A Decade of Criminal Justice in South Africa

The Criminal Justice System: How much transformation has taken place during the first decade of constitutional democracy?

by

Dennis Davis

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In a recent contribution to evaluation of the criminal justice system Wilfried Scharf and Boyane Tshehla (2003 Acta Juridica 160 at 161) wrote 'In the early stages of democratization one of the biggest challenges in respect of the criminal justice system is the time-lag between the dismantling of the old South African system and the construction of the new'.

An assessment of progress which has been achieved during the first decade of constitutional democracy, account must be taken of this time-lag and the causes therefor. In the first blush of freedom during the 1990's there was unquestionably an underestimation of the extent of the obstacles posed by a lack of State capacity, poor planning and management, ideological divisions, limited resources, and inadequate training of the existing personnel in the assessment of the transformative potential of the system.

Not only was structural change mandated within the context of all these obstacles, but the social and economic instability brought by decades of apartheid rule ensured that crime, particularly of a violent nature, would increase at a significant pace as social and political transformation was initiated. This is reflected in the figures. Between April 1994 and March 2003 215 000 murders were reported, violent crime increased from 630 885 to 887 128 between 1994 and 1995 and 2002 to 2003; an increase of 41%.

En passant, it should be noted that within these figures there was a considerable spatial difference; for example the murder rate in the Western Cape was reported as being 84,8: 100 000 in 2002 / 2003 compared for example to 12,1 :100 000 in Limpopo.

Not surprising therefore public perception of the criminal justice system deteriorated markedly. Prof. Kotze conducted a study in 2001. (see 2003 (16) SACJ 38. The study is somewhat dated but it still, in my view extremely suggestive of present perceptions). In this study there were two sets of respondents. The first was an elite group drawn from MPs, the ten most senior officials in each

Government department, chief executive officers of private organizations, managers, editors and senior journalists, senior members of COSATU and NGOs, churches and agriculture. There was a further representative sample of public opinion.

For the purposes of this talk I will take but two sets of finding. Table I reflects a confidence index in the legal system, police and civil service. Although the elite sample contains respondents, many of whom are drawn from a constituency which would be expected to show a relatively high level of confidence, namely ANC supporters, only 34% have confidence in the system compared to opposition supporters of which an even lower 20% had confidence. Overall, the level of confidence indicated as: "Not much" and "Not at all" from these groups was 71%. On the other hand, the percentage of the public that has confidence is relative high, 64%, more than double that of the elite sample. Amongst the public, ANC supporters recorded 75% confidence compared to the 41% of DA supporters and 62% of the Inkatha Freedom Party (IFP) supporters.

Table I: Confidence index in the legal system

2001

Response	Elite	ANC Elite	DAElite	Public	ANC	DA	IFP
A great deal	4.0	5.4	1.7	24.3	25.9	13.2	56.3
Quite a lot	24.8	28.4	18.6	39.6	50.0	28.2	5.6
Not very much	54.7	52.0	59.3	23.4	18.4	31.9	10.3
None at all	16.5	14.2	20.4	12.7	5.7	26.7	27.8

The second table which I wish to consider is a suspects rights index for the elite and public: positive and negative attitudes by party support. This table II indicates that the elite are substantially more liberal than the public insofar as the manner in which suspects should be treated by the police and courts are concerned. Of the elite 38%, and nearly half of the public (48%) are reported as being negatively inclined to a due process model of criminal justice.

Table II Suspects rights index for the elite and public: positive and negative attitudes by party support

Attitude	Elite	ANC Elite	DA Elite	Public	ANC	DA	IFP
Strongly Negative	4.6	1.9	9.3	2.0	2.1	1.7	2.0
Negative	23.3	23.4	23.7	45.5	39.8	55.5	43.5

Neither	13.1	14.4	11.0	19.7	24.1	12.3	21.1
Positive	48.3	46.9	50.8	29.1	30.9	28.7	30.3
Strongly Positive	10.4	13.4	5.1	3.1	3.1	1.8	3.1

From this evidence at least two important conclusions can be tentatively drawn, being

1. There is serious, widespread disquiet across the population, notwithstanding party political allegiances, regarding the criminal justice system, albeit that the elite appear to be more concerned than the public while the former are also better disposed towards due process than the public.

