearing of backlogs' as the most positive impact; allowing them time to focus on more serious cases.

However, it was encouraging to note from the interviews that prosecutors also recognised the potential of RJ for reconciliation and restoration in communities; especially when dealing with minor and petty offences emanating from conflict within families and between people known to each other that could be dealt with more appropriately outside the 'confines' of court processes and procedures.

These cases are mostly trivial and usually involve neighbours, family members and friends. Many are cases where parties themselves requested or even insisted on mediation. Prosecutors are sometimes compelled to mediate due to the lack of service providers, or if services are only available on certain days. Prosecutors acknowledged that the lack of proper facilities at the courts meant that the quality of RJ processes was being compromised, and emphasised the dire need for dedicated RJ facilities and services at all courts in the country (a separate room staffed by a social worker and other professionals trained in the facilitation of RJ processes).

In the past, prosecutors were not expected to actually mediate cases themselves,²⁷ but rather to refer cases to a social worker or probation officer, who would engage with the accused to determine their suitability for RJ. The reality is that the provision of RJ services in KZN is confined to a

few well-resourced and well established organisations such as Khulisa and NICRO, and a number of courts do not have service providers or social workers to whom cases can be referred. RJ is already being ‘practised’ by prosecutors who take on the role of mediators; performing the functions of screening, preparation, and facilitation of cases. Furthermore, these mediation sessions are held in less than ideal conditions – a disused court room or the prosecutor’s office. In the light of the new NPA directives on restorative justice which ‘allow’ prosecutors to mediate cases under certain conditions, it is imperative that the victim is properly consulted, and his/her needs taken into account, before the prosecutor decides on a course of action.²⁸

Training

Only eight respondents had received training in RJ. Training was provided by the NPA and Khulisa. Most (17) said they were familiar with the general principles of RJ and how it was being implemented by JARP, while four indicated they were not familiar, and three did not respond to this question.

A network of civil society organisations has developed a set of standards to guide the implementation of restorative justice programmes and processes linked to the criminal justice system. However, it became apparent from the interviews that while prosecutors generally ‘knew about’ the NPA guidelines through training provided by the senior public prosecutor, they were unaware of the existence or content of the practice standards; drafted to ensure ‘specific level of quality in relation to service delivery’.²⁹ Unfortunately, this ‘toolkit’ has not been widely disseminated nor incorporated into the existing guidelines. Furthermore, some junior prosecutors had not heard about RJ prior to being employed by the NPA.

Prosecutors’ primary focus is the prosecution of crimes through the courts, and their education and training prepares them for this. The facilitation of mediation requires skills in, among others, psychology, victim support,

communication and facilitation, trauma counselling and crisis intervention, and familiarity with appropriate support programmes for victims and offenders. It is critical that RJ centres are staffed by people who have the skills and experience to deal with all these issues.

CONSTRAINTS OF RJ

All justice practices, including RJ, are constrained in some way. The formal CJS is limited by its inability to listen to victims (and offenders) recounting the circumstances of the crime, and its consequences on those directly involved. Restorative practices are limited by the ability of offenders and victims to think and act in ways that are restorative. Boyes-Watson has argued that ‘[d]espite the likelihood that state involvement will undermine the ideal vision of restorative justice, our greatest hope for achieving RJ in modern societies lies in growing state involvement in RJ’.³⁰

But, on the other hand, as RJ becomes diluted and absorbed into the CJS, its capacity to offer meaningful recourse to a wide range of victims may be compromised. Concerns have been raised about the CJS’s ability to deliver victim centred justice. In current practice there is minimal consultation with the victim because of time constraints and pressure to reduce the number of cases on the court roll.

Since the provision of RJ services straddles various disciplines and departmental roles, the absence of proper coordination in service delivery across departments remains a challenge. Much can be achieved through partnerships, piloting, and engaging with all relevant state departments and civil society groupings in the development of new programmes and strengthening existing ones. Adequate budgetary allocation for RJ services is crucial for the development, accreditation, and monitoring and evaluation of RJ programmes and initiatives. The introduction of modules on the theory and practice of RJ in criminal justice in legal curricula could address the knowledge gap on RJ amongst criminal justice personnel. Funding and resources are also needed

for training and capacity building of all role players in the sector, and for awareness raising and rights education in communities. There is currently still an over-dependency on NGO service providers for both training and services. Since NGOs are heavily reliant on donor funding and/or financial support from the state, this state of affairs means that there is no guarantee of these services being consistently available.

CONCLUSION

It is encouraging to note that many more cases are being referred to restorative processes, rather than merely diverted to programmes that cater only to the needs of the offender, such as substance abuse, anger management, and vocational and skills development programmes, and where a satisfactory outcome for the victim is often absent. Overall, JARP has succeeded in supplementing the conventional justice system by helping to lower the court backlog, allowing the court to utilise existing capacity for serious offences, and thereby improving the efficiency of the courts. It has also provided victims and offenders with an opportunity to participate in a process that attempts to address the harm caused by the offence or wrongdoing in a more holistic way.

In order to further advance and integrate RJ in the criminal justice system, a logical step would be to design a case flow approach that identifies those cases that are appropriate for RJ intervention. A central intake unit, operating under established guidelines, would direct cases in one of two directions: a RJ route or a conventional criminal justice route. While the conventional route would apply to serious cases such as murder, rape and aggravated robbery, the RJ route would apply to all others (a parallel but 'interlinked' track). The decision to divert cases must be informed by the circumstances of the crime, the offender and the victim. This system might also apply to the so-called victimless crimes such as prostitution and drug offences.

The 'mediation movement', which was initially conceived of as a transformative process, is

increasingly understood and practised as a settlement producing, problem solving technology. In the main, RJ interventions, in South Africa and internationally, are evaluated in terms of their potential to satisfy the needs of victims and offenders, prevent reoffending, and achieve some degree of reconciliation. However, it has the potential to do far more. It is a challenge for all those working in this field (advocates, academics, practitioners, and policy makers) to understand why and how, particular restorative programmes work; if and when they do, in specific contexts. The values and practices of restorative justice hold much promise for serving the needs of crime victims, offenders and community members; and when practised with appropriate skill, can impact positively not only on participants' long term healing, but also their overall justice experience.



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A POWERFUL TOOL OF JUSTICE

Paralegals and the provision of affordable and accessible legal services

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In many parts of Africa, a quiet revolution is transforming the delivery of legal assistance to pre-trial detainees and accused persons. Too poor to afford the services of a lawyer, and unable to rely on inadequate – or nonexistent – state-funded legal aid systems, many Africans are at the mercy of often oppressive and corrupt criminal justice systems. This is beginning to change as paralegals – who are less expensive and more accessible than lawyers – are empowering the poor and marginalised in their interactions with police, prosecutors, and the courts. In almost two dozen countries across Africa, paralegals are providing a critical service, particularly in the early stages of the criminal justice process. They provide primary legal aid services that often no one else is providing, which in turn results in the elimination of unnecessary pre-trial detention, the speedy processing of cases, diversion of young offenders, and reduction of case backlogs. Some paralegal services also provide food and medical supplies to people in detention. They may also be present at police stations in order to deter ill-treatment and forced confessions. Paralegals play a valuable role in reducing prison overcrowding by locating the family members of pre-trial detainees and facilitating bail hearings. This article gives an overview of paralegal services in a number of African countries, and shows how these services are assisting thousands of pre-trial detainees and accused persons to access justice in environments where legal services are scarce or non-existent.

SCARCITY OF LAWYERS

Throughout much of Africa, persons accused of crime do not have access to a private lawyer. In places where a rudimentary legal aid system operates, such as Kenya, Malawi or Nigeria, a lawyer is often provided only at the trial stage of legal proceedings.¹ Yet, access to a lawyer at the early stages of the criminal justice process can be crucial to limit abuse and torture at the hands of the authorities – often leading to forced

confessions – and significantly enhancing accused persons' chances of awaiting trial at liberty.

A survey on access to justice in Africa found that while national laws – often entrenched as constitutional provisions – respect a right to state-funded legal aid, access to such aid is limited.² Such aid is particularly rare at police stations (where many suspects and accused persons are detained) and only sometimes available in prisons and the lower courts.³ In numerous African countries legal aid at public expense is restricted to capital cases, given the scarcity of public defenders, as borne out by the following examples:⁴

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- Liberia, with a population of 3,8 million has 21 public defenders, most of whom are recent law graduates with limited practical experience.
- In 2012 Malawi, a country of 15,5 million, had 18 legal aid lawyers, of whom 16 are junior or have fewer than five years' experience.
- In 2011 Sierra Leone, with a population of 6,4 million, had three legal aid lawyers who exclusively provide services in the capital city, Freetown, through a pilot national legal aid scheme.
- In Zambia, the Legal Aid Board has 21 lawyers on its staff to provide services to a population of 13 million people.⁵

In many poorer African countries there is a general shortage of professional legal personnel. Lawyers are in such short supply that they charge a premium for their services, putting them out of the reach of all but the wealthy. In Malawi, for example, some 250 registered lawyers are servicing a population of some 15,5 million people.⁶ With an average of one lawyer for every 70 000 inhabitants, only Malawians with considerable means can hope to obtain the services of a lawyer. Sierra Leone and Rwanda have about 300 lawyers each for, respectively, six and ten million inhabitants.⁷ Moreover, most lawyers are typically concentrated in their country's largest urban centres, so that rural populations have virtually no access to lawyers.

While some African countries have an abundance of lawyers, their fees remain too high for the average accused. For example, Nigeria has more than 50 000 lawyers, the highest number of any country in Africa.⁸ Yet it is estimated that some three-quarters of pre-trial detainees in Nigeria are too poor to afford a private lawyer.⁹

DEMAND FOR PARALEGALS

An innovative and cost-effective way to compensate for the dearth of affordable and accessible lawyers on the continent is through the use of paralegals. Typically paralegals receive relatively basic instructions in the law and criminal procedure, buttressed by practical experience working at the coalface of the criminal

justice system. Paralegals are closely supervised through on-the-job training, often working under the supervision of lawyers, and where necessary, refer cases to lawyers for further assistance. That is, lawyers ensure that the paralegals under their care operate within the ambit of the law. Such lawyers also provide legal advice to paralegals in respect of individual cases, and help draft memoranda and formal letters directed at criminal justice officials.

