

Prison Overcrowding and the Constitutional Right to Adequate Accommodation in South Africa

by

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Introduction

Among the provisions in the South African Constitution is the right of "everyone who is detained, including every sentenced prisoner ... to conditions of detention consistent with human dignity, including ... the provision, at state expense, of adequate accommodation..."¹ Eight years have passed since the Constitution came into force, but a substantive jurisprudence around this provision has still to develop. Yet it is simply a matter of time. At risk of second-guessing a jurisprudence which is yet to emerge, it seems clear that the extent of overcrowding in South Africa's prisons places the incarceration of the vast majority of this country's inmates in violation of constitutional standards, no matter how low these standards are set.

The Department of Correctional Services (DCS) calculates the capacity of its prisons on the basis of 3.344 square metres per prisoner in a communal cell and five square metres in a single cell. Whether this calculation of capacity meets the constitutional standard of "adequate accommodation" is a moot point which will be discussed later. For the moment, suffice it to say that on 31 July 2004, the total capacity of South Africa's prisons stood at 114 821 prisoners, while the actual number of inmates stood at 184 806. The occupation

rate, in other words, was 161%.² If capacity is calculated on the basis of 3.344 square metres per prisoner, this means that an inmate in an average communal cell has just under 2.1 square metres of floor space. This is, of course, the average; in some prisons, conditions are considerably worse. In mid-2004, for instance, Durban Medium C was 387% full, and Umtata Medium 377% full, giving the average prisoner housed in a communal cell about 0.9 square metres of floor space.

The gap between this state of affairs and civilised norms is alarming. In Europe, the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), the body charged with monitoring compliance to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, has set nine to 10 square metres of floor space per prisoner as a desirable standard. As a bare minimum standard, it has set four square metres per prisoner in a communal cell and six square metres for a single cell.³ At present, the average South African prisoner in a communal cell thus occupies just over half the floor space considered a bare minimum in the CPT's jurisdiction.

In the United States, the American Public Health Association (APHA) has set standards requiring a minimum of 60 square feet (18.18 square metres) per prisoner. The APHA standards are determined, in part, by a measure of the prison administration's capacity to maintain the safety of prisoners and officials, and to conduct inmate programmes — such as work, training and recreation — which render life behind bars tolerable.⁴

Such standards are, of course, not necessarily coterminous with constitutional standards. Courts around the world have historically been reluctant to adjudicate on the constitutionality of prison accommodation by reference to a simple measure of floor space. Most examine floor space in the broader context of prison life: how much time prisoners spend in their cells each day, how much exercise they get, access to ventilation and natural light, quality of food, climatic conditions, access to work, recreation and training. And yet, when floor space per prisoner diminishes to the extent that it has in South Africa, even the most reticent and cautious courts have ruled, on an adjudication of floor space alone, that prison conditions are degrading or cruel.

In the United States, for instance, where the jurisprudence on prison conditions established by the Supreme Court insists that overcrowding per se is not a constitutional violation, prisons which have crammed inmates into less than three square metres of floor space each have been roundly condemned by the courts. In 1981, for example, the Seventh Circuit found the confinement conditions of five men to a cell measuring five-by-seven feet (in other words, 10.6 square metres, or 2.12 square metres per prisoner) to have "shocked[ed] the general conscience" and stated that such overcrowding constituted cruel and unusual punishment, thus violating the Eight Amendment of the United States Constitution.⁵ Four years earlier, the Tenth Circuit had found that housing two men in "a little 35–40 square foot cubby hole offends the contemporary standards of human decency."⁶

Similarly, the European Court of Human Rights, which has been reluctant to use floor space alone as a threshold to determine whether conditions of detention are degrading, has nonetheless come close to doing so when floor space per prisoner has diminished to the extent that it has in South Africa. In *Kalashnikov v Russia*, the applicant was confined to a

cell with 11 to 14 occupants, each of whom had 0.9–1.9 square metres of floor space. The court went on to describe related conditions, but stressed that question of floor space alone "raises an issue under Article 3 of the [European] Convention [on Human Rights]",⁷ which prohibits degrading treatment.

Later, when we discuss international jurisprudence on prison conditions more systematically, we will see that determining the threshold at which overcrowding constitutes a violation of prisoners' rights is complex and contested. For the moment, it is sufficient to point out that when floor space drops to as little as 2.1 square metres per prisoner, as it has in South Africa, the grey areas in international jurisprudence narrow considerably. Courts around the world have found a bald measurement of floor space sufficient to declare conditions of detention cruel or degrading.

In this context, it is extremely unlikely that the South African courts will find that current accommodation conditions meet constitutional standards. A more pertinent and difficult question concerns the standards they will establish and the remedies they will fashion.

I argue in what follows that while the courts are almost certain to declare current conditions unconstitutional, the minimum standards they set are likely to be conservative, the remedies they order cautious and modest. The courts, in other words, are unlikely to fulfil the aspirations of the prisoners' rights lobby. In the best of all possible worlds, a world in which the right of prisoners to adequate accommodation is fully realised, the courts would establish quantifiable minimum accommodation standards and order the government to abide by them. The legislature would rewrite its sentencing, bail and parole policies to realise a state of affairs in which the size of the prison population is determined by the capacity of the prison system to hold inmates in acceptable conditions. This, I argue, is the best of all possible worlds, but it is not our world. If the courts do fashion a global remedy, it will be open-ended and its implementation will not be time-bound. The ideal of a prison population determined by available space will constitute an ever-receding horizon.

This is not to discourage a campaign of constitutional litigation. But it does suggest that such a campaign is in itself insufficient. Whether we house prisoners in acceptable conditions is a question of political will, and the courts will not substitute for that will. It is a fraught and charged question, one that ultimately stands on whether we are willing to stem the current tide of retributory fear and anger and build a justice system that expresses and nurtures the bonds of solidarity that bind us. An appeal to the courts should certainly form part of such a project, but only a part. The heart of the battle is political; legal action would form a component of this battle.

Imprisonment Trends in Post-Apartheid South Africa

When the drafters of South Africa's interim Constitution decided to include a clause specifically guaranteeing the human dignity of prisoners, they were, no doubt, looking backwards, at the apartheid era that had just passed. Nobody contested the inclusion of the provision. It was common cause that prison conditions under apartheid were horrendous — one of the many ugly symptoms of white minority rule. Nelson Mandela's dictum, penned a year after the interim Constitution was passed into law, that "no one truly knows a nation until one has been inside its jails",⁸ captured the spirit of the drafters' thinking. "The belief,"

as Dirk Van Zyl Smit has commented, "was that in a democratic South Africa, the crime rate would gradually decline and that the remaining crime could be dealt with by a fair criminal justice system, following the precepts of the new Constitution and imposing relatively moderate punishments."⁹

If the drafters had been afforded a window onto the future, and seen the state of South Africa's prisons ten years into democracy, they would have been aghast. In January 1995, eight months after the African National Congress government took office, South African prisons had an official capacity of 96 361, and an actual prison population of 116 846. The prisons were, in other words, at 121% of capacity. Nearly ten years later, on 31 July 2004, the official capacity stood at 114 821, while the actual number of inmates was 184 806. South Africa's prison population had grown by 58% in the preceding decade. Prison construction had not come close to matching the swelling numbers; levels of overcrowding had increased by 40%. What had happened during the first ten years of democracy?

It is not that the justice system was either prosecuting or convicting more offenders. Between 1991 and 2000, the number of prosecutions dropped by 23%, while the number of convictions dropped by 19%.¹⁰ There is little evidence that they have increased appreciably since then. So, the problem was not that more and more people were coming into prison: it is that they were staying there for longer. Why was this so?

