

Judging the Holy Cow: Examining the Role of Implicit Bias in Judicial Rulings – An Analysis of the Decision in *Mbena v Minister of Justice and Correctional Services* 2015 4 All SA 361 (ECP)

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Abstract

This contribution is an investigation into the role of implicit (as opposed to explicit) biases in judicial rulings by examining the judgment of Chetty J in *Mbena v Minister of Justice and Correctional Services* 2015 4 All SA 361 (ECP). Implicit bias refers to prejudice on a visceral level, namely unconscious bias, of which the bearer, to wit the judicial officer, is unaware. I suggest that exploring implicit bias in judicial rulings in the context of South Africa's harsh stigmatising shaming culture driven by incarceration as its dominant sentencing regime, will introduce a valuable window in identifying, as well as possibly illuminating and eliminating, unjustified and harmful biases. In this contribution I specifically focus on the generalised bias against ex-offenders in South Africa's harsh stigmatising shaming culture (which I distinguish from integrative shaming cultures found in Japan, China and many African societies) which attitude perpetuates the marginalisation, stigmatisation and discrimination of offenders which exceed their court-sanctioned punishment. I attempt to outline the reasons as to why the isolation and elimination of social biases of this nature are important since, in the view of many criminologists but particularly John Braithwaite, stigma is counter-productive and criminogenic as it leads to enhanced recidivism rates. To this end, I analyse the salient features of the case within a broad social context (including a consideration of phenomena such as the prison-industrial complex on South African soil) which exceeds a narrow legal framework. My roadmap for the paper encompasses a consideration of the salient, albeit disputed, facts of the case with a view towards an alternative, if plausible reading based on the probabilities of the two sets of conflicting facts presented by the opposing parties. I highlight the significance of the judgment before recommendations for improved public policy formulation are proffered.

Keywords

Implicit bias; judicial rulings; stigmatising shaming culture; harmful social biases; illuminating and eliminating; ex-offenders; plausible reading; recommendations for improved public policy formulation.

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1 Introduction

It is a commonplace in the literature that prisoners have a profound sense of justice and fair play.

Roy King¹

One of the benefits of being aware of the potential impact of implicit social biases is that you can take a more active role in overcoming social stereotypes, discrimination, and prejudice.

Kendra Cherry²

The above extracts from Roy King, a seasoned prison researcher, and Kendra Cherry, are relevant to this discussion since King's quotation shows that a different reality is possible from that imbibed by the judgment of Chetty J in *Mbena v Minister of Justice and Correctional Services*³ and the quotation of Cherry's indicates the reasons as to why this contribution is important to this discussion, namely that highlighting these harmful unconscious social biases in judicial rulings paves the way to both their illumination and their ultimate elimination.

Against this brief induction to this contribution, note that in his contempt of court trial for refusing to testify before the Zondo Commission of Inquiry into State Capture, former president Jacob Zuma is on record for repeatedly complaining that the judges on the Constitutional Court bench were biased against him. More credibly, the liberation icon Nelson Mandela⁴ describes in his impressive autobiography, *Long Walk to Freedom*, how hanging judges dispensed justice during the heyday of apartheid – if you had a so-called hanging judge (as the presiding officers of this bend were known) on the bench and the accused is up for a capital crime, a careful course had to be charted to avoid an almost certain execution. In the same vein, Barend van Niekerk⁵ argued persuasively that judges on the bench during high apartheid had an explicit bias against black accused in capital sentencing cases, i.e. those in which the death penalty may have been imposed. In the late 1970s and early 1980s, this same maverick Professor Van Niekerk was affiliated with the then University of Natal (now the University of KwaZulu-Natal) in Durban, holding a chair in Law.

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1 King "Effects of Supermax Custody" 131.

2 Cherry 2020 <https://www.verywellmind.com/implicit-bias-overview-4178401>.

3 *Mbena v Minister of Justice and Correctional Services* 2015 4 All SA 361 (ECP). (hereafter, *Mbena*).

4 Mandela *Long Walk to Freedom*.

5 Van Niekerk 1977 *The Bulletin*.

But this disturbing phenomenon of explicit biases in judicial rulings is not restricted to the South African legal scene. In the context of US constitutional politics, Morgan Marietta⁶ argues that:

[a] clear trend on the current [US Supreme] court is toward greater protection of religious liberty [...] In each of these three major cases [guns, abortion and religion], a now conservative-dominated court – especially after the death of Justice Ruth Bader Ginsburg, who was replaced by Amy Coney Barrett – may move American constitutional law in a new direction.

It is these pieces of reminiscence that come to mind when one peruses and critically considers the judgment of Chetty J in *Mbena*. It is not, however, my intention in this contribution to examine explicit bias, but rather implied bias, as biases of this nature are more often than not overlooked and hence remain unexamined. In what follows, I will carefully dissect this judgement in an attempt to demonstrate the reasons why I consider this judicial artifact to be a good example of (implicit) judicial bias on a visceral level, namely unconscious bias. This form of executive-mindedness is cast in an unconvincing, albeit uncompromising, binary vision. When the scope is widened to incorporate multiple perspectives, the complexity of what happened emerges. Van Niekerk⁷ refers to this phenomenon as the "entire web of complex issues".

Regarding implicit bias (although he does not employ the term), Van Niekerk⁸ has this to say:

The judge will no doubt personally be the most reasonable man imaginable, punctilious to a fault about procedural niceties, a gentle and genteel man to behold and to hear, and yet he will carry on his back, like a pack mule in the Andes, the heavy burden of his own typical upbringing and of the values of the society to which he belongs. This may not look like racism of the kind described above, but the effect upon our man in the dock Will be mighty similar.

In this regard, I am reminded of the poet Audre Lorde⁹ who considered writing a political act as being the way "we predicate our hopes and dreams toward survival and change". Similarly, in chess training for youngsters, it is often stressed that once you become aware of patterns of play on the board (notably in combinational play and especially the endgame), the player would be sensitised to consider such patterns in all aspects of play with a marked improvement in her/his level of play. By the same token, I suggest that exploring implicit bias in judicial rulings in the context of this country's harsh stigmatising shaming culture driven by incarceration as our dominant

⁶ Marietta 2021 <https://theconversation.com/us-supreme-court-gets-set-to-address-abortion-guns-and-religion-168720>.

⁷ Van Niekerk 1977 *The Bulletin* 285.

⁸ Van Niekerk 1977 *The Bulletin* 283.

⁹ Quoted in Mirk 2016 <https://www.bitchmedia.org/article/audre-lorde-thought-self-care-act-political-warfare>.

sentencing regime,¹⁰ will introduce a valuable window in identifying, as well as possibly illuminating and eliminating, unjustified and harmful biases.

In part, my argument also rests on how the unacknowledged impact of South Africa's harsh stigmatising shaming culture which created the ideal conditions or context for this lamentable travesty of justice, namely, perpetuating marginalisation, stigmatisation and discrimination on offenders which exceed their court-sanctioned punishment. Across the shaming spectrum globally, stigma would inhabit one extreme of this continuum while integrative shaming would occupy the other extreme.¹¹ In the former shaming practice, offenders are stigmatised, marginalised and discriminated against in ways which drive them away from mainstream culture into the arms of criminal subcultures, making resettlement nothing but a pipedream. In the latter practice, everything possible is done to resettle and reintegrate ex-offenders back into her or his community (by the provision of suitable employment and post-release accommodation). John Braithwaite,¹² one of the most cited criminologists in the West, argues that whereas stigma is counter-productive and in fact criminogenic, integrative shaming is an effective tool in crime prevention since it is employed "as a tool to allure and inveigle the citizen to attend to the moral claims of the criminal law, to coax and caress compliance, to reason and remonstrate with him over the harmfulness of his conduct".¹³ In this respect, it is worth noting that ex-prisoners are known to internalise their own inferiority and the burning shame of stigma. Goffman¹⁴ comments that:

the standards he [the stigmatized person] has incorporated from the wider society equip him [or her] to be intimately alive to what others see as his failing, inevitably causing him, if only for moments, to agree that he does indeed fall short of what he really ought to be. Shame becomes a central possibility, arising from the individual's perception of one of his own attributes as being a defiling thing to possess, and one he can readily see himself [or herself] as not possessing.

Ex-prisoners' personal autonomy suffer under conditions of the debilitating impact of the internalisation of stigma, a process known as "self-stigma", and the resultant shame.¹⁵ Alexander¹⁶ contends that ex-offenders and their families feel "intense shame ... despite the lack of obvious alternatives" to a criminal career path.¹⁷ Jones-Young and Powell¹⁸ report that ex-offenders

¹⁰ Christie *Crime Control as Industry*; Lötter *Reintegration of Ex-Offenders* 26-36, 44-46; Lötter 2020 *KOERS*; Lötter 2020 *Phronimon*; Lötter 2020 *Acta Academica*.