While paralegals cannot represent someone at trial, they provide significant legal and practical assistance to arrestees and accused persons before the commencement of their trials, especially for awaiting trial detainees.

Providing assistance during the pre-trial stage of the criminal justice process is important for a variety of reasons. Many African prison systems are disproportionately filled with pre-trial detainees. In a number of countries, including Angola, Benin, Cameroon, Liberia, Nigeria, and Uganda, prisons contain more pre-trial detainees than convicted and sentenced prisoners. In South Africa a third of all prisoners are pre-trial detainees.

In many African countries the duration of pre-trial detention is measured in months and years. In Nigeria, the average length of pre-trial detention nationally has been reported at 3,7 years.¹⁰ In 2010, half of Nigeria's pre-trial detainees had been detained for between five and 17 years, according to the country's National Prison Service.¹¹ Prisoners who had been in pre-trial detention for between seven and 17 years have been documented in Benin.¹² Even in South Africa, with its relatively well-resourced criminal justice system, the average length of pre-trial detention is six months.¹³

Persons in pre-trial detention have not been convicted of a crime. Yet pre-trial detainees' conditions of confinement and treatment by criminal justice personnel can amount to severe punishment. Poorer detainees often languish under the worst conditions in places of detention, compared to those who have access to some, albeit limited, financial resources. In many places detainees without money to bribe a guard or pay

off a cell leader are denied access to medication, adequate food, a bed, and other amenities. Such detainees are at heightened risk of assault as corrupt guards and cell leaders seek to compel them to pay up. Pre-trial detainees are also at risk of being tortured by police officers seeking to extract confessions that can be used in court to secure a conviction.¹⁴

In short, the decision to detain someone before they are found guilty of a crime can have a severe, lasting, and adverse impact on detainees and those who love and depend on them. Pre-trial detainees lose their freedom, and can also lose their families, health, homes, jobs, and community ties.¹⁵

The availability of legal and practical assistance – especially at the very early stages of the criminal justice process – can thus make a significant difference to arrestees' likelihood of being remanded into pre-trial detention and, in cases where they are detained, the duration thereof.

As a World Bank report concludes, not all interventions during the pre-trial phase of the criminal justice process require the intervention of lawyers. Rather, paralegals can – and do – provide 'first aid' in access to justice in many African countries:

...properly construed, paralegal services should be viewed as especially necessary in sub-Saharan Africa because of the poor extent of access to justice available to most Africans. In systems suffering from high prisoner remand populations and extensive court delays, there can be little or no case for bolstering the private legal profession or even the government public defender offices while the more urgent need for paralegal services is neglected. Paralegals should be viewed as a priority in building credible systems of justice in Africa.¹⁶

POINTS OF INTERVENTION

Most paralegals in Africa are employed by non-governmental organisations (NGOs), although some are also employed by universities (as part of law clinic programmes, for example) and by

governments who seek a cost-effective solution to the dearth of legal aid lawyers in their jurisdictions.

Paralegals provide assistance to arrestees and accused persons at various points in the criminal justice process. It is helpful to summarise each of these in turn, to better understand the work paralegals perform at the police station, at court, and within the prison.

At the police station

Using their knowledge of the law and the circumstances of their client, paralegals can identify individuals who are eligible and suitable for release from the police station, and assist them accordingly. In doing so they gather and provide information to the police about whether arrestees fulfil legal criteria for pre-trial release.¹⁷

Paralegals who attend a police station can assist in verifying the identities and locations of relatives and others who might assist the arrestee. The presence of a paralegal in a police station, particularly one who attends the station regularly, is also likely to moderate any tendency of police officers to mistreat arrestees or to demand a bribe. Police stations are also the most effective points for identifying and diverting juvenile suspects who might otherwise be classified and processed as adults.

At court

A trained paralegal who has interviewed an unrepresented detainee before a court hearing is able to advise the detainee about the right to apply for bail (if applicable in the legal system) and to gather facts that are relevant to such an application, such as the names of relatives who may be able to raise bail deposits or act as sureties. Even in systems that do not generally permit non-lawyers to speak for litigants at a pre-trial hearing, pragmatic judicial officers may often allow a paralegal to speak for an indigent defendant on matters of bail.¹⁸

Paralegals can improve the quality of self-representation among defendants, especially during

the pre-trial phase of the criminal justice process. This is done through awareness raising and education on self-representation, demystifying the court process through role playing on what to expect in court, and providing guidance on the bail process and the grounds on which judicial officers typically base their pre-trial release/detention decisions. As a result, accused persons become more active players and partners in the administration of justice, typically resulting in more successful bail applications at court.¹⁹

At prison

Where accused persons have not been given or offered bail and are in pre-trial detention awaiting the next court hearing, paralegals can assist them in preparing and lodging bail applications. Paralegals who work in prisons can either train prisoners individually in preparing bail applications, or offer group workshops to inform remand prisoners about court procedures in general, court etiquette, and their options for gaining representation by a lawyer or acting for themselves. In addition to advisory assistance offered in the prison, paralegals can also search for relatives of detainees to inform them of the whereabouts of the detainee and to ascertain who may assist the detainee to obtain release on bail.

As part of their prison-based work, paralegals typically seek to identify pre-trial detainees whose remand warrants have expired, who have been in pre-trial detention longer than the statutory maximum allows, who wish to plead guilty, and who are terminally ill. The paralegals then bring such detainees to the attention of the relevant investigating officers, prosecutors, and magistrates.

In a number of African countries, paralegals conduct regular prison-based Paralegal Aid Clinics (PLCs).²⁰ The clinics aim to empower detainees to apply the law in their own cases. The paralegals use a range of participatory learning techniques, including role plays, games and songs, that enable detainees to, for instance, apply for bail, make a plea in mitigation (should they wish to plead guilty), and cross-examine

witnesses and police officers.²¹ In jurisdictions where resource constraints are acute, paralegals seek to reach as many detainees as possible, addressing groups rather than individuals – group PLCs accommodating 50-150 detainees per clinic are not uncommon.²²

IMPACT

Paralegal schemes have had a significant, measurable impact on pre-trial detention populations in a range of countries.

In Malawi, the Paralegal Advisory Service Institute (PASI), an NGO, contributed to a fall in the proportion of prisoners held in pre-trial detention from 35% in 2000 to below 15% today – one of the lowest proportions in southern Africa and half the global average. Between 2007 and late 2011, PASI paralegals facilitated 91 camp courts (i.e. court hearings in prisons or remand centres), resulting in 1 490 successful bail applications, and 603 cases where charges against the accused were withdrawn.²³ PASI's paralegals conducted 3 504 PLCs between 2002 and 2007, attended by 104 700 prisoners, mostly pre-trial detainees.²⁴

In Sierra Leone, Timap for Justice, a Freetown-based NGO, employs ten paralegals to work at police stations in three districts, where it is able to reach and assist over half of all arrestees who come through the police stations. Over a one year period in 2011-2012, the paralegals provided assistance to 5 781 arrestees. They secured police bail for those people in half of the cases. In addition, they succeeded in getting the charges dropped entirely in 28% of the cases, usually due to mistakes of identity, misunderstandings of facts, or lack of evidence.²⁵ Timap is thus successful in securing release – either without charge or on bail – for approximately 80% of the people its paralegals assist in police stations.

Working in five prisons in Rwanda, ten paralegals conducted awareness raising sessions for 3 000 pre-trial detainees over a one year period, preparing detainees for their next court appearance by role playing bail applications,

applications for release, pleas in mitigation, and cross-examination (for defendants who wished to plead guilty). Within a one year period in 2009-2010, the paralegals assisted with the pre-trial release of almost 200 detainees, and the permanent release (through a dismissal of charges) of 625 pre-trial detainees.²⁶

Since 2007, Uganda's Paralegal Advisory Services (PAS) has deployed 38 paralegals, working in 38 prisons covering 57% of Uganda's prison population. An evaluation of PAS's work over an 11-month period in 2009-2010 revealed that its paralegals contributed to the release of almost 24 000 pre-trial detainees.²⁷ Between 2005 and 2010, the number of pre-trial detainees as a proportion of all prisoners in Uganda declined from 63% to 55%. At prisons where PAS operated, the proportion of pre-trial detainees declined to 25%, compared to 75% in prisons where PAS was not active.²⁸

EVOLVING RECOGNITION FOR PARALEGALS

Since 2004, international legal and regulatory frameworks have supported the existence of paralegals as service providers in the criminal justice process. The *Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa* provides that the delivery of effective legal aid to the maximum number of persons is to rely on non-lawyers, including paralegals.²⁹ The *Lilongwe Declaration* and its associated *Plan of Action* were adopted by the African Commission on Human and Peoples' Rights in 2006, and by the UN Economic and Social Council (ECOSOC) in 2007.

The United Nations *Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* urge states to recognise the role played by paralegals or similar service providers in providing legal aid services where access to lawyers is limited.³⁰ According to this document, states should, in consultation with civil society and justice agencies and professional associations, introduce measures to:

- develop, where appropriate, a nationwide scheme of paralegal services with standardised training curricula and accreditation schemes
- ensure that quality standards for paralegal services are set and that paralegals receive adequate training and operate under the supervision of qualified lawyers
- ensure access for accredited paralegals who are assigned to provide legal aid to police stations, facilities of detention, pre-trial detention centres and prisons; and
- allow court-accredited and duly trained paralegals to participate in court proceedings and advise defendants when there are no lawyers available to do so

At the national level, some countries have started adopting policies and passing legislation to promote paralegals within their criminal justice systems. For example, legislation in Malawi and South Africa recognises paralegals as legal service providers. In Sierra Leone, a new legal aid law (passed by the legislature in 2012 but not promulgated by the executive at the time of writing) provides for a legal framework for institutionalising and scaling-up of community based paralegal programs throughout the country.³¹

CONCLUSION

Paralegals are playing an increasingly important role in enhancing access to justice for accused persons and criminal suspects. A 2012 audit by Penal Reform International (PRI) identified dozens of paralegal organisations working in the criminal justice sector in 21 African countries.³²

In many places paralegals who deliver justice services are adding to their repertoire of tools, including mediation, advocacy, and public education.³³ In both Malawi and Sierra Leone, for example, paralegals handle a substantial number of cases through some form of alternative dispute resolution – thereby avoiding people becoming ensnared with the formal criminal justice system in the first place. Moreover, in both countries paralegal organisations have engaged in advocacy, lobbying policy makers to promulgate laws that

formalise the role paralegals play in the criminal justice process.