During the first five or six years of democracy, the growing number of inmates was accounted for almost entirely by the swelling ranks of unsentenced prisoners. On 31 January 1995, there were 22 282 unsentenced prisoners in South Africa's prisons. By 31 January 2001, the figure had risen almost threefold, to 61 563. The number of sentenced prisoners, in contrast, was more or less stable: 92 581 on 31 January 1995, and 88 301 on 31 July 1998.

In 2000, the inexorable rise in the number of unsentenced prisoners ceased, and indeed, the numbers began to decline. From a high of 61 563 on 31 January 2000, the figure had dropped to 48 306 by July 2004. As Van Zyl Smit has argued, the problem was successfully managed primarily by the creative use of release policies:

In practice, the decline was achieved in the first instance in 2000 by using the extraordinary power granted by section 66 of the Correctional Services Act (8 of 1959) to the minister and the president to release 8 451 unsentenced prisoners who had been granted bail of less than R1 000 but had been unable to post it. The argument of the Inspecting Judge and accepted by the minister was that these prisoners had been granted bail by a court and therefore a court had decided in principle that they did not pose any danger to their communities should they be released...

In 2001, further pressure from the Inspecting Judge led to an imaginative new provision being added to the Criminal Procedure Act, which allows the head of a prison to apply to court for the bail conditions of unsentenced prisoners to be reconsidered so that they can possibly be released. This provision is explicitly aimed at overcrowding. It may only be invoked where the head of a prison is "satisfied that the prison population of a particular prison is reaching such

proportions that it constitutes material and immanent threat to human dignity, physical health or safety of the accused".¹¹

And yet, at the very time that the unsentenced prison population began to stabilise and then decline, the sentenced population began to increase dramatically. From a low of 88 301 on 31 July 1998, the number of sentenced prisoners has climbed consistently and inexorably to 136 500 by 31 July 2004. This sudden and dramatic increase in sentenced prisoners can, in all likelihood, be traced to policy decisions the legislature took in the late 1990s, and, to a lesser extent, to the attitude of the courts. The effect of these policies is, first, that those convicted of crimes are being sentenced to longer terms of imprisonment and, second, that the capacity to manage prison volumes by use of the parole system and bursting provisions is diminishing.

The trend began in the mid-1990s when judges, responding to South Africa's growing fear of crime, began sentencing people to longer prison terms. But the real impetus came in 1998 when legislation mandating minimum sentences for a host of crimes, which had been passed by Parliament a year earlier, came into effect. The legislation mandated life sentences for several crimes including premeditated murder, the murder of a law enforcement official, multiple rape, gang rape and the rape of a minor. The legislation also mandated minimum sentences for, among other crimes, robbery with aggravating circumstances, car-jacking, drug trafficking, the smuggling of ammunition, firearms and explosives, rape, and the indecent assault of a child.¹²

While the sentencing regime grew more severe, filling the prisons with inmates serving longer sentences, traditional mechanisms used in the past to manage prison volumes became increasingly unavailable. During the apartheid era, government primarily used two mechanisms to regulate prison volumes: presidential amnesties and a flexible parole policy. Both were used liberally. For instance, between December 1990 and July 1991, three successive amnesties were collectively responsible for the early release of no fewer than 64 883 sentenced prisoners.¹³

But by the late 1990s, both of these mechanisms had become increasingly unavailable. Presidential amnesties, which had long been criticised for undermining the integrity of sentences passed by the judiciary, were beginning to exact a political price too hefty to pay. As for parole, the flexible release system used during the apartheid era was scrapped in 1993, to be replaced by a confusing and convoluted "credits" system incapable of deployment in the management of prison volumes. The 1993 system has, in turn, recently been replaced by a new set of provisions — passed into law in 1997, but into effect only in 2004 — which render the release system even more rigid. Under the new provisions, prisoners serving life cannot be considered for release until they have served 25 years of their sentence. And prisoners sentenced under the mandatory sentencing provisions of 1997 can only be considered for release after they have served four-fifths of their sentence or 25 years, whichever is the shorter.

In short, Parliament began to impose longer sentences for an array of offences, and, simultaneously, made it more difficult to manage prison volumes by effecting early releases. The results in regard to the changing composition of the prison population are astounding. Between the beginning of 2000 and mid-2004, the number of prisoners serving

sentences of 10 years or more increased by 162%, and the number serving more than 20 years increased by 174%. During the same period, the number of prisoners serving between five and 10 years increased by 8.2% and the number serving less than five years increased by just 2.9%.

The Puzzling Thinking of the Legislature and the Courts

It is somewhat baffling that Parliament passed the 1997 minimum sentencing provisions apparently without thought to the effects on prison volumes, and thus without thought either to the constitutional right of prisoners to be held in conditions consistent with human dignity. There is an abundance of international evidence to show that a sudden and sustained increase in sentences for serious crimes will inevitably lead to inexorable increases in prison numbers; there was no reason for Parliament not to have known the likely effects of its legislation. In the United States, for instance, mandatory minimum sentencing regimes were introduced in the late 1970s and early 1980s. From 1980 to 1995, the United States prison population grew by 242%.¹⁴ While there was initially some debate about the causes for the increasing volumes, it is generally accepted now that the primary reasons were lengthening prison sentences, decreased possibilities for parole and policies mandating incarceration for growing numbers of offences.¹⁵

It might be argued that Parliament was not thinking of the long term because it did not envisage the mandatory minimum sentencing provisions lasting long. The provisions were meant to stand for two years, and would then have to be renewed by Parliament annually. As Marais J.A. commented in *Malgas v The State*, the first constitutional challenge to the minimum sentencing regime to reach the Supreme Court of Appeal, "when conceived [the provisions] were intended to be relatively short-term responses to a situation which it was hoped would not persist indefinitely".¹⁶ The provisions, however, have been renewed by Parliament annually ever since.

Indeed, the fact that a "temporary" piece of legislation has *de facto* become permanent is, perhaps, a symptom of just how muddled and unconsidered Parliament's crime-fighting policies have become. They are, in essence, little more than a knee-jerk reaction to the South African public's fear of crime, and an expression of a growing retributory current in society, rather than a considered strategy aimed at reducing crime.

This is so for a number of reasons. First and foremost, there isn't a shred of evidence the world over that marginal increases in the severity of punishment increase levels of deterrence among potential offenders. On the contrary, if anything deters, it is the certainty, and not the increasing marginal severity, of punishment. The latest, as well as the most rigorous and authoritative survey on this subject, was published by a group of Cambridge University criminologists in 1999. In a comprehensive analysis of every statistical study conducted on the relationship between sentencing and deterrence since the early 1970s, the authors conclude that:

The most comprehensive available studies ... generally show significant negative relationships between likelihood of conviction and crime rates — over a ten-year period, for England, the USA and Sweden, and over a fifteen-year period for England and the USA. This comports with findings of earlier

research... The statistical associations between severity of punishment and crime rates are considerably weaker, however... [T]he negative correlations between sentence severities and crime rates during periods studied generally are not sufficient to achieve statistical significance.¹⁷

The certainty of punishment in South Africa has, if anything, diminished since the end of the apartheid period.¹⁸ It is almost as if Parliament, frustrated by the shortcomings of the justice system, has reflexively grabbed the nearest tool at its disposal, and substituted severity for certainty. In so doing, it is, the best available evidence shows, barking up the wrong tree.

