

# *Glenister* at the Coalface: Are the Police Part of an Effective Independent Security Service?

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‘The law people are not right.’

Zamdela Informal Settlement Focus Group

‘As the people of the law they should be telling us and teaching us about law but if they take the law and put it under their boots, the boots are heavy and the law heavy too.’

Focus Group Respondent on the Police, Alexandra Township, 2013

## I DEFINING THE RULE OF LAW

In 1994, South Africa became a constitutional democracy. At the same time, the Constitution provided a foundation for the transformation of the state, the law and society, and it placed the rule of law and the principle of legality at the centre of the new democracy’s value system and institutional arrangements.

As Frank Michelman notes, ‘the judicially enforceable claim to legality inhabits South African law... as a norm sourced directly in the Final Constitution’<sup>1</sup> and can be traced directly to s 1(c) of the Founding Provisions of the Constitution (‘Final Constitution’ or ‘FC’). FC s 1 identifies ‘the supremacy of the Constitution and the rule of law’ as one of four sets of core values of the new democratic state. As a result, the ‘rule of law’ doctrine (a) ‘informs the interpretation of many, possibly all, other rights’ and (b) has the status of a, ‘self-standing “justiciable and enforceable” claim’ and moreover a ‘justiciable constitutional right’.<sup>2</sup>

*Glenister v President of the Republic of South Africa & Others* found that changes to national legislation which replaced the Directorate of Special Operations, known as the Scorpions (DSO), with the Directorate for Priority Crime Investigation, known as the Hawks (DPCI), were unconstitutional. When refracted through the prism of rationality review and reasonableness review grounded in FC s 1(c), the Court took a rather robust view of what the rule of law doctrine requires.<sup>3</sup> Broadly speaking, *Glenister* found that corruption undermines the rights and freedoms in Chapter 2 of the Constitution, constitutes a fundamental threat to the rule

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<sup>1</sup> F Michelman ‘The Rule of Law, Legality and the Supremacy of the Constitution’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2006) Chapter 11.

<sup>2</sup> *Ibid* at 11-2 (own emphasis).

<sup>3</sup> *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6, 2011 (3) SA 347 (CC), 2011 (7) BCLR 651 (CC) at para 170.

of law and concludes that it therefore ‘imperils our democracy’. Corruption is seen to undermine ‘the credibility of governments; the institutions and values of democracy; and ethical values and morality’ and to ‘endanger the stability and security of societies’.<sup>4</sup> In the face of this pernicious threat, the judgment found that the Constitution and the state’s international law agreements require the state to establish and maintain an independent body to combat corruption and organised crime. The judgment argues that ‘the very structure of our Constitution – in which the rule of law is a founding value...affords the obligation [to establish an independent body to combat corruption] a homely and emphatic welcome.’<sup>5</sup> The Hawks were found to be insufficiently independent to root out corruption. The *Glenister* Court held that the Hawks represented a failure by the state to create and to maintain an adequately independent anti-corruption entity that would (a) keep the governors accountable and (b) promote and protect and respect the rights and freedoms of the governed.

This article looks at the problem of corruption to which *Glenister* refers through a different disciplinary lens: sociology. It does not ignore the law, but utilises the voices of South African citizens to explore these problematics as they are captured in focus groups recently run by the Human Sciences Research Council (HSRC) throughout South Africa: in the township of Alexandra in Gauteng; the informal settlement, Zamdela, in the Free State; and an informal settlement falling under traditional jurisdiction, Violet Bank, in the province of Limpopo.

## II DEFINING CORRUPTION

Corruption is commonly referred to as the betrayal of public trust for reasons of private interest.<sup>6</sup> The Public Service Anti-Corruption Strategy of 2002 defines corruption as ‘any conduct or behaviour in relation to persons entrusted with responsibilities in public office which violates their duties as public officials and which is aimed at obtaining undue gratification of any kind for themselves or for others.’<sup>7</sup> In 2004, the Prevention and Combating of Corrupt Activities Act 12 of 2004 was enacted. In s 4(1) it defines corrupt activities related to public officials by providing that any:

- (a) public officer who, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or
- (b) person who, directly or indirectly, gives or agrees or offers to give any gratification to a public officer, whether for the benefit of that public officer or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner—
  - (i) that amounts to the—
    - (aa) illegal, dishonest unauthorised, incomplete, or biased; or

<sup>4</sup> Ibid.

<sup>5</sup> Ibid at para 205.

<sup>6</sup> DH Rosenbloom *Public Administration, Understanding Management, Politics and Law in the Public Service* (1989) 467.

<sup>7</sup> Department of Public Service and Administration ‘Public Service Anti-Corruption Strategy’ (January 2002) 11.

- (bb) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory contractual or any other legal obligation;
- (ii) *that amounts to—*
- (aa) the abuse of a position of authority;
- (bb) a breach of trust; or
- (cc) the violation of a legal duty or a set of rules;
- (iii) designed to achieve an unjustified result: or
- (iv) that amounts to any other unauthorised or improper inducement to do or not to anything,
- is guilty of the offence of corrupt activities relating to public officers.<sup>8</sup>

The South African Police Service, specifically in terms of the recently released Green Paper on Policing, acknowledges that corruption exists at all levels of that organisation.<sup>9</sup> The Green Paper notes that ‘between 2002 and 2009 the police developed three different anti-corruption strategies which existed on paper but were never effectively implemented.’<sup>10</sup> A new strategy was launched in 2010, which focuses on the prevention, detection, investigation and resolution of corruption. The Green Paper attributes the failure of previous anti-corruption strategies to a number of factors: (a) a lack of buy-in by senior personnel, (b) a lack of systems and processes to ensure that anti-corruption strategies are implemented, and (c) a failure proactively to identify systemic corruption and to provide for adequate, efficient and fairly executed disciplinary processes.<sup>11</sup> The Green Paper relies, in part, on a Police Advisory Council Report (2006–2008), which found that the SAPS had, ‘insufficient capacity to investigate corruption, that codes of conduct and ethics were not adhered to, and that disciplinary issues were not dealt with timeously’.<sup>12</sup> Recent figures released in Parliament indicate that many high-ranking police officials have been found to have criminal records relating to crimes including rape, murders, cash-in-transit heists and lesser offences.<sup>13</sup> The Independent Police Investigative Directorate (IPID) set up to ensure oversight over the South African Police Service and Metro Police Services found that

<sup>8</sup> Prevention and Combating of Corrupt Activities Act 12 of 2004, s 4(1).

<sup>9</sup> Civilian Secretariat for Police *Green Paper on Policing* (2013) 48.

<sup>10</sup> *Ibid* at 49.

<sup>11</sup> *Ibid* at 50.

<sup>12</sup> *Ibid* at 48.

<sup>13</sup> See D Smith ‘Nearly 1,500 South African Police Exposed as Convicted Criminals: Officials Admit Total Includes Hundreds Of Senior Officers Who Have Committed Murder, Rape and Theft’ *The Guardian* (15 August 2013) available at <http://www.theguardian.com/world/2013/aug/15/south-african-police-convicted-criminals>. The article describes how, ‘the parliamentary portfolio committee on police heard that a major-general, 10 brigadiers, 21 colonels, 43 lieutenant-colonels, 10 majors, 163 captains and 706 warrant officers have been found guilty of serious offences. In total 1,448 members of the police have convictions, according to an audit up to January 2010. The crimes include murder, attempted murder, culpable homicide, rape, attempted rape, assault, aiding an escapee, theft, housebreaking, drug trafficking, kidnapping, robbery, malicious damage to property and domestic violence.’

during 2008/2009 and 2009/2010, at least 1 092 people lost their lives as a result of the use of force by the police, the highest number since the late 1990s.<sup>14</sup>

These findings by the state itself indicate that corruption in South Africa concerns more than a small spread of high-level incidents. It has become a systemic problem of power that rends the fabric of society and poses a direct challenge to the 'rule of law' culture to which our Constitution aspires.

