



GUILTY OR NOT GUILTY: BEHIND BARS ANYWAY

TWENTY-THIRD ISSUE AUGUST 2012

QUARTERLY



roundtable

THE HELEN SUZMAN FOUNDATION

SERIES

# roundtable

## helen.suzman.foundation promoting liberal constitutional democracy

### Vision

Promoting liberal constitutional democracy in South Africa.

### Mission

To create a platform for public debate and dialogue – through publications, roundtable discussions, conferences, and by developing a research profile through an internship programme – with the aim of enhancing public service delivery in all its constituent parts. The work of the Helen Suzman Foundation will be driven by the principles that informed Helen Suzman’s public life.

These principles are:

- Reasoned discourse;
- Fairness and equity;
- The protection of human rights.

The Foundation is not aligned to any political party and will actively work with a range of people and organisations to have a constructive influence on the country’s emerging democracy.

*“I stand for simple justice, equal opportunity and human rights; the indispensable elements in a democratic society – and well worth fighting for.” — Helen Suzman*

*Hosted in association with the Open Society Foundation For South Africa*



---

## Contact Details

**Tel** +27 11 482 2872 **Fax** +27 11 482 7897 **Email** [tim@hsf.org.za](mailto:tim@hsf.org.za) **Website** [www.hsf.org.za](http://www.hsf.org.za)

**Postal address** Postnet Suite 130, Private Bag X2600, Houghton, 2041, South Africa

**Physical address** 2 Sherborne Road, Parktown, 2193, Johannesburg

---

# Contents

- 2 **PROFILES**
- 4 **EXECUTIVE SUMMARY**
- 6 **FRANCIS ANTONIE**  
Director of the Helen Suzman Foundation, Chair
- 8 **NOOSHINI ERFANI-GHADIMI**  
Project Coordinator, Wits Justice Project (WJP)
- 13 **STEPHEN TUSON**  
Attorney, Wits Law Clinic
- 17 **KATHY SATCHWELL**  
Judge, South Gauteng High Court
- 22 **VINCENT SMITH**  
Chair of the Portfolio Committee on Correctional Services; and Co-Chair of  
the Interim Joint Committee on the Scrutiny of Delegated Legislation
- 26 **DISCUSSION, QUESTIONS & COMMENTS**
- 34 **MEDIA COVERAGE**  
Business Day Live

---

This *Quarterly Roundtable Series* monograph is published by The Helen Suzman Foundation. **ISSN 1996-1770**

**Board of Trustees:** Hylton Appelbaum, Doug Band, Colin Eglin, Nicole Jaff, Daniel Jowell, Temba Nolutshungu, Krishna Patel, Siphon Seepe, Mary Slack, Richard Steyn, David Unterhalter, Gary Ralfe, Jane Evans and Modise Phekonyane  
**Director:** Francis Antonie **QRS Coordinators:** Michael Edmeston, Kate Francis, Timothy Kenny, Lewis Mash and Anele Mtswi

**Design & Layout:** Alison Parkinson **Media Photography:** Caroline Suzman

**Funders:** The Helen Suzman Foundation is grateful to the Open Society Foundation For South Africa for their support.

---

# Profiles



Nooshini Erfani-Ghadimi

**Nooshin Erfani-Ghadimi** joined the Wits Justice Project (WJP) as Project Coordinator in January 2012. Through the four arms of the project – journalism, advocacy, law and education – the WJP strives to bring substantial changes to the law and its practice and the wider criminal justice system as a whole. Before that, Nooshin was the Humanitarian Diplomacy Senior Officer of the International Federation of Red Cross Red Crescent Societies – the world's largest humanitarian network. Her specific portfolio included government relations and diplomacy; public affairs and advocacy; humanitarian affairs; communications; and protocol and external relations.

Nooshin has also worked in the corporate and consultancy sectors, living and working on three continents, and brings these experiences to her work in advocating for the most vulnerable.



Stephen Tuson

**Prof. Stephen Tuson** is a practising attorney, working at the Wits Law Clinic providing free legal services to the poor. He teaches Criminal Law and Criminal Procedure and is a specialist criminal defence attorney. He also runs the Wits Family Law clinic and has taught at Wits University for 22 years. He offers seminars and training in Trial Advocacy at both Wits University and to Law Institutes in Uganda and Lesotho.



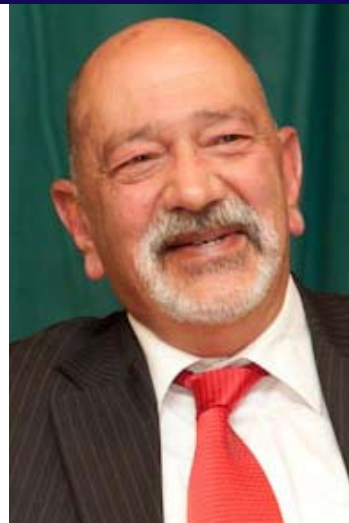
**Kathy Satchwell**

**Judge Kathy Satchwell** was educated at Rhodes University. She was a prominent human rights attorney in the 1990s. She gave evidence before the Truth and Reconciliation Commission on the role of the legal system in contributing to the violations of human rights in South Africa under apartheid. In 1999 she was appointed by President Nelson Mandela to be Chairperson of the Road Accident Fund Commission. In September 2001 in the case *Satchwell v President of the Republic of South Africa*, Satchwell, won the right for her partner to enjoy the same benefits as those previously reserved for spouses of married heterosexual judges. This right was confirmed by the Constitutional Court in 2002. This decision is seen as one of five key decisions that set the status of same-sex civil unions in South Africa. Judge Satchwell currently presides in the South Gauteng High Court.



**Vincent Smith**

**Mr Vincent Smith** was elected as the first Deputy Chairperson of the ANC Johannesburg Regional Executive at its launch after the unbanning of the organisation and served until 2008. In 1999 he was elected to Parliament and served as member and chairperson of the Standing Committee on Public Accounts (SCOPA) until 2009. Mr Smith was elected to the Executive of the SADC committee on Public Accounts in 2005 and served first as General Secretary from 2005 until 2007 and then as Chair from 2007 until 2009. Vincent currently serves as Chair of the Portfolio Committee on Correctional Services; and Co-Chair of the Interim Joint Committee on the Scrutiny of Delegated Legislation.



**Francis Antonie**

**Francis Antonie** is the Director of the Helen Suzman Foundation. He is a graduate of Wits, Leicester and Exeter Universities. He was awarded the Helen Suzman Chevening Fellowship by the UK Foreign Office in 1994. From 1996 to 2006 he was senior economist at Standard Bank; thereafter he was Director of the Graduate School of Public Development and Management at Wits University. He was the founding managing director of Strauss & Co.

# Executive



The Helen Suzman Foundation, in association with the Open Society For South Africa, hosted a QRS dealing with prisoners in remand and human rights. The aim of the QRS was to explore the issues currently faced by people who are placed in remand detention pending the finalisation of their court case. These issues include overcrowding, court delays, excessive time spent in remand, and an inability to qualify for bail amongst others.

In order to understand and measure the success of any democracy one must examine the functioning of its criminal justice system: how crime is investigated, prosecuted and punished within the framework of the country's constitution and the benchmark of international human rights law.

South Africa suffers under the burden of an immense level of crime, the causes of which and the remedies for the problem have long been debated. At this point the discussion moves on to the prison system and its inmates. In South Africa the prison system has often been criticised for its inefficiency and systemic failures, which have led, in some instances, to violations of basic human rights.

According to the Department of Correctional Services, at the end of March 2012 there were:

- 158 853 inmates in the country.
- Of these, 46 481 were remand detainees – people who have been arrested and charged but whose trials have not been concluded. They have not been found guilty due to the presumption of innocence afforded by Section 35(3)(h) of the Constitution.
- Approximately 2 in 5 of these inmates will eventually be acquitted. This means that a staggering number of innocent people are being deprived of their freedom.

As a consequence ordinary people, potentially innocent of any crime, can languish in appalling conditions in prisons across South Africa for years before their trial is concluded.

The serious failures of the criminal justice system in South Africa – including unreliable forensic processes and structures, and inefficient court processes – increase the likelihood of denying justice to those wrongly incarcerated and deprived of their freedom.

This is not a unique problem to South Africa and these same issues can be found in a number of regional and international jurisdictions. In the International Centre for Prison Studies' *World Prison Brief* as at 31 December 2011 Malawi's prisoners in remand stood at 12.3 percent of its total prison population (one of the lowest in Africa). Tanzania, on the other hand, had over



50 percent of its total prison population sitting in remand; Nigeria had a remand population of over 70 percent as of 31 March 2012. The United States as at 31 December 2010 had a remand population of 21.5 percent and the Netherlands was up at 40.6 percent in September 2011. What is not clear from the data, however, is the length of time these prisoners may spend in remand detention.

The Roundtable asked its panelists to consider the following questions:

- Is there a breakdown in South Africa's criminal justice system?
- Why has this happened?
- What is being done to overcome these problems?
- What more can be done to overcome these challenges?

The panelists were each able to offer a number of salient points that explained why South Africa was faced with the type of problems experienced in its Correctional Service centers. Key among the reasons for bottlenecks throughout the court system and hence having a direct impact on the number of people who are placed in remand detention was the proclivity of the South African Police Service to arrest suspected persons without carrying out an investigation of the merits of the case. This was attributed to the way police

officers have their performance evaluated. Instead of measuring the number of successful prosecutions due to a successful investigation, police are measured on the number of arrests they make. This means that the other measures at their disposal, such as the issuing of a summons, are often overlooked.