¹¹ Braithwaite "Inequality and Republican Criminology" 277-305.

¹² Braithwaite *Crime, Shame and Reintegration* 20, 100.

¹³ Braithwaite *Crime, Shame and Reintegration* 9.

¹⁴ Goffman *Stigma* 18.

¹⁵ Lötter *Reintegration of Ex-Offenders* 158.

¹⁶ Alexander *New Jim Crow* 165.

¹⁷ And see Howerton *et al* 2009 *Journal of Offender Rehabilitation*.

¹⁸ Jones-Young and Powell 2015 *Human Resource Management Review*.

are a "highly stigmatized population", a finding which finds agreement in Nagel's¹⁹ remark that offenders and released ex-offenders are "some of society's most marginalized people". These observations should be seen within the wider context of the Department of Correctional Services' (DCS) general standing as a government institution which has inspired very little confidence in its ability to deliver on its mandate.²⁰ In conclusion, I suggest several recommendations for improved policy formulation, although I also am skeptical that this would be taken up seriously by DCS or public policy formulators.²¹

My roadmap for the contribution is as follows: Firstly, the salient, albeit disputed, facts of the case will be investigated with a view towards an alternative, if plausible reading based on the probabilities of the two sets of conflicting facts presented by the opposing parties. Secondly, the law and the encompassing social reality before the decision in *Mbena* will be considered. Thirdly, I delineate features of the ruling itself to be followed, fourthly, by an overview of the significance of the judgment. Recommendations for improved public policy formulation will round off the piece before a conclusion is proffered.

2 The facts

Following the murder of a warden, Babini Nqakula, by an offender at St Albans Maximum Security Prison situated on the outskirts of Port Elizabeth (now Gqeberha), in July 2005, the DCS authorised the intervention of the EST (Emergency Support Team) or the *taakmag* (as it is known colloquially in prison jargon). Ostensibly, the rationale for the intervention was the search for and possible recovery of weapons brandished by the various gangs operating in the prison. On the one hand, in the official version, the Nqakula murder at the time linked to apparent gang activity (at paragraph 10 of Chetty J's judgment). As a result, as the public subsequently learnt, the prison was locked down for days followed by a prolonged and brutal mass assault. On the other hand, the version proffered by the offenders was that the "much-feared"²² *taakmag*'s intervention was nothing but a show of

¹⁹ Nagel 2008 *Journal of Pan African Studies* 68.

²⁰ Marqua-Harries, Stewart and Padayachee 2019 *SA Crime Quarterly*.

²¹ Space does not allow much room to explore this aspect, but I might just refer to the issue of vested interests, among others, in South African corrections, notably the insidious operations of the so-called prison-industrial complex. Lötter 2020 *Phronimon*; Lötter 2020 *Acta Academica*. Christie *Crime Control as Industry 4* refers to the danger embedded in the often-overlooked authoritarian tendency of the crime control industry's inherent growth potential, because crime fighting is seen as "natural" and desirable.

²² Raphaely 2015 <https://www.dailymaverick.co.za/article/2015-03-03-st-albans-prison-torture-a-conspiracy-of-silence/#.VlwQpXYrKUK>.

force or "retributive collective punishment",²³ and in its brutal aftermath, 231 offenders intended to sue DCS.²⁴ Though two sets of facts are covered in the judgment, namely that of the individual offender who killed Nqakula and the mass assault which followed with the intervention of the *taakmag*, my concern in this contribution is with the latter only.

3 The law before the decision in *Mbena*

Before Chetty J's decision in *Mbena*, one could believe in the general application of three pieces of wisdom enshrined in the Constitution. These are section 12(1)(e) (the right to human dignity), section 34 (equal access to our courts) and section 36 (no unjustifiable limitation of rights) of the Constitution.²⁵ These three sections of the South African Constitution are reproduced below for ease of reference and discussion.

Firstly, section 12(1)(e) of the Constitution, provides:

12 Freedom and security of the person

- (1) Everyone has the right to freedom and security of the person, which includes the right- ...
 - (e) *not to be treated or punished in a cruel, inhuman or degrading way.* (Emphasis added.)

Secondly, to these words of received wisdom, I add the following:

34. Access to courts. - Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

Thirdly, the wording of section 36:

Limitation of rights

- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
 - (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and

²³ Raphaely 2015 <https://www.dailymaverick.co.za/article/2015-03-03-st-albans-prison-torture-a-conspiracy-of-silence/#.VlwQpXYrKUK>.

²⁴ Sain 2016 <https://www.iol.co.za/news/south-africa/eastern-cape/prisoners-lose-bid-to-appeal-st-albans-torture-case-2020050>.

²⁵ *Constitution of the Republic of South Africa*, 1996 (the Constitution).

(e) *less restrictive means to achieve the purpose.*²⁶

- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

Apart from these three provisions in the Constitution, Ackerman J elaborated on the (presumed) "human dignity" of offenders. In *S v Dodo*²⁷ at paragraph 38 the learned judge suggests that:

To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end [...] Even in the absence of such features, mere disproportionality between the offence and the period of imprisonment would also tend to treat the offender as a means to an end, thereby denying the offender's humanity.

In the telling words of George Bizos,²⁸ a right "to equality and dignity" is indispensable in any democratic society since in the absence of its provision, people almost "invariably" rebel. I concede, however, as one of my reviewers reminded me, that this statement is not only true for democratic societies but is an absolute and non-alienable right that forms the bedrock of a person's individuality.

To these words by one of South Africa's legal paragons, is added the scholarly weight of the legal views of that of Chaskalson and Kentridge,²⁹ who argue that the restriction on offenders' rights must be carefully scrutinised to ensure that there is sufficient authority for such limitations *and* in addition such limitations must be "*formulated sufficiently narrowly*" so as to protect them from "*overbroad discretionary powers*".³⁰

Finally, in *Goldberg v Minister of Prisons*³¹ it was held as follows:

It seems to me that fundamentally a convicted and sentenced prisoner retains all the basic rights and liberties...of an ordinary citizen except those taken away from him by law, expressly or by implication, or those necessarily inconsistent with the circumstances in which he, as a prisoner, is placed.

The ratio in the *Goldberg*-decision (even though decided in 1979) appears to be in line with more recent amendments to our post-apartheid legislation. According to Section 27 of *Correctional Services Act*,³²

²⁶ Emphasis added.

²⁷ *S v Dodo* 2001 1 SACR 594 (CC).

²⁸ Bizos *Odyssey to Freedom* 433.

²⁹ Chaskalson and Kentridge *Constitutional Law* 28-24.

³⁰ My emphasis.

³¹ *Goldberg v Minister of Prisons* 1979 1 SA 12 (A) 39C-D.

³² *Correctional Services Act* 111 of 1998.

Searches

- (1) The person of a prisoner may be searched by a manual search, or search by technical means, of the clothed body.
- (2) Upon reasonable grounds, the person of a prisoner may be searched in the following ways:
 - (a) A search by visual inspection of the naked body;
 - (b) search by the physical probing of any bodily orifice;
 - (c) a search by taking a body tissue or body excretion sample for analysis;
 - (d) a search by the use of an X-ray machine or technical device, by a qualified technician, if there are reasonable grounds for behaving that a prisoner has swallowed or excreted any object or substance that may be needed as an exhibit in a hearing or may pose a danger to himself or herself or to correctional officials or to the security of the prison; and
 - (e) by detaining a prisoner in a manner prescribed by regulation for the recovery by the normal excretory process of an object that may pose a danger to himself or herself, to any correctional official to any other person or to the security of the prison.
- (3) A search of the person of a prisoner is subject to the following restrictions:
 - (a) *the search must be conducted in a manner which invades the privacy and undermines the dignity of the prisoner as little as possible*,³³
 - (b) a correctional official of the same gender as the prisoner must conduct the search and correctional officials of the other gender must not be present;
 - (c) searches must be conducted in private;
 - (d) searches contemplated in subsections (1) and (2) must be authorised by the Head of Prison but searches in terms of subsection (2)(b), (c), (d) and (e) must be executed or supervised by a registered nurse, medical officer or medical practitioner, depending on the procedure necessary to effect the search.
- (4) A correctional official or person conducting a search in terms of this section may seize anything found.