The conventional definition of corruption generally identifies, 'an act of private abuse or private misuse or private appropriation as lying at the heart of the phenomenon of corruption'. The World Bank offers a pithy definition of corruption as an 'abuse of public office for private gain'.<sup>15</sup> Standard definitions of corruption rely on a liberal conception of state and society in which the private and public realms are unambiguously distinguished and the state exists as an essentially neutral entity. In this conception of the liberal polity, bureaucrats in the state are expected to operate in a similarly neutral fashion and partisanship can draw accusations of corruption. Bourdieu, Wacquant and Farage analyse the genesis of the modern state in terms of the emergence of a bureaucratic field created through the acts of bureaucratic agents. Thus, 'the state "comes into being" to the extent that these agents act in a neutral and disinterested manner vis-à-vis the public good'.<sup>16</sup>

Ivor Chipkin's definition is of more immediate interest for our purposes. Chipkin draws on 'classical' conceptions developed by Montesquieu in which 'corruption ... is a feature of any polity (democratic, aristocratic, monarchic or despotic) when its leaders fail to act on the basis of its core or foundational principles ... [W]e might say that a person or a party or a government is corrupt in South Africa to the extent that he/she/it behaved in a way that undermined the principles of the Constitution'.<sup>17</sup> This substantive definition of corruption would seem apposite to understand the nature of the challenges being faced in the South African context.

The reality in many post-colonial contexts is that, despite our liberal Constitution and an ostensibly liberal democratic state form, the distinctions between the realm of the 'private' as a domain of personalised relationships and networks is not as easily distinguished from the 'public' domain, a realm ostensibly governed by neutral rules enacted by dispassionate bureaucrats. The private and the public are deeply implicated in each other and mutually shape the nature of power in both domains. As anthropologists of the state have pointed out for some time, states are not simply 'a constellation of objects but a particular set of social relations'.<sup>18</sup>

Chipkin contends that the ANC does not have a liberal conception of the state. Instead the ANC's objective has been to utilise the state as a vehicle for the

<sup>14</sup> See D Bruce 'Beyond Section 49: Control of the Use of Lethal Force' *South African Crime Quarterly* 36 (2011) 3.

<sup>15</sup> I Chipkin 'The Politics of Corruption: Two Competing Definitions' Public Affairs Research Institute (PARI) *Long Essay* Number 3 (October 2012) 3.

<sup>16</sup> *Ibid* at 21.

<sup>17</sup> *Ibid* at 3.

<sup>18</sup> Chipkin (note 15 above) at 20.

transformation of state and society in order to redress the inequities of the past. He writes:

In these situations the measure of public service is not the degree to which public servants deal impartially with the public, but the opposite. It is the degree to which the organisation and structures of the administration are tilted towards the service of blacks and Africans in particular.<sup>19</sup>

In his examination of the functioning of state hospitals and provincial health departments, Van Hold likewise points to the tension between the establishment of a neutral state bureaucracy in the Weberian sense and a nationalist project that seeks to transform state and society. On his account, a series of ‘informal rationales’ function in the state health bureaucracy that are ‘shaped by the imperative to undo racism and white domination in the state and in society more broadly, and that they tend to work against and erode the Weberian rationales for a meritocratic and effective state bureaucracy’.<sup>20</sup>

The gap between exemplary policies around corruption and the reality of state performance can, similarly, be tied to the functional opposition of state injunction (the Constitution) and state practitioner (day-to-day official practice). This tension or opposition, as Das has noted, ‘is always potentially disruptive of any simple sovereign directive’.<sup>21</sup> Das also argues that ‘many of the functionaries of the state themselves find the practices of the state to be illegible [indecipherable]’.<sup>22</sup> As Gillespie notes in her study of post-apartheid prisons, ‘warders faced with the task of implementing new corrections policy ... are often despondent, overwhelmed, or confused by the task that has been given to them. The work warders do in mediating that illegibility [obscurity] makes policy open to interpretation; makes of state practice a site of translation and improvisation’.<sup>23</sup>

The assumption of a direct relation between means and ends, which philosophers such as John Dewey have critiqued, leads to a blindness to the ways in which the democratic (and even idealist) impulse of policy is compromised by the realities of organisational life and routines of institutional life. This myopia with respect to the lived realities of institutions leads, as Selznick has argued, to a failure to understand the manifold ‘ways in which the inner, typically uncharted, informal life of large institutions affects the interrelations between purported ends and adopted means, and influences what occurs in the space between the two’.<sup>24</sup>

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<sup>19</sup> Ibid at 9.

<sup>20</sup> K von Holdt ‘Nationalism, Bureaucracy and the Developmental State: The South African Case’ (2010) *South African Review of Sociology* 41 (1) 4.

<sup>21</sup> V Das as cited in K Gillespie ‘Moralizing Security: “Corrections” and the Post-Apartheid Prison’ (2008) 2 (1) *Race/Ethnicity: Multidisciplinary Global Contexts* 77.

<sup>22</sup> Ibid at 77.

<sup>23</sup> Ibid.

<sup>24</sup> P Selznick *TVA and the Grass Roots: A Study in the Sociology of Formal Organization* (1949).

This article therefore locates corruption within the context of the struggle to transform the criminal justice system in South Africa through policy and prescription and the equally difficult struggle of post-apartheid South Africans meaningfully to realise their status as law-making citizens. In this context, ‘corruption’ has become part of the daily practice of power in citizens’ interactions with the state, in particular its police service, and has established a reciprocal, if unequal, relationship of mutual personal ‘gratification’ that protects citizens against the predations of the state and which is used by them to gain small, temporal advantages in this predatory world. It is this daily predation which in fact ‘imperils our democracy’. The formal institutional checks and balances designed to curb the abuse of power and bring about a rule-of-law culture fast become empty and rarefied abstractions, as citizens grapple daily with a material environment that often seems to negate the spirit of the rights and values espoused by our Constitution.

### III THE RULE OF LAW: RHETORIC AND REALITY, PART 1

If, as Michelman argues, FC s 1(c) recognises the rule of law as a pervasive value, a justiciable principle and a grundnorm which informs the interpretation of most if not all other rights, in what way can we actually say that it has mitigated the abuse of public (and private) power exercised and pervasive practices of corruption? The concept and the doctrine of the rule of law has, from the time of Aristotle and Plato, been associated with restraint on the exercise of arbitrary power by governments. Dicey’s standard definition of the rule of law contains three key tenets:

1. ‘No man is punishable ...except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint; and
2. ‘Here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.’ This establishes a principle of equality before the law; and
3. ‘The general principles of the constitution ... are the result of judicial decisions determining the rights of private persons in particular cases brought before the courts’<sup>25</sup>.

Michelman focuses his attention on the manner in which the South African Constitution is shot through with aspirations to the rule of law, that ‘[c]laims to freedom from arbitrary treatment stem from multiple constitutional roots’<sup>26</sup> and that the decisions of the Constitutional Court have repeatedly established this legality principle in practice.