This focus on arrest has a direct influence on the overburdening of the courts system and thus the Correctional Services facilities where these people end up in remand detention if they fail to secure bail, which is often the case in South Africa.

It was highlighted that each point on the criminal justice continuum faced its own particular set of problems which each needed to have resolved through the better management of current resources and better implementation of existing legislation. All of these pressure points had an adverse effect on the ability of the Correctional Services facilities to adequately deal with those prisoners who found themselves in remand detention. The problem being that this category of prisoner had not been found guilty of any crime because they were yet to have their case heard in court. This presents its own challenges which need to be overcome with strategic interventions made into the functioning of South Africa's entire criminal justice system.

# Summary

# Welcome



*The serious failures of the criminal justice system in South Africa, including unreliable forensic processes and structures and inefficient court processes increase the likelihood of denying justice to those wrongly incarcerated and deprived of their freedom.*

According to the Department of Correctional Services, at the end of March 2012 there were:

- 158 853 inmates in the country.
- Of these, 46481 were remand detainees. These are people who have been arrested and charged but whose trials have not been concluded. They have not been found guilty due to the presumption of innocence afforded by Section 35(3)(h) of the Constitution.
- Approximately 2 in 5 of these inmates will eventually be acquitted. This means that a staggering number of innocent people are being deprived of their freedom.

Good evening, ladies and gentlemen, and a warm welcome. On behalf of the Helen Suzman Foundation and our partner, the Open Society Foundation for South Africa, I want to welcome you and our speakers to this roundtable discussion on Remand Detention and Human Rights.

A critical yardstick for measuring the success of any democracy is the functioning of its criminal justice system, how crime is investigated, prosecuted and punished within the framework of the country's Constitution, and against the benchmark of international human rights law.

South Africa suffers under the burden of an immense level of crime, the causes of which and remedies for the problems have long been debated. We've been fortunate in that we've been supported by the Open Society in a major justice project, looking at the delivery of justice in South Africa with a specific focus on the judiciary.

At this point then, the discussion moves on to the prison system and its inmates. In South Africa the prison system has often been criticised for its inefficiency and systemic failures which have led, in some instances, or perhaps in many instances to violations of basic human rights.

As a consequence, ordinary people potentially innocent of any crime, can languish in quite appalling conditions across South Africa for a long time, perhaps for years before their trial is concluded.

The serious failures of the criminal justice system in South Africa, including unreliable forensic processes and structures, and inefficient court processes, increase the likelihood of denying justice to those wrongly incarcerated and deprived of their freedom. This is not a unique problem to South Africa, and these same issues can be found in a number of regional and international jurisdictions.

In the International Centre for Prison Studies "World Prison Brief" as at the 31 December 2011, Malawi's prisoners in remand stood at 12.3 percent of its total prison population (one of the lowest in Africa). Tanzania, on the other hand, had over 50 percent of its total prison population sitting in remand and Nigeria had a



remand population of over 70 percent as of 31 March 2012.

The United States as at 31 December 2010 had a remand population of 21.5 percent and the Netherlands was up at 40.6 percent in September 2011. What is not clear from the data however, is the length of time these prisoners may spend in remand detention.

But tonight's roundtable seeks to explore these issues and to provide some answers to the following questions:

- Is there a breakdown in South Africa's criminal justice system?
- Why has this happened?
- What is being done to overcome these problems?
- And what more can be done to overcome these challenges?

Our panel tonight is charged with answering these questions and putting forward solutions to the problems, which I trust will be considered by those responsible for drafting and implementing policy. I have asked our speakers to limit their inputs to 12 minutes and once we have heard from all of them I will open up the debate to the floor.

If I can introduce our speakers. Nooshin Erfani-Ghadimi on my left joined the Wits Justice Project as Project Coordinator in January 2012. Through the four arms of the project; journalism, advocacy, law and education, the Wits Justice Project strives to bring substantial changes to the law and its practice and to the wider criminal justice system.

Before that, Nooshin was a Humanitarian Diplomacy Senior Officer of the International Federation of Red Cross, Red Crescent Societies, the world's largest humanitarian network. Her specific portfolio included then government relations and diplomacy and advocacy. She brings a range of different work experiences to her work at the Wits Justice Project.

Our second speaker also from Wits is Professor Stephen Tuson. He is a practising attorney. He works at the Wits Law Clinic which provides free legal services to the poor. He teaches

criminal law and criminal procedure and is a specialist criminal defence attorney.

He also runs the Wits Family Law Clinic and has taught at Wits University for 22 years. He offers seminars in training on Trial Advocacy at both Wits University and at the Law Institutes in Uganda and Lesotho.

Judge Cathy Satchwell was educated at Rhodes University. She was a prominent human rights attorney in the 1990s. She gave evidence before the TRC and the role of the legal system in contributing to the violation of human rights in South Africa under apartheid. In 1999, she was appointed by President Nelson Mandela to Chair the Road Accident Fund Commission.

In September 2001 in the case of *Satchwell v the President of the Republic of South Africa*, she won the right for her partner to enjoy the same benefits as those previously reserved for spouses of married heterosexual judges.

This right was confirmed by the Constitutional Court in 2002. This decision is seen as one of five key decisions that confirm the status of same-sex civil unions in South Africa. Judge Satchwell currently presides in the South Gauteng High Court.

Finally, Vincent Smith our last speaker was elected the first Deputy Chair of the ANC, Johannesburg Regional Executive at its launch after the unbanning of the ANC and he served in that position until 2008. In 1999, he was elected to Parliament and served as a member and the Chair of the Standing Committee on Public Accounts until 2009.

Vincent was elected to the Executive of the SADC Committee on Public Accounts in 2005 and served first as General Secretary from 2005 until 2007 and then as Chair from 2007 to 2009. Vincent currently serves as Chair of the Portfolio Committee on Correctional Services and he is Co-Chair of the Interim Joint Committee on the Scrutiny of Delegated Legislation.

I will now call on Nooshin to help us frame the issues and the challenges which are faced by the Department of Correctional Services. Thank you, Nooshin.



## Nooshini Erfani-Ghadimi

**G**ood evening, everyone. I want to start this presentation by saying that even though we are going to focus on the challenges facing the South African criminal justice system, we should not forget its many achievements and successes. We have to acknowledge that the legal framework for ensuring a fair and effective system which protects human rights and dignities in an equitable and predictable way already exists.

However, despite these advantages, the justice system in South Africa clearly has a long way to go before it lives up to its potential. There are numerous dysfunctions which have led to unacceptable miscarriages of justice. The reasons for these systemic failures must be understood and investigated, and solutions found to prevent such violations.

It is important to assess the system as a continuum. Where a bottleneck occurs in processing crime scene evidence, for instance, it is likely to result in a backlog at the courts,

with the case being postponed and the accused repeatedly remanded, in facilities that are overcrowded and difficult to manage.

As a symbol of the failures of the system, none is more fitting than the overuse of remand detention and the thousands of people who are deprived of their liberty despite being presumed innocent. This is why the Wits Justice Project has chosen to focus on the plight of those in remand detention, and to use its four axes of journalism, law, education and advocacy to help improve the criminal justice system in South Africa.

Remand detainees are defined as people who have been arrested and charged, but whose trials have not been completed. They have not yet been found guilty, and are to be presumed innocent under the South African Constitution.

It is clear that excessive and arbitrary use of remand detention undermines the presumption of innocence: one of the cornerstones of a rights-based system.

According to the Department of Correctional Services, at the end of March 2012 there were:

- 158 853 inmates in South African prisons.
- Of these, 46 481 were remand detainees. That's 29% of all detainees are in pre-trial and have yet to be found guilty.
- It costs about R240 to house each inmate per day – an estimated bill of R11 million/day for remand detainees alone.

*... the South African Constitution provides that everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit, subject to reasonable conditions.*

Remand detention is not a uniquely South African problem. On any particular day, about three million people are held in pre-trial detention around the world, and on average, 10 million are admitted into remand in the course of a year.

Many remand detainees are eligible for bail – the South African Constitution provides that everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit, subject to reasonable conditions. The law provides for a two-stage bail enquiry: the first is, do you qualify for bail? This looks at if you are a flight risk, if you are a danger to society and if you are likely to interfere with the investigation of your alleged crime. If the answer to all these questions is no, then bail must be given. This obviously excludes violent crimes which have separate bail requirements. The second stage of the bail enquiry is called “the affordability enquiry”, where the judge or magistrate must consider what amount of bail you can reasonably afford.

However, despite these provisions, the poor and the indigent are less likely to be able to access bail as they do not have the means to pay even small amounts. This could be due to judicial officers not applying the two-stage enquiry properly, perhaps due to the pressure to appear “tough on crime”. There is often a misunderstanding by the public of the purpose

of bail. If you have been accused of a crime and are seen out and about, communities believe that you have “gotten away with it”.

One of the major factors contributing to the high number of remand detainees is the unreasonable delays in bringing trials to a conclusion. The Wits Justice Project has written a series of articles highlighting the various ways in which such delays occur, including arbitrary arrests by the police, unreliable chains of evidence, missing files, dockets and transcripts, overstretched court resources, and unnecessary postponements and adjournments.

As if it is not bad enough that we wrongly deprive someone of their liberty whilst they wait for the end of their trial, we detain them in conditions which can reasonably be described as sub-standard and inhumane. The average level of over-crowding in South Africa's correctional centres is 137%. In 2011, 18 centres were overcrowded by 200% or more.

When the facilities have to host more than the number of people they were designed for, there are many serious repercussions, including damage to the physical and mental health of inmates and warders. And it leads to infringements of the human rights outlined in the Constitution itself.

