

# Rationalising injustice

## The reinforcement of legal hegemony in South Africa

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*The legal system in South Africa holds a legitimate and authoritative position in the country's constitutional democracy and political order, despite the commonplace experiences of injustice that take place at the hands of the criminal justice system. This article looks at how the legal consciousness of community activists, student activists and migrants is shaped by experiences of arrest and detention, and focuses particularly on how their perceptions of the law reinforce the legitimacy and hegemonic status enjoyed by the criminal justice system and broader legal system in South Africa. The article draws on original interviews with community activists, student activists and migrants, who recounted their experiences of arrest and detention. Using a socio-legal framework of legal consciousness, the article unpacks how these groups reinforce legal hegemony through the ways in which they understand and rationalise their experiences of punishment. Despite the reasonable expectation that those who have experienced a miscarriage of justice would be most sceptical and pessimistic about the law's legitimacy, this article finds that they continue to maintain their faith in the law. The article presents an analysis of interviews conducted with members of these groups, and shares evidence that begins to explore some of the ways in which South Africa's criminal justice system is able to sustain its legitimacy, despite the gaps between what the law ought to be and what the law actually is.*

Scholars and practitioners who have studied South Africa's criminal justice system have focused on crime, policy, and institutional perspectives in their efforts to understand its nature, effects and place in society.<sup>1</sup> These accounts have tended to overlook how members of society view and understand the criminal justice system. By providing a top-

down understanding of the system, these scholars have missed the various bottom-up processes that entrench, but also resist, the character of criminal justice in South Africa today. In particular, these accounts do not help us understand how the criminal justice and broader legal systems are influenced from below through the actions and perspectives of ordinary members of society.

This article attempts to address this oversight by using the socio-legal framework of legal consciousness to explore the ways in which

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particular groups of people encounter and understand the criminal justice system. As a theoretical framework and tool, legal consciousness seeks to investigate how the law is able to maintain its legitimacy and hegemonic status, despite its shortcomings. It investigates the apparent gap between ‘the law on the books’ and ‘the law in action’<sup>2</sup> by examining the legal system’s role in maintaining South Africa’s political order, despite commonplace experiences and examples of injustice and the failures of the criminal justice system.

The article presents findings from a larger study that asked two questions: how do migrants and community and student activists encounter and understand the law in South Africa in the context of getting arrested and detained; and how is their legal consciousness shaped as a result of such encounters? The article focuses particularly on the second question, namely how the participants’ perceptions of the law reinforce the legitimacy and dominant status of the criminal justice and broader legal systems in South Africa.

As groups that organise and protest around socio-economic and socio-political issues, community and student activists are typically quite aware of the law as it pertains to their protest activity. They deliberately assert their rights, and often organise on the basis of the state’s failure to meet its legal obligations. However, migrants<sup>3</sup> in South Africa do not have the same history of political mobilisation and collective organising.<sup>4</sup> Instead, their experiences of the law are often concentrated around their encounters with the Department of Home Affairs.<sup>5</sup> As such, migrant encounters with the law are obligatory, and less confrontational or purposeful than those of activists, who typically intentionally mobilise the law through collective organisation. Migrants are generally more suspicious of the law because of the dominant and pervasive role that it plays in their lives.

The article finds that although migrants and activists experienced varying degrees of violence, protracted legal proceedings, harassment and clear injustice, most maintain their reverence for the law, sometimes inadvertently. Most of these individuals unintentionally reinforce legal hegemony through the ways in which they understand and rationalise their experiences of punishment. This reinforcement is part of the reason that the penal system is entrenched in our way of thinking of and dealing with social challenges, and underscores the fact that we remain restricted by a crime and punishment framework.

### **Legal consciousness and the criminal justice system in South Africa**

South Africa’s political order is based on a normative conception of the law as the legitimate and arguably unrivalled authority in South Africa’s constitutional democracy. It is thought of as the guarantor of freedoms and the neutral mediator of conflict. The legitimacy of the law can be attributed to the Constitution and the history that necessitated its birth. Another source of its legitimacy has been the law’s long history of fighting injustice, even under colonial rule and apartheid.<sup>6</sup> But how does the law in South Africa continue to enjoy its authoritative status, given the gap between the standards of the law (guided by the principles enshrined in the Constitution) on the one hand, and the day-to-day lived experiences and actual encounters with the law, on the other?