In *Pharmaceutical Manufacturers Association of South Africa* the Constitutional Court was asked to review and to set aside the President’s decision to bring the South African Medicines and Medical Devices Regulatory Authority Act 132 of 1998 into

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<sup>25</sup> D Clarke ‘The Many Meanings of the Rule of Law’ in K Jayasuriya (ed) *Law, Capitalism and Power in Asia* (1998) 27.

<sup>26</sup> Michelman (note 1 above) at 11-15.

operation on 30 April 1999.<sup>27</sup> This matter turned on no ordinary, run-of-the-mill determination. At its heart lay a question of profound constitutional importance. Does a South African court possess the power, under the Final Constitution, to review and to set aside a decision by the President of South Africa to bring an Act of Parliament into force? A decade earlier, in the dying days of apartheid, the answer would ordinarily have been ‘No’. In 2000 the Constitutional Court, in working its way up to a response, wrote that ‘under our new constitutional order the control of public power is always a constitutional matter’<sup>28</sup> and that ‘the exercise of all power must conform with the Constitution, and, in particular, the exercise of public power must meet the requirements of the rule of law – a foundational principle in the Constitution’.<sup>29</sup> In short, the answer to the question posed was now ‘Yes.’

It would be a mistake, however, to read the *Pharmaceutical Manufacturers* Court as merely signalling a shift of our legal system from parliamentary sovereignty to constitutional democracy. As Michelman rightly observes, the *Pharmaceutical Manufacturers* Court was staking out a position in which ‘the Final Constitution means by the rule of law something richer than that formula’s most traditional, formal, Diceyan signification’.<sup>30</sup>

It is when the sites pull together toward the vindication of human dignity, human rights, non-racialism, non-sexism, and the rest that the unity of the country’s law in their service figures as a true value. Accordingly, if we read FC s 1 holistically – so that the coupling of the rule of law to constitutional supremacy signifies the value of legal-systemic unity in the service of human dignity, non-racialism, and the rest – then ‘the rule of law’ signifies not just the rule of rules but the rule of justice, as the Final Constitution envisions justice. ‘Supremacy of the Constitution and the rule of law’ signifies the unity of the legal system in the service of transformation by, under, and according to law.<sup>31</sup>

The ‘desired societal condition’<sup>32</sup> to which Michelman refers, and to which the Court commits us, is indeed deeper and richer than more formalistic accounts in which the governors and the governed are subject to the same rules of the game. But how exactly is the Constitutional Court’s thicker conception of the rule of law meant to lead us toward the kind of egalitarian social democracy to which the Constitution’s founding provisions<sup>33</sup> ostensibly point?

Martin Krygier has critiqued conventional legal preoccupations with the ‘anatomy’ of the rule of law in the Diceyan tradition and an undue obsession with its formulaic institutional artifices. He asks us to pay careful attention to the teleology and sociology of the rule of law, ie its immanent rather than instrumental value (so often the preoccupation of development advocates and

<sup>27</sup> *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* [2000] ZACC 1, 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC).

<sup>28</sup> *Ibid* at Explanatory Note.

<sup>29</sup> *Ibid*.

<sup>30</sup> Michelman (note 1 above) at 11-38.

<sup>31</sup> *Ibid*.

<sup>32</sup> *Ibid* at 36.

<sup>33</sup> See J Fowkes ‘Founding Provisions’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS 5, 2014) Chapter 13.

international agencies) and the conditions of its realisation in the complex social worlds in which rules have to rule.<sup>34</sup>

Krygier identifies two reasons to maintain a commitment to the rule of law: (1) it operates as a bulwark against arbitrariness ie ‘the reduction of reasonable fear of power’,<sup>35</sup> and (2) it tends to create a stable set of rules and regulations that defines expectations and makes co-operation between strangers possible in large modern societies. He then detects four conditions that are required for the rule of law to function as intended. The first concerns the reach of institutions that restrain both state actors and non-state actors. The second relates to the character of the norms that restrain and guide the behaviour of all social actors: ‘They have to be such that people can know what they require’.<sup>36</sup> The third demands ‘a real and knowable link between the norms and the ways they are *administered*. This [understanding] will often require complex practices of interpretation, and there is room for real and extensive controversy, but unless the controversy is about what the norms require, you have left the rule of law’.<sup>37</sup> The fourth, and most important, condition for the rule of law is for Krygier that ‘the institutionalised norms need to *count* as a source of restraint and a normative resource, usable and with some routine confidence used in social life’.<sup>38</sup> In sum, a rule-of-law culture is a living, breathing social and political phenomenon in which ‘what matters ... is how the law affects subjects’.<sup>39</sup> Again, the effect is not simply top down – as it is in traditional conception. Given that citizens’ direct interaction with high-level officials and organs of state is generally rare, the real measure of success for a rule-of-law culture is the extent to which ‘citizens are able and willing to use and to rely upon legal resources as cues, standards, models, and bargaining chips ... in relations with each other and with the state, as realistic (even if necessarily imperfect) indicators of what they and others can and are likely to do’.<sup>40</sup>

Krygier, drawing on Eugen Ehrlich’s work, takes these four aforementioned requirements to reflect the existence of ‘living law’. Ehrlich understood the ‘living law’ to be far more essential to the actual lives of communities than the formal activities of legal institutions. (However, Ehrlich was not interested in a reversal of conceptual hierarchy but in an understanding that the ‘[t]he interrelationships between official “rules for decision” and “living law” are complex and variable’)<sup>41</sup> Krygier concludes,

The only time the *rule* of law can occur, when then law might be said to rule, is when the law counts significantly, distinct and even in competition with other sources of influence, in the thoughts and behaviour, the normative economy, of significant sectors of a society.

<sup>34</sup> M Krygier ‘The Rule of Law: Legality, Teleology, Sociology’ University of New South Wales *Faculty of Law Research Series* Paper 65 (2006).

<sup>35</sup> *Ibid* at 12.

<sup>36</sup> *Ibid* at 13.

<sup>37</sup> *Ibid*.

<sup>38</sup> *Ibid*.

<sup>39</sup> *Ibid* at 17.

<sup>40</sup> *Ibid* at 18.

<sup>41</sup> *Ibid* at 15.

But do we know what makes law count here?<sup>42</sup> To what extent do Krygier's conditions obtain in South Africa?<sup>43</sup> To what degree does law count and act as meaningful constraint on the abuse of power and the failure of leaders to act in terms of the core values of the Constitution?

As Woolman points out, the South African Constitution and its Bill of Rights are exemplary in the way in which they balance the requirements of security and freedom, on which all democracies necessarily rest.<sup>44</sup> The Constitution articulates a significantly different premise for security than that which characterised the apartheid state. This is a national security that is meant to reflect the 'will of the people' and to secure the conditions for equality and a better life. Section 198(a) of the Constitution, under governing principles for the security services, provides that '[n]ational security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life'. Also under the governing principles for the security services, s 198(c) asserts the principles of the rule of law by providing that, '[n]ational security must be pursued in compliance with the law, including international law'.

The Constitution also includes other important provisions that build upon this conception of security. FC s 12(1) reads:

- Everyone has the right to freedom and security of the person, which includes the right—
- (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.

Woolman shows how, through a complex web of provisions, 'the Final Constitution imposes positive obligations on members of the security services to entrench the normative underpinnings of our basic law'.<sup>45</sup> Under FC s 199(5), '[t]he security services must act, and must teach and require their members to act in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic'.<sup>46</sup> Section 196(6) also places a positive obligation on members of the security services *not* to obey a 'manifestly illegal order' – thus placing the rule of law above the rule of person or power. FC s 205(3) describes the objects of the police service, namely to 'prevent, combat

<sup>42</sup> Ibid at 17.