I would like to tell you about Victor, a 37-year-old man who worked as a cashier at Montecasino in Fourways. In 2005 six men staged an armed robbery of the casino. They stole R3.6-million that was stored away in the vaults. Victor knew where the money was kept and he provided the robbers with this information. Victor was arrested alongside the other accused and that's how he ended up in Johannesburg's Medium A prison, commonly known by the name of another casino, Sun City, and one of the most overcrowded remand detention centres in South Africa. In fact 202% overcrowded. That's 81 men in a space designed to provide absolutely minimal space for 40 men.

Victor has been detained in remand – that is, awaiting trial, not yet convicted, presumed innocent – for nearly six years. The trial against him and six co-accused is marred by extensive delays because of absent judges, prosecutors and co-accused that don't come to trial. Victor slept on the floor of an overcrowded communal

cell during the first year of his detention, later he was promoted to a bed, which he shared with two other men. The only toilet in the cell was used by 65 men.

In order to cope, prison authorities carry out a very worrying practice of not always giving the regulated minimum of one hour a day exercise. By locking down at 4pm until the next morning, the inmates are unsupervised in their cells from then.

Victor told the WJP that he was afraid, not only of contracting TB – as a lot of inmates were coughing – but also of being stabbed or maimed by the gangs who control the jail.

*Studies show that those in remand are more prone to committing suicide than convicted inmates, due to “confinement shock” a sense of hopelessness and because of the violence and rape they are exposed to.*

Two years ago, Victor’s wife divorced him, after meeting another man in his absence. He has a son who was 10 when he was arrested and whom he has hardly seen since. When family and friends do visit, they cannot hug or touch, as remand detainees are classified as ‘non-contact’ inmates and are separated from their visitors by a glass partition and usually faulty speaker phones. This means that communication is restricted to joining other families shouting through the glass in a bid to be heard.

Meanwhile, there is little progress in the trial. Victor tells us he focuses on the future to stop him from going crazy. Remand inmates, however, are not offered any books or courses for them to prepare for that future – those are privileges only for the guilty and not for those still presumed innocent.

Convicted inmates have access to educational and vocational training programmes, to rehabilitation and social services and to psycho-social support. Because remand detainees are seen to be in a “waiting room”, only the barest essentials are provided.

So someone – it could be you – is accused of a crime. You are arrested, pleading your innocence all the while, but you are charged. You are granted bail, but you cannot afford it. You are held in remand until your case can be heard, or until your bail amount can be reviewed. In the meanwhile, you are held in a facility which is over-crowded and which puts habitual criminals in with first time offenders. Even if you are there for only a short time or are eventually acquitted, you are still exposed to:

- Intentional violence – both inmate on inmate and warder on inmate violence.
- The spread of communicable diseases, like HIV and TB,
- You face social stigma, because you have been incarcerated – innocent or not.
- You could lose your job and have less of a chance of ever getting another one
- Ironically, you have now been exposed to hardened criminals and could emerge as one yourself
- You could lose the support of your family
- Or your family could lose their only breadwinner – and possibly their home.
- Studies show that those in remand are more prone to committing suicide than convicted inmates, due to “confinement shock” a sense of hopelessness and because of the violence and rape they are exposed to.

Prison walls are porous and what happens there seeps through and affects the outside community. Research shows that prisons are especially conducive to TB transmissions and that prisoners and remand detainees are at an especially high risk of infection. A study in Pollsmoor Prison showed that there is a 90% risk of TB transmission per year. We cannot hope to control the spread of TB without controlling it in our prisons. The same study showed that just by implementing the current national recommendation on cell occupancy, the transmission rate could be cut by 30%.

That is why the WJP decided to join the Treatment Action Campaign and the Centre for Applied Legal Studies – with Section 27 as our legal representative – as a friend of the court for the *Dudley Lee v the Minister of Correctional Services* Constitutional Court case which will be heard on 28 August. Dudley Lee was arrested in 2000 and kept as a remand detainee in Pollsmoor. He was diagnosed with TB in

September 2003. A year later, he was acquitted and released. Mr Lee then sued the Minister of Correctional Services for negligently causing him to become infected with TB.

So, what are some of the steps we can take to both reduce the number of people in remand, and to reduce the time in pre-trial?

First, let's look at police services. We should move away from having performance indicators for police that only look at the number of arrests made and not the number of successful cases which go to trial.

*Our police men and women must receive better training. You have to be able to understand the law if you are to enforce it. And we need to empower the police to be able to issue formal cautions for petty offences...*

Arbitrary arrests, where people are arrested while the police are still finalising their investigation, must be reduced. When the police do make an arrest, they must have enough evidence to present at the first hearing. This will reduce the number of appearances and help to set earlier trial dates.

Our police men and women must receive better training. You have to be able to understand the law if you are to enforce it. And we need to empower the police to be able to issue formal cautions for petty offences, instead of arresting people who have infringed civic bylaws – by drinking in public, for instance.

We should also look at providing legal assistance for people in police custody, to provide them with legal representation in police interviews, before they are taken to court and asked to plea.

The use of such paralegals should extend into the court system and into communities. Just as first aid can save a life in the absence of non-medical personnel, so a person with basic training in the fundamentals of the law can help those facing the complexities of the



criminal justice system. Paralegals can assist the accused and their families with bail and appeal processes, can help trace parents of juveniles (to assist in diverting them out of the system), provide translation where needed and legal information and training in courts, prisons and to communities.

We have physically over-stretched courts: there is a lack of working equipment, in court rooms and often even electricity and water supplies are erratic. All these result in delays in the finalising of trials, with cases being remanded 10, 20, 50 times. And each delay can be for months at a time.

There should be a cross-cutting, inter-departmental digital system – accessible and used by the SAPS, Home Affairs, the Judiciary and Courts and by those in Correctional Services. The WJP often gets asked to help inmates access their dockets, transcripts and records, which have been lost by the authorities. The State has a responsibility to ensure the protection of such data, and to provide everyone with free access to such records. This is especially important for those who want to appeal their sentence, but cannot



because the records of the original trial are missing.

The public's perceptions of crime in South Africa, and its frustration with the authorities in dealing with the problem makes it difficult to advocate on behalf of someone accused of breaking the law. Many people mistakenly believe that the worse the situation in prisons is, the more of a deterrent it becomes. This has clearly shown itself not to be the case.

It is important for people to understand the rights enshrined in international human rights law, and in the South African Constitution. Even more importantly, it is crucial that people understand that when systemic failures deprive even one person of their rights, it can spread as contagion and affect the whole of society.

We all need to work towards change and to help the responsible authorities protect the rights of all citizens of South Africa – even those behind bars.

**CHAIRPERSON:** Many thanks for beginning our discussion this evening and for setting the scene. I'm going to call on Stephen Tuson.

# Tuson

## Stephen Tuson

# Stephen

A lot of what Nooshin has said I'm going to repeat. I hope not to bore you and I am also trying to give you a sense from the coalface, nothing terribly learned or clever, just a sense of what's happening out there and my own ideas as to the solutions that can help solve these problems.

Francis started out with some statistics and I'd just like to amend one of the statistics he started with. He said that two out of five awaiting trial people are acquitted and I'd just like to add another category of person to that.

It's those people who are arrested and do not even get to court and the charges are withdrawn. People where the charges against them are withdrawn before they even get to trial, can push the statistic to three out of five people arrested walk and I think that's a shocking statistic.

I'd just like to quote from the South African Law Commission research paper which mentions this:

"40% of all cases that went to court were withdrawn before trial. The State may withdraw a case for a variety of reasons but it frequently does so when there is insufficient evidence to warrant prosecution.

This includes situations where there was inadequate police investigation, or where the police docket had been lost, stolen or otherwise not at court. Cases are also withdrawn when State witnesses are not at court on the trial day, many of whom simply give up with being subjected to the numerous postponements that are common in the lower courts."

I've started with that quote because I think that's the source of our problem, terrible policing, and I'm going to repeat this over and over again. I've identified four issues with the system at the moment and I'd like to list them and then talk about each one of them.

The first problem, in my view, is that there are too many unnecessary arrests and there are two subcategories there which I'll talk about.

Secondly, there's poor investigation of the merits of a case by the police.

When a charge is laid or a complaint is made at the Charge Office at the Police Station, the investigation is shocking. It's shoddy and that has a knock-on effect as I'll explain later. Then there's an improper application of our bail law and procedures, as has been referred to by Nooshin, and then inordinate delay in getting to trial, the delays in getting ourselves a trial date. There are issues there which I need to talk about.

*There are too many arrests when other procedures will do. Our Criminal Procedure Act provides for a summons procedure where people can be summoned to Criminal Court. There's a notice and an indictment.*

The first problem I mentioned was that there are too many unnecessary arrests. In my view, this can be broken down into two further categories. There are too many arrests when other procedures will do. Our Criminal Procedure Act provides for a summons procedure where people can be summoned to Criminal Court. There's a notice and an indictment.

But what do our police default to? They arrest in the most petty, silly matters such as drinking in public. People will be arrested and this means that people who are arrested have to be brought to court within 48 hours in terms of our procedure.

There is an appearance in court and this in itself, we call it the remand or first appearance court, is clogged unnecessarily because of this necessity to arrest people. I want to make that point clear; too many unnecessary arrests when other procedures will do.

Secondly, too many unnecessary arrests when the merits are poor. A neighbourhood dispute where a person wants to get back at his neighbour. He will go and lay a complaint which is completely groundless and what do the cops do? They'll arrest the neighbour without interrogating the issue, finding out what the situation is, and finding out if there's any merit to the allegations.

