

The Criminalisation of Migration in South Africa: Administrative Failure, Enforcement and Penal Governance

Mansah Dondo Amoah

Molya Vundamina

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Abstract

This article examines the criminalisation of migration in South Africa through a doctrinal and contextual analysis of immigration legislation, refugee protection, constitutional jurisprudence, policy reform, enforcement practice and crimmigration scholarship. It argues that South Africa's penal migration governance should not be understood as a sudden shift from an otherwise neutral administrative system. Rather, it reflects older punitive logics rooted in apartheid and late-apartheid mobility control, which have been reconfigured within the contemporary constitutional order through status-based offences, administrative detention, deportation, surveillance and enforcement-led governance.

The article's central contribution is to show how administrative failure operates as a driver of penal migration governance in South Africa. The migration system does not merely respond to irregularity. In important respects, documentation barriers, inaccessible Refugee Reception Offices, backlogs, expired permits, corruption and weak regularisation pathways produce or prolong irregular status. That status is then made legally and institutionally significant through categories such as "illegal foreigner", and may expose migrants, asylum seekers and refugees to arrest, detention, deportation, exclusion or denial of protection. The article therefore traces a causal chain between administrative dysfunction, documentation precarity, classification as irregular and coercive enforcement.

The article first defines crimmigration in the South African context and distinguishes it from xenophobia, securitisation, administrative dysfunction and general rights violations. It then historicises penal migration governance by tracing continuities between apartheid-era movement control, the Aliens Control Act and contemporary immigration enforcement. It further examines the legal architecture of penal migration governance, including immigration-related offences, section 34 detention, deportation powers and the qualified protection of asylum seekers. The article also analyses enforcement practices such as Operation New Broom, workplace inspections, biometric verification and the Border Management Authority. The article argues that these developments carry serious constitutional and human rights implications, particularly for dignity, equality, liberty, administrative justice, non-refoulement, children's rights, healthcare and education. By placing South Africa in comparative perspective with the United States, the article shows both convergence with global crimmigration trends and the distinctive features of the South African case. It concludes that rights-based migration governance requires more than limits on detention and deportation. It requires reform of the administrative systems, legal categories, political narratives and enforcement practices through which irregularity is produced, made visible and punished.

Keywords: Criminalisation, crimmigration, penal governance, detention, deportation, administrative failure, migration enforcement

Résumé

Cet article examine la criminalisation de la migration en Afrique du Sud à travers une analyse doctrinale et contextuelle de la législation sur l'immigration, de la protection des réfugiés, de la jurisprudence constitutionnelle, des réformes politiques, de la pratique répressive et de la doctrine de la crimmigration. Il soutient que la gouvernance pénale des migrations en Afrique du Sud ne doit pas être comprise comme une rupture soudaine d'un système administratif par ailleurs neutre. Elle reflète plutôt des logiques punitives plus anciennes, enracinées dans le contrôle de la mobilité de l'apartheid et de la fin de l'apartheid, reconfigurées dans l'ordre constitutionnel contemporain au moyen d'infractions fondées sur le statut, de la détention administrative, de l'expulsion, de la surveillance et d'une gouvernance axée sur la répression.

La contribution centrale de l'article est de montrer comment la défaillance administrative opère comme moteur de la gouvernance pénale des migrations en Afrique du Sud. Le système migratoire ne se contente pas de réagir à l'irrégularité. À bien des égards, les obstacles documentaires, l'inaccessibilité des bureaux d'accueil des réfugiés, les arriérés, les permis expirés, la corruption et la faiblesse des voies de régularisation produisent ou prolongent le statut irrégulier. Ce statut acquiert ensuite une portée juridique et institutionnelle à travers des catégories telles que celle d'« étranger illégal », et peut exposer les migrants, les demandeurs d'asile et les réfugiés à l'arrestation, à la détention, à l'expulsion, à l'exclusion ou au refus de protection. L'article retrace ainsi une chaîne causale entre dysfonctionnement administratif, précarité documentaire, classification comme irrégulier et répression coercitive.

L'article définit d'abord la crimmigration dans le contexte sud-africain et la distingue de la xénophobie, de la sécuritisation, du dysfonctionnement administratif et des violations générales des droits. Il historicise ensuite la gouvernance pénale des migrations en retraçant les continuités entre le contrôle des déplacements de l'ère de l'apartheid, l'Aliens Control Act et la répression contemporaine de l'immigration. Il examine en outre l'architecture juridique de la gouvernance pénale des migrations, notamment les infractions liées à l'immigration, la détention au titre de l'article 34, les pouvoirs d'expulsion et la protection limitée des demandeurs d'asile. L'article analyse également les pratiques répressives telles que l'opération New Broom, les inspections sur les lieux de travail, la vérification biométrique et la Border Management Authority. L'article soutient que ces évolutions emportent de sérieuses implications constitutionnelles et en matière de droits humains, en particulier pour la dignité, l'égalité, la liberté, la justice administrative, le non-refoulement, les droits de l'enfant, les soins de santé et l'éducation. En plaçant l'Afrique du Sud dans une perspective comparative avec les États-Unis, l'article met en évidence tant la convergence avec les tendances mondiales de la crimmigration que les traits distinctifs du cas sud-africain. Il conclut qu'une gouvernance des migrations fondée sur les droits exige davantage que des limites à la détention et à l'expulsion : elle requiert la réforme des systèmes administratifs, des catégories juridiques, des récits politiques et des pratiques répressives par lesquels l'irrégularité est produite, rendue visible et punie.

Mots-clés : criminalisation, crimmigration, gouvernance pénale, détention, expulsion, défaillance administrative, répression migratoire

Resumen

Este artículo examina la criminalización de la migración en Sudáfrica a través de un análisis doctrinal y contextual de la legislación migratoria, la protección de los refugiados, la jurisprudencia constitucional, las reformas políticas, la práctica de aplicación de la ley y la doctrina de la crimigración. Sostiene que la gobernanza penal de las migraciones en Sudáfrica no debe entenderse como un giro repentino de un sistema administrativo por lo demás neutro. Refleja, más bien, lógicas punitivas más antiguas, arraigadas en el control de la movilidad del apartheid y del apartheid tardío, reconfiguradas en el orden constitucional contemporáneo mediante delitos basados en el estatus, la detención administrativa, la deportación, la vigilancia y una gobernanza centrada en la coerción.

La contribución central del artículo consiste en mostrar cómo la falla administrativa opera como motor de la gobernanza penal de las migraciones en Sudáfrica. El sistema migratorio no se limita a reaccionar ante la irregularidad. En aspectos importantes, las barreras documentales, la inaccesibilidad de las oficinas de recepción de refugiados, los retrasos acumulados, los permisos vencidos, la corrupción y la debilidad de las vías de regularización producen o prolongan el estatus irregular. Ese estatus adquiere luego relevancia jurídica e institucional a través de categorías como la de « extranjero ilegal », y puede exponer a migrantes, solicitantes de asilo y refugiados al arresto, la detención, la deportación, la exclusión o la denegación de protección. El artículo traza así una cadena causal entre disfunción administrativa, precariedad documental, clasificación como irregular y coerción.

El artículo define primero la crimigración en el contexto sudafricano y la distingue de la xenofobia, la securitización, la disfunción administrativa y las violaciones generales de derechos. Luego historiza la gobernanza penal de las migraciones trazando las continuidades entre el control de los desplazamientos de la era del apartheid, la Aliens Control Act y la aplicación contemporánea de la legislación migratoria. Examina además la arquitectura jurídica de la gobernanza penal de las migraciones, incluidos los delitos migratorios, la detención según el artículo 34, las facultades de deportación y la protección limitada de los solicitantes de asilo. El artículo analiza asimismo prácticas de aplicación como la operación New Broom, las inspecciones laborales, la verificación biométrica y la Border Management Authority. El artículo sostiene que estos desarrollos conllevan serias implicaciones constitucionales y de derechos humanos, en particular para la dignidad, la igualdad, la libertad, la justicia administrativa, el principio de no devolución, los derechos de los niños, la atención de salud y la educación. Al situar a Sudáfrica en una perspectiva comparada con los Estados Unidos, el artículo muestra tanto la convergencia con las tendencias globales de la crimigración como los rasgos distintivos del caso sudafricano. Concluye que una gobernanza migratoria basada en los derechos exige más que límites a la detención y a la deportación: requiere la reforma de los sistemas administrativos, las categorías jurídicas, los discursos políticos y las prácticas de aplicación mediante los cuales la irregularidad es producida, hecha visible y castigada.

Palabras clave: criminalización, crimigración, gobernanza penal, detención, deportación, falla administrativa, aplicación coercitiva de la legislación migratoria

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Introduction: Migration Control and the Rise of Crimmigration

[1] Migration control has increasingly become intertwined with criminal law, policing and security governance. Across a range of jurisdictions, states have moved beyond the ordinary administrative regulation of entry, residence and removal, and have relied more visibly on criminal offences, detention, deportation, surveillance and enforcement operations to manage irregular migration¹. As Aas points out, the boundary between criminal justice and immigration control is becoming

¹ KIELY Elizabeth / SWIRAK Katharina, *Criminalising borders, migration and mobility*, in: *The criminalisation of social policy in neoliberal societies*, Bristol 2021, p. 56.

harder to maintain². This convergence is commonly described as “crimmigration”: the overlap between criminal law and immigration law through which migration-related conduct, status or presence is treated through penal or quasi-penal mechanisms³.

[2] Crimmigration is used in a specific sense in this article. It does not treat all hostility towards migrants, all administrative failures, or all rights violations as crimmigration. Xenophobic discourse, securitisation, weak documentation systems and poor administration are important parts of the South African context, but they are not identical to crimmigration. Rather, they become relevant where they support, justify or enable the use of criminal-law techniques, policing powers, detention, deportation, surveillance or penal-style enforcement against migrants. The central concern of this article is therefore the legal and institutional process through which migration governance is transformed into a punitive system of control.

[3] South Africa provides a compelling case study of this transformation. As the continent’s most industrialised economy and a key destination for migrants from across Africa and beyond, the country has long grappled with the challenges of migration governance⁴. Yet migrants continue to be portrayed by some politicians, media outlets and public figures as criminals, security threats and economic burdens, despite little reliable evidence to support these claims. Indeed, available evidence suggests that migrants are more frequently the victims of crime than its perpetrators⁵. The term *migrant* is also commonly treated as a single, undifferentiated category, obscuring important legal distinctions between migrant workers, traders, asylum seekers, refugees, students and visitors. These narratives shape public understandings of migration and create a political environment in which increasingly restrictive and enforcement-oriented responses appear both necessary and legitimate⁶.

[4] Against this backdrop, this article draws on framing theory and social constructionism to examine how these representations are produced, reinforced and normalised through political discourse, media narratives and institutional practices⁷. It further engages with the concepts of crimmigration and penal governance to explain how these constructions become embedded in legal rules, administrative practices and coercive forms of immigration enforcement, ultimately contributing to the criminalisation of migration⁸.

[5] South Africa’s criminalisation of migration is not entirely new. Its roots can be traced to earlier immigration control frameworks, including the Aliens Control Act and apartheid-era forms of mobility control. Klaaren and Ramji’s earlier analysis of post-apartheid migration policing is important in this regard, as they argue that South Africa’s approach to migration policing has

² AAS Katja Franko, *The ordered and the bordered society: Migration control, citizenship, and the northern penal state*, in: *The borders of punishment: Migration, citizenship, and social exclusion*, Oxford 2013, p. 23.

³ STUMPF Juliet, *The crimmigration crisis: Immigrants, crime, and sovereign power*, American University Law Review (Vol. 56/2) 2006, pp. 367-419.

⁴ CRUSH Jonathan / WILLIAMS Vincent, *Criminal tendencies: Immigrants and illegality in South Africa*, SAMP Migration Policy Brief No. 10, 2002, p. 1.

⁵ *Ibid.*

⁶ *Ibid.*, p. 3.

⁷ TARISAYI Kudzayi Savious, *Framing Operation Dudula and anti-immigrant sentiment in South African media discourse*, Indonesian Journal of Education and Social Sciences (Vol. 3/1) 2024, p. 34.

⁸ Stumpf, ‘*The crimmigration crisis*’, pp. 367-419.

remained largely unchanged since the end of apartheid⁹. They further show how law, bureaucracy and policing can contribute to the production of “illegality”, particularly where documentation systems are inaccessible, arbitrary or implemented through intrusive policing practices¹⁰. The present article therefore does not claim that penal migration governance emerged only recently. Rather, it argues that what is new is the intensification and normalisation of penal logic through recent enforcement operations, biometric verification, detention practices, deportation drives, political rhetoric and proposed legal reforms.

[6] The article’s core argument is that punitive migration governance in South Africa is produced through the interaction of three developments. First, administrative weakness and documentation failures create or deepen irregular status. Secondly, legal frameworks attach criminal, detention or deportation consequences to that status. Thirdly, intensified enforcement operations, political rhetoric and technological border control normalise the treatment of migrants as objects of suspicion, surveillance and removal. Increased enforcement alone does not necessarily amount to criminalisation. It becomes crimmigration where immigration control is implemented through penal mechanisms or where administrative irregularity is treated as criminality.

[7] Methodologically, the article adopts a doctrinal and contextual legal analysis. It examines South African immigration and refugee legislation, constitutional principles, relevant case law, policy developments and enforcement practices, while drawing on crimmigration, border criminology and South African migration governance scholarship. The article also uses selected enforcement examples, including Operation New Broom, to illustrate how the legal framework operates in practice. Its aim is not to provide a general account of all migration-related rights violations, but to show how particular legal and institutional mechanisms produce punitive migration governance.

[8] The analysis proceeds in five parts. Part I defines crimmigration in the South African context, historicises penal migration governance and identifies its key drivers. Part II examines the legal architecture of penal migration governance, focusing on immigration-related offences, detention, deportation and asylum seeker protection. Part III analyses enforcement practices, including Operation New Broom, multi-agency inspections, technological verification and the Border Management Authority. Part IV considers the constitutional and human rights implications of penal migration governance. Part V places South Africa in comparative perspective by considering the United States as a more developed crimmigration model, while emphasising the distinctive constitutional, historical, racial, regional and administrative features of the South African case.

[9] The article concludes that South Africa’s migration regime should not be understood as having moved neatly from administrative immigration control to penal governance. Rather, punitive features have long been present in South African migration control, but recent legal, institutional and enforcement developments have intensified and normalised them. A rights-based recalibration of migration governance therefore requires more than limits on detention or deportation. It requires attention to the administrative systems, legal categories, political narratives and enforcement practices through which irregularity is produced and punished.

⁹ KLAAREN Jonathan / RAMJI Jaya, *Inside illegality: Migration policing in South Africa after apartheid*, Africa Today (Vol. 48/3) 2001, p. 35.

¹⁰ *Ibid*, pp. 39, 42.

I. Crimmigration

A. Defining Crimmigration in the South African Context

[10] “Crimmigration” refers to the growing convergence between immigration control and criminal justice¹¹. At its broadest, the term captures the increasing use of criminal-law tools, penal logic and enforcement practices to regulate migration¹². It is not limited to the creation of immigration-related offences. It also includes the use of policing, detention, deportation, surveillance and other coercive mechanisms to manage migration status, presence and movement¹³. Border criminology similarly shows that punishment increasingly operates beyond prisons and criminal courts, including through borders, detention centres and deportation systems¹⁴.

