

DEATH IN DEMOCRACY

In South Africa, despite extensive constitutional safeguards, the number of people who die at the hands of the police or whilst in custody remains alarmingly high. Although the courts have demonstrated a commitment to upholding constitutional values, these values have had little traction in the criminal justice system. Possible explanations for the vulnerability of suspects, accused and convicted persons in South Africa include a social justice deficit and ambiguity in commitment to constitutional values by the Executive.

Pamela J SCHWIKKARD

BA, LLB (Wits University), LLM (University of Natal),

LLD (University of Stellenbosch);

Professor and Dean, Faculty of Law, University of Cape Town.

I. Introduction

1 In 1994, South Africa became a democracy founded on a progressive Constitution which embraced the principle of constitutional supremacy. The Constitution of the Republic of South Africa 1996 ("Constitution") includes a Bill of Rights which protects both traditional liberal individual rights as well as socio-economic rights. It also provides for a number of institutions which are required to strengthen democracy; these include a Public Protector and a Human Rights Commission.¹ The Bill of Rights includes provisions that impact on the criminal justice system, *inter alia*, the right to life,² the right to dignity³ and the right to equality.⁴ The right to freedom and security of the person⁵ and the rights of arrested, detained and accused persons⁶ are set out in full below. Their detailed nature reflects a complete rejection of the brutality of the apartheid regime. These detailed provisions demand attention and should be juxtaposed with the reality faced by the majority of the population.

12 Freedom and security of the person.

1. Everyone has the right to freedom and security of the person, which includes the right–

1 Section 181 of the Constitution of the Republic of South Africa 1996.

2 Section 11 of the Constitution of the Republic of South Africa 1996.

3 Section 10 of the Constitution of the Republic of South Africa 1996.

4 Section 9 of the Constitution of the Republic of South Africa 1996.

5 Section 12 of the Constitution of the Republic of South Africa 1996.

6 Section 35 of the Constitution of the Republic of South Africa 1996.

- a. not to be deprived of freedom arbitrarily or without just cause;
 - b. not to be detained without trial;
 - c. to be free from all forms of violence from either public or private sources;
 - d. not to be tortured in any way; and
 - e. not to be treated or punished in a cruel, inhuman or degrading way.
2. Everyone has the right to bodily and psychological integrity, which includes the right–
- a. to make decisions concerning reproduction;
 - b. to security in and control over their body; and
 - c. not to be subjected to medical or scientific experiments without their informed consent.

35 Arrested, detained and accused persons

1. Everyone who is arrested for allegedly committing an offence has the right–
- a. to remain silent;
 - b. to be informed promptly–
 - i. of the right to remain silent; and
 - ii. of the consequences of not remaining silent;
 - c. not to be compelled to make any confession or admission that could be used in evidence against that person;
 - d. to be brought before a court as soon as reasonably possible, but not later than–
 - i. 48 hours after the arrest; or
 - ii. the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;
 - e. at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and
 - f. to be released from detention if the interests of justice permit, subject to reasonable conditions.
2. Everyone who is detained, including every sentenced prisoner, has the right–

- a. to be informed promptly of the reason for being detained;
 - b. to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;
 - c. to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
 - d. to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;
 - e. to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and
 - f. to communicate with, and be visited by, that person's—
 - i. spouse or partner;
 - ii. next of kin;
 - iii. chosen religious counsellor; and
 - iv. chosen medical practitioner.
3. Every accused person has a right to a fair trial, which includes the right—
- a. to be informed of the charge with sufficient detail to answer it;
 - b. to have adequate time and facilities to prepare a defence;
 - c. to a public trial before an ordinary court;
 - d. to have their trial begin and conclude without unreasonable delay;
 - e. to be present when being tried;
 - f. to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
 - g. to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
 - h. to be presumed innocent, to remain silent, and not to testify during the proceedings;
 - i. to adduce and challenge evidence;

- j. not to be compelled to give self-incriminating evidence;
 - k. to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
 - l. not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
 - m. not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
 - n. to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
 - o. of appeal to, or review by, a higher court.
4. Whenever this section requires information to be given to a person, that information must be given in a language that the person understands.
5. Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

2 The Constitution has required a change to the rules of both substantive and procedural criminal law. Generally, the High Courts have been vigilant in promoting constitutional values. The last 19 years has seen, *inter alia*: the abolition of the death penalty;⁷ the decriminalisation of consensual sex between men;⁸ the repeal of legislation permitting detention without trial; further regulation of the use of deadly force;⁹ rules requiring unconstitutionally obtained evidence to be excluded where admission would infringe the right to a fair trial or be detrimental to the administration of justice;¹⁰ a stringent

7 *S v Makwanye* 1995 (3) SA 391 (CC). Section 11 of the Constitution of the Republic of South Africa 1996.

8 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC).

9 Section 49 of the Criminal Procedure Act 51 of 1977. Parts of this section were declared unconstitutional in *Ex parte Minister of Safety and Security, In re Walters* 2002 (2) SACR 105 (CC). Consequently, the section was amended to ensure that use of deadly force would only be justified when it was necessary and proportional. Further amendments are proposed in the Criminal Procedure Amendment Bill B 39-2010 which has not yet been enacted.