Summarising this array of impressive judicial and academic authority, the legal position as regards to offenders before *Mbena* could be said to recognise the right of offenders (as with everybody else) to access our courts on an equal footing, as well as the right to personal dignity as entrenched in several legal instruments and judicial pronouncements. These objectives should be secured by a restrictive reading of the circumstances when these rights could be intruded upon. Something which

³³ Emphasis added.

did predate the judgment in *Mbena*, though, is our harsh stigmatising shaming culture which, in the context of the United States, which evinces a similar culture, has been explained by Michelle Alexander as

[t]he disturbing phenomenon of people cycling in and out of prison, trapped by their second-class status, has been described by Loic Wacquant as a "closed circuit of perpetual marginality." Hundreds of thousands of people are released from prison every year, only to find themselves locked out of the mainstream society and economy. Most ultimately return to prison, sometimes for the rest of their lives. Others are released again, only to find themselves in precisely the same circumstances they occupied before, unable to cope with the stigma of the prison label and their permanent pariah status.

Reducing the amount of time people spend behind bars – by eliminating harsh mandatory maximums – will alleviate some of the unnecessary suffering caused by this system, but it will not disturb the closed circuit. Those labeled felons will continue to recycle in and out of prison, subject to perpetual surveillance by the police, and unable to integrate into the mainstream society and economy. Unless the number of people who are labeled felons is dramatically reduced, and unless the laws and policies that keep ex-offenders marginalized from the mainstream society and economy are eliminated, the system will continue to create and maintain an enormous undercaste.³⁴

If I did not know these lines were written specifically for the US theatre, I would think they were particularly applicable to the South African situation. These valuable ideas are tendered mindful of the hypocrisy embedded in what the Oxford historian RW Johnson has called the "sweeping criminalisation of the South African state".³⁵ In the perceptive words of Willem de Haan, "what we need is not a better theory of crime, but a more powerful critique of crime".³⁶ All the same, the protection of "vulnerable communities", as Mary de Haas calls it, is of paramount importance in our conflict-ridden society.³⁷ Clear authority in the Constitution (section 36E: Limitation of rights) and section 27(3)(a) of the *Correctional Services Act* could be found for the proposition that where the rights of offenders are intruded upon, such intrusions must impact the dignity and privacy of the prisoner or offender as little as possible. I argue that the decision in *Mbena* shattered this façade.

³⁴ Alexander *New Jim Crow* 95-96.

³⁵ Johnson *How Long Will South Africa Survive?* 45; Johnson *How Long Will South Africa Survive?* 2nd ed 45. According to a recent poll by Victory Research conducted for Media24 before the local government elections on 1 November 2021, it was found that even under Ramaphosa's leadership, most South Africans still consider the ruling party as being thoroughly corrupt. Gerber 2021 <https://www.news24.com/news24/southafrica/news/anc-voters-associate-the-party-with-corruption-but-still-trust-it-media24-poll-finds-20211025>.

³⁶ De Haan "Abolitionism and Crime Control" 208.

³⁷ De Haas 2021 <https://www.msn.com/en-za/news/editorpicks/cele-calling-the-shots-is-dangerous-for-the-country/ar-AAPCrkq?ocid=msedgntp>.

4 The decision in *Mbena*

Commentary on legal decisions in English-speaking jurisdictions are generally concerned with whether or not the court's decision (known as the *ratio decidendi*) can be justified in view of the common law tradition of the hegemony of precedent. In this contribution, however, I deviate from that time-honoured tradition to consider, instead, the idea of implicit bias (against offenders as a class) in the judgement. I argue that decisions such as *Mbena* should be understood within the context of South Africa's harsh stigmatising shaming culture and an analysis of this decision reveals a level of executive-mindedness cast as binary thinking (black/white; good/evil) which belies the dignity and integrity of judicial decision-making – which reasonable South Africans have come to expect in the post-apartheid era. I contend that if any socially unjustified implicit bias (in terms of prejudice against, as well as the discrimination and marginalisation of an identifiable group)³⁸ can indeed be demonstrated, this would be a worthwhile exercise justified by the fact that previous findings have shown that an awareness of such biases is a first crucial step on the path to elimination.³⁹ As such, I suggest that this contribution should be seen as a constructive effort in the debate on whether the courts have a political role to play in shaping policy.⁴⁰

5 Significance

In considering and pronouncing on the significance of Chetty's J's judgment in *Mbena*, I will accept for the sake of argument the learned judge's view that the issue which stood to be decided turned on "a balance of probabilities" which (granted) was perambulated by the truthfulness and reliability of the plaintiffs' testimony. In deciding the issue of the balance of probabilities, one needs to also consider the opposing party's (DCS's)

³⁸ Geiger 2006 *CLR* 1197.

³⁹ Cherry 2020 <https://www.verywellmind.com/implicit-bias-overview-4178401>.

⁴⁰ Ayer 2021 https://www.nytimes.com/2021/10/04/opinion/supreme-court-conservatives.html?algo=clicks_decay_96&block=5&campaign_id=142&emc=edit_fory_20211005&fallback=false&imp_id=100967217&instance_id=4; Bizon Odyssey to Freedom; Bouie 2021 <https://www.nytimes.com/2021/07/23/opinion/supreme-court-commission-court-packing.html?action=click&module=RelatedLinks&pgtype=Article>; Corder *Judges at Work*; Greenhouse 2021 <https://www.nytimes.com/2021/09/09/opinion/abortion-supreme-court-religion.html?action=click&module=RelatedLinks&pgtype=Article>; Marietta 2021 <https://theconversation.com/us-supreme-court-gets-set-to-address-abortion-guns-and-religion-168720>; Orentlicher 2020 <https://theconversation.com/ruth-bader-ginsburg-helped-shape-the-modern-era-of-womens-rights-even-before-she-went-on-the-supreme-court-95705>; Van Niekerk 1977 *The Bulletin*; Vladeck 2021 <https://www.nytimes.com/2021/04/15/opinion/supreme-court-religion-orders.html?action=click&module=RelatedLinks&pgtype>; Weiner 2017 <https://www.nytimes.com/2017/11/11/opinion/sunday/the-power-of-the-courts-is-messing-up-politics.html?action=click&module=RelatedLinks&pgtype>; Weiler "Epilogue: Judging the Judges".

version to tease out those probabilities vis-a-vis that of the offenders', since, in my view, the version proffered by the offenders were eminently feasible while that of DCS was even more likely to be a trumped-up one. This includes credible allegations of punitive solitary confinement, as intimidation tactics against the plaintiffs, by the DCS.⁴¹ In this respect, Chetty J accepted the DCS's version that the only possible cause of action was violence.⁴² Upon counsel for the offenders' cross-examination of Banzana, one of the *taakmag*'s commanders, whether or not an alternative course of action (such as teargas or the threat thereof for the small remaining group of offenders that allegedly refused to leave the cell) could not be followed,⁴³ the learned judge accepted the version tendered by the aforesaid Banzana⁴⁴ that no other option was available, as "eminently reasonable". Two pieces of evidence, however, contradict Chetty's ruling on this point.

Firstly, Megarry J in *John v Rees*⁴⁵ held:

As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.

This decision and especially its *ratio decidendi* was cited with approval in *Minister of Justice and Correctional Services v Walus*⁴⁶ by the Supreme Court of Appeal.⁴⁷ By the same token, I argue that unless the threat or use of teargas as a warning, was executed even in a moderate amount, we cannot know *ex post facto* whether or not it would have led to a different result. This distinction is important since the former was bound to lead to a lesser invasion than outright assault. In *Walus*⁴⁸ the Supreme Court of Appeal formulated the test for procedural fairness in the following terms: "If the process leading to the bid's success was compromised, it cannot be known with certainty what course the process might have taken had procedural requirements been properly observed". Said in another way, if the threat of teargas was not used or the execution of a moderate amount into the cell was not executed, there is no way of knowing if that would have

⁴¹ Raphaely 2014 <https://www.dailymaverick.co.za/article/2014-06-17-st-albans-theses-of-torture-and-intimidation-continue/>.

⁴² *Mbena* paras 36.1 and 36.2.

⁴³ *Mbena* para 44.

⁴⁴ *Mbena* para 46.

⁴⁵ *John v Rees* [1970] Ch 345; [1969] 2 All ER 274 (CH) 402.

⁴⁶ *Minister of Justice and Correctional Services v Walus* 2017 4 All SA 1 (SCA).

⁴⁷ Coram: Maya P, Shongwe ADP, Mbha and Van Der Merwe JJA and Schippers AJA in *Minister of Justice and Correctional Services v Walus* 2017 4 All SA 1 (SCA) 20.