[11] This definition distinguishes crimmigration from broader anti-migrant hostility and from related but distinct concepts. Criminalisation refers to the legal process through which conduct, status or presence is made punishable through criminal offences, penalties or prosecution¹⁵. Securitisation refers to the framing of migration as a threat to national security, public order or social stability¹⁶. Xenophobia or particularly Afrophobia, refers to social hostility towards perceived foreigners, which, in South Africa is often racialised and directed particularly at Black African non-nationals¹⁷. Administrative dysfunction refers to state failures in documentation, processing, access to immigration services and status verification¹⁸. Rights violations refer to unlawful infringements of constitutional or international protections. Penal governance is broader than formal criminal punishment and describes a mode of rule that manages populations through coercion, detention, surveillance, exclusion and stigma¹⁹. Crimmigration intersects with all these categories, but should not be treated as synonymous with them. It becomes visible where immigration control is carried out through criminal-law tools, policing, detention, deportation, surveillance or other penal and

¹¹ KOGOVŠEK ŠALAMON Neža / FRETT Barry / KETCHUM Elizabeth Stark, *Global crimmigration trends*, in: *Causes and consequences of migrant criminalization*, Cham 2020, p. 4.

¹² European Center for Populism Studies, *Crimmigration*, n.d.; Kogovšek Šalamon / Frett / Ketchum, ‘Global crimmigration trends’, pp. 3–25.

¹³ FRANKO Katja, *Criminal justice in the age of crimmigration*, Annual Review of Criminology (Vol. 9/1) 2026, pp. 299–304.

¹⁴ BOSWORTH Mary, *Border criminology and the changing nature of penal power*, in: *The Oxford Handbook of Criminology*, Oxford 2017, p. 385.

¹⁵ DUFF Antony / HÖRNLE Tatjana, *Principles of criminalisation*, in: *Core Concepts in Criminal Law and Criminal Justice*, Cambridge 2025, p. 15.

¹⁶ BUZAN Barry / WÆVER Ole / DE WILDE Jaap, *Security: A new framework for analysis*, Boulder 1998, pp. 23-26; HUYSMANS Jef, *The European Union and the securitization of migration*, Journal of Common Market Studies (Vol. 38/5) 2000, p. 758.

¹⁷ TSHISHONGA Ndwakhulu, *The impact of xenophobia-Afrophobia on the informal economy in Durban CBD, South Africa*, The Journal for Transdisciplinary Research in Southern Africa (Vol. 11/4) 2015, p. 165.

¹⁸ Scalabrini Centre of Cape Town and Another v Minister of Home Affairs and Others [2023] ZACC 45, paras. 9-10, 13; KHAN Fatima / SCHREIER Tal (eds), *Refugee Law in South Africa*, Cape Town 2014, p. 143.

¹⁹ BRANDARIZ José Angel, *An expanded analytical gaze on penal power: Border criminology and punitiveness*, International Journal for Crime, Justice and Social Democracy (Vol. 10/2) 2021, pp. 99-102; BARKER Vanessa, *Penal power at the border: Realigning state and nation*, Theoretical Criminology (Vol. 21/4) 2017, pp. 444-445, 449-451.

quasi-penal mechanisms²⁰. The concern is therefore not only that migrants are treated harshly, but that administrative questions of entry, status and residence are increasingly governed through tools associated with punishment, risk management, detention and expulsion²¹.

[12] In the South African context, this distinction is particularly important because migration is often treated as a single, undifferentiated category in public and political discourse. In reality, the term “migrant” may refer to workers, traders, students, visitors and other persons who move for different reasons and under different legal regimes. Refugees and asylum seekers are legally distinct from other migrants because they seek international protection from persecution, conflict, serious public disorder or other forms of harm²². When these categories are viewed as the same, persons with protection claims may be treated as immigration offenders, and administrative irregularity may be recast as criminality. This failure to distinguish between legal categories contributes to the wider criminalisation of migration.

[13] Crimmigration should also not be treated as a uniform global model. The relationship between immigration law and criminal justice differs across jurisdictions and must be understood in its specific legal, institutional and historical context²³. In South Africa, this relationship is shaped by apartheid-era mobility control, the legacy of the repealed Aliens Control Act 96 of 1991, administrative failures within the Department of Home Affairs, racialised enforcement practices, regional migration dynamics and recurring xenophobic mobilisation. Apartheid and late-apartheid migration laws created a coercive architecture of exclusion, documentation control and detention²⁴, while the democratic Constitution and refugee framework later placed that architecture under a rights-based legal order. Yet the Immigration Act retained criminal offences and detention powers that continue to make irregular status vulnerable to penal treatment. In recent years, administrative backlogs, border-management reforms, biometric verification, expanded inspections and politically charged enforcement campaigns have intensified the practical reach of this penal logic. The concern, therefore, is not that immigration enforcement exists, but that it increasingly operates against people whose irregularity may have been produced or prolonged by state failure.

B. Historicising Penal Migration Governance in South Africa

[14] South Africa’s contemporary penal migration governance should not be understood as an entirely new development. It is better understood as the continuation and intensification of older techniques of racialised movement control. Under apartheid, the state regulated movement, residence and labour through pass laws, influx control, racially differentiated immigration law and coercive policing. These systems did not only regulate mobility²⁵. They criminalised unauthorised presence, enabled arrest and removal, and treated Black mobility as a problem of public order. In

²⁰ Kogovšek Šalamon / Frett / Ketchum, ‘Global crimmigration trends’, p. 5.

²¹ *Ibid.*, pp. 5–6; Franko, ‘Criminal Justice in the Age of Crimmigration’, pp. 299–304.

²² Habitat for Humanity, *Refugees, asylum seekers and migrants: The crucial difference*, 2016; SENGUPTA Somini, *Migrants or refugees? There is a difference, with legal implications*, 2015; Refugee Council of Australia, *What is the difference between a refugee, an asylum seeker and a migrant?*, 2019.

²³ Franko, ‘Criminal justice in the age of crimmigration’, p. 300.

²⁴ KLOTZ Audie, *Migration after apartheid: Deracialising South African foreign policy*, *Third World Quarterly* (Vol. 21/5) 2000, p. 832.

²⁵ TATI Gabriel, *The immigration issues in the post-apartheid South Africa: Discourses, policies and social repercussions*, *Espace populations sociétés* (Vol. 2008/3) 2008, pp. 429–430.

this sense, apartheid governance was penal in nature because it used documentation, policing, arrest and forced removal to determine who could lawfully be present in particular spaces²⁶.

[15] This history matters because apartheid's movement-control apparatus was directed not only at foreign nationals, but also at Black South Africans. Pass laws and influx control treated Black presence in urban areas as conditional, document-dependent and subject to police verification. Apartheid policing became largely devoted to policing racial mobility, with unannounced raids, stop-and-search operations and roadblocks used not only to enforce segregation, but also to suppress crime and political unrest. The difference between controlling racial groups inside the country and controlling immigrants at the border was never clear-cut. The two systems overlapped and supported each other. Both relied on the same basic technologies of governance: documentation, suspicion, policing, arrest and removal²⁷.

[16] Late-apartheid immigration control extended this logic into the regulation of cross-border mobility. Crush and McDonald identify four pillars of apartheid migration policy: racist immigration selection, the exploitation of migrant labour from neighbouring countries, tough enforcement legislation, and the refusal to adopt international refugee protection²⁸. The Aliens Control Act, enacted at the end of apartheid, consolidated this control-oriented approach. It introduced tougher penalties for unauthorised migration, expanded powers of entry, search and arrest, increased penalties for harbouring an "illegal alien", and enabled nationwide raids and deportations, particularly against Mozambican refugees and migrants²⁹. This statute, therefore, did not simply regulate entry and residence. It carried forward a penal logic in which unauthorised presence was treated as a threat requiring detection, detention and removal.

[17] The post-apartheid transition disrupted some features of this system, but it did not immediately dismantle its legal and institutional architecture³⁰. The Aliens Control Act remained in force for several years after 1994 and continued to shape immigration enforcement in the new constitutional order. Crush and McDonald describe it as one of the final pieces of apartheid legislation and argue that it remained a blunt, often unconstitutional instrument for migration management after apartheid³¹. The South African Human Rights Commission also found that, in practice, immigration enforcement under the Aliens Control Act operated arbitrarily with incidents of assault and coercion, produced wrongful detention and affected both foreigners and South Africans³².

[18] The early democratic period therefore reveals continuity rather than a clean break. Deportations rose sharply after 1994. Human Rights Watch recorded an increase from 44,225

²⁶ VIGNESWARAN Darshan, *The complex sources of immigration control*, International Migration Review (Vol. 54/1) 2020, pp. 262-263, 276-278; CRUSH Jonathan / McDONALD David A., *Introduction to special issue: Evaluating South African immigration policy after apartheid*, Africa Today (Vol. 48/3) 2001, pp. 2-4.

²⁷ Vigneswaran, 'The complex sources of immigration control', p. 277.

²⁸ Crush / McDonald, 'Evaluating South African immigration policy after apartheid', pp. 2-3.

²⁹ Crush / McDonald, 'Evaluating South African immigration policy after apartheid', pp. 3-4.

³⁰ HANDMAKER Jeff / NALULE Caroline, *Border enforcement policies and reforms in South Africa (1994-2020)*, International Institute of Social Studies Working Paper No. 686, 2021, pp. 4, 8-10.

³¹ *Ibid*, pp. 1-2; Human Rights Watch, *Prohibited persons: Abuse of undocumented migrants, asylum-seekers, and refugees in South Africa*, 1998 (cité: Human Rights Watch, *Prohibited persons*).

³² South African Human Rights Commission, *Report into the arrest and detention of suspected undocumented migrants*, Johannesburg 1999, pp. 4-7, 9.

deportations in 1988, to 96,600 in 1993, and to 180,713 in 1996, while also cautioning that rising deportation statistics may reflect intensified policing rather than an actual increase in undocumented migration³³. There was also the creation of Internal Tracing Units within the South African Police Service and the growing role of the South African National Defence Force in migration control³⁴. This suggests that post-apartheid enforcement drew on policing capacities and practices inherited from apartheid-era movement control.

[19] The South African Human Rights Commission's 1999 investigation confirms this continuity. The Commission found that many apprehensions were based on random checks, appearance, language, skin colour, or failure to produce identity documents³⁵. It also found that valid documents were sometimes ignored, destroyed or made inaccessible, that bribery and extortion were widespread, and that detention frequently occurred without adequate procedural safeguards³⁶. Significantly, the post-apartheid immigration enforcement reproduced core features of apartheid movement control: the expectation that racialised persons must constantly prove lawful presence, the use of police discretion to determine belonging, and the conversion of documentation failure into detention and removal.

[20] Klaaren and Ramji develop this argument further. They argue that South Africa's migration policing policy had not changed substantially since apartheid and that police tactics in post-apartheid enforcement operations were dramatically similar to apartheid policing practices³⁷. Their analysis of Operation Crackdown is especially important. The operation targeted areas largely populated by Black immigrants, focused on whether people had proper "passes" or immigration documents, and reportedly included the destruction of valid documents in ways that "made immigrants illegal"³⁸. They argue that Operation Crackdown exemplified the criminalisation of being Black and foreign, just as apartheid had criminalised Blackness³⁹. Operation Crackdown is therefore important not only as an example of intensified post-apartheid enforcement, but as an illustration of how immigration policing can produce the very illegality it claims to detect. Through raids, document checks and the reported destruction or disregard of valid documents, enforcement practices transformed documentation vulnerability into suspicion, arrest, detention and possible removal⁴⁰.

[21] The implication for this article is that South Africa's penal migration governance is not best understood as a recent shift from an otherwise neutral administrative system. It is better periodised as a longer-standing feature of South African mobility control that has changed form over time. Apartheid produced racialised movement control. Late apartheid consolidated immigration control through the Aliens Control Act. The early democratic period retained many of these structures while

³³ Human Rights Watch, *Prohibited persons*; CRUSH Jonathan, *Covert operations: Clandestine migration, temporary work and immigration policy in South Africa*, SAMP Migration Policy Series No. 1, 1997, p. 21.

³⁴ Crush, 'Covert operations', p. 26.

³⁵ South African Human Rights Commission, *Report into the arrest and detention of suspected undocumented migrants*, pp. 18-23.

³⁶ *Ibid*, pp. 21-24, 30-34.

³⁷ Klaaren / Ramji, 'Inside illegality', pp. 35-36.

³⁸ *Ibid*, pp. 36-37.

³⁹ *Ibid*, p. 37.

⁴⁰ *Ibid*, pp. 36-37, 40-42.

attempting partial reform. Later reforms, including the Immigration Act, intensified enforcement, detention, deportation and documentation-based control within a constitutional order that formally protects the rights of migrants. Contemporary developments such as biometric verification, intensified inspections, the BMA and Operation New Broom should therefore be read as recent intensifications of a much older penal tradition rather than as entirely new departures.

C. Drivers of Penal Migration Governance in South Africa

[22] The following subsections do not treat political rhetoric, media framing, xenophobia or administrative weakness as identical to crimmigration. Rather, they analyse these factors as drivers of penal migration governance in South Africa. Their relevance lies in how they shape the conditions under which administrative irregularity is increasingly interpreted as criminality, enforcement-led responses gain political legitimacy, and rights-based safeguards are weakened in practice. These factors do not, on their own, prove criminalisation. They become significant for crimmigration where they justify, enable or normalise the use of criminal offences, policing, detention, deportation, surveillance and other coercive mechanisms in migration control. This section therefore examines the political, social, institutional and transnational dynamics that contribute to the punitive treatment of migrants, while keeping the article's central focus on the legal and institutional mechanisms through which migration governance assumes a penal character.

1. Political Rhetoric, Xenophobia and Public Sentiment

[23] Political rhetoric plays an important role in shaping how migration is understood and governed in South Africa. It does not, by itself, amount to crimmigration. However, it becomes relevant to penal migration governance where it frames migrants as threats to public order, employment, social stability or national security, and where that framing is then used to justify stricter immigration controls, policing, detention and deportation⁴¹. In this sense, political discourse helps create the conditions under which administrative irregularity is treated as criminality, and enforcement-led responses appear politically necessary⁴².

[24] This framing is reinforced by South Africa's socio-economic conditions. High unemployment, inequality and uneven access to public services create a context in which migrants can be scapegoated for structural failures that are not caused by migration alone⁴³. South Africa's official unemployment rate was 32.7% in the first quarter of 2026, increasing from 31.4% in the previous quarter.⁴⁴ Such conditions can make exclusionary narratives more politically effective, particularly where migrants are associated with joblessness, crime, pressure on public services and informal economic competition. The relevance of these conditions to crimmigration is not that poverty or unemployment automatically produce criminalisation, but that they make punitive migration control easier to legitimise⁴⁵.

⁴¹ MACHINYA Johannes, *Migration and politics in South Africa: Mainstreaming anti-immigrant populist practice*, African Human Mobility Review (Vol. 8/1) 2022, pp. 64, 72-73; Buzan / Wæver / de Wilde, 'Security', pp. 23-26; Huysmans, 'The European Union and the securitization of migration', p. 758.

⁴² France 24, *South Africa Police Clash with Anti-Immigrant Protesters*, 2026.

⁴³ KAZIBONI Anthony / LANCASTER Lizette / MACHABAPHALA Thato / MULAUDZI Godfrey, *Scapegoating in South Africa: Busting the myths about immigrants*, ISS Southern Africa Report (53) 2022, p. 3.

⁴⁴ Stats SA, *Quarterly Labour Force Survey (QLFS) – Q1: 2026*, media release, 2026, p. 6.

⁴⁵ GORDON Steven Lawrence, *Migrants in a state of exception*, Transcience Journal (Vol. 1/1) 2010, p. 4.