<sup>43</sup> Even if we move beyond standard head counts regarding those citizens who fail to understand or to appreciate the content of our basic law and the Court that fleshes out its meaning (less than 30 per cent possess the vaguest sense of their importance), questions have been raised as to whether the Court itself has failed to articulate its decisions in a manner that makes them accessible to every other state actor and non-state actor and therefore fails to satisfy (Krygier-inflected) conditions necessary for the rule of law to survive. See S Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *South African Law Journal* 762.

<sup>44</sup> S Woolman 'Security Services' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS 3, 2011) Chapter 23B.

<sup>45</sup> Ibid at 23B-2.

<sup>46</sup> Ibid.

and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law’.

The South African Police Service Act 68 of 1995 – though enacted a year earlier – can be partially read as enabling legislation for the constitutional objectives articulated above. (At the time, we possessed an Interim Constitution (1994) quite similar to the Final Constitution ultimately adopted (1997).) It requires, among other things, a new police service that can

- (a) ensure the safety and security of all persons and property in the national territory;
- (b) uphold and safeguard the fundamental rights of every person as guaranteed by Chapter 3 of the [Interim] Constitution;
- (c) ensure co-operation between the Service and the communities it serves in the combating of crime;
- (d) reflect respect for victims of crime and an understanding of their needs; and
- (e) ensure effective civilian supervision over the Service.

The next section of this article will pit the constitutional and legislative aspirations identified above against the material ‘reality’ of South African citizens lives and thereby assess the extent to which the necessary conditions for a living rule-of-law culture (that Krygier outlines) actually obtain.

#### IV THE RULE OF LAW: RHETORIC AND REALITY, PART 2 (THE SUBJECT OF LAW)

As Etienne Balibar has noted, contemporary democracy has been marked by the transformation of the subject of the feudal prince into the modern subject. The modern citizen is subject to the law rather than the prince. At the same time, and even more profoundly, the subject of law also becomes a citizen who *makes the law*.<sup>47</sup> This transformation leads to the emergence of the citizen-subject, who is (ideally) both the maker of the law and the subject of the law.

The reality, both in developed and in post-colonial societies, has been a struggle for many citizens, particularly those marginalised by poverty, to become meaningful ‘makers of law’. Von Lieries contends that since ‘democracy and marginalisation have become intertwined in late modernity’,<sup>48</sup> and in post-apartheid South Africa in particular marginality is the rule rather than the exception.<sup>49</sup> Patrick Heller similarly claims that while we find a ‘high degree of consolidated representative democracy in democracies of the global south, such as Brazil, India, and South Africa, [that consolidation] should as such not be confused with a high degree of effective citizenship’.<sup>50</sup> In short, most South African citizens do not have the means to exercise their civil and political rights effectively.<sup>51</sup>

<sup>47</sup> E Balibar ‘Citizen Subject’ in E Cavada, P Connor & JL Nanc (eds) *Who Comes after the Subject?* (1991) 48.

<sup>48</sup> B von Lieries ‘Marginalisation and Citizenship in Post-Apartheid South Africa’ in S Robins (ed) *Limits to Liberation: Citizenship, Governance and Culture after Apartheid* (2005) 25.

<sup>49</sup> Ibid 23.

<sup>50</sup> P Heller ‘Democracy, Participatory Politics and Development: Some Comparative Lessons from Brazil, India and South Africa’ (2012) 44(4) *Polity* 646.

<sup>51</sup> Ibid.

According to some authors, the post-apartheid liberal imagination assumes an autonomous, individual agent, sovereign over his or her actions, free to ‘choose the value system adopted in our Constitution’<sup>52</sup>. Ross therefore argues that: ‘In making everyday lives, people juggle with terribly limited possibilities at hand. These are not “choices” in the sense implied by liberal notions of the sovereign subject.’<sup>53</sup> Swartz reaches similar conclusions in her study of young people in the township of Langa in the Western Cape.<sup>54</sup> Ross,<sup>55</sup> in her study of people living in an informal settlement on what are known as the ‘Cape Flats’ in the same province, has decisively shown that people living in disadvantaged contexts do not lack values or fail to distinguish between ‘right’ and ‘wrong’.<sup>56</sup> However, what her study reveals is that under conditions of endemic poverty people struggle to hold onto, and act in terms of, these values. The problem with the liberal rule-of-law model is that while individuals ‘internalise a normative model of the good life and a liberal model of decency’<sup>57</sup> and seek to achieve this against enormous daily material odds, when they fail [to act in accordance with this model], the failure is explained as an individual failure, which does not ‘acknowledge the erosion of the grounds on which social worlds are built, or how they are shaped by historical processes’.<sup>58</sup>

Heller argues that classical and contemporary theories of democracy generally take for granted the decisional autonomy of individuals as the foundation of democratic life. In many, although not all<sup>59</sup> of these theories, citizens are presumed to have the basic rights and the *capacity* to exercise free will, associate as they choose and vote for the party they believe best reflects their interests and concerns. This capacity of rights-bearing citizens to associate, deliberate and form preferences in turn produces the norms that underwrite the legitimacy of democratic political authority. But as Somers has argued, this view conflates the *status* of citizenship (a bundle of rights) with the *practice* of citizenship in the context of developing democracies. In developing democracies, where inequalities remain high and access to rights is often circumscribed by social position or compromised by institutional weaknesses (including the legacies of colonial rule), the problem of associational autonomy is so acute that it brings the very notion of citizenship into question.<sup>60</sup> As Hornberger concludes, ‘for human rights to offer the promise of justice and freedom, a certain subject position is required, and if it is absent, then this position needs to be produced’.<sup>61</sup> Human rights, constitutionalism and the rule of law in post-apartheid South Africa therefore concern not simply a set

<sup>52</sup> The Presidency Republic of South Africa *National Development Plan: Vision for 2030* (2011) 422.

<sup>53</sup> FC Ross *Raw Life, New Hope: Decency, Housing and Everyday Life in A Post-Apartheid Community* (2009) 211.

<sup>54</sup> SG Swartz *The Moral Ecology of Township Youth* (PHD dissertation University of Cambridge) (2007).

<sup>55</sup> Ross (note 53 above).

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid* at 210.

<sup>58</sup> *Ibid* at 207.

<sup>59</sup> CF Waltzer in *Spheres of Justice. A Defense of Pluralism and Equality* (1983).

<sup>60</sup> Heller (note 50 above) at 645.

<sup>61</sup> J Hornberger *Policing and Human Rights: The Meaning of Violence and Justice in the Everyday Policing of Johannesburg* (2011) 7.

of institutions or rules but a process of subject-making, ie ‘a grid of dispersed institutions, technologies and knowledge practices advancing society towards a collection of responsible subjects who can see themselves as rights-bearing individuals, responsible and self-controlling, productive and peaceful’.<sup>62</sup>

Bourdieu has assessed some of these processes of subject-making that are critical to incorporate the citizen within the law, and to turn ‘direct conflict between concerned parties into judicially regulated debate between officials acting by proxy’.<sup>63</sup> These citizen-creating capacities, he continues, ‘are not just skills that can be picked up on the street, but they are framed by and steeped in a middle-classness (if not upper-middle-classness) including access to higher education. ... [It may also require] a certain linguistic stance [or capacity].’<sup>64</sup> However, ‘when such subjectivities are an exception and where the availability of such juridical capital ... is limited, the application of human rights is challenging and threatening to those who apply them and to those who fall under them’.<sup>65</sup>

This conceptualisation of the problems that recur when ideal notions of constitutional democracies and rule-of-law cultures are superimposed upon communities, and even whole societies, that lack the material conditions to be active citizens or just happy self-actualising subjects is of critical importance in understanding the relationship of virtually all South African citizens to the criminal justice system. The vast majority of South Africans are not middle class, and continue to hold marginal or fragile positions within the polity. These citizens lack the ‘judicial capital’ to ensure a substantive relationship with and incorporation within the formal legal framework.