⁴⁸ *Minister of Justice and Correctional Services v Walus* 2017 4 All SA 1 (SCA) para 14.

led to a different outcome. Hence, the process of procedural fairness was compromised and the resultant assault unlawful.

In the same judgment, the Supreme Court of Appeal also held that:

[14] The relevant test is trite [10] and was recently reiterated in *AllPay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Security Agency & others*.^[11] There the court, dealing with questions of procedural fairness and lawfulness in a procurement matter, said:

'To the extent that the judgment of the Supreme Court of Appeal may be interpreted as suggesting that the public interest in procurement matters requires greater caution in finding that grounds for judicial review exist in a given matter, that misapprehension must be dispelled. So too the notion that, even if proven irregularities exist, the inevitability of a certain outcome is a factor that should be considered in determining the validity of administrative action.'

*This approach to irregularities seems detrimental to important aspects of the procurement process. First, it undermines the role procedural requirements play in ensuring even treatment of all bidders. Second, it overlooks that the purpose of a fair process is to ensure the best outcome; the two cannot be severed.*⁴⁹ On the approach of the Supreme Court of Appeal, procedural requirements are not considered on their own merits but instead through the lens of the final outcome. This conflates the different and separate questions of unlawfulness and remedy. If the process leading to the bid's success was compromised, it cannot be known with certainty what course the process might have taken had procedural requirements been properly observed.

Once a ground of review under PAJA has been established there is no room for shying away from it. Section 172(1)(a) of the Constitution requires the decision to be declared unlawful. The consequences of the declaration of unlawfulness must then be dealt with in a just and equitable order under s 172(1)(b). Section 8 of PAJA gives detailed legislative content to the Constitution's "just and equitable" remedy.'

[15] Our courts have, under common law, also been under caution to guard against the possible blurring of the distinction between procedure and merit for the same reason, articulated as follows:

'Procedural objections are often raised by unmeritorious parties. Judges may then be tempted to refuse relief on the ground that a fair hearing could have made no difference to the result. But in principle it is vital that the procedure and the merits should be kept strictly apart, since otherwise the merits may be prejudged unfairly.' [12]

[16] Summed up, the principles are the following. The inevitability of a certain outcome is not a factor to be considered in determining the validity of the decision. Therefore, neither party may argue that the consideration of the victim impact statement by the minister would make no difference. The proper approach is rather to establish, factually, and not through the lens of the final outcome, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA. In this exercise the materiality of any deviance from the legal requirements must be taken into account, where appropriate, by linking the

⁴⁹ Emphasis added.

question of compliance to the purpose of the provision before concluding that a review ground under PAJA has been established. So, if the process leading to the decision was compromised, it cannot be known with certainty what the administrator would have finally decided had the procedural requirements been properly observed.

Further on in its judgement, the court also held that:

[23] The duty of an appellate court is to ascertain whether the court a quo came to a correct conclusion on the case before it.[16] Its role is generally limited to deciding issues that are raised in the appeal proceedings and it may not, on its own, raise issues which were not raised by the appellant. However, where a point of law is apparent on the papers (even where it has been expressly abandoned) but the common approach of the parties proceeds on a wrong perception of the law, and its consideration on appeal would involve no unfairness to the party against whom it is directed, the court is not only entitled, but is also obliged, *mero motu*, to raise the point of law and require the parties to deal therewith.[17] Otherwise it would be bound to make a decision that is premised on an incorrect application of the law, despite the accepted facts, merely because a party failed to raise the legal point, as a result of an error of law on his part.[18] That would infringe the principle of legality.[19]

These observations by our highest court bar constitutional issues, tie in well with the perceptive words of the late Barend van Niekerk,⁵⁰ namely that during High Apartheid, capital punishment was biased against black people and the wider implications thereof.

This position relates to the argument proffered by Geiger⁵¹ that the marginalised position of ex-offenders has given them "suspect status". The judge, coming as he does from a privileged background, will invariably be of a dominant (executive-minded) discourse-mindset. Van Niekerk⁵² puts his finger on a grave criticism of our criminal justice system (one which after the lapse of all these years and the ushering in of a new paradigm of non-racial humanitarianism, has still not been appreciably remedied): "The mental condition, the social background of the accused, the inherently and institutionally deprived youth and background of the average accused are seldom canvassed and therefore seldom considered or heeded". This thinking ties in well with that of Marqua-Harries, Stewart and Padayachee⁵³ that the developmental trajectory of many offenders is informed by neglect, abuse and/or trauma and as these vicissitudes shape the background and context of crime in South Africa, awareness of these parameters should and must inform the punishment (assuming this to be the correct "treatment regime") meted out to these offenders, especially youth offenders.

⁵⁰ Van Niekerk 1977 *The Bulletin* 277.

⁵¹ Geiger 2006 *CLR*.

⁵² Van Niekerk 1977 *The Bulletin* 281.

⁵³ Marqua-Harries, Stewart and Padayachee 2019 *SA Crime Quarterly*.

Apart from the impaired developmental trajectory which most offenders invariably exhibit, the learned judge's unequivocal rejection⁵⁴ of the plaintiffs' version as an inability to attach any

credence whatsoever to their testimony. They were both untruthful witnesses, the blatancy of their prevarications being seriously exposed under cross-examination. Their evidence was moreover directly in conflict with that of Mr Adriaan van Heerden ("Boela") and Mr Joseph Peter Bain ("Bain"), both warders at the medium B facility at St Albans. Their cross-examination by Mr Dyke was characterised by the innuendo that by virtue of their employment with the defendant, they were party to a cover-up of the mass assault. *The insinuation is devoid of any merit and I accept their evidence unreservedly.*⁵⁵

I am constrained to ask why it is that an organization such as DCS, with sufficiently more resources than the plaintiffs, were less likely that the offenders (the plaintiffs) to be party to a cover-up. The former was under their (DCS's) constant care and surveillance and could be separated from each other at a drop of a hat and banished to one of several hundred facilities nationwide. Let us also not shy away from comparing apples with apples and oranges with oranges. Even if we accept the version of DCS that "Mbena was *not* on a frolic of his own"⁵⁶ (emphasis added) when he killed Nqakula, but under contract by one the gangs operating in prison, why is it that Chetty J accepted DCS's version so readily / unreservedly? Did DCS not also have something to lose if they lost the case, quite apart from their reputation? This having been said, Mbena's version that he killed Nqakula because the latter told tales of bad behaviour to his (Mbena's) mother which resulted in her terminating further visits, is feasible. In this respect, the wise words of Catherine Heard⁵⁷ are worth bearing in mind, namely "the critical role that family contact plays in keeping prisons stable". Threatening this lifeline, as Nqakula did, was bound to have serious consequences and noting its potential impact, only adds value to the counter-narrative. DCS's narrative that Nqakula's murder is the result of a wider gang activity when the former is infinitely more able to shape, pad and direct their own narrative, is clearly even more likely to be fabricated. To this end, Major General Veary's expert testimony⁵⁸ on the "origin, history, structure, internal processes and operations of prison gangs within the South African penal system" is, with the greatest respect, nothing but circumstantial weighed against Mbena's version that he acted on his own initiative and motive. On this point, it is perhaps significant to note that gangs originated in South African prisons during high apartheid as a direct result of push-back against harsh neo-colonial style repressive conditions⁵⁹ – conditions which,

⁵⁴ Mbena 370-20e.

⁵⁵ My emphasis.

⁵⁶ Mbena 367-13e.

⁵⁷ Heard 2020 *Victims and Offenders* n12.

⁵⁸ Mbena 367-20d-e.

⁵⁹ Steinberg *The Number*.

curiously, did not seem to have evolved much since then, as the disputed facts in *Mbena* demonstrates.

