

Reform and Stasis: Transformation in South African Prisons

by

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Introduction

South Africa's constitutional revolution, symbolised by the election of Nelson Mandela to the presidency in 1994, has been widely regarded as one of the twentieth century's most outstanding examples of democratic transition.

South Africans themselves, however, have quickly come to appreciate the extent to which older habits of mind and structures of governance persist in the new order. This is most obvious in the continued dominance of whites in private-sector business and the ownership of land, but it is also apparent in, for example, the continuing grip of 'traditional' leaders operating a system of indirect rule in overwhelmingly black rural areas¹ and both the legislation and the practice governing migration from other parts of Africa.² In short, although the system of apartheid was formally dismantled in the 1990s, many of its mechanisms of governance have persisted in the new, democratic dispensation.

Apartheid is widely recognised to have been largely an exercise in classifying and mapping, assigning different populations, defined on the basis of 'race' and ethnicity, to designated areas with their own legal and administrative norms. Millions of people were forcibly removed to places of residence determined for them by state officials. Punishment of those who failed to respect this system involved a range of corporal punishments, formal and informal, and the construction of a penal system. The country had one of the world's highest rates of rate of imprisonment and conviction caused particularly by the enforcement of the law requiring various population groups to carry identity documents, known as 'passes'. Between 1975 and 1984, 1.9 million people, almost all of them black, were arrested for failing to carry their documents or for being in an unauthorised location.³ Pass-law offences, together with offences against the Immorality Act, and various forms of opposition to apartheid, were responsible for a large proportion of people sent to prison.

Imprisonment, moreover, was harsh. The prison system was militarised in the 1950s, when warders adopted military-style uniforms and ranks, and developed the use of convict labour for the development of the country, in building roads, harbors and in mine work. Pass law breakers served to increase the supply in available labour. The penal system was also used

extensively from the 1960s to detain people without trial and those who were convicted of crimes related to apartheid opposition.⁴ Under the regime of apartheid, the main objective of prisons was to keep their inmates out of the community. In conformity with the racist ideology that underpinned the system of government as a whole, black prisoners were separated from white prisoners, and their conditions and treatment was especially poor.

It is the abolition of formal racial segregation - in prisons as in politics - that has been the most visible change in South Africa since its democratisation. Since the start of the transition period that began in earnest in 1990, the 'independent homelands' and their individual prisons have been officially incorporated into South Africa. The country now has a prison system controlled by one national body, the Ministry of Correctional Services, and administered by the [Department of Correctional Services](#) (DCS). It is officially committed to a policy that aims to make prisons more humane places than they were under apartheid, with a view to rehabilitating offenders and reinserting them into society. This is in conformity with the spirit of one of the world's most liberal constitutions.

The transition of the 1990s offered to South Africans an opportunity to reshape their views on crime and punishment. A number of important attempts have indeed been made to bring about prison reform. But to a large extent these initiatives have been blunted by a significant rise in the number of people being imprisoned and in resistance to change from different quarters, including from vested interests in the bureaucracies that administer prisons. Prison life remains dominated by the existence of powerful gangs that can sometimes wield a considerable degree of control of daily life in prisons. In these and other respects, the features of South African prisons bear a close relationship to conditions in society at large. Just as gangs have existed in prisons for many decades, so too have they been a feature of the country's expanding towns and mine settlements since the end of the nineteenth century.⁵ The African nationalist political organisations that eventually overcame apartheid in the political sphere, with important roots in the townships that grew massively with the country's industrialisation after the Second World War, evolved over a considerable period in an environment where crime and politics were mixed in complex ways, where political parties organised and the Police wrestled to retain control. Both developed connections to criminal gangs. This has produced a distinctive situation in which both political parties and the security services may at times use criminal gangs for political purposes and, vice versa, where gangs intent on robbery and protection rackets may at times claim political motives or seek the protection of a political patron.⁶

Senior figures in the African National Congress developed a highly political view of crime during the course of their struggle against apartheid. They generally assumed that crime among blacks would decrease after the overthrow of apartheid, as a result both of the enhanced legitimacy of the state and its various organs and of the anticipated improvement in living conditions. Hence, the emergence of violent crime especially as an important, and worrying, feature of South Africa's new democratic society has deep implications for politics and for prisons. The persistence of very high levels of crime has created great political pressure for the government to be seen to be tough on criminals, including by commissioning a new generation of maximum-security prisons, by encouraging or requiring judges to give longer sentences and by increasing the security of prisons generally.

This paper will look at some of the important changes that have been brought about in policy and legislation in the last few years. It will also look at some issues which create resistance to change in this area. Although prisons do not form a perfect microcosm of the wider society, and should not be analysed in that light, they do reflect conditions in society at large in a variety of ways, ranging from the efficiency of their administration and the treatment meted to those officially classified through conviction and imprisonment as the enemies of society.