On the other hand, as Steinberg has noted, as a result of the history of policing in the South African context, or rather the absence of policing for black South Africans and the plethora of informal forms of self-regulation which arose as a result, many citizens continue to give halting and uneven consent to being policed. Steinberg argues, therefore, that the key challenge which the democratic dispensation faced in terms of policing was not in fact to establish the legitimacy of the new police service but to establish its authority over various other pre-existing forms of social regulation, which were often characterised by violence and division.<sup>66</sup>

These historical conditions of ‘non-policing’ created a particular subjectivity: ‘To be black and to live in Johannesburg (or any other major South African city, for that matter) was to seek protection.’<sup>67</sup> This protection was acquired on a profoundly particularist basis that led to division and exclusion: ‘While everybody in black urban South Africa sought protection, no single agency protected everyone. Wherever protection is exchanged for friendship, loyalty, money or from ethnic solidarity, some people are excluded. A host of informal

<sup>62</sup> Ibid at 7.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid at 8–9.

<sup>66</sup> J Steinberg ‘Establishing Police Authority and Civilian Compliance in Post-Apartheid Johannesburg: An Argument from the Work of Egon Bittner’ (2012) 22 (4) *Policing and Society: An International Journal of Research and Policy* 488.

<sup>67</sup> Ibid.

agencies bump shoulders and clash.<sup>68</sup> In the post-apartheid context, instead of the police becoming an agency which could ‘control the predatory violations of the conditions of coexistence among strangers’ (as influential police theorist Egon Bittner once envisaged the purpose of policing), the police, by focusing on effectively responding to calls for assistance and investigating cases, engaged in a distorted form of crime prevention, which sought to target ‘risk’ populations through heavy-handed and often brutal assertions of their authority against vulnerable communities. As a result, Steinberg concludes:

[F]or black urban South Africans, too little changed. The vital functions of keeping peace among strangers were still radically underprovided. People thus had little reason to abandon private sources of security for the police.<sup>69</sup>

## V THE STRUGGLE OVER POLICING

It should be clear by now, as Hornberger notes, that the police occupy a complex position in the new social formation that does not necessarily promote the dispassionate application of the law: ‘After the end of apartheid, as in many other so-called transitional countries, the police force was seen on the one hand as embodying the evils of the past, while on the other hand it was assigned the role to protect human rights.’<sup>70</sup> Instead their ‘disposition’ is located within a complex matrix of meaning which is rooted in an explosive mixture that includes persisting apartheid structures; the lower-class societal position of most police officers; popular ideas of the efficiency and expedience of violence; and a sense of powerlessness and failure among police officers in the face of limited resources, lack of skills and a crushing everyday culture of crime and disorder.<sup>71</sup> It comes then as no surprise that ‘the legalistic and technocratic common sense cultivated at the international level of human rights holds little power in everyday policing.’<sup>72</sup> The picture that emerges from everyday practice and multiple moments of encounter with state agents in Johannesburg is one in which the state’s authority is a personalised and unpredictable force, contributing substantially to its residents’ sense of insecurity and precariousness.<sup>73</sup>

A number of studies of policing in South Africa have noted the difficulties and unpredictability of transferring international ‘models’ of crime prevention to contexts outside of the environments in which they were initially formulated. South Africa’s early post-apartheid policing policy documents – the National Crime Prevention Strategy (NCPS) of 1996 and the White Paper on Safety and Security (1998) – were profoundly influenced by international ‘crime prevention’

<sup>68</sup> Ibid at 488.

<sup>69</sup> Ibid at 491.

<sup>70</sup> Hornberger (note 61 above) at 94.

<sup>71</sup> Ibid at 9.

<sup>72</sup> Ibid at 12.

<sup>73</sup> Ibid at 14.

models of policing.<sup>74</sup> Brogden and Shearing note the way in which, at the time of the transition to democratic rule South Africa, it became enormously desirable for a range of actors to ‘market’ their use of international models of crime prevention and community policing:

[D]emocratic policing is being marketed as one commodity among others in an international technological supermarket. The approach being adopted is consistent with the marketing of other products where what is on offer is a result of research and development that has taken place elsewhere in the industrialised world.<sup>75</sup>

This “‘best practice” ... was therefore being defined and generated by a burgeoning international industry of police reform’.<sup>76</sup> However, as Steinberg notes, ‘the results of policy transfer, especially to societies in the process of a major transition, are often unknowable’.<sup>77</sup> Pfigu uses the concept of ‘travelling models’ to understand how global ideas such as community policing and crime prevention are recontextualised and reappropriated by a variety of actors at local and national levels, including by the communities in which these ideas are propagated, as well as by various other local actors, mediators and knowledge brokers. Communities interpret these ‘new’ ideas in terms of their own normative and cognitive frameworks, drawing on their own experience and local histories of, for example, ‘community policing’, to interpret and redefine imported Western conceptions of community policing. Travelling models are therefore subject to processes of local and national ‘translation’, which may fundamentally transform the meaning and practice of these models. Looking at these processes of translation can ‘[shed] new light on implementation, or how policy moves from policy formation to “front line practice” and vice versa’.<sup>78</sup> These processes of translation are ongoing, continually shifting meaning and practice around core concepts such as crime prevention.

In the more developed world, the function of the police is widely understood and accepted as necessary in order to create ‘conditions for the orderly coexistence of strangers,’ or, more specifically, to ‘control ... predatory violations of those conditions’.<sup>79</sup> This form of democratic policing is contingent on a ‘shared commitment to order’<sup>80</sup> in the city, ‘and it is precisely from this common commitment to order that the idea of police arises, for citizens accept that an agency must exist to deal with... breaches of the peace, and that to do so, this agency must have licence to use asymmetrical force over others’.<sup>81</sup>

<sup>74</sup> See E Pelser & A Louw ‘Where Did We Go Wrong? A Critical Assessment of Crime Prevention (2002) 2 *SA Crime Quarterly*; J Steinberg ‘Crime Prevention Goes Abroad: Policy Transfer And Policing in Post-Apartheid South Africa’ (2011) 15 *Theoretical Criminology* 349; M Brogden & C Shearing *Policing for a New South Africa* (1993); T Pfigu *Local Responses to a Travelling Model of Crime Prevention and Crime Management: Community Policing in Stellenbosch, South Africa* (PHD Dissertation University of Stellenbosch) (2012).

<sup>75</sup> Brogden & Shearing (note 74 above).

<sup>76</sup> Steinberg ‘Crime Prevention Goes Abroad’ (note 66 above) at 350.

<sup>77</sup> *Ibid.*

<sup>78</sup> Lendvai cited in Pfigu (note 74 above) at 52.

<sup>79</sup> Steinberg ‘Establishing Police Authority’ (note 66 above) at 482.

<sup>80</sup> *Ibid.* at 481.

<sup>81</sup> *Ibid.* at 481–482.