The concept of legal hegemony provides a useful framework for dealing with this question. It emerges out of law and society scholarship and forms part of a long tradition within socio-legal studies concerned with the relationship between law and its place in society. A large number of these studies focused on civil cases, predominantly set in North America. While subsequent works have taken up legal consciousness in other social contexts around

the world,<sup>7</sup> no such study has been applied to South Africa, and none has focused on criminal cases.

There is, however, a body of South African literature that engages with some of the issues raised by legal consciousness scholarship. Joel Modiri, Jackie Dugard, Grace Khunou and Brandon Bodenstien are among the scholars who have grappled with experiences of the law since the end of apartheid, looking critically at how the law is implemented and what the consequences are for society. Modiri<sup>8</sup> and Dugard's<sup>9</sup> work provides critical legal analysis, focusing on the law, the courts, and actual judgements, while Khunou<sup>10</sup> and Bodenstien's<sup>11</sup> work turns to the ordinary courtroom encounters and lived experiences of regular people passing through the legal system. These studies provide indispensable knowledge of first-hand encounters with the law and give a credible depiction of how the law works in South Africa.

Much of the work on South Africa's criminal justice system focuses on prisons, particularly on sentenced incarceration. Minimal attention is given to short-term incarceration in jails, holding cells and deportation centres, and while awaiting trial.<sup>12</sup> We know, however, that the legal system is not designed to have every case reach trial.<sup>13</sup> Many of these brief encounters with the criminal justice system consequently remain unaccounted for. More than half of those in remand detention will be released because they are acquitted, or because their charges are withdrawn or struck off the roll.<sup>14</sup>

As long as these perspectives are absent, our knowledge of how ordinary people experience the law through their encounters with the criminal justice system will be limited. If we do not shift this focus, our understanding of South Africa's criminal justice system will remain incomplete. In expanding the application of legal consciousness and introducing it to the South

African context, we are provided with a new and perhaps decolonial approach to how we study our criminal justice system, as well as to the broader perceptions of law in South Africa.

## Methodology

This article draws on data collected in a study (undertaken in 2016 and 2017) on how short-term incarceration shapes legal consciousness among community activists, student activists and migrants. It delves into accounts of arrest and detention among these groups in order to develop an in-depth understanding of the ways in which legal consciousness is shaped by particular experiences of the law, and how members of these groups understand the criminal justice system as a result.

Based on the experiences of a small cohort of 24 individuals – eight African migrants, eight student activists, and eight community activists – the study is not representative and cannot be reflective of South Africa's wider population. What we learn from these interviews, however, can shed light on the experiences of similar social groups. The study used purposive and snowball sampling methods to identify and access potential participants until the target sample size was reached. The data was captured through semi-structured, in-depth interviews and was analysed using thematic analysis. The interviews were conducted in a language preferred by the participants and were all conducted in and around Johannesburg.<sup>15</sup> To protect their identities, the participants were identified by a code pseudonym that consists of a letter ('C', 'S' or 'M'), followed by a number (between 1 and 24).<sup>16</sup>

Each interview was structured in three parts: the first looking at basic information and the background of the participant, the second focusing on an incident of arrest and detention, and the third reflecting on that experience. The

second part of the interview focused on how the participants actually recalled a particular experience of arrest and detention by asking how they were treated, how they interacted with the police, how they recalled the legal process, and how much of it they understood. The third part shifted towards an exploration of their perceptions and understandings of the law more broadly, in light of their experience of arrest and detention. Some of the questions asked in this section of the interview included what they thought of their experience(s) looking back, and how they now felt about the law and its agents in South Africa. For some, the experiences took place years ago, while for others, mainly the student activists, the experiences were much more recent.<sup>17</sup>

This article focuses on data gleaned during the third part of the interview in particular. It draws out some of the meanings that participants now attached to their experiences of arrest and detention. In this part of the interview, participants shared their perceptions of the law in general by making reference to their experiences of the criminal justice system. The responses they shared reveal how their encounters with the criminal justice system, largely characterised by violence and ill treatment, shape their broader perceptions of the law in South Africa – in other words, their legal consciousness. The responses reveal how participants came to rationalise their experiences in a way that unintentionally reinforces legal hegemony, and how their experiences do not necessarily alter their confidence in the law in South Africa and the value they attach to it. Those who were expressively critical of the criminal justice system, I argue, also unintentionally entrench legal hegemony, despite their staunch refusals to acknowledge the law's legitimacy.