[25] Xenophobia must also be understood as a distinct but connected driver of penal migration governance. It refers to hostility towards perceived foreigners and, in South Africa, is often racialised and directed particularly at Black African non-nationals⁴⁶. This is why some scholars and commentators use the term “Afrophobia” to capture the specific targeting of African migrants⁴⁷. Xenophobic violence is frequently explained through reference to unemployment, service delivery failures and economic competition, but these explanations are incomplete⁴⁸. They do not fully account for the racialised character of the hostility or the recurring depiction of African migrants as criminal, disorderly or undeserving of protection⁴⁹. Although hostility and violence against foreign nationals had long been documented in South Africa, particularly in townships and informal settlements, the May 2008 attacks represented an unprecedented escalation rather than a new phenomenon⁵⁰. Existing research demonstrates that anti-immigrant attitudes were already deeply entrenched before 2008; the nationwide attacks brought these longstanding patterns into sharp public view. Beginning in Alexandra, Johannesburg, the violence rapidly spread across the country, leaving 62 people dead, approximately 1,700 injured and more than 100,000 people displaced⁵¹.

[26] The primary targets were African foreign nationals, particularly migrants from Zimbabwe, Mozambique, Malawi, Somalia, Ethiopia and Nigeria, who were frequently singled out because of their visibility in the informal economy, linguistic and cultural differences, and perceptions that they competed for jobs, housing and public services or were associated with criminality⁵². As the deadliest outbreak of xenophobic violence in post-apartheid South Africa, the May 2008 attacks remain the defining example of how entrenched anti-migrant hostility can escalate into widespread collective violence. These attitudes continue to shape political discourse and reinforce public support for increasingly restrictive immigration policies, intensified enforcement measures and the broader criminalisation of migration.

[27] Similar dynamics were visible during the 2019 violence in Johannesburg and surrounding areas, where foreign-owned businesses were looted and foreign nationals were again associated with crime and economic threat. Over 50 businesses were reportedly affected, and the violence resulted in approximately 10–12 deaths and more than 600 arrests⁵³. Public statements by political

⁴⁶ Tshishonga, ‘The impact of xenophobia-Afrophobia on the informal economy’, p. 165.

⁴⁷ TARISAYI Kudzayi Savious / MANIK Sadhana, *An unabating challenge: Media portrayal of xenophobia in South Africa*, Cogent Arts and Humanities (Vol. 7/1) 2020, p. 2; Gordon, ‘Migrants in a state of exception’.

⁴⁸ MISAGO Jean Pierre / BULE Kabiri / MLILO Silindile, *Xenophobic violence in South Africa: An analysis of trends, causal factors and responses*, Xenowatch Quinquennial Report, African Centre for Migration and Society, 2021, pp. 23-25.

⁴⁹ MATSINHE D. Mario, *Africa’s fear of itself: The ideology of Makwerekwere in South Africa*, Third World Quarterly (Vol. 32/2) 2011, pp. 295-313.

⁵⁰ DODSON Belinda, *Locating xenophobia: Debate, discourse, and everyday experience in Cape Town, South Africa*, Africa Today (Vol. 56/3) 2010, p. 2; SMITH Matthew J., *Violence, xenophobia and the media: A review of the South African media’s coverage of xenophobia and the xenophobic violence prior to and including the events of 2008*, Politikon (Vol. 38/1) 2011, pp. 111-129; DAHLBERG Moa / THAPAR-BJÖRKERT Suruchi, *Conceptualizing xenophobia as structural violence in the lives of refugee women in Gauteng, South Africa*, Ethnic and Racial Studies (Vol. 46/12) 2023, pp. 2768-2790.

⁵¹ Dodson, ‘Locating xenophobia’, p. 2; Gordon, ‘Migrants in a state of exception’.

⁵² Human Rights Watch, *South Africa: Events of 2008*, 2009.

⁵³ Human Rights Watch, *South Africa: Punish Xenophobic Violence*, 2019; TADE Oludayo, *Xenophobia in South Africa: how family members influenced Nigerians to flee or stay*, 2022.

figures in the aftermath of these attacks reinforced the link between migration, unemployment and irregular status. For example, the then Mayor of Johannesburg, Herman Mashaba, made statements that were widely criticised. He asserted that South Africans had “nothing to apologise for” in relation to the attacks on foreign nationals and emphasised the responsibility of government, particularly the Department of Home Affairs, to address irregular migration⁵⁴. He further linked migration to unemployment, suggesting that undocumented migrants were contributing to job losses among South African citizens.

[28] In a similar vein, the current Minister of Sport, Arts and Culture and leader of the Patriotic Alliance has frequently expressed views that have been criticised as anti-migrant, including support for mass deportations and contributions to a broader hostile public discourse. His statements have often framed migrants as criminals and economic threats. In 2022, leaders of the Patriotic Alliance called on citizens to expel “illegal foreigners”, rhetoric that risked legitimising private individuals’ assumption of immigration enforcement functions and encouraging them to determine, without legal authority, who was lawfully entitled to remain in the country⁵⁵. These narratives mirrored those advanced by Operation Dudula, a movement established in June 2021 that claimed to combat crime, unemployment and pressure on public services allegedly caused by undocumented migrants. The name *dudula*, an isiZulu term meaning “to force out” or “to knock down”, encapsulates the movement’s objective of removing migrants from local communities. In doing so, the movement contributed to the normalisation of citizen-led immigration enforcement and the portrayal of undocumented migrants as legitimate targets of exclusion⁵⁶.

[29] On the other hand, South African political discourse is not uniformly anti-migrant. Julius Malema, leader of the Economic Freedom Fighters (EFF), has at times adopted a more pan-African and anti-xenophobic stance, criticising vigilante movements such as Operation Dudula and calling for greater attention to documentation, regularisation and African solidarity⁵⁷. These positions are important because they show that migration is contested within South African politics. However, political narratives do more than shape public opinion; they can also mobilise collective action. Exclusionary rhetoric may embolden organised groups and private individuals to assume immigration enforcement roles, reinforcing the perception that migrants constitute a threat requiring removal. Political discourse therefore becomes legally significant when it legitimises both state and non-state coercive responses to migration.

2. Media Perceptions and Reporting

[30] Public perceptions of politically divisive issues are profoundly shaped by the media, which frequently presents news through frames that reflect the ideological orientations and expectations of its target audiences⁵⁸. In doing so, narratives are amplified while competing perspectives are marginalised or omitted. Lerner, Roberts and Matlala observe that the media plays a vital role in

⁵⁴ BAKARE Tonye, *Xenophobia: Mayor of Johannesburg says no need to apologise to Nigeria*, 2019.

⁵⁵ SABC News, *The ANC says it will look at South Africa’s immigration challenges*, 2022.

⁵⁶ MTHOMBENI Zama, *Xenophobia in South Africa: Problematising Ubuntu as an ethical response*, *The Thinker* (Vol. 93/4) 2022, p. 64.

⁵⁷ The Guardian, *South Africa Anti-Migrant vigilante Operation Dudula registers as party for 2024 elections*, 2023; MALEMA Julius, *Julius Malema on African Unity and Migration*, 2022.

⁵⁸ GASPARYAN Olga / SIROTKINA Elena, *Media choice and audience perceptions: Evidence from visual framing of immigration in news stories*, *Plos One* (Vol. 20/9) 2025.

challenging racism, xenophobia and other forms of discrimination, but can equally reinforce prejudice where it reproduces discriminatory narratives or fails to challenge them. This is reflected in the findings of the Truth and Reconciliation Commission, which recognised that the South African media was not immune from complicity in human rights violations under apartheid⁵⁹. Against this backdrop, visual imagery and language operate together to shape public understandings of migration and influence how migrants are perceived within society.

[31] Gasparyan and Sirotkina explain that media framing shapes public understanding by selectively emphasising particular aspects of reality while marginalising others⁶⁰. In South Africa, migration reporting has frequently framed migrants and asylum seekers through a limited set of recurring narratives, portraying them as undocumented, criminal, economically burdensome or responsible for social disorder by taking away jobs and resources⁶¹. These portrayals are further reinforced through identity marking, whereby the nationality or immigration status of foreign nationals accused of crimes is foregrounded, while equivalent identifiers are less frequently emphasised when South African nationals are implicated. Relatedly, media reporting often employs selective framing, in which crimes involving migrants receive disproportionate attention or are presented as representative of the broader migrant population rather than the conduct of individual offenders⁶². Similar reporting patterns have been documented in studies of United States media, where race and immigration status are more likely to be highlighted when minority groups are implicated in crime despite substantial evidence disputing any general link between immigration and criminality⁶³.

[32] Tarisayi's empirical analysis of South African newspaper coverage demonstrates how these framing practices operate in relation to Operation Dudula. Although newspapers occasionally presented competing perspectives, coverage frequently reproduced claims that migrants were responsible for unemployment, crime and pressure on public services, often reporting the statements of politicians and anti-migrant movements without critically interrogating them⁶⁴. Rather than merely portraying migrants negatively, such reporting amplified narratives that associated migration with criminality and social decline, contributing to the political salience of immigration and reinforcing public support for increasingly restrictive and enforcement-oriented approaches to migration governance.

[33] Over time, these patterns of representation have shaped public understanding, normalised the stereotypes, and contributed to the entrenchment of xenophobic attitudes. These misleading and harmful narratives have further been reinforced by the tendency of both traditional and social media to conflate migrants, asylum seekers, and criminals, often without providing adequate context or

⁵⁹ LERNER Anna / ROBERTS Sandra / MATLALA Callies, *Race and migration in the community media: Local stories, common stereotypes*, Media Monitoring Africa, 2010, p. 8.

⁶⁰ Gasparyan / Sirotkina, 'Media choice and audience perceptions'.

⁶¹ Tarisayi, 'Framing Operation Dudula and anti-immigrant sentiment in South African media discourse', p.34; NGUBANE Londeka P., *The scarlet letter F: Foreign nationals struggle for inclusion in South Africa and against hate crimes*, Journal of Anthropological and Archaeological Sciences (Vol. 2/3) 2020, p. 255.

⁶² *Ibid.*

⁶³ DIXON Travis L., *Good guys are still always in white? Positive change and continued misrepresentation of race and crime on local television news*, Communication Research (Vol. 44/6) 2017, pp. 775–792.

⁶⁴ Tarisayi, 'Framing Operation Dudula and anti-immigrant sentiment in South African media discourse', p. 34.

nuance for readers or followers. The failure to provide adequate context obscures the structural drivers of migration, thereby reinforcing simplistic and frequently prejudicial interpretations⁶⁵.

[34] Media coverage of migration in South Africa often mirrors dominant political framing, disproportionately associating foreign nationals with crime and illegality while neglecting the broader legal and socio-economic context⁶⁶. At the same time, social media ecosystems facilitate the rapid spread of misinformation and disinformation, leaving many users ill-equipped to distinguish credible information from manipulated content or automated accounts. These dynamics shape public opinion in ways that legitimise restrictive and enforcement-oriented policy responses⁶⁷.

3. Administrative Failure and the Production of Irregularity

[35] Administrative weaknesses within South Africa's immigration and asylum systems should not, in themselves, be treated as evidence of crimmigration. It becomes relevant to penal migration governance where bureaucratic failure produces or deepens irregular status, and where that irregularity is then treated as a basis for arrest, detention, deportation or exclusion. The central concern is therefore not only that the Department of Home Affairs struggles to process applications efficiently. The more serious concern is that delays, inaccessible offices, unresolved appeals and weak regularisation pathways, documentation failures, corruption and limited access to legal status produce or prolong irregularity, leaving many migrants unable to regularise their presence despite their willingness to comply with the law⁶⁸.

[36] This dynamic is especially visible in the asylum system, where structural weaknesses are reflected in persistent institutional shortcomings within the Department of Home Affairs. These include prolonged appeal backlogs, expired asylum permits with limited practical opportunities for renewal, restricted access to Refugee Reception Offices, and the loss, destruction or confiscation of documentation, particularly affecting asylum seekers during flight, upon arrival or while attempting to regularise their status⁶⁹.

[37] The scale of the backlog became so severe that in 2021, the Department of Home Affairs and United Nations High Commissioner for Refugees (UNHCR) launched a project to address more

⁶⁵ GORDON Steven Lawrence, *Knowledge, the media and anti-immigrant hate crime in South Africa*, in: *Mediating xenophobia in Africa. Unpacking discourses of migration, belonging and othering*, 2020, p. 100; Gasparyan / Sirotkina, 'Media choice and audience perceptions'.

⁶⁶ Gordon, 'Knowledge, the media and anti-immigrant hate crime in South Africa', p. 100.

⁶⁷ IRETON Cherilyn / POSETTI Julie (eds), *Journalism, fake news & disinformation: Handbook for journalism education and training*, Paris 2018, p. 9.

⁶⁸ AMIT Roni / KRIGER Norma, *Making migrants "il-legible": The policies and practices of documentation in post-apartheid South Africa*, *Kronos* (Vol. 40/1) 2014, pp. 269-290; *Scalabrini Centre of Cape Town and Another v Minister of Home Affairs and Others* [2023] ZACC 45, paras. 9-10, 13.

⁶⁹ South African Government News Agency, *Home Affairs signs agreement to deal with backlog of asylum seekers*, 2021; DAMONS Marecia, *Asylum seeker appeal backlog rises to 161,000 cases*, 2026; *Scalabrini Centre of Cape Town and Another v The Minister of Home Affairs and Others* [2023] ZACC 45; Klaaren / Ramji, 'Inside illegality', pp. 36-37; Global Detention Project, *Immigration detention in South Africa: Stricter control of administrative detention, increasing criminal enforcement of migration*, Geneva 2021 (cité: Global Detention Project, *Immigration detention in South Africa*), pp. 17-19.

than 153,000 asylum seekers who had waited many years for appeal decisions⁷⁰. In December 2025, the Department reported to Parliament that the Refugee Appeals Authority still had a backlog of approximately 151,802 pending cases, alongside 3,700 pending section 27 adjudications before the Standing Committee for Refugee Affairs and 7,829 matters pending consideration for withdrawal of refugee status under section 36 of the Refugees Act 130 of 1998⁷¹. Section 27 grants recognised refugees documentary recognition, constitutional protection, identity and travel documentation, and access to employment, while section 36 permits the withdrawal of refugee status, after which the person may be treated as an “illegal foreigner” under the Immigration Act. By May 2026, Parliament was informed that the asylum appeal backlog had risen to approximately 161,000 cases, including 70,976 active cases for renewal awaiting an outcome⁷². The persistence of these backlogs demonstrates that administrative dysfunction remains a defining feature of South Africa’s asylum system. As a result, many migrants are left without valid documentation through no fault of their own, rendering them vulnerable to arrest, detention and deportation despite having pending asylum claims, appeals or other regularisation processes.

[38] The practical effects of these institutional failures are particularly evident at Refugee Reception Offices (RROs). These offices are the gateway through which asylum seekers declare their intention to seek protection, lodge claims, renew documents and maintain lawful presence. Where delays, backlogs, long waiting periods and limited access to information prevent asylum seekers from promptly lodging or renewing claims, many are left undocumented despite attempting to comply⁷³. Additionally, asylum seekers often face long queues, repeated refusals of assistance, and appointment delays lasting months or even over a year⁷⁴. As a result, many remain undocumented or hold only appointment proof, leaving them vulnerable to immigration enforcement⁷⁵.

[39] Earlier research on post-apartheid migration governance shows that some asylum seekers have had to pay unofficial fees simply to lodge claims, obtain access to officials, use interpreters, renew documents or secure assistance from decision-makers⁷⁶. Those unable to pay may abandon the process and remain in the country without documents⁷⁷. Thus, the state’s own administrative practices produce irregularity⁷⁸. This exposes them to arrest, detention and deportation for delays that are largely attributable to the state’s own administrative failures, creating a “Catch-22” in which administrative barriers produce the very irregularity that subsequently becomes the basis for coercive immigration enforcement.

⁷⁰ South African Government News Agency, [Home Affairs signs agreement to deal with backlog of asylum seekers](#).