Why would 231 offenders elect to conspire to sue – and in fact did sue – the DCS, if their version of an unjustified mass assault carried on over a number of days during a complete lock-down and media black-out of the maximum section of the prison, does not contain some truth?⁶⁰ This includes allegations of punitive solitary confinement by DCS as intimidation tactics against the plaintiffs.⁶¹ The learned judge records the so-called "discredited" version, namely that:

Their evidence that the floor and walls of the corridors in Maximum, B and D sections, constituted a melange of human excrement, bodily fluids, blood, human tissue and an agglomeration of prison issue and civilian clothing was tendered as antecedent corroboration for Siko's anticipatory testimony that he and the inmates of B and D sections had had their clothes forcibly ripped and baton beaten off their bodies and been forced to lay [sic] naked in the corridors where they were brutally assaulted by members of the EST.⁶²

An impartial observer would have expected a more nuanced assessment of the two exclusionary versions tendered.⁶³ I pause to ponder the question of whether the learned judge's *modus operandi* is indeed the way to do a restrictive reading with a view to protecting the integrity of the least invasive avenue, as demanded by the legislative instruments quoted at length above. Apart from Roy King's⁶⁴ suggestion, an expert on supermax custody, proffered at the opening of this paper, that "[i]t is a commonplace in the literature that prisoners have a profound sense of justice and fair play", I must also respectfully raise the possibility that the judge was simply executive-minded. Consider Van Niekerk's⁶⁵ remark on the broad support for the death penalty among black people in South Africa during High

⁶⁰ Sain 2016 <https://www.iol.co.za/news/south-africa/eastern-cape/prisoners-lose-bid-to-appeal-st-albans-torture-case-2020050>; Raphaely 2015 <https://www.dailymaverick.co.za/article/2015-03-03-st-albans-prison-torture-a-conspiracy-of-silence/#.VlwQpXYrKUK>; Raphaely 2015 <https://www.dailymaverick.co.za/article/2015-02-16-bringing-back-accountability-how-prison-torture-underlines-sas-crisis-of-l>;

⁶¹ Raphaely 2014 <https://www.dailymaverick.co.za/article/2014-06-17-st-albans-ales-of-torture-and-intimidation-continue/>.

⁶² *Mbena* 370 para 20d of the judgment.

⁶³ Referring to Nigeria's official version of the trans-Atlantic slave trade, as opposed to the immense value of a more nuanced narrative, Sayer 2021 https://theconversation.com/nigerian-museums-must-tell-stories-of-slavery-with-more-complexity-and-nuance-169785?utm_medium=email&utm_campaign=The%20Weekend%20Conversation%20-%201007207 frames it in the context of "deliberate erasure [which] has deep roots in imperialist and eurocentric agendas". Duckworth *Grit* 137 makes the case for nuance even stronger by arguing that the expert is attuned to nuance rather than novelty.

⁶⁴ King "Effects of Supermax Custody" 131.

⁶⁵ Van Niekerk 1977 *The Bulletin* 279.

Apartheid, "[a]s victims of the highest crime rate of violence in the world in their own ghettos, these people have very little stomach for what they regard as the molly-coddling of violent criminals". By analogy, a judge, or any other judicial officer in South Africa's violent, crime-ridden and conflicted society,⁶⁶ could not but be influenced, even if only on a visceral level, by bias against these perpetrators.

This refers specifically to the credibility of the members of this class as plaintiffs, and is concerned especially with a complaint against "legitimate" authority (DCS) executing a legitimate mandate under trying conditions. I argue that even though they were prisoners with no unblemished records, the fact of the matter is that even as flawed individuals they may well have had a legitimate complaint and even if the defendant, as was the case in *Mbena*, was a government department, unless special protections are built into the process to ensure procedural fairness, the principle of equal access to the courts and the promise of the sanctity of human dignity will remain empty. With the odds stacked against them in terms of resources and organisational capacity as well as the playing fields uneven with the public perception of them as a "suspect class",⁶⁷ what is to become of the promises of fair treatment as entrenched in section 36(1)(e) of the Constitution and section 27(3)(a) of the *Correctional Services Act*?⁶⁸ South Africa's harsh stigmatising shaming practice will clearly impact the environment in which judges and other judicial officers work and consider the outcomes of their decisions.

This issue is not just of academic importance, but very much ties into the issue of decreasing public safety and our unsustainable rates of recidivism, by some accounts as high as 86-94%.⁶⁹ Bizo's notion ties in well with the idea of basic human needs in conflict management. From a conflict management perspective, it is generally understood that the use of force, especially the use of violence, is not an effective source of control. John Burton,⁷⁰ working from his basic human-needs perspective has made the point most tellingly as follows:

Deterrence does not deter sane behaviours, and the power political frame was unrealistic because no account was taken of relevant human factors: there are ontological, inherent human needs that cannot be suppressed, (needs of

⁶⁶ Harris "Xenophobia"; Kriegler 2018 <https://theconversation.com/south-africa-wont-become-less-violent-until-it-is-more-equal-103116>; Institute for Economics and Peace 2018 <https://www.economicsandpeace.org/report/global-peace-index-2018-report/>.

⁶⁷ Geiger 2006 *CLR*.

⁶⁸ *Correctional Services Act* 111 of 1998.

⁶⁹ Cronje *Comparative Analysis of Recidivism* 23; Murhula and Singh 2019 *African Journal of Criminology and Justice Studies*; Pierce and Kiewit 2020 <http://www.702.co.za/podcasts/269/tonight-with-lester-kiewit/279121/nicro-the-high-rate-of-offender-recidivism>.

⁷⁰ Burton 2001 *International Journal of Peace Studies*.

identity and recognition that are the bases of relatedness), which make deterrence sometimes irrelevant at all societal levels. The only option, in politically realistic terms, was to resolve the social and behavioural problems that led to specific conflicts, and not try merely to suppress them or to settle them by coercion.

I am of the respectful opinion that when DCS decided to send in the *taakmag* after the killing of Nqakula, it was a knee-jerk reaction with the specific intention of settling the score with violence and coercion, a course which Burton counsels against, though in another context, and certainly DCS did not do so with a view to grasp what had led to the murder of one of its own. I feel justified in advancing this viewpoint since this course of action seems to be the only idea that makes sense in the light of the circumstances which transpired. I argue, for example, that a conflict management approach would have prevented the volume of violence that occurred. Clearly, the conflict management tool of resolving "the social and behavioural problems that led to specific conflicts" (namely the tendency of wardens to cause conflict between the inmate and his family members), was furthest from DCS's mind.

Galtung⁷¹ elaborated on the difference between direct violence, structural (violence locked into a toxic institutional environment, such as the prison) and cultural violence (such as an environment where patterns of violence are culturally justified, for example violence against women in a patriarchal set-up). I contend that in the *Mbena* case all three forms of violence came together as one to harness a perfect storm. The harsh stigmatising shaming culture legitimated the direct violence perpetuated on the offenders in an institutional environment that reveres violence as the knee-jerk answer to violence. But this deplorable managerial culture of attempting to solve violence with violence – since the evidence is that it is not working – is not limited to corrections in post-apartheid South Africa. In the context of the stigmatising shaming culture found in the US, Uggen, Manza and Behrens note that their respondents' express anger, resentment and frustration at their post-release treatment and their findings illustrate the loss of the tremendous potential of integration for desistence and rehabilitation.

The bitterness underlying these comments shows the flip side of the power of community reintegration: when stigma and rejection are the dominant experience, the potentially restorative benefits of civic participation are lost.⁷²

But these observations also apply with equal force to the situation in South Africa. As far as ill-treatment and harm to (their) human dignity go, Irwin and Owen⁷³ remark that the "most persistent and insidious degradation is the hostility and contempt directed" at prisoners by officials, specifically prison staff and also medical personnel who view complaints with suspicion and

⁷¹ Galtung 1969 *Journal of Peace Research*; Galtung 1990 *Journal of Peace Research*.

⁷² Uggen, Manza and Behrens "Less than the Average Citizen" 277.

⁷³ Irwin and Owen "Harm and the Contemporary Prison" 108.

treat prisoners like trash. The outcome of these degradation rituals is not difficult to fathom. Irwin and Owen comment:

Treating prisoners with contempt and hostility and persistently and systematically casting them as ill-worthy, harms prisoners in complicated and somewhat unexpected ways. Many are psychologically scarred. More reject their rejecters, turn away from conventional society and embrace an outsider, usually a criminal, viewpoint.⁷⁴

As Irwin notes, offenders and ex-offenders are but flawed people⁷⁵ and, as the Russian novelist Dostoyevsky observed more than a hundred and fifty years ago, merely regular people with dreams, fears and hopes.⁷⁶ The prison dynamic also relates to the issue of the continued shadow or influence of apartheid in 21st century South Africa in the form of the ongoing project of the prison in a post-colonial context.⁷⁷ These scholars (Mboti; Davis and Dent) argue with some justification that the prison in a post-colonial or post-slavery context, such as the case in South Africa, is a project which continues the seminal apartheid notion of "us versus them"-mindset, the apartheid government's (and that of countless colonial administrations throughout Africa's colonial period) tried and tested method of divide and rule. The well-known Malcolm X, leader of the militant Black Panthers in the United States before his assassination by henchmen acting for the Nation of Islam, is on record as saying that second-class citizenship is nothing if not twentieth century slavery. This having been said, the link between incarceration and slavery is well established.⁷⁸ I accordingly move to propose a few recommendations for possible improved public policy formulation.