## Research findings and analysis

The participants' socio-political identities, namely community activist, student activist, and

migrant, are significant because those identities shaped their encounters with the law. From the interviews, it is clear that each participant believed that the treatment they received was in some way related to these respective identities, and that their arrest and detention was based on how the police perceived them.<sup>18</sup> The migrants whom I interviewed were not activists, and the reasons behind their arrest and detention were therefore related to their perceived criminal activity or illegal migrant status. The community and student activists were detained for their alleged involvement in protest-related activity.

The community activists I spoke to came from, or were affiliated with, the Thembelihle Crisis Committee (TCC). Two of the participants viewed their arrests as the result of their perceived involvement in the protest activity that brought them in contact with the law. All of these interviewees had legal representation and each was later released without conviction. The student activists were arrested for their involvement (or perceived involvement) in the #FeesMustFall protest activity in 2015 and 2016. Two of these participants also saw their arrests as the result of their perceived involvement in the protests. Both these interviewees were legally represented and also later released without conviction. Among the migrants interviewed, only one of the participants was convicted of a drug-related offence, while the other seven participants were all released from immigration detention or remand detention. Most of these interviewees also had some form of legal representation.

Of the 24 participants, four were women (two community activists and two student activists). The time spent in custody ranged from three days to six weeks for community activists, while the students were detained between a few hours to one week. Of the three groups, the migrants spent the longest time in custody,

ranging from eight to 16 weeks.<sup>19</sup> Compared to the community and student activists, it is clear that migrants experienced significantly longer periods of detention and were the most vulnerable of the three groups in terms of violations and abuses.

### **Encountering the ‘gap’: expectations of the law and the shaping of legal consciousness**

Legal consciousness attempts to understand the law’s ability to maintain its authority in spite of the gap that exists between what the law is and what the law should be. This study develops a model of how encounters with the law and our perceptions of the law are informed by a combination of normative and predictive expectations of the law. Normative expectations are drawn from morally or ethically based idealised conceptions of the law.<sup>20</sup> Normative expectations are based on the image that the law projects of itself, such as being objective and just. Predictive expectations are informed by depictions, shared perceptions, and experiences of the law that can be both personal and vicarious. These expectations are highly influential and extremely pervasive and because of this, they actively shape legal consciousness. These expectations make up what Ewick and Silbey refer to as ‘schemas’ that are the ‘publicly exchanged understandings [and perceptions]’ of the law.<sup>21</sup>

Persons with stronger normative expectations are likely to be disposed to a general acceptance of the law or a resignation to the law. For someone who has not experienced a hostile and contentious event like getting arrested, reliance on normative expectations would translate to routine obedience to the law. A stronger emphasis on predictive expectations (including depictions, perceptions and experiences) is likely to impel some to manoeuvre and negotiate with(in) the law, and others to defy or resist the law. The experiences

and perceptions of the law described in the interviews were typically at odds with how participants expressed their normative expectations of the law. This illustrated the gap between what people believe the law is and what the law ought to be or, put differently, the ‘empirical gap’ that exists between the ‘law on the books’ and the ‘law in action’ that has been identified in socio-legal scholarship.<sup>22</sup>

The rights enshrined in the Constitution, particularly its foundational values of human dignity, equality and freedom, are perceived by many people to be idealistic. On the one hand, we hold on to these principles and freedoms because they are what we aspire to in South Africa. On the other hand, these values remain distant, elusive and unattainable, particularly for community activists, student activists and migrants. The experiences of the criminal justice system recounted in this study are illustrative of the gap between the constitutional standards of arrest and detention, and the lived experiences of the individuals who experience these events. Their narratives reveal the various ways in which processes of arrest and detention are either intentionally used to administer punishment, or how they result in undue punishment because of the various deficiencies of the criminal justice system.<sup>23</sup>

When I asked the participants to share thoughts about their experiences and how they now perceived the law, its institutions and personnel, the community activists and student activists held overwhelmingly negative perceptions of the law in South Africa. In fact, only one of the community activists and one of the student activists presented a mixed view of the law. These negative views characterised the law in South Africa as partial, oppressive, overwhelmingly corrupt, and benefitting the powerful, wealthy and privileged. C12’s description of the law was that: ‘It serves the

few ... It's for the rich ... It's not for us as poor people. It doesn't serve us.' At various points in the interview, he referenced the struggles with which he identified to substantiate his belief in the law's partiality. He cited examples like the striking miners of Marikana and the protesting students of #FeesMustFall:

Because the state, the system ... it does oppress especially – you know, they will have a lenient hand on criminals and use a very oppressive system on activists. You check your #FeesMustFall, ja. The brutality on those students, it was a matter of saying we are going to clamp down on those activists ...<sup>24</sup>

Some of the students also believe that the criminal justice system is partial as a result of their experiences of arrests and detention. A student activist [S6] shared how he believes the law works, based on identity and how it differed from the ideal standard:

[M]y experience ... didn't match what I expect the law to be because ... the way they applied [the law] depends on who you are and ... where you come from, you know, your race, you know. I'm black and I'm anti- you know, the ruling party, so the law takes a different turn when you're in that position, I think.<sup>25</sup>

The migrants' responses were predominantly neutral in that they were a mixture of positive and negative opinions that acknowledged both the successes and failures of the law in South Africa. They viewed the law as pragmatic, imperfect, corruptible, but largely well-functioning. Of the eight migrants I spoke to, one had a negative view of the law and two had very positive and optimistic views of the law as being fair, just, and impartial. Given the complex and fluid nature of legal consciousness, I view perceptions of the law as existing on a continuum, with the most idealistic perceptions on one end and the most

pessimistic perceptions on the other. However, encounters with the law and exchanges about the law can shift those perceptions. As Merry argues, legal consciousness is interactively derived as people encounter the law but also as they share their experiences.<sup>26</sup>

The interviewees described forms of legal consciousness drawn from reflections on their experiences of the law. These forms of legal consciousness therefore present a general idea of what is believed to be true about the law in South Africa, derived from encounters with the criminal justice system as either a community activist, student activist, or migrant. These perceptions and strands of legal consciousness are based on a particular experience of the law, and while they might not present a complete account of the interviewees' legal consciousness, we are still able to learn from them. Indeed, these narratives hold implications for the ways in which legal hegemony is sustained.

### **Overcoming the 'gap': the rationalising frames of punishment and the (re)entrenchment of legal hegemony**

The multiple perceptions of the law emerging from the interviews reflect the complexity and multiplicity of experiences of the law. As highlighted by Ewick and Silbey, no one image of the law prevails.<sup>27</sup> It is precisely this complexity that allows the law to sustain its hegemonic status within South Africa's political order. The interviews reveal how people deal with their feelings of shame, humiliation, and regret that result from their experiences of arrest and detention, but also show how negative recollections are often accompanied by feelings of pride and even gratitude.

All of the interviewees felt, justifiably, that they were treated completely unjustly. However, some of the interviewees viewed their experiences as more than simply miscarriages of justice in that their testimonies would go

further to grapple with why they experienced what they did or what they believe has come of that experience. These rationalising frameworks form part of 'the time I went to jail' stories that the interviewees share with others, and are woven into their broader archive of life experiences.

From the interviewees' responses, I identified four rationalising frameworks: (1) injustices that highlight the 'gap'; (2) the personal value derived from the experience; (3) tangible outcomes derived from the experience; and (4) injustices attributed to individual actors. These frameworks are important because firstly, they show that people do not all experience and rationalise punishment or injustice in the same way. Secondly, their significance for legal consciousness is that they serve as a bridge between experiences of the law and our broader perceptions of the law. Thirdly, and perhaps most importantly, these rationalising frameworks inadvertently reconcile the gap between how the law was experienced and what was normatively expected of the law.

The first rationalising framework differs from the other three frameworks because those interviewees explicitly refused to acknowledge that the law as it exists in South Africa today holds any value. Their experience not only reflected the injustices of the law but also highlighted the gap between the law of the books and the law in action. The interviewees attributed their experience to a failure of the legal system in South Africa that cannot be 'explained away' or 'excused'. They scoffed at the very idea of the existence of a functioning legal system in South Africa, and pointed out the various ways in which the law had failed them.

Two students, S7 and S8, expressed awareness of some of the normative expectations of the law, but insisted that their expectations of the law in South Africa were grounded in their

predictive expectations; in other words, what they had heard, seen and believed to be true about the law in South Africa. When I asked S8 about his expectations of the law, he argued that he had no expectations of the law in South Africa because for him the law was nothing but 'an oppressive system' and 'money-laundering scheme' that exploited both victims and perpetrators.<sup>28</sup> In S8's view, black and poor people suffered the most under South Africa's legal system, and his experience of the criminal justice system confirmed his equally negative perceptions of the law.