Paralegals typically come from the communities they serve.³⁴ They are thus finely attuned to local contexts and needs, such as speaking local languages, knowledge of local forms of justice, and community acceptance. Paralegals are consequently well suited to ameliorating community disputes which, if left unaddressed, may lead to criminal conduct (e.g. violence over a land dispute). They also play a constructive role as intermediaries between the formal criminal justice system and local communities who are often suspicious of the rules and processes governing the justice system. In a number of places paralegals are directly involved in community education, explaining the purpose of bail and the importance of the 'presumption of innocence' to an often sceptical public.

Paralegals have an important role to play in criminal justice systems throughout Africa. In many countries the effective use of paralegals is inhibited by a lack of legal recognition, often exacerbated by the attitude of professional bar associations that resist the use of paralegals because of concerns over lost status or income. Where paralegals are not recognised, changes in the law may be necessary so that paralegals are officially allowed access to people in police or prison custody.



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PRISON REFORMS IN MOZAMBIQUE FAIL TO TOUCH THE GROUND

Assessing the experience of pre-trial detainees in Maputo

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This article presents the findings of research on pre-trial detention in the Mozambique capital city Maputo. Conditions of detention and access to legal representation of a group of pre-trial detainees are analysed within the context of development of the prison system in Mozambique. The research shows that while progress has been made at the legal and institutional level of the prison system, reforms have yet to impact on pre-trial detainees' lives.

Since 2009 the Open Society Foundations (OSF) has been conducting a global campaign on pre-trial justice;¹ highlighting issues such as the conditions in which pre-trial detainees are held and the socio-economic consequences that these detainees encounter while in detention. The European Commission (EC) also conducted a 2007 study that analysed the minimum standards of pre-trial detention in the member states of the European Union.² In Africa, too, civil society organisations and academic institutions have considered the plight of pre-trial detainees.³

Research has focused on the conditions of detention and access to legal representation of detainees incarcerated in prisons and police custody.⁴

The UN Working Group on Arbitrary Detention⁵ and the Special Rapporteur on Prisons and Conditions of Detention in Africa (SRP)⁶ have shown that the conditions and socio-economic consequences of detention are tougher for pre-trial detainees than for sentenced prisoners.⁷ Pre-trial detainees are often exposed to violence and torture, are subject to the arbitrary decisions of corrupt officials, and have to share their cells with sentenced prisoners. In many countries access to food, water and sanitation is inadequate, increasing the exposure of pre-trial detainees to diseases.⁸ More often than not pre-trial detainees do not know their basic rights and rarely get to

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see a lawyer before their trial.⁹ In addition, they are more likely than sentenced prisoners to lose their jobs and their homes while in custody.¹⁰

In 2001 the SRP found that pre-trial detainees in Mozambique lacked access to legal representation and suffered deplorable conditions while in prison.¹¹ In 2006 a study by the Open Society Initiative Southern Africa (OSISA) noted that 'conditions of detention in police cells and prisons are not compliant with the UN Minimum Standard Rules for the Treatment of Prisoners (SMR),¹² with severe overcrowding, poor physical infrastructure and an ensuing lack of sanitary conditions and access to basic health care'.¹³

Pre-trial detention in Mozambique remains a critical issue. This article shows that although the Mozambican prison system has improved at a legal and institutional level, much more needs to be done to improve the lives of pre-trial detainees.

METHODOLOGY

The research on which this article is based¹⁴ aimed to explore the conditions of detention and access to legal representation of 20 pre-trial detainees in the Central and Civil Prisons of Maputo. These two establishments are where the majority of pre-trial detainees in the capital city are imprisoned. However, in Maputo pre-trial detainees are also held in the women's prison, police stations and the General Command of the Criminal Investigative Police (Policia de Investigação Criminal, PIC).¹⁵

Statistics collected in the Central and Civil prisons on 29 November 2011 found that both centres hosted 2 273 people, 1 160 of whom were pre-trial detainees. The researcher interviewed 20 pre-trial detainees at these facilities.

The Mozambican National Prison Services (Serviços Nacional das Prisões, SNAPRI) authorised private face-to-face interviews with the detainees. The participants were selected by the authorities of each prison. Open-ended questionnaires were used to assess the conditions of detention and access to legal representation.

The conditions of detention and access to legal representation of these 20 detainees cannot be considered nationally representative. However, the findings reflect challenges confronted by pre-trial detainees at these institutions.

Among the 20 detainees, 17 were Mozambicans and three were foreigners. Nine respondents were older than 30, seven were between the ages of 22 and 30 and four were between the ages of 16 and 21. Fifteen of the 20 respondents were accused of robbery or theft, two of murder, one of drug trafficking, one of assault and one of election fraud (trying to vote twice in the presidential election).

OVERVIEW OF PRISONS IN MOZAMBIQUE

There are 184 centres of detention in Mozambique under the authority of the Ministry of Justice.¹⁶ Establishments include central, civil, provincial and district prisons, and labour camps (*centros abertos*), located in the country.¹⁷

In Maputo there are five prisons: central, maximum security, civil, a women's prison and the new juvenile centre built in 2011. Some academic research has focused on conditions of detention in Maputo prisons,¹⁸ however, there is a lack of accurate information about the situation of prisons in the other Mozambican provinces.¹⁹

The SNAPRI is the only governmental body that releases regular statistics on the prison population. Its statistics go back as far as 2006, when it was established. Every year national statistics are published on the website of the International Centre for Prison Studies (ICPS) at Kings College at the University of Essex. The ICPS has assisted the SNAPRI in developing appropriate policies on prisons and disseminating prison data. Mozambique had an estimated 16 881 prisoners in June 2012, with a pre-trial population of 38%.²⁰

Data available from other sources (see Table 2) show that while the total prison population has doubled in the last decade, the number of pre-trial detainees appears to have remained stable.

Table 1: Mozambican prison population 2012

Total prison population	16 881 (June 2012)
Pre-trial detainees	6 415 (June 2012) 38% of the total prison population
Prison population rate (per 100 000 of national population)	69 (on an estimated national population of 24,43 million at June 2012)
Female prisoners	2,2% (2009)
Foreign prisoners	0,9% (June 2012)

Data available from the International Centre for Prisons Studies

Table 2: Prison population 2000 – 2012

Year	2000	2006	2012
Prison population	8 812	15 000 ca.	16 881
Pre-trial detainees	6 422	7 950 ca.	6 415

Data 2000 available from O Sistema Prisional em Moçambique; data 2006 available from AfriMap, Mozambique: Justice Sector and the Rule of Law: A Review; data 2012 available from the International Centres for Prisons Studies.

PRISON LAW

The prison system is still regulated by the colonial-era Law Decree 26 643 of 28 May 1936.²² However, in 1975, after independence, prisons were unified under the Ministry of Justice with Law Decree 1 of 1975 and monitored through the Inspectorate of the Prisons (Inspecção Prisional). The creation of the Criminal Investigation Police (Policia de Investigação Criminal, PIC) placed the detention centres for pre-trial detainees under the Ministry of the Interior while all the other prisons remained under the Ministry of Justice.

Since independence, Mozambique has signed and ratified the majority of regional and international human rights instruments.²³ However, many of the principles of international law still need to be substantively developed in the Mozambican context as well as within the prison system, and various international protocols need to be ratified.²⁴

The new Constitution of the Republic of Mozambique (Constituição da Republica de

Moçambique, CRM) was enacted in 1990 and amended in 2004. The CRM recognises individual rights and freedoms that had been denied under the 1975 Constitution. CRM Article 64 fixes conditions for pre-trial detention, stating:

1. Pre-trial detention shall be permitted only in cases provided for by the law, which shall determine the duration of such imprisonment.
2. Citizens held in pre-trial detention shall, within the period fixed by law, be brought before the judicial authorities who alone shall have the power to decide on the lawfulness and continuation of the imprisonment.
3. Everyone deprived of their liberty shall be informed promptly and in a way that they understand of the reasons for their imprisonment or detention and of their rights.
4. The judicial decision by which an imprisonment or detention is ordered or maintained shall be communicated at once to a relative.

In 2002, following the recommendations of the Kampala Declaration on Prison Conditions in Africa,²⁵ Mozambique adopted the Prison Policy n. 65/2002. The Kampala Declaration aimed to reduce the widespread number of pre-trial detainees in Africa by ensuring that detainees were kept in remand detention for the shortest possible period, and establishing a system of monitoring conditions of detention.²⁶ However, the Mozambican policy contains only broad guidelines in relation to the conditions of detention of pre-trial detainees.²⁷

The sole body in charge of the management and administration of prisons, the SNAPRI, was created by law decree in 2006. The SNAPRI is subordinate to the Ministry of Justice and its duties include oversight of prisons, management supervision, as well as the execution of security measures and the promotion of labour and work opportunities for prisoners. However, the SNAPRI is severely hampered by a shortage of funds and trained human resources.²⁸

The appointment of Benvinda Levi as Minister of Justice in 2008, and her commitment to the

respect of the rule of law and prisoners’ human rights has led formerly secretive places such as prisons to open their doors to civil society, the media, national NGOs and academic researchers.²⁹

In 2009 the Ministry of Justice welcomed an UNDP project aimed at strengthening national capacity and supporting legal reform in the prison sector.³⁰ The goal of the project was to improve the prison service’s efficiency by bringing the legislative framework of the prison system in line with the Constitution and with universally accepted principles on the treatment of prisoners. The project also aimed to reduce prison overcrowding and social rehabilitation by introducing alternatives to imprisonment, motivated by the overpopulation of prisons, poor conditions of detention, and a lack of access to justice.

Mozambican prison law is currently in the process of being revised and new legislation on alternatives to prisons has been approved by the Council of Ministers.³¹ While these reforms have focused on legal and institutional changes, it is hoped that they will improve the lives of pre-trial detainees.

RESEARCH FINDINGS

Prisons

The Civil and Central prisons of Maputo were built during the colonial era. The Civil Prison with a capacity of 250 prisoners was built during the 1930-40s, while the Central Prison was built during the 1960s to house about 700 prisoners.

The Central Prison is situated in Machava, a mainly residential suburb in the north-western outskirts of the capital city. The Civil Prison is located in the diplomatic and residential neighbourhood of Sommerschild.