10 Section 35(5) of the Constitution of the Republic of South Africa 1996.

enforcement of the presumption of innocence;¹¹ the right to legal representation at state expense where a substantial injustice would otherwise occur;¹² access to information held by the State being given to defendants so that they can adequately defend themselves;¹³ the abolition of misogynist rules of evidence.¹⁴ The author has previously looked at the impact of these constitutional reforms and raised the question as to whether these progressive reforms have indeed improved the lot of those who come in contact with the criminal justice system.¹⁵ This essay focuses on one aspect: death and the criminal justice system, and further interrogates the gap between the content of the law and its impact on the citizenry.

3 Prior to 1994, South Africans lived under the draconian system of apartheid. Death as a result of state violence was commonplace and took many forms: lawful executions, death in prisons and in police custody and other unlawful extra-judicial killings. In 1995, the death sentence was abolished;¹⁶ consequently, the number of deaths at state hands is no longer supplemented by judicial hangings.¹⁷ Nevertheless, relying solely on official statistics, death at state hands occurs at an alarming rate despite the transition to democracy and a comprehensive Bill of Rights.

11 *S v Zuma* 1995 (2) SA 642 (CC); *S v Coetzee* 1997 (3) SA 527 (CC); *S v Bhulwana*; *S v Gwadiiso* 1996 (1) SA 388 (CC); *S v Boesak* 2001 (1) SA 912 (CC). Section 35(3)(h) of the Constitution of the Republic of South Africa 1996.

12 Section 35(2)(c) of the Constitution of the Republic of South Africa 1996. *S v Vermaas*; *S v Du Plessis* 1995 (3) SA 292 (CC).

13 *Shabalala v Attorney-General Transvaal* 1996 (1) SA 725 (CC).

14 *S v Jackson* 1998 (1) SACR 470 (SCA).

15 P J Schwikkard, "A Constitutional Revolution in South African Criminal Procedure?" in *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (P Roberts & J Hunter eds) (Oxford: Hart Pub, 2012) at p 25. See also R Jansen & E T Achieme, "Prison Conditions in South Africa and the Role of Public Interest Litigation Since 1994" (2011) 27 *South African Journal of Human Rights* 183 who note the contradiction between progressive law reforms since 1994 applicable to prisons and the actual conditions in prison. They conclude at 183 that "[t]he prisons and prison conditions reflect our society as one with abnormally high crime levels, with other pressing priorities, and a general public with little concern for conditions in prison". See also J Sloth-Nielsen, "The State of South Africa's Prisons" in *The State of the Nation* (S Buhlungu ed) (HSRC Press, 2007) at p 384 and A Dissel, "Tracking Transformation in South African Prisons" (2002) 11(2) *Track Two* 8.

16 *S v Makwanye* 1995 (3) SA 391 (CC).

17 This number was substantial: L Vogelmann, "The Living Dead: Living on Death Row" (1989) 5 *South African Journal of Human Rights* 183 reports that close to 1,300 people were hanged between 1980 and 1989.

II. The numbers

4 During the apartheid era, whilst there was significant interest in the death of political activists in detention, there was relatively little interest in the death of “ordinary” people in custody.¹⁸ Records of the Human Rights Committee, Amnesty International and the Institute of Race Relations give the following limited picture: in the period 1963–1990, 73 political prisoners died whilst in detention without trial; during 1984–1990, 32 activists died while in police custody. From 1980 to 1982, 300 people (both political and non-political) died in police custody and in 1987 there were 105 deaths in this broader category.¹⁹ The Annual Reports of the South African Institute of Race Relations indicate that the highest number of people killed by the police under apartheid occurred in 1985 when a state of emergency was declared by the apartheid regime, 763 were reported to be killed by the police that year.²⁰ However, any comparison of police and prison deaths during apartheid and post-apartheid must be treated with the utmost caution as the apartheid statistics are highly unreliable; in particular, they do not take into account deaths at the hands of the military or deaths in the “homeland states”.²¹

5 In 1997, the Independent Complaints Directorate (“ICD”)²² was established; its primary function is to investigate complaints against the police. In 2012, its name was changed to the Independent Police Investigative Directorate (“IPID”).²³ The IPID is required to investigate all deaths in police custody or as a result of police action²⁴ and the police must report such deaths to the ICD.²⁵ The death toll in 1997 was 737;²⁶

18 D Bruce, “Interpreting the Body Count: South African Statistics on Lethal Police Violence” (2005) 36(2) *South African Review of Sociology* 141 at 142.

19 See D Bruce, “Interpreting the Body Count: South African Statistics on Lethal Police Violence” (2005) 36(2) *South African Review of Sociology* 141; *A crime against humanity: analysing the repression of the apartheid state* (M Coleman ed) (David Philip, 1998); and L Fernandez, “Police Abuses of Non-political Suspects: A Survey of Practises in the Cape Peninsula” (Institute of Criminology, University of Cape Town, 1991).

20 1985 Annual Survey of the South African Institute of Race Relations.

21 See D Bruce, “Interpreting the Body Count: South African Statistics on Lethal Police Violence” (2005) 36(2) *South African Review of Sociology* 141.

22 The Independent Complaints Directorate was established in terms of s 206(6) of the Constitution of the Republic of South Africa 1996 and states its vision as being “to promote proper police conduct in accordance with the principles of the Constitution”.

23 Unlike the Independent Complaints Directorate the Independent Police Investigative Directorate reports directly to the Minister of Police and not the National Commissioner of Police.