Similarly, when I asked S7 what he expected of the law, he replied quite simply: 'Nothing. In South Africa? I expect absolutely nothing!'<sup>29</sup> These perceptions, which were echoed to varying degrees by some of the other participants, present criticisms of the law that challenge the idea that there is a functioning legal system in South Africa. S7 and S8 do not conform to any rationalising framework, as they reject any attempt to make sense out of what they describe as 'nonsense'.

These overly cynical accounts, however, get away with more than they are willing to acknowledge: they overlook their own implicit commitment and subscription to some kind of legitimate legal system in South Africa by virtue of their socio-political identities as student and community activists. Activist work assumes a belief in rights and entitlements. Political organisation, advancing particular objectives and demands, implicitly imagines the possibility of achieving some form of relief through legal means. And in fact, South Africa has a long and rich history of victories that have been won through the legal system. Also, a commitment to the right to freely organise and protest is best expressed by actually taking part in the activity, no matter how heavy-handed government's response might be. Therefore, through their very activism, the supremacy of the law as the

final arbiter and protector is sustained. Legal hegemony is reinforced, even when its power is deliberately resisted.

Conversely, the other three rationalising frameworks reveal that although the participants recognised and understood that the criminal justice system had failed them, and that there had been an abuse of power, they (re)interpreted their experiences, and in so doing helped reconcile the gap between the injustices that they experienced and their normative expectations of the law. Legal hegemony is thus reinforced through framing the experience as a failure that is not entirely attributable to the legal system. Some participants viewed it as an imperfect and flawed framework, while others continued to hold a negative view of the law.

All three frameworks reveal an attempt to reconcile the gap, while also, unintentionally, reasserting the law's power. These rationalising frameworks represent what Crenshaw, quoting Gordon, describes as 'the many thoughts and beliefs that people have adopted which [may] limit their ability "even to imagine that life could be different and better"'.<sup>30</sup> These three frameworks ultimately reassert the law's dominant and hegemonic status within society.

The participants who rationalised their experiences of arrest and detention on the basis of perceived personal value, expressed surprisingly positive views about the experience, often referencing religion and divine intervention, lessons learned, and the benefits of the experience. M24, who was wrongfully arrested and eventually convicted because of a drug-related matter that took place within three months of his arrival in South Africa, described his experience as follows:

When I think of my time in jail, you see, it's like God, he want to save my life inside there, you understand. Because, even some people who I know outside before I go, before I come back,

some of them is dead, you understand? You understand?<sup>31</sup>

M4 shared similar sentiments that also included a religious outlook on his time in detention:

[W]hen I think about those things, I say, 'Thank God. God, You opened my eyes and showed me something I didn't know.' Because even though I was wrongly arrested, I learned a lot, which I wouldn't have learned ...<sup>32</sup>

The role of religion as a rationalising framework featured quite strongly, particularly in the testimonies of migrants. Faith becomes a text according to which one's life experiences can be interpreted and understood. For M4 and to some extent M24, their experiences formed part of a divine plan for them to learn how the law in South Africa works. This notion of lessons learned, supported either by faith or by past experiences of jail, is a very intriguing way of rationalising unwarranted punishment.

The community activists rationalised their experiences of arrest and detention in terms of the tangible outcomes. These came in the form of their community, Thembelihle, now receiving various socio-economic services from government. Thembelihle's continued existence and how it resisted removal was presented as a victory in and of itself. The activists made sense of their arrests and detention by attributing tangible outcomes to these experiences, as they see it as part of their struggle for Thembelihle as a community. When I asked what they made of their arrests and time in detention, some of the responses reflected these sentiments:

When I look back we usually make a joke out of it when we are together because it is through those kinds of actions that makes Thembelihle today to be as it is today because the aim of the authorities was to take Thembelihle out of here ...<sup>33</sup>

Well today [my arrest is] a badge of honour [laughs], you know ...<sup>34</sup>

The quotes highlight the meaning attached to experiences of being arrested and detained. These outcomes are also associated with the very long history of protest and struggle. For the activists of Thembelihle, the harassment that they described, the grievous wounds that some had suffered, and the experiences of arrest and detention, all took on greater significance and ultimately contributed to the successes and victories of the movement. Such an account does little to challenge legal hegemony because, although their experiences epitomise the ways in which the law failed them, their victories are often secured through legal means. The various services they receive and their ability to resist government efforts to relocate the community have partly been the result of winning arduous and protracted legal battles. Even their eventual release following their arrests was because they had legal representatives such as the Socio-Economic Rights Institute (SERI), Centre for Applied Legal Studies (CALS), and other pro-bono legal support. This would not have been possible without a functioning and somewhat legitimate legal system. As such, the law can be both predator and saviour. Through these victories, the law is vindicated and its power is sustained.