The prison population

Statistics collected through interviews with the directors of the prisons showed that in November 2011 the Civil Prison housed 143 people, while

the Central Prison housed 2120 people. The conversion of the Civil Prison into a public utility building may be the reason for the low number of detainees in this establishment.³²

The following table provides a breakdown of the prison population of the two prisons.

Table 3: Prison population at Central and Civil Prisons

	Civil Prison	Central Prison
Male	125	2 120
Female	12	–
National pre-trial detainees	131	911
Foreign pre-trial detainees	6	6
National sentenced prisoners	–	1 196
Foreign sentenced prisoners	–	7

In Central Prison, 167 sentenced prisoners were between 16 and 21 years old, 128 were serving correctional sentences, while 30 were serving sentences longer than two years. Among the pre-trial detainees 499 people were detained beyond the legal pre-trial detention terms,³³ 276 had been detained for more than three months, while 223 had been detained for more than one year.

Conditions of detention

The Universal Declaration of Human Rights (UDHR), the ICCPR and the UNCAT, the UN Standard Minimum Rules for the Treatment of Prisoners (SMR) and other international guidelines for the protection of people in custody assert the importance that conditions of detention have on the lives of people detained.³⁴

Conditions of detention refer to the physical characteristics of the infrastructure, access to light and ventilation, level of occupation of cells, and access to food, drinkable water and sanitation. They also refer to any other situation that impacts on an incarcerated person. Any person in custody has the right to be charged within a reasonable time, to be presumed innocent,³⁵ and to be treated

with dignity.³⁶ Prisoners also have the right to be informed about their responsibilities and rights inside prison, to have access to an adequate standard of living and health care, to be visited by their families and to be represented by a lawyer.

The right to be charged within a reasonable time

Article 64 of the CRM requires that a person has the right to be brought before the investigative judge and to be charged or to be informed of the reason for the detention not later than 48 hours after the arrest. The term can be extended to a maximum of five days in case of *flagrante delicto*, failing which, the person must be released.

The following table shows the length of time detainees were held before being charged.

Table 4: Length of detention before charge

	Not charged after one year detained	20 days from arrest	Between 8 and 15 days from arrest	Between 48 hours and 5 days	Do not remember
No of detainees	1	1	5	8	5

Pre-trial custody time limits

Although Article 308 of the Criminal Procedure Code (Código de Processo Penal, CPP) states specific limits for the duration of the pre-trial detention, the research found that this has yet to be implemented. All interviewees had been detained for longer than allowed by law. Six detainees had been in prison for more than one year and one had been detained for around three years.

The right to be informed

Article 10 of the ICCPR and Rule 35 of the SMR state that detainees must be treated with dignity and informed about their rights and the rules of the prison. This information needs to be given in writing and/or orally upon admission.

The respondents said that if this information is given at all, it is provided verbally in both prisons. Six respondents at the Civil Prison said that a prison official clarified the rules and the rights of the institution, while three said that no one had given them this information.

In the Central Prison seven detainees confirmed that they were informed about the rules and their rights upon their admission to the institution; two of them did not remember and only one said that he had not received any information.

Respondents said that information focused on the rules and the prison disciplinary requirements, rather than on their rights.

Vulnerable groups

Particular attention was paid to the conditions of detention of particular vulnerable groups such as women, children, foreigners and detainees affected by tuberculosis and/or HIV/AIDS. International standards provide rules for special categories of people.³⁷

The only female respondents were at the Civil Prison. They were separated from males at all times and supervised only by female officers. The interviews revealed that their access to adequate food was worse than that of male prisoners. A pregnant woman was living among as the other female prisoners, though she had been given a mosquito net, which nobody else had. Respondents reported that another prisoner had her child with her but she was given no extra food.

Juveniles were detained with adult prisoners in the Central Prison, while they were detained in separate cells in the Civil Prison.

Although juveniles were present in both establishments, the directors said that prisons could no longer accept persons younger than 16. Since June 2011 juveniles between the ages of 16 and 21 years old have been detained in the rehabilitation centre of Boane, forty kilometres from Maputo.³⁸ The centre is the first juvenile establishment in Mozambique and holds 200 people.³⁹

The situation of the three foreign prisoners interviewed was an area of concern. A lack of documents of identification and language barriers make access to justice very difficult. Embassies and/or consulates do not recognise people who cannot prove their citizenship. The absence of diplomatic representatives in Mozambique and the lack of transfer agreements with other countries make the situation even worse.⁴⁰ One foreign respondent said:

I became invisible in this world. No one at home knows where I am and here there is no embassy to represent me. I am allergic to the food they give me but I need to eat to stay alive. No lawyer came to see me and I do not know what to do.⁴¹

The only apparent measure to protect vulnerable persons is separation. In both the Central and Civil Prisons certain sections are reserved for people affected by tuberculosis. The prison policy provides for the separation of different categories of prisoners: female, juveniles, elderly and sick people. While particular measures, such as permanent medical assistance, are required for pregnant women and prisoners affected by HIV/AIDS, there are no norms to assist foreign prisoners. The research found that while the female detainees are always separated from male detainees, juveniles are still imprisoned with adults. In addition, no particular measures are in place to protect vulnerable groups while in pre-trial detention.

The right to adequate standards of living

Article 14 of the ICCPR, Article 11 of the ICESCR and Rules 9-16, 21 and 41 of the SMR place an obligation on states to ensure that people in custody are treated with humanity and fairness.

Both prisons are characterised by old and degrading infrastructure. 'As paredes estão cansadas' [The walls are tired],⁴² said one of the detainees interviewed in the Civil Prison. Although roofs were not leaking, walls are cracked.

In the Civil Prison five of the detainees said that they were sleeping on blankets and mats, while two people were using thin mattresses provided by the prison administration. One person was sleeping on magazines and three were using personal mattresses provided by their families. Most of the detainees possessed only a plastic bag in which they kept their clothes or personal items.

In the Central Prison most of the detainees slept on blankets and mats found in the prisons. Only three detainees slept on new bunk beds, which had been provided by the prison together with mattresses, pillows and bed sheets the previous year. There were not enough beds for all the prisoners and many detainees slept on the floor between or under the beds, and in the corridors between the bunk beds.

Daily time outside the cells

Rule 21 of the SMR requires a minimum of one hour of outside exercise per day per prisoner. In the Civil Prison prisoners were allowed to watch a television located in the yard of the prison from after lunch until 17h00. On the day of the visit they were allowed more time outside the cells. Fridays were dedicated to football.

In the Central Prison, overcrowding created the necessity to open the cells from 07h00 to 17h00. While this allowed prisoners to spend more than an hour per day outside the cells, and alleviated the poor living conditions of the institutions, overcrowding remained a challenge.

Access to adequate food

Article 11 of the ICESCR, Rules 20 and 87 of the SMR and Article 37 of the UN Rules for the Protection of Juveniles Deprived of their Liberty (JDLR) all codify the right to adequate nutrition and water for people in custody.

Three meals per day are served in the Civil Prison, but in the Central Prison detainees receive only breakfast in the morning and a 'reinforced lunch'⁴³ (almoço reforçado) at 13h00. Some of the prisoners eat half of the lunch portion immediately

and half later, for dinner. One detainee said, 'Para não ficar podre eu como agora. Quando deixar vai ficar podre.' [To not eat when the food is already rotten, I eat it now. If I leave for later it will go rotten].⁴⁴

Food is not distributed at regular times and the actual diet consists of a combination of porridge for breakfast, and rice, maize, beans or peanut sauce for lunch or dinner. Female detainees in the Civil Prison said that they had sugar and hot water for breakfast.

Access to drinking water and sanitation

In the female section of the Civil Prison there was one toilet, a sink and a shower; although one of the women interviewed said that there was a toilet in her cell. Each section in the male area had four toilets, three taps and one shower. Two detainees said that in the bathrooms water ran only in the early morning between 07h00 and 09h00, and in the afternoon between 17h00 and 18h00. Buckets, 200 litre tanks and bottles were filled to have access to water during the nights. One female detainee said that they used plastic bags to relieve themselves in the night.

The access to sanitation appeared to be worse in the Central Prison than in the Civil Prison. Some detainees said that there was only one toilet, shared by between fifty and eighty prisoners. Access to drinking water in the Central Prison improved due to the opening of two wells. However, while detainees had access to water during the day, they filled buckets, bottles and 200 litre tanks for the night.

Access to health care

Rule 22 of the SMR sets medical standards for prisons. One respondent said that medical services are 'a parte mais chata aqui dentro' [the most difficult thing in the prison].⁴⁵ In both institutions, a health ward opened from Monday to Friday, from 09h00 until 15h00. The service worked as a pharmacy rather than a health care centre. One of the Civil Prison detainees said:

The doctor gives only Paracetamol for all the diseases you have. If you get sick after three o'clock in the afternoon you need to wait until the next morning and nothing is going to change because the only thing he is going to give is Paracetamol. A prisoner needs to pray God to not get sick from Friday until Monday.⁴⁶ [translated from the Portuguese]

In the Central Prison detainees were sometimes tested for malaria and HIV/AIDS. Transportation to the civil hospital of Maputo was rare and only happened when the detainee was grievously unwell, as the transfer of sick detainees is seen to increase the possibility of escape.

Although access to health care in prison was restricted, this needs to be seen in context since 40% of the Mozambican population has no access to medical services. There are only three doctors and 21 nurses for every 100 000 people in Mozambique. There are approximately 600 doctors in the country.⁴⁷

Contact with the outside world

The SMR⁴⁸ states that a detainee shall have the right to be visited by members of family, friends, and legal representatives, and have an opportunity to communicate with the outside world.

Prisoners at the Central Prison could receive visits for a total of seven days in a period of two weeks. In the Civil Prison female prisoners received visits on Fridays, whilst males received visits the other days of the week. The visit timetable was flexible: from 12h00 to 17h00 in the Central Prison, and from 09h00 to 12h00 and from 13h00 to 15h00 in the Civil Prison. Visiting times did not appear to be limited, especially in the Civil Prison, due to the low number of detainees. Both prisons had a common area dedicated to visits, where officials supervised the progress of the visit.

Detainees were allowed to see their legal representative daily until 15h00 in a reserved room of the administration area. It appeared that

there was no time limit imposed and conversations with legal representatives were not made in the presence of officials.