2. Flowing from this, is the problem that the due process model of criminal justice which has been constitutionally entrenched in the 1996 Constitution is under significant pressure from the alternative crime control model.

With these considerations, it is now possible to consider a number of key challenges which will need to be met over the next decade if the criminal justice system has not to be further impaired, both on efficiency and legitimacy grounds.

1. There is a key challenge to preserve the due process model which, as mentioned above is the chosen constitutional model for our criminal justice system. It is important that the major advantages of this model are adequately presented to the public so that public discourse is not entirely commanded by advocates of the crime control model. Part of the problem is that current public discourse turns on the nature and use of crime statistics. Statistics become the common denominator for experience of reality and help promote a politics of indignation which swamps any process of deliberation. Statistics serve to flatten the impact of crime on different sections of the population; small wonder that the elite sample in the Kotze study have less confidence in the criminal justice system then a representative sample, the majority of whom have suffered from decades of imposed order and little law. The sociology of statistics needs to be fully deconstructed, but that must await another occasion.

2. Public discourse thus has the potential to subvert the constitutional scheme. Take for example the death penalty. It is ten years since the death penalty was declared to be unconstitutional by the Constitutional Court (*S v Makwanyane and Another* 1995(3) SA 391 (CC)). Notwithstanding this seminal decision by the Constitutional Court which asserted the principle of constitutional democracy over that of majoritarian rule, its reintroduction has consistently been raised by expedient politicians. But the death penalty has no empirical purchase in curbing the crime rates which have been described

above. (See paras 116-127 and 182-183 of Makwanyane). The Department of Correctional Services should be commended for the implementation of the applicable section (Section 73) of the Correctional Services Act 111 of 1998 which ensure that those accused who are convicted and sentenced to life imprisonment are imprisoned for the duration of their sentence. A prisoner will thus serve 25 years before a court (and only a court) can consider parole. In effect therefore, life imprisonment therefore means life imprisonment. An effective system is in place. There is no serious empirical research which can support the argument that the death penalty would better serve the objective of deterrence than a well functioning sentence of life imprisonment; and yet public discourse fuels irrational advantages of the death penalty.

3. After almost eight years it should now be clear that, notwithstanding the introduction of minimum sentences (Act 105/97), the power afforded the courts to depart from the tariff, in the event that it finds that substantial and compelling circumstance exist, means that the introduction of a tariff does not invariably result in consistency of sentencing practice. While the SCA in S v Malgas 2001(1) SACR 469 (SCA) has provided careful guidance to judicial officers, the term 'substantial and compelling circumstances' can be made to do different work.

4. In a few highly publicized cases particularly stemming from the lower courts, sentences are meted out so as justifiably trigger public criticism of gross insensitivity to questions of race and gender. Although these cases are, in my view, few in number, the fact remains that far more needs to be done to ensure consistency of principle in sentencing practice. Judicial education does take place in the area of sentencing. My experience in this connection is obviously limited to the superior courts. The occasional seminar for a few hours is instructive but insufficient to deal with this critical issue for the criminal justice system. When I was a student at the Institute of Criminology at the University of Cambridge a number of lengthy, well considered practical courses were conducted for judicial officers. Thomas's Principles of Sentencing provided a coherent text book in the field. It is the least that can be expected for the South African criminal justice system to function coherently.

5. Of critical concern are the absence of viable alternatives to the carceral option. The reduction of the awaiting trial population notwithstanding, far too many accused still become short term prisoners in our prisons. There must be provision for additional facilities in the form of parole officers, community service and other non carceral options to ensure that prison only becomes an option for serious offences where a long term of imprisonment is necessitated. But even if non carceral options are extended, it would appear that the system of minimum sentences is having a number of negative consequences. According to Judge Hannes Fagan, the Inspecting Judge ,the increase in prison population is significantly due to the minimum sentence legislation. In his view, it has promoted a vengeful, uncaring attitude to sentencing but has

not succeeded in reducing crime. (2004 SA Crime Quarterly 1).