Some of the interviewees rationalised their experiences by attributing the injustices that they experienced to individual actors. They blamed the police, immigration officers, and poor legal representatives. M1 and M13, both of whom were arrested and taken to the Lindela Repatriation Centre, experienced xenophobic treatment at the hands of Home Affairs and Immigration officials.

[T]here's some people working in South Africa, they don't know the law. Like immigration officers... they treating you like a foreigner, 'You are foreigner, you are

*makwerekwere, makwerekwere.*' ... The law is not talking like this but you can go somewhere, other people, they are talking like this.<sup>35</sup>

*La loi est bonne mais sauf que ceux dont on a mis pour pratiquer cette loi en faveur des étrangers, ils ne le font pas. Ils ont souvent des sentiments. Des sentiments xénophobiques, des sentiments autochtones et des originaux de ce pays...*

[The law is good but those put in place to implement the law in favour of foreigners, they don't do it. They harbour feelings, xenophobic feelings, feelings for natives and the originals of this country...]<sup>36</sup>

These interviewees attribute their negative experiences to professionals within the criminal justice system who lack expertise and harbour deep xenophobic and prejudicial attitudes. Immigration officers were seen as the gatekeepers between them and a legal stay in South Africa. In his interview, M1 argued that migrants in South Africa are forced into a precarious existence where they have to live in the shadows of the law.

Others attributed much of the criminal justice system's failure and their unfortunate experiences of arrest and detention to police conduct. M20 and M21 recognised the legitimacy of the law but felt that police corruption and incompetence resulted in their prolonged stay in remand detention. S2 argued that 'the law and people that work for the law are different'.<sup>37</sup> When accounting for the way that he and his comrades were treated, S5 described the police and their attitude towards their work as follows:

[T]he police officers, they do what they do only to serve their own purposes, not because they like the job, like most of them ... joined the police force not because they wanted to be police officers but because they just wanted a job ... So hence, most

of them they don't do what's right, they just do what they're required to do, not because they, themselves they believe in the law.<sup>38</sup>

This rationalising framework reinforces the legal hegemony by refusing to see the misconduct of officials and legal personnel as part of a systemic problem. The law maintains its legitimacy because individuals are responsible for the arrestees' unjust experiences. These participants may have believed that their experience of the law would have been different, were it not for these particular individuals, and possibly much closer aligned to their normative expectations.

## Conclusion

This article is based on the shared experiences of 24 migrants, student activists and community activists. Therefore the article cannot claim to be reflective of the broader population whose encounters with the criminal justice system present different complexities and involve different population groups. However, the article's engagement with the development of legal consciousness and the impact that has on sustaining legal hegemony begins to shed light on some the intricacies behind how the law upholds its authority, despite its shortcomings.

The legal consciousness of individuals has been shaped by their experiences of arrest and detention, either by trying to make sense of their experiences of injustice, or simply refusing to. For those who made an effort to rationalise their experience of arrest and detention, those frameworks of rationalisation helped bridge the gap between their experiences of the law and the ideal and normative expectations of the law. Participants' efforts to attach meaning to their experiences contributed to sustaining legal hegemony in South Africa. For those who refused to attach any particular meaning

to, or refused to rationalise, their experiences, the gap between what the law is and what the law ought to be remained just that – a gap. These same participants, however, unknowingly also contributed to sustaining legal hegemony because of their everyday interactions with the law, which lie beyond their exceptional experiences of arrest and detention.

This article has shown how negative experiences of the criminal justice system were not enough to shift interviewees' commitment to their normative expectations of the law as impartial and just. Through rationalising frameworks that they employed to make sense of their experiences, they actively bridged the gap between their experiences of what the law is and their commitment to their normative expectations of what the law ought to be.