⁷¹ Parliamentary Monitoring Group, *Question NW6919 to the Minister of Home Affairs*, 2025.

⁷² Damons, [Asylum seeker appeal backlog rises to 161,000 cases](#).

⁷³ DUMA Thandeka, *Long delays in processing asylum claims disgraceful*, 2014.

⁷⁴ WASHINYIRA Tariro / CHIRUME Joseph, *Refugees face “No Hope” Service from Home Affairs*, 2023.

⁷⁵ *Ibid*.

⁷⁶ WA KABWE-SEGATTI Aurelia / LANDAU Loren (eds), *Migration in post-apartheid South Africa: Challenges and questions to policy-makers*, Paris 2008, p. 182; AMIT Roni, *Queue here for corruption: Measuring irregularities in South Africa’s asylum system*, Johannesburg 2015 (cité: AMIT, ‘Queue here for corruption’), p. 20; Global Detention Project, [Immigration detention in South Africa](#), pp. 18-19.

⁷⁷ Wa Kabwe-Segatti / Landau, ‘Migration in post-apartheid South Africa’, p. 182.

⁷⁸ Duma, [Long delays in processing asylum claims disgraceful](#).

[40] The Constitutional Court's decision in *Scalabrini Centre of Cape Town and Another v Minister of Home Affairs and Others* illustrates the danger of converting documentation lapses into loss of protection⁷⁹. The challenged provisions required asylum seekers to renew their visas within one month of expiry, failing which their claims could be deemed abandoned⁸⁰. The practical consequence was that a person with a potentially valid refugee claim could be required to leave South Africa or face deportation without the merits of the claim being assessed⁸¹. The Court confirmed that the provisions were unconstitutional, noting that they exposed asylum seekers and their children to the risk of arrest, detention and deportation simply because a visa had not been renewed⁸². This is central to the article's argument. In a dysfunctional system, expired documents may reflect prolonged queues, transport costs, poverty, inaccessible offices or bureaucratic delay rather than deliberate non-compliance.

[41] A further consequence of administrative dysfunction is the frequent conflation of legally distinct categories of non-citizens. Asylum seekers, refugees, economic migrants and undocumented migrants are often treated as a single category of "illegal foreigners", despite the different legal rights and protections applicable to each⁸³. This collapse of legal distinctions expands the reach of immigration enforcement by exposing individuals with protection claims or pending regularisation processes to arrest, detention and deportation⁸⁴. In this way, administrative simplification enables coercive enforcement by treating documentation status as a proxy for criminality or deportability.

[42] The same documentation-centred logic also affects persons with claims to South African citizenship. South African citizens and children entitled to citizenship may struggle to prove their status because of late birth registration, missing records, administrative delay, uncertain parentage, orphanhood, abandonment or barriers faced by mixed-nationality families⁸⁵. These issues should not be treated as identical to immigration enforcement. However, they show that South Africa's documentary regime can produce exclusion even where a person has an underlying legal entitlement to belong. Where proof of legal status cannot readily be produced, administrative failure may become a basis for suspicion, denial of services or even wrongful treatment as a foreigner.

[43] A crimmigration analysis therefore asks what happens after administrative failure has produced documentary vulnerability. Where a person without valid documentation is treated as an "illegal foreigner", subjected to status verification, arrested, detained or deported, administrative failure becomes a gateway to penal migration governance. This does not mean that every undocumented person is undocumented because of state failure, nor does it mean that immigration enforcement is illegitimate. It means that enforcement becomes constitutionally and conceptually troubling where the same state that fails to provide accessible documentation later relies on the absence of

⁷⁹ *Scalabrini Centre of Cape Town and Another v The Minister of Home Affairs and Others* [2023] ZACC 45.

⁸⁰ Refugees Act 130 of 1998, ss. 22(12), 22 (13).

⁸¹ *Ibid*, paras. 7-8.

⁸² *Ibid*, paras. 46-47.

⁸³ MOYO Khangelani / ZANKER Franzisca, *No hope for the "foreigners": The conflation of refugees and migrants in South Africa*, Journal of Immigrant and Refugee Studies (Vol. 20/2) 2022, p. 253.

⁸⁴ *Ibid*, pp. 253-265; Global Detention Project, 'Immigration detention in South Africa', pp. 17-19.

⁸⁵ MULLER Liesl H., *The law is not enough: Realising the child's right to a nationality in South Africa*, Statelessness & Citizenship Review (Vol. 4/2) 2022, p. 256; EKAMBARAM Sharon / MDABE Lindokuhle / BUMBA Geruza, *Why women in rural communities continue to be the face of statelessness in South Africa*, 2023.

documentation to justify coercive control. In such cases, irregularity is not simply a pre-existing legal fact. It is an administrative condition that may be produced, prolonged and then punished.

4. Legal and Policy Frameworks

[44] Legal and policy frameworks play a central role in producing penal migration governance. This is done not only by expressly criminalising certain immigration-related conduct, but also by creating legal categories and procedures through which administrative irregularity becomes linked to surveillance, detention, deportation and exclusion. In this sense, the legal framework does not merely regulate migration. It helps determine when a person becomes legible to the state as irregular, removable or subject to coercive control. This is why scholars of crimmigration and deportability argue that migrant “illegality” is not simply an existing fact that the state identifies. Rather, it is produced through laws, documents, enforcement powers and institutional practices that decide who may remain, who may be removed, and who may be punished for failing to comply⁸⁶. The detailed statutory architecture through which this occurs is examined later. For present purposes, the point is that law and policy operate as one of the drivers through which migration control becomes increasingly punitive.

[45] This is particularly important in the South African context because migration law has long relied on categories that attach suspicion and coercive consequences to legal status. Klaaren and Ramji argue that South African immigration legislation has historically produced the “illegal immigrant” not only as a person outside legal regulation, but as a person constructed as contrary to law⁸⁷. The shift from the Aliens Control Act’s category of the “prohibited person” and “illegal alien” to the Immigration Act’s language of the “illegal foreigner” did not simply modernise terminology. It preserved a legal structure in which status-based irregularity could trigger apprehension, detention, deportation and exclusion⁸⁸. The significance of these categories lies in their practical effects: once a person is classified as an “illegal foreigner”, the legal system makes available a set of coercive administrative and penal tools that would not otherwise apply.

[46] Most recently, the Cabinet-approved Revised White Paper on Citizenship, Immigration and Refugee Protection has generated significant public debate regarding the future direction of South Africa’s migration policy⁸⁹. Although these reforms are framed as measures to improve efficiency, prevent abuse and strengthen national security⁹⁰, they also signal a policy direction in which migration governance is increasingly organised around screening, monitoring, deterrence and removal. The proposal to establish specialised immigration courts, together with the expansion of integrated digital monitoring systems, signals a further institutionalisation of immigration

⁸⁶ DE GENOVA Nicholas P., *Migrant “illegality” and deportability in everyday life*, Annual Review of Anthropology (Vol. 31/1) 2002, pp. 419-440; Stumpf, ‘*The crimmigration crisis*’, pp. 378-391; LEGOMSKY Stephen H., *The new path of immigration law: Asymmetric incorporation of criminal justice norms*, Washington and Lee Law Review (Vol. 64/2) 2007, pp. 471-477.

⁸⁷ Klaaren / Ramji, ‘*Inside illegality*’, pp. 40-42.

⁸⁸ *Ibid*; PEBERDY Sally / CRUSH Jonathan, *Rooted in racism: The origins of the Aliens Control Act*, in: *Beyond control: Immigration and human rights in a democratic South Africa*, Cape Town 1998, pp. 33-34.

⁸⁹ Department of Home Affairs, *Cabinet Approved Final Revised White Paper on Citizenship, Immigration and Refugee Protection*, Government Gazette, 26 March 2026 (cit : Department of Home Affairs, Cabinet Approved Final Revised White Paper).

⁹⁰ *Ibid*, pp. 10,44-46.

enforcement⁹¹. Although administrative in form, these mechanisms strengthen the state's capacity to identify, process and remove migrants through increasingly formalised adjudicative and enforcement structures.

[47] Read together with the Immigration Act, the Refugees Act 130 of 1998 and the Refugee Regulations, 2017, the proposed reforms illustrate a broader shift towards penal migration governance⁹². Rather than resolving the administrative failures that often produce irregular migration, they expand the legal and institutional mechanisms through which migrants become subject to surveillance, detention, deportation and other coercive forms of immigration control. The implications of these proposals for asylum access and non-refoulement are considered later in the discussion of intensified enforcement.

5. Securitisation of Migration and Law Enforcement Practices

[48] Securitisation theory explains how migration becomes constructed as a security threat requiring exceptional state intervention⁹³. While the Copenhagen School emphasises the role of political discourse in framing migration as a threat, the Paris School focuses on the everyday bureaucratic practices—such as surveillance, border management and immigration policing—that institutionalise migration control⁹⁴. Together, these perspectives explain how migration comes to be governed primarily through security and enforcement rather than protection.

[49] Both discursive and institutional forms of securitisation are evident in the South African context. At the level of speech acts, political leaders have frequently framed migrants as threats to employment, public safety, and national identity. Such rhetoric has been particularly pronounced in the periods preceding major outbreaks of xenophobic violence, during which migrants have routinely been portrayed as competitors for employment, housing and public services, and as contributors to crime and social instability⁹⁵. By constructing migration as a threat requiring exceptional state intervention, these narratives legitimise increasingly restrictive immigration policies and coercive enforcement practices, thereby reinforcing the criminalisation of migration through penal migration governance⁹⁶.

[50] At the same time, securitisation is embedded in everyday governance practices. Legislative and institutional developments, such as the Border Management Authority Act 2 of 2020, have strengthened border enforcement and surveillance, while ongoing policing operations and documentation regimes administered by the Department of Home Affairs South Africa continue to treat migration as a matter of control and risk management. These bureaucratic practices operate routinely, often without overt political framing, yet they reinforce the construction of migrants as security concerns.

⁹¹ *Ibid* paras. 129–131.

⁹² Refugees Act 130 of 1998, ss. 21(4), 22(6), 23; Refugee Regulations, 2017, regs. 2(2), 8(1), 10.

⁹³ FARNY Elisabeth, *Implications of the securitisation of migration*, E-International Relations (Vol. 29/1) 2016, pp. 1–8.

⁹⁴ SIBANDA Sehlule / NYERE Chidochashe, *The securitization of African immigrants in South Africa*, *Frontiers in Political Science* (Vol. 8/1) 2026, p. 2.

⁹⁵ Tarisayi, 'Framing Operation Dudula and anti-immigrant sentiment in South African media discourse', p. 34.

⁹⁶ Sibanda / Nyere, 'The securitization of African immigrants in South Africa', p. 2.

[51] Together, these dynamics illustrate how securitisation in South Africa operates through a mutually reinforcing relationship between rhetoric and practice. Political discourse constructs migration as a security threat, while institutional practices such as surveillance, immigration policing and border enforcement translate that narrative into routine governance. In doing so, securitisation provides the conditions under which increasingly coercive forms of migration control become normalised, reinforcing the criminalisation of migration through penal migration governance.

6. Global and Regional Trends

[52] Since 9/11, many states have increasingly framed border control through security, counter-terrorism and risk-management logics⁹⁷. South Africa's migration policy reflects this broader global trend toward the securitisation of migration, in which irregular mobility is increasingly framed as a security concern linked to crime, terrorism, and transnational threats. This framing has contributed to the expansion of detention regimes, the acceleration of deportation processes, and the growing use of surveillance technologies in border governance⁹⁸. Contemporary enforcement practices in South Africa similarly reflect these developments, with increased reliance on biometric systems, multi-agency raids, and intensified deportation operations. Taken together, these measures illustrate the localisation of Western-style border enforcement logics, where migration control is primarily approached as an issue of security and risk management rather than rights protection⁹⁹.

[53] This securitised approach is not limited to Western states and South Africa, but is also evident across parts of the African continent. Kenya provides a clear example of this trend, as its migration and refugee policy has increasingly been shaped by counter-terrorism priorities. In particular, governance of Somali refugees has been heavily securitised, with encampment policies and intensified screening measures introduced in response to security concerns associated with Al-Shabaab¹⁰⁰. Similarly, Libya has become a key site of externalised European border control, where EU-supported interception and detention practices have contributed to the containment and return of migrants attempting to cross the Mediterranean. In North Africa more broadly, Tunisia and Morocco have also intensified border enforcement in response to European Union pressure to curb irregular migration flows¹⁰¹.

[54] Overall, South Africa's migration regime should be understood as part of a wider global and regional pattern in which migration is increasingly governed through security-oriented and exclusionary logics, reinforcing the shift toward crimmigration across multiple jurisdictions.

⁹⁷ CHUMBA Christopher / OKOTH Pontian Godfrey / WERE Edmond, *Effectiveness of border surveillance strategies in the management of transnational terrorism in Kenya and Somalia*, International Journal of Political Science (Vol. 2/2) 2016, p. 42.

⁹⁸ BIGO Didier, *Security and immigration: Toward a critique of the governmentality of unease*, Alternatives: Global, Local, Political (Vol. 27/1) 2002, p. 2.

⁹⁹ South African Government, *Home Affairs launches Operation New Broom and biometric verification to combat illegal immigration*, 2025.

¹⁰⁰ Chumba / Okoth / Were, 'Effectiveness of Border Surveillance Strategies', p. 42.

¹⁰¹ Statewatch, *Impunity for war criminals and the European migration strategy in Libya*, 2025.

II. Legal Architecture of Penal Migration Governance in South Africa

[55] South Africa's Immigration Act 13 of 2002 is formally an administrative statute concerned with entry, residence, departure and immigration status. However, it also contains criminal offences, detention powers and deportation mechanisms that bring immigration regulation into close contact with penal power. This section therefore does not treat all immigration enforcement as criminalisation. Instead, it distinguishes between three related but separate mechanisms: formal criminal offences under the Immigration Act; administrative detention and deportation under section 34 of the Immigration Act 13 of 2002, as amended by the Immigration Amendment Act 11 of 2025 once commenced; and the qualified protection of asylum seekers under the Refugees Act 130 of 1998. Read together, these mechanisms show how migration governance may assume a penal character even where the state formally describes its actions as administrative regulation rather than punishment¹⁰².

A. Formal Criminal Offences Under the Immigration Act

[56] The clearest form of criminalisation appears in section 49 of the Immigration Act, which creates criminal offences for various forms of migration-related conduct. These include entering or remaining in the Republic in contravention of the Act, failing to depart after being ordered to do so, assisting unlawful entry or stay, knowingly employing an undocumented foreign national, producing or using false documentation, impersonating an immigration officer and participating in conduct intended to contravene the Act. Depending on the offence, conviction may result in a fine or imprisonment. This is the point at which immigration law most directly adopts the form of criminal law: administrative non-compliance is not merely corrected through status regularisation or removal, but is made punishable through prosecution and sentence.

[57] The significance of section 49 is not that every migration-related offence is trivial or that the state may never regulate entry and residence. Rather, the concern is that the Act criminalises forms of conduct and presence that are unlawful because of immigration status, documentation or administrative non-compliance. This blurs the line between administrative irregularity and criminal wrongdoing¹⁰³. A person who overstays, fails to regularise status or lacks valid documentation may be treated not only as someone subject to administrative correction, but as an offender. This is a central feature of crimmigration: the legal status of the migrant becomes the basis for criminal sanction¹⁰⁴.

[58] This conflation of status and criminality is not novel but has deep legislative roots in South Africa's migration regime. The Aliens Control Act 96 of 1991 (repealed), enacted during the late apartheid period, marked a decisive shift towards punitive migration governance. It introduced criminal penalties for immigration-related violations¹⁰⁵, prohibited the employment of

¹⁰² Stumpf, 'The crimmigration crisis', pp. 367-419.