6. The criminal justice system must absorb more from the principles of restorative justice. Without engaging in an exposition of restorative justice, suffice it to cite the United Nations Commission of Crime Prevention of Criminal Justice (2003) 'Restorative process means any process in which the victim and the offender where appropriate, any other individuals or community members affected by crime participate together actively in the resolution of matters arising from a crime, generally with the help of a facilitator. Restorative processes may include mediation, conciliation, conferencing and sentencing circles'.

   Courts in South Africa have operated within the so-called triad adopted from the decision in the *S v Zinn* 1969(2) SA 537(A) at 540 G whereby the sentencing officer must be concerned with the offender, the crime and interest of society. The victim as a specific element in the decision making is significantly omitted. The concerns of the victim need to be considered in the process of sentencing in particular, and in the broader construction of the trial.

   In this regard consideration should also be given to the role of indigenous justice in the debate concerning restorative justice as appears to have been done by the South African Law Commission in its Discussion Paper 87 concerning community dispute resolution structures. The point made by Kgosimore is important: 'Indigenous justice system also contains elements of restorative justice. For example, the Thembu People of the Eastern Cape attain justice through practicing the philosophy of healing and reconciliation by placing the victim, the offender and the community at the heart of the justice process. Observation among the Ba-venda people was that medicine and sacrifice, in crimes that had less serious effects could be used to cleanse and heal the offender. In other instances the offender was required to compensate the injured party and then share a ritual meal, in which all the people would eat one of the animals imposed as a fine upon the offender in public'. (cited in Tshehla: The restorative justice bug bites the South African criminal justice system' 2004 (17) SACJ 1 at 13.)

7. As noted above, the decline in the number of awaiting trial prisoners from 63964 in 2000 to 48346 in July 2004 is to be welcomed. However there are still far too many awaiting trial prisoners living in horrendous conditions, waiting far too long to come before a court to be confronted with a series of remands. It is clear that bail will have to be used far more imaginatively than at present and cannot simply be an excuse for reinforcing race and class in the criminal justice system.

8. There is still too much reliance on confessional policing, and too little investigation employed as the critical tool of policing. Far too many cases

make no use of DNA or other expert evidence. Sadly even with the improvements over the past few years, from time to time sloppy police investigation results in acquittals or discharges in cases where this should not occur (see the instructive report in City Press 6 Feb 2005) That is not to say that there have not been significant improvements. For example cases brought to court have increased significantly from 529000 trials in 1996 to 1.12 m. in 2003 an increase of 112%. Prosecutions have increased by approximately 500 000 in 1996 to 1.12 m in 2003. (See in general M Schonteich Revealing figures: A ten year review of South African Criminal Justice performance 2004(17) SACJ 220).

9. As has been mentioned already the prison population is distressingly high. At present there would appear to be 184 806 prisoners forced into cells built to hold 114 747. Four out of every 1000 South Africans are in prison! The prison system cannot be transformed by the simple expedient of building a few more prisons.

10. Of equal concern is the power of prison gangs. As Jonny Steinberg has noted in his recent book *The Number*, it is remarkable that the basis of this gang culture particularly as developed by Nongoloza in the late 19th and early 20th century "has been preserved in the prison gangs of today – the 26s, 27s and 28s. The uniforms copied from the early Boer Republic are still there – imaginary of course, worn only in prisoners' heads. So are the .303 rifles and bayonets that the Boer commandos took into battle with the British in 1899. Nongoloza's original rank structure, dividing members between soldiers and judicial officers, and dividing the judicial officers themselves between an upper and a lower court, is still extant.