6 Recommendations

The following seven (7) recommendations are made or suggested:

- a) Model offenders about to be released should, at far as possible, be offered employment opportunities within DCS, as this initiative is likely to positively impact on violence and enhance constructive mutual understanding between wardens and offenders behind bars.⁷⁹ This idea has been employed with significant success in the Peoples' Republic of China (PRC), an integrative shaming culture and, more

⁷⁴ Irwin and Owen "Harm and the Contemporary Prison" 108.

⁷⁵ Irwin *Warehouse Prison* ix.

⁷⁶ Notably Dostoyevsky *Notes from a Dead House* (originally published in Russian in 1862 and representing a semi-autobiographical account of the author's own imprisonment as a political prisoner in Siberia during the early 1850s).

⁷⁷ Mboti "Apartheid Studies and Spectral Carcerality"; Davis and Dent 2001 *Signs*.

⁷⁸ Alexander *New Jim Crow*; Alexander 2020 <https://www.nytimes.com/2020/01/17/opinion/sunday/michelle-alexander-new-jim-crow.html>; Nagel 2008 *Journal of Pan African Studies*.

⁷⁹ Lötter 2019 *TGW*.

recently, the US. China was still a very poor, underdeveloped country during the 1950s when this initiative was first successfully attempted and accordingly the objection of South Africa being a developed country should not negate this initiative. As for the American practice, whereas the Chinese tendency was motivated by socialist concerns during Mao's rule, the former is because of pragmatism. According to at Chammah & Neff,⁸⁰ at least 30 (thirty) states in the US which includes Michigan, Texas, California, Minnesota, Pennsylvania, New Mexico and Arizona, among others, have adopted this practice.

- b) As Kendra Cherry⁸¹ as well as Fuller, Murphy and Chow⁸² argue, it is indeed possible to identify unconscious prejudice, reframe and eliminate these unfortunate, albeit understandable, personality traits to create high-performing teams. As the philosopher of hermeneutics (the art of textual interpretation), Hans-Georg Gadamer⁸³ suggests, prejudice in itself is not the problem, but not being aware of its reach and impact is. Consequently, following my analysis of (perhaps unconscious) judicial prejudice towards (ex) offenders, I suggest "sensitivity" workshop training (at one time widely used to combat racism) for judicial officers (judges and magistrates), something which in view of our encompassing harsh stigmatizing shaming culture in this country is sorely needed.
- c) Criminal defence lawyers should attempt to present convincing argument during sentencing proceedings to sway the bench to consider alternatives to direct imprisonment by leading expert evidence to demonstrate the lifelong "collateral consequences" of stigmatisation, marginalisation and discrimination (notably deleterious employment screening and social shunning amid stunned developmental trajectories). If individualised sentencing means anything, then the debilitating effects of stigma on the lives of ex-offenders must be considered. Failing this, the release of offenders from prison means that sentencing has not run its course and that they are, in effect, never free.
- d) Fostering and educating public awareness of the benefits of the understanding that resilience can overcome calamity (incarceration and the shame of an interrupted career path) if the survivors are supported and not labeled, as well as forgiveness of ex-offenders, is absolutely vital.

⁸⁰ Chammah and Neff 2018 <https://www.themarshallproject.org/2018/01/16/when-your-prison-becomes-your-paycheck>.

⁸¹ Cherry 2020 <https://www.verywellmind.com/implicit-bias-overview-4178401>.

⁸² Fuller, Murphy and Chow *Leader's Guide to Unconscious Bias*.

⁸³ Gadamer *Truth and Method*.

- e) Labelling stigmatisation of ex-offenders as "hate crime" and the authoring by a well-argued declaratory order from a division of the High Court in South Africa, would go a long way to pique public interest in an alternative way of thinking about stigma and its social consequences and acceptance.
- f) A constitutional challenge should be considered against the effects of the "collateral consequences" of incarceration causing the stigmatisation of, marginalisation and discrimination against ex-offenders launched by an organisation such as NICRO or the University of the Western Cape's Civil Society Prison Reform Initiative (which have the interests of ex-offenders at heart) under the provisions of the *Promotion of Equality and Prevention of Unfair Discrimination Act*, 2000,⁸⁴ or similar legislation.⁸⁵
- g) The entrenched culture of "impunity"⁸⁶ and the tendency of attempting to solve violence with violence within DCS need to change to a more pro-active approach to managing conflict between the prison population and the wardens. According to Lucas Muntingh⁸⁷ (a well-known South African prison researcher), among others, lack of effective grievance procedures was, at least in part, to blame for the *Mbena* incident. This form of structural⁸⁸ violence has the knock-on effect of releasing resentful, scared and amplifiable violent offenders into the community upon the expiry of their sentence on the inside. Many scholars and practitioners within the conflict management field are available to assist the department in this regard.

7 Conclusion

Even if former president Jacob Zuma's off-the-cuff remarks of judicial bias or prejudice have irked the bench and the legal profession in general, it had the advantage of triggering debate on a topic which seemed anathema in the new dispensation after the so-called demise of apartheid in 1994. Granted that the debate on bias in judicial pronouncements are not limited to South Africa, it is a critical area which has not received much academic and scholarly attention of late.

The issue of conscious bias in the judgments emanating from the US Supreme Court as having a conservative quasi-religious slant should not

⁸⁴ *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 (PEPUDA).

⁸⁵ Lötter *Reintegration of Ex-Offenders* 271-273.

⁸⁶ Raphaely 2015 <https://www.dailymaverick.co.za/article/2015-02-16-bringing-back-accountability-how-prison-torture-underlines-sas-crisis-of-l>.

⁸⁷ Raphaely 2015 <https://www.dailymaverick.co.za/article/2015-02-16-bringing-back-accountability-how-prison-torture-underlines-sas-crisis-of-l>.

⁸⁸ Galtung *Peace by Peaceful Means*.

allow us to become complacent in critiquing our own bench for bias – conscious or otherwise. I say this mindful of the significant degree of transformation of the bench in terms of both non-white and female representation since 1994. In this contribution, I have focused on unconscious bias or prejudice embedded on a visceral level and I am grateful to Chetty J for the opportunity to do so. Having said this, I must also add the rider that the learned judge's ruling in *Mbena* will not, unfortunately, have the benefit of deterring future violence behind bars and may even have the long-term result, perhaps even more unfortunately, of entrenching structural violence. By stating this, I do not propose that incarceration/incapacitation does not deter future crime, but merely that by perpetuating further violence behind bars, as Chetty J's judgement in *Mbena* does, would encourage future crime, both during and after incarceration.

These remarks are certainly not limited to just one judge. Judicial officers are products of their society and if this is a harsh stigmatising shaming culture, as I argue that South Africa in the third decade of the twenty-first century is, they are bound to have this stereotype embedded on a visceral level, at the very least. There is nothing malignant about prejudice as such, as the famous German philosopher of hermeneutics, Hans-Georg Gadamer, suggested since without this innate ability we as humans would be unable to take an interest in anything. The trick, though, is to be aware of these potential biases, for once we are alive to their reach, we can take active steps to eliminate them from our repertoire. To this end, I have proposed sensitivity training for judicial officers, among other suggestions for improved public policy formulation, despite my reservations over the possibility of academics to influence and impact this arena.

In the final analysis, it is important to note that by looking out for this most "marginalised of groups" (offenders and ex-offenders), we are also looking out for ourselves, since, as George Bizos and John Burton hinted, classes which are denied basic human needs (recognition and human dignity) are bound to rebel. In the context of South Africa's violent and conflicted society, this means continued and unsustainable rates of recidivism or re-offending.