On the other hand, in Johannesburg, ‘the mundane but intense daily encounters between police and [many] residents of [the city] connect the police, as an institution that embodies the legal and political complexities of state transformation, with people’s everyday lives and with various forms of violence, crime and insecurity’.<sup>82</sup> The police are not viewed as a ‘neutral’ force at the boundary of state and society. Indeed, Hornberger’s study of policing in the inner city of Johannesburg reveals a highly particularised and personalised relationship between the police and residents of the inner city, evoked in the imagery of a phrase used by residents with whom she engaged as ‘my police ... your police’.<sup>83</sup>

How then to understand the ‘my police/your police’ experience of many South African? Wolfe asks us to look at the interpersonal social networks at play in the ‘interstices’ of the formal system.<sup>84</sup> Informal social ties based on rules of reciprocity and shared moral codes, often ‘supplement’ macro-institutional frameworks by becoming the means through which the system itself works.

In South Africa, the police, local politicians and even agents of the judicial system, instead of consistently acting as representatives of the law, may enter into complex relationships of reciprocity and exchange with the social actors that they supposedly have to ‘control’. Thus, far from being an external force to the systems of social relationships or networks where particular perceptions and practices of violence are developed, they constitute an integral part of those same systems. The very same state agents will act as an incarnation of the formal institutional system on some occasions, and just as frequently participate in the networks representing particular personal or corporate interests.

Thus relationships with the police are often centred around ‘capturing’ the support and coercive force of certain police officers through personal relationships, which is seen to be critical to urban survival and the management of the predatory behaviour of both the police themselves and other residents in a crowded urban landscape. As one focus group respondent explained: ‘They’ve [the police] got their own people whom they help’.<sup>85</sup> In the rough and tumble of township and informal settlement life, as opposed to the somewhat less turbulent and privately secured space of middle class South Africans,

police officers are seen as power brokers to be captured by means of special relations and employed to determine the momentary hierarchy and victory of one moral claim over the other. A competition emerges to gain the best access to this source of power in order to strengthen a claim.<sup>86</sup>

A young woman in Alexandra Township captures the essence of these personal relationships with police, and the dissatisfaction with more ‘formal’ security arrangements in the following brief account:

There was a policeman we knew... and every time there was a problem we use to call him ... But when he left we had to go to the police station and it’s up to them that they come

<sup>82</sup> Hornberger (note 61 above) at 14.

<sup>83</sup> Ibid at 216.

<sup>84</sup> E Wolfe *Eastern Europe and the People without History* (1982).

<sup>85</sup> Alexandra focus group women 25+ (2013).

<sup>86</sup> Hornberger (note 61 above) at 220.

or not. He [the policeman] did this because he knew my brother and did crime with them. So that was good when he was there we got help quickly now we have to go straight to the police station because he is no longer there.<sup>87</sup>

Another Alexandra resident described how she ensured that the police actually took her case seriously:

If I didn't know some of the officials there who followed up this case they were going to release him, our case wasn't going to go anywhere, so we were lucky because there were people who knew me who worked at the police station and they made sure that the guy is locked up.<sup>88</sup>

This world of considerable informality is one in which residents' relationships with the police can be seen as a form of 'micro-governance' through which residents attempt to manage the everyday fluidity of an unregulated environment.

But what we see here is more than just a novel form of micro-governance. In this everyday realm, 'the legal and formal dichotomies of the criminal and the not criminal, the legal and the illegal, right and wrong, as well as justified and unjustified, have blurred and no longer hold. Instead, multiple and competing moralities are applied.'<sup>89</sup>

In this fluid environment the experience of many citizens is that the police are directly involved in criminal activities. A few insights from focus-group participants are particularly helpful in understanding what is actually going on in the world around us:

1. There was a policeman who worked in the suburbs, he did housebreakings and bank robbery with guys from the township, they found out and people asked him why he did such a despicable thing when he is a policeman.<sup>90</sup>
2. If I am a criminal and I know the police I work with and I am arrested at any other police station they will come to my rescue because they know what they are going to gain from what I have stolen.<sup>91</sup>
3. If you go to the police station to report housebreaking and the police is involved in that crime, your case is not going to go anywhere.<sup>92</sup>
4. Yes instead of doing their job they make deals with drug dealers, you would think that they are there to arrest the drug dealers but they're actually there to collect the stuff.<sup>93</sup>

The police are also understood to be directly involved in extraordinary acts of violence:

1. I don't trust the police nowadays. They shot my child, till today they have not attended the court, they have not phoned me to let me know how far the case is at court. They hurt my child, they never took him to the hospital; I took him to the

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<sup>87</sup> Alexandra focus group women 18–24 (2013).

<sup>88</sup> Alexandra focus group women 25+ (2013).

<sup>89</sup> Hornberger (note 61 above) at 220.

<sup>90</sup> Alexandra focus group women 25+ (2013).

<sup>91</sup> Alexandra focus group women 18–24 (2013).

<sup>92</sup> Alexandra focus group women 25+ (2013).

<sup>93</sup> Alexandra focus group women 25+ (2013).

hospital myself. They went to the hospital and told us they found him stealing but when I asked them what he stole they never responded until today.<sup>94</sup>

2. They said I stabbed someone. Then they took me away and I was beaten and they said I will tell the truth because my pants were full of blood ... they didn't take a statement or anything I was beaten up and they said I must go because they had to question other people.<sup>95</sup>
3. [They are guilty of sins of omission, of failing to respond to calls for assistance]: 'There was a guy who got shot at the park, we phoned the police ... when we phoned they told us there are no vans ... They only came the following day at 7am and asked where the guy was shot ... When they took that guy to the clinic he was still okay but the following day after 5pm they phoned to let us know that he died.'<sup>96</sup>
4. Police fail to respond to calls for assistance because, 'they don't have a van', but 'I always see the vans at shisanyama (bring and braai) with girls, but when you phone you are told there are no vans. Sometimes they just roam around chasing after girls whilst on duty with the vans, the vans are supposed be at the station in case there's a call out, instead they go to the butchery with the vans and they chill at the malls.'<sup>97</sup>

In this environment particularist relationships with the police are pervasive and necessary to make the law work, and turn on a number of axes of power and reciprocity. Young women attempting to press a claim at a police station are both subject to sexual predation and simultaneously utilise their sexuality to gain small advantage for their claims: '[I]f she has curves they will jump. And when I leave one of them will propose to me and will take me where I am going.'<sup>98</sup> Sexuality can also assist to bargain away criminal allegations: 'But if you are pretty they will say "Oh my sister, you are so beautiful and you are doing such silly things, why did you do that?"' If they are attracted to you at first glance then you will be treated better.<sup>99</sup> Or it can be used to offer protection for relatives engaged in criminal activities: 'I remember my brother went to steal and he told me that when the police come I must take off my jean and wear a shirt and open it a bit in front. I did just that and I went to stand by the door, they forgot why they were there ... they asked for my numbers and I gave it to them because I wanted them to leave.'<sup>100</sup>

At the same time, women find little succour when they seek redress for patriarchal violence:

My uncle used to hit my aunt and she will go to the police station to report the violence but they will just laugh at her because they knew my uncle and they would laugh at her because she was ugly and they would say 'what man would hit a person because of you when you are so ugly?'<sup>101</sup>

For any claim to be expedited or even responded to, material inducements are frequently required.

This focus group exchange captures some of these enforced reciprocities:

<sup>94</sup> Alexandra focus group women 25+ (2013).

<sup>95</sup> Zamdela focus group men 25+ (2013).

<sup>96</sup> Alexandra focus group women 25+ (2013).

<sup>97</sup> Alexandra focus group women 25+ (2013).

<sup>98</sup> Alexandra focus group women 18–24 (2013).