¹⁰³ CHACÓN Jennifer M., *Overcriminalizing immigration*, Journal of Criminal Law and Criminology (Vol. 102/3) 2012, pp. 613-615.

¹⁰⁴ *Ibid* p. 650.

¹⁰⁵ Aliens Control Act 96 of 1991 (Repealed), ss. 57-58.

undocumented persons¹⁰⁶, and authorised extensive detention powers, including detention pending deportation¹⁰⁷. In doing so, it established the statutory architecture upon which the Immigration Act was later built and refined, for example “Illegal aliens” became “Illegal foreigners”. This legislative trajectory embedded a penal logic at the core of migration control, laying the foundation for what is now understood as the “crimmigration” paradigm, in which immigration law increasingly mirrors the techniques and rationalities of criminal justice, and migration status has repeatedly been linked to suspicion, documentation checks, detention and removal¹⁰⁸.

[59] Criminal liability also extends beyond migrants themselves to those who interact with them. Section 38(1) creates a form of strict or near-strict liability for employers, rendering it an offence to employ an undocumented foreign national, with penalties including fines and imprisonment. Section 49(1)(b) prohibits knowingly aiding or assisting an illegal foreigner, including providing accommodation or employment. These provisions enlist private actors, including employers and service providers, into immigration enforcement. They also expand the social reach of penal migration governance by turning work, accommodation, documentation and assistance into possible sites of criminal liability. This does not mean that all employer regulation is illegitimate. It means that the legal framework uses criminal sanction to deter forms of association with undocumented migrants and thereby reinforces the idea that irregular migration is a social harm to be punished.

[60] Recent enforcement discourse has further underscored this punitive orientation. President Cyril Ramaphosa has repeatedly emphasised this provision, warning employers in November 2025 that they “could face jail time” for hiring undocumented workers¹⁰⁹. This position was reiterated in the February 2026 State of the Nation Address, where the President announced the appointment of 10,000 additional labour inspectors to intensify compliance measures¹¹⁰. They signal that the state is increasingly prepared to govern migration through inspection, sanction and deterrence, rather than through regularisation, administrative reform and rights-based status determination.

B. Administrative Detention and Deportation under Section 34

[61] The legal and policy developments discussed above ultimately find expression through the state’s arrest, detention and deportation powers. Once migrants are identified as an “illegal foreigner”, whether through immigration violations or administrative dysfunction, section 34 of the Immigration Act authorises their arrest and detention pending deportation. Any such detention must be in line with sections 12 and 35 of the Constitution, which prohibit arbitrary deprivation of freedom and require detention to comply with dignity and due process.

[62] Although immigration detention is formally justified as an administrative mechanism to facilitate deportation, it frequently assumes punitive characteristics in practice. Individuals may be detained for up to 30 days, with judicially authorised extensions of up to 90 days, in prison-like facilities where they experience severe restrictions on their liberty and are subjected to procedures

¹⁰⁶ Aliens Control Act (Repealed), s. 32.

¹⁰⁷ Aliens Control Act (Repealed), ss. 43-47.

¹⁰⁸ Crush / Williams, ‘*Criminal tendencies*’, pp. 10-11; Klaaren / Ramji, ‘*Inside illegality*’ p. 35.

¹⁰⁹ SEOKWANG Lesego, “[Stop employing illegal foreigners or face possible jail time](#)” – Ramaphosa, 2025.

¹¹⁰ Department of Employment and Labour, [Department of Employment and Labour Welcomes the President’s SONA Focus on Jobs, Enforcement and Inclusive Economic Growth](#), 2026.

analogous to those employed within the criminal justice system¹¹¹. The Global Detention Project reports that undocumented migrants arrested on DHA warrants are sometimes held briefly in facilities such as Westville Prison and Pollsmoor Prison before transfer to Lindela Repatriation Centre, a dedicated immigration detention facility used to hold individuals pending deportation¹¹². This demonstrates the convergence of administrative and penal logic.

[63] The Immigration Amendment Act 11 of 2025, assented to by the President on 11 May 2026, but has not yet commenced, reflects the continuing tension between procedural fairness and immigration enforcement¹¹³. While the Act introduces additional safeguards, including judicial oversight, an individualised assessment of detention, and consideration of release subject to reasonable conditions, it also formalises the statutory framework governing detention pending deportation. Section 34(1A) requires immigration officers to interview the foreigner concerned before deciding whether detention is necessary and, where detention is maintained, to bring the detainee before a court within 48 hours, or on the next court day where necessary, for an independent determination of whether continued detention is justified¹¹⁴. The amendment further provides for periodic judicial reconsideration of detention and permits detainees to make representations before the court.

[64] These measures strengthen procedural fairness and reduce the risk of arbitrary detention. However, they do not alter the underlying premise that detention pending deportation remains one of the principal mechanisms through which the state enforces immigration law against persons classified as “illegal foreigners”. The amendment therefore illustrates the tension at the heart of penal migration governance. On the one hand, it responds to constitutional defects by strengthening judicial supervision. On the other, it preserves detention as a key tool of deportation and continues to organise immigration control around arrest, detention and removal.

[65] Several concerns nevertheless remain. The Act grants immigration officers broad discretion without clearly defining the factors they must consider, or the conditions they may impose, when deciding whether to release a detained foreign national. This creates a risk of arbitrary, inconsistent or unlawful decision-making, particularly if detailed regulations are not introduced alongside the amendment. Similarly, although the Act permits conditional release where this is in the interests of justice, it does not define what that standard requires in the immigration detention context. Without clearer guidance, the standard may be applied unevenly and may produce unfair or unconstitutional outcomes.

[66] Procedural fairness is also a significant concern. The Act does not adequately guarantee reliable access to interpreters or legal representation, both of which are essential for fair hearings and lawful decision-making. Language barriers and the absence of legal assistance may therefore undermine the effectiveness of the safeguards introduced by the amendment. Accordingly, while the Act’s objective of strengthening judicial oversight is important, its practical fairness will depend not only on its text, but also on implementation.

[67] If courts, immigration officers and detention facilities treat judicial oversight as a formal step within an otherwise automatic removal process, the amendment may constitutionalise procedure

¹¹¹ Lawyers for Human Rights, *Report: Status of Immigration Detention in South Africa*, December 2023.

¹¹² Global Detention Project, ‘*Immigration detention in South Africa*’, p. 37.

¹¹³ Parliament of South Africa, *Immigration Amendment Act*, 2025.

¹¹⁴ Immigration Amendment Act 11 of 2025, s. 34(1A)(a).

without fully displacing the penal logic of immigration detention. Its significance therefore lies in this unresolved duality: it strengthens procedural safeguards, but does so within a framework that continues to rely on detention, removal and state coercion as central instruments of immigration control.

C. The Asylum Seeker Exception and Its Limits

[68] The interaction between immigration control and refugee protection demonstrates that penal migration governance is not absolute. The Refugees Act 130 of 1998 establishes a distinct protection regime for persons seeking international protection. In *Ruta v Minister of Home Affairs*¹¹⁵, the Constitutional Court held that where an individual expresses an intention to apply for asylum, the Refugees Act rather than the Immigration Act governs their legal position. The Court emphasised that prospective asylum seekers must be afforded a genuine opportunity to access the asylum system and should not be treated as “illegal foreigners” merely because they have not yet lodged a formal asylum application¹¹⁶.

[69] Recent jurisprudence has, however, qualified this protective approach. In *Ashebo v Minister of Home Affairs*¹¹⁷, the Constitutional Court held that an expression of an intention to seek asylum does not automatically entitle an undocumented foreign national to release from detention. Instead, the applicant must demonstrate “good cause” for their irregular entry or delayed application before accessing the asylum process. While *Ashebo* does not overturn *Ruta*, it narrows the practical scope of its protection by conditioning access to the asylum system on an additional evidentiary burden. This represents a significant qualification of the earlier protective approach reflected in *Bula v Minister of Home Affairs* and *Ruta*, both of which recognised that the protections of the Refugees Act extend to prospective asylum seekers before the formal lodgement of an asylum application¹¹⁸.

[70] Similarly, in *Ersumo v Minister of Home Affairs*¹¹⁹, the Supreme Court of Appeal held that delay in seeking asylum does not, without more, justify denying access to the asylum process, recognising that the Refugees Act affords protection even prior to the formal submission of an application. By requiring applicants to establish “good cause” for their irregular entry or delayed application, *Ashebo* introduces an additional threshold that narrows the practical scope of these earlier protections.

[71] The Constitutional Court’s reasoning in *Ashebo* was reaffirmed in *Lembore v Minister of Home Affairs*¹²⁰, where the Court applied the good-cause requirement to six Ethiopian and Somali nationals who had entered South Africa irregularly and were subsequently arrested and detained under the Immigration Act. The applicants said they had fled persecution and violence in Ethiopia and Somalia, had crossed the Zimbabwe border without passports, and wanted to apply for asylum but were arrested before they could do so. The earlier guarantee of a 14-day period to enable asylum seekers to regularise their status has effectively fallen away. The current framework does not provide a clear or automatic grace period, instead placing the burden on individuals to promptly

¹¹⁵ *Ruta v Minister of Home Affairs* [2018] ZACC 52.

¹¹⁶ *Ibid.*

¹¹⁷ *Ashebo v Minister of Home Affairs and Others* [2023] ZACC 16.

¹¹⁸ *Bula and Others v Minister of Home Affairs and Others* [2011] ZASCA 209.

¹¹⁹ *Ersumo v Minister of Home Affairs and Others* [2012] ZASCA 31.

¹²⁰ *Lembore and Others v Minister of Home Affairs and Others* [2024] ZAGPJHC 102.

access the asylum system or justify any delay. This shift increases the risk of detention and enforcement, further contributing to the criminalisation of irregular entry¹²¹.

[72] Additionally, the ruling in *Ashebo* appears to conflict with well-established principles of international refugee law governing irregular entry. Article 31(1) of the 1951 Refugee Convention prohibits the penalisation of refugees on account of their unlawful entry or presence, provided they come directly from a territory where their life or freedom was threatened and present themselves without delay¹²². This reflects the reality that irregular entry is often an inherent consequence of forced displacement rather than a matter of choice, as refugees frequently have no realistic opportunity to comply with ordinary immigration requirements and may be compelled to enter a country without valid documentation or through irregular routes in order to reach safety.

[73] The UNHCR has further emphasised that states must avoid imposing unrealistic evidentiary or procedural requirements, particularly regarding identity documentation, given the conditions under which refugees flee. In practice, however, the requirement to demonstrate “good cause” for irregular entry or delayed application risks undermining these protections by effectively penalising asylum seekers for circumstances inherent to forced displacement¹²³.

III. Enforcement Practices and Penal Logic

[74] The punitive potential of South Africa’s immigration framework emerges through the exercise of immigration powers in practice. Although immigration enforcement is a legitimate function of the state, it may assume a penal character when arrest, detention and deportation are employed in response to irregularity produced or prolonged by administrative barriers to regularisation. Enforcement therefore extends beyond the regulation of migration and functions as a mechanism of punishment and exclusion. This punitive dynamic is shaped not only by enforcement practices but also by political discourse that portrays undocumented migrants as threats to national security, economic stability and social cohesion, thereby legitimising more coercive forms of immigration enforcement and making punitive migration governance politically acceptable.

A. Intensified Enforcement and the Expansion of Penal Logic

[75] South Africa’s contemporary immigration enforcement is increasingly characterised by coordinated, visible and technology-assisted operations. Operation New Broom illustrates this development. Launched by the Department of Home Affairs, the operation targets designated “hotspot areas” within metropolitan municipalities, and uses biometric technology to identify and process persons suspected of being unlawfully present in South Africa¹²⁴. According to the Minister of Home Affairs, Leon Schreiber, the initiative seeks to “combat illegality” while operating within

¹²¹ *Bula v Minister of Home Affairs*, para. 70; Refugee Regulations (Forms and Procedures) 2000, reg. 2(2); UNHCR, *Global Trends: Forced Displacement in 2018*, 2019, p. 47.

¹²² Convention relating to the Status of Refugees, 1951, art. 31(1).

¹²³ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (cité: UNHCR, *Guidelines on the Applicable Criteria and Standards*), para. 25.

¹²⁴ South African Government, [Home Affairs launches Operation New Broom and biometric verification to combat illegal immigration](#); South African Government News Agency, *Cabinet welcomes the launch of Operation New Broom*, 2025.

the bounds of due process and the rule of law¹²⁵. The constitutional concern is therefore not the existence of immigration enforcement itself, but whether such enforcement is carried out in a manner that converts administrative irregularity into suspicion, arrest, detention and removal.

[76] The scale of recent enforcement suggests a significant intensification of immigration control. Operation New Broom has conducted six major enforcement actions resulting in 1,400 arrests of undocumented foreign nationals¹²⁶. These figures, however, form part of a broader intensification of immigration enforcement rather than an isolated initiative. Parliamentary data indicates that 4,317 immigration inspections and operations were conducted in the first nine months of Minister Schreiber's tenure, exceeding the 3,917 inspections conducted during the previous administration's entire five-year term¹²⁷. During this period, a total of 12,822 undocumented foreign nationals were arrested and 810 fraudulent documents were seized¹²⁸.

[77] Administrative removals also increased substantially, with 46 898 undocumented foreign nationals deported during the 2024/25 financial year, an 18 per cent increase from the previous year and the highest annual total recorded in five years¹²⁹. Collectively, these figures illustrate a significant intensification of immigration enforcement, providing the context within which the operation's broader constitutional and penal implications must be assessed¹³⁰. These figures show how immigration control has been increasingly organised around detection, apprehension, biometric verification and removal. Where these measures are directed at persons whose irregular status may have been produced or prolonged by documentation failures, asylum backlogs or barriers to regularisation, administrative weakness and coercive enforcement operate together to produce penal migration governance¹³¹.

[78] This intensification is not confined to dedicated immigration operations. Immigration enforcement has become increasingly integrated into broader regulatory and administrative functions through coordinated inspections involving the Department of Employment and Labour, the Department of Home Affairs and the South African Police Service. These often unannounced operations combine labour law compliance inspections with immigration status verification, extending migration control into ordinary regulatory spaces beyond the border or traditional immigration enforcement¹³². Labour inspections are not inherently punitive. However, they become significant where status verification is embedded in policing and inspection practices increasing the likelihood that individuals whose irregular status has been created or prolonged by administrative failures will be identified and subjected to arrest, detention or deportation.

¹²⁵ *Ibid.*

¹²⁶ Roos Adrian, *DA Hails Surge in Immigration Enforcement*, 2025.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ South African Government, *Home Affairs on 2024/25 deportations*, 2025; South African Government News Agency, *Deportations rise over two financial years*, 2026.

¹³⁰ Roos, [*DA Hails Surge in Immigration Enforcement*](#).

¹³¹ Amit / Kriger, 'Making *migrants* "il-legible"', pp. 269-290; Moyo / Zanker, 'No hope for the "foreigners"', pp. 253-265.

¹³² South African Government, *Minister Leon Schreiber takes Operation New Broom to Limpopo*, 2025; MAQHINA Mayibongwe, *R680 000 fines issued to employers hiring illegal foreign workers*, 2025.

[79] Operation New Broom also illustrates the discursive link between irregular migration and criminality. Its emphasis on hotspots, biometric verification, apprehension and deportation frames undocumented migration as a public-order and security concern rather than merely an administrative status issue. In South Africa's context of recurring xenophobic violence and suspicion towards African migrants, this framing reinforces narratives that cast migrants as threats rather than rights-bearers. Highly visible enforcement operations may reinforce public narratives that equate migration with criminality, even where irregularity results from administrative dysfunction such as documentation delays, processing backlogs and barriers to regularisation may leave individuals vulnerable to enforcement despite genuine attempts to comply with immigration requirements¹³³. While Operation New Broom reflects the state's legitimate interest in enforcing immigration law and responding to public concerns about crime, the exercise of those powers must remain consistent with constitutional guarantees of dignity, equality, freedom and security of the person, and just administrative action¹³⁴.