Bibliography

Literature

Alexander *New Jim Crow*

Alexander M *The New Jim Crow: Mass Incarceration in the Age of Colourblindness* (New Press New York 2012)

Bizos *Odyssey to Freedom*

Bizos G *Odyssey to Freedom* (Struik Pretoria 2009)

Braithwaite *Crime, Shame and Reintegration*

Braithwaite J *Crime, Shame and Reintegration* (Cambridge University Press Cambridge 1989)

Braithwaite "Inequality and Republican Criminology"

Braithwaite J "Inequality and Republican Criminology" in Hagan J and Peterson RD (eds) *Crime and Inequality* (Stanford University Press Stanford 1995) 277-305

Burton 2001 *International Journal of Peace Studies*

Burton JW "Conflict Prevention as a Political System" 2001 *International Journal of Peace Studies* 23-32

Chaskalson and Kentridge *Constitutional Law*

Chaskalson M and Kentridge S *Constitutional Law of South Africa* (Juta Cape Town 2013)

Christie *Crime Control as Industry*

Christie N *Crime Control as Industry: Towards Gulags, Western Style* 4th ed (Routledge London 2017)

Corder *Judges at Work*

Corder H *Judges at Work: The Role and Attitudes of the South African Appellate Judiciary, 1910-1950* (Juta Cape Town 1984)

Cronje *Comparative Analysis of Recidivism*

Cronje M *A Comparative Analysis of Recidivism with Specific Reference to Crimino-Victimogenic Variables, Offence Analysis and Programme Participation* (PhD-thesis University of KwaZulu-Natal 2017)

Davis and Dent 2001 *Signs*

Davis A and Dent G "Prison as a Border: A Conversation on Gender, Globalization, and Punishment" 2001 *Signs* 1235-1241

De Haan "Abolitionism and Crime Control"

De Haan W "Abolitionism and Crime Control: A Contradiction in Terms" in Stenson K and Cowell D (eds) *The Politics of Crime Control* (Sage London 1991) 203-217

Dostoyevsky *Notes from a Dead House*

Dostoyevsky F *Notes from a Dead House* [1862] Pevear R and Vokolhonsky L [trans] (Vintage Classics New York 2016)

Duckworth *Grit*

Duckworth A *Grit: The Power of Passion and Perseverance* (Scribner New York 2017)

Fuller, Murphy and Chow *Leader's Guide to Unconscious Bias*
Fuller P, Murphy M and Chow A *The Leader's Guide to Unconscious Bias: How to Reframe Bias, Cultivate Connection, and Create High-Performing Teams* (Simon & Schuster New York 2020)

Gadamer *Truth and Method*
Gadamer HG *Truth and Method* [1960] Glen-Doepe W [trans] (Seabury Press New York 1975)

Galtung 1969 *Journal of Peace Research*
Galtung J "Violence, Peace, and Peace Research" 1969 *Journal of Peace Research* 167-191

Galtung 1990 *Journal of Peace Research*
Galtung J "Cultural Violence" 1990 *Journal of Peace Research* 291-305

Galtung *Peace by Peaceful Means*
Galtung J *Peace by Peaceful Means: Peace and Conflict, Development and Civilization* (Sage London 1996)

Geiger 2006 *CLR*
Geiger B "The Case for Treating Ex-Offenders as a Suspect Class" 2006 *CLR* 1191-1242

Goffman *Stigma*
Goffman E *Stigma: Notes on the Management of Spoilt Identity* (Penguin London 1990)

Harris "Xenophobia"
Harris B "Xenophobia: A New Pathology for a New South Africa?" in Hook D and Eagle G (eds) *Psychopathology and Social Prejudice* (University of Cape Town Press Cape Town 2002) 169-184

Heard 2020 *Victims and Offenders*
Heard C "Commentary: Assessing the Global Impact of the Covid-19 Pandemic on Prison Populations" 2020 *Victims and Offenders* 848-861

Howerton et al 2009 *Journal of Offender Rehabilitation*
Howerton A et al "The Consolations of Going Back to Prison: What 'Revolving Door' Prisoners Think of their Prospects" 2009 *Journal of Offender Rehabilitation* 439-461

Irwin *Warehouse Prison*
Irwin J *The Warehouse Prison: Disposal of the New Dangerous Class* (Roxbury Los Angeles 2005)

Irwin and Owen "Harm and the Contemporary Prison"

Irwin J and Owen B "Harm and the Contemporary Prison" in Liebling A and Maruna S (eds) *The Effects of Imprisonment* (Willan Cullompton 2005) 94-117

Johnson *How Long Will South Africa Survive?*

Johnson RW *How Long Will South Africa Survive? The Looming Crisis* (Jonathan Ball Johannesburg 2015)

Johnson *How Long Will South Africa Survive?* 2nd ed

Johnson RW *How Long Will South Africa Survive? The Crisis Continues* 2nd ed (Jonathan Ball Johannesburg 2017)

Jones-Young and Powell 2015 *Human Resource Management Review*

Jones-Young NC and Powell GN "Hiring Ex-Offenders: A Theoretical Model" 2015 *Human Resource Management Review* 298-312

King "Effects of Supermax Custody"

King RD "The Effects of Supermax Custody" in Liebling A and Maruna S (eds) *The Effects of Imprisonment* (Willan Cullompton 2005) 118-145

Lötter *Reintegration of Ex-Offenders*

Lötter C *The Reintegration of Ex-offenders in South Africa Based on the Contemporary Chinese Model: An Interdisciplinary Study* (PhD-thesis University of the Free State 2018)

Lötter 2019 *TGW*

Lötter C "Vrygelate Gevangenes word as Gevangenispersoneel Aangestel: Kan Suid-Afrika Leer by Hierdie Nuwe Internasionale Tendens? [Ex-Offenders Should be Appointed as Prison Wardens: Can South Africa Learn from this New International Trend?]" 2019 *TGW* 493-511

Lötter 2020 *KOERS*

Lötter C "'n Pleidooi vir die Kriminalisering van Stigma teen Vrygelate Gevangenes in Suid-Afrika [A Plea for the Criminalization of Stigma Against Ex-Offenders in South Africa]" 2020 *KOERS: Journal for Christian Scholarship* 1-16

Lötter 2020 *Phronimon*

Lötter C "The Tenuous Link Between Crime and Incarceration: Bosasa's Public-Private Partnership" 2020 *Phronimon* 1-21

Lötter 2020 *Acta Academica*

Lötter C "Critical Theory and Praxis in Postapartheid South Africa: The Case for a Critical Criminology" 2020 *Acta Academica* 106-130

Mandela *Long Walk to Freedom*

Mandela N *Long Walk to Freedom: The Autobiography of Nelson Mandela* (Little Brown & Co New York 1995)

Marqua-Harries, Stewart and Padayachee 2019 *SA Crime Quarterly*

Marqua-Harries L, Stewart G and Padayachee V "Towards Transforming a System: Re-Thinking Incarceration for Youth (and Beyond)" 2019 *SA Crime Quarterly* 33-40

Mboti "Apartheid Studies and Spectral Carcerality"

Mboti N "Apartheid Studies and Spectral Carcerality" Unpublished paper delivered at the Centre for Social Change *Global Prison Conference* (16-18 November 2018 Johannesburg)

Murhula and Singh 2019 *African Journal of Criminology and Justice Studies*

Murhula PBB and Singh SB "A Critical Analysis on Offenders Rehabilitation Approach in South Africa: A Review of the Literature" 2019 *African Journal of Criminology and Justice Studies* 21-43

Nagel 2008 *Journal of Pan African Studies*

Nagel M "'I Write What I Like': African Prison Intellectuals and the Struggle for Freedom" 2008 *Journal of Pan African Studies* 68-80

Steinberg *The Number*

Steinberg J *The Number* (Jonathan Ball Johannesburg 2005)

Uggen, Manza and Behrens "'Less than the Average Citizen'"

Uggen C, Manza J and Behrens A "'Less than the Average Citizen': Stigma, Role Transition and the Civic Reintegration of Convicted Felons" in Maruna S and Immarigeon R (eds) *After Crime and Punishment: Pathways to Offender Reintegration* (Willan Cullompton 2004) 261-293

Van Niekerk 1977 *The Bulletin*

Van Niekerk B "The Death Penalty in South Africa: Some Psychiatric and Psychological Elements" 1977 *The Bulletin* 276-286

Weiler "Epilogue: Judging the Judges"

Weiler JHH "Epilogue: Judging the Judges – Apology and Critique" in Adams M et al (eds) *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Portland 2013) 235-253

Case law

AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency 2014 1 SA 604 (CC)

Goldberg v Minister of Prisons 1979 1 SA 12 (A)

John v Rees [1970] Ch 345; [1969] 2 All ER 274 (CH)

Mbena v Minister of Justice and Correctional Services 2015 4 All SA 361 (ECP)

Minister of Justice and Correctional Services v Walus 2017 4 All SA 1 (SCA)

S v Dodo 2001 1 SACR 594 (CC)

Legislation

Constitution of the Republic of South Africa, 1996

Correctional Services Act 111 of 1998

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

Internet sources

Alexander 2020 <https://www.nytimes.com/2020/01/17/opinion/sunday/michelle-alexander-new-jim-crow.html>

Alexander M 2020 *The Injustice of This Moment is Not an 'Aberration'* <https://www.nytimes.com/2020/01/17/opinion/sunday/michelle-alexander-new-jim-crow.html> accessed 4 February 4 2020