<sup>99</sup> Alexandra focus group women 18–24 (2013).

<sup>100</sup> Alexandra focus group women 18–24 (2013).

<sup>101</sup> Alexandra focus group women 18–24 (2013).

- Respondents: Even if you scream they won't come.  
 Interviewer: Why don't they come?  
 Rs: Aaah they want money.  
 T: We don't know why they are not doing their job; money talks, so if you are poor they won't attend you.  
 M: Yes. If you get raped and you call the police and you don't have money, they won't come but if they know that you are rich, they come quickly because they know they are going to get something, 'I will eat there.'  
 Interviewer: How do you know this?  
 Rs: We see these things happen. (*Respondents agreeing*)<sup>102</sup>

As much as money is required to press claims, it can be used to quash claims. The respondents in a focus group collectively asserted, 'Yes police love money when a person has money they just ignore their crimes'.<sup>103</sup> Another young man explained his personal experience, 'I was once arrested for public drinking but I gave them R150 and they dropped me off and let me go'.<sup>104</sup> Women in a focus group in Violet Bank also explained how the rule of law is subordinated to the rule of money:

- Interviewer: All eight of you are saying the police are not doing anything?  
 Respondents: They [the police] love money. A criminal pays them R600 and they leave him alone but the crime is still going on and it's growing.<sup>105</sup>

Devaluation of claims on the basis of material status is linked, in the South African context, directly to devaluation on the basis of race. The police are seen to be complicit in the continued devaluation of black lives in post-apartheid South Africa and therefore the claims of black citizens can be ignored or dismissed:

- L: I think the police are controlled by white people because most of the time they don't really care about us blacks, if they get a call saying somebody has stolen from a white person there go there running, mostly their cases are being attended to.  
 Interviewer: Is it true what L is saying?  
 Rs: Yes it's true.  
 Rs: We are not given the same treatment.<sup>106</sup>

The personalised relationships that residents form with police are made possible by the extremely fractious nature of the police organisation itself, which Hornberger finds to be characterised by competing individual loyalties and personal interests. As a result it is, 'their [police] internal rationales, often unintelligible to outsiders, which determine whether they intervene on your behalf or on behalf of someone else'.<sup>107</sup>

Here legitimacy is not acquired as an overarching organisational value but is granted in a particularistic fashion to and by citizens depending on the extent to which police intervene on their behalf in any given situation. Moreover, as Hornberger writes:

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<sup>102</sup> Alexandra focus group women 25+ (2013).

<sup>103</sup> Violet Bank focus group men 18–24 (2013).

<sup>104</sup> Violet Bank focus group men 18–24 (2013).

<sup>105</sup> Violet Bank focus group women 25+ (2013).

<sup>106</sup> Violet Bank focus group women 25+ (2013).

<sup>107</sup> Hornberger (*supra*) at 225.

It becomes obvious that policemen do not always imagine themselves in their everyday practices to be operating from the same organisation with a shared organisational rationale.<sup>108</sup> There is no official, unbiased, coherent policing to be reinterpreted and made sense of by local people, but only the practice by local police officers ... and the trajectories of the internal working rationale, which is given meaning by local people.<sup>109</sup>

As a result our police services are shaped by a range of different police cultures which can appear confusing to residents interacting with the security services. On one hand, some police hold a personal sense of mission, which characterises policing culture worldwide. On the other hand the organisation is also characterised by what Hornberger calls ‘docket culture’, which, in the face of the enormous workloads that many South African detectives carry, involves closing dockets as ‘undetected’ whether or not investigations have been carried out in order, literally, to reduce the pile of dockets.

It comes as little surprise, as Hornberger concludes, that the official, formal world of policing appears to be a mere fiction, a distant noise, to residents of townships, informal settlements and inner-city precincts.<sup>110</sup>

## VI THE ‘PRECARIOUS’ VALENCE OF THE LAW

While the law stands at the centre of the liberal imaginary as a principle of universality, neutrality and fairness, in South Africa, ‘everyday injustices have to be suffered without reference to a meaningful idea of Law standing above all.’<sup>111</sup> As one focus group respondent argued, ‘so there’s nowhere we can say we know for sure that at this police station we’ve got police that are reliable, police that are protecting us’.<sup>112</sup> Such statements reflect the fact that these struggles for legal legitimacy and the creation of a rule of law culture cannot concern the institutions themselves but must address the complex local regulatory environment in South Africa in which the salience of human rights and the law itself are a source of considerable contestation. As Ashforth notes: ‘Despite the “small miracle” of democratic transformation to date, the South African state still has a long way to go before the legitimacy of governance can be taken for granted as a cultural foundation of political power.’<sup>113</sup>

Systematic violence plays a central role in this disjunction between the rule of law and the rule of personalised, arbitrary power. So while state discourse envisages a society based on context-transcending universal human rights mediated and enforced through law (an essentially juridical conception of society), communities themselves engage in complex mediations and appropriations of the discourse of rights, particularly in relation to the overturning of generational and gendered hierarchies, which the rights discourse appears to imply. Frequently it is the body, particularly the gendered as well as the youthful body, which is the

<sup>108</sup> Ibid at 225.

<sup>109</sup> Ibid at 226.

<sup>110</sup> Ibid at 225.

<sup>111</sup> A Ashforth *Witchcraft, Violence and Democracy in South Africa* (2005) xii.

<sup>112</sup> Alexandra Focus Group, Women 25+ (2013).

<sup>113</sup> A Ashforth ‘An Epidemic of Witchcraft? The Implications of AIDS for the Post-Apartheid State’ (2002) 61 (1) *African Studies* 122.

site of these contestations, as well as the site where these contestations are policed through violence in various forms of ‘disciplinary’ practice, whether the beating of children, the rape of women or violence against the transgendered other.<sup>114</sup>

Another disjunction between the neutral conception of the rule of law and the lived experience of many South Africans turns on the informal forms of regulation that existed before, during and after apartheid and which continue to operate in the absence of other reliable forms of law enforcement. This authority structure therefore stands outside state law and is policed with private violence. A group of older men in the township of Shoshanguve explains: ‘The real parents were our grandparents who could use corporal punishment.’<sup>115</sup> In such a genealogical society the subject is defined in terms of a predetermined hierarchy, particularly based on gender and generational divisions, rather than individual volition and self-making. These are not contractual relationships between equal legal subjects, as the state envisages in its efforts to legally govern relationships between parent and child, man and woman. They are *bond* relationships ‘embodied in inequality’<sup>116</sup> and include the ‘right to violence in the interests of nurture’.<sup>117</sup>

The attempt to apply state law and in particular the ‘law of rights’ to the bond relationship is seen as having unleashed unnatural forms of social disorder. As older women in Atteridgeville note: ‘When we were growing up it was tough because of apartheid but at least there was order, discipline and respect.’<sup>118</sup> State law is simultaneously seen as ‘interfering’ in relationships of intimacy in the realm of the private, and as an intruder in the ‘public’ domain, particularly in relation to the policing of social bonds based on a communitarian as opposed to legal ethic.