[80] The diffusion of penal migration governance is reflected in the growing role of informal and community-led enforcement. Against the backdrop of recurring xenophobic violence, punitive immigration enforcement has normalised the portrayal of migrants as threats, contributing to fear, displacement and repatriation requests following anti-migrant mobilisation such as the 30 June ultimatum. When undocumented migration is framed as a matter of crime and public security, the logic of immigration enforcement may be internalised by private actors, who increasingly assume functions ordinarily reserved for the state. This is evident in various parts of South Africa, where organised groups have conducted raids, demanded proof of immigration status, shut down foreign-owned businesses and sought to remove migrants from homes, workplaces and public places, despite lacking any legal authority to exercise immigration enforcement powers¹³⁵. These practices show how enforcement can move beyond formal state institutions and become embedded in social life, reproduced not only through law, policing and detention, but also through everyday forms of surveillance, exclusion and intimidation.

[81] These practices have frequently been justified through references to the power of citizen's arrest under section 42 of the Criminal Procedure Act 51 of 1977. However, the section confers only limited powers of arrest in narrowly defined circumstances and does not authorise private individuals to conduct immigration inspections, verify immigration status, or exercise immigration enforcement powers¹³⁶. The growing use of these practices shows that penal migration governance operates beyond formal state institutions, with private actors increasingly performing immigration enforcement functions.

[82] The limits of immigration enforcement have recently been clarified by the Gauteng High Court in *Kopang Africa Against Xenophobia and Others v Operation Dudula and Others*¹³⁷. The Court

¹³³ Machinya, 'Migration and politics in South Africa', pp. 66-72; Sibanda / Nyere, 'The securitization of African immigrants in South Africa' pp. 1-9.

¹³⁴ BUTHELEZI, *Home Affairs Unveils "Operation New Broom" to Combat Illegal Immigration*, IOL, 2025; HUBENKO Dmytro / OLOFSE Louis, *South Africa on edge amid anti-migrant protests*, 2026; ROOMANAY Shabodien, *South Africa's crisis of state authority and when citizens begin deporting people*, 2026.

¹³⁵ SABC News, *Protest against undocumented foreign nationals*, 2026; KHALIL Hafsa, *African migrants warned to close shops during South Africa anti-migrant march*, 2026; The Guardian, [South Africa Anti-Migrant vigilante Operation Dudula registers as party for 2024 elections](#).

¹³⁶ MALINGA-MNISI Nkosikhona, *SA govt clarifies legal limits of arresting citizens*, 2026.

¹³⁷ *Kopang Africa Against Xenophobia and Others v Operation Dudula and Others* [2025] ZAGPJHC 1102.

held that Operation Dudula's conduct was unlawful and interdicted it from demanding identity documents, harassing or intimidating migrants, blocking access to healthcare, interfering with schools, unlawfully evicting non-nationals, removing traders from their stalls or interfering with employment. The judgment confirms that immigration enforcement powers cannot be exercised by private individuals or vigilante groups. In doing so, it reinforces the distinction between lawful state enforcement and unlawful private coercion that lies at the heart of the rule of law.

[83] This dynamic is intensified by racialised profiling. Individuals are frequently identified as “illegal” or “intruders” through superficial indicators such as skin colour, language, accent or physical appearance, with darker-skinned refugees and asylum seekers disproportionately vulnerable to suspicion, arrest and exclusion¹³⁸. This means that enforcement and social exclusion may operate not only against undocumented migrants, but also against refugees, asylum seekers, permanent residents and even South African citizens who are perceived to be foreign. In this respect, penal migration governance does not merely target unlawful presence. It produces foreignness itself as a marker of suspicion¹³⁹.

[84] These developments show that migration control is no longer confined to border management or isolated immigration checks. It is increasingly diffused across state institutions, workplace regulation, biometric systems, policing practices and informal social enforcement. The central concern is not immigration enforcement itself, but the risk that administrative status is treated as a basis for surveillance, arrest, detention, exclusion and removal. This strengthens the article's central argument: in South Africa, penal migration governance is produced through the interaction between administrative failure, intensified enforcement, criminalising discourse and weak implementation of constitutional safeguards.

B. The Border Management Authority and Technological Enforcement

[85] The newly established Border Management Authority (BMA) represents a significant institutional development in migration enforcement, created under the Border Management Authority Act 2 of 2020. It should, however, be understood within a longer history of border securitisation in South Africa. Vorvornator argues that South Africa's border system has moved through different phases: apartheid-era militarised border control, post-1994 attempts to shift from military control towards democratic and regional cooperation, and later renewed securitisation in response to concerns about irregular migration and cross-border crime¹⁴⁰. This history provides the context in which the BMA was created. Rather than marking a break with the past, it represents a contemporary reorganisation of border control within a longer trajectory that has consistently linked migration with crime, sovereignty and security.

[86] As part of its operational mandate, the BMA has deployed approximately 600 border guards to vulnerable segments of South Africa's borders, while increasingly relying on advanced technologies such as drones, body cameras, and digital surveillance systems to detect and prevent

¹³⁸ South African Human Rights Commission, *Report into the arrest and detention of suspected undocumented migrants*, pp. 18-23, 27-28; Klaaren / Ramji, 'Inside illegality', pp. 36-37, 43-44.

¹³⁹ Gordon, 'Migrants in a state of exception', p. 6.

¹⁴⁰ VORVORNATOR Lawrence Korsi, *Exploring South Africa's pre and post-apartheid border system: Border securitisation, illegal migration and cross-border crimes*, Journal of African Foreign Affairs (Vol. 11/2) 2024, pp. 132-137.

undocumented entry¹⁴¹. In parallel, the introduction of an electronic travel authorisation system, initially rolled out for states participating in the G20 hosted by South Africa, signals a broader shift towards the automation of migration control¹⁴². This system is expected to utilise machine learning and facial recognition technologies to manage entry and exit processes, further embedding digital governance within border control practices¹⁴³.

[87] These developments should not be treated as purely technical reforms. Border securitisation is often presented as a solution to irregular migration and cross-border crime, but may fail to address the structural causes of migration, while diverting attention from regional cooperation and rights-based migration management¹⁴⁴. Viewed through this lens, the BMA's reliance on technological enforcement has clear limitations. While it may strengthen detection and processing capacity, it does not necessarily address administrative backlogs, documentation failures, limited regularisation pathways, or the socio-economic drivers of mobility¹⁴⁵. In this sense, the turn to drones, biometric verification and automated authorisation systems may strengthen the state's capacity to identify and exclude migrants, while leaving unresolved the deeper conditions that produce irregular status.

[88] While these measures enhance enforcement capacity, they raise important concerns regarding surveillance, data protection, and fundamental rights. The processing of biometric data must comply with the Protection of Personal Information Act 4 of 2013, which requires lawful, minimal, and purpose-specific data use¹⁴⁶. Yet, the scale and opacity of such systems challenge compliance with principles of proportionality, transparency, and accountability. These concerns are reinforced by international standards, including Article 17 of the International Covenant on Civil and Political Rights and global norms reflected in the General Data Protection Regulation, which caution against intrusive and unreviewable data processing.

[89] The reliance on algorithmic and biometric systems also introduces risks of error, bias, and exclusion, particularly where decisions affecting entry, detention, or deportation are automated or difficult to challenge¹⁴⁷. These risks are not neutral. They disproportionately affect migrants who are already structurally vulnerable due to precarious legal status, limited access to remedies, and socio-economic marginalisation¹⁴⁸. In this context, surveillance technologies can deepen existing inequalities and further restrict migrants' ability to assert their rights¹⁴⁹. The concern is not that

¹⁴¹ South African Government, *Minister Leon Schreiber launches cutting-edge technology for BMA to improve border management*, 2025.

¹⁴² South African Government, *Minister Leon Schreiber presents new Electronic Travel Authorisation to tourism industry*, 2025.

¹⁴³ *Ibid.*

¹⁴⁴ Vorvornator, 'Exploring South Africa's pre and post-apartheid border system', pp. 123-124, 139-140.

¹⁴⁵ Wa Kabwe-Segatti / Landau, 'Migration in post-apartheid South Africa', pp. 57-58, 100-101.

¹⁴⁶ Protection of Personal Information Act 4 of 2013, ss 9-11.

¹⁴⁷ TIAN George Yijun / MCFARLAND Tim / GUO Sanzhuan, *Automated decision making and deportation: Legal concerns and regulation*, Griffith Law Review (Vol. 34/2) 2025, pp. 277, 293.

¹⁴⁸ *Ibid* 294; ENEVA Andreeva Stoyanka / MORA-GÁMEZ Fredy, *Civil society and the (im)possibilities of algorithmic contestation in migration governance*, Frontiers in Sociology (Vol. 10/1) 2025, p. 2.

¹⁴⁹ Eneva / Mora-Gámez, 'Civil society and the (im) possibilities of algorithmic contestation in migration governance', p. 12.

every use of border technology amounts to crimmigration. Rather, technological enforcement becomes relevant to penal migration governance where it is used to classify, monitor, apprehend or exclude migrants through risk-based systems that are difficult to understand or challenge.

[90] More broadly, framing migration as a technical problem to be solved through technological innovation obscures underlying questions of justice and dignity. South Africa's contemporary border reforms form part of a longer deterrent and security-oriented trajectory, rather than a clean break from earlier enforcement models¹⁵⁰. By prioritising efficiency and detection, these systems reinforce a securitised approach to migration governance. In doing so, they contribute to the broader shift from administrative regulation to penal governance, where migrants are increasingly managed through surveillance, exclusion, and control rather than protection and facilitation.

IV. Constitutional and Human Rights Implications

[91] Penal migration governance has serious constitutional and human rights implications. The concern is not only that migrants may be prosecuted, detained or deported. It is also that the treatment of migration as a problem of criminality, risk and enforcement affects how migrants experience constitutional rights in practice. South Africa's Constitution protects dignity, equality, freedom and security of the person, access to courts, children's rights, healthcare and basic education¹⁵¹. These rights apply to "everyone" within the Republic, not only citizens. However, where immigration control is implemented through arrest, detention, documentation checks, deportation and social exclusion, formal rights may be weakened in practice.

A. Due Process, Detention and Liberty

[92] As discussed earlier, detention under section 34 of the Immigration Act is formally administrative, since it is directed at deportation rather than punishment. Its constitutional significance, however, lies in the fact that administrative detention may still amount to a serious deprivation of liberty. The issue is therefore not merely whether detention complies with the technical requirements of the Immigration Act, but whether the broader system of arrest, confinement and removal is implemented consistently with dignity, freedom and security of the person, access to courts and the rule of law¹⁵².

[93] This problem is compounded by persistent failures in the implementation of procedural safeguards. Although the Immigration Act provides for status verification, notification of rights and judicial oversight, reports indicate that these protections are frequently undermined in practice. The 48-hour verification requirement is not always observed, and individuals may be held for extended periods in police stations without proper verification of their immigration status¹⁵³. In some cases,

¹⁵⁰ Handmaker / Nalule, 'Border enforcement policies and reforms in South Africa', pp. 4, 13-15, 31-32.

¹⁵¹ Constitution of the Republic of South Africa, 1996.

¹⁵² SUTTON Rebecca / VIGNESWARAN Darshan, *A Kafkaesque state: Deportation and detention in South Africa*, Citizenship Studies (Vol. 15/5) 2011, pp. 632-637.

¹⁵³ Immigration Act 13 of 2002, ss 41(1), 34(2); Lawyers for Human Rights, *Monitoring policy, litigious and legislative shifts in migration and detention in South Africa*, 2020, p. 19.

delays in bringing detainees before a court appear not merely as administrative inefficiency, but as part of a coercive environment in which officials allegedly solicit bribes in exchange for release¹⁵⁴.

[94] Many migrants are arrested and detained without being informed of their rights, including the right to judicial review or legal representation¹⁵⁵. In certain cases, detainees are transferred to Lindela Repatriation Centre before they are able to consult a lawyer, which limits their ability to challenge detention or assert protection claims before removal procedures advance¹⁵⁶. These practices reveal the consequences of the disconnect between law and practice. In a penal migration governance framework, failures in administrative processes can transform uncertainty about a person's status into prolonged confinement.

[95] Procedural safeguards are constitutionally necessary. Status verification, written reasons, interpretation, legal assistance and judicial oversight are the mechanisms through which a person can contest unlawful detention, resist wrongful deportation and correct an erroneous classification as "illegal". Where these safeguards are delayed, inaccessible or inconsistently applied, detention becomes one of the principal ways in which immigration status is converted into coercive state power.

[96] The constitutional harm is therefore broader than unlawful detention in individual cases. Penal migration governance places pressure on the rule of law by allowing immigration status to become a gateway to confinement, exclusion and removal. This undermines the constitutional promise that all persons within South Africa are entitled to dignity, freedom and security of the person, just administrative action and access to courts¹⁵⁷. A rights-based approach must therefore ensure that detention remains exceptional, individually justified and subject to meaningful judicial control, rather than being used as a routine tool of migration management.

B. Non-Refoulement and Refugee Protection

[97] Penal migration governance also places refugee protection under strain. The principle of non-refoulement is the cornerstone of refugee protection¹⁵⁸. It prohibits countries from returning individuals to countries where they face persecution, torture, or serious harm¹⁵⁹. It is codified in Article 33(1) of the 1951 Refugee Convention and reiterated in Article II(3) of the 1969 OAU Refugee Convention. Domestically, this principle is entrenched in section 2 of the Refugees Act 130 of 1998, which prohibits the return of any person to a country where they may face persecution

¹⁵⁴ *Ibid.*

¹⁵⁵ Lawyers for Human Rights, *Monitoring policy, litigious and legislative shifts in migration and detention in South Africa*, p. 38; Global Detention Project, *Immigration detention in South Africa*, pp. 22-23.

¹⁵⁶ *Ibid.*

¹⁵⁷ Constitution of the Republic of South Africa, 1996, ss 10, 12, 33, 34 and 35.

¹⁵⁸ Norton Rose Fulbright, *Refugee Law: A practical guide for practitioners*, n.d., p. 5.

¹⁵⁹ *Ibid.*

or serious harm¹⁶⁰. It is also widely regarded as a rule of customary international law and has been recognised by South African courts as part of the domestic legal framework¹⁶¹.

[98] This principle has also been affirmed in international human rights law. In *Ioane Teitiota v New Zealand*, the Human Rights Committee held that states may not deport individuals where there is a real risk of irreparable harm, including threats to life under Article 6 of the International Covenant on Civil and Political Rights (ICCPR). The Committee emphasised, that environmental degradation and life-threatening conditions may trigger non-refoulement obligations where they expose individuals to such harm¹⁶².

[99] In South Africa, non-refoulement is reinforced by the Constitution. The Bill of Rights applies to all persons within the Republic, regardless of citizenship or immigration status¹⁶³. Decisions that may result in removal therefore engage the rights to dignity, life, freedom and security of the person, and freedom from cruel, inhuman or degrading treatment¹⁶⁴. The Constitutional Court's decision in *Mohamed v President of the Republic of South Africa*¹⁶⁵, read alongside *S v Makwanyane*¹⁶⁶, confirmed that the state may not hand a person over to another state in circumstances that expose them to serious rights violations. Decisions that may cause refoulement engage with sections 10, 11, and 12 of the Constitution, which enshrine the rights to dignity, life, and the security and freedom of the person¹⁶⁷. Although that case concerned extradition rather than asylum, its reasoning is relevant to migration control because it affirms that all exercises of public power must comply with constitutional rights and South Africa's international obligations.