If increasingly severe sentences for serious crimes do not serve the purpose of deterrence, there is another purpose of punishment which they do not serve particularly well either: the incapacitation of high-risk offenders. It is common cause in modern criminology that violent crimes are commonly committed by young males. The age band within which young men are most likely to commit violent crimes varies with time and place, but there is no serious study disputing that men over the age of 35 are responsible for only a minor proportion of violent crimes.¹⁹ As increasingly severe sentences result in the ageing of the prison population, it is likely that prisons will begin to house a diminishingly dangerous segment of the criminal population. And, as the early release conditions for those serving life and mandatory minimum sentences grow more rigid, it is likely that prisons will attempt to manage their populations by releasing younger inmates. The long-term result is that resources will be spent increasingly to incarcerate an older and less dangerous prison population.²⁰

Finally, insofar as a swelling prison population leads to overcrowding, and insofar as overcrowding results in deteriorating prison conditions, it is probable that young inmates released from prison are far more likely to re-offend than they would have been if they had served their sentences in more humane prison conditions. This question is, admittedly, under-researched, but what research findings exist, largely produced in the United States, are quite categorical. In the most rigorous statistical study conducted to date, Yale and Harvard economists Keith Chen and Jesse Shapiro compared rates of recidivism among over a thousand inmates housed in two categories of prison conditions. Prison conditions were compared in regard to access to the outside world, freedom of movement and exposure to violence. They concluded that:

... moving a prisoner from minimum to low security roughly doubles his probability of rearrest within three years following release. This is not present in a control population of [comparable] prisoners who are ... not housed with the general prison population, suggesting that our findings are indeed driven by the effect of prison conditions on inmates.²¹

The crucial point is that our prison population has swelled beyond bursting point not as an inevitable result of South Africa's high crime rate, but because of a set of dubious policy decisions taken in response to our high crime rate. Indeed, it is likely that Parliament's recent policy trends do little or nothing to reduce crime while violating the constitutional rights of prisoners. The question of the relationship between sentencing regimes and prison conditions has not even been asked, let alone answered. It constitutes something of a blind

spot.

This blind spot characterises not just the legislature's attitude but the judiciary's as well. In general, the courts of the post-apartheid period have responded to the plight of individual prisoners living in poor conditions with a great deal of sympathy. The Supreme Court of Appeal has opined that while "... the public might feel particularly unsympathetic towards prisoners ... [w]e cannot dispense with the essential values that make us a civilised society. We are bound by the values entrenched in our Constitution."²² The Witwatersrand Local Division has ruled that a decision at Johannesburg Prison to remove access to electrical sockets, and thus to television, radio and music, violated the applicants' constitutional rights.²³ The Cape Provincial Division has ruled that an HIV-positive prisoner be given access to antiretroviral drugs at state expense, despite the fact that these drugs were not available to patients at a state hospital outside prison.²⁴

And yet, the courts have consistently failed to draw the link between the poor prison conditions which they so decry and legislative policy. Two constitutional challenges to the 1997 mandatory sentencing laws have reached the Supreme Court of Appeal and the Constitutional Court — *Malgas v The State* and *The State v Dodo* respectively. In the latter case, Ackermann J. explicitly stated that the proportionality of a prison sentence in relation to the crime committed must be judged, among other things by "the conditions under which it is served".²⁵ And yet the Court failed to make a connection between the law it was approving and the capacity of the state to house prisoners under constitutionally admissible conditions.

The connection between sentencing regimes and the constitutionality of prison conditions is not a secret that has been kept from South Africa's courts. In parts of the world, it is a matter explicitly engaged by public policy. For instance, in 1995, the Parliamentary Assembly of the Council of Europe, concerned by levels of prison overcrowding in member states, noted that "a sharp rise in the prison population in recent years" was caused "not only by increased criminality" but by "the augmentation of penalty scales and longer sentences imposed by the courts..." It invited member states to implement a series of recommendations on the consistency of sentencing, as well as a European Rule on the use of non-custodial punishment.²⁶

Indeed, the question of the relationship between sentencing regimes and conditions of imprisonment appears to have fallen off the South African judicial map. In a survey conducted in 2000, 42 magistrates and High Court judges from around the country were asked whether the capacity of the correctional system to carry out sentences should be considered when sentence is imposed; 80% of respondents said never or almost never, while 10% of respondents said always or almost always.²⁷

It seems that we have moved a long distance from the optimistic and cheerful days when the drafters of the interim Constitution decided unanimously to include a clause specifically guaranteeing the human dignity of prisoners. In a manner which is not rationalised, indeed, which is barely articulated, we appear to have decided that the question of prison conditions dissolves in the face of the imperatives of retribution, deterrence and society's safety. And yet, as I have argued, it is not clear that current sentencing trends serve the punitive goals of criminal deterrence and societal safety. We may well be fritting away at a constitutional

right in exchange for nothing at all.

Overcrowding and the Purpose of the Implementation of a Prison Sentence

In November 1998, a new Correctional Services Act was passed into law. It stood idle for almost six years. Most of its provisions came into effect on 1 October 2004. The purpose of the Act is explicitly to give "effect to the Bill of Rights in the Constitution, 1996, and in particular its provisions with regard to prisoners" (preamble). The Act thus contains Parliament's interpretation of prisoners' constitutional rights and gives expression to the statutory implications of these rights.

In regard to the legislative objective of the implementation of prison sentences, the Act is pithy and concise. It states: "With due regard to the fact that the deprivation of liberty serves the purposes of punishment, the implementation of a sentence of imprisonment has the objective of enabling the sentenced prisoner to lead a socially responsible and crime-free life in the future" (section 36).

As important as the Act's explicit articulation of the purpose of the implementation of sentences are its silences; its articulation, in other words, of what the purpose of the implementation of sentences *is not*. In particular, punishment, deterrence and retribution are not among the objectives of the administration of prisons. In this regard, the Act stands in opposition to American constitutional law. There, the Supreme Court has stated that "restrictive" or "even harsh" prison conditions cannot amount to constitutional violations but are merely part of the penalty prisoners pay for their crimes.²⁸ The Act also stands in opposition to a strand of common law developed under apartheid. In 1979, the Appellate Division stated that the deprivations of imprisonment "were intended, so that imprisonment may have some deterrent effect, not only in so far as the prisoner himself is concerned, but also in so far as other persons might contemplate engaging in criminal conduct".²⁹

The Act stands closer to the dictum that "people are sent to prison as punishment and not for punishment".³⁰ It also stands closer to the German Federal Constitutional Court's jurisprudence, which states that the purpose of deterrence is served by the presence of criminal law and the resultant threat of punishment; that conviction serves the purpose of retribution; and that the administration of punishment does not serve either of these purposes, but, rather, is aimed at the resocialisation of the prisoner.³¹

The purpose of enabling a sentenced prisoner to lead a socially responsible and crime-free life in the future places a number of positive duties on both the prison administration and the prisoner. The prisoner is obliged to "perform any labour which is related to any development programme or which generally is designed to foster habits of industry..." (section 37(1)(b)). Note also that in insofar as resocialising a prisoner places the prison administration in a tutelary role over him, constitutional rights he enjoys on the outside may be limited in prison. For instance, a prisoner may be denied reading material that "is not conducive to his or her rehabilitation" (section 18(1)).

As for the prison administration, it is required to conduct an assessment of every newly sentenced prisoner to determine, among other things, his or her health, educational, social and psychological and specific development programme needs, as well as his or her needs

regarding reintegration into the community. The prison administration must act on this assessment by structuring the manner in which every sentence of imprisonment of 12 months or more is served in accordance to the prisoner's needs (section 38).

