

# On the record

## Judge Jody Kollapen

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*With the revelations by Bosasa officials at the State Capture Enquiry, held in early 2019, laying bare the corrupt links between prisons, detention centres and border control, and high-ranking political and government officials, the time is ripe to excavate the capitalist interests that fuel incarceration in this country. How did the prison industrial complex overtake the lofty principles that ushered in the South African democratic era? Judge Jody Kollapen is well-placed to speak to the evolution of the South African prison from a colonial institute that served to criminalise and dominate 'natives', to its utility as instrument of state repression under apartheid, to its present manifestation in the democratic era. He has laboured at the coalface of apartheid crime and punishment through his work as an attorney in the Delmas Treason Trial and for the Sharpeville Six, and also worked as a member of Lawyers for Human Rights, where he coordinated the 'Release Political Prisoners' programme. Importantly, Judge Kollapen had a ringside seat at the theatre of our transition from apartheid to democracy as he was part of the selection panel that chose the commissioners for the Truth and Reconciliation Commission (TRC). Many questions can be asked of the South African TRC, including whether it was the best mechanism to deal with the past and whether it achieved reconciliation. What concerns us here is its impact on crime and punishment in the democratic era. If our transition was premised on restorative justice, then should that not be the guiding principle for the emerging democratic state? In line with this special edition's focus on the impact of incarceration on the marginalised and vulnerable, Judge Kollapen shares some insights on how the prison has fared in democratic South Africa, and how imprisonment affects communities across the country. As an Acting Judge in the Constitutional Court, a practitioner with a long history of civic engagement, and someone who has thought and written about criminalisation, human rights and prisons, Judge Kollapen helps us to think about what decolonisation entails for prisons in South Africa.*

**Nontsasa Nako (NN):** My first question is what you think decolonisation would mean when it comes to penal systems, detention centres, prisons and the criminal justice system?

**Judge Jody Kollapen (JK):** Maybe I would need to first understand what is meant by the term decolonisation.

**NN:** That's the crux of my question; what do we mean by decolonisation? What would it imply when it comes to jurisprudence and legal systems?

**JK:** I think when we look at the whole system of crime and punishment and the building of prisons and the use of the penal system, it's difficult to divorce it from the pillars of colonial and apartheid rule. It was an essential feature. And so, from that perspective, the decolonisation project must interrogate why we had prisons initially. It was a source of

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cheap labour for many farmers. It was a form of criminalisation of a large percentage of black people. Those realities seem to have seamlessly moved into the present, without a sufficient interrogation of their very rationale. The social and economic structure, for example, lent itself to criminalising people: if people had to steal a loaf of bread out of poverty the intervention was the criminal justice system rather than social security system. I don't think that any of those pillars have been sufficiently interrogated.

And I think in our anger about crime and punishment we continue to seize upon the penal system as the most effective system. So, decolonisation really means revisiting why we should have prisons and why we should have punishment: what is the purpose? And locate it also within the context of the African value systems that we are quite glib about. In many African societies offenders were dealt with in a restorative way. Exclusion was really a means of last resort.

**NN:** You say that we are glib about the African value systems, which the Truth and Reconciliation Commission (TRC) said it was relying on. And in that sense, it seemed to be a way of rethinking crime and punishment and seemed instead a way of engaging victims and offenders in a way that would be better. My question is whether you think we have made use of that system at all?

**JK:** Well I don't think so, but I also don't think that system was advanced and engaged with honestly as a means to constructing a better future. And, if I may explain, for me what the truth and reconciliation system did – and even though it was founded on some wonderful principles – it allowed South Africans to look back into the past and see how horrible it was, and to be quite romantic about it. To say, 'Right, we've seen that and now can we get back to the present?' But we didn't take the lessons from the past.