    Most interesting of all, the gangs have held onto Nongoloza's original ideology. All three are organized around a largely mythical narrative of the great bandit's career. Indeed, they place the origin of their own division into three rival gangs in Nongoloza's times. And yet, while they disagree about episodes in his life, and about decisions he made in regard to the nature of banditry, all agree that he became a bandit because blacks were being disinherited of their land and forced to work like slaves in the mines. In other words, throughout the century, South Africa's prisons have incubated a fiercely anti-colonial ideology.

    But it is an ideology of the most disturbing kind. Indeed, the very idea of banditry has always been a deeply unsettling phenomenon; it tampers with the boundary between acquisitive crime and political nobility; it hovers ambivalently between and aspiration to social equality and anti-social violence, between a disdain for the current order and disdain for social order in general. (at 3-4).

    The combination of overcrowding and dominant gang culture is an explosive

mix which can only reproduce patterns of violent crime.

Conclusion

Whatever steps are taken to meet these challenges, the criminal justice system is located in the broader socio economic environment of this country. Without speedy delivery of housing, education and communal facilities for the vast majority of South African population, this country will continue to encounter significant crime rates. Let me conclude with a personal anecdote. About a year ago I tried a brutal case of murder which involved three offenders all under the age of 20 who sodomised, burnt and murdered a young man. When my assessors and I went to Elsies River on inspection, we were confronted with appalling conditions in which the community lived. I observed that very little had changed in this area of Elsies River from what I remembered as a young student running a UCT Faculty legal aid clinic in the area. When we departed the scene I asked my assessors if the three of us lived in these conditions how many of us would be law abiding to which the unanimous response was probably only one. That in itself is an indication of how delivery of basic services is inexplicably linked with the problem of transformation of the criminal justice system.

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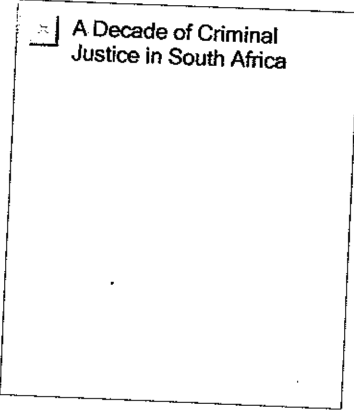

Our Bursting Prisons

by

Hannes Fagan

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Our prisons are grossly overcrowded. With space for 113 825, we have 186 546 prisoners crammed in, i.e. 73 000 above capacity.[1] It leads to awful conditions in numerous of our 240 prisons. For example, Umtata Medium with capacity for 580 is holding 2 188 prisoners; Johannesburg Medium B with capacity for 1 300 is holding 4 697 and Pietermaritzburg with capacity for 1 330 is holding 3 662 prisoners. Human rights' deprivations are commonplace under such crowded conditions and instead of rehabilitation centres, the overcrowding turns our prisons into crime-promoting institutions.

The overcrowding is due to our huge prison population. 4 out of every 1 000 South Africans are in prison. We are one of the worst countries in the world, and the worst in Africa, in our use of incarceration.[2]