This plays out after the arrest. The investigation is poor. It's shoddy and we get people in court, denied bail, awaiting trial, remanded repeatedly and we hear of cases six years down the road, where the charges are simply withdrawn because of a lack of evidence.

I'm talking about arrests that should not have happened because they could have been summoned to court. Arrests that should not have happened because there's no merit to the complaint itself and there should have been a proper investigation of those merits.

If people are arrested who should not have been arrested, then it will be difficult to free up those remand courts. Other procedures can be followed by the police services which will help in freeing up the court rolls where many cases are remanded or postponed, otherwise the endemic hopelessness will remain in our system.

I'll talk about the improper application of our bail law and procedures later when I give some solutions to these issues because that is a problem. The way our courts and prosecutors and control prosecutors are dealing with bail is flawed and we need to fix that and try and work around it.

The fourth problem is the inordinate delay in getting matters to trial. Why? We hear of this phenomenon of postponement for further investigation. Why were they arrested in first place if there's a need for further investigation?

I accept that there are some cases where you arrest a suspect hot on the scene, climbing out the window with a bag of swag on his shoulders. These people have to be arrested for housebreaking and then there will be the necessary investigation. But many of our criminal complaints are what I call "cold complaints".

A member of the public goes to the Charge Office and makes a complaint and there's now a live charge to be considered. We need to know what's delaying the further investigation.

Witness statements, forensic reports, our forensic services are in shambles, we've got terrible laboratory backlogs, a serious lack of funding. I understand that recently



the Johannesburg Laboratory Services were threatened with closure because of the failure to pay bills.

Public defenders: There's a delay in getting adequate representation by public defenders in the lower courts timeously. Public defenders need to consult with their clients and witnesses. There's a poor work ethic in our courts from the prosecution, the public defenders and the attorneys. People would rather postpone ...

*I once asked a prosecutor, I watched her postpone ten matters out of ten on her roll and I asked her did you prosecute anybody today, did you make anybody answer to their crimes? Her answer was no. The ethos is it doesn't affect me, he can just go back to prison, it's not my problem. There's no empathy.*

**JUDGE SATCHWELL:** *But the judges work very hard.*

**PROF TUSON:** Yes, certainly. But generally there's a poor work ethic. People would much rather postpone matters than finalise them. I once asked a prosecutor, I watched her postpone ten matters out of ten on her roll and I asked her did you prosecute anybody today, did you make anybody answer to their crimes? Her answer was no. The ethos is it doesn't affect me, he can just go back to prison, it's not my problem. There's no empathy.

This is a thorny issue. There are improper delaying tactics raised by defence attorneys. They know that if they can delay the matter *ad nauseum*, witnesses die, witnesses lose interest, get fed up, immigrate and we can have a victory as a result of improper delaying tactics by the defence and this is a reality.

So it is unnecessary arrests, shoddy or terrible investigation by the cops, the improper application of the bail procedures and this inordinate delay of cases for the reasons I've indicated. I'm going to propose some solutions and then I'll be finished.



I think the key point that I'm trying to make rests on one factor. If we could have proper investigation of the merits by the police we can solve a large number of our problems. When a complaint is made at the police station, a thorough investigation of the merits should ensue and there should be collaboration between the investigating officer and the prosecution.

We have this prosecutor called the Control Prosecutor who is supposed to read the docket, assess the merits and decide whether or not there is a complaint to pursue based on the evidence at hand. Unfortunately, there's not a good, healthy relationship between the control prosecutor and the investigating officer. There should only be an arrest once there's a decision that a case has merit.

There should be a thorough investigation phase so that we can say this case has an excellent chance of conviction, and there is no unnecessary arrest, no awaiting trial person who is going to be acquitted or the charge is going to be withdrawn later because of lack of evidence. I'm saying that before any arrest, as far as possible there should be a thorough investigation of the merits.

# Stephen Tuson

Once it has been decided that the merits are good a decision can be made. Either the suspect is charged or further investigation is required. Note I said “charge” not “arrest” because then you must make a next decision. How are we going to get him to court? Issue a summons, a notice or arrest and there should be a considered decision made at that stage. Don't just default to arrest because that's what is clogging the system.

I have had clients who have cooperated with police, who have volunteered to turn themselves over, to come to the police station, to give a warning statement and they get arrested at the police station.

*We are all familiar with this 'arrest the suspect on Thursday' idea. The police do this to abuse the powers because they know that they can hold the suspect in custody for the entire weekend ...*

They are employed. They have families. They are no flight risk. They are economic crimes. They are not a danger to society but they're arrested. Why? It's unnecessary when there are other avenues which can be pursued.

I submit that only dangerous offenders or people who are a genuine flight risk, need to be arrested. A proper investigation of the merits will assist us in that regard.

We are all familiar with this 'arrest the suspect on Thursday' idea. The police do this to abuse the powers because they know that they can hold the suspect in custody for the entire weekend; they only have to make their first appearance on Monday.

This is an abuse of the process and it's wrong. We should do a bail assessment enquiry before arrests so we can decide whether or not this person should be arrested; or if a summons will suffice.

I think too much discretion is vested in poorly trained police. Many of our police have hidden agendas when they arrest suspects. They may have an agreement with an attorney, a local

attorney who's always haunting the charge office and they know that if they deny bail to a suspect who should get bail, they can put the suspect in touch with that attorney.

The attorney will charge a fee, which he splits with the investigating officer. This kind of corruption is endemic in our police stations. It's happening every night with the afterhours bail situation and this contributes to the problem.

One last point, we have good law regarding the release of suspects on bail. The amendments to the Criminal Procedure Act are good and thorough and detailed but they are applied poorly. This needs to change.

There is inadequate investigation of the circumstances of a suspect. An investigation of this nature must determine whether he's employed, has a fixed address, a family, his income, fixed assets in the area of the jurisdiction of court. All these factors are used by the courts to decide on the granting of bail.

I would like to see more resources put into the investigation of the suspect's personal circumstances so that proper and reliable decisions can be made with regard to this person getting bail or not. I believe that the vast majority of people who are detained in custody without bail would get bail if we had a proper investigation of their personal circumstances.

We need to hold the role players accountable. Prosecutors, attorneys, interpreters, and orderlies need to be at court on time and fully prepared. We need to be able to use Section 342(A) of the Criminal Procedure Act where the magistrate can hold those people to account for inordinate delays.

I think the magistrates and judicial officers should start cracking the whip to hold people accountable. I would also like to see, in criminal matters, pre-trial hearings. I think if we can get pre-trial procedures in place for criminal matters, we can avoid a lot of the endemic delays in our criminal cases.

**CHAIRPERSON:** Stephen, many thanks for bringing the courts into this room. I'm going to ask Kathy to continue. Thanks.

# Kathy Satchwell



Kathy Satchwell

**M**y experience of this problem is obviously fairly personal and it comes from my experience as an attorney and the last 15 years as a judge. But, for me, both the problem and the solution is rooted perhaps in whether you were brought up as a good little Roman Catholic girl or a good little Marxist Socialist and I hanker back to the Marxist Socialism of my earlier days.

I happen to think that law is not only a reflection of a society in which we live. I think law is the creation of the society and very often it is the deliberate creation of the society and very often, I think in South Africa as I will try and argue now, the legal system that we have and which we implement is the creation of the ruling class. Now why would I say that?

Well, I say it to be provocative and to keep your interest because it's the end of a long working day. But I also think there is some truth in that and if I might advance three particular areas where I think there is something we could think about.

The first is if we just look at our criminal justice system. Of course it is a reflection of our society. We do not have mob justice. From time immemorial in this society, even in the past courts where I appeared fairly frequently, people were brought before a court.

They were entitled to know the charges. They were entitled to face their accusers. They were allowed to challenge. There was supposedly a neutral person to adjudicate and punishment, in theory, only followed upon guilt. Now that is the practice of our law and the promise of the Constitution is a fair trial.

That is wonderful, but it immediately has some problems. Process means delay. You are not brought in off the street and you don't just have your hand chopped off.

First of all, we've got to find you a legal representative. Then somebody has got to type up a charge sheet or an indictment. Then the witnesses have got to be found, then place on a court roll has got to be found. So endemic to

a fair process is the concept of delay. Those are the good things that lead to problems.

The bad things that lead to problems in our criminal justice system is that we are a struggling democracy and we're still making up our mind as to what we want to spend our money on. We are not meant to know it, but the Johannesburg City Council, or was it the province or both, spent R90 million on a Miss World event.

But wouldn't it be better for today's discussion if instead of spending R90 million on that, we spend R90 million on courts and orderlies and windows or air-conditioning and records so that you could have appeals because you would have a transcript of a trial? No, we would rather spend money on Miss World.

The Department of Justice has an awful lot of people working on its gender desk and I have asked them what they do. It sounds odd for a feminist to ask them and clearly comes off as being a little anti. It's not a good question and they tell me that they are very concerned about women in the judiciary and I thanked them kindly.

I did write to Bridgette Mabandla when she was Minister of Justice to object that on the Department of Justice's website, the Department of Justice was funding and hosting a golf day and I did wonder who we were trying to capture, who our market was that we were trying to attract into our Department of Justice through golf and I can promise you none of the judges who play golf were invited to that golf day. Bridgette never replied and I saw her sometime afterwards and asked her, she said: "Oh, Kathy."

But the point is what do we choose in this society to spend our money on? Well, a friend and I were in Kimberley a little while ago, about a month ago, and the *Diamond Fields Advertiser* had a front page story.