**NN:** So we did not input that into our criminal system in any way?

**JK:** What it would have meant was, firstly, a commitment that the process of the TRC would continue after the TRC completed. Government, civil society, business, the prisons, the police, for example, would have had to have a commitment to dealing with whatever emerged during the process. And it would then have to be incorporated into policy, into law, if need be. But because it was such a painful process, it was almost that everybody wanted to breathe a sigh of relief and say, 'Thank God that's over, and now can we get back to our life in present South Africa?' So, if you look, for example, at what emerged in the TRC regarding police misconduct, violence in the police, excessive use of force, I haven't seen any real evidence of how those lessons have been used in policing, in saying how do we avoid doing that again. We all condemn it and we are all ashamed about it, but then that's it, we just want to cut a clear line through it. And I think for many white people it was also convenient that we cut that clear line because they were able to then say that 'this whole thing about transformation, why do we have to talk about it? We have dealt with it, the TRC dealt with it, it's over.' It was a nice way to insulate it and then to leave it there.

**NN:** So, particularly in respect of prisons, would decolonisation mean completely rethinking prison or would it mean making prison less inhospitable, if I can use that word?

**JK:** I think you need to completely rethink it because if you work on the basis of simply reforming the institutions then you don't deal with the question of who is entering those institutions. You don't then interrogate the questions about what the purpose of these institutions should be, of who most deserves to go to prison and what kind of society do we wish to create by building so many prisons and incarcerating so many people. Recognising,

on the one hand, that there are those who society needs to be protected from, and that we shouldn't be scared to say that there are some people who need to be put in prison for the rest of their lives. There are those who will simply not stop offending, and therefore society needs protection against those people. But then, on the other side of the pendulum, there are many who will find themselves in prison simply because of a number of factors that are quite variable, for example, the amount of money they have. It's also clear that the quality of legal representation has a large influence on whether you go to prison or not. And therefore, those who can afford the best legal representation increase their chances of not being in prison, while those who have to make do with poor quality legal representation face a greater risk of imprisonment. That can't be a rational basis for deciding who goes to prison or not and yet it is largely still a significant factor in that determination.

**NN:** We received submissions for this edition dealing with cashless bail, detention centres for holding foreign nationals awaiting deportation, and whether there is a clear public understanding of justice and human rights. I am wondering whether any of these themes tap into what you would think of as decolonisation? Are we tinkering with a broken machine, as it were? Or putting a Band-Aid on a broken leg with thinking about whether we can make detention centres more hospitable, whether we should think about cashless bail? Should we think about abandoning some of the bureaucracy because it harms the poor?

**JK:** Look, I think we're tinkering with the system because fundamentally we're being held hostage by crime and violence. In a sense, the public anger and outrage is so strong because the criminal justice system is not seen to be working effectively, and therefore tinkering with the last part of the system in

terms of incarceration and conditions within the penal system is a no-win situation. Because, what happens is that we have such low levels of arrests, prosecution and convictions, that there is almost a kind of a subconscious thing that says, 'Those people we do catch, we will deal with them!' Almost to compensate for those that we didn't catch. When you enter the debate at the tail end, you're on the losing wicket from the beginning. You're up against both public sentiment and real perceptions of a system that's not working well. But the solution is not an easy one; how do you get the public to understand these things? How do you get people more involved in corrections? I think for example, a large percentage of South Africans haven't been inside a prison. I try to visit prisons regularly. There is a perception out there that you get three meals a day, it's a wonderful life in there, but that's far from the truth. It's a terrible place to be in for any human being, and it is questionable whether people can be rehabilitated in those conditions, if somebody goes there for three or six months. So, I think public knowledge is important, in order to have a meaningful public debate. At this stage, public knowledge is quite limited with regard to the system.

**NN:** There is a theory that prisons hide in plain sight, that they are there and we think we know what is going on there, but we don't. So how do we breach that curtain? How does the public get to know about the prison in a way that's not romanticised or fictionalised or portrayed through the snippets of prison riots? How does prison come into the public consciousness?

**JK:** Well I think the role of the media, the role of academics, the role of NGOs [non-governmental organisations] and the role of the judiciary are important. For example, when I visit a prison I should be in a position to say something about the conditions that I saw there. I think that might go a long way to

at least changing public perceptions of what happens in prison. And the public may rightfully be concerned about whether we should send someone there for three months if there's a real risk that this person may be further damaged. There's a prevailing sense that we send someone there for three months and we're likely to improve them.

**NN:** Because we're only likely to be familiar with prison if we're personally touched.

**JK:** Exactly.

**NN:** Thank you so much.