24 Section 53(20(b) of the South African Police Services Act 68 of 1995.

25 Section 53(8) of the South African Police Services Act 68 of 1955.

26 1997/98 Annual Report of the Independent Complaints Directorate.

in 2011, it was slightly lower at 720.²⁷ The average death toll from 2000 to 2010 was 713.²⁸ South Africa in 2011 had a population of approximately 50.5 million. England and Wales in 2011 had a population of approximately 63.3 million;²⁹ during the same period the average death rate in police custody was 27.³⁰ Another notable difference is the number of suicides in police custody: in South Africa from 2000 to 2010 (not including suicides in prison)³¹ the average rate of suicide *per annum* was 83³² compared to 3.6 in England and Wales (the UK figures include suicides in prison).³³ The Annual Reports of the Independent Complaints Directorate are not consistent in reporting death as a result of torture or assault by the police. However, the 2009 Annual Report does reflect that seven people were tortured to death and in the 2005 Annual Report it is recorded that 14 people were beaten to death by the police whilst in custody. These reports seem to have gone largely unnoticed by the public, including politicians.

6 In South Africa all deaths in prison must be reported to the Judicial Inspectorate for Correctional Services. In 1998, 615 prison inmates died³⁴ and in 2011, 852 died. Of the 852 deaths, 48 were due to unnatural causes. The most common cause of unnatural death is suicide, followed by homicide, most homicides being committed by prison officials.³⁵ The majority of natural deaths are from tuberculosis, pneumonia and HIV.³⁶ Over half of those who die of natural causes die within the first year of incarceration, the death rate dropping after two years of incarceration.³⁷ The 2011/12 Annual Report of the Judicial

27 2011/12 Annual Report of the Independent Complaints Directorate.

28 See Annual Reports of the Independent Complaints Directorate from 2000 to 2010.

29 Office for National Statistics <<http://www.ons.gov.uk/ons/rel/pop-estimate/population-estimates-for-uk--england-and-wales--scotland-and-northern-ireland/mid-2011-and-mid-2012/index.html>> (accessed 8 November 2013).

30 Independent Police Complaints Commission <www.ipc.gov.uk/en/Pages/deaths-custody-study.asp> (accessed 8 November 2013).

31 The Annual Reports of the Judicial Inspectorate of Prisons only sporadically report the number of suicides in prison. The 2011/12 Annual Report reflects an average of 27 prisoners *per annum* committing suicide from 2009 to 2011. The 2009/10 Annual Report records a high of 112 suicides in police custody and 30 suicides in prison bringing the 2009 total of suicides in prison and police custody to 142.

32 This figure is calculated on the basis of the figures reported in the Annual Reports of the Independent Complaints Directorate; as figures for 2003 and 2010 could not be found, the average is calculated over the remaining nine years in the period 2000–2010.

33 This figure is calculated on figures reported by the Independent Police Complaints Commission <www.ipc.gov.uk/en/Pages/deaths-custody-study.asp> (accessed 8 November 2013).

34 1998/9 Annual Report of the Judicial Inspectorate for Correctional Services.

35 2010/11 Annual Report of the Judicial Inspectorate for Correctional Services.

36 2010/11 Annual Report of the Judicial Inspectorate for Correctional Services at p 26.

37 2010/11 Annual Report of the Judicial Inspectorate for Correctional Services at p 26.

Inspectorate noted that not only did the number of deaths increase as the inmate population increased but also the rate of death.³⁸ This was due to the appalling conditions arising as a result of overcrowding.³⁹ The average rate of death in prison between 2000 and 2010 was 1,318 *per annum*.⁴⁰ In England and Wales during the same period the average death rate in prison was 171 *per annum*.

7 Accepting that statistics require a degree of scepticism, the comparison between the numbers of those who die whilst in police or prison custody in England and Wales and in South Africa at least serves the purpose of demonstrating that the South African figures are unusually high.⁴¹ What is also unusual is that there appears to be a low level of public or political response to these large numbers of reported deaths. With the exception of a few incidents, some of which will be dealt with below, the public sentiment would appear to support increased crime control measures which is mirrored in political rhetoric.

III. Some exceptional cases

8 In April 2011, Andries Tatane was beaten to death by police whilst participating in a march protesting against poor service delivery. The national Broadcast Corporation recorded six officers severely beating an unarmed Mr Tatane who was trying to protect a group of elderly people who were being targeted by a water cannon. Mr Tatane died 20 minutes after this horrific beating. Why did this capture the public imagination? Perhaps because it was recorded on video and Mr Tatane, a husband and father of two, was not perceived to be a

38 2011/12 Annual Report of the Judicial Inspectorate for Correctional Services at p 54.

39 2011/12 Annual Report of the Judicial Inspectorate for Correctional Services at p 54. On overcrowding see also J Steinberg, "Prison Overcrowding and the Constitutional Right to Adequate Accommodation in South Africa" (a paper commissioned by the Centre for the Study of Violence and Reconciliation) www.csvr.org.za/docs/correctional/prisonovercrowding.pdf (accessed 8 November 2013). In 2012, there was a significant reduction in overcrowding as 35,506 prisoners were released as a result of a special remission of sentences granted by the President; see 2012 Annual Survey of the South African Institute of Race Relations (SAIRR) at p 767.

40 2000/1 to 2010/11 Annual Report of the Judicial Inspectorate for Correctional Services.