Interviews with detainees indicated that they could use radios in their cells and that television was allowed a few hours per day. Newspapers and magazines were brought into the prisons by churches and relatives.

Access to legal representation

Article 62 of the 2004 Constitution of Mozambique guarantees legal assistance to accused persons. However, ten of the respondents said that they had not received any legal counsel since their arrest; six persons said that they had paid personal lawyers, and four had recently received assistance from lawyers of the Institute for Legal Assistance (Instituto de Patrocínio e Assistência Jurídica, IPAJ).⁴⁹

Detainees showed a particular preoccupation with their right to access legal representation; most of them could not afford to pay a lawyer and IPAJ was criticised. The detainees who paid personal lawyers said that their professional service was inadequate, and they were left without assistance and having to pay a new lawyer.

Considering the role of IPAJ, a detainee said:

Here there is only a lot of talking because the chance of a lawyer appearing and helping people is very low. Sometimes they pass by but not with the interest to work. If they would really work, they would be here every week. Legal assistance works like this: you need to know someone.⁵⁰
[translated from the Portuguese]

While the work of the IPAJ has increased over the last years, the institute alone cannot cover the enormous need of citizens to access justice. Table 5⁵¹ shows the number of cases assisted by the IPAJ across the country in 2007 and in 2011.

Inadequate access to justice should also be seen in the national context. In 2005 there were 509 lawyers in Mozambique, five for every 100 000

Table 5: Cases assisted by IPAJ

	Cases assisted by IPAJ	No of lawyers	No of para-legals
2007	7 320	17	71
2011	53184	38	85

people.⁵² Ninety percent of these lawyers were located in Maputo and in other big cities.

CONCLUSION

This article has shared the findings of research conducted into the conditions of pre-trial detention in the Mozambique capital city.

The first part of the article covered the legislative reforms that took place in the Mozambican penal system since 2000, and how the old militaristic and secretive world of prisons has been opened up to the public and academic research. However, the reforms have not impacted much on conditions experienced by pre-trial detainees.

- The right to be charged within a reasonable time is not always respected: pre-trial custody time limits for all respondents had expired and all the detainees interviewed had been in detention beyond the legal term.
- While the right for a detainee to be informed about his/her rights upon admission was partially provided for, information was limited to the responsibilities of the detainees within the prison walls.
- The lack of attention received by vulnerable groups was of concern. While female detainees were separated from males, some juveniles were imprisoned with adults. It is hoped that the creation of a new juvenile centre close to Maputo would improve this situation. Foreign detainees face the greatest challenges.
- The right to adequate standards of living is compromised by the old infrastructures of both prisons and by the overcrowding in the Central Prison.
- Access to adequate food, drinking water and sanitation remains a big challenge in both prisons.

- Contact with the outside world and daily time spent outside the cells ameliorated the negative consequences of the overcrowding.
- Access to health and justice were the most problematic issues in both prisons.
- The right to legal representation was severely compromised. Pre-trial detainees found themselves in a malfunctioning criminal justice system, waiting months and years before seeing a lawyer or a judge.

At the time of writing, the finalisation of the new law was pending. Once passed, reform will focus on creating an ambitious new criminal justice system. It is hoped that this reform will start to *touch the ground* and result in a real improvement for detainees.



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

NOTES

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13. AfriMap, *Mozambique: justice sector and the rule of law, a review*, Johannesburg: Open Society Foundation for Southern Africa, 2006.
14. This article is based on research conducted for an LLM in Criminal Justice at the University of Cape Town, 'From the rule of law towards human rights-based approaches to criminal justice reform in Mozambique. The case of pre-trial detention.' The research was supervised by Professor Elrena van der Spuy and it is available on-line at www.ppja.org.
15. The police of the Republic of Mozambique are divided into three main branches: the main police force which is responsible for public order and security; the Criminal Investigative Police (Polícia de Investigação Criminal, PIC) and the Special Forces (Forças Especiais) that are sub-divided into a number of specialised units.
16. Available at http://www.prisonstudies.org/info/worldbrief/wpb_country.php?country=35, (Accessed on 20 September 2011).
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32. Data available at <http://www.opais.co.mz/index.php/sociedade/45-sociedade/14835-cadeia-civil-de-maputo-podera-ser-transferida-por-estar-localizada-no-centro-da-cidade.html> (Accessed on 1 December 2011).
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35. Article 14 of the ICCPR.
36. Article 5 of the UDHR and the African Charter on Human and People's Rights.
37. The Convention on the Rights of the Child (CRC) and the UN Rules for the Protection of Juveniles Deprived of their Liberty contain specific norms on the respect of children and juveniles detained. The UNSMR provide specific rules for imprisoned women, sick and insane and mentally abnormal prisoners.
38. Law 8/2008 of 15 July gives the Ministry of Justice the responsibility to create adequate conditions for juveniles in conflict with the law.
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40. There are only two transfer agreements that Mozambique signed with Malawi and the Community of Portuguese Language Countries (Comunidade dos Países de Língua Portuguesa, CPLP).
41. Quote from the interview with a detainee, November 2011.
42. Quote from the interview with a detainee conducted in the Central Prison, November 2011.
43. Interviews with the officials showed that the reinforced lunch is made of 500g of meal instead of the normal 250g.
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“DIP ME IN CHOCOLATE AND THROW ME TO THE LESBIANS”

Homophobic hate crimes, the state and civil society

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This article describes some of the shortcomings in the prosecution of a homophobic hate crime as well as a non-governmental organisation's attempt to influence the sentencing of the perpetrators. The fact that an NGO believed it was necessary to intervene in a criminal case, was allowed to lead evidence, demonstrated the harmful effects of homophobic hate crimes and made arguments that these effects should be used in aggravation of sentence, suggests that NGOs may take on a new proactive roll in the prosecution of crimes involving some forms of prejudice. The NGO was unsuccessful in that the magistrate ultimately passed a lenient sentence, in the form of correctional supervision. The sentence included a condition that the perpetrators participate in 'awareness programmes of gays and lesbians', conducted by civil society rather than the state. In so doing, the court missed an opportunity to respect, protect, promote and fulfil the rights of gays and lesbians.

On 7 October 2007, a young black gay man, Deric Duma Mazibuko, was severely assaulted in a tavern in Germiston, South Africa.¹ He was punched, kicked, and hit over the head by a group of patrons with chairs and a metal spanner. The assault began with a homophobic incident. One of the perpetrators had questioned a friend of Mazibuko's, asking why she was hanging out with 'moffies'/'faggots', and asked her if he could 'have' one of them. The assault was accompanied by homophobic hate speech. During the assault one of the perpetrators said Mazibuko was gay and had 'no reason to live'. Mazibuko had a series of

fits during the onslaught of blows to his body and head and was then knocked unconscious. Had it not been for his group of friends, who managed to stop the assault and take Mazibuko to hospital, he would probably be dead and would be another name on the long list of gay and lesbian people who have been killed as a result of homophobic attacks.²

Mazibuko approached a non-profit organisation, OUT LGBT Wellbeing (OUT), which serves the lesbian, gay, bisexual, transgender and intersex community. The organisation provides health services, conducts research, and engages in advocacy and lobbying. Mazibuko sought psychological support as a result of the assault and

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was adamant that justice needed to be done. None of the perpetrators were arrested even though the assault was reported to the police.

OUT then approached Webber Wentzel attorneys both on Mazibuko's behalf and on behalf of its constituency. Gays and lesbians within OUT's constituency were increasingly becoming victims of such crimes and were receiving little or no redress from the state.³ OUT requested that Webber Wentzel assist in ensuring the perpetrators were brought to justice, and in developing the common law in a way that would combat homophobic hate crimes.

In many respects this was the 'perfect' hate crime test case: the victim survived and was intent on seeking justice; the homophobic motive of the crime could not be placed in dispute; and there were a number of witnesses who could identify the main perpetrators. Moreover, if the perpetrators were convicted, common law principles could be used to persuade the judicial officer to consider the 'hate' motive as an aggravating factor in sentencing, as a result of the particular deleterious effects of homophobic hate crimes.⁴

This is part of the story of how, over a period of five years, Mazibuko, his partner, his friends, and a small handful of activists and lawyers from Webber Wentzel (myself included) patiently pursued the elusive possibility of justice in a system that is failing gays and lesbians who are victims of hate crimes.

The case unfolded in a context where the South African legislature has not passed legislation comprehensively addressing hate crimes. Breen and Nel have pointed out that South Africa has no hate crime legislation and have argued that there is a serious need for such legislation in order to promote equality.⁵ On the other hand, Dixon and Gadd have argued that South Africa should take a cautious approach to developing hate crime legislation, as international experience has shown a host of unexpected consequences, not all of which contribute to promoting equality or to the project of diverse nation building.⁶ These

authors did not, however, make reference to the Promotion of Equality and Prevention of Unfair Discrimination Act (Act 4 of 2000). This Act arguably includes the type of hate crime legislation that Breen and Nel describe as sentencing enhancing legislation. Section 28(1) provides that 'if it is proved in the prosecution of any offence that unfair discrimination on the grounds of race, gender or disability played a part in the commission of the offence, this must be regarded as an aggravating circumstance for purposes of sentence'. It is clear that the Act was intended to encourage harsher sentences for hate crimes, where certain types of discrimination played a part in the commission of the crime. Yet what is striking about the law is that it does not refer to discrimination based on sexual orientation and would not therefore, without legal challenge, require a harsher sentence for a homophobic hate crime.

Therefore, at the outset of the case my clients and I decided to attempt to create a legal precedent in ensuring that the homophobic aspect of the assault on Mazibuko would be treated as an aggravating factor in sentencing the perpetrators.⁷

THE FOCUS

This article focuses on the questions that the case raised about the relationship between the state and civil society in the prosecution and punishment of homophobic hate crimes.

It does not focus on the apparent injustices in the criminal process. These include the prosecutor's initial decision not to prosecute the case, as the crime was framed as a 'tavern fight' and as such did not warrant prosecution. This decision was subject to a successful internal review after an application by OUT to the National Prosecuting Authority. This, and the deleterious behaviour of the accused, resulted in a delay of two years between the commission of the crime and the commencement of the trial. The trial then took three years to reach a conclusion (despite its simplicity), and for the accused to be convicted of assault with intent to do grievous bodily harm.