Prisons in the new South Africa

The earlier, rigid, racial segregation in South Africa's prisons began to change in the late 1980s and early 1990, when all reference to race was removed from the law. Prison reform was placed on the political agenda during the political handover, and from the start of the transformative period it was deemed important to recognise the rights of prisoners. The prisons law was amended in 1993 when solitary confinement and punishment on a spare diet were abolished, as was corporal punishment for prisoners. This is a clear mirror of wider changes in a society which has moved over two decades from a formal racial segregation covering every area of life to a formal democracy in which there are equal rights before the law for all, and in which liberal standards of respect for the integrity of the human body are enshrined. In the landmark case of *Minister of Justice v Hofmeyer*⁷ in 1993, the court accepted the principle that a prisoner retains all his personal rights except those abridged by law, and that the extent and content of such rights should be determined by reference not only to the legislation, but also to the common-law rights of prisoners.

The introduction of first the interim, and then the final Constitution,⁸ consolidated the concept of prisoners' rights. In addition to ensuring the protection of human dignity, liberty and equality of all people, and the general protection against cruel, inhuman and degrading treatment or punishment, the Constitution provides specific protections for detained, accused and arrested persons. S 35(2) deals with the rights of detained and arrested persons, including 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.' In *S V Makwanyane*, the first Constitutional Court case, which declared the death penalty unconstitutional, the court reaffirmed that although dignity may be impaired by imprisonment, a prisoner does not lose all his rights on entering prison. Chaskelson P. said '[i]mprisonment is a severe punishment but prisoners retain all the rights to which every person is entitled under [the Constitution] subject only to limitations imposed by their prison regime.'⁹

The new Correctional Services Act drafted in 1998 takes the new imperative of human rights into account.¹⁰ It seeks to incorporate the values enunciated in the Bill of Rights, and prescribes a new approach to imprisonment. It recognises international principles on correctional matters and establishes certain mandatory minimum rights applicable for all prisoners, that cannot be withheld for any disciplinary or other purpose. In terms of the new Act, the Department of Correctional Services is committed to a threefold purpose:

- Enforcing the sentences of the court in the manner prescribed by the Correctional Services Act
- Detaining all people in safe custody whilst ensuring their safe custody

- Promoting the social responsibility and human development of all prisoners.

However, in the three years since the promulgation of this progressive piece of legislation, only certain sections have become enacted. The major portions – those relating to the treatment of prisoners, discipline, and release – are still paper provisions. Initially the Department of Correctional Services indicated that the delay was due to the need to re-write the regulations and accompanying standing orders. Several amendments were later made to the Act, but it is anticipated that it should be fully passed by the end of 2001. Due to these delays, the old Correctional Services Act 8 of 1959, and part of the new act, are applicable to different aspects, leading to some confusion about the correct treatment of prisoners.

In conformity with the new, liberal and humane legislative approach to prisons, a policy of demilitarising the Department of Correctional Services has been in force since 1996, in the belief that this will aid a strategy of rehabilitation. This has involved changing the structure, ranks systems and mode of address of prison officers, removing insignia, and putting an end to militarized daily parades. Central to this process was the creation of a new civilian structure and mode of discipline. The demilitarisation of the prison system, with all that that implies for the treatment of prisoners and the respect accorded to their legal rights, has in practice been no more than partly successful. The prisons administration, however, remains marked by a quasi-military approach and culture. Although members are no longer assigned ranks and they wear no visible insignia, members and prisoners sometimes refer to warders by their military rank. The khaki uniforms and heavy boots still bear strong resemblance to army uniforms. To some extent resistance to the more humane policy introduced by law is because the process of demilitarisation has been conceptualized in a narrow and mechanistic manner.¹¹ It was received with some suspicion and criticism by prison staff who had grown to appreciate their military-like status and who saw the reforms as a threat to their security, both personal and professional. If liberal intentions, reflected in legislation, have not fundamentally altered the character of a harsh prison system, then one of the reasons is resistance on the part of a section of the state bureaucracy that sees change as a threat to its own status.

Prison reforms

At the heart of the prisons issue is the central question of what a correctional system is for. A White Paper in 1994 stated the government's belief that offenders have the potential to change their behaviour and to be reincorporated as law-abiding members of society. Hence, the goal of correctional services was to provide facilities, opportunities, services and incarceration conditions that would be conducive to the rehabilitation and development of offenders.¹² It was clearly perceived that the prison conditions existing in the country at that time did not provide an environment in which such a policy could be implemented.