41 Contextual differences between the two jurisdictions include the fact that whereas in South Africa the number of prisoners *per* 100,000 population in 2011 was 316, in England and Wales it was 152. See 2012 Annual Survey of the South African Institute of Race Relations at p 772. See also New Zealand Department of Corrections, "Prisons Facts and Statistics" (March 2011) <www.corrections.govt.nz/resources/facts_and_statistics/prisons/march_2014.html> (accessed 9 November 2013).

criminal. Although the official response later changed, at the time the National Commissioner of Police declined to comment and the Minister of Police “berated citizens for ‘provoking and taunting’ the police”.⁴² The seven police officers charged with Andries Tatane’s death were acquitted.⁴³

9 On 16 August 2012, 34 striking mineworkers were shot dead and more than 70 injured at Marikana. On 17 August, the Commissioner of Police, Riah Phiyega stated “whatever happened represents the best of responsible policing”.⁴⁴ This massacre was recorded and received extensive television coverage both nationally and internationally. Ordinary South Africans were outraged; the miners were not criminals, they were challenging capital, an action that resonated with many citizens.

10 In February 2013, the police arrested a foreign national employed as a taxi driver, Mr Mido Macia, on the basis that his vehicle was obstructing the traffic. The police alleged that Mr Macia resisted arrest which resulted in him being dragged behind a police vehicle. He later died in the police cell from head injuries and internal bleeding. A civilian recorded the “dragging” on a cell phone and the video was carried on both national and international television channels. There was widespread public condemnation. There was no suggestion that Mr Macia was involved in anything other than a minor traffic infringement and the public was not threatened by Mr Macia’s conduct. Mr Macia could have been any ordinary member of society.

11 These cases fall into the exceptional category of cases that provoke public outrage and should be contrasted to the relative lack of public interest in the torture, beating to death, and abnormally high suicide rates of people in police custody. In the three examples above there was publicity and the victims of the police brutality were not viewed as criminals. We do not know if those tortured, beaten to death or driven to suicide were “criminals” as they were never tried in a court of law.

42 “Police under Fire After Ficksburg Protester’s Death” <<http://mg.co.za/article/2011-04-18-police-under-fire-after-ficksburg>> *Mail & Guardian* (18 April 2011) (accessed 1 October 2013).

43 Institute for Security Studies, “The Tatane Case Raises Hard Questions for South Africa’s National Prosecuting Authority” <www.polity.org.za/article/the-tatane-case-raises-hard-questions-for-south-africas-prosecuting-authority-2013-04-12> (accessed 9 November 2013).

44 Recording at <www.enca.com/south-africa/phiyeqa-questioned-about-previous-comment> (accessed on 11 June 2013).

IV. Law and lived reality?

12 In *Stanfield v Minister of Correctional Services*,⁴⁵ the applicant applied to be placed on parole according to s 69 of the Correctional Services Act⁴⁶ on the basis that he had contracted lung cancer and his life expectancy had been severely shortened. His application was refused and the matter went on review. The applicant argued, *inter alia*, that s 69 should have been interpreted so as to “promote the spirit, purport and the object of the Bill of Rights”⁴⁷ and that in terms of s 10 of the Constitution, the right to dignity, the applicant was entitled to die in a dignified and humane way.⁴⁸ In granting the application the court noted that “[w]hat will be ‘consistent with human dignity’ in any particular case will ... depend on the facts and circumstances of each case”.⁴⁹ The court held that the prisoner’s continuing right to dignity was well established at common law and cited the following extract from *Goldberg v Minister of Prisons*:⁵⁰

It seems to me that fundamentally a convicted and sentenced prisoner retains all the basic rights and liberties (using the word in its Hohfeldian sense) of an ordinary citizen except those taken away from him by law, expressly or by implication, or those necessarily inconsistent with the circumstances in which he as a prisoner, is placed. Of course the inroads which incarceration necessarily makes upon a prisoner’s personal rights and liberties ... are very considerable. He no longer has freedom of movement and has no choice in the place of his imprisonment. His contact with the outside world is limited and regulated. He must submit to the discipline of prison life and the rules and regulations which prescribe how he must conduct himself and how he is to be treated while in prison. Nevertheless, there is a substantial residuum of basic rights which he cannot be denied; and, if he is denied them, then he is entitled ... to legal redress.

13 On the facts, Van Zyl J found that the third respondent had failed to respect the applicant’s inherent right to human dignity by ignoring or downplaying the fact that the applicant was “suffering from an inoperable and incurable disease” which would cause his death within a few months.⁵¹ This was compounded by the third respondent’s failure to recognise the inadequacy of the medical facilities in the

45 2003 (12) BCLR 1384 (C).

46 8 of 1959; this provision has been repealed and medical parole is now provided for in s 79 of the Correctional Services Act 111 of 1998.

47 Section 39 of the Constitution of the Republic of South Africa 1996.

48 *Stanfield v Minister of Correctional Services* 2003 (12) BCLR 1384 (C) at [15] and [68].

49 *Stanfield v Minister of Correctional Services* 2003 (12) BCLR 1384 (C) at [89].

50 1979 (1) SA 14 (A) at 39C-F.

51 *Stanfield v Minister of Correctional Services* 2003 (12) BCLR 1384 (C) at [124].

prisons.⁵² The court also found that the third respondent's insistence that the applicant remain imprisoned until it was physically impossible for him to commit any crime "inhumane, degrading and thoroughly undignified".⁵³ It also held that the failure to take the applicant's individual circumstances into account by "a lumping together of all prisoners suffering from terminal diseases" also undermined the applicant's right to dignity.