Did you know that the Northern Cape didn't send one athlete to the Olympics but I think, according to the *Diamond Field Advertiser*, the province was sending 27 MECs and Members of Province off to London.

So, on the one hand we have the promise of the fair trial and at the same time we guarantee all

*To me it's a societal problem and we cannot simply poke our fingers and all the rest of it at the police and at the court orderlies. Yes, they are incompetent but you pay peanuts and what do you get? That's what we've got.*

sorts of things, and on the other hand we don't, as a society, put our money into the kinds of issues that worry us here today.

To me it's a societal problem and we cannot simply poke our fingers and all the rest of it at the police and at the court orderlies. Yes, they are incompetent but you pay peanuts and what do you get? That's what we've got.

The next issue I want to comment on is the issue of bail. I don't hear bail applications as a start. I hear bail appeals. But I think it's fair to say as a general principle the rich are free and the poor are not and if you think about bail applications the first thing is, yes it is very nice.

We are all innocent until proven guilty and we are entitled to our freedom unless if you look at Section 60 of the Criminal Procedure Act. The onus has changed. You've now got to prove that you're entitled to bail if you are charged with certain offences and on the whole they are serious offences and they're offences involving violence.

We as judges must look at who the kinds of people are that get involved in the kinds of crimes that would mean you're unlikely to get bail and the answer is, of course, the poor.

I do not live with six other people in one room, with no electricity, where it's incredibly hot in summer and where it's incredibly cold in winter. I didn't grow up with adults having sex in front of me. I am not surrounded by the agonies of people with mental illness. I am not surrounded by breathing, fighting, struggling people and so I don't lash out with a knife or with a beer bottle.

I don't spend my days in a drunken stupor because I actually have to get up for work in the morning and go to work. But if I didn't have any work, that's probably exactly what I would do.



# Kathy Satchwell

So it is no surprise to me at all that it is the poor who are engaged in crime. Sometimes its survival and sometimes its boredom, and quite honestly, if I was a young black South African aged 18 who lived in Orange Farm and I never knew my father and quite honestly my mother has 8 other children, well, when I dropped out of school the first time I wanted some money I would ask somebody for it.

*... it's those mothers and those fathers that I would like to have up in front of me. I would like to castrate them and I would like to sterilise them and I would like to say stop having children for whom you take no responsibility.*

The second time I would take the handbag. The third time I would use a knife. The fourth time I would have probably got a gun by then and then I'd be serving a sentence for murder and I can absolutely see why it happens.

I must tell you when I sit in my court, it's those mothers and those fathers that I would like to have up in front of me. I would like to castrate them and I would like to sterilise them and I would like to say stop having children for whom you take no responsibility.

It sounds incredibly fascist but it is more fascist for a society to say to young people: "we give you no hope, we give you no future and we send you to jail". So what do we see in bail courts?

Well, what we see is those who have marginal lives. They don't have addresses. They live in what we nicely nowadays call 'informal settlements'. They are not informal settlements. They are squatter camps. Not a single one of us wants to live in them. They don't have proper addresses. They don't have jobs. They'll never have a job.

They are not going to get bail. It's not even a question of have they got the money. They are flight risks because they live in this underworld. Who does get bail? Well, you get bail if you're nice and middle class and have a job and have a family and all the rest of it.

What are we doing in bail matters? Well, blue collar or no collar people are those who are innocent until proven guilty but are sitting in prisons. And white collar, of course, arrives at the front or back of the High Court with everybody taking a photograph as they get out their motor cars.

So again it is society that chooses who the victim will be in perpetuity. The impact all this has on society is hugely negative. There is both a personal and an institutional impact. The personal impact is that lives are destroyed even more than this society has already destroyed those lives.

*This type of behaviour forces you to harden your heart. We don't just destroy lives but we destroy the humanity inside every single person – from the constable up to the Appeal Court Judge.*

Those lives were destroyed at birth, or very few people were given a way out of that Catch-22, but they're destroyed because, as Steve has commented and as Nooshin has commented, we lose family relationships, job opportunities disappear and if you don't get TB in prison, I would be very surprised.

It also destroys something else. In the courts, people become numbers and not people. When I look at people who have been in custody, it reminds me of a memorandum I did for the Deputy Minister two or three years ago. I am still waiting for a response. This type of behaviour forces you to harden your heart. We don't just destroy lives but we destroy the humanity inside every single person – from the constable up to the Appeal Court Judge.

The other area which is impacted is the institutional side. Individuals lose faith in the courts. They are aggrieved. They lose faith in the criminal justice system. Quite rightly they are aggrieved if they have spent so much time in jail before their trial is finalised.

I can remember writing to some of the people who had funded defence and aid after everybody was unbanned. I wrote to a woman called Rosemary Sands who had smuggled money into South Africa for about 25 years.

I said you know the one really good thing about the work that you have done, smuggling money in, so that all the political trials and the work for them would be done, was that to a certain extent you kept alive the concept of the rule of law and the concept of a legal system because it became in itself, so I thought, a sight of struggle.

I don't know what we're really keeping alive now and I think the danger of that is not just that the people lose faith but everybody loses faith. And why not then have a system of mob justice? Why not have People's Courts?

I defended quite a lot of people on charges of being involved in People's Courts and I must tell you there is much to commend them for. There is much to learn from what very ordinary people see as being a justice system that they can hold on to.

Institutional damage is also caused when it comes to sentencing people who have spent so much time in jail. This leads me back to the memorandum I wrote and perhaps it will explain some of my indignation.

I wrote this memorandum on the 30th of March 2008. At that stage I was sitting in the Vereeniging Circuit Court. The interesting point about the Vereeniging Circuit Court that I sat in, is that in the first week that I was on duty in that court, I had 10 murder trials all down on the court roll for Monday.

Now I know I'm a wonderful person but even I am not that wonderful. *State v Mokubung* was given five days. *State v Mokopane* was given one day. *State v Masali* was given no days and so on and so on.

How long had everybody been waiting? Well, according to my memorandum, as I read it now, take *State v Masali*, this was the first week of the 2008 term. The events had taken place in year 2000. So somebody had been in custody from 2000 to 2008. The second week was four trials and so on and so on. So what happened was that I volunteered to stay in Vereeniging and work through the backlogs.

There were two little boys called Khoza. They were taken into custody in April 2005 and their case had been postponed on previous circuits.

The State wanted to postpone it until October of that year and I said, no. Now I can't say the charges must be withdrawn. But what I did say was that's fine tomorrow morning at 07.30 I'm hearing a bail application and I can tell you now, I will be granting the accused bail. In other words, there's no discretion involved. I will be granting bail.

What did the prosecutor do? They withdrew the charges. In other words, everybody had actually given up. Nobody was actually looking at what was happening in the Vereeniging Circuit and the minute we were now going to have a bail application, somebody had to look, then realising that they had probably lost the witnesses.

I sent this memorandum off in March 2008 and I'm still waiting for a response. Johnny de Lange was the new, very enthusiastic Deputy Minister. But there is some good news and the good news is that I happen to be sitting in crime again this term and when I got my roll for the first week of this term, I had three cases down for the Monday.

Interestingly, the first case which I did was the rape of a 7-year old girl on the 24th of December last year. So I gave that case priority because the accused had been in custody since the 24th of December. He is now serving a life sentence.

That delayed by a week the matter of State v. Mbatha who is a policeman charged with the murder of a young man in Dobsonville and that took place on Valentine's Day this year.

The point is that things have become much quicker. What do I think the solutions are? We have to do something about poverty because, of course, when you have poverty, you have crime. It is not that people are innately wicked and wake up in the morning and say let me do a little rape today or let me go out and murder someone. Things happen in messy lives and you are going to have messy lives where you have poverty.

We need to put money into policemen and nurses and teachers. But for today's discussion we need to put our money into the police and not into Miss World. We need to do something about corruption.



We need to do something about courts where you will give a reasonably willing judge 10 murder trials for one week. You need to do something to arrange your courts.

You need professional people who start managing things. I suspect that nobody really minds that these cases are postponed year after year, circuit after circuit. After all they only involve poor black people! They don't involve real people.

We need to do something about housing and employment because if you do something about housing and employment then everybody will get bail. Why will everybody get bail?

Because they have a stake in the society in which they live. If you don't have a stake in the society in which you live you will wander off and disappear into Venda Land or Sekhukhune Land. That's my rant. I was a both a good Catholic girl and Marxist Socialist.

**CHAIRPERSON:** Kathy, many thanks. I'd like to call on Vincent Smith to bring the discussion to a conclusion. Thanks, Vincent.



## Vincent Smith

**T**hank you very much, Chair, and maybe let me start with the final point made by the Judge. I too agree, first let's say that as the oversight authority, we are very concerned about the state of overcrowding and it's on record that we are concerned about it and we HAVE brought it to the top of the list.

I also agree, sitting and thinking about this over a whole number of days, that I don't think we're going to solve the awaiting trial or remand detention problem unless we look at the bigger picture.

70% of remand detainees are younger than 35. They are black. They are poor and unless we do the things that the judge has spoken about, we are going to be saddled with this overcrowding in our remand detention.

I think the turnaround is about 25 to 30 000 people per month that are detained and released. So we have to look to the root causes of it. But that's not the discussion for today. I just thought I must put that on the table.

We are concerned, judge, because first of all from a constitutional or human rights point of view, your freedom cannot be arbitrarily taken away from you as is done and colleagues have spoken about it. You are entitled to a free and fair trial and that doesn't happen and I will touch on some of those things.