The article discusses the role of OUT in the criminal process and what it suggests with regard to the relationship between the state and civil society in the development of a constitutional democracy in South Africa. The article also considers the insights or lessons this case offers about the role civil society may play (or may wish not to play) in the criminal justice system, a system in which civil society ordinarily has not featured at all.⁸

I have chosen to refer broadly to the 'state' rather than name the individual organs of the state (such as the investigator, prosecutor or magistrate). The insights or lessons that I will focus on, as outlined above, depend on thinking about both the state and civil society in this monolithic way, as the observations are grounded in constitutional law rather than criminal procedure.⁹

OUT AS *AMICUS CURIAE*

When the perpetrators, Khanyesa Madubaduba, Buhle Mapekula and Zuke Mapekula, were convicted, OUT launched an application to intervene as an *amicus curiae* (a friend of the court). The organisation wished to lead evidence and make legal submissions in the sentencing phase of the trial to show the effect that homophobic hate crimes have on the victim, the victim's community, and society at large. The purpose of this intervention was to persuade the magistrate that these harmful effects should be treated as an aggravating factor in sentencing the perpetrators. The hope was that they would accordingly receive a harsher sentence. OUT was concerned that gays and lesbians were experiencing serious hate-based victimisation, and that criminal cases were not being investigated and therefore not prosecuted.

Since civil society plays no formal role in the investigation and prosecution of crimes (this is exclusively the domain of the state), the case offered an opportunity to see if it was possible to influence the way in which the magistrate sentenced the perpetrators and, if successful, to set a precedent for the future sentencing of perpetrators of homophobic hate crimes.¹⁰

OUT was admitted as a friend of the court.¹¹ The organisation made both legal submissions and led three witnesses to demonstrate the detrimental effects of this hate crime on the victim; and the effects of homophobic hate crimes on the gay and lesbian community and South African society as a whole. Despite this evidence, and legal argument, the magistrate did not impose a harsher sentence on the perpetrators, instead opting to impose a more lenient one. In doing so, the magistrate failed to treat the homophobic aspect of the crime as an aggravating factor in sentencing the perpetrators.

The case suggests some interesting ways of thinking about the relationship between the state and civil society in combating hate crime and promoting equality.

- First, the case demonstrates how difficult it can be for civil society to hold the state to account in criminal matters. It was necessary to overcome several legal hurdles in order to be admitted as a friend of the court, and to be allowed to make both legal submissions and lead evidence.¹²
- Secondly, the case shows how the value of being admitted as a friend of the court was undermined by the state's retreat from responsibility. In this case the prosecutor abdicated some of her responsibilities, allowing OUT to make the case for harsher sentencing; and the magistrate crafted the sentence such as to place the burden of rehabilitation on civil society.

A friend of the court fulfilling a state function

South African law allows for the intervention of a 'friend of the court' (*amicus curiae*) as a party to a dispute where such friend of the court is not the party involved in the dispute. This is a relatively recent development (post 1994), which was introduced when the court needed additional input and information that was not, or could not be, provided by the parties to the dispute.¹³ Interventions by friends of the court are most common and relatively uncomplicated in civil

disputes.¹⁴ They are far less common in criminal cases, which are disputes between the state and private parties where the state is vested with powers to investigate, arrest, detain, try and punish perpetrators of crimes; and the accused is protected from the exercise of such powers by a set of rights contained in section 35 of the Constitution.¹⁵

A cautious approach is adopted towards the admission of friends of the court in criminal matters. This resulted from a decision of the Constitutional Court which held that in criminal matters friends of the court should probably not be admitted if they 'stack the odds against the accused', as it is for the state alone to make out a case against the accused.¹⁶ It was as a result of these principles that OUT applied to be a friend of the court only after the perpetrators were found guilty. It was important that OUT played no role in the finding of guilt and thereby could not be seen to stack the case against the perpetrators.

However, once the perpetrators were convicted and OUT was admitted as a friend of the court, its role became more significant.

The organisation called three witnesses over a period of two days, and led expert and experiential evidence that it believed was crucial to a fair sentence. Included in the evidence was that:

- Victims of homophobic hate crimes experience particular psychological difficulties, such as feelings of depression and marginalisation, which lowers self-esteem.¹⁷
- Victims experience suicide ideation (thoughts of wanting to take one's life) as a result of the crime.¹⁸
- Victims also often have a post-traumatic stress disorder or reaction and as a result have a heightened sense of fear, anxiety, distrust and vulnerability, which leads to behavioural change (such as not going to public places).¹⁹ Mazibuko, the victim, experienced some forms of this trauma and did not want to come to court as a result of experiencing flashbacks of

the crime. (As a result a counsellor from OUT would accompany him to court).²⁰ Mazibuko also moved out of the Germiston area where he was living as a result of the crime.²¹

- Homophobic hate crimes send a message, not only to the individual victim, but to all gay and lesbian people, that they are less worthy and at risk of being attacked. The resultant fear and anxiety mean gays and lesbians limit their expression and movement as they are less likely to live openly and sometimes go into hiding for a period of time.²²
- Homophobic hate crimes undermine the efforts of South African society to create equality and dignity for all, and set back the advances that have been made towards equality and dignity for gays and lesbians.²³
- Homophobic hate crimes have longer effects on victims than ordinary crimes; additionally the psychological effects are often more severe than the psychological effects of ordinary crimes.²⁴ This is because homophobic hate crimes target vulnerable individuals because of their sexual orientation and are often accompanied by extreme levels of violence, which indicates an intention to demean or dehumanise the victim.²⁵
- The perpetrators were disrespectful, offensive and threatening towards gays and lesbians during the course of the trial as one of them (we argued, with the tacit consent of the other two) wore a T-shirt to the proceedings which read '*Dip me in chocolate and throw me to the lesbians*'.²⁶ We argued that this signified a disdain for the court process, and ongoing prejudice and a lack of remorse on the part of the perpetrators.²⁷

OUT's intervention as a friend of the court, the evidence it led and the arguments it made suggest that the state is failing to hold perpetrators of homophobic hate crimes to account²⁸ and is therefore failing to give effect to its constitutional duties to respect, protect, promote and fulfil the rights of gays and lesbians to equality.²⁹ Although OUT chose to intervene in this case it did so because it was the only legal remedy available to it. However, constitutional law, criminal law and criminal procedure require the prosecutor to prosecute a crime and motivate a particular

sentence, based on the circumstances of the crime and the effects it has on communities and society at large. The legal framework does not ordinarily contemplate civil society playing this role; equally civil society does not ordinarily have the resources or skills to perform what is primarily a state function. OUT's intervention signals the state's shortcomings in upholding the right to equality and preventing, investigating and prosecuting homophobic hate crimes.

Secondly, if viewed benevolently, the case demonstrates that the state may be struggling with how to prosecute homophobic hate crimes – but, if viewed malevolently, that the state does not have a particular interest in protecting minority groups.

Although OUT played an essential role in ensuring that the crime was framed as a homophobic hate crime and prosecuted as such, OUT's intervention during the sentencing phase of the trial may have had an unintended consequence. After OUT's intervention the prosecutor did not call any witnesses of her own in aggravation of sentence, not even Mazibuko himself. This suggests that the prosecutor relied on the NGO to make her case, rather than seeing the organisation's evidence as supplementary to the state's argument. In other words, instead of holding the state to account, the intervention may have had the consequence of enabling the prosecutor to shy away from her prosecutorial duties.

SHIFTING THE BURDEN OF PUNISHMENT TO CIVIL SOCIETY

This abdication of responsibility was also evident in the imposed sentence.

OUT led its three witnesses in the sentencing phase. The organisation made the argument that the 'hate element in this case must be perceived and accepted as an aggravating factor and [...] ought to translate into a harsher sentence'.³⁰ The defence then led evidence in mitigation of sentence. Two correctional supervision reports for Khanyesa Madubaduba and Zuko Mapekula were

submitted. The latter took the stand and briefly explained that he was employed and had three dependants. The perpetrators requested that they be sentenced to a period of correctional supervision 'coupled with anger management programmes', (suggesting that they believed anger was the problem, rather than prejudice). The prosecutor led no witnesses and requested direct imprisonment.

The magistrate started her sentencing judgment by stating that she was required not to over- or under-emphasise the 'interests of the community'.³¹ She incorrectly suggested that the evidence that OUT placed before the court was intended to express the outrage of the community. But OUT had in fact placed evidence before the court about the *harmful effects* of hate crimes on the victim, his community and society as a whole, not evidence of the outrage of the community. In assessing the expert and experiential evidence led by OUT, the magistrate explained that she was not bound to accept views of experts and the court was required to decide whether an expert opinion was correct.³² She rejected OUT's unchallenged evidence that hate crimes have a particularly detrimental effect, and held rather that 'any form of crime has a negative impact on the community'.³³ She gave no reasons for rejecting the evidence beyond her own sense of the effect of ordinary crimes. She also incorrectly found that although she had information from experts on the effects of this type of attack she did not have 'direct information which specifically dealt with the complainant'.³⁴ The magistrate did, however, have hearsay evidence (which may be used for sentencing purposes) from one of OUT's witnesses regarding the trauma Mazibuko experienced, how he was fearful of coming to court, and how he eventually moved house as a result of the assault.

The magistrate did not treat the homophobic hate aspect of the crime as an aggravating factor in sentencing and imposed the following sentence:

- Khanyesa Madubaduba and Zuko Mapekula were sentenced to correctional supervision for three years, subject to various conditions,

including performing community service and taking part in 'treatment, development and support programmes'.

- Buhle Mapekula received a fine of R1 500 or four months imprisonment, which was wholly suspended on condition that he was not convicted of assault with intent to do grievous bodily harm during the period of suspension.
- All three perpetrators were required to participate in 'awareness programmes of gays and lesbians' or 'awareness programmes of the LGBT group,' and to submit a certificate of attendance to the clerk of the Germiston Magistrates Court.³⁵

It was in her choice of punishment that the magistrate abdicated further responsibilities of the state. As far as we are aware, neither civil society organisations nor the state provide awareness programmes 'of gays and lesbians' or 'of the LGBT group.' However, since the majority of programmes for convicted offenders are offered by NGOs, the implication of the sentence was that NGOs would develop and run such programmes. But if lesbian and gay awareness programmes for perpetrators of homophobic hate crimes are run by civil society, it means the state is not required to take moral responsibility for this form of rehabilitative punishment, which may involve sensitising prejudiced people to difference, educating them about how to manage a diverse society, and sensitising them to the harms of homophobia. Employees of the state in the department responsible for offering rehabilitation programmes will therefore not engage with these issues. And finally, on the most pragmatic level, organisations within civil society (many of which are currently struggling to finance themselves) may now have to carry the additional burden of financing such lesbian and gay awareness programmes for the very people that have physically harmed their constituency (and even at times during the court proceedings threatened and showed disrespect for gays and lesbians).