14 Despite this judgment a large number of prisoners continue to die from natural causes on an annual basis: 900 prisoners died from natural causes in 2010 and 804 in 2011.⁵⁴ Section 79 of the Correctional Services Act⁵⁵ permits the release of prisoners on medical parole when a prisoner has been diagnosed as being in the final phase of any disease or condition. However, the Judicial Inspectorate noted in its report that despite the fact that in many instances the prison authorities were aware of the deceased's deteriorating health, they were not released on parole.⁵⁶ These deaths should be juxtaposed with the release of Shabir Shaik (a close friend and adviser to the President) on medical parole after serving two years and four months of his 15-year sentence for corruption, and with Jackie Selebi (the former Commissioner of Police⁵⁷ and head of Interpol), released on medical parole in 2012 after serving only seven months of his 15-year sentence. Both are alive at the time of writing and Shabir Shaik is allegedly sufficiently well to enjoy a game of golf.⁵⁸

15 In 1997, in the case of *B v Minister of Correctional Services*,⁵⁹ the court had to deal with the question whether the applicants and other HIV infected prisoners were entitled to receive appropriate anti-viral medication. This required the court to consider what would constitute "adequate medical treatment" in terms of s 32(e) of the Constitution. In rejecting the respondent's argument that the State was under no duty to provide prisoners with a greater degree of medical care than that available at state expense outside of the prison, the court held that the

52 *Stanfield v Minister of Correctional Services* 2003 (12) BCLR 1384 (C) at [125].

53 *Stanfield v Minister of Correctional Services* 2003 (12) BCLR 1384 (C) at [126].

54 2009/10 and 2010/11 Annual Reports of the Judicial Inspectorate of Correctional Services.

55 111 of 1998.

56 2008/9 Annual Report of the Judicial Inspectorate for Correctional Services at p 25. In the same report it is noted that the medical treatment of prisoners was delayed and that there was inadequate screening for chronic and contagious diseases at the admission stage (at p 37).

57 Selebi's successor, Bheki Cele, was also dismissed as a result of allegations of corruption.

58 See "Selebi Given Strict Medical Parole Conditions" *Mail & Guardian* (23 July 2012) <www.mg.co.za/article/2012-07-23-selebi-must-abide-by-parole-conditions> (accessed 1 October 2013).

59 1997 (6) BCLR 789 (C) at [2].

State owed a higher degree of care to prisoners.⁶⁰ Brand J's reasons for this conclusion included the fact that "[u]like persons who are free, prisoners have no access to other resources to assist them in gaining access to medical treatment"⁶¹ and that in respect of HIV prisoners, the prison environment exposed them more "to opportunistic viruses than HIV sufferers who are not in prison".⁶² Noting that the Department of Correctional Services had failed to establish that it could not provide the combination anti-viral therapy, the court held that the failure to provide this treatment to the first and second applicants infringed their s 25(2)(e) right to adequate medical treatment. The court ordered that the applicants be provided with the prescribed anti-viral therapy.⁶³ In 1998, 534⁶⁴ prisoners died of natural causes in prison. Despite judicial intervention the figure had risen to 1,087⁶⁵ by 2000 and by 2004 it reached a high of 1689.⁶⁶ This cannot be solely blamed on prison conditions as the somewhat eccentric and ambiguous government response to HIV was doing little to treat or curb the spread of HIV. Civil disquiet at this deadly approach led to a constitutional challenge. In 2002, in the case of *Minister of Health v Treatment Action Campaign (No 2)*,⁶⁷ the court found that there was no rational justification for the government policy of not providing anti-retroviral medication to HIV pregnant mothers in order to prevent mother to child transmission and ordered that the State provide such medication. This case marked a pivotal turning point in the Government's response to the treatment of HIV. Although the death rate in prison only started declining in 2005, by 2011 it had dropped to 804,⁶⁸ less than half the number of deaths in 2004.

16 More recently in the case of *Lee v Minister of Correctional Services*,⁶⁹ the court held that the Minister's failure to guard against the spread of tuberculosis ("TB") in a maximum security prison was unlawful and unconstitutional. TB is the number one cause of death by natural causes in prison: if this judgment has a widespread normative effect, there may well be a reduction of deaths by natural causes in prison.

60 *B v Minister of Correctional Services* 1997 (6) BCLR 789 (C) at [52].

61 *B v Minister of Correctional Services* 1997 (6) BCLR 789 (C) at [53].

62 *B v Minister of Correctional Services* 1997 (6) BCLR 789 (C) at [54].

63 See also *S v Vanqa* 2000 (2) SACR 371 (TkHC) in which the court held that the authorities' conduct in refusing a seriously asthmatic bail applicant access to medical treatment breached both the s 32(2)(f) right to access to a chosen medical practitioner and the s 35(2)(e) right to medical treatment at state expense.

64 1998/9 Annual Report of the Judicial Inspectorate of Correctional Services.

65 2000/1 Annual Report of the Judicial Inspectorate of Correctional Services.

66 2004/5 Annual Report of the Judicial Inspectorate of Correctional Services.

67 2002 (5) SA 721 (CC).

68 2011/12 Annual Report of the Judicial Inspectorate of Correctional Services.

69 2011 (2) SACR 603 (WCC). This decision was upheld by the Constitutional Court in *Lee v Minister for Correctional Services* 2013 (2) SA 144 (CC).