We ARE also concerned because I don't know how many of you ever think about this. It costs the State R6 000 a month to house an individual; R6 000 a month. So the more we have, the more, Judge Satchwell, it costs the State, as opposed to money going in to the things you're talking about; R6 000 a month.

I am very angry about that because my grandmother and your grandmother who are pensioners only get R1 200 a month on their pension. The State subsidises R6 000 for somebody that is incarcerated and R1 200 goes to a role model and that concerns us greatly and I raise that point wherever we go.



I thought I'd just talk on some of the issues that my colleagues have spoken about as to why we are where we are. The police, for instance, are measured on how many arrests they make and not on how many convictions there are. That is the first thing that we need to change, over and above the corruption that happens. I am saying structurally they have to change the way the police are measured.

We hear horrendous stories of investigating officers saying to those in remand detention, unless you pay me I will continue to postpone your hearing. So, even the police are bribing those that are on the list; in other words, those that are awaiting trial will have to pay the investigating officer just to go to court.

Colleagues have spoken about the forensic shortcomings as part of the problem and I agree. The way police are measured and the corruption taking place are the types of things that I thought I'd put on the table so that we can have a holistic discussion. The whole policing system needs a rethink.

*Because of the constitutional obligation of people being tried fairly, many demand to be tried in their first language. So you may get somebody from Nigeria, from some remote village, wanting to be tried in his dialect.*

But I do think that there are certain other things that we should talk about like the accused themselves. Because of the constitutional obligation of people being tried fairly, many demand to be tried in their first language. So you may get somebody from Nigeria, from some remote village, wanting to be tried in his dialect. The National Prosecuting Authority may not have a translator or particular translators come at a very high cost or you may have the accused changing his legal representatives every other day. I'm saying that the accused also have a role to play in the delays.

Another serious issue is an accused that has multiple cases. He may be remanded in Johannesburg for a heist but he's also got a case in Cape Town for murder. So what you

find is that an awaiting trial accused may have multiple cases and the police are then unable to release him after the 30 days or immediately. Those are the types of things that affect the accused. There is not very much that the system can do about somebody that wants to be tried in his language.

I spoke about multiple cases and somebody referred to the fact that there might also be multiple accused. So one of the accused may be there but his colleague that may have been out on bail doesn't arrive at court. This would result in the accused being remanded. Those are some of the things that we need to talk about.

Judge, let me talk about the judiciary as well. I think that we have to point a finger at the judiciary as well. You know, they all know that if you are given bail of less than R1 000, you can get a police bail, for instance, at the police station.

So what do judges do? They set bail at R1 050 so that you can't qualify for that type of bail from the police station. Judges would also be reluctant, and I'm not sure that we can blame them, to give bail because somebody doesn't have a fixed address and he may be a flight risk. That is a challenge that we are faced with in this country.

For the sentenced inmates, we have insisted on electronic tagging. I'm not sure that you could do electronic tagging on somebody that has not been found guilty. It's a problem that judges would say we're not prepared to release this person on bail because he or she will not come back. Judges are also not willing to find alternate ways of, if I could call it, bail remand, for want of a better word.

I don't think you have to be incarcerated. Why can't we say you will be given bail and your condition is that you go to the police station every day? More than 10 000 people in our cells are there because they can't afford bail of R1 000 or more; more than 10 000 inmates.

Surely the magistrate or the judge, if he gives me bail of R500, has indicated that he or she in their own heart didn't want me to be in the cell so why not give me bail of R500 and say that I must report to the police station every Monday



Smith

Vincent

*The community may feel that if the cops can't keep the alleged perpetrator where they think he should be, then they will necklace the person.*

or every Friday. I do think that there needs to be a change from incarceration being the first option meted out by the judiciary.

The flipside of that though is that of society. If I'm picked up today and tomorrow I'm in the street, people lose faith in the criminal justice system and in some instances revert to mob justice. The community may feel that if the cops can't keep the alleged perpetrator where they think he should be, then they will necklace the person.

There are two sides of the coin. Society must face these challenges and deal with them because it is society that puts pressure on the police, or on the magistrate or on judges not to grant bail and they don't distinguish between serious crime and somebody who might have

shoplifted a loaf of bread because his child was hungry. At the moment it's a one size fits all around not granting bail and I think society has a role to play in that regard.

The Prosecuting Authority has also shown an inability to have translators readily available. However, translators charge exorbitant fees because they know that they are a scarce commodity and the case can't continue until the translator is ready. Sometimes translators collude with either the perpetrator or the system because they are the only ones that understand the language of the accused. Our translation mechanisms have to be reviewed in order to be fixed up.

Somebody spoke about paralegals. The fact of the matter is that there are legal aid services across our awaiting trial courts but those services are of such a poor standard. In fact we know of many legal aid practitioners that say to their clients go and plead guilty because of the case load.

They have something like 50 cases per individual and some of these awaiting trial

detainees or remand detainees only see their legal representative at the dock because of the case load.

We need to do something about the Legal Aid in South Africa because most of these people that are in remand detention cannot afford private legal assistance and I think that we must look at that. This particular matter has been raised.

We also spoke about the collusion between the police and the prosecuting authority in terms of the backlogs and so on. What is it that we think should be done or has been done? Firstly, there was a Correctional Matters Amendment Act that we passed early this year. We have said that there should be no remand detainee that is incarcerated for longer than two years.

It's illegal to hold somebody for longer than two years. As I speak, I speak under correction, there's something like 2 600 people in terms of the backlog that have been incarcerated for more than two years and we have been promised that within three months the Department will start addressing that backlog.

*... the onus should be on the courts to say why somebody should be incarcerated as opposed to the accused making a case for why he should be granted bail, of course excluding serious violent crimes.*

Also in that Act we have stipulated that if somebody in remand detention is physically disabled or terminal, they should be able to go to the magistrate and ask for that person not to be put into our centres but rather to be kept at home, and we're talking here purely from a humane point of view. This was not the case in the past. This will also help in addressing the backlogs.

The option of alternatives to incarceration I think is something we need to look at alongside periodic visits to police stations. I think it's something that we need to look at as the criminal justice system continues its business.

I also think, and the first speaker spoke about the bail regime, that we need to look at it and say that the onus should be on the courts to say why somebody should be incarcerated as opposed to the accused making a case for why he should be granted bail, of course excluding serious violent crimes.

We need to turn the bail protocol around and say unless the court can prove that an accused person is going to be a flight risk, that person should automatically be granted bail. Currently one must prove why they shouldn't stay inside. Those types of things must change.

The last thing I want to talk about and I've raised it before, and maybe I must raise it again with you as well, in terms of the overcrowding and so on somebody spoke about what happens after 4 o'clock. It's correct. The gangs take over. You know, we've agitated and I'm agitating and lobbying you as well, because we are convinced and we are determined as the Portfolio Committee, that we'll push it through. We think the time has come where we need to put CCTV cameras in the cells and many of you are going to say but we are impinging on the privacy of the inmate.

My argument is that one can't impinge on the privacy of the inmate at the expense of somebody that is raping you every day. I have fought that fight and I've won it. It's the Department of Correctional Services that seems to be reluctant.

But we do think that regardless of whether there's overcrowding or not, to be able to address the humane part of it, we have to use technology and the technology that we are asking civil society to think about is the use of cameras and we know that cameras are not going to stop the rape or stop the murder but it's going to act as a deterrent. We do think that there could be efficient evidence for that to be used in a court case.

Thank you very much, Chair.

**CHAIRPERSON:** Thank you, Vincent. I'm going to open up the discussion to the floor. we'll take three questions at a time. When you're identified, could you please just identify who you are. Thank you.



# Questions

*MS PRATT: Thank you. I am Anne Pratt from Memela, Pratt and Associates. I really would like to thank the panel. I think there are some very practical helpful suggestions. My question is really where to from here? There is quite a lot that's come up regarding the police and changing things within the police system.*

*So my first question really is: is there not a way in which this panel can meet with the new Commissioner of Police? I think she's a very accessible kind of person, meet with her and some of her top guard to take these practical suggestions forward in terms of how the Commissioner of Police can consider these things and start implementing them.*

*My second question is, is there not a way again in which this forum could then move some of these suggestions onto the decision makers, including the Executive and Judiciary because what I find quite frustrating is that we get some very healthy suggestions that come up, but which never seem to go anywhere. Thank you.*

*MR ROUSSOS: Thanks. My name is Mike Roussos. What fascinated me about some of the comments being made is that we're doing it in the context of a fairly significant rise in crime levels and obviously a fairly significant concern about crime inside the country.*

*So when we start talking about the human rights issues surrounding people who have been charged and have been put in prison, or held on remand pending some kind of trial, obviously public sympathy tends to be rather low and people are kind of more concerned about what we're doing about crime.*

*What's interesting about what a lot of the people have said in trying to analyse what's happening to those people who have been put in those prison cells awaiting some kind of hearing is that if you trace some of the problems, it all seems to come back to the efficiencies of the system, whether it's the judicial system, or the police or the investigation process that takes place.*

*So the same kind of factors would presumably make a big difference to combatting crime. If all of those inefficiencies were resolved, presumably we'd be able to tackle some of the crime that's out there and be able to do something about the major issue that concerns everyone and hopefully address the human rights of some of those people who inadvertently have been put in prison.*

*What fascinates me is that amongst your speakers, I would have thought Vincent would be representing the kind of side that's responsible for the process but it appears*



*that everyone is kind of saying well it's a big problem and somebody must sort it out. But who is going to sort it out?*

**MS ROTTMAN:** *Hi, my name is Britta Rottman. I'm the Head of the branch Remand Detention at the Department of Correctional Services. Thank you very much for the kind of solutions that you've put forward.*

*It's certainly something that we need to take on board and some of the research that you have mentioned, we would very much like to have a look at and see how we can implement that and see how we can improve things.*

*But I did want to comment on the figures that we are talking about because I'm a little bit concerned about where these figures come from. If we look at the figures that we have at Correctional Services, our figures for March, our average figures on remand detainees is 46 920 and currently as of 14th of August, the figure is at 45 076 and this is a trend that we've seen generally within remand detention, that the figures are in fact coming down.*

*I do think that some of the things that have been put in place in terms of cooperation within the cluster have contributed to that. So I think that we are seeing a downward trend and we must keep that impetus going. Thank you.*



**PROF TUSON:** I would just like to reply to the first question of Anne; where to from here? I agree with you and I think we need to determine two policies. We need both judicial policy and police policy around these issues to be decided and properly implemented.