Estimates indicate that some 85 to 94% of prisoners in South Africa re-offend after their release,¹³ and consequently rehabilitation of prisoners is of high priority. The Correctional Services Act recognizes the importance of rehabilitative work with prisoners, and to 'promoting the social responsibility and human development of all prisoners and persons subject to community corrections.'¹⁴ The Act gives guidelines on how to implement this, providing for the assessment of every prisoner, as well as the participation of prisoners in designing programmes for their sentences. The Act also states that the Department must

provide access to as full a range of programmes and activities as is possible to meet the educational and training needs of a prisoner. A prisoner may also be compelled to participate in programmes.

During a National Cabinet *legotla*, the Department identified rehabilitation as one of its key objectives. The programme to reduce recidivism involves strengthening partnerships with civil society. Specific objectives include; the development of individualized need-based rehabilitation programmes; marketing programmes to inmates; promoting a restorative justice approach; combating illiteracy; increasing training facilities; and increasing prisoner-made goods and services to enhance self-sufficiency.¹⁵

The Act creates an enormous responsibility to provide programmes, yet it is constrained by lack of resources, such as sufficient social workers, teachers, psychologists and other professional staff.¹⁶ Many prisons have severe space constraints and simply do not have rooms in which to run programmes. The conditions in prison are not conducive to a learning environment for prisoners. Even community assistance requires departmental resources, and prisons that are unable to accommodate their services often turn away offers of assistance from non-governmental organisations (NGOs). However, the past few years have seen a growth in the number of community services offered within prisons, and an increase in partnership projects between the department and non-governmental organisations.¹⁷

Integral to the intended change from a policy based on punishment in a military-style system to the intended rehabilitation of offenders in a demilitarised system was the concept of Unit Management, inspired by America. The essence of this policy was to create smaller units of prisoners (no larger than 60) to facilitate direct supervision, custody and control, and to contribute to rehabilitation.¹⁸ Two new prisons were purpose-built to pilot the new scheme, and it was introduced into remaining prisons at the beginning of 2001. Whether the concept can be easily translated to older, overcrowded prisons with large numbers of prisoners in each section remains to be seen. Unit management is supposed to allow ordinary warders to play a role in the development of prisoners, but overburdened as they are by the numbers of inmates, they are unlikely to have sufficient time for this role. It is likely that in many prisons the concept will mean only that warders are re-named 'unit officers'.

Among other new initiatives introduced in the last five years is the establishment of independent oversight of prisons through the Independent Judicial Inspectorate headed by an inspecting judge. This office was established in 1998, and is mandated to inspect prisons and report on the treatment of prisoners and conditions in prison. The office took some time to be established and only conducted a limited number of inspections in its first year. Its activity later increased, with 68 inspections conducted in 2000. Mr. Justice Fagan, the current inspecting judge, has prioritized the reduction of the prison population and was the instigator of a wave of early prison releases in 2000. However, his initiative seems not to have continued through 2001 and many of the recommendations for long-term reduction have not yet been taken forward.

The Judicial Inspectorate is also charged with the appointment of independent prison visitors (IPVs), who are ordinary members of society in the sense of not being professional

judicial or prisons personnel. One or more Independent Prison Visitors is to be appointed for each prison, to make regular visits, interview prisoners and deal with the complaints of prisoners by reporting the complaints to the Head of Prison and monitoring the way that they are dealt with. So far, 117 IPV's have been appointed in three of the nine provinces, and they dealt with 74,362 complaints by prisoners in 2000.¹⁹ One of the shortcomings of the IPV's is that they have no means of ensuring that the recommendations they make to prison directors are actually carried out. In any event, many of the complaints they receive relate to conditions in prison, which are systemic and cannot be resolved by the IPV's, or seemingly by the judicial inspectorate, alone. However, it is important for this function to build credibility if it is going to be accepted by prisoners, and also to ensure its long-term sustainability.

A further measure introduced in an attempt to improve the prison systems is the privatization of prisons, made possible by the Correctional Services Act. As with Unit Management, this is an idea borrowed to a considerable extent from US practice. The government believed that privatization would attract private capital and thus would help to reduce prison overcrowding. It also provides the opportunity to build 'new generation prisons' that are supposed to meet the objectives of the Unit Management policy. Through the Asset Procurement and Operating Partnerships System (AOPS) the Department has entered into agreements for the design, financing, construction and management of two privatized prisons. The first was opened in July 2001 and run by Ikhwezi Bloemfontein Correctional Contracts (BCC). This prison is a 2,928-bed facility for maximum security prisoners. A second prison for 3,024 people is to be opened in Louis Trichardt in February 2002. A DCS-appointed controller is to monitor the daily implementation of the contract between the department and the private company. Private prisons also fall under the jurisdiction of the judicial inspectorate.