17 Although there have been some court judgments that have had an impact on prison conditions, conditions remain abysmal⁷⁰ and the death rate at the hands of the police and prison officials remains unacceptably high. The State clearly feels that non-compliance with constitutional standards in the field of criminal justice does not carry political risks nor does slow or recalcitrant compliance with court orders. The State has consistently formally indicated a willingness to comply with judgments; however, in the absence of political will, substantive compliance can always be sabotaged by bureaucracy.⁷¹

V. The absence of traction

18 The constitutional restraints on state power, particularly in the field of criminal justice, in the South African constitution are not simply the product of imitation; they are a response to the atrocities of the past. This care to uphold due process values and curb the excesses of law enforcement agencies is a common characteristic in countries that have succeeded in replacing authoritarian regimes with democratic ones.⁷²

19 However, what is also common in countries undergoing such a political transition is that crime increases as the authoritarian reins are relaxed and public support for due process values rapidly diminishes. Public and political rhetoric emphasises the necessity of crime control. This crime control rhetoric most often focuses on the necessity of giving police more powers and “criminals” less sympathy.⁷³ The tension between the constitutional values and demands for crime control also

70 R Jansen & E T Achiume, “Prison Conditions in South Africa and the Role of Public Interest Litigation Since 1994” (2011) 27 *South African Journal of Human Rights* 183 at 190 who note that the impact of public interest litigation on the daily administration of prisons has been minimal and tends to be “confined to the specific relief granted by the courts”. See also P De Vos, “Prisoners’ Rights Litigation in South Africa Since 1994 – A Critical Evaluation” (2005) *Law, Democracy and Development* 89.

71 See R Amit, “Winning Isn’t Everything: Courts, Context, and the Barriers to Effecting Change Through Public Interest Litigation” (2011) 27 *South African Journal of Human Rights* 8. See also A Trochev, “Can Weak States Have Strong Courts? Evidence from Post-communist Russia” in *Legitimacy, Legal Development and Change: Law and Modernization Reconsidered* (D K Linnan ed) (Ashgate, 2012) at p 351.

72 L Brayshear Tiede, “Criminal Law Reform After Dictatorship: Chile’s Struggle to Balance Rights With Citizens Desire for Law and Order” in *Legitimacy Legal Development and Change: Law and Modernization Reconsidered* (D K Linnan ed) (Ashgate, 2012) at p 323.

73 L Brayshear Tiede, “Criminal Law Reform After Dictatorship: Chile’s Struggle to Balance Rights With Citizens Desire for Law and Order” in *Legitimacy Legal Development and Change: Law and Modernization Reconsidered* (D K Linnan ed) (Ashgate, 2012) at p 323.

give rise to inconsistencies between policies and action. For example,⁷⁴ at the same time as the Department of Corrections Services made a policy commitment to constitutional values, it opened C-Max prison in which prisoners may be held in solitary detention for 23 hours a day, are only permitted to exercise in a 4 x 1.5m cage, and are only allowed to shower in a cage. Another surprising example is the alleged statement by the then National Commissioner of Police, Bheki Cele, to the effect that police should shoot to kill and ask questions later, in calling for the amendment of s 49 of the Criminal Procedure Act which had previously been amended to regulate the use of deadly force.⁷⁵

20 In this context the South African High Courts have been remarkably consistent in upholding constitutional values, less so other branches of government. The Executive and the Legislature have shown an equally consistent commitment to the language of crime control and it is one of the few areas of consensus amongst political parties.

21 Examples of post-democracy responses are the tightening of bail conditions⁷⁶ and attempts to once again relax the constraints on the powers of the police to shoot to kill.⁷⁷

22 The focus on policing provides a narrative that is easily understood by all and distracts from the reasons for high levels of crime and the State's inability or unwillingness to respond to the complex socio-economic needs of the population.

23 Policing alone is unlikely to reduce high levels of crime, but these levels of crime may well affect how a beleaguered police force responds to crime, especially when it concerns crimes of a particularly violent nature.⁷⁸ When members of society feel their lives and livelihood are threatened by crime, the notion that constitutional restraints also provide protection for the innocent gives little solace. The idea that it is better for ten guilty people to go free than one innocent person be

74 As noted by R Jansen & E T Achiume, "Prison Conditions in South Africa and the Role of Public Interest Litigation Since 1994" (2011) 27 *South African Journal of Human Rights* 183 at 185. See also A Dissel & Stephen Ellis, "Reform and Stasis: Transformation in South African Prisons" (a paper produced by the Centre for the Study of Violence and Reconciliation) <www.csvr.org.za/docs/correctional/reform.pdf> (accessed 22 March 2013).

75 See n 9 above. However, it should be noted that the Government on 29 June 2011 issued a statement denying that Cele had made such a statement, see <www.info.gov.za/speech/DynamicAction?pageid=4618sid=195968&tid=36279> (accessed 10 June 2013).

76 Section 60 of the Criminal Procedure Act 51 of 1977.

77 Section 49 of the Criminal Procedure Act 51 of 1977. See n 9 above.

78 See concept paper of the Centre for the Study of Violence and Reconciliation, "The Violent Nature of Crime in South Africa" (25 June 2007) <http://www.issafrica.org/crimehub/uploads/Violent_nature_sa.CSVRBruce.pdf> (accessed 1 October 2013).

convicted has little persuasive power when violent crime is prevalent; hence the power of the crime control narrative.