Although the Act does not say so explicitly, it could be argued that the purpose of resocialising a prisoner is intimately connected to the protection of his or her right to dignity. This is the position that the German Federal Constitutional Court has taken. It has stated:

Constitutionally, this claim [to resocialisation] corresponds to the self-image of a society that places human dignity at the centre of its value order... As the holder of human dignity and the rights which guarantee it, the criminal offender must have the chance, after serving his sentence, to integrate into society.³²

Does overcrowding compromise the purpose of the administration of a prison sentence — to resocialise prisoners? Undoubtedly so. This is both common sense and, indeed, common cause in the prisons literature. It is difficult to find a dissenting voice. For instance, a focus group of 20 seasoned prisons officials conducted in the United States in the early 1990s chose to define the threshold at which a prison becomes overcrowded by, among other things, the point at which administrative flexibility begins to reduce in such areas as inmate classification and movement, and the development of appropriate inmate programmes.³³ Members of the focus group agreed that when a prison reaches 80% of its design capacity, administrative flexibility begins to suffer, particularly in regard to the classification and movement of prisoners. The focus group identified "adjustments to or near abandonment of classification systems" as one of the most serious indices of overcrowding.³⁴

As the United Kingdom's Chief Inspector of Prisons put it in her 2001–02 annual report:

A proper resettlement strategy means assessing individual needs at reception and working throughout sentence to meet them. This means placing prisoners where they can undertake the appropriate courses, [and] have access to the education and training they need... Prison overcrowding is, however, undoubtedly making it more difficult to build and sustain progress. It is more difficult to get prisoners out of cell and into activities. Frequent prisoner movement makes the completion of courses and skilled-based qualifications much more difficult.³⁵

In short, there is a direct relationship between prison volumes and the capacity of the prison administration to carry out of one its primary statutory duties — to manage programmes aimed at the resocialisation of prisoners. Indeed, the extent to which prison volumes impede prison administration is an accepted component of the definition of prison overcrowding.

Prison Security, Overcrowding and the Residuum Principle

While the Act excludes deterrence and retribution from the purposes of prison administration, it does recognise that one of the fundamental tasks of the correctional services administration is to maintain "security and good order" in the prisons (section 4(2))

(b)). Maintaining security and good order, in turn, entails limiting prisoners' rights, including, inevitably, the right to dignity. A glaring example is that a prisoner may, on reasonable grounds, be subjected to a "search by visible inspection of the naked body" and a "search by the physical probing of any bodily orifice" (section 27(2)). Yet the Act also stresses that "the duties and restrictions imposed on prisoners to ensure safe custody ... must be applied in such a manner that conforms to their purpose and do not affect the prisoner to a greater degree or for a longer period than necessary". The Act goes on to state that "the minimum rights of prisoners entrenched in this Act must not be violated for disciplinary or any other purpose" (section 4(2)).

Here, the Act gives expression to a common law principle first stated in 1911 — the residuum principle. It finds its clearest statement in a dissenting Appellate Division opinion handed down by Corbett J.A. in 1979:

It seems to me that fundamentally a convicted and sentenced prisoner retains all the basic rights and liberties ... of an ordinary citizen except those taken away from him by law ... or those necessarily inconsistent with the circumstances in which he, as a prisoner, is placed... [T]here is a substantial residuum of basic rights which he cannot be denied; and if he is denied them, then he is entitled, in my view, to legal redress.³⁶

In recent times, the residuum principle has been invoked robustly in regard to prisoners' right to adequate medical treatment. In *Van Biljon and others v The Minister of Correctional Services and others*, Brand J ordered the minister to provide antiretroviral treatment, at state expense, to an HIV-positive prisoner, despite the fact that the same treatment was not available to indigents at a state hospital outside prison. His ruling was based, in part, on the common law residuum principle. Brand J. stated that:

There are prisoners, like the first applicant, who may well be able, upon their release, to earn an income which will enable them to afford anti-viral treatment or who will receive charitable assistance from their employers. As far as the latter category of prisoners is concerned, an inroad would be made upon their personal liberties if they were to be refused access to anti-retroviral treatment. Since such inroad cannot be described as a necessary consequence of incarceration, I do not believe that the refusal to provide these prisoners with anti-viral medication is consistent with the principles of our common law.³⁷

Is there a relationship between overcrowding and the violation of the residuum principle? On the one hand, there is a simple relationship. To the extent that living in a crowded environment — one in which a requisite degree of privacy is substantially reduced — induces psychological suffering and a loss of personal integrity, the residuum principle comes into play. Such suffering has no legislative purpose and is not a necessary consequence of incarceration. In commenting on the residuum principle in *S v Makwanyane*, Chaskalson P. stressed that among the rights prisoners retain is "the right personality". He noted that such a right is of "vital importance to prisoners and highly valued by them precisely because they are confined, have only limited contact with the outside world and are subject to prison discipline..."³⁸ The conditions necessary to exercise the right to personality — a modicum of privacy, a sphere, however small, in which to

inhabit one's own inner world — require space.

There is also an indirect relationship between overcrowding and the residuum principle. Overcrowding strains the prison administration's capacity to maintain security and good order. The more crowded a prison, the more the maintenance of security curtails the quality of life in prison. Movement is severely restricted, access to recreational and learning facilities decrease, invasions of privacy increase, and prisoners spend a greater proportion of time in their cells. There must come a point when the maintenance of security in severely crowded prisons begins to encroach on prisoners' rights to an intolerable degree. While the prison administration has a statutory duty to maintain security, the Act does not envisage the administration doing so in chronically overcrowded conditions.

Finally, overcrowding not only renders the maintenance of security intolerably oppressive, it also decreases levels of security. Commenting on increasing incidents of prison disturbances in her 2001–02 annual report, the Chief Inspector of Prisons for England and Wales has commented:

Safety in prisons depends on dynamic, as well as physical, security: relationships between staff and prisons that provide both understanding and intelligence. These are much less easy to make and sustain when there are more prisoners... Frustrations at the amount of time spent in cell, or location away from home, can easily boil over into disturbances, and it is scarcely surprising that these, too, have increased.³⁹

To the extent that overcrowding aggravates levels of violence behind bars, there is an argument to be made that it encroaches on the prison administration's duty to maintain security and good order, and thus exposes inmates to an intolerably dangerous environment, violating their right to safety.

Mere Comfort Versus Needs

There is another aspect of the position of prisoners in South African common law worth commenting upon. It begins with the observation that human needs cannot be defined in abstract, but only take shape and acquire meaning in particular contexts. For inmates, of course, the relevant context is the fact of their confinement. Access to an amenity which, outside of prison, may constitute a mere diversion or a comfort, could, in the confined and relatively deprived conditions of prison life, constitute a fundamental need, and thus, in law, find expression as an individual right. This principle is most clearly stated by Hoexter J.A.:

An ordinary amenity of life, the enjoyment of which may in one situation afford no more than comfort or diversion, may in a different situation represent the direst necessity. Indeed, in the latter case, to put the matter starkly, enjoyment of the amenity of life may be a lifeline making the difference between physical fitness and debility and likewise the difference between mental stability and derangement.⁴⁰

In a recent High Court case, Schwartzman J. has used this common law principle to

interpret prisoners' constitutional rights to conditions of detention consistent with human dignity and the right not to be subjected to cruel and degrading punishment. In this case, the prison administration removed the applicants' access to electrical sockets, and thus to television, music and radio. In finding against the prison administration, the judge argued that for the applicants:

... the prospect of being able to enjoy privileges recognised by the Department of Correctional Services for which access to electricity is an indispensable requirement cannot be characterised as "no more than a comfort or diversion" and "could be an amenity of life that makes the difference between mental stability and derangement." It could also materially affect their prospects of rehabilitation, one of the recognised objectives of imprisonment. To deprive them entirely and in perpetuity of this prospect could also result in their being "treated and punished in a cruel and degrading manner" (section 12(1)(c) of the Constitution) or their being detained in conditions that are inconsistent with human dignity (section 35(2) of the Constitution).⁴¹

Thoughts on a South African Constitutional Jurisprudence on Prison Overcrowding

The brief and schematic discussion above serves as background to the decisions the South African courts must make in regard to the development of a constitutional jurisprudence on adequate accommodation. In this section, I discuss the choices the courts face in developing minimum accommodation standards.