If we can get the police to agree that they will enforce - there's a standing order out there that says arrest is a last resort that you should only arrest dangerous suspects or flight risk suspects and instead we should rather use a summons. We need to enforce that standing order and make it a policy and even regulate or legislate it. That you may not arrest unless there are certain conditions fulfilled.

We need a commitment, a policy commitment from the Commissioner which must be filtered down to the police and we also need a policy commitment from the judiciary, magistrates and judges saying that we will bend over backwards, if possible, to release people on bail and do that two-part enquiry; do they qualify for bail? Yes. Can they afford it? No. We'll release them on a warning and so I agree with you that we need to get policy statements from at least those two sources.

# Comment



# Comments

The high crime levels question from Mike; no public sympathy and then what are we going to do about it? We did something in Soccer World Cup. We had special courts, special investigators, special prosecutors and it worked like a dream and that just shows you what can happen with the right will and resources. It can work.



**MR SMITH:** Just two things. The first one, I think it was Mike that said who is going to do something about it. You know, the separation of powers, again it's something that we all voted for, is part of problem.

I am an overseer. I cannot - it's the young lady that spoke there who should be doing something. When I say the young lady, I don't mean her necessarily, but government. So I agree that maybe this panel is short. It should have had the Executive here as well so that as the oversight body we can raise it with the Executive but it's the Executive that needs to do something.

I think what we also need to do as the Oversight Committee, and I don't want to wipe our hands, the Minister of Justice has continuously been saying that they're moving to a court-ready state of affairs. In other words, by the time somebody goes to court, the prosecutor, everybody must be ready.

Our role, I think must be to continuously monitor and to raise the flag when issues arise. When Mr Radebe, the Minister says they must be court-ready then we should not have this back and forth. We should be monitoring all the time.

I also agree that we should be talking to the Minister of Police and saying to her, change your measurement tools for the police, because to arrest and then investigate is one of the major problems and unless they change that, it's going to remain a major problem. I'm saying it's not the only solution but for me that's one of the easier things that could be done. Institute a timeframe for investigation before arresting a suspect.

We've said, for instance, that the police can't keep you in their custody for more than 7 days as Correctional Services. I think there should be a similar type of mechanism from their side. If you arrest somebody, depending on the nature of the crime, surely there should be a timeframe in which initial investigations are carried out before an arrest is made, currently there is not a time frame.

The Boeremag trial has been going on for 8 years, for instance. For 8 years we have been paying for those guys to be in jail.

So I don't know if there's a one size fits all but I do think that we need to, all of us, think about these things. It's very complex because the Boeremag trial will take 8 years, but surely



somebody stealing a loaf of bread shouldn't take more than 30 days.



**MS ERFANI-GHADIMI:** The question about where do we go from here, there are a lot of good organisations that deal with these issues and they are working together and looking for partners in government and I'm very happy to hear that there is a section for remand and that you're looking for cooperation. Mr Smith and his committee have been great so there's a lot of goodwill towards seeking solutions.

In terms of public sympathy, which I think actually helps the first question, I think we need to realise that prisons are almost like Crime Universities right now. You go in for any amount of time, you become more criminalised. We need to spend more time and more resources on rehabilitation rather than just keeping somebody in a cell.

We need to make sure that the public sees that their interests in what happens inside a prison means that when an inmate comes out, they're ready to join society again and it needs our collective efforts to make sure that happens.

In terms of data, I'm really glad you raised that because we often search for the correct data and have difficulty finding it. In order to fix the problem, a proper prison census that reports reliably on what is going on inside would go a

long way to providing good data which would help to inform debate. So yes, there might be discrepancies in the numbers that we have, but that just shows you that the problem is a lack of reliable, accessible data.

**CHAIRPERSON:** Thank you for rescuing the Chair on the data. Three different sources, three different sets of data, so if we could all assist one another in this but you're closer to it than we are and we'll probably follow your lead.

**MR LEON:** *Hi, I'm Peter Leon. I'm a lawyer. I just wanted to ask the panel a question. It really struck me when I heard what Steve was saying, what was said earlier on, that the conditions we have in our jails, the issues of TB, overcrowding, rape that Vincent Smith was talking about and the delays.*

*The fact that you could be locked up for 6 years before a matter proceeds to trial, I mean, even accepting what the Correctional Services Committee has done with the Amendment Act, which obviously is very commendable, doesn't it make a complete mockery of the Constitution?*

*I did just ask this question rhetorically because it really does strike me that you have a Constitution which proclaims all these wonderful things about a fair trial, a speedy trial, the presumption of innocence, all these things we hold dear, but the conditions in which we detain people, awaiting trial prisoners and convicted people really struck me as being quite appalling - these are well-known facts.*

# Questions



*Does it not say something about our society and the dissidence between what we proclaim in our Constitution and what we actually practice on the ground?*

**MS HARDY:** *Hi, my name is Kathleen Hardy. I'm an attorney at the Centre for Applied Legal Studies. I have a very quick, brief question for Mr Smith. Maybe the answer won't be so brief but I'd just like to know what the status is of Section 49(G) of the Correctional Matters Amendment Act?*

*The last time I heard was that it could become effective at the end of July and that there were just certain systems and this again is data and sharing of information between the courts and Correctional Services which regards to the two-year limit of incarceration where the accused has to be brought before the court.*

*As it's been published but is not yet in effect, what sort of timeframes are we're looking at there? Thank you.*

**MS GON:** *Sara Gon, HSF. This is an observation not a question but it seems to come up, it seems to link to every debate we have, whatever the subject may be, and I think what it highlights more than anything is a complete lack of leadership which has an effect on policy, and which then has an effect on implementation.*

*Our last debate was about business's role in a wider political system and one of the issues that came up was that very fundamental issue*

*that's been pointed out particularly by Kathy about reducing unemployment. The point that was made at that debate was that little progress has been made on the issue of unemployment because of policy, ideology, and a mistrust of the profit motive.*

*At that very level we keep going around in circles on an issue so fundamental to how society goes in a range of directions, including ultimately to the criminal justice system, and it strikes me that without decisive forward thinking political leadership on those most fundamental of issues, you end up with greater or lesser backlogs in the criminal justice system.*



**MR TUSON:** *Your question about it making a mockery of the Constitution. I think the problem is this progressive realisation argument. If we took the department to court and litigated these conditions, what would we ask the court to do? Would*

*we say release everybody, which is unlikely? Would we say build more prisons - apparently we need 21 prisons at a cost of R50 billion to house what we've got at an acceptable level.*

*So no, when we litigate, if we litigate these issues, we've got to be careful and ask ourselves what are we likely to get, what's realistic and I think we need to set standards and I understand that there are regulations which set minimum standards.*

# Comments





We can then hold the department to those standards on a case by case basis possibly and then set bright lines and possibly make progress in that way. But if we go bull in a china shop too fast, too quick, I think it will be counter-productive. That's just a feeling.



**JUDGE SATCHWELL:** Also in response to Peter's comment, I don't know a great deal about conditions in prison awaiting trial. But one of the things I'm beginning to learn about convicted prisoners is that I am continually surprised and impressed, very impressed by the Department of Correctional Services.

What we have in a lot of our Application Courts and Motion Courts are prisoners bringing applications against the Minister, the Commissioner, the Parole Board, the Head of the Prison, etc, etc saying I have not been fairly treated, I must be released, I am entitled to be released on parole because of X, Y and Z.

The stories usually are I'm serving a 25-year sentence. I came in, I did Standard 8, then I did matric, then I did a diploma in how to keep my cell tidy, then I did a diploma in AIDS understanding, and people attach these endless diplomas. Obviously they are very proud of their diplomas and you'll get a whole paragraph on how I won the prize for the tidiest something or else.

I am just so impressed that the department, which probably doesn't have enough money, that is overcrowded, that, from what I read in the newspapers, it is not safe to be in a correctional centre, and these are, as Mike says, quite honestly the people that nobody really wants to spend money on, that the Department has time for all these things.

By the way, because I'm so nice to all the prisoners and these prisoners are not stupid, they look and they see which judges are in which Motion Court and I get those prisoners. So they will postpone their matters and these very, very busy Department of Correctional Services people will run around taking oaths, delivering, serving documents, all the rest of it.

But I've got a chap at the moment, for instance. He's doing a very long sentence for armed robbery. Not only has he done matric and got his tidy cell certificates, he's actually finished his LLB and he's doing a Masters.

So his application is on the grounds that he deserves to be released because he's been offered articles of clerkship by a firm in Johannesburg, whose letter is attached, and it's very interesting because he also says that he's entitled to a whole lot of special amnesties and things and it's wrong that he's been excluded because he's serving a life sentence and now it's become a whole constitutional issue and the State President had to be joined to the case.