Despite initial hesitant criticism of privatization,²⁰ it is currently receiving some support because of the cynical view that '[p]rivate prisons will necessarily be an improvement on public prisons because it would be almost impossible to perform any worse.'²¹ The private prisons are limited by their contract to accept no more prisoners than is specifically agreed upon. The contract sets out in detail the services that these companies must provide, and in most cases they are expected to exceed the standard currently found in public sector prisons. The contract with BCC is a 25 year lease-purchase arrangement, whereby the DCS pays rent for the use of the facilities. Once the payments are complete the facilities are handed over to the department of Public Works. This binds the department in a long-term relationship that potentially limits its ability to criticize the private contractor or to oust them should they fail to meet their obligations.²² The Department has already indicated that it will limit the extent of future investment in this direction.

Senior members of the Department who visited the US in the early period of South Africa's political transformation also introduced the concept of super-maximum security prisons, based on the American model from Marian Island. The first 'C-Max' prison was opened in 1997 in the converted 'death row' in Pretoria Prison. This facility was designed to house 95 sentenced and unsentenced high-risk prisoners, or the 'worst of the worst'. C-Max prisoners are held in 23 hour a day isolation. They are permitted to exercise in a 4 meter by 1, 5-meter cage, and allowed a 10-minute shower in a cage. There is a high emphasis on security and prisoners are shackled to a stun belt whenever they leave the prison, and handcuffed

each time they leave the cell.

The development of these institutions was met with sharp criticism from the South African Human Rights Commission and non-governmental organisations. One of their concerns was the lack of any clear rationale by the Department for this prison, or a clear vision of its intended objectives. It was unclear how inmates would be selected for transfer to C-Max, or how they would become eligible for release from it. It was felt that the concept of isolation of prisoners defeated the stated objectives of rehabilitation, and was most likely to lead to psychological and behavioral problems. The Department of Correctional Services was unrepentant, however, and the then Minister, Dr Sipo Mzimela, criticized the Human Rights Commission for being 'starry eyed'. He added: 'Nobody can tell me I am violating fundamental human rights if I take dangerous inmates out of ordinary prisons where they run amok'.²³ Following changes in political leadership and the appointment of a new Commissioner, this prison was de-prioritised and the regime slightly relaxed. The Department plans the construction of several Super-maximum prisons in various parts of the country. The first prison was constructed in Kokstad, but has not yet opened.

Prison conditions

Together with resistance from a prisons' bureaucracy intent on preserving its privileges and resistant to reform are the problems posed by the number of people being sent to prison and the consequent overcrowding in the prison system.

Despite the abolition of the hated pass-laws and of a range of other apartheid regulations that had swollen the prison population under the rule of the National Party, the prison population has continued to rise. It has increased significantly, from 113,856 prison inmates in 1994 to 170,328 inmates on 31 December 2000. This reflects a 30% growth in the number of people sentenced to prison terms, but above all a startling growth of 117% in the number of unsentenced prisoners.²⁴ These people are held in a prison system that has an official capacity for 105,016 prisoners in 236 prisons throughout the Republic, with the result that there is 60% overcrowding nationally.²⁵ In fact there is considerable variation between one prison and another. While a prison such as Pollsmoor in the Western Cape may be more than 200% populated, and others as much as 393%, prisons such as Malmesbury, Goodwood and Brandvlei Juvenile Centre are specially designed to house a certain number of prisoners and have not been allowed to exceed their target-figures.

The growth in the prison population simply reflects to some extent the growth in reported crime since 1994 and delays in processing court cases, partially responsible for the growth in the number of people awaiting trial. In December 2000, prisoners spent an average of 136 days awaiting trial (up from 76 days in June 1996),²⁶ due to backlogs in the system. However, there are cases of prisoners spending two years or more years awaiting trial. It costs the state R5.6 million a day to house prisoners awaiting trial.²⁷ Other factors influencing the growth in prison numbers include changes in the law regarding bail and in relation to sentencing. In 1996, the bail laws were amended to shift the onus onto a person accused of a serious offence to prove why he should be released on bail pending the trial.²⁸ This made it more difficult for people to be granted bail, particularly in the case of indigent accused who are not represented at bail hearings. A large number of accused are unable to afford even the small amounts of bail set for less serious offences, and thus spend long

periods in prison awaiting their trial. In 1998, the Bureau for Justice Assistance reported that more than 20,000 awaiting-trial prisoners had been granted bail but were forced to remain in prison, as they could not afford bail.²⁹

Prison overcrowding, then, is to some extent a reflection of the number of people in society at large without significant assets, who, if they find themselves in trouble with the law, are more likely than others to end in detention. But it is above all a reflection of a more stringent public demand for punishment that stands in clear contradiction to the official policy of rehabilitating offenders. It is here that the condition of South Africa's prisons most clearly demonstrates a difference between the official policy and widespread public expectations, analogous to the gulf between the provisions of one of the world's most liberal constitutions and some of the realities of South African society. In response to public demand, legislation on minimum sentencing for serious offences legislation was introduced in 1997.³⁰ A study by Lukas Muntingh indicates that the length of prison sentences is increasing. While large numbers of prisoners are given short sentences of up to six months (49% in 1999), this figure has reduced over the last decade and a half, and more prisoners are now receiving sentences of more than two years (10% of prisoners in 1984, compared with 31% in 1999).³¹ It was also in response to public pressure that the law on parole was amended in 1997, extending the period that prisoners have to serve before becoming eligible for parole.³² It provides that all prisoners should serve at least half of their sentences or 25 years before being considered for release. For certain offences the court may stipulate a non-parole period for up to two-thirds of the sentence. A prisoner serving a life sentence may not be released until he or she has served 25 years or has reached the age of 65 years and has served 15 years of a sentence. The number of prisoners serving very long sentences is also an unintended consequence of the abolition of the death penalty. Some judges believe that imprisonment is not a punishment severe enough for certain categories of crime, and also lack faith in the parole board or the Department to make a correct decision about early release. Consequently, some judges have handed down extremely long sentences or multiple life sentences.

Special amnesties or pardons undertaken by presidential decree, such as just after inauguration of the new government in 1994 and to mark Nelson Mandela's eightieth birthday, have failed to make a lasting impression and have been subject to fierce criticism from the public. Similarly, attempts to reduce the prison population through special measures have had little impact on the overall problem of overcrowding. Following pressure from the Independent Inspecting Judge, 3,000 sentenced prisoners whose parole dates had already been approved were received early release from prison in October 2000.³³ A further 8,451 prisoners charged with less serious crimes who had been unable to pay bail of less than R1,000 were released pending their trial. This reduced the population immediately by 12,000 prisoners, but by the end of the year prison numbers had risen again to above their old level.³⁴ Every other measure to reduce prison overcrowding has been ineffective. The Department of Correctional Services has commissioned the building of three new prisons, two of which are contracted out to private companies for construction and management, but this will expand total capacity by no more than 8,000 places. In response to recommendations from the judicial inspectorate, the Department has committed itself to other measures such as using so-called 'community corrections' for low-risk prisoners awaiting trial, and utilizing electronic monitoring for those awaiting trial or

serving parole.³⁵ Although these systems have been operable for some years, they have so far failed to make an impact on prison numbers.

In 2000 the Judicial Inspectorate reported on the conditions in prison as follows:

Conditions in prison, more particularly for unsentenced prisoners, are ghastly and cannot wait for long term solutions. For example, one toilet is shared by more than 60 prisoners; [there is a] stench of blocked and overflowing sewage pipes; shortage of beds resulting in prisoners sleeping two on a bed whilst others sleep on the concrete floors, sometimes with a blanket only; inadequate hot water; no facilities for washing clothes; broken windows and lights; insufficient medical treatment for the contagious diseases that are rife. The list of infringements of prisoner's basic human rights caused by overcrowding is endless.³⁶

One of the consequences of overcrowding is that it leads to poor sanitation and hygiene and adversely affects prisoner health. There are limited resources and inadequate provision of basic and more advanced health care. Prisoners complain to the Judicial Inspectorate more about health care and food than any other aspect of prison life. Because of the poor environment and medical treatment, contagious diseases flourish in prison, and the department has inadequate resources or strategy to deal with them. The most prevalent diseases are hepatitis B and C, syphilis, tuberculosis and HIV/AIDS. When a person's immune system becomes vulnerable through HIV/AIDS, a range of opportunistic diseases flourish, with tuberculosis being the most common among them. Consequently, the number of deaths by 'natural causes' has escalated sharply from 186 in 1995 to 1,087 in 2000.³⁷ As many as 90% of these deaths were AIDS-related.³⁸

The prevalence of HIV and AIDS is increasingly a concern in South Africa generally. A report released by the Medical Research Council found that one in four deaths in South Africa is AIDS related. It is also estimated that AIDS will have killed between 5 and 7 million South Africans by 2010.³⁹ It is not known how many prisoners are HIV infected, but it is assumed that many enter prison already infected. Large numbers contract HIV while in prison. The prison environment creates many opportunities for the spread of the disease through high-risk behaviour. Sodomy - coercive, forced and consensual - is widely practiced in the prison. Gang violence and sharing of tattooing needles also contributes to the spread of HIV.

The department has a limited programme on HIV/AIDS awareness and also encourages the assistance of community organisations. Although it does acknowledge that sexual activity occurs in prison, it does not actively encourage safe sex practices or awareness. Condoms are available from the dispensary in the hospital section in the prison, but prisoners must first be counseled by a social worker. This approach also fails to recognise the difficulty that prisoners have in accessing health care generally. Although the department would encourage the release of prisoners who are fatally ill with the disease, it has indicated that it is often more difficult to release prisoners into the community where there is also inadequate health care. These prisoners are left to die in the prison. Dealing with HIV and AIDS in prison remains one of the key challenges for the future of corrections.

Allied to these problems of overcrowding and poor facilities is that of gangs. Organised criminal gangs with connections both inside and outside prisons have dominated the South African prison system for over a hundred years. Their grip is strengthened by the fact that most prisons in the country were built in a time when prisoners were segregated by race. They were mostly designed to hold large numbers mostly of black prisoners who were held in communal cells designed to hold up to 23 people. Despite the full knowledge of the Department, gangs continue to recruit new members, organise their activities and carry out a reign of terror on gang members and non-gang members alike. The gangs are highly structured and well organized, with each gang traditionally filling a different function in a prison. They dominate every aspect of prison life. They control the allocation of prisoners to cells, the distribution of food, the vibrant drug trade, and much of the sexual activity.⁴⁰ The gangs also contribute to corruption among the warders.

Violence is inherent to gang life, and may be used in initiatory rites, for the control of power, and for discipline. Of the 112 deaths by assault in prisons in the period 1990 to 2001, 46% were attributed to assaults by gang members, while 50% were attributed by assaults by another prisoner.⁴¹ The South African Human Rights Commission has on several occasions investigated gang violence, and made recommendations to the Department on how to manage gangs including by isolating gang members and refusing to negotiate with them.⁴² These recommendations appear not to have been followed and gang activity continues to flourish.

Yet there is no doubt that the security of prisons has improved. In the last few years the department has taken a rigorous approach to security, and through the implementation of its programmes it has reduced escapes from 1,244 in 1996 to 250 in 2000.⁴³ Electronic fencing has been erected at 19 prisons at the cost of R36 million. However, visits to these prisons reveal that in most cases the electricity is switched off. The Department attributes the decline in escapes to optimal use of existing security equipment, continual evaluation of security services, staff training and perhaps the most effective strategy, disciplinary action against negligent staff.⁴⁴

Corruption

In prison administration as in some other branches of the state bureaucracy, the liberal reforms enacted in the mid-1990s have sometimes had the unintended effect of encouraging the growth of corruption. Some prison officials exploited the uncertainty associated with the adoption of a civilian code of conduct in prisons for their own purposes. Various changes in policies, especially as they affected staff had an adverse effect on staff morale. Affirmative action policies affected white members, and also caused large numbers of them to leave in recent years. Corruption has had a major impact on morale, and well as on the public image and the functioning of the Department.

The Correctional Services Department seems plagued by endemic corruption that interferes with its ability to meet its legal objectives. It has affected its most senior members. In 1999 Parliament's public accounts committee found the Commissioner for Correctional Services, Dr Khulekani Sitole, unsuitable for high office in public service and he was allowed to resign. The committee found that Sitole had wasted and misused state money and given himself generous merit awards of more than R100,000. He had also employed 24 players

for his personal amateur soccer club and paid their salaries from the Correctional Services budget.⁴⁵

Two deputy directors in the DCS in KwaZulu Natal, Russel Ngubo and Thami Memela, have been investigated on numerous occasions on allegations of murdering political rivals and assassinating witnesses prepared to testify against them, both from the Department of Correctional Services and outside of it. Ngubo was once the right hand man of a KwaZulu Natal warlord, and is now one of the province's most feared men. In February 2001 Ngubo got into trouble again for demanding that prisoners at Pietermaritzburg prison be temporarily released to play soccer with him. So bad is his reputation, that on hearing that Ngubo had arrived for a visit, the head of one prison immediately called out the army and the police and locked himself in the prison. The DCS subsequently laid criminal charges against Ngubo for obstructing justice, but he is still in service of the DCS.⁴⁶ A senior member of the department, Thuthu Bhengu, was appointed to investigate allegations of corruption and nepotism in Pietermaritzburg, but was assassinated in July 2001 before she could complete her work.⁴⁷

With this kind of leadership, it is unsurprising that corruption extends right throughout the prison system. Media reports allege that prisoners are obliged to pay warders a fee for food, beds, bedding, or for a decent cell. At one prison visited by the writer, prisoners alleged that they had to pay warders to allow them to pass through the gates of different sections of the prison, even if this was to attend a rehabilitation programme.⁴⁸ In January 1998, it was reported that prisoners were able to purchase prostitutes, alcohol and even weekends out of prison. It was also alleged that prisoners had formed criminal syndicates with warders to smuggle and steal state property.⁴⁹ Two warders from Groetvlei Medium B Prison in Bloemfontein were convicted in October 2001 for offering to give two prisoners a key that would secure their release. The prisoners, convicted of armed robbery, and serving eight year sentences were offered the keys for R5000.00. The two warders were convicted and sentenced to four years in prison.⁵⁰ Apparently, it is also possible for prisoners to run corruption scams at the expense of warders. One report indicated that 16 prison warders were convicted of participating in a money-lending racket with prisoners. They received a warning from the Department.⁵¹

The Judicial Inspectorate was initially charged with investigating corruption and dishonest practices in the department,⁵² but has refused to undertake this task. It maintained that it would require far more resources than it had at its disposal, and that investigation of corruption requires a different kind of approach to investigating treatment of prisoners, and would also take up too much of its time. There were also concerns about compromising the good relationships with personnel that the Inspectorate relies on in order to do its work. The department of Correctional Services has its own anti-corruption unit within its department of Good Governance. The section is likely to be amended when the Correctional Services Act is put before Parliament by the end of 2001 to relieve the inspectorate of its burden.⁵³

It is problematic that the investigation of corruption is to be left solely in the hands of the department. Despite a few high profile arrests or convictions, the department has so far been unable to manage corruption, and clearly intimidation and nepotism affects departmental members' ability to investigate their own. It is also difficult to separate the

treatment of prisoners from corruption because of the integral relationships between warders and prisoners. The two often go hand in hand, and the Inspectorate will find it impossible to ignore this issue completely.

Conclusion

The period of South Africa's democratic transition saw many changes in law and policy on prisons intended to have a humane effect. The new legal framework put in place outlaws racial discrimination and is orientated towards the rights and duties of prisoners. This provides the basis for a prison system that conforms to standards set by the modern democracy that South Africa purports to be.

Yet as in some aspects of social life, attitudes and vested interests of a deeply illiberal nature, often rooted in the apartheid era, continue to exist, so too in prisons. Many of the changes enacted by law have not yet been implemented. Above all, rising prison numbers, often resulting from the overwhelming public call for the repression of crime, are overwhelming the capacity of the prison administration to ensure that basic rights and needs are met. In consequence, the official broader goals of rehabilitation and development are being severely stifled. Although the budget of the Department of Correctional Services has increased significantly in recent years, this has not yet had a significant impact on prison conditions.

What is needed is clearly something more than an appropriate legal environment. Dirk van Zyl Smit, an expert on prison reform, argues that real change in practice and implementation of constitutional ideals may possibly only occur once prisoners begin to enforce their rights through legal actions,⁵⁴ as happened in the early history of prisons. In the meantime, the gulf between the formal rules and the reality of South Africa's prisons testifies to a lack of political will from senior government members.

Notes:

¹ Barbara Oomen, 'The Chieftaincy Business: Defining Traditional Authority and Customary Law in South Africa' (PhD thesis, University of Leiden, forthcoming).

² Jeff Handmaker and Jennifer Parsley, 'Migration, Refugees, and Racism in South Africa', *Refuge*, Vol. 20, 1 (2001), pp.40-51.

³ Andrew Ormond, *The Apartheid Handbook* (2nd edn, Penguin Books, London, 1986), p. 124.

⁴ For general history on the penal system see Van Zyl Smit (1992) *South African Prison law and Practice*. Butterworths, Durban.

⁵ See Charles van Onselen, *Studies in the Economic History of the Witwatersrand, 1886-1914* (2 vols, Longman, London, 1982).

⁶ See the chapter by Stephen Ellis in Jean-François Bayart, Stephen Ellis and Béatrice

Hibou, *La Criminalisation de l'Etat en Afrique* (Eds Complexe, Bruxelles, 1997).

⁷ 1993 3 SA 131 (A).

⁸ An interim Constitution was passed in 1993 and was meant to set the basis for drafting of a final Constitution, which was enacted in 1996.

⁹ 1995 6 BCLR 665 (CC); 1995 3 SA 391 (CC) 142.

¹⁰ Act 111 of 1998.

¹¹ Giffard, G. (1997) *Out of Step? The Transformation process in South African Department of Correctional Services*, Master's Dissertation for University of Leicester, and Dissel, A. ['The Passing Out Parade: Demilitarisation of the Correctional Services'](#), *Acta Criminologica*, Vol 10(1) 1997, 17 – 26.

¹² White Paper on the Policy of the Department of Correctional Services in the New South Africa (1994).

¹³ Muntingh, op cit, p. 54.

¹⁴ Section 2 of Correctional Services Act 111 of 1998.

¹⁵ National Assembly Budget Vote, 5 June 2001, Minister Ben Skosana.

¹⁶ The ratio of educators to prisoners is 1:382; social workers 1:300; auxiliary social workers 1:555; and psychologists 1: 1 578. This is calculated according to the number of post available for the particular position. Yet in many cases some of these posts are vacant. For instance, of the 64 post for psychologists, only 39 were filled early this year. Muntingh, op cit.

¹⁷ The Department of Correctional Services hosted a national symposium in 2000 to develop a 'collective social responsibility' to correctional services. This was attended by many NGOs and CBOs who are engaged in service provision and programmes in prisons. See also Muntingh for a discussion of programmes run by eight South African NGOs.

¹⁸ Correctional Services Minister Ben Skosana (2001).

¹⁹ Annual report of the Judicial Inspectorate: 2000, <http://judicialinsp.pwv.gov.za>.

²⁰ The idea of privatising prison was introduced as early as 1994, and received initial criticism from NGOs. *New Nation*, 5 July 1994.

²¹ Goyer, K. C. (2001) [Prison Privatisation in South Africa](#), Institute for Security Studies, Pretoria, p. 67.

²² Ibid. p 70, 71.

²³ Pete, op cit, p. 5 – 7.

²⁴ In 1994, the unsentenced population constituted 19% of the prisoner population. It now makes up 37% of the total. Statistics from Department of Correctional Services.

²⁵ Minister Ben Skosana, keynote address at 6th Annual Infrastructure Financing and development Symposium on the New Generation Prisons: 9 October 2001.

²⁶ Schonteich, M (2001) *Lawyers for the People: The South African Prosecution Service*, Institute for Security Studies, Monograph No. 53, p. 103.

²⁷ Annual Report of the Judicial Inspectorate: 2000, <http://judicialinsp.pwv.gov.za>.

²⁸ The Criminal Procedure Act no 51 of 1977, section 60(11)(a), was amended by Act no 85 of 1997.

²⁹ Pete, S. (2000) 'The Good the Bad and the Warehoused', *South African Journal of Criminal Justice* 2000 (13), p. 19.

³⁰ Introduced by the Criminal Law Amendment Act no 105 of 1997.

³¹ Muntingh, L. (2001) *After prison: the case for offender reintegration*, Institute for Security Studies, Pretoria, at p. 47.

³² Parole and Correctional Services Amendment Act 87 of 1997.

³³ Press release from the Ministry of Correctional Services, 9 October 2000 at <http://www-dcs-pwv.gov.za>.

³⁴ Mr Ben Skosana, Minister of Correctional Services in National Assembly Budget Vote Speech on 5 June 2001.

³⁵ Ibid.

³⁶ Judicial Inspectorate report on Overcrowding in Prisons, 2000. <http://judicialinsp.pwv.gov.za>.

³⁷ Judicial Inspectorate (2000) op cit.

³⁸ Goyer, op cit, p. 20.

³⁹ *Mail and Guardian*, 5 October 2001.

⁴⁰ The extent of sexual activity in prisons is unknown, but some studies indicate that at least 45% of inmates engage in sexual acts in prison (Carelse in Goyer and Gow (2000) ['Capital Punishment? The risk of HIV/AIDS in Prison'](#), *Crime and Conflict* 21, 14–18. Sexual activity in prisons is coercive, forced or consensual. See Gear, S (2001) ['Sex, Sexual Violence and Coercion in Men's Prisons'](#), Centre for the Study of Violence and Reconciliation.

⁴¹ Statistics supplied by the Department of Correctional Services.

⁴² Pete, S, op cit, at p. 40.

⁴³ Minister Ben Skosana, Op cit.

⁴⁴ Dissel, A (2000) 'Correctional Services: Challenges for the Future.' *Critical Choices for South African Society*, No. 4. Political Studies Department, Cape Town.

⁴⁵ Dissel (2000), op cit.

⁴⁶ *Mail and Guardian*, February 23 2001, and 4 May 2001.

⁴⁷ *SABC News*, 1 July 2001.

⁴⁸ Interviews with prisoners at Krugersdorp prison, July 2001.

⁴⁹ Pete, op cit, 24.

⁵⁰ *Sunday Times* 28 October 2001.

⁵¹ The 16 had been borrowing money from prisoners. *Mail and Guardian*, 9 March 2001.

⁵² Sections 85(2) and 90(1) of the Correctional Services Act 111 of 1998.

⁵³ Annual Report 2000 of the Judicial Inspectorate.

⁵⁴ Van Zyl Smit, D. (2001) 'South Africa', in Van Zyl Smit and Dünkel, F. (eds) *Imprisonment Today and Tomorrow: International Perspectives on Prisoner's Rights and Prison Conditions*, Kluwer Law International, The Netherlands.

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