In a recent paper, American penal law scholar Susanna Chung identified three competing standards both American and international courts have used in determining whether prison overcrowding constitutes a constitutional violation.⁴² The first she calls the "totality-of-conditions" approach. Here, the court considers levels of overcrowding — particularly cell floor space per prisoner — but considers it together with a range of other conditions such as availability of basic necessities, sufficient staff supervision, the state of sanitation, the amount of allotted exercise time, how much time prisoners spend in the open air, and so forth.

One of the clearest exemplars of the totality approach is to be found in the jurisprudence of the European Court of Human Rights. The Court adjudicates on prison conditions under Article Three of the European Convention on Human Rights which states that: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment". In deciding whether prison conditions amount to degrading treatment, the Court considers the following:

According to the Court's case law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim... [T]he State must ensure that a person is detained under conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to such distress or

hardship exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured.⁴³

In *Kalashnikov v Russia* (cited in note 5 above), the Court came close to dispensing with the totality approach and deciding that Article 3 had been breached on account of floor space alone. It noted that the CPT had set "7m² per prisoner as an approximate, desirable guideline for a detention cell," and that in the applicant's space, the inmates of a communal cell had 0.9–1.9 square metres of floor space each. "Thus, in the Court's view, the cell was continuously, severely overcrowded. *This state of affairs in itself raises an issue under Article 3 of the Convention*" (emphasis added). In the end, the Court did raise a series of other conditions before ruling for the applicant; it noted that inmates in the applicant's cell had to share beds and thus sleep in eight-hour shifts, that the cell light was kept on throughout the night, that there was "general commotion and noise", inadequate ventilation and that exercise time was limited to one to two hours per day.⁴⁴

The second judicial approach to overcrowding Chung identifies she terms the "core conditions" approach. It arises out of an aspect of American jurisprudence which appears to be directly odds with South African constitutional law — it is certainly at odds with the South African legislature's interpretation of prisoners' constitutional rights — and is thus not directly relevant. Briefly, the United States Supreme Court has ruled that the only clause in the American Constitution prison conditions may violate is the 8th Amendment prohibition on cruel and unusual punishment, and that overcrowding *per se* cannot constitute an 8th Amendment violation.⁴⁵ Rather, the Supreme Court stated that it will only find a constitutional violation when prison conditions result in "unquestioned and serious deprivations of basic human needs", such as the denial of medical care, essential food or sanitation.⁴⁶ Several United States federal court judgments have thus tested overcrowding only to the extent that it infringes on these "core conditions". This jurisprudence has widened the Supreme Court's original "core conditions" to include clothing, shelter and personal safety.⁴⁷

In contrast to the American Constitution though, the South African Constitution explicitly provides prisoners with the right to adequate accommodation. And it does not link the phrase "adequate accommodation" to "deprivations of basic human needs". It links it instead to human dignity. The "core conditions" test is thus somewhat tangential in the South African context.

Rather, a South African jurisprudence would have to choose between Chung's "totality approach" and a third test she identifies: the "*per se* approach". This considers prison overcrowding itself to be a constitutional violation. As noted in the introduction to this paper, when floor space per prisoner drops to as low as 2–3 square metres per prisoner, courts which have traditionally steered away from a *per se* approach — such as American federal courts and the ECHR — have embraced the *per se* approach. At its crispest, it demands the establishment of minimal floor space standards in national legislation, and rules that any prison that has dropped below these minima is accommodating its inmates in violation of the constitution.

There are several strong arguments for and against the *per se* approach. Perhaps the most

persuasive argument against it is that a simple measurement of floor space per prisoner is a bald and limited measure of the quality of life behind bars. As any experienced prison administrator will testify, "two institutions may be filled equally beyond their design or rated capacities and still be very different places in which to work or live".⁴⁸ Indeed, the literature on prison design shows amply that questions entailed in designing a humane prison extend well beyond a simple measure of floor space per prisoner. Attention is paid to the use of sound-deadening materials like carpets and acoustic tiles. Metal-on-metal contacts are avoided or limited. The location of radios and televisions is carefully designed to isolate or disperse audio sources.⁴⁹ A well-designed prison may be more "crowded" than a poorly designed one by measure of floor space, but it may in fact be more habitable by a nuanced measure of quality of life. Similarly, the question of how private and discreet a prisoner's floor space is may be as important as its size.

The extent to which a prison is overcrowded should also be measured by the constraints placed on the ability of its administrators to manage it. A simple measurement of floor space per prisoner will not capture this aspect of overcrowding adequately. Floor space must be considered relative to the design of the prison, the ratio of inmates to staff, and the composition and particular needs of the inmate population. Note that this aspect of overcrowding concerns both the capacity of prison management to keep inmates in safe custody, and to the maintenance of prison conditions consistent with human dignity.

Proponents of a *per se* approach may retort that these limitations are worth living with for one important reason: quantifying minimum standards is the only means by which courts can adjudicate on accommodation conditions consistently; it is thus the best device courts have to provide an enforceable global remedy to inadequate accommodation. The alternative is an intolerable degree of inconsistency; the totality approach may capture the quality of life in a particular prison or for a particular inmate in a more nuanced manner, but it struggles to make sufficiently meaningful comparisons across prisons, and is difficult to use in the establishment and enforcement of a general remedy. Proponents of the *per se* approach may argue that minimum floor space should be quantified in a manner that takes into account the many aspects of overcrowding as best as possible.

The Correctional Services Act and the Per Se Approach

Whatever the respective merits of these rival approaches, the South African legislature appears to have interpreted Section 35(2)(e) of the Constitution to require that a *per se* approach to adequate accommodation be enshrined in statutory law. Chapter Three of the Act is titled "Custody of All Prisoners Under Conditions of Human Dignity", and thus signals the legislature's interpretation of Section 35(2)(e). In Chapter Three of the Act, Section 7(1) reads as follows: "Prisoners must be held in cells which meet the requirements prescribed by regulation in respect of floor space, cubic capacity, lighting, ventilation, sanitary installations and general health conditions. These requirements must be adequate for detention under conditions of human dignity."

Dirk Van Zyl Smit has interpreted this section as follows:

Creating enforceable accommodation standards requires setting specific standards that can be challenged in court if necessary. At first glance, the

section [ie 7(1)] does not do so. However, it places a clear duty on the authorities to set such standards by regulation. The advantage of this system is that it allows the department a degree of flexibility to improve minimum standards of accommodation as resources increase. Crucially, however, the regulations themselves will have to set specific conditions of detention that meet standards of human dignity... [W]ere the regulations themselves to prescribe standards that were too restrictive, prisoners could challenge such regulations on the grounds that they failed to create an accommodation regime that met the constitutional human dignity standard.⁵⁰

And yet, reading the regulations the Department of Correctional Services (DCS) has drafted in response to the promulgation of the Act, it appears that the DCS has attempted to sidestep the task of establishing enforceable minimum accommodation standards. Section 3(2)(a) of the regulations reads as follows: "A cell accommodation must have sufficient floor space and cubic capacity space to enable the prisoner to move freely and sleep comfortably within the confines of the cell."