Ayer 2021 https://www.nytimes.com/2021/10/04/opinion/supreme-court-conservatives.html?algo=clicks_decay_96&block=5&campaign_id=142&mc=edit_fory_20211005&fallback=false&imp_id=100967217&instance_id=4

Ayer D 2021 *The Supreme Court Has Gone Off the Rails* https://www.nytimes.com/2021/10/04/opinion/supreme-court-conservatives.html?algo=clicks_decay_96&block=5&campaign_id=142&mc=edit_fory_20211005&fallback=false&imp_id=100967217&instance_id=4 accessed 12 October 2021

Bouie 2021 <https://www.nytimes.com/2021/07/23/opinion/supreme-court-commission-court-packing.html?action=click&module=RelatedLinks&pgtype=Article>

Bouie J 2021 *The Supreme Court Needs to Be Cut Down to Size* <https://www.nytimes.com/2021/07/23/opinion/supreme-court-commission-court-packing.html?action=click&module=RelatedLinks&pgtype=Article> accessed 12 October 2021

Chammah and Neff 2018 <https://www.themarshallproject.org/2018/01/16/when-your-prison-becomes-your-paycheck>

Chammah M and Neff J 2018 *When Your Prison Becomes Your Paycheck* <https://www.themarshallproject.org/2018/01/16/when-your-prison-becomes-your-paycheck> accessed 23 May 2022

Cherry 2020 <https://www.verywellmind.com/implicit-bias-overview-4178401>
Cherry K 2020 *How Does Implicit Bias Influence Behavior? Explanations and Impacts of Unconscious Bias* <https://www.verywellmind.com/implicit-bias-overview-4178401> accessed 11 October 2021

De Haas 2021 <https://www.msn.com/en-za/news/editorpicks/cele-calling-the-shots-is-dangerous-for-the-country/ar-AAPCrkq?ocid=msedgntp>
De Haas M 2021 *Cele Calling the Shots is Dangerous for the Country* <https://www.msn.com/en-za/news/editorpicks/cele-calling-the-shots-is-dangerous-for-the-country/ar-AAPCrkq?ocid=msedgntp> accessed 17 October 2021

Gerber 2021 <https://www.news24.com/news24/southafrica/news/anc-voters-associate-the-party-with-corruption-but-still-trust-it-media24-poll-finds-20211025>
Gerber J 2021 *ANC Voters Associate the Party with Corruption, but Still Trust It - Media24 Poll* <https://www.news24.com/news24/southafrica/news/anc-voters-associate-the-party-with-corruption-but-still-trust-it-media24-poll-finds-20211025> accessed 1 November 2021

Greenhouse 2021 <https://www.nytimes.com/2021/09/09/opinion/abortion-supreme-court-religion.html?action=click&module=RelatedLinks&pgtype=Article>
Greenhouse L 2021 *God Has No Place in Supreme Court Opinions* <https://www.nytimes.com/2021/09/09/opinion/abortion-supreme-court-religion.html?action=click&module=RelatedLinks&pgtype=Article> accessed 12 October 2021

Institute for Economics and Peace 2018 <https://www.economicsandpeace.org/report/global-peace-index-2018-report/>
Institute for Economics and Peace 2018 *Global Peace Index* <https://www.economicsandpeace.org/report/global-peace-index-2018-report/> accessed 23 May 2022

Kriegler 2018 <https://theconversation.com/south-africa-wont-become-less-violentuntilits-more-equal-103116>
Kriegler A 2018 *South Africa Won't Become Less Violent Until It's More Equal* <https://theconversation.com/south-africa-wont-become-less-violentuntilits-more-equal-103116> accessed 23 May 2022

Marietta 2021 <https://theconversation.com/us-supreme-court-gets-set-to-address-abortion-guns-and-religion-168720>
Marietta M 2021 *US Supreme Court Gets Set to Address Abortion, Guns and Religion* <https://theconversation.com/us-supreme-court-gets-set-to-address-abortion-guns-and-religion-168720> accessed 15 October 2021

Mirk 2016 <https://www.bitchmedia.org/article/audre-lorde-thought-self-care-act-political-warfare>

Mirk S 2016 *Audre Lorde Thought of Self-Care as an "Act of Political Warfare"* <https://www.bitchmedia.org/article/audre-lorde-thought-self-care-act-political-warfare> accessed 19 October 2021

Orentlicher 2020 <https://theconversation.com/ruth-bader-ginsburg-helped-shape-the-modern-era-of-womens-rights-even-before-she-went-on-the-supreme-court-95705>

Orentlicher D 2020 *Ruth Bader Ginsburg Helped Shape the Modern Era of Women's Rights – Even Before She Went on the Supreme Court* <https://theconversation.com/ruth-bader-ginsburg-helped-shape-the-modern-era-of-womens-rights-even-before-she-went-on-the-supreme-court-95705> accessed 11 October 2021

Pierce and Kiewit 2020 <http://www.702.co.za/podcasts/269/tonight-with-lester-kiewit/279121/nicro-the-high-rate-of-offender-recidivism>

Pierce B and Kiewit L 2020 *NICRO: The High Rate of Offender Recidivism* <http://www.702.co.za/podcasts/269/tonight-with-lester-kiewit/279121/nicro-the-high-rate-of-offender-recidivism> accessed 7 April 2021

Sain 2016 <https://www.iol.co.za/news/south-africa/eastern-cape/prisoners-lose-bid-to-appeal-st-albans-torture-case-2020050>

Sain R 2016 *Prisoners Lose Bid to Appeal St Albans Torture Case* <https://www.iol.co.za/news/south-africa/eastern-cape/prisoners-lose-bid-to-appeal-st-albans-torture-case-2020050> accessed 28 October 2021

Sayer 2021 https://theconversation.com/nigerian-museums-must-tell-stories-of-slavery-with-more-complexity-and-nuance-169785?utm_medium=email&utm_campaign=The%20Weekend%20Conversation%20-%202021007207

Sayer F 2021 *Nigerian Museums Must Tell Stories of Slavery With More Complexity and Nuance* https://theconversation.com/nigerian-museums-must-tell-stories-of-slavery-with-more-complexity-and-nuance-169785?utm_medium=email&utm_campaign=The%20Weekend%20Conversation%20-%202021007207 accessed 30 October 2021

Raphaely 2014 <https://www.dailymaverick.co.za/article/2014-06-17-st-albans-ales-of-torture-and-intimidation-continue/>

Raphaely C 2014 *St Albans: Tales of Torture and Intimidation Continue* <https://www.dailymaverick.co.za/article/2014-06-17-st-albans-ales-of-torture-and-intimidation-continue/> accessed 31 October 2021

Raphaely 2015 <https://www.dailymaverick.co.za/article/2015-02-16-bringing-back-accountability-how-prison-torture-underlines-sas-crisis-of-l>

Raphaely C 2015 *Bringing Back Accountability: How Prison Torture Underlines SA's Crisis of Leadership*

<https://www.dailymaverick.co.za/article/2015-02-16-bringing-back-accountability-how-prison-torture-underlines-sas-crisis-of-faith/> accessed 31 October 2021

Raphaely 2015 <https://www.dailymaverick.co.za/article/2015-03-03-st-albans-prison-torture-a-conspiracy-of-silence/#.VlwQpXYrKUK>

Raphaely C 2015 *St Albans Prison Torture: A Conspiracy of Silence* <https://www.dailymaverick.co.za/article/2015-03-03-st-albans-prison-torture-a-conspiracy-of-silence/#.VlwQpXYrKUK> accessed 31 October 2021

Vladeck 2021 <https://www.nytimes.com/2021/04/15/opinion/supreme-court-religion-orders.html?action=click&module=RelatedLinks&pgtype>

Vladeck SI 2021 *The Supreme Court is Making New Law in the Shadows* <https://www.nytimes.com/2021/04/15/opinion/supreme-court-religion-orders.html?action=click&module=RelatedLinks&pgtype> accessed 12 October 2021

Weiner 2017 <https://www.nytimes.com/2017/11/11/opinion/sunday/the-power-of-the-courts-is-messing-up-politics.html?action=click&module=RelatedLinks&pgtype>

Weiner G 2017 *The Power of the Courts is Messing Up Politics* <https://www.nytimes.com/2017/11/11/opinion/sunday/the-power-of-the-courts-is-messing-up-politics.html?action=click&module=RelatedLinks&pgtype> accessed 12 October 2021

List of Abbreviations

CLR	California Law Review
DCS	Department of Correctional Services
EST	emergency support team
NICRO	National Institute for Crime Prevention and the Rehabilitation of Offenders
PRC	Peoples' Republic of China
TGW	Tydskrif vir Geesteswetenskappe
US	United States