24 The more challenging question is what causes the crime rate to be so high and violent in South Africa and what causes the frequently brutal response by state authorities. Much has been written about the causes of crime and violent crime. What distinguishes South Africa from most other countries is both the rate and violent nature of crime.⁷⁹ In South Africa, the brutality of the past regime and the persistent brutality of poverty are the most obvious causes.⁸⁰ The brutality of the apartheid regime is well documented and needs no further discussion. However, the brutality of poverty⁸¹ requires further interrogation. Is economic growth a prerequisite for democracy? Establishing a causal link between economic growth and democracy is difficult and complicated by questions of degree and definition. South Africa falls into the “developing country” category and shows the characteristics of a functional democracy. However, it is also a democracy based on constitutional supremacy and its sustainability requires a widespread commitment to constitutional values at all levels of society. For the purposes of this essay, this requisite level of commitment will be referred to as legitimacy (a term that lends itself to many interpretations).

25 In South Africa, it is not the GDP that has the potential to erode the legitimacy of the constitution; it is the pattern of wealth distribution that is the greatest danger. The Gini coefficient in South Africa is one of the highest in the world, reflecting the gross inequality in distribution of wealth.⁸² The unemployment rate, depending on how it is measured, ranges between 24.9 and 36.2%.⁸³ The divide between rich and poor has

79 See United Nations Office on Drugs and Crime, “UNODC Homicide Statistics” <www.unodc.org/unodc/en/data-and-analysis/homicide.html> (accessed 1 October 2013). See also Centre for the Study of Violence and Reconciliation, “The Violent Nature of Crime in South Africa” (25 June 2007) at p 54 <http://www.issafrica.org/crimehub/uploads/Violent_nature_sa.CSVRBruce.pdf> (accessed 1 October 2013); Centre for the Study of Violence and Reconciliation, “Why South Africa is So Violent and What Should We be Doing About It?” (2010) <www.issafrica.org/crimehub/uploads/CSVStatement0911110.pdf> (accessed 9 November 2013).

80 Centre for the Study of Violence and Reconciliation, “The Violent Nature of Crime in South Africa” (25 June 2007) at p 162 <http://www.issafrica.org/crimehub/uploads/Violent_nature_sa.CSVRBruce.pdf> (accessed 1 October 2013).

81 Centre for the Study of Violence and Reconciliation, “Why South Africa is So Violent and What Should We be Doing About It?” (2010) at p 3 <www.issafrica.org/crimehub/uploads/CSVStatement0911110.pdf> (accessed 9 November 2013).

82 See “South Africa Economic Update: Inequality of Opportunity” <[data/worldbank.org/indicators/SI.Pov.Gini](http://data.worldbank.org/indicators/SI.Pov.Gini)> (accessed 9 November 2013).

83 South African Institute of Race Relations 2012 Annual Survey at p 215. See also “South Africa Economic Update: Inequality of Opportunity” <resources.worldbank.org/INTAFRICA/resources/257994-1342195607215/SAEU-July_2012_Full_Report.pdf> (accessed 9 November 2013).

increased and is greater than it was under the apartheid regime.⁸⁴ A wide range of social grants⁸⁵ have staved off a humanitarian disaster; nevertheless a large proportion of the country lives below the poverty line whilst a small elite lives in extraordinary luxury.

26 Despite the constitutional guarantees of education,⁸⁶ health care, food, water and social security,⁸⁷ widespread poverty and the inability of the State to improve the poor state of education offered to the majority of South Africans under apartheid,⁸⁸ denies the majority of South Africans access to the benefits of economic growth as well as minimises their ability to participate in the democratic state.

27 Where the elite flaunt and measure success in material terms and the majority have little hope of ever changing their material conditions, crime becomes an attractive means for survival, asserting masculinity⁸⁹ and a potential means of social mobility. The stakes are so high that resorting to violence in an already brutalised society is perhaps a likely outcome.⁹⁰

28 The police and prison authorities are faced with the herculean task of apprehending and containing a proportion of the population to whom the Bill of Rights is a complete abstraction, absurdity or unknown, and in doing so they must uphold constitutional values. These law enforcement agents are poorly educated (an inevitable consequence of a dysfunctional school system) and this impacts on the level of training they can receive. They are also poorly resourced, poorly

84 See also Centre for the Study of Violence and Reconciliation, "The Violent Nature of Crime in South Africa" (25 June 2007) at p 163 <http://www.issafrika.org/crimehub/uploads/Violent_nature_sa.CSVRBruce.pdf> (accessed 1 October 2013).

85 Over 16 million South Africans receive social grants; the highest grant is approximately US\$120 *per* month. See South African Institute of Race Relations 2012 Annual Survey at p 583.

86 Section 29 of the Constitution of the Republic of South Africa 1996.

87 Section 27 of the Constitution of the Republic of South Africa 1996.

88 The South African schooling system, both primary and secondary, comes near the bottom of the world rankings, as well as on the African continent. See TIMSS 2011 International Results in Mathematics and Pirls 2011 International results in reading accessed at <<http://timss.bc.edu>> (accessed 1 October 2013).

89 Centre for the Study of Violence and Reconciliation, "The Violent Nature of Crime in South Africa" (25 June 2007) at p 168 <http://www.issafrika.org/crimehub/uploads/Violent_nature_sa.CSVRBruce.pdf> (accessed 1 October 2013).

90 Centre for the Study of Violence and Reconciliation, "The Violent Nature of Crime in South Africa" (25 June 2007) at p 173 <http://www.issafrika.org/crimehub/uploads/Violent_nature_sa.CSVRBruce.pdf> (accessed 1 October 2013); Centre for the Study of Violence and Reconciliation, "Why South Africa is So Violent and What We Should be Doing About It?" (November 2010) at p 3 <<http://www.issafrika.org/crimehub/uploads/CSVStatement091110.pdf>> (accessed 9 November 2013).

paid and consequently held in low esteem.⁹¹ Their social standing is further undermined by an association between authority and the apartheid state – although 19 years after the transition to democracy this association has weakened.