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## Notes

- 1 See A Dissel and S Ellis, *Reform and stasis: transformation in South African prisons*, Cape Town: Centre for the Study of Violence and Reconciliation, 2002; L Muntingh, Punishment and deterrence: don't expect prisons to reduce crime, *South African Crime Quarterly*, 26, 2008, 3-9; K Gillespie, Moralizing security: 'corrections' and the post-apartheid prison, *Race/Ethnicity: Multidisciplinary Global Contexts*, 2:1, 2008, 69-87; F Buntman, Prison and democracy: lessons learned and not learned, from 1989 to 2009, *International Journal of Politics, Culture, and Society IJPS*, 22:3, 2009, 401-18; J Chaskalson and Y de Jong, Bail, in C Gould (ed.), *Criminal (in)justice in South Africa: a civil society perspective*, Pretoria: Institute for Security Studies (ISS), 2009; D Gordon, *Transformation and trouble: crime, justice, and participation in democratic South Africa*, Ann Arbor: University of Michigan Press, 2009; G Super, Twenty years of punishment (and democracy) in South Africa: the pitfalls of governing crime through the community, *South African Crime Quarterly*, 48, 2014, 7-15.
- 2 S Silbey, After legal consciousness, *Annual Review of Law and Social Science*, 1:1, 2005, 323-68.
- 3 In this study, the term 'migrant' will be used to refer to broadly to migrants who are black and brown and typically live in the poorer urban areas in South Africa. The migrants included in this study are all from African countries.
- 4 J Klaaren, Citizenship, xenophobic violence and law's dark side, in L Landau, *Exorcising the demons within: xenophobia, violence and statecraft in contemporary South Africa*, Johannesburg: Wits University Press, 2011, 135-49; T Polzer and A Segatti, From defending migrant rights to new political subjectivities: Gauteng migrants' organisations after May 2008, in *ibid.*, 200-225.
- 5 Klaaren, Citizenship, xenophobic violence and law's dark side, 144.