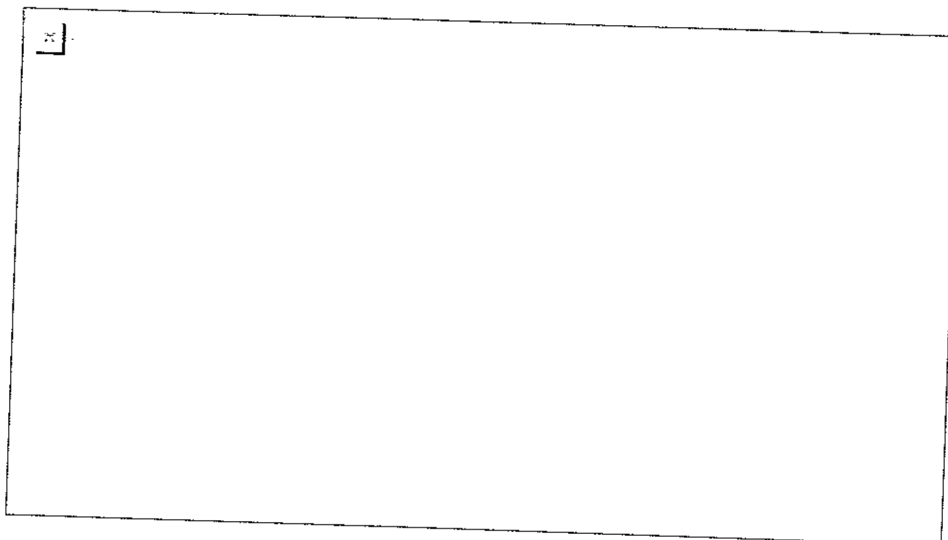
Less prisoners essential

Our immediate aim must be to reduce our prison population to about 120 000. That will still place us at almost double the world average but will bring considerable relief.

During the period 1995 to 2000, the increase in our prisoner population was caused mainly by the explosion in the number of awaiting-trial prisoners from 24 265 in January 1995 to 63 964 in April 2000. Since April 2000 the number of awaiting-trial prisoners has decreased, owing to the concerted efforts of inter alia the police, the prosecutors, the magistrates, the judges, the heads of prison and NICRO with its diversion programmes.

The steady decline in the number of awaiting-trial prisoners to the latest figure of 49 438 in September 2004 is most welcome. It must now continue down to the target figure of 20 000 such prisoners.

(Note seasonal variation)



The praiseworthy efforts to reduce the number of awaiting-trial prisoners are however nullified by the increase in the sentenced prisoner population.

The growth in the number of sentenced prisoners is being fuelled by a dramatic increase in the length of prison terms. The primary cause is the minimum sentence legislation.

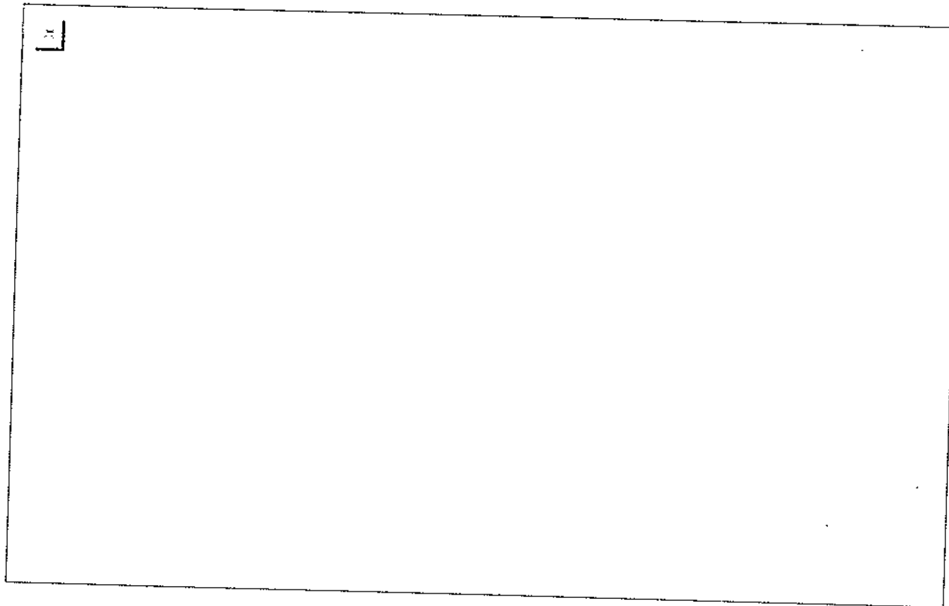
Minimum Sentences

In 1997 Parliament feared that crime was getting out of hand and in the belief that long sentences would act as a deterrent (and possibly also to placate the public after the abolition of the death sentence), passed the minimum sentence legislation (Criminal Law Amendment Act 105 of 1997). Minimum sentences of 5, 7, 10, 15, 20, 25 years and life were introduced for a variety of offences including categories of theft, corruption, drug dealing, assault, rape and murder. It obliged a judge and magistrate to impose not less than the prescribed minimum sentence unless substantial and compelling circumstances justified a lesser sentencey. Suspension of any part of such sentence was prohibited. Bail was also made more difficult to obtain by s 4(f) of the Criminal Procedure Second Amendment Act 85 of 1997.