29 A police officer on patrol (in a vehicle or on foot) is vulnerable and will frequently find himself or herself outnumbered and outgunned.⁹² Apprehending criminals is a risky business and when the risk is taken the chances of the criminal being convicted is low due to the absence of investigatory and prosecutorial capacity and lower court inefficiencies. In this context, police brutality born out of fear and frustration is not surprising. Where the social and economic milieu in which law enforcement agents operate is inimical to due process and the right to life, it is unlikely that the due process values in the constitution will become embedded in the ethos of either the police or prison services. This resonates with the argument that the exercise of civil and political rights is meaningless if people do not have ready access to education, food, water and shelter.⁹³ Constitutional legitimacy is further undermined when there is non-compliance by state agencies such as police and prison authorities⁹⁴ and when political leadership casts aspersions on the value of one or more provisions in the constitution and their enforcement by the courts.

30 The normative influence of the constitution is also weakened by the State's inability or unwillingness to use the law to materially change the conditions of ordinary citizens or those whose rights are impinged upon by law enforcement agencies. Despite the higher courts' commitment to democratic values and individual rights, their normative effect remains weak as non-compliance carries little political risk due to the irrelevance of the courts (particularly the higher courts) to the majority of South Africans.

91 J Steinberg, *Thin Blue: The Unwritten Rules of Policing South Africa* (Jonathan Ball Publishers SA, 2008).

92 J Steinberg, *Thin Blue: The Unwritten Rules of Policing South Africa* (Jonathan Ball Publishers SA, 2008).

93 See J Oloka-Onyango, "Human Rights and Sustainable Development in Contemporary Africa: A New Dawn, or Retreating Horizons?" (2000) 6 *Buffalo Human Rights Law Review* 39; J M Isanga, "Rethinking the Rule of Law as Antidote to African Development Challenges" in *Legitimacy, Legal Development and Change: Law and Modernization Reconsidered* (D K Linnan ed) (Ashgate, 2012) at p 77; and G Budlender, "People's Power and the Courts: Bram Fischer Memorial Lecture 2011" (2011) 27 *South African Journal of Human Rights* 582.

94 See generally E Buscaglia, "Institutional Factors Determining the Gap Between Law in the Book vs Law in Action: An Analytical Framework for Improving Judicial Effectiveness" in *Legitimacy, Legal Development and Change: Law and Modernization Reconsidered* (D K Linnan ed) (Ashgate, 2012) at p 294.

31 Apartheid was enforced by the courts and consequently the courts have not been viewed synonymously with justice. The vast majority of South Africans do not have access to the legal system as they do not have sufficient resources. The courts were instruments of the apartheid government and now they are the instruments of the elite, with the exception of the occasional public interest cases which even then seldom deliver material benefits even to the individual applicant.⁹⁵

32 In the field of criminal justice, the irrelevance extends to constitutional values due to the threat that high levels of crime pose to ordinary citizens. It is in this area that the anti-majoritarian role of the Judiciary is most vulnerable to attack. The Executive does not appear entirely comfortable with the notion of constitutional supremacy and the President has stated that “[t]he powers conferred on the courts cannot be regarded as superior to the powers resulting from a mandate given by the people in a popular vote”.⁹⁶ (There is a certain irony here as the Legislature, the only elected body, has had difficulty in holding the Executive accountable.⁹⁷) In this context the notion that an unelected authority should protect the rights of a criminal minority is unlikely to inspire confidence in the courts or constitution. But this is only because the false panacea of policing is waved as a distraction to the underlying causes of crime. The citizens, suspects and guilty die, because the new dispensation has not delivered on the promise⁹⁸ of social justice.

VI. Conclusion

33 The transition to democracy and acceptance of the principle of constitutional supremacy has had a significant and positive impact on South Africa’s criminal justice system. However, suspects, accused, detained and arrested persons remain exceptionally vulnerable. Although

95 For example, in *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), the court declared a housing policy that made no provision for emergency relief to those without housing unconstitutional. Irene Grootboom in whose name the application was brought died eight years later, never having received any relief. See “Grootboom Dies Homeless and Penniless” *Mail & Guardian* (8 August 2008) <<http://mg.co.za/article/2008-08-08-grootboom-dies-homeless-and-penniless>> (accessed 1 October 2013).

96 Statement issued by the Presidency on 1 November 2011.

97 See G Budlender, “People’s Power and the Courts: Bram Fischer Memorial Lecture 2011” (2011) 27 *South African Journal of Human Rights* 582.

98 K Klare, “Legal Culture and Transformative Constitutionalism” (1998) 14 *South African Journal of Human Rights* 146 at 153 optimistically writes:

Unlike classical liberal bills of rights, whose chief purpose was to secure individual liberty and property from imposition by government, the South African Constitution embodies the idea that the power of the community can (and must) be deployed to achieve goals consistent with freedom, that collective power can be tapped to create social circumstances that will nurture and encourage people’s capacity for self-determination.

economic growth might not be a prerequisite for democracy, without social justice the liberal guarantees contained in a bill of rights will have little traction. This is compounded by the absence of apparent commitment to these values by senior leadership in the Executive, Legislature and state bureaucracy.