If the intention of the Act is indeed to establish concrete, and thus enforceable, minimum standards, the DCS has ducked the issue and failed to meet the legal requirements of the Act. For there is an argument to be made that the regulations are so vague as to be unenforceable.

If the regulations were to be challenged on these grounds, the DCS may well retort that setting minimum standards by means of a bright line is a blunt and crude approach to the question of prison conditions, that regulations ought to specify the purpose that animates them and not a rigid, quantifiable threshold. Yet, even if a court were indeed to find that the Act does not require the DCS to specify a quantifiable floor space, the problem remains that the regulatory requirements, however defined, "must be adequate for detention under conditions of human dignity".

Does giving prisoners the "space to move freely and sleep comfortably within the confines of the cell" meet constitutional standards of adequate accommodation? It is hard to see how, for the regulation, as it stands, would allow for a degree of crowding which would appear to impinge on the prison management's capacity to implement many of the functions that go to the heart of the purpose of imprisonment and the dignity of the prisoner.

For instance, the regulations also provide that "any cell used for the housing of prisoners must be sufficiently lighted by adequate natural and artificial light so as to enable a prisoner to read and write" (Section 3(2)(c)). Yet being able to read and write — which surely speak directly to the resocialisation of the prisoner, as well as to his dignity — requires a modicum of peace and a requisite degree of space beyond "the space to move freely and sleep comfortably". It would be odd if a cell were sufficiently lit to allow for reading and writing, but were too crowded to do so.

Indeed, a prison in which inmates are able to move freely and sleep comfortably may still be too crowded for the prison administration to carry out the bedrock of its statutory duties: to assess each inmate's needs and design an individual programme tailored to the conditions of his reintegration into society; to maintain security and good order in a manner which is

not intolerably oppressive. In short, the DCS's regulations permit a degree of overcrowding that undermines the core functions of imprisonment.

It takes neither much sympathy nor much imagination to understand why the DCS wrote the regulation in the manner it did. It inherited from the apartheid era a measure of prison capacity — 3.344 square metres per prisoner in a communal cell — below international standards. And even by the measure established by the old regime, our prisons are 161% full. The DCS did not want to write a regulation that would render the incarceration of most, if not all, South African inmates illegal the moment the statute came into effect. Indeed, when it comes to a discussion of remedy, we will see that it is not just the DCS, but also the courts, that will find themselves in an invidious position in this regard. Nonetheless, however much one understands the motives of the regulation's drafters in ducking the task the Act set them, duck it they have.

Litigation Strategies and Remedies

At time of writing an interesting jurisprudence on correctional accommodation is just beginning to emerge. The Eastern Cape Division, for instance, has recently been confronted with a series of cases in which juveniles were sentenced to terms of incarceration in a reform school. The state could not implement the sentences because there are no reform schools in the Eastern Cape. The offenders were incarcerated for "inordinately long periods" in prisons or police cells awaiting the carrying out of their sentences.⁵¹

Plasket J. found that a number of constitutional rights had been violated. Most involved the rights of the child under section 28 of the Constitution. He also found that the right not to be deprived of freedom arbitrarily, the right to dignity, and the right to a fair trial had been violated.⁵²

The remedy the court formulated is worth noting. Plasket J. found that "the 'usual' remedies, such as the declarator, the prohibitory interdict, the mandamus and awards of damages may not be capable of remedying ... systematic failures or the inadequate compliance with constitutional obligations, particularly if one is dealing with the protection, promotion or fulfilment of rights of a programmatic nature."⁵³ Instead, he formulated a "structural interdict, a remedy that orders an organ of state to perform its constitutional obligations and report [to the court] on its progress in doing so from time to time."⁵⁴ In this regard Plasket J. ordered, among other things, that the provincial Education Department report on its short, medium and long term plans for the incarceration of juvenile offenders, and that a task team working on the establishment of a reform school in the province be identified and submit regular reports to the Judge President and/or the inspecting judge of prisons, until the reform school is established.⁵⁵

For the purpose of this paper, the last of the violations listed by Plasket J. — the right to a fair trial — is of particular interest. In this regard he argued that "the right to a fair trial must include the right not to be subjected to a sentence substantially more severe than the one imposed by the court".⁵⁶ He cited Du Plessis J., who, in *S v Mahlangu*⁵⁷ found: "If a competent sentence can for practical reasons not be carried into effect, and the accused is prejudiced thereby, the proceedings cannot be said to have been in accordance with justice: the test is not only whether the proceedings were technically sound, but also whether their

practical effect is just."⁵⁸

The parallels to a potential jurisprudence on accommodation for adult prisoners are fairly clear. On the one hand, in the case cited above the issue arose in the sharpest possible manner: the facility to which the offenders had been sentenced simply did not exist. And the offenders were children, whose rights in regard to the conditions and circumstances of detention are stronger than those of adults. Nonetheless, the same principle applies. An adult accused might raise the question of accommodation standards at the sentencing stage of his trial; he would argue that the sentence is unconstitutional insofar as the state is unable to implement it in accordance with his right to be detained in conditions consistent with human dignity. The merits of such litigation are twofold. First, it would draw the courts into establishing a jurisprudence on accommodation standards. And second, it would work towards establishing a very important principle in South African case law: that a sentence violates the right to a fair trial insofar as the state cannot implement it in accordance with constitutional standards; and thus — perhaps most important as regards the development of a remedy that addresses the systemic problem — that sentencing regimes should be guided, in part, by the availability of prison space.

There are other options for litigation that may prove fruitful. An HIV-positive accused might argue that being detained in an overcrowded facility would expose him to an unreasonable risk of contracting opportunistic infections such as tuberculosis. A first-time offender might argue that overcrowding has so impinged on security that his sentence would expose him to an unreasonable risk of being raped or assaulted. An offender might also argue that his sentence is illegal inasmuch as the prison administration is, due to overcrowding, unable to execute a sentence plan required of it by the Correctional Services Act. The advantage of these types of litigation is that they would draw the courts into considering the broadest possible range of ills associated with overcrowding in the course of establishing an accommodation jurisprudence. Another path would be for bail applicants to argue that a failure to grant them bail would result in their detention under conditions that violate their rights under section 35(2) of the Constitution.

Some have argued that proceeding on this case-by-case basis might not be the most efficacious route to take. "Evaluation of the constitutionality of detention on this basis in individual cases is not impossible," Van Zyl Smit argues, "but it would be time-consuming and messy".⁵⁹ The problem is global, and in the best of all possible worlds, the courts would establish and give effect to a global principle: a constitutional principle that the size of the national prison population should be determined by the space available. How likely are the South African courts to give effect to such a principle?

Technically, the courts could: confronted by a class action on behalf of South Africa's prisoners, the courts could establish quantifiable minimum accommodation standards. They could then hand down a supervisory order compelling the State to draw up plans for the accommodation of prisoners in constitutionally acceptable conditions and to report back to the courts from time to time. The order would be attached to a timeframe. Once the allotted time lapses, the imprisonment of inmates in conditions that fail to meet minimum standards would be declared to be in violation of the Constitution.