As the minimum sentence legislation was regarded as an emergency measure, it ceased to have effect two years after its commencement on 1 May 1998 unless extended by the President with the concurrence of Parliament. It has since been extended to 30 April 2005.

The effect of the minimum sentence legislation has been to greatly increase the number of prisoners serving long and life sentences. It has resulted in a major shift in the length of prison terms as indicated in the diagrams hereunder.

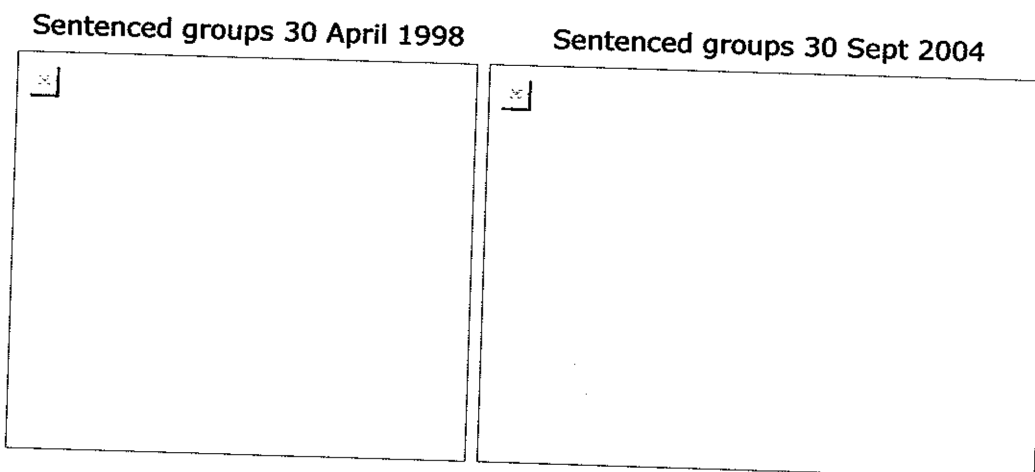
Effect of Minimum Sentence Legislation on prison numbers



Sentences of 7 years and less showed little change from 1997 (67 535) to 2004 (67 483), while sentences of more than 7 years increased rapidly from 1997 (29 376) to 2004 (67 081).

Life sentences increased from 638 in 1997 to 5 511 on 30 September 2004.

Prison populations have changed substantially. In April 1998, immediately before the implementation of the minimum sentence legislation, only 18 644 (19%) of the sentenced prisoners were serving a term of longer than 10 years. This has since increased to 49 094 (36%).



Previous release policies

Release after 1/3rd

The Correctional Services Act 8 of 1959 provided that a prisoner could be placed on parole after serving half his sentence, less credits earned.[3] The general rule was that prisoners could be released on parole after serving one third of their sentences.[4] That would be done by the Commissioner of Correctional Services on recommendation of a parole board.

10 years for life prisoners

Prisoners serving life sentences could be considered for parole after serving ten years.[3] A parole board would report to the National Advisory Council who would make a recommendation to the Minister whether to place the prisoner on parole.[9] About 1996/97 the policy changed and life prisoners, although they could still be released after 15 years, were generally considered for parole only after serving 20 years.

The Correctional Services Act 111 of 1998

The Correctional Services Act 111 of 1998 (the Act) was passed by Parliament in November 1998 but its date of commencement still had to be proclaimed (s138 of the Act).

On 19 February 1999, sections 1, 83-95, 97,103-130, 134-136 and 138 were put into operation. Sections 83 and 84 established the National Council for Correctional Services.[4] Sections 85 to 94 established the Judicial Inspectorate. Sections 103-112 dealt with Joint Venture Prisons. Sections 113 to 129 dealt with Offences.