# Comments



What's the point of the story? The point is that I think maybe these are only tiny glimmers that I get to see in court but maybe there are lots of them and I think that the department, it's not singling out these people, should be commended. Some are just rising above this terrible circumstance in which they find themselves.

So I'm not that gloomy about what the prisons are like or maybe it's the Johannesburg Prison. I actually think it's sometimes a very nice achievement, and I must tell you, the prisoners, they stand there all six of them because now they must be released because they've been denied the right to an appeal because their transcript has been lost.

You say well, yes, Mr Kriegler and what did you do, why are you serving a life sentence? Oh no, it was a bit of handbag stealing and they all lie about what they're doing their life sentence for because nobody wants to say six murders and ten rapes and there's a pathos and a dignity in not wanting to be shamed in front of a whole court. So anyway, it's just kudos to the department sometimes.



**MR SMITH:** Maybe just three points. The first point, I think we must distinguish between sentenced and remand detainees. In terms of the sentenced inmates, I really do think - and I agree with the Judge that DCS is

doing a lot. I mean, there's rehab. There's no overcrowding as such around sentenced prisoners.

The problem is with the remand detainees and I agree with Peter that we are very, very open to being guilty of transgressing people's human rights. You can't have 30 people in a 16-person cell, it's just not on. So with regards to the remand detainees, we really do have a problem in terms of people's human rights.

Somebody spoke about rehab. You know, the difficulty is if you are in remand detention, what rehabilitation could the department offer you considering that you have not been found guilty of anything. The minute you agree to rehabilitation it's almost as if you are saying well I'm guilty of that crime. So remand detention people are just locked up. It's really just a warehouse and it's very inhumane.



The question around Section 49, the criminal justice cluster agreed on a protocol in July that says these are the steps that every role player must be able to play and I think they're busy rolling that out. So I would assume that sooner rather than later Section 49(G) would become practical.

But I do know that this cluster has now agreed on who needs to do what has been agreed at the cluster level. I think it's just a matter of rolling it out in terms of the two years and of course dealing with the backlogs. As I said, I think there's in excess of 2 600 that, as we speak, have been held beyond the two-year period which will have to be dealt with almost immediately. Thank you.



**MS ERFANI-GHADIMI:** The Chair has asked me to comment on the idea of political leadership. We were having this discussion, the Wits Justice team and a visiting PhD candidate, about the role of the people in the State.

My argument was that we are the State and that we are responsible for the people for whom we vote. So I think it comes to that we need to hold everyone accountable to a much higher degree.

**CHAIRPERSON:** Ladies and gentlemen, on behalf of the HSF I'd all like to thank our panellists for coming to talk to us about these issues. There is a great sense of anticipation about what happens next.

I think there is this idea of this panel maybe convening in another forum, talking to the Commissioner of Police, which I think is something I would like to be part of as well. I would like to take the Helen Suzman Foundation into that. One of the great legacies of Helen was that she always said go and see for yourselves, political prisoners especially. I'll bear witness to her going to visit prisoners.

If we can help via the Foundation we would really want to do that, partly because in itself it is a good thing, it's the Catholic background I'm afraid that gets us all, but partially it's also living up to Helen's legacy. Thank you very much for being here tonight. Thank you.

# Awaiting-trial prisoners held in grim conditions

Aug 23, 2012 | Carolyn Raphaely

It's only a matter of time before conditions in our prisons will come before the Constitutional Court, writes Carolyn Raphaely

THE presumption of innocence is a cornerstone of the constitution. So why are awaiting-trial detainees who have not yet been found guilty of any crime forced to suffer living conditions worse than those endured by sentenced offenders?

This conundrum was highlighted by Deputy Chief Justice Dikgang Moseneke, keynote speaker at the University of the Witwatersrand journalism department's annual Ruth First memorial lecture last Friday. "One of my conventional obligations as a judge is to make prison visits," Moseneke said. "Recently, my walkabout in one of our largest prisons in Gauteng revealed frightening overcrowding of awaiting-trial prisoners.

"Three to four people seemed to share a bed meant for one. The authorities suggested to me that the average time to await a final trial is approximately two years, and yet the intake of additional people awaiting trial occurs daily." Clearly, what Moseneke saw gave him pause for thought.

"Whilst the department responsible for correctional centres may be doing its best in trying circumstances, courts must, in collaboration with other institutions concerned with criminal justice, devise effective case-load management that will not honour in the breach the constitutional guarantee to a fair and speedy trial," he said.

The Correctional Services Act provides for an Inspecting Judge of Prisons — currently Judge

Vuka Tshabalala — as well as an apparatus for regular prison visits by employees of the Judicial Inspectorate of Correctional Services. The act also states that every judge in South Africa, and every magistrate in her or his area of jurisdiction, is entitled to visit a prison at any time, and to gain access to any part of the prison. This privilege appears to be more honoured in the breach than the observance. However, in recent years an initiative driven by Constitutional Court judge Edwin Cameron has reinvigorated a system of regular prison visits by judges utilising what Cameron has described as an "extraordinary statutory window into our prison systems that the act affords".

At a Wits Justice Project talk show at the Constitution Hill Women's Prison earlier this year, Cameron said that since the system was initiated in 2010, Constitutional Court judges had visited at least 37 prisons.

Cameron has personally visited seven or eight, an experience he described as extraordinary, unsettling and very troubling, especially the overcrowding.

In the bad old days, Helen Suzman was one of very few — if not the only — MPs to take an interest in prison conditions and to take advantage of parliamentary privilege, which afforded her visitation rights to Robben Island. Suzman's visits led to significant improvement in detainee conditions.

Today, legal practitioners like Guy Hoffman SC articulate what could be the prevalent position of the legal fraternity: "The function of a presiding officer is to impose an appropriate penalty. It is not the presiding officer's role to take into account that prison conditions are not

ideal. That function is for the Department of Correctional Services, which runs the prisons, and for the Inspecting Judge of Prisons."

Yet if judges and magistrates fully understood the effect on inmates' lives of repeated postponements or the implications of, say, unreasonable delays resulting from lost transcripts, the granting of unaffordable bail or shoddy police investigation, they might consider the human rights implications of their decisions. Not to mention the implications of subjecting awaiting-trial detainees to conditions that do not comply with the Correctional Services Act or the Criminal Procedure Act, and which may violate constitutional provisions regarding conditions of detention consistent with human dignity.

The Department of Correctional Services estimates overcrowding in South Africa's 241 correctional centres at 137%, with 18 correctional centres more than 200% overcrowded last year. At end-March this year, 49,467 of South Africa's 162,162 prison inmates were remand detainees living in conditions best described as inhumane.

Here trespassers, petty thieves and people not yet found guilty of any crime are forced to share beds with serial killers, rapists and robbers. This means that even if they are acquitted, there's a good likelihood they will emerge criminalised.

Vincent Smith, the chairman of the parliamentary portfolio committee on correctional services, points out that remand detainee overcrowding is worsened by the fact that police success is measured by the number of arrests made, not the number of convictions secured.

Ironically, South Africa's daunting crime problem will never be solved until prison conditions improve. The reality is that prison walls are porous. What happens in Sun City (that is, Johannesburg Prison) does not stay in Sun City. Rather, what happens in Sun City, happens in Soweto and Joburg.

At a Helen Suzman Foundation colloquium on remand detention last week, Smith noted that 25,000-30,000 awaiting-trial inmates are detained and released every month. This high inmate churn predictably results in difficulty implementing rehabilitation programmes. Equally problematic is the fact that offering rehabilitation to theoretically innocent inmates implies that they require rehabilitation.

While politicians talk, in Sun City's Medium A, for example, up to 90 awaiting-trial detainees are locked up in cells designed for a maximum of 38.

"It's not hard to surmise," Cameron said, "that it's only a matter of time before conditions in our prisons — especially the absence of rehabilitation, long lock-up times and overcrowding in the awaiting-trial sections — will come before our courts and eventually the Constitutional Court".

In the meantime, judges and magistrates nationwide should follow in Moseneke, Cameron and Suzman's footsteps and avail themselves of the opportunity afforded by the law to see the grim reality for themselves.

• *Raphaely is a member of the Wits Justice Project, which investigates alleged miscarriages of justice.*

**SUPPORT LIBERAL DEMOCRACY**

Dear Reader,

As a member of the Helen Suzman Foundation's mailing list, you currently receive all publications and invitations to Roundtable discussions and symposia.

I invite you to become a Friend of the Foundation. The subscription is R1000, which is excellent value for a tax deductible donation.

Your help will enable us to continue the vital work of the Foundation in supporting liberal constitutional democracy.

Payment can be made by EFT or cheque, and email (or fax) your personal details to [kate@hsf.org.za](mailto:kate@hsf.org.za) (011 482 2872).

To those of our readers who have already contributed, thank you for your continued support.

Our banking details are:  
Helen Suzman Foundation  
Nedbank Branch code: 195 805  
Account Number : 1958 496006  
Swift Code: NEDSZAJJ

With kind regards



**Francis Antonie**  
**Director**  
Helen Suzman Foundation

**PERSONAL DETAILS Required**

Name .....

Email address..... Contact Number.....

Postal address.....

.....



justice  
dignity  
public service  
knowledge  
dedication  
courage  
knowledge  
accountability  
justice  
honesty  
impartial  
freedom  
knowledge  
dignity  
public service  
dedication  
impartial

[helen.suzman.foundation](http://helen.suzman.foundation)  
promoting liberal constitutional democracy