There is certainly international precedent for all of these measures. Finding internationally

accepted accommodation standards is not too difficult. The Council of Europe's CTP has established four square metres per prisoner as a minimum in a communal cell, six square metres in single cells.⁶⁰ In the United States, both the American Correctional Association and the American Public Health Association have set standards requiring a minimum of 60 square feet (18.18 square metres) for prisoner.⁶¹ These latter standards have found their way into United States federal regulations; the Bureau of Prisons has used them to establish the rated capacity of its prisons.⁶² (In the United States, rated capacity reflects the number of inmates that can be housed safely in a facility.) Courts have used these standards to establish judicially enforceable minima. In the state of Florida, for instance, it is illegal for a prison to exceed its rated capacity.⁶³ A similar situation prevails in Norway and Holland. In these jurisdictions, the size of the prison population is directly determined by available space.⁶⁴

So, taking this path is not unprecedented, but would it be realistic for the prisoners' rights lobby to hope that the courts might do so? The answer, in all probability, is no. Ironically, the courts would be reluctant to hand down an order of this nature precisely because the accommodation crisis is so grave. What would it take to increase floor space from the current average of 2.1 square metres per prisoner to an internationally acceptable standard of, say, four or five square metres, and to do so within a fixed timeframe? There are, essentially, three options, or a combination of all three.

One is to manage the prison population by making generous use of the provision in the Correctional Services Act for the minister to release prisoners on parole when conditions of overcrowding become intolerable. Yet, given how severe the overcrowding problem is, and how liberally this provision would have to be used to make a difference, its deployment would run into constitutional problems of its own, for it would surely undermine the integrity of sentences imposed by the judiciary.

A second option would be for the state to build its way out of the crisis. The financial costs of taking this path would be overwhelming. In the last decade, prison building has barely kept pace with South Africa's population growth, let alone with the growth in the number of inmates. According to Treasury figures, it costs approximately R550 million to build a new facility with a capacity to house 3 000 inmates.⁶⁵ At current rates of overcrowding, government would have to build 21 such prisons at a cost of R11.5bn just to bring average floor space per prisoner back to 3.334 square metres. (This assumes, of course, that the prison population is frozen at its current level.) Meeting its constitutional obligation to prisoners by building prisons would undoubtedly crowd out other of the state's constitutional obligations, such as to the homeless and the chronically ill.

A third option is to adjust the sentencing regime to take account of available prison space. As discussed earlier, the current sentencing regime does not take account of available space, and this is probably the main cause of the inexorable growth of the sentenced prison population. Linking the sentencing regime to prison capacity is undoubtedly a necessary component of any long-term solution. But it cannot figure prominently in a short or medium solution, one fixed to a timeframe of, say, three or four years.

Stated bluntly, the courts are not going to demand a remedy they know the state is incapable of implementing. For this reason alone, the courts are unlikely to set quantifiable

minimum standards, and then hand down a supervisory order linked to a definite timeframe.

Realistically, the strongest possible order a court may hand down in regard to a global remedy might entail something of the following: prison conditions are found to violate constitutional standards, but the standards themselves are set in the broadest terms; Parliament is given a fixed timeframe in which to draft a law aimed to address overcrowding. Once the law is drafted, both its content and its implementation could obviously be tested in the courts. The strength of an order of this nature is that Parliament would be forced, for the first time, to fashion sentencing and bail policies that take cognisance of available space, and parole policies flexible enough to manage the size of the prison population. The ultimate horizon — albeit an ever-receding horizon — would be a state of affairs in which available space became a significant determinant in shaping the size in the prison population.

That is probably the best sort of global remedy the prisoners' rights lobby could hope for. More likely is that the courts would issue a declaratory order: levels of overcrowding would simply be declared to be violation of constitutional standards. There would be no specific order regarding remedy. A long chain of litigation would have to ensue to give effect to the declaratory order. The process would, in Van Zyl Smit's phrase, be "time-consuming and messy".

In the worst of circumstances, the courts may find that the right to adequate accommodation has been justifiably limited due to resource constraints. Such a finding might be linked to a statement urging the state to address the matter. This would not necessarily mean that the right is limited indefinitely. The judicial finding that the right has been limited would constitute an important moral statement and a spur to further litigation challenging the state to take action to realise the right.

Much would seem to depend on the timing of a global challenge to prison conditions. Now is probably not a propitious time to launch such a challenge. South Africa's jurisprudence on prison conditions remains slight. To confront a court now with the starkest and most difficult of questions — viz. a systemic, global remedy — before a substantive jurisprudence has developed, would unintentionally invite the courts to back down from the matter and establish the weakest possible accommodation standards.

It would probably be advisable to begin by exploring two prior avenues of litigation. The first would be to challenge the accommodation regulations the DCS has written. There is undoubtedly a strong argument to be made that the regulations do not meet the legal requirements of Correctional Services Act. Establishing minimum standards in statutory law would probably be a better place to begin than attempting to establish such standards in constitutional law. The second path would be a series of carefully chosen individual cases challenging the constitutionality of sentences and of bail conditions. The cases should be chosen in a manner that will draw the courts into considering the widest possible range of ills associated with overcrowding: as discussed above, health, safety and the incapacity of the prisons to construct and implement sentencing plans would be among these ills.

A series of such individual cases would hopefully effect the development of a rich and nuanced jurisprudence on accommodation standards in South African case law. Once such a

jurisprudence has begun to develop, the prisoners' rights lobby would be far better armed to approach the issue of a global remedy.



I argued at the beginning of this paper that addressing the crisis of prison overcrowding is matter of political will, and that the courts are unlikely to order a remedy that substitutes for this will. A campaign on prison overcrowding is as much a moral and political campaign as it is a legal one. The task is ambitious. It entails asking the post-apartheid polity why it is prepared to cause a great many people a great deal of suffering in exchange for very little. It entails rubbing against the grain of a deep current of retribution and revenge, one that finds expression in the belief that causing pain will assuage our fear of crime and make us safer. An appeal to the courts must be seen as a component of such a campaign; it should be viewed a strategy aimed as much as garnering moral authority and rhetorical strength as at winning satisfying judicial remedies.

Notes:

¹ Section 35(2)(e) of the Constitution of the Republic of South Africa Act 108 of 1996. The whole of Section 35(2)(e) reads as follows: "Everyone who is detained, including every sentenced prisoner, has the right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment."

² Throughout this article, figures on capacity and occupancy rates in South African prisons are sourced from latest Department of Correctional Services statistics available at time of writing.

³ CPT "Report to the Polish government on the visit to Poland carried out by CPT from 30 June to 12 July 1996," ; CPT "Report to the Albanian government on the visit to Albania carried out by the CPT from 9 to 19 December 1997", ; CPT "Report to the Slovakian government on the visit to Slovakia by the CPT from 9–18 October 2000",

⁴ Personal communication with APHA official, November 2004.

⁵ *Chavis v Rowe*, 643 F.2d 1281 (7th Cir. 1981).

⁶ *Battle v Anderson*, 564 F.2d, 388, 395 (10th Cir. 1977).

⁷ *Kalashnikov v Russia*, ECHR, 2002, para 101.

⁸ *Nelson Mandela Long Walk to Freedom* (London: Little Brown, 1994), 201.

⁹ Dirk Van Zyl Smit "Swimming Against the Tide: Controlling the Size of the Prison Population in the New South Africa", in Bill Dixon and Elrena van der Spuy (eds) *Justice Gained? Crime and Crime Control in South Africa's Transition* (Cape Town: UCT Press, 2004), 227–258.