Not retrospective

Section 136 provides that the release of prisoners already serving sentences shall not be affected by the Act and would be dealt with in terms of the Correctional Services Act 8 of 1959 and the policy and guidelines formerly applied (i.e. ½ minus credits down to 1/3rd).

Prisoners already serving life sentences are to be considered for parole after 20 years. On 1 July 1999 section 5 and on 25 February 2000 section 3 came into operation. In 2001 the Act was amended. On 31 July 2004 sections 2, 4, 6-49, 96-102 and 131-133 came into operation. They set out in detail the manner in which prisoners should be held and treated. Further detail is contained in Regulations promulgated also on 31 July 2004.

New release provisions

On 1 October 2004 the remaining sections of the Act, i.e. sections 50-82 came into operation. They deal with Community Corrections (ss 50-72) and Release from Prison and Placement under Correctional Supervision and on Day Parole and Parole (ss 73-82).

A prisoner will have to serve *half* of his sentence before consideration for parole (s 73(6)(a)). A life prisoner will have to serve *25* years and may then be granted parole by *the court* on the recommendation of the Correctional Supervision and Parole Board (ss 73(6)(b)(iv), 75(1)(c),78(1)). A prisoner sentenced in terms of the minimum sentence legislation will have to serve *four fifths* of his sentence or 25 years before consideration for parole (s 73(6)(b)(v)).

Accordingly, the earliest that parole can be considered has moved from one third to one half and for many prisoners to four fifths of their sentences. For those serving life it has gone up from 10 to 20 and now 25 years plus substitution of "the court" for the National Council for Correctional Services.

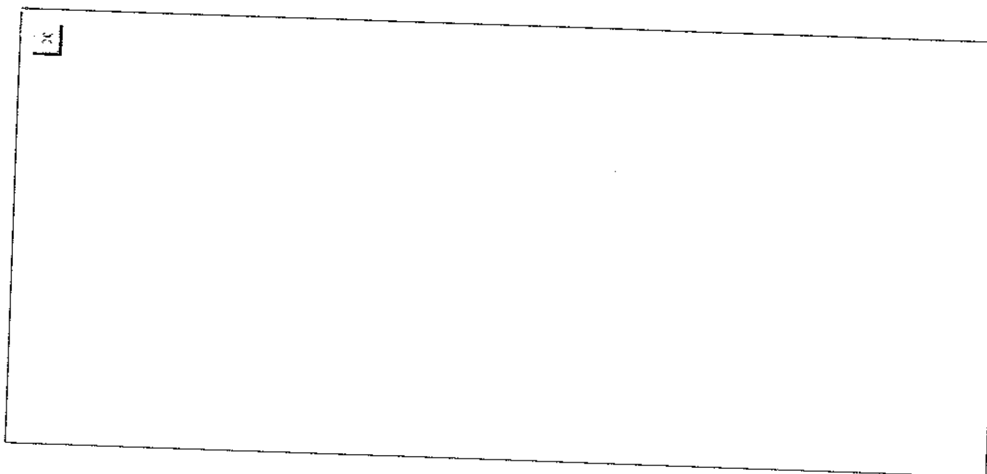
An impossible state of overcrowding

Implementation of the new release provisions will lead to an even more intolerable overcrowding situation. Increases in the serving of sentences from a third to a half as well as to four fifths and from 10 to 20 to 25 years for life imprisonment plus reference to a court (the court who imposed the sentence?) will inevitably lead to very many more prisoners in our already overcrowded prisons.

Long sentences

The numbers continue to rise. The latest available figures (30 September 2004) show 5 511 prisoners serving life sentences compared to 4 460 twelve months earlier plus 43 583 serving longer than 10 years compared to 40 056 in September 2003. Our sentenced prisoner population has increased by 28 801 prisoners since April 2000, despite about 7000 being released on nine months' advanced parole in September 2003. The growth rate of more than 7 500 per year will inevitably lead to such inhumane conditions that mass releases will be required periodically.