[100] Despite this strong legal framework, practical implementation remains uneven. Measures that prioritise rapid deportation may result in individuals being returned without a proper assessment of their protection claims, exposing them to the very harms the principle seeks to prevent¹⁶⁸. This risk is heightened where irregular entry, lack of documentation or delay in applying for asylum is treated primarily as evidence of illegality¹⁶⁹. In such circumstances, persons in need of protection may be arrested, detained or removed before their claims are properly assessed¹⁷⁰.

[101] As discussed in the preceding section on the asylum seeker exception, South African law recognises that persons seeking international protection should not be treated simply as ordinary

¹⁶⁰ *Ibid*; Convention relating to the Status of Refugees, 1951, art. 33(1).

¹⁶¹ *Kabuika v Minister of Home Affairs* 1997 (4) SA 341 (C), para. 3; *Makumba v Minister of Home Affairs* [2014] ZAWCHC 183; *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others* [1996] ZACC 16.

¹⁶² *Teitiota v New Zealand* UN Doc CCPR/C/127/D/2728/2016, paras. 9.11–9.12.

¹⁶³ Constitution of the Republic of South Africa, 1996, ch. 2.

¹⁶⁴ *Ibid*.

¹⁶⁵ *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC), paras. 48, 52, 54, 77.

¹⁶⁶ *S v Makwanyane and Another* [1995] ZACC 3.

¹⁶⁷ *S v Makwanyane*, para. 44.

¹⁶⁸ Forced Migration Studies Programme, *Barriers to asylum: The Marabastad Refugee Reception Office*, Johannesburg 2008, pp. 7-8.

¹⁶⁹ UNHCR, *Guidelines on the Applicable Criteria and Standards*, para. 25.

¹⁷⁰ AMIT Roni, *No refuge: Flawed status determination and the failures of South Africa's refugee system to provide protection*, International Journal of Refugee Law (Vol. 23/3) 2011 (cit  : AMIT, 'No refuge'), p. 458.

immigration offenders. Earlier jurisprudence protected access to the asylum system even where a person had entered or remained in South Africa irregularly, while more recent jurisprudence has introduced a “good cause” threshold before such access is activated¹⁷¹. For present purposes, the significance of this shift lies in its effect on non-refoulement. Where access to asylum is made conditional on explaining irregular entry or delay, persons fleeing persecution may be exposed to detention or removal before their protection needs have been substantively assessed.

[102] This requirement fails to account for the realities of forced displacement. Refugees often flee without valid documentation and may have no realistic option but to enter through irregular routes. Article 31(1) of the 1951 Refugee Convention recognises this reality by prohibiting the penalisation of refugees for unlawful entry or presence where they present themselves without delay and show good cause for their entry or presence. Conditioning access to asylum procedures on the justification of irregular entry therefore risks reversing the protective purpose of refugee law by treating vulnerable individuals as presumptive offenders. In the South African context, this protection must be read against the realities of inaccessible Refugee Reception Offices, documentation barriers, corruption, asylum backlogs and administrative delay¹⁷². A strict approach to irregular entry may therefore punish asylum seekers for circumstances that are often created by flight itself or by the state’s own administrative failure.

[103] These tensions are further reflected in recent policy developments. Although the Draft Revised White Paper on Citizenship, Immigration and Refugee Protection, recently approved by Cabinet, does not expressly depart from the principle of non-refoulement, its emphasis on enforcement, risk management and border control may, in practice, make access to international protection more difficult. It proposes that Refugee Reception Offices be located at ports of entry to facilitate immediate assessment of asylum claims, that asylum seekers who enter unlawfully must show good cause for their unlawful entry or presence, and that the first safe country principle be strictly applied¹⁷³. It also proposes more effective monitoring of asylum seekers awaiting the outcome of their applications and legislative measures relating to voluntary and involuntary repatriation¹⁷⁴. These proposals may be framed as administrative efficiency, but they risk making access to asylum conditional on manner of entry, documentation, prior transit through another country, or compliance with border-based screening procedures.

[104] The risk of refoulement is therefore not only a consequence of unlawful deportation in individual cases. It is also produced structurally where migration governance prioritises detection, detention and removal over access to asylum procedures. When administrative dysfunction, securitised policy and criminalising language combine, asylum seekers may be misclassified as “illegal foreigners” and exposed to deportation despite having legitimate protection claims. Non-refoulement therefore functions as an important limit on penal migration governance: it requires the state to ensure that no person is removed before their protection claim has been fairly, individually and effectively assessed.

¹⁷¹ *Ersumo; Ruta; Ashebo; Lembore*.

¹⁷² VAN HOUT Marie Claire / WESSELS Jakkie, *#ForeignersMustGo versus “in favorem libertatis”: Human rights violations and procedural irregularities in South African immigration detention law*, *Journal of Human Rights* (Vol. 22/4) 2023, pp. 551-554; Global Detention Project, *Immigration detention in South Africa*, pp. 17-18.

¹⁷³ Department of Home Affairs, Cabinet Approved Final Revised White Paper, pp. 10,44-46.

¹⁷⁴ *Ibid*, pp. 46-47.

C. Children and Social Rights as Consequences of Penal Governance

[105] The effects of penal migration governance extend beyond arrest, detention and deportation. They also shape how migrants, asylum seekers and refugees experience access to protection, healthcare and education in everyday life. This section therefore uses children's rights, healthcare and education to show how administrative irregularity, documentation barriers, enforcement practices and social hostility can turn public services into sites of exclusion and indirect migration control.

[106] Children illustrate this dynamic most clearly. South African law provides clear safeguards for children irrespective of nationality. Section 28 of the Constitution guarantees that a child's best interests are of paramount importance in every matter concerning the child. Section 28(1)(g) further provides that children may only be detained as a measure of last resort, for the shortest appropriate period, and must be held separately from adults in conditions appropriate to their age. These protections are reflected in section 32 of the Refugees Act which provides for the protection and care of any child who appears to be in need of care and who qualifies for refugee status, which must be interpreted in line with constitutional safeguards.

[107] The child protection framework further limits the use of immigration enforcement against children. Section 32 of the Refugees Act protects children who appear to be in need of care and who qualify for refugee status, while the Children's Act applies to all children in South Africa, including undocumented and unaccompanied migrant children¹⁷⁵. Such children should therefore be referred to the Children's Court and placed in appropriate care, rather than treated primarily as immigration offenders¹⁷⁶. The international and regional children's rights framework imposes strict limitations on the detention of children. Article 37(b) of the UN Convention on the Rights of the Child, 1989 requires that child detention be lawful, non-arbitrary, used only as a last resort and for the shortest suitable period. Article 17 of the African Charter on the Rights and Welfare of the Child, 1990 similarly requires special treatment for children deprived of liberty and separation from adults.

[108] The importance of this child-centred approach was affirmed in *Centre for Child Law v Minister of Home Affairs*, where the High Court addressed the detention of unaccompanied foreign children at Lindela Repatriation Centre. The children had been detained with adults and faced deportation without adequate safeguards. The Court held that the detention and intended deportation of the children violated their constitutional and statutory rights, ordered that the children be removed from Lindela and required the relevant state departments to deal with them through appropriate child protection procedures¹⁷⁷. The case confirms that children in migration contexts must be treated first and foremost as rights-holders in need of protection, rather than as immigration offenders.

[109] Despite this legal framework, practice has not always followed the protective model. Reports continue to document instances where children are detained in immigration facilities contrary to legal requirements, or where authorities fail to follow proper child protection procedures. In 2013 and 2014, Lawyers for Human Rights frequently came across children being detained for deportation, both at police stations, especially in Musina, and at Lindela¹⁷⁸. In 2017, serious abuses

¹⁷⁵ Children's Act 38 of 2005, s. 150(1)(j).

¹⁷⁶ Children's Act 38 of 2005, ss. 151-152.

¹⁷⁷ *Centre for Child Law and Another v Minister of Home Affairs and Others* 2005 (6) SA 50 (T).

¹⁷⁸ Lawyers for Human Rights, [*Monitoring Policy, Litigious and Legislative Shifts in Migration and Detention in South Africa*](#).

were reported at Lindela Repatriation Centre, including the alleged detention of children, poor medical care, and mistreatment of detainees¹⁷⁹. More recently, in 2025, a 15-year-old girl in Johannesburg was reportedly wrongfully arrested after being suspected of being a foreign national and failing to produce an ID, following an alleged tip-off from Operation Dudula¹⁸⁰. Despite asserting her South African citizenship, she was searched, denied the opportunity to contact her parents, and placed in holding cells until her father arrived with proof of identity¹⁸¹. These practices therefore undermine the child-centred protection framework established by the Constitution, the Refugees Act, the Children's Act and international law.

[110] Healthcare and education reveal a related form of exclusion. The Constitution guarantees the rights of access to healthcare services and basic education to “everyone”, and these guarantees are not limited to citizens¹⁸². In principle, refugees, asylum seekers and undocumented migrants should not be denied essential healthcare or basic education merely because their documentation is incomplete or unresolved¹⁸³. However, in practice, documentation checks, fear of detection, xenophobic hostility and informal gatekeeping may discourage or prevent access. In this way, public institutions that should provide care and inclusion may become spaces where migrants encounter surveillance and exclusion.

[111] This is particularly visible in healthcare. Although section 27 of the Constitution protects access to healthcare services, and section 27(g) of the Refugees Act entitles refugees to the same basic health services received by inhabitants of the Republic¹⁸⁴, non-nationals often encounter barriers in practice¹⁸⁵. These barriers include inconsistent application of eligibility rules, demands for documentation, medical xenophobia, and intimidation by anti-migrant groups seeking to prevent foreign nationals from accessing hospitals and clinics¹⁸⁶. As discussed earlier, groups such as Operation Dudula and March and March have, in a number of documented instances, attempted to prevent and, in some cases, physically blocked foreign nationals from accessing public healthcare facilities, including hospitals and clinics¹⁸⁷. This led to many tragic consequences, including the reported death of a one-year-old Malawian child who was denied treatment at public clinics.¹⁸⁸ These actions, often justified through xenophobic narratives of resource scarcity,

¹⁷⁹ VAN DYK Joanna, *Did Bosasa illegally detain kids while working for the Department of Home Affairs?*, 2017.

¹⁸⁰ MASHALE Kamogelo, *NGOs ask for legal clarity over Dudula's “xenophobic” deeds*, 2025.

¹⁸¹ *Ibid.*

¹⁸² Constitution of the Republic of South Africa, 1996, ss. 27, 29(1)(a); Refugees Act 130 of 1998, s. 27(g).

¹⁸³ *Ibid.*

¹⁸⁴ Refugees Act 130 of 1998, s. 27(g); National Health Act 61 of 2003, s. 5; *Somali Association of South Africa v Limpopo Department of Economic Development, Environment and Tourism* [2014] ZASCA 143, paras. 35-36; *Union of Refugee Women v Director, Private Security Industry Regulatory Authority* [2006] ZACC 23, paras. 99, 113.

¹⁸⁵ ALFARO-VELCAMP Theresa, *Don't send your sick here to be treated, our own people need it more: immigrants' access to healthcare in South Africa*, *International Journal of Migration, Health and Social Care* (Vol. 13/1) 2017, p. 53.

¹⁸⁶ CRUSH Jonathan / TAWODZERA Godfrey, *Medical xenophobia and Zimbabwean migrant access to public health services in South Africa*, *Journal of Ethnic and Migration Studies* (Vol. 40/4) 2014, pp. 655-670.

¹⁸⁷ NGCOBO Khanyisile, *Anti-Migrant Group Ordered to Stop Blocking Foreigners from South African Healthcare*, 2025; France 24, [South Africa Police Clash with Anti-Immigrant Protesters](#).

¹⁸⁸ COTTERELL Gareth, *EFF to Open Case against Operation Dudula after Death of 1-Year-Old Child*, 2025.

undermine constitutional protections and raise serious concerns regarding discrimination, public health risks, and the progressive erosion of the right to healthcare for non-nationals¹⁸⁹. The point is not to argue that every healthcare barrier is crimmigration. Rather, healthcare becomes relevant to this article where access to care is shaped by immigration status, social suspicion and informal enforcement, thereby reinforcing the idea that migrants are undeserving or removable outsiders.

[112] Education provides another important example of how documentation-based exclusion affects access to constitutional rights. The right to basic education is immediately realisable and applies to every child within South Africa¹⁹⁰. In *Centre for Child Law v Minister of Basic Education*, the High Court held that undocumented children may not be excluded from public schools because they lack birth certificates, permits or other identity documents¹⁹¹. While this judgment confirms that documentation cannot be used as a gatekeeping device to deny basic rights, migrant and undocumented children continue to experience delays, intimidation and exclusion where schools treat unresolved documentation as a basis for refusing enrolment¹⁹².

[113] In practice, access to basic education is increasingly shaped not by constitutional entitlement, but by documentation requirements, enforcement-oriented governance and anti-migrant sentiment. Documentation therefore operates as a de facto gatekeeping mechanism, while fear of detection, harassment or exclusion may further discourage migrant and undocumented children from exercising their right to basic education. Not every barrier to education constitutes crimmigration in the strict sense. However, this pattern shows how the logic of penal migration governance extends beyond arrest, detention and deportation into the everyday functioning of public institutions. Essential public services can therefore become sites of indirect migration control, where ordinary administrative and institutional practices undermine constitutional rights.

[114] These discussions demonstrate why children's rights, healthcare and education are integral to the article's central argument. They are not separate social-rights enquiries, but manifestations of how penal migration governance extends beyond formal immigration enforcement. When migrants are framed primarily as illegal, risky or undeserving, the effects are felt not only in police operations, detention centres and deportation processes, but also in schools, clinics and child protection systems. A rights-based migration regime must therefore ensure that immigration status and documentation barriers are not used, whether formally or informally, to deny protection, healthcare or education.

D. Dignity, Equality and the Rule of Law

[115] Collectively, the harms discussed above reveal that penal migration governance is not merely an immigration issue, but a constitutional one, engaging the foundational values of dignity, equality and the rule of law. A key critique of the Immigration Act is its continued use of the term "illegal foreigner," which has been widely criticised in scholarship and human rights discourse for its dehumanising effect, as it appears to criminalise the person rather than the conduct or status in

¹⁸⁹ RAMJATHAN-KEOGH Kaajal, *SALC Submissions on the South African National Health Insurance Bill (NHI)*, Southern Africa Litigation Centre, 2019.

¹⁹⁰ Constitution of the Republic of South Africa, 1996, s. 29(1)(a).

¹⁹¹ *Centre for Child Law and Others v Minister of Basic Education and Others* [2019] ZACGHC 126, paras. 81, 85-86, 121-130.

¹⁹² Parliament of South Africa, *Committee Chairperson calls for vigilance to foreign nationals in light of possible disruptions by Operation Dudula*, 2025.

question¹⁹³. This is especially problematic where irregularity may result from documentation barriers, delayed asylum procedures, inaccessible Refugee Reception Offices or administrative dysfunction¹⁹⁴.

[116] In South Africa's context of recurring xenophobic violence and racialised suspicion of African migrants, this language may reinforce the construction of migrants as outsiders, threats or undeserving rights-bearers¹⁹⁵. It also shapes how migrants are treated by officials, service providers, political actors and members of the public. Where migrants are framed primarily as "illegal", administrative irregularity can become a quasi-criminal marker that exposes individuals to detention, deportation, stigma and exclusion¹⁹⁶. This is inconsistent with a constitutional framework that guarantees dignity, equality, freedom and security of the person, just administrative action, and access to courts to everyone within the Republic¹⁹⁷.