Yet another disjunction between the procedural conception of the rule of law and the lived experience of many South Africans flows from the failure of the law to take account of African conceptions and practices of justice predicated upon the notion that the community, rather than the individual, is the site of justice. As Hund and M Koto-Rammopon write:

Punishment and the resolution of disputes will lay emphasis upon law as expressing the will and traditions of the community. There is no distinction between legal and moral

<sup>114</sup> South Africa has one of the highest rates of reported rape in the world – recorded as 113.5 incidents per 100 000 of the population in 2002 to the United Nations Office on Drugs and Crime. While comparative statistics may be affected by higher reporting rates in South Africa than other countries, various forms of sexual violence are extremely high. In 2010/2011 the South African police recorded a total of 56 272 cases of rape and sexual assault and a ratio of 132.4 incidents of sexual offences per 100 000 of the population. South Africa has also been increasingly affected by violent attacks against gay South Africans, in particular by a phenomenon called ‘corrective rape’, usually against lesbian women, allegedly carried out to ‘correct’ these women’s sexual orientation. In March 2011 it was reported that activists who had collected 170 000 signatures from 163 countries demanding that corrective rape be recognised as a ‘hate crime’ met with senior officials of the Ministry of Justice and Constitutional Development who undertook to address the matter (IRIN).

<sup>115</sup> V Barolsky ‘“A Better Life for All”, Social Cohesion and the Governance of Life in Post-Apartheid South Africa’ (2012) 38 *Social Dynamics: A Journal of African Studies* 143.

<sup>116</sup> S van Zyl ‘Explaining Violence in South Africa: Some Psychoanalytic Considerations’ (1990) Centre for the Study of Violence and Reconciliation (CSVR) 7.

<sup>117</sup> *Ibid* at 9.

<sup>118</sup> V Barolsky (note 115 above) at 143.

issues ... The person at the bar of judgment is there, in principle, as a whole man, bringing with him his status, occupation, and the entire history of all his social relations. Justice is substantive and is directed to a particular case in a particular social context and not to the creation of a general rule or precedent.<sup>119</sup>

Crais similarly notes how the community as a whole displaces the individual as the subject of the law:

Typically infractions involved as much the person directly involved as the community of which he or she was a member. Thus people could be found guilty of offences they themselves did not commit ... the central issue revolved around the restoration of balance within the community, less personal culpability or the restoration to the individual of the harm done to them.<sup>120</sup>

In each of these settings, the law of the state is not the law of the people. As older men in Nyanga observe: 'When gangs attack one of our friends we group ourselves to discipline them, but according to *South African* law we are regarded as people who are taking law into own hands.'<sup>121</sup>

Why is South Africa subject to these persistent disjunctions between the rule of law and the law as lived? As John Comaroff points out, unlike European nation-states, which were characterised by 'the emergence of a sense of nationhood based, imaginatively and affectively, on horizontal connection',<sup>122</sup> the relationship of extreme exploitation and exclusion established between the colonial state and the colonised, meant that a similar horizontal 'imagining' of national identity did not occur in the colonial environment and what were produced were 'states *sans* nations'.<sup>123</sup> Ekeh explains the disjunction in terms of the existence of two publics under colonial rule, the traditional and the civic. The 'primordial public' (the 'traditional') contained colonial subjects and operated in terms of collective claims and moral imperatives. The 'civic public', ie the bureaucratic, individualised and regulatory environment created by the colonial administration, was seen by colonial subjects as an 'amoral' environment that imposed no moral obligations on them.<sup>124</sup> According to Comaroff, these two public realms were the product of the colonial state's contradictory effort, 'to convert "natives" (simultaneously and contradictorily) into *both* right-bearing citizens and culture-bearing ethnic subjects'.<sup>125</sup>

These tensions between the individual subject of a rule-of-law culture and the collective subject of more indigenous, localised forms of law – these tensions between competing visions of 'justice' – partially explain why the uptake of the rule of law culture to which the Constitution aspires has been so slow. The post-apartheid state may posit the Constitution as the basis of a new solidarity, but

<sup>119</sup> J Hund & M Koto-Rammopon 'Justice in a South African Township: The Sociology of *Makoglla*' (1983) 6 *Comparative and International Law Journal of Southern Africa* 201.

<sup>120</sup> C Crais *The Politics of Evil Magic, State Power and the Political Imagination in South Africa* (2002) 86.

<sup>121</sup> Barolsky (note 115 above) 144.

<sup>122</sup> J Comaroff 'Reflections on the Colonial State, in South Africa and Elsewhere: Factions, Fragments, Facts and Fictions' (1998) 3 *Social Identities* 321.

<sup>123</sup> *Ibid* at 343.

<sup>124</sup> P Ekeh 'Colonialism and the Two Publics in Africa: A Theoretical Statement' (1975) 17 (1) *Comparative Studies in Society and History* 1.

<sup>125</sup> Comaroff (note 122 above) at 344.

change takes time and is met with resistance. As a group of older men in the township of Nyanga explained: 'In our new society we have a new challenge of democracy where talk are (sic) things like human rights and children's rights.'<sup>126</sup>

Ethnographic work by Lars Burr<sup>127</sup>, Fiona Ross,<sup>128</sup> Mark Hunter,<sup>129</sup> Suren Pillay<sup>130</sup> and Nthabiseng Motsemme<sup>131</sup> reveals 'the multiple overlapping domains of law and moral systems that have evolved (both as part of and in resistance to) the colonial and apartheid eras'.<sup>132</sup> The 'moral and ethical foundations of the law'<sup>133</sup> are in conflict in ways that sometimes contest the sovereignty of the state through the assertion of alternative regimes of social control.

Von Holdt et al have argued, therefore, that South African society must be characterised as 'precarious': 'A precarious society is characterised by social fragmentation and competing local moral orders which not only generates precarious lives, but a social world in which society itself becomes precarious.'<sup>134</sup>

What is at issue here, to put it bluntly, is whether we possess the very conditions of constitution of the nation, let alone the creation of a constitutional democracy based upon the rule of law.

## VII CONCLUSION

This article has sought to grapple with some of the complexities related to the struggle to realise the rule of law substantively as a pervasive norm and justiciable claim through an effective and independent security service in a material and social world of profound fragmentation, normative contestation, deprivation and institutional disarray. This is not to say that this ideal, as it is being articulated and to some extent realised in the judgments of the courts of post-apartheid South Africa, ought to be reconsidered. This article simply sounds a cautionary note. We must adopt a chastened sense of the social world within which these assertions of the rule of law operate and find ways in which these two worlds might be harmonised so that a principle of legality might one day be fully realised.

<sup>126</sup> Barolsky (note 115 above) at 138.

<sup>127</sup> L Buur 'Democracy & its Discontents: Vigilantism, Sovereignty & Human Rights in South Africa' (2008) 35 *Review of African Political Economy* 118.

<sup>128</sup> Ross (note 53 above).

<sup>129</sup> M Hunter *Love in the time of Aids: Inequality, gender, and rights in South Africa* (2010).

<sup>130</sup> S Pillay *Crime, Community and the Governance of Violence in Post-Apartheid South Africa* (2008) 35 (2) *Politikon* 141-158.

<sup>131</sup> N Motsemme 'Loving in a time of hopelessness: on township women's subjectivities in a time of HIV/AIDS' in N Gasa (ed) *Women in South African History: Basus'imbokodo, Bawel'imilambo / They Remove Boulders and Cross Rivers* (2008).

<sup>132</sup> Buur (note 127 above).

<sup>133</sup> *Ibid* at 4.

<sup>134</sup> K von Holdt M Langa S Molapo N Mogapi K Ngubeni J Dlamini & A Kirsten *The Smoke that calls. Insurgent Citizenship, Collective Violence and the Struggle for a Place in the New South Africa: Eight Case Studies of Community Protest and Xenophobic Violence* Johannesburg, Centre for the Study of Violence and Reconciliation (CSVR) and Society Work and Development Institute (SWOP) (2011) 7.