The approach that the magistrate took in sentencing the three perpetrators undermines the efforts of civil society to put cogent and persuasive evidence before the courts to enable

judicial officers to respect, protect, promote and fulfil the right to equality. The approach also enabled the state to evade the moral responsibility of meting out punishment (which is one of the ways in which it legitimises itself). It shifted a part of the financial and operational burden of punishing offenders to civil society. Sadly, symbolically, the criminal process, instead of protecting gays and lesbians, in fact caused the perpetrators to be 'thrown back to the gays and lesbians' without considering that these awareness programmes do not exist, and that it is insensitive to ask the people who are being subjected to prejudicial violent crime to rehabilitate the very perpetrators of such crimes.



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NOTES

1. Germiston is a town east of Johannesburg in the Ekurhuleni Metropolitan Municipality.
2. The One in Nine Campaign, in October 2012, released a list of murdered gays and lesbians: Ivan Johannes, Zoliswa Nkonyana, Madoe Mafubedu, Simangele Nhlapo, Sizakele Sigasa, Salome Masooa, Thokozane Qwabe, Waldo Bester, Eudy Simelane, Khanyiswa 'Lhoyie' Hani, Desmond 'Daisy' Dube, Neil Daniels, Sibongile Mphelo, Girly 'S'Gelane' Nkosi, Noxolo Magwaza, Nqobile Khumalo, Nontsikelelo Tyatyeka, Thapelo Makhutle, Phumeza Nkolonzi, Sasha Lee Gordon, Andritha Thapelo Morifi, Sanna Supa, Ntombana Desire 'Deezay' Mafu, Dineo, Gugu 'George' Mazibuko, and countless more, unnamed and unknown, (<http://www.oneinnine.org.za/ipoint>, accessed 17 November 2012).
3. OUT had conducted research which showed, amongst other things, that gay, lesbian, bisexual and transgender people who were victimised were unlikely to report such incidents to the police for reasons which included that the police wouldn't take the matter seriously and that the victims feared being abused by the police (see: Levels of empowerment among lesbian, gay, bisexual and transgender [LGBT] people in Gauteng, South Africa, research initiative of the joint working group conducted by OUT LGBT Well-being in collaboration with UNISA Applied Psychology, 6-7), (http://www.out.org.za/images/library/pdf/Gauteng_GL_Empowerment_Report.pdf, accessed 17 November 2012). In OUT's experience this meant that homophobic hate crimes were not being investigated and prosecuted (and courts were not being given the opportunity to impose appropriate sentences on the perpetrators of homophobic hate crimes).
4. The common law on sentencing perpetrators requires a judicial officer to consider a range of factors when deciding on a perpetrator's sentence. These factors include the nature and effect of the crime, the circumstances of the accused and the interests of society

(see: *S v Zinn* 1969 (2) SA 537 (A)). This enables evidence to be placed before a court on the effects that hate crimes have on the victim, his or her family, his or her community and society at large – which may be used by the judicial officer in aggravation and would justify a harsher sentence. Additionally, in *S v Combrink* 2012 (1) SACR 93 (SCA) the Supreme Court of Appeal required judicial officers to ‘be conscious and sensitive to cases which on the facts appear to have a racial or discriminatory connotation, especially when dealing with the question of sentence’, at para 24.

5. Duncan Breen and Juan Nel, South Africa – A home for all? The need for hate crime legislation, *South African Crime Quarterly*, 38, November 2011, 33-43.
6. Bill Dixon and David Gadd, Look before you leap, hate crime legislation reconsidered, *South African Crime Quarterly*, 40, June 2012, 25-30.
7. It is important to explain that strategic litigation is one-dimensional. Legal remedies (as opposed to other forms of social intervention) are limited in their effect. Strategic litigation does not lend itself to engaging with some of the more complex issues that are raised when thinking about how to address hate crimes. We accordingly adopted an approach which supported enhancing sentencing for hate crime perpetrators with an awareness that there is some debate about whether enhanced sentences have the desired effect of creating a more equal society in the long term. Perry, in a global survey of the writing on hate crimes, makes the point that it is an open question as to whether sentencing enhancement will lead to greater tolerance of minorities by the general non-minority public. (Barbara Perry, *The more things change ... post-9/11 trends in hate crime scholarship*, in Neil Chakraborti, *Hate Crime, Concepts, policy, future directions*, Devon, Oregon: Willian Publishing, 2010, 17). She argues that ‘[m]ost offenders are youth, and especially young men responding to what they see as a threat – to their community, to their neighbourhood, or to their self-esteem. Often, these threats are more imagined than real. It may be more effective, then, to challenge those myths, and to thus ‘humanise’ the victims and their communities. Incidents of hate crimes can be taken as a starting point for education and healing rather than simply punishment. Consequently, community-based responses represent valuable alternatives. We have not come very far at all in creating such alternatives, let alone evaluating them.’ (Perry, *The more things change*, 31).
8. Although there are numerous cases in which *amicus curiae* (friends of the court) have successfully intervened in civil cases there are only a handful of cases in which *amici* have attempted to intervene in criminal cases. There are no reported judgments in which a magistrates court has admitted an *amicus curiae* in a criminal matter and only one reported case where a high court admitted an *amicus curiae* (see *S v Engelbrecht* (Centre for Applied Legal Studies intervening as *Amicus Curiae* 2004 (2) SA 391 (W)). An attempt by the Institute for Security Studies to be admitted as an *amicus curiae* in the Constitutional Court in a criminal matter failed in *Ex Parte Institute for Security Studies: In Re S v Basson* 2006 (6) SA 195

(CC).

9. The lessons or insight that may be drawn from the case are as much about the criminal process as they are about the way in which the Constitution of the Republic of South Africa, 1996, divides power between the three branches of government. Where civil society is compelled to intervene in criminal cases it demonstrates not only particular failings of the actors in the criminal process but also a constitutional change in that civil society takes on a role (and requests and assumes power), which challenges the conventional constitutional separation of power divide between the three branches of government. Civil society becomes another mechanism (like the media, which is sometimes referred to as the ‘fourth estate’) and is able to hold each of these branches to account.
10. In some respects OUT’s intervention came from a place of desperation and frustration. Civil society organisations working in the gay and lesbian community, including OUT, had been campaigning for years to try and ensure the state recognised that homophobic hate crimes took place, that they were considered to be a special category of crime which warranted investigation that took account of the discriminatory aspect of the crime, and that these crimes were then prosecuted as such to ensure that perpetrators and the public knew that they could not be countenanced because of the damaging effects it had on gays and lesbians, their communities and society at large. Despite these campaigns the state had done little to address these crimes: investigators, prosecutors and magistrates had been given no direction or training in relation to hate crimes and hate crime legislation had not been drafted, debated or passed.
11. The magistrate admitted OUT on the basis that rule 28 of the Magistrate Court Rules allows such admission, and even if she was incorrect in relation to this interpretation of rule 28, Section 186 of the Criminal Procedure Act, 1977 allows her to subpoena a witness if the evidence of a witness is essential for a just verdict. Interestingly, the approach adopted by the magistrate has to some extent been confirmed in a recent decision of the Constitutional Court in which it was decided that the High Court Rules, properly interpreted, allow friends of the court to make submissions and lead evidence (see: *Children’s Institute v Presiding Officer of the Children’s Court, District of Krugersdorp* and others 2012 ZACC 25).
12. The difficulty of holding the state to account was also illustrated by the original decision not to prosecute, which was then internally reviewed by OUT.
13. Originally, friends of the court would appear if they were either asked to appear for a particular party or interest at the request of the court. A friend of the court could also be an advocate requested by the court to provide assistance in developing a novel question of law that arises in a matter. It is only more recently that the rules of court and the common law have been developed to allow the intervention by parties who wish to be friends of the court on their own volition and because of their own interests (see Geoff Budlender, ‘*Amicus Curiae*’ in *Constitutional Law of*

South Africa (Juta & Co, Second Edition, Revision Service 1, 2009), at 8-1).