- ¹⁰ Institute for Security Studies, "Criminal Justice Monitor",
- ¹¹ Van Zyl Smit, "Swimming Against the Tide", 233–234.
- ¹² Criminal Law Amendment Act 105 of 1997, sections 51 and 53.
- ¹³ See Van Zyl Smit, "Swimming Against the Tide", 235.
- ¹⁴ *Federal Bureau of Prisons Federal Bureau of Prisons Quick Facts*,
- ¹⁵ See, *inter alia*, Darrell Gilliard and Allen Beck *Prisons and Jail Inmates*, 1995 (Washington DC,: Bureau of Justice Statistics, 1996); J. Woolredge "A state-level analysis of sentencing policy and inmate overcrowding", in *Crime and Delinquency*, 42(2), 1996, 456; Thomas Gabor and Nicole Crutcher *Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities and Criminal Justice Expenditures* (Ottawa: Canadian Department of Justice, Research and Statistics Division, 1997).
- ¹⁶ *Malgas v The State*, SCA 117/2000, para 7.
- ¹⁷ Andrew von Hirsch, Anthony Bottoms, Elizabeth Burney and P.O. Wikström *Criminal Deterrence and Sentence Severity: an analysis of recent research*, (Oxford and Portland Oregon: Hart, 1999), 45.
- ¹⁸ See note 11, *supra*.
- ¹⁹ See, most authoritatively, James Q. Wilson and Richard J. Herrnstein *Crime and Human Nature*, (New York: Touchstone, 1986); David Farrington "Longitudinal Analysis of Criminal Violence", in M.E. Wolfgang and N.A. Weinder (eds) *Criminal Violence* (Beverly Hills, Calif: Sage, 1982); David Farrington "Human Development and Criminal Careers", in M. Maguire, R. Morgan and R. Reiner (eds) *The Oxford Handbook of Criminology* (2nd ed. Oxford: Clarendon, 1997).
- ²⁰ In this regard, see M. Vitiello "Three Strikes: Can we return to rationality?" in *Journal of Criminal Law and Criminology* 87, 1997.
- ²¹ Keith Chen and Jesse Shapiro *Does Prison Harden Inmates? A Discontinuity Approach*, (Cowles Foundation Discussion Paper 1450, Cowles Foundation for Research in Economics, Yale University, January 2004), 3. See also Richard Harding *The Psycho-Social Environment of Prisons and its Relationship to Recidivism*, (Crime Research Centre, University of Western Australia, 2000), for a research project which asked similar questions in the Australian context.
- ²² *Minister of Correctional Services and others v Kwakwa and others*, SCA 60/2000, para 28.
- ²³ *Strydom v Minister of Correctional Services and others*, WLD 1999(3) BCLR 342 (W).

²⁴ Van Biljon and others v Minister of Correctional Services and others, 1997 (4) SA 441, SALR, 441-460.

²⁵ Dodo v The State, CCT 1/01 CC (2001), para 36.

²⁶ Parliamentary Assembly, Council of Europe, Recommendation 1257 (1995) on the conditions of detention in Council of Europe member states.

²⁷ Martin Schönreich, Duxita Mistry and Johan Struwig *Qualitative Research Report on Sentencing: an empirical, qualitative study on the sentencing practices of the South African criminal courts, with a particular emphasis on the Criminal Law Amendment Act 105 of 1997*, South African Law Commission Discussion Paper, May 2000.

²⁸ Rhodes v Chapman, 452 U.S. (1981)

²⁹ Goldberg and others v Minister of Prisons and others, AP, 1979(1), SALR, 38D.

³⁰ Dirk Van Zyl Smit, cited in Liora Lazarus *Contrasting Prisoners' Rights*, (Oxford: Oxford University Press, 2004), 40.

³¹ Lazarus, *Contrasting Prisoners' Rights*, 34-41.

³² Cited in Lazarus, *Contrasting Prisoners' Rights*, 42.

³³ John M. Klofas, Stan Stojkovic and David A. Kalinich "The Meaning of Correctional Crowding: Steps Towards an Index of Severity" in *Crime and Delinquency*, vol. 38 no. 2, 1992, 178–182.

³⁴ Klofas *et al* "The Meaning of Correctional Crowding", 182.

³⁵ *Annual Report of Her Majesty's Chief Inspector for Prisons in England and Wales, 2001-2002*, 5 and 23.

³⁶ Goldberg and others v Minister of Prisons and others, AP, 1979(1), SALR, 39D-E.

³⁷ Van Biljon and others v Minister of Correctional Services and others, 1997 (4) SA 441, SALR, 456-457J-A.

³⁸ S v Makwanyane 1995 (3) SA 391 (CC).

³⁹ *Annual Report of Her Majesty's Chief Inspector for Prisons in England and Wales, 2001–2002* 15.

⁴⁰ Minister of Justice V Hofmeyer, 1993 (3), SA 131, SALR, 141H-J.

⁴¹ Strydom v Minister of Correctional Services and others, Witwatersrand Local Division, 1999 (3) BCLR 342 (W), para 15.

⁴² Susanna Y. Chung "Prison Overcrowding: Standards in Determining Eight Amendment Violations", in *Fordham Law Review*, vol. 68, 2000, 2351–2400.

⁴³ Aliev v Ukraine, ECHR, 2003, paragraphs 130 and 131. For more of the ECHR's jurisprudence on prison conditions under Article Three of the Convention, see Peers v Greece; Dougoz v Greece; Vilasinas v Lithuania; Kudla v Poland; Kalashnikov v Russia.

⁴⁴ Kalashnikov v Russia, ECHR, 2002, paragraph 97.

⁴⁵ See note 29 *supra*.

⁴⁶ Rhodes v Chapman, 452 U.S. (1981)

⁴⁷ See, for instance, Hoptowit v Ray, 9th Circuit Court, 1982; Kitt v Ferguson, D. Neb 1990. In the latter case, the Court found that "double-bunking ... can be viewed as cruel and unusual punishment only if it leads to deprivations of essential food, medical care, or sanitation, or if it increases violence among inmates".

⁴⁸ Klofas *et al* "The Meaning of Correctional Crowding", 176.

⁴⁹ See, for example, J.C. Johnston "A psychological perspective on the new design concepts for William Head Institution (British Columbia)" in *Focus on Corrections Research* 3, 1991, 14–21.

⁵⁰ Van Zyl Smit, "Swimming Against the Tide", 240.

⁵¹ S v Zuba and 23 similar cases, CA40 (2003), para 1.

⁵² At para 21.

⁵³ At para 37.

⁵⁴ At para 38.

⁵⁵ At para 34.

⁵⁶ At note 18.

⁵⁷ 2000 (2) SACR 210 (T).

⁵⁸ Zuba, para 30.

⁵⁹ Van Zyl Smit, "Swimming Against the Tide", 251.

⁶⁰ See note 4, *supra*.

⁶¹ Chung, "Prison Overcrowding", 2356.

⁶² Bureau of Prisons, *Rated Capacities for Bureau Facilities*, Program Statement 1060.11, 30 June 1997.

⁶³ William D. Bales and Linda G. Dees, "Mandatory Minimum Sentencing in Florida: Past Trends and Future Implications", in *Crime and Delinquency* vol. 38 no. 3, 1992, 309.

⁶⁴ Nils Christie *Crime Control as Industry* (2nd and enlarged edition, London & New York: Routledge, 1994).

⁶⁵ Author's communication with Treasury official.

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