- 6 Gordon, *Transformation and trouble*; Klaaren, Citizenship, xenophobic violence and law's dark side; T Ngcukaitobi, *The land is ours: South Africa's first black lawyers and the birth of constitutionalism*, Johannesburg: Penguin Random House, 2018.
- 7 LB Nielsen, Situating legal consciousness: experiences and attitudes of ordinary citizens about law and street harassment, *Law & Society Review*, 34, 2000, 1055–90; D Cowan, Legal consciousness: some observations, *The Modern Law Review*, 67:6, 2004, 928–958; M Hertogh, A 'European' conception of legal consciousness: rediscovering Eugen Ehrlich, *Journal of Law and Society*, 31:4, 2004, 457–481; K Hull, Legal consciousness in marginalized groups: the case of LGBT people, *Law & Social Inquiry*, 2016; D Engel and J Engel, *Tort, custom, and karma: globalization and legal consciousness in Thailand*, Palo Alto: Stanford University Press, 2010; LJ Abrego, Legal consciousness of undocumented Latinos: fear and stigma as barriers to claims-making for first- and 1.5-generation immigrants, *Law & Society Review*, 45:2, 2011, 337–70; A Kubal, Migrants' relationship with law in the host country: exploring the role of legal culture, *Journal of Intercultural Studies*, 34:1, 2013, 55–72.
- 8 See JM Modiri, The colour of law, power and knowledge: introducing critical race theory in (post-) apartheid South Africa, *South African Journal on Human Rights*, 28, 2012, 405–436; JM Modiri, Race as/and the trace of the ghost: jurisprudential escapism, horizontal anxiety and the right to be racist in BoE Trust Limited, *PER: Potchefstroomse Elektroniese Regsblad*, 16:5, 2013, 583–616.
- 9 J Dugard, Court of first instance? Towards a pro-poor jurisdiction for the South African Constitutional Court, *South African Journal on Human Rights*, 24:2, 2006, 214–38; J Dugard, 'Judging the judges': towards an appropriate role for the judiciary in South Africa's transformation, *Leiden Journal of International Law*, 20:4, 2007, 965–981; J Dugard, Courts and the poor in South Africa: a critique of systemic judicial failures to advance transformative justice, *South African Journal on Human Rights*, 24:2, 2008, 214–38.
- 10 G Khunou, Fathers don't stand a chance: experiences of custody, access and maintenance, in L Richter and R Morrell (eds), *Baba: Men and fatherhood in South Africa*, Cape Town: Human Sciences Research Council, 2006; G Khunou, Maintenance and changing masculinities as sources of gender conflict in contemporary (sic) Johannesburg, University of the Witwatersrand, 2008, <http://wiredspace.wits.ac.za/handle/10539/4651>.
- 11 B Bodenstein, In search of advice: (re)defining meaningful access to justice in the district courts of Johannesburg, University of the Witwatersrand, 2017, <http://wiredspace.wits.ac.za/handle/10539/26556>.
- 12 See Gillespie, Moralizing security; Muntingh, Punishment and deterrence; L Muntingh, The prison system, in Gould, *Criminal (in)justice in South Africa*, 201–13; Dissel and Ellis, *Reform and stasis*; Gould, *Criminal (in)justice in South Africa*.
- 13 M Feeley, *The process is the punishment: handling cases in a lower criminal court*, New York: Russell Sage Foundation, 1992; P Ewick and S Silbey, Conformity, contestation, and resistance: an account of legal consciousness, *New England Law Review* 26, 1998, 731.
- 14 C Ballard, Research report on remand detention in South Africa: an overview of the current law and proposals for reform, Cape Town: Civil Society Prison Reform Initiative (CSPRI), 2011, 5.
- 15 The interviews were kindly translated and transcribed by Lebo Thabong, Sanelisiwe Sithole and Sibongile Shope
- 16 The letters 'C', 'S' and 'M' stand for community activist, student activist and migrant, respectively. The numbers range from 1 to 24 and indicate when the interview was conducted within the series, ranging from the first interview conducted to the last interview conducted. The logic here is that each interview conducted impacted on the one that followed.
- 17 It is unclear how the differences in how recent the experiences were may have had an impact on how they remembered and reflected on their experiences. Therefore, when analysing the interviews, this was something that I had to be aware of.
- 18 Some of the interviewees were arrested because of their *perceived* activity and, by extension, their *perceived* sociopolitical identities of being community activists, student activists or migrants. In such cases, these interviewees made it clear that at the time of the arrest and detention, their arrests were wrongful in that they were not involved in the activities for which they were arrested, e.g. protest activity or drug dealing. In this study, I categorised them according to these perceived identities.
- 19 Three migrants spent eight weeks in detention, another three spent 12 weeks, while another two spent 16 weeks.
- 20 Normative and predictive expectations are concepts drawn from JB Barbeau, Predictive and normative expectations in consumer satisfaction: a utilization of adaptation and comparison levels in a unified framework, in K Hunt and RL Day (eds), *Conceptual and empirical contributions to consumer satisfaction and complaining behavior*, Bloomington: Indiana University School of Business, 1985, 27–32. The concepts have been adapted and applied to a legal consciousness framework.
- 21 Ewick and Silbey, Conformity, contestation, and resistance, 46.
- 22 Silbey, After legal consciousness; Hertogh, A 'European' conception of legal consciousness; S Halliday and B Morgan, I fought the law and the law won? Legal consciousness and the critical imagination, *Current Legal Problems*, 66:1, 2013, 1–32.
- 23 See, for example, R Hopkins, Broken beyond imagination: South Africa's justice system, *Daily Maverick*, 15 April 2014; Ballard, Research report on remand detention in South Africa; A Karrim, To grant bail or not to grant bail, Wits Justice Project, 2017, <http://www.witsjusticeproject.co.za/investigative-journalism/to-grant-bail-or-not-to-grant-bail/>; J Gordin and I Cloete, Imprisoned before being found guilty: remand detainees in South Africa, *U. Cin. L. Rev.*, 80, 2011, 1167–77.
- 24 C12, interview, 2017.
- 25 S6, interview, 2017.
- 26 SE Merry, *Getting justice and getting even: legal consciousness among working-class Americans*, Chicago: University of Chicago Press, 1992, 211–13.
- 27 Ewick and Silbey, Conformity, contestation, and resistance, 51.
- 28 S8, interview, 2017.
- 29 S7, interview, 2017.
- 30 K Crenshaw, Race, reform, and retrenchment: transformation and legitimation in anti-discrimination law, in K Crenshaw et al. (eds), *Critical race theory: the key writings that formed the movement*, New York: The New Press, 1995, 103–26, 108.
- 31 M24, interview, 2017.
- 32 M4, interview, 2017.
- 33 C16, interview, 2017.
- 34 C10, interview, 2017.
- 35 M1, interview, 2017.
- 36 M13, interview, 2017.
- 37 S2, interview, 2017.
- 38 S5, interview, 2017.