[117] South African constitutional jurisprudence has consistently treated dignity as a foundational value. In *S v Makwanyane*, the Constitutional Court linked dignity to the values of humanity and *ubuntu*¹⁹⁸. Similarly, in *Port Elizabeth Municipality v Various Occupiers*, the Court reaffirmed that constitutional adjudication, particularly in contexts involving vulnerable groups, must be guided by considerations of humanity and compassion rooted in these values¹⁹⁹. Applied to migration governance, these principles require that migrants, asylum seekers and refugees be treated with dignity despite their often precarious legal and social position.

[118] The implications for the rule of law are therefore structural. Where administrative failures produce irregularity, and irregularity then becomes the basis for coercive enforcement, the state risks punishing individuals for conditions it has helped to create. This undermines legality, accountability and procedural fairness. A rights-based migration regime must therefore distinguish between criminal conduct, administrative irregularity and protection claims, and must ensure that immigration enforcement remains subject to dignity, equality, non-discrimination and access to justice.

V. South Africa in Comparative Perspective: Converging Patterns of Penal Migration Governance

[119] The United States (US) offers a useful comparative reference point because it represents a highly institutionalised model of crimmigration. In the United States, immigration control is closely linked to criminal prosecution, detention, deportation, specialised enforcement agencies and surveillance. Seminal crimmigration scholarship has shown how US immigration law increasingly

¹⁹³ Lawyers for Human Rights, *Monitoring policy, litigious and legislative shifts in migration and detention in South Africa*, p. 6.

¹⁹⁴ Amit / Kriger, 'Making migrants "il-legible"', pp. 270-279.

¹⁹⁵ Lawyers for Human Rights, *Monitoring policy, litigious and legislative shifts in migration and detention in South Africa*, p. 6.

¹⁹⁶ RAMACHANDRAN Niroshan / WRIGHT Matthew, *Framing and the mechanisms of criminalisation in the migration context*, International Review of Sociology, 2026, p. 14.

¹⁹⁷ Constitution of the Republic of South Africa, 1996, ss. 9, 10, 12, 33 and 34.

¹⁹⁸ *S v Makwanyane* 1995 (3) SA 391 (CC), paras. 224-225.

¹⁹⁹ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), paras. 37-38.

borrowed from criminal law, while criminal law and policing have been used to advance immigration enforcement objectives²⁰⁰. South Africa shares some of these features, including immigration offences, employer sanctions, detention pending deportation, biometric verification and enforcement-led operations. However, South Africa should not be presented as a local version of the United States. Its penal migration governance is shaped by a distinctive constitutional framework, apartheid and post-apartheid histories of racialised exclusion, regional mobility in Southern Africa, administrative backlogs and the production of irregular status through state dysfunction²⁰¹.

[120] The first point of comparison is criminal prosecution. In the US, unlawful entry and re-entry are federal criminal offences and have formed part of a large-scale system of criminal immigration prosecution²⁰². This is one of the clearest features of the US crimmigration model: immigration breaches may be processed directly through criminal courts and punishment. South Africa also criminalises certain forms of immigration non-compliance under the Immigration Act, including unlawful entry, remaining in the Republic unlawfully, and assisting or employing persons without the required status²⁰³. However, South Africa's crimmigration dynamic is not primarily one of mass criminal prosecution. Its stronger pattern lies in the use of administrative classification, arrest, detention and deportation to produce coercive outcomes that resemble penal control without necessarily passing through ordinary criminal trial processes²⁰⁴.

[121] The second point of comparison is detention and removal. In the US immigration detention is supported by a large and specialised removal apparatus, including detention facilities, expedited removal procedures and federal enforcement institutions²⁰⁵. Detention is formally civil, but scholars have argued that its conditions, purposes and effects often resemble punishment²⁰⁶. For example, conditions within US Immigration and Customs Enforcement (ICE) detention facilities often resemble punitive confinement. Reports of overcrowding, inadequate medical care, prolonged isolation, abuse and preventable deaths show how civil detention can operate with prison-like severity, with at least 13 people having died in ICE custody by late March 2026, following a record 33 deaths in 2025²⁰⁷. South Africa similarly frames detention under section 34 of the Immigration

²⁰⁰ Stumpf, 'The crimmigration crisis', pp. 376-392; Chacón, 'Overcriminalizing immigration', pp. 613-620; GARCÍA HERNÁNDEZ César Cuauhtémoc, *Creating Crimmigration*, Brigham Young University Law Review (Vol. 2013/6) 2014, pp. 1467-1485.

²⁰¹ Klaaren / Ramji, 'Inside illegality,' pp. 35-47; PEBERDY Sally, *Imagining immigration: Inclusive identities and exclusive policies in post-1994 South Africa*, Africa Today (Vol. 48/3) 2001, pp. 19-22.

²⁰² 8 U.S.C § 1325; 8 U.S.C § 1326.

²⁰³ Immigration Act 13 of 2002, ss 49, 38.

²⁰⁴ Van Hout / Wessels, *'#ForeignersMustGo versus "in favorem libertatis"'*, pp. 551-554.

²⁰⁵ SWEENEY Maureen A. / SHEBAYA Sirine / COLLOPY Dree K., *Detention as deterrent: Denying justice to immigrants and asylum seekers*, Georgetown Immigration Law Journal (Vol. 36/1) 2021, pp. 292, 314-321.

²⁰⁶ DAS Alina, *Immigration detention: Information gaps and institutional barriers to reform*, University of Chicago Law Review (Vol. 80/1) 2013, p. 138; RYO Emily / PEACOCK Ian, *A national study of immigration detention in the United States*, Southern California Law Review (Vol. 92/1) 2018, p. 5; SAADI Altaf / DE TRINIDAD YOUNG Maria-Elena / PATLER Caitlin / ESTRADA Jeremias Leonel / VENTERS Homer, *Understanding US immigration detention: Reaffirming rights and addressing social-structural determinants of health*, Health and Human Rights Journal (Vol. 22/1) 2020, p. 187.

²⁰⁷ ULLOA Jazmine / McCANN Allison / RODRÍGUEZ MEGA Emiliano, *Deaths in ICE custody are growing, 2026; Arizona's Family, Concerns raised about ICE detention facilities as number of deaths in custody rises, 2026*.

Act as administrative because it is directed at deportation rather than punishment. Yet, as discussed above, migrants may be held in police cells, correctional facilities or Lindela Repatriation Centre, sometimes in prison-like conditions and with limited access to legal advice or judicial remedies²⁰⁸. The convergence therefore lies in the use of civil or administrative detention to achieve coercive exclusion. The divergence lies in scale and institutional design: the US has a more extensive and specialised detention infrastructure, while South Africa's system is more fragmented and shaped by administrative weakness, under-capacity and uneven implementation.

[122] The third point of comparison is enforcement architecture. The US has a specialised federal enforcement structure, particularly through ICE which carries out arrest, detention and removal functions through Enforcement and Removal Operations and conducts investigations through Homeland Security Investigations²⁰⁹. South Africa's enforcement architecture is more dispersed. The Department of Home Affairs, the Border Management Authority, the South African Police Service and other state actors all participate in migration enforcement. This creates a different form of penal migration governance. Rather than operating through one highly consolidated immigration enforcement agency, South Africa's system works through overlapping administrative, policing and border-control institutions. This can blur accountability, especially where immigration enforcement is combined with criminal policing, document verification, employer inspections or public-order operations.

[123] The fourth point of comparison is surveillance and workplace control. In both jurisdictions, migration governance increasingly relies on verification, data and risk management. In the US, enforcement is linked to federal databases, workplace enforcement, information-sharing and removal systems²¹⁰. In South Africa, biometric verification, employer sanctions, inspections and enforcement operations similarly show how immigration status is monitored beyond the border. However, South Africa's surveillance practices must be understood alongside the state's own role in producing irregularity. Where asylum backlogs, documentation failures and inaccessible offices leave people unable to prove status, verification systems may deepen exclusion rather than simply identify unlawful presence. In this respect, surveillance does not merely detect irregularity; it may also expose people to enforcement for administrative failures that the state has helped to create²¹¹.

[124] The fifth point of comparison is racialisation and social exclusion. US crimmigration has been closely associated with the racialisation of Latino and other migrant communities, with scholarship showing how immigration enforcement can produce immigrant criminality through racialised policing and institutional practices²¹². South Africa's racialised dynamics are different but no less significant. Migration enforcement operates within a post-apartheid context in which Black African

²⁰⁸ Sutton / Vigneswaran, 'A Kafkaesque state', pp. 632-637; Global Detention Project, *Immigration detention in South Africa*, pp. 24-25, 31-37; Van Hout / Wessels, '#ForeignersMustGo versus "in favorem libertatis"', pp. 552-554.

²⁰⁹ ICE, *Enforcement and Removal Operations*; ICE, *Homeland Security Investigations*.

²¹⁰ KALHAN Anil, *Immigration surveillance*, Maryland Law Review (Vol. 74/1) 2014, p. 1, 27-39; LEE Stephen, *Workplace enforcement workarounds*, William & Mary Bill of Rights Journal (Vol. 21/2) 2012, p. 554.

²¹¹ Amit / Kriger, 'Making migrants "il-legible"', p. 269-290.

²¹² ARMENTA Amada, *Racializing crimmigration: structural racism, colorblindness, and the institutional production of immigrant criminality*, Sociology of Race and Ethnicity (Vol. 3/1) 2017, pp. 83-84; MENJÍVAR Cecilia / ABREGO Leisy J., *Legal violence: Immigration law and the lives of Central American immigrants*, American Journal of Sociology (Vol. 117/5) 2012, pp. 1380, 1388-1391, 1395; Human Rights Watch, *US: ICE abuses in Los Angeles set stage for other cities*, 2025.

migrants, especially those from Zimbabwe, Nigeria, Mozambique, Malawi, Somalia, Ethiopia and the Democratic Republic of Congo, are often subjected to suspicion based on language, accent, appearance or nationality²¹³. Both systems demonstrate how legal status, race and perceived foreignness can combine to produce migrants as risky, unlawful or removable outsiders.

[125] The sixth point of comparison is constitutional accountability. The US has constitutional protections, but immigration law has historically been shaped by strong federal enforcement power and a civil immigration framework that often limits the procedural protections available to non-citizens²¹⁴. Although a Hold ICE Accountable Act has been introduced that would create an independent Special Prosecutor to investigate alleged unlawful conduct by DHS personnel, including ICE, with full prosecutorial powers, institutional independence from the current administration, and continuing congressional and judicial oversight²¹⁵. South Africa's constitutional framework is different. The Bill of Rights applies to "everyone" within the Republic, and the Constitutional Court has required immigration detention to comply with freedom and security of the person, judicial oversight and procedural fairness²¹⁶. This is an important divergence. South Africa's legal framework provides stronger textual grounds for rights-based limits on detention, deportation and administrative exclusion. The problem is that these protections are often weakened in practice by administrative dysfunction, weak implementation, limited access to remedies and enforcement-driven governance.

[126] The two jurisdictions converge in some respects but diverge in others. South Africa shares with the United States a move towards enforcement-led migration control, including detention, deportation, surveillance, employer sanctions and criminalising language. However, the South African model is not simply imported from the United States. It is shaped by local histories of racialised policing, apartheid-era spatial and population control, regional migration patterns, xenophobic politics, and the bureaucratic production of irregular status. The comparison helps clarify what is distinctive about South Africa's form of penal migration governance: it depends less on mass criminal prosecution than on the interaction between administrative failure, documentation regimes, coercive enforcement, and constitutional under-implementation.

Conclusion: Rethinking Migration Governance Beyond Punishment

[127] In South Africa, the criminalisation of migration should not be understood as a wholly recent departure from an otherwise neutral administrative system. It is better understood as a longer-standing mode of mobility control that has been reconfigured through different legal, institutional and technological forms. Apartheid-era movement control, late-apartheid immigration legislation, early post-apartheid deportation practices and contemporary enforcement reforms all reveal a recurring logic: the use of documentation, suspicion, policing, detention and removal to regulate

²¹³ Tshishonga, 'The impact of xenophobia-Afrophobia on the informal economy', p. 164; Matsinhe, 'Africa's fear of itself', pp. 295-313.

²¹⁴ FRANKEL Richard, *Bringing "Civil"ity into immigration law: Using the Federal Rules of Civil Procedure to fix immigration adjudication*, *Vanderbilt Law Review* (Vol. 76/5) 2023, p. 1379.

²¹⁵ STEVENS Haley, *Following ICE misconduct: Rep. Stevens introduces the Hold ICE Accountable Act*, 2026; H.R.8154 - To provide for the appointment of a special prosecutor to investigate any unlawful action by any officer or employee of the Department of Homeland Security taken on or after January 20, 2025.

²¹⁶ Constitution of the Republic of South Africa, 1996, ss. 9, 10, 12, 33, 34 and 35.

belonging. What has changed is not the existence of this logic, but the legal and institutional forms through which it is now expressed within a constitutional democracy.

[128] This article has argued that penal migration governance in South Africa is produced through the interaction of several forces. Legal and policy frameworks create categories such as “illegal foreigner”, “prohibited person” and “undesirable person”, through which administrative irregularity becomes linked to arrest, detention, deportation and exclusion. Administrative dysfunction then deepens this process by producing or prolonging irregularity through backlogs, inaccessible offices, expired documents, delays, corruption and weak regularisation pathways. Enforcement practices, political rhetoric, technological surveillance and border securitisation further transform this irregularity into a basis for coercive state action. The result is not simply the enforcement of immigration law. It is a system in which migrants may be punished for legal precarity that the state itself has helped create.

[129] The article has therefore sought to move beyond a narrow account of crimmigration as the direct criminalisation of migration offences. In South Africa, the penalisation of migration often operates through administrative law, documentation regimes and enforcement discretion. Detention pending deportation may be formally administrative, but it frequently assumes punitive characteristics. Deportation may be framed as a regulatory measure, but it can function as exclusion and banishment. Surveillance technologies may be presented as tools of efficiency, but they can expand the state’s capacity to classify, monitor and remove. Similarly, political narratives that associate migrants with crime, illegality or social disorder create the conditions in which coercive enforcement appears necessary, even where the link between migration and criminality is not supported by evidence.

[130] These developments carry serious constitutional implications. A system that treats lack of documentation as a proxy for unlawfulness or threat risks undermining dignity, equality, freedom and administrative justice. It also places pressure on the principle of non-refoulement, particularly where asylum seekers encounter procedural barriers before their claims are assessed on the merits. The danger is not only unlawful deportation in individual cases. It is also the structural production of deportability through administrative failure, restrictive policy design and enforcement practices that prioritise detection and removal over access to protection.

[131] The turn to penal migration governance is neither inevitable nor neutral. It reflects policy choices about how migration is framed, how legal categories are constructed, how administrative systems are resourced, and how enforcement powers are exercised. A different approach is both possible and constitutionally required. This does not mean abandoning migration regulation. It means reorienting migration governance towards legality, proportionality, procedural fairness and rights-based administration. Such an approach would require accessible documentation systems, functioning Refugee Reception Offices, meaningful remedies, clear limits on detention, effective judicial oversight, protection against refoulement, and political leadership that resists the use of migrants as scapegoats for broader social and administrative failures.

[132] Ultimately, the article’s central claim is that South Africa’s migration system does not merely respond to irregularity. In important respects, it produces irregularity, renders it visible through documentation and surveillance, and then treats it as a basis for coercive control. Recognising this dynamic is essential to any serious reform agenda. The question is therefore not whether South Africa may regulate migration. It plainly may. The question is whether it can do so in a manner consistent with its constitutional commitments to dignity, equality, freedom, administrative justice and the protection of all persons within its territory. The criminalisation of migration is a choice. So too is a rights-based alternative.

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