14. A party wishing to intervene in a civil case as a friend of the court would have to comply with the procedural rules of the particular court as well as the requirements of the common law in relation to admission of friends of the court. Currently the rules regarding the admission of friends of the court differ depending on the court in which the matter is being heard. On the whole a friend of the court is required to show its interest in the matter, the nature of the submissions it wishes to make, the relevance of the submissions to the issues before the court and how the submissions differ from the submission already before the court (see, for example: Constitutional Court Rule 10, Supreme Court of Appeal Rule 16, Labour Appeal Court Rule 7, High Court Rule 16A, Labour Court Rule 19) and *S v Engelbrecht (Centre for Applied Legal Studies intervening as Amicus Curiae)* 2004 (2) SACR 391 (W)).
15. Section 35 of the Constitution of the Republic of South Africa, 1996 for example, includes that arrested persons have the right to remain silent, detained persons have the right to be informed of the reason for being detained and accused persons have the right to be informed of the charge with sufficient detail to answer it.
16. *Ex Parte Institute for Security Studies: In Re S v Basson* 2006 (6) SA 195 (CC), para 15.
17. Evidence of Professor Nel (9 December 2011), transcript of court proceedings, 45-46.
18. Evidence of Professor Nel, 44, Evidence of Melanie Judge (27 January 2012), transcript of court proceedings, 84.
19. Evidence of Professor Nel, 47-48, Evidence of Melanie Judge, 83-84.
20. Evidence of Mmapaseka Emily Letsike (27 January 2012), transcript of court proceedings, 66.
21. Evidence of Mmapaseka Emily Letsike, 67.
22. Evidence of Professor Nel, 51-52, Evidence of Melanie Judge, 91-93.
23. Evidence of Professor Nel, 56-57, Evidence of Melanie Judge, 94.
24. Evidence of Professor Nel, 58-59.
25. Evidence of Melanie Judge, 90-91.
26. Evidence of Mmapaseka Emily Letsike, 69, Evidence of Melanie Judge, 96.
27. Advocate Kate Hofmeyr's argument (27 January 2012), transcript of court proceedings, 103-104. Advocate Hofmeyr explained that '[w]e submit that the wearing of that T-shirt represents a number of things, it represents a disdain for this process and a refusal to be remorseful about the conduct that accused 3 and indeed the other accused perpetrated. We submit that it is deeply offensive to wear such a T-shirt in this public setting where the purpose for us all gathering together is to assess the guilt of three men accused of brutally attacking a man because he was gay. It is also, we submit, a confirmation of the very prejudice that motivated that attack, it is a confirmation that those were not just words that crept into accused 3's mouth when he said, he is gay he does not deserve to live. Those words were representative of a view that certain people are less worthy than others and that certain people do not deserve as much respect as others and the T-shirt simply confirmed that prejudice.'
28. Civil society has documented some of these failings. See, for example, Human Rights Watch, '*We'll show you you're a woman*' – violence and discrimination against black lesbians and transgender men in South Africa, 2011, 46-56 <http://www.hrw.org/sites/default/files/reports/southafrica1211.pdf> (accessed 29 October 2012).
29. Section 7(2) of the Constitution.
30. Advocate Kate Hofmeyr's argument, 104. Advocate Hofmeyr continued to explain that a harsher sentence is appropriate to repair both the damage done to Mazibuko, his community and society at large and to send a counter-message that the perpetration of hate crimes is unacceptable (104-105).
31. Magistrate Monaledi's sentencing judgment (9 March 2012), transcript of court proceedings, 120.
32. Magistrate Monaledi's sentencing judgment, 123.
33. Ibid.
34. Magistrate Monaledi's sentencing judgment, 125.
35. Mr Khanyesa Madubaduba and Mr Zuko Mapekula were required to attend these programmes for three years and Mr Buhle Mapekula was required to attend for two years.

BOOK REVIEW

Police reform from the bottom up

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Title: Police reform from the bottom up: officers and their unions as agents of change

Editors: Monique Marks and David Sklansky

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The title of this volume, *Police reform from the bottom up*, is bound to create expectations amongst those concerned with the challenges confronting institutional change in public police agencies. It is an interest shared by police scholars and practitioners across the usual North-South divide. Few police agencies today can ignore the imperatives for ongoing adaptive 'reforms' in response to changes in the external environment. The notion of reform of course means different things in different contexts. For example, the demand for large scale restructuring of the police (rather than bits of reform here and there) is all the more pressing in the context of state overhaul triggered by processes of democratisation, as in post-conflict settings.

Over the past two decades the theories and strategies associated with institutional reform of the police as public agency have been a source of invigoration for policing studies. The application of reform ideas produced in the North has also given rise to a lucrative export industry where consultants and advisors descend on troubled destinations to assist in the re-engineering of the security sectors of new democracies. Such efforts

have tended to prioritise the development of top down interventions, i.e. of creating political buy-in and nurturing managerial skills and expertise as critical entry points to large scale institutional revamping. In such efforts the rank and file – under-trained, under-skilled and under-paid – are viewed with suspicion. They are not considered natural allies for changing the character of routine policing and often they are not allowed to organise into workplace associations along the lines of their colleagues in the North. In post-conflict settings democratisation of the institution is still to translate into democratic dividends for police as bearers of rights themselves. Given this state of affairs there is much novelty in the ideas developed by the contributors to this book.

A volume which seeks to explore the role of the rank and file and workplace associations as agents in reform in the North seems well poised to challenge conventional assumptions about the sources of institutional change. The introduction sets out the objectives of the monograph: namely to consider the role of the rank and file as well as police unions in reform of police organisations. The volume is organised into three sections. The first considers the role of rank and file as change agents; the second section looks more specifically at the relationship between police unions and police reform. The concluding section focuses on

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organisational and cultural aspects of police organisation which may facilitate or inhibit change. The team assembled for the three-pronged engagement includes internationally acclaimed policing scholars (David Bayley, Maurice Punch, Wesley Skogan, Jerome Skolnick, Hans Toch and Samuel Walker, to name but a few.) The contents of the inside cover further whet the appetite. Here there is reference to a 'pioneering volume', by 'an international, cross-disciplinary collection of scholars and police unionists' who 'address a range of neglected questions, both empirical and theoretical, about the place of police officers themselves in the process of reform.'

The first thing to note is that this publication grew out of the deliberations of a conference held at the University of California in Berkeley quite a while back, in 2006. The introduction notes that the discussions were 'wide ranging and spirited' and characterised by many 'areas of disagreement' (p5). A second observation is that this volume does little more than combine articles previously published in special issues of two international journals: *Police practice and research* and *Policing and society*. All the articles included in this volume are reprinted in their original form. It is only the introduction by Marks and Sklansky which has been expanded in an attempt to stitch the three broad themes lifted from the special editions together. The short section on police culture included here also cannot compare with the much more substantive treatment of the topic in O'Neill, Marks and Singh's edited volume on *Police occupational culture: new debates and directions* (2007). A third observation is that this publication draws a rather implicit assumption that 'rank and file' and 'police unions' are in some way similar, if not synonymous. This is a very dubious assumption. The connections between the two sections are not explored in the present volume and one is left with unresolved questions about the relationship between the two. However, the most critical shortcoming of this volume is that the three sections of the volume are not integrated in any explicit manner.

The lack of integration in this volume however does not mean that individual pieces are devoid of merit. The introduction to the volume by Marks and Sklansky goes some way toward framing the issues of theoretical and political interest regarding 'bottom-up' involvement in organisational change. Many of the issues, the editors aptly emphasise, remain contested. Much more research, on aspects of participatory management and the role and function of unions in different jurisdictions, is required so as to be able to engage with the issues in a more substantive manner.

David Bayley's reflections on critical innovations in American policing provide a very useful descriptive overview of key reforms in American policing. Most of the innovations, Bayley demonstrates, relied on external policy input by academics. In the implementation of new ideas few attempts were made to canvas the opinion of the rank and file or harness their street knowledge and skills in support of the reforms. This, Bayley intimates, is short-sighted. Senior leadership should make a concerted effort to bring foot soldiers squarely into the reform initiatives and in doing so harness 'craft knowledge' learnt on the street for adaptive reforms. Other contributors draw on experiments of participatory management in police departments to illustrate the scope for involving officers into attempts, for example, to reduce the use of excessive force (Hans Toch) or improving employee perceptions and attitudes (Steinheider & Wuestewald). Collaborative research networks, so argue Wood *et al.*, do hold some potential for boosting the capacity of police as 'change agents'. More research on the dynamics and challenges confronting front line police work, according to Thatcher, can deliver 'situated knowledge' of relevance to organisational reform endeavours.

In Section 2 of the volume Walker provides an overview of the literature on US police unions, which he declares is very inadequate, and outlines an agenda for research. Berry *et al.*, and Finnane bring comparative insights into the discussion: we learn that differences in political context and organisational culture of unions (in the UK,

Netherlands, New Zealand and Australia) impact on the role of unions *vis-à-vis* institutional change. Not exactly surprising. Even in the enlightened North unionisation remains differential and uneven. The right for police to organise and bargain, as Adams outlines, remains a sticky issue as unionisation evokes concerns about state security.

The third section of the book reintroduces more generic issues about police occupational culture and change. Wesley Skogan's sensible piece reiterates that 'police reform is risky and hard, and efforts to innovate in policing often fall short of expectations' whilst the 'sources of resistance' emanate from many diverse quarters (p144). This paper serves as a timely reminder that in the wider scheme of things the rank and file and their instruments of collective bargaining constitute but one source of inspiration for, or obstacle to, change.

A loose collection of articles hardly makes for a coherent book in which key thematic issues are explored in an integrated manner. The lack of integration means that readers interested in the substantive issues are advised to consult the special journal editions in which focus and coherence are better achieved than is the case of this volume. Be that as it may, a volume like this, framing issues of broader significance in ways not quite imaginable in other parts of the world, can serve as an inspiration to explore sub-cultural proclivities and workplace dynamics characteristic of street police operating under very different conditions. Only once we understand such dynamics should we be confident enough to draw research based conclusions about the 'rank and file' and their particular relationship to wider institutional change in pursuit of public safety.

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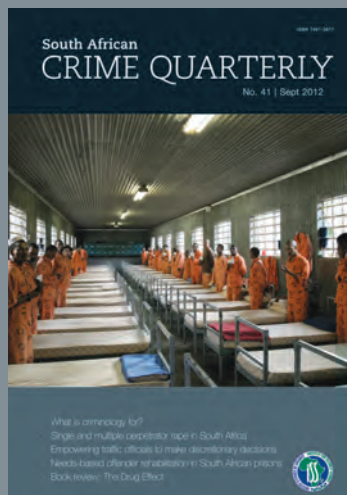
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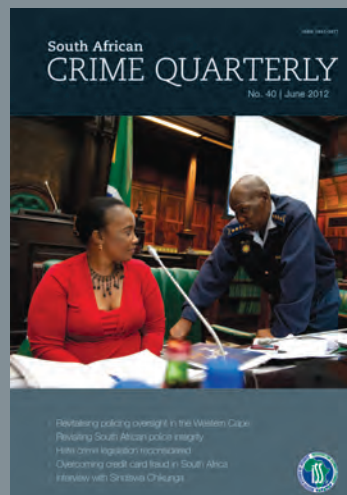
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PREVIOUS ISSUES



In this edition of SACQ Bill Dixon challenges South African criminologists to answer the question why criminal acts in South Africa are so violent, and considers why we have failed to do so. Jewkes *et al.* present the findings of a study on rape; social work academics Friedo Herbig and Ann-Mari Hesselink reflect on how to better assess, and therefore treat offenders and Rika Snyman argues for the need to train traffic police to appropriately use their discretion.



In this edition of SACQ David Bruce describes efforts by the Western Province play a more active role police oversight. Sanja Kutnjak Ivković and Adri Sauerma present the findings of research into the code of silence between police officers, which protects corruption from detection. Bill Dixon and David Gadd argue that hate crimes legislation is not always, or necessarily in the best interests of protecting the victims of crimes of prejudice, or for countering such crimes. And Trevor Budhram provides an overview of credit crime fraud in South Africa.

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