Growth in prison population



Minimum sentence legislation should not be extended

The Minimum Sentence Legislation should not be extended beyond 30 April 2005 for the following reasons:

- The legislation was brought in as a temporary measure because of the perception that crime was getting out of control and the belief that the remedy lay in harsh sentencing. The latest figures produced by SAPS indicate a considerable reduction in crime and there is accordingly no justification for extending the legislation.
- The increase in the number of prisoners due to the minimum sentence

legislation has made our prisons terribly overcrowded and it is worsening by the day. In numerous prisons the conditions of detention are truly awful and in clear breach of our Constitution and the requirements of Act 111 of 1998 and the Regulations.

- The harsh sentences display a vengeful, uncaring and unforgiving attitude completely contrary to our famed national trait of understanding and forgiveness.
- There is no evidence that the increase in length of sentences has had a deterrent effect on would-be offenders. It is the certainty of detection and punishment, not the severity of the punishment that is the real deterrent.[8]
- While the long sentences are not achieving the aim of reducing crime, they are on the contrary causing more crime. The overcrowding precludes proper rehabilitation and turns prisons instead into places where criminality is nurtured.
- The long sentences make reintegration into the community more difficult as contact with families tends to be lost.
- Our huge prison population turns us into one of the very worst countries in the world in the use of incarceration for offenders.
- Prescribing minimum sentences has the effect of generalizing punishment instead of individualizing it as is proper.
- The effect of minimum sentences is to undermine the discretion of the courts and to create the perception that judges and magistrates lack the ability to arrive at appropriate sentences on their own.
- The legislation is creating inordinate delays in the completion of cases including lengthy periods between conviction in Regional Courts and sentence in High Courts when cases are remitted for sentence.
- It is preferable for the same court to conduct the trial and impose the sentence as it is already conversant with the facts concerning the offence which might affect sentence.
- The cost of imprisoning more and more young men (60% of our prisoners are men under the age of 30) is tremendous. Such monies can surely be better spent to uplift communities and prevent crime.

Amend Correctional Services Act III of 1998

The Act should be amended by:

- Deleting the provision for the serving of half the sentence before consideration for parole (preferably leaving it to the Department of Correctional Services to regulate as before);
- Deleting the 25 year period before consideration for parole of those serving life imprisonment (preferably leaving it to the National Council for Correctional Services to regulate as before);
- Deleting the requirement that a court should consider parole for life prisoners and restoring the National Council for Correctional Services as the appropriate body to do so;

- Deleting the four fifths requirement for those sentenced in terms of the minimum sentence legislation.

Notes:

[1] Figures as at 30 September 2004 from the Department of Correctional Services (DCS).

[2] 186 546 prisoners in a total population of 46.59m (mid 2004 estimates Stats SA). International Centre for Prison Studies, World Prison Brief – Highest Prison Population Rates – September 2003.

[3] Section 65(4)(a).

[4] Van Zyl Smit: SA Prison Law and Practice (1992) p 362.

[5] Van Zyl Smit (idem) p 379

[6] Section 65(5).

[7] The Minister appoints the National Council which consists of two judges, a regional magistrate, a director of public prosecutions, two members of DCS, a member of SAPS, a member of the Department of Welfare, two persons with special knowledge of the correctional system and four or more representatives of the public.

[8] "While punishment does have a deterrent effect, it is the certainty of punishment rather than the severity of the sentence that is likely to have the greatest deterrent impact. There is certainly no evidence, empirical or even anecdotal, to suggest that increasing sentences from, say, six to 11 years for rape or robbery deters rapists or robbers generally, or even discourages them individually from committing a crime that otherwise they would not have risked." – Prof Dirk van Zyl Smit in "Justice gained? Crime and Crime Control in South Africa's Transition "UCT Press (2004) at p 248.

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or